

American Sanitary Partition Corp. and Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. Cases 29-CA-1557, 29-CA-1557-2, 29-CA-1557-3, and 29-CA-1557-4

August 29, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On June 9, 1969, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended the dismissal of such allegations. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.¹

Conclusions of Law

In place of the Trial Examiner's "Conclusions of Law" we make the following Conclusions of Law:

1. American Sanitary Partition Corporation is an Employer within the meaning of Section 2(2) of the Act, and is engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

¹We find it unnecessary, and make no determination, regarding the Trial Examiner's finding that Milord, Menard, and Rosa were not discriminatorily selected for layoff on January 6, 1969, since we agree with his findings that the layoff of these and other employees on that date was violative of Sec 8(a)(1) and (3) of the Act, and the remedy would be the same, as provided herein. The Respondent has excepted to the Trial Examiner's credibility determinations. After a review of the record, we conclude that the credibility findings are not contrary to the clear preponderance of all the relevant evidence and we find no basis for disturbing them. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd 188 F 2d 362 (C A 3)

3. By coercively interrogating employees about their union sentiments or activities, and threatening them with reprisals for such activities, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging Pedote, Perez, R. Figueroa, Menard, Milord, and Rosa in reprisal for employee union activities, Respondent has violated Section 8(a)(3) and (1) of the Act

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, American Sanitary Partition Corporation, Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

1. In the last indented paragraph of the notice, delete the name "Felix" and substitute the name "Felix Perez" therefor.

2. Add the following as the last indented paragraph of the notice:

WE WILL notify the foregoing employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The initial charge herein was served upon Respondent on January 8, 1969.¹ The consolidated complaint issued on February 17, and the case was heard on April 1 and 2. The issues litigated related to alleged violations of Section 8(a)(1) and (3) of the Act. Briefs were filed by Respondent and General Counsel.²

Upon the entire record,³ including observation of the demeanor of the witnesses, I adopt the following findings and conclusions:

I. JURISDICTION

American Sanitary Partition Corp., hereinafter called Respondent, is a corporation engaged at its plant in Long Island City, New York, in the manufacture and sale of metal partitions and related products. It annually ships to out-of-State points products valued at more than \$50,000.

Respondent is engaged in commerce under the Act.

¹All dates hereinafter are in 1969, unless otherwise stated

²Respondent's brief contained a motion to strike certain evidence. That motion is hereby denied.

³For corrections of the transcript, see the orders of May 7, and June 2, 1969. After the hearing, a stipulation requested by the Examiner was submitted, and is hereby received in evidence as TX Exhs. 1(a)-(e).

II THE UNION

Shopman's Local 455, International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO, herein called the Union, is a labor organization under the Act.

III THE UNFAIR LABOR PRACTICES

The pleadings raise the following issues

1 Whether Respondent violated Section 8(a)(1) by interrogation, threats of reprisal for Union activity, and admonitions to refrain from such activity?

2 Whether Respondent violated Section 8(a)(3) and (1) by the discharge of six employees on January 6?

A *Sequence of Events*

The business of Respondent has been operated since 1936.⁴ It has about 40 employees, most of whom are engaged in the fabrication of Respondent's products, the balance being engaged in spraying, packing, and maintenance work. Respondent's officers and sole stockholders are Virtes, Birkenmaier, Galvani, and Schmidt. Virtes is the chief executive officer. Birkenmaier maintains liaison between the administrative staff and the production operation, and Galvani is the shop foreman, and an admitted supervisor.⁵ He is assisted by Barhold in directing the personnel engaged in fabrication. Respondent had until January 4, operated continuously on the basis of a 56-hour week.

On January 3, three employees, including Pedote and Perez,⁶ met with the president of the Union, who gave them about 40 authorization cards to distribute among the employees. The three divided these cards among themselves, and early in the morning of the next day, a Saturday, began to pass them out among the employees. Some more were distributed on Monday, January 6. At 5 p. m., on that date six employees, including Perez and Pedote, at least five of whom had already signed Union cards,⁷ were notified either that they were being laid off or discharged. None has been recalled. On January 9, the Union requested recognition by Respondent, which was refused, and on January 10, the Union filed a petition for an election. An election was held in which the ballots of the six foregoing employees were challenged by Respondent on the ground that they were no longer employees. Such challenges were sufficient in number to affect the outcome of the election.

B *Discussion*

1. The 8(a)(1) conduct

There was testimony by Pedote, Perez, and Milord that on January 6, between 3 30 and 4 30 p. m. they, as well as other employees, were separately asked by Barhold whether they had signed a union card. Moise corroborated Milord as to the incident involving him.

⁴Although Respondent was not incorporated until 1960, this admittedly did not involve any substantial change in the nature of the business or the identity of the owners.

⁵Schmidt is the treasurer of the corporation.

⁶The third employee was not identified in the record.

⁷The sixth employee, Rosa, testified that he signed his card on January 6, between 5 and 5 30, which was about the same time that he was discharged.

Gayton testified that either before or after the January 6 discharges Barhold asked him if he knew of a group that was trying to bring in a union, and Paschell testified that early in the morning of January 7, Barhold asked him if he had signed a union card.

Barhold professed to have no recollection of interrogating Milord or Moise on January 6, but vacillated as to whether he might have done so on January 7. He admitted interrogating Gayton about the Union, but, as to the date, alternated between a lack of recollection and an insistence on January 7. He acknowledged that he interrogated Paschell on the 7th.

Unlike the others, Moise, Gayton and Paschell were not involved in the January 6 discharges, but were still employed by Respondent and testified under subpoena.

On the basis of Barhold's own admission, it is found that he interrogated Paschell and Gayton. Moreover, in view of the mutually corroborative testimony of Milord and Moise, and the vagueness of Barhold's denials as to them, it is found that he interrogated them in the afternoon of January 6.

Barhold flatly denied questioning Perez. Perez testified that, when he was interrogated by Barhold, Cedeno was present, and that a conversation ensued between Cedeno and Barhold, which was partly overheard by the witness, including a remark by Cedeno that "he didn't sign" and a reference by Barhold to the fact that Cedeno had eight children and could lose his job. Barhold denied interrogating Cedeno, but professed not to recall whether he made any reference at that time to the size of Cedeno's family.⁸ In any event, on the basis of demeanor, as well as Barhold's manifest evasiveness and equivocation with regard to the other interrogation incidents, I credit Perez and find that he was interrogated by Barhold on the 6th.

Pedote testified that about 4 30 in the afternoon of the 6th Barhold asked him if he had signed a Union card, that the witness falsely denied that he had, and that Barhold accused him of lying, asserting that other employees had admitted signing cards, that "the boss" was disappointed in Pedote and that he was "behind this." According to Pedote, the following colloquy ensued:

He said, "Tonight eight guys they got to go." I said, "Eight guys why? Because the Union?" He said, "The boss, they don't care, they let them go twenty guys." "How long you keep the work going for twenty men?" "As long as you don't get the union inside," he says. "So he can fire twenty men, can keep the business going for twenty men?"

* * * * *

I said, "I don't understand he is going to lay off so many guys just to keep the union out." He said, "For that reason, for the union, many guys, they sign the card, so they get rid of the guys."

The six claimants were in fact discharged within the next half hour. Barhold denied interrogating Pedote, but as to the foregoing warnings of discharge for Union activity Barhold alternated between flat denials and a lack of recollection. At any rate, on the basis of demeanor and the circumstantiality of Pedote's testimony, I credit him as to the interrogation and threats.

⁸Cedeno was not called to testify. The General Counsel explained that Cedeno had not replied to letters from the General Counsel. Respondent offered no explanation for not calling him, although he was admittedly still in its employ.

⁹Respondent had about 40 production employees.

Respondent contends that, in any event, it was not responsible for Barhold's conduct because he was not a statutory supervisor. His official designation was working foreman, and the General Counsel does not dispute that he spent part of his time doing production work. However, it is also undisputed that he assisted Galvani, an admitted supervisor, in directing the work of the 25 fabricating employees, and that during Galvani's frequent, and regularly recurring, absences, Barhold took over for him. Nevertheless, Respondent contends that even during such periods Barhold's discretion was limited by the instructions he received from Birkenmaier relating to the scheduling and assigning of work, and that contention is supported mainly by Birkenmaier's testimony.¹⁰ However, both Barhold and President Virtes admitted that even at times when Galvani is present Barhold determines job priorities and selects men for particular assignments on the basis of his judgment of their ability. And, Virtes admitted that on two evenings a week and on Saturdays up to 30 men work overtime under Barhold, in the absence of both Galvani and Birkenmaier, that on those occasions Barhold would be the only one who could pass on an employee's request for time off, and that on days that Galvani is absent Barhold participates with Birkenmaier in the selection of men for overtime work. Barhold's hourly rate is \$5.85, which is \$1.65 more than that of the next highest paid production worker.

Under all these circumstances, it is found that Barhold was at all times here material a statutory supervisor, and that by the interrogation and threats found above Respondent violated Section 8(a)(1).

2 The discharges

About 5 p.m., on the 6th, President Virtes discharged all six men here involved,¹¹ telling at least some of them that they were being laid off because of a decline in business.¹² There was conflicting testimony as to whether the others were told they were being discharged for unsatisfactory work, or whether they, too, were told only that the reason was poor business. At any rate, Virtes asserted that, whatever he may have told the claimants, the truth was that Respondent was faced at the time with a need to reduce its work force for economic reasons, that the six were selected because of their shortcomings as employees, and that because of such shortcomings Respondent had no intention of rehiring them even if business did improve. As already noted, the claimants subsequently voted in the Board election under challenge.

The General Counsel contends, alternatively, (1) that Respondent's decision to reduce its force on January 6 was prompted by the Union organizing campaign, and was designed to stall that campaign, and (2) that, even if the decision to cut back on personnel was economically motivated, the selection of particular employees for termination was based on their Union activity.

In support of these contentions, the General Counsel points to the following:

All six claimants signed union cards on January 4 and 6. The discharges took place almost immediately after Barhold, as found above, asked three of the claimants whether they had signed cards, admitted to Pedote that he

¹⁰Some support therefor is found also in the testimony of Virtes and Galvani.

¹¹They are hereinafter referred to as the "claimants."

¹²Virtes did not controvert the testimony of these employees that he promised to recall them when business improved.

had obtained information from other employees about their involvement in the matter, accused Pedote of being the instigator of the Union movement, and predicted that there would be a mass discharge that day in reprisal for the employees' card signing activity.

To counter this, Respondent adduced evidence, *inter alia*, that the decision to reduce the work force was made early in the afternoon on January 4, that the actual selection of employees for termination was made in the morning of the 6th, and that the claimants' final checks were prepared early that afternoon. All these events, Respondent points out, occurred before the interrogation of employees by Barhold, and, hence, before Respondent could have acquired any information about employee Union activity on the basis of such interrogation. However, this contention assumes that the sole source of Respondent's knowledge of employee Union activity was the interrogation conducted by Barhold. In fact, such interrogation, in itself, had little value as a means of identifying Union adherents, since all those interrogated denied, albeit falsely, any involvement with the Union. Such interrogation in the afternoon of the 6th is more significant as evidence that Barhold had at some earlier point in time learned, or been led to suspect, that cards had been signed and, as his remarks to Pedote indicated, had already ascertained the identity of at least some of the employees so involved and that Pedote was, himself, a prime mover in the matter. Thus, there is nothing in the timing of Barhold's interrogation to foreclose the inference that Respondent learned of the employees' Union activity even before the meeting early in the afternoon of January 4,¹³ at which it was allegedly decided to effect the terminations.

In any case, it having been found that Barhold admitted to Pedote that the impending discharges would be in reprisal for the signing of Union cards and for the purpose of keeping the Union out, such admission is, in itself, at least *prima facie* evidence that Respondent knew of the employees' Union activity when it decided to effect the discharges, and there is no need to speculate as to the source of such knowledge.¹⁴ Such admission is, moreover, *prima facie* evidence of the reason for the discharge action.

As against the foregoing considerations, Respondent adduced testimony by Barhold and those responsible for the discharge decision (1) that they had no knowledge of the employees' union activity until January 7, and (2) that such decision, as well as the selections for discharge, were based solely on legitimate, business considerations. However, as to (1) for reasons already related, I do not credit Barhold's disclaimer, and, since he has been found to be a statutory supervisor, it is proper to infer that he imparted his knowledge to other members of management. This inference is fortified by an evaluation of the testimony of the latter. Although Galvani claimed to have heard nothing about the Union until January 7, his credibility was impaired by an obvious lack of candor in his demeanor, as well as by evasions and apparent conflicts in his testimony.¹⁵ Birkenmaier, who also claimed to have first heard about the Union on the 7th, was, vague as to who his informant was.

¹³As already related, the distribution of union cards in the plant began early in the morning of the 4th.

¹⁴Under Board precedents, such knowledge may be inferred, in any event, from the small size of Respondent's plant complement. *Wiese Plow Welding Co.*, 123 NLRB 616.

¹⁵He at first refused to say who told him about the Union on the 7th, asserting that he did not wish to "incriminate" anyone, and then insisted

For all these reasons, it is found that Respondent knew of the employees' union activities when the discharge decision was made.

As to the reason for that decision, Virtes testified that at the meeting of Respondent's officers on January 4, Respondent's yearend records pertaining to 1968 order backlog and shipments were reviewed; that, upon consideration of such records, in conjunction with the unfavorable outlook for future business, it was determined that it would be prudent to reduce expenses by eliminating overtime work and discharging six employees; and that at a subsequent meeting in the morning of January 6, selection was made of those employees who were considered least valuable to Respondent. As to the allegedly unfavorable economic situation of Respondent, as revealed by the foregoing records, Virtes initially cited the decline in the backlog of orders between the end of 1967 and the end of 1968, which, the record shows, represented a drop in value from \$402,000 to \$338,000.¹⁶ Subsequently, when it was pointed out to him that his records showed that by far the sharpest drop in order backlog in the latter part of 1968 occurred in November, as shown by the backlog figure as of the end of that month, Virtes explained that no action to reduce expenses was taken in December because shipments in November had continued at a relatively high rate, whereas in December both backlog and shipments declined. The implication of this seems to be that, in planning for the future, Respondent gave more weight to the volume of monthly shipments than to backlog and that, despite the sharp drop in backlog as of November 30, the high rate of shipments during that month deterred Respondent from retrenching early in December.

However, in pointing up the importance of monthly shipments, Virtes inadvertently exposed the fallaciousness of Respondent's alleged reliance on 1968 yearend backlog as an index of future production needs. While it is true that the value of such backlog was \$64,000 less than the corresponding item for 1967, this was clearly not the result of any decline in the volume of new orders but of the relatively heavy volume of shipments during the last half of 1968 as compared with the last half of 1967. Such 6-month volume for 1968 exceeded the 1967 figure by \$120,000. This indicates that in the 1968 period there was a more rapid conversion of backlog into shipments (presumably, because of tighter delivery schedules).

That this was in fact the principal reason for the 1968 yearend drop in backlog is conclusively shown by the fact that, as revealed by Respondent's records, in 1968, value of new orders received in December was \$132,000, which was only slightly less than November's \$136,000, substantially more than February's \$117,000, and only \$7,000 to \$10,000 less than the figures for March, April, and May.¹⁷ And, had Respondent compared the value of new orders for December 1968 with that for December 1967, it would have found that the 1968 figure exceeded that for 1967 by \$27,000.

that he merely overheard a conversation among several employees, whom he could not see and whose voices he did not recognize.

¹⁶Here, as elsewhere, figures have been rounded to the nearest thousand.

¹⁷The foregoing figures as to new orders have been derived by subtracting the value of shipments for a particular month from the value of backlog at the beginning of the month, and subtracting the result from the value of backlog at the end of the month. Thus, as of December 1, 1968, backlog was \$348,000, and December shipments amounted to \$142,000. If one subtracts the latter from the former, the resulting backlog would be \$206,000, at the end of December. However, since actual backlog on December 31, as shown by the record, was \$338,000, the difference of

Moreover, if one looks at another commonly accepted index of the trend of business activity—Respondent's gross revenue from sales in 1968 as compared with 1967—one cannot fail to be impressed by the fact that, as shown by the record of monthly shipments, the results for both years were approximately the same until the last 2 months of 1968 when, in November, there was a 30 percent increase from \$137,000 to \$179,000, and, in December, a 42 percent increase from \$100,000 to \$142,000.¹⁸

Accordingly, it is difficult to understand how any realistic analysis of Respondent's business records could lead one to take a dim view of Respondent's near-term business prospects.

Finally, although Respondent's records show that its inventory rose in value from \$240,000 on September 30, to \$264,000 on December 31, Virtes admitted that the latter figure was not excessive, comparing favorably with the 1967 yearend figure, which, as shown by the record, was \$280,000. Moreover, on the basis of Virtes' own initial testimony that, ideally, inventory should equal the total shipments for the preceding 3 months, Respondent would have been justified in devoting the entire month of January 1969, to production for inventory alone.¹⁹

As to prior layoffs, Virtes at first testified that the most recent reduction in force by Respondent for economic reasons had occurred in 1963, but he later amended this date to 1958, explaining that such action had been necessitated by a steel strike. Thus, so far as the record shows, apart from the foregoing occasion, involving a general, prolonged shutdown of its major suppliers,²⁰ Respondent's management in 30 odd years had not found it necessary to effect any discharges or layoffs because of economic conditions.

Nevertheless, Virtes insisted that his decision on January 4 to retrench was based on economic conditions, including not only the data discussed above relating to backlog and shipments, but also the unfavorable outlook for Respondent's principal customer—the construction

\$132,000 (\$338,000 minus \$206,000) necessarily represents the value of new orders received during December.

¹⁸No evidence on net profits was submitted at the hearing, Respondent contending that they were confidential and, in any event, not relevant, since they were not a factor in the decision to retrench (See TX Exh. 1(b)). Absent any evidence to the contrary, it is fair to assume that net profit rose in proportion to gross revenue.

¹⁹Value of yearend inventory was less by about \$230,000 than the value of total shipments for the last quarter of 1968, and, it appears from an analysis of Respondent's records in evidence pertaining to size of inventory and monthly shipments that the value of Respondent's average monthly production in that quarter was only about \$170,000. (Total production for the quarter was obtained by adding the increase in inventory over the preceding quarter to total shipments for the quarter.) Thus it would have taken more than an entire month's production to make up the foregoing deficit in inventory.

At a later point, Virtes shifted to the position that inventory should equal total shipments for the 2 latest months. Even on this basis, 1968 yearend inventory would have been short by about \$60,000. Finally, upon returning to the stand the next day, Virtes offered still a different standard—namely, that inventory should equal one half the value of shipments over a 3-month period. By this test, 1968 yearend inventory would be about \$15,000 over the mark. However, the validity of this criterion is impeached not only by Virtes' foregoing vacillation but also by the fact that the value of Respondent's inventory for the last quarter of 1967 and the first two quarters of 1968 exceeded this standard by anywhere from \$70,000 to over \$140,000.

²⁰Steel is one of Respondent's principal raw materials. There was no steel strike in 1958, and Virtes presumably had reference here to the industrywide strike in 1959, which closed down all major basic steel producers for a period of 116 days. See Bulletin No 1482, U.S. Bureau of Labor Statistics.

industry. As to the latter point, Virtes testified that construction activity was "down" on January 4, and all reports "indicated that it would continue to go down." The only other references to this matter were contained in Galvani's testimony that "by reading all the papers . . . , listening to the stock market, things were going off . . . ," and in Birkenmaier's testimony that the decision to retrench was influenced by "news in general, that building would be off." In its brief, Respondent requests that notice be taken of predictions by government agencies "prior to January 1, 1969, that business was due to decline as a direct result of government efforts to 'cool down' the economy; i.e., comments of Treasury, Council of Economic Advisors, and Federal Reserve Board officials."

However, governmental efforts to dampen the economy were nothing new in January 1969. They had been under way for several years, and during those years Respondent had been hard put to meet the demand for its product, operating continuously 56 hours a week.²¹ There was no evidence of any dramatic change in the general economic situation on or about January 4, 1969, nor was any reference made to any specific news item or article in the public press or trade journals that might have convinced Respondent that any new governmental measures would have any more adverse effect on its business than had been the case in the past, or that there would be any further decline in construction activity of such a drastic and imminent nature as to require the immediate discharge of 15 percent of Respondent's work force, in the middle of a pay period, and without any prior notice. The fact of the matter is that Respondent's alleged fear for the future proved groundless, since business admittedly improved within the next few months.²²

To sum up, Respondent would have one believe that the coincidence in timing between the inception of the Union campaign and the discharge decision was merely fortuitous, and that it was purely a matter of chance that at that very time Respondent became so pessimistic about the future that it precipitately took an action that was, so far as the record shows, virtually unprecedented in Respondent's 33 years of operation. Analysis of Respondent's business records does not reveal any dramatic change in backlog²³ or shipments during December 1968 in comparison with prior months; and, in fact, total sales for 1968, and presumably, net profits, compared favorably with 1967.²⁴

²¹According to information from the Federal Reserve Board, prior to January 1969, that Board's rediscount rate had risen steadily (except for two relatively brief cutbacks) from 4 percent in September 1965 to 5 1/2 percent in December 1968, and the current tightness in the money market dates back at least to October 1966. Yet, not only did Respondent continue to operate on a 56-hour week to January 6, 1969, but it also added to its work force as late as December 15, 1968.

²²At the time of the hearing (April 2, 1969), backlog had admittedly returned to a high level, and Respondent's records (Trial Examiner's Exhibit 1(c)) show that backlog improved substantially in January, and in February and March reached even higher levels.

²³The backlog figure on December 31, 1968, although substantially less than the 1967 yearend figure, was slightly higher than that for January 31, 1967, and only about 3 percent less than on November 30, 1968.

²⁴For the first quarter of 1969, Respondent's records show (1) that monthly shipments were substantially below average, (2) that inventory at the end of March declined to \$222,000 from \$264,000, at the end of December and (3) that order backlog rose to \$361,000 in January, \$424,000 in February, and \$433,000 in March.

The fact that, as the record shows, Respondent did not throughout that quarter replace the claimants and operated on substantially reduced overtime until late in February is but equivocal evidence of the good faith

Upon consideration of all the foregoing matters, it is concluded that the evidence in support of Respondent's economic defense is not sufficiently persuasive to rebut the General Counsel's *prima facie* case, particularly the evidence as to the timing of the discharges in relation to the inception of the employees' Union activity, and Barhold's admission that there would be a mass layoff on the 6th in reprisal for such activity; and, it is found that the General Counsel has established by the preponderance of the evidence that Respondent early in January decided to reduce its work force because of its displeasure over the employees' adherence to the Union and in order to dampen their ardor for the Union, and that by discharging the six claimants for that reason Respondent violated Section 8(a)(3) and (1) of the Act.

In view of this finding, it may not be thought necessary to consider the General Counsel's further contention that, in any event, Respondent should be found to have based its selections for discharge on discriminatory considerations. However, to provide for the contingency that a reviewing authority may not agree with the preceding finding, this contention will next be discussed.

As to Pedote, there seems to be little reason to doubt that his selection was discriminatory. He had been in Respondent's employ since 1955, as a welder, which was one of the two most skilled jobs in Respondent's operation, he was admittedly a good welder, and he had received a merit increase as late as December 1968, only a few weeks before his discharge. Moreover, as found above, it was Pedote who was taxed by Barhold, only minutes before his discharge, with having signed a Union card and with being the instigator of the Union. In addition, according to Pedote's credited testimony, he was told by Barhold at that time that Respondent was disappointed in Pedote because of his sponsorship of the Union, and, at the conclusion of their conversation, Barhold directed Pedote to go to the office, explaining "they want to talk to you because they disappointed about you." Upon complying with this instruction, Pedote was notified of his termination.

Respondent's defense as to Pedote was that, while he was a good welder, he did not like to work with others, preferring jobs that he could handle by himself. However, Virtes admitted that this situation had existed for the past 2 years, and, despite this alleged shortcoming, Pedote, as already noted, received a merit raise in December 1968. Galvani acknowledged that merit raises such as Pedote received were reserved for those employees who showed "exceptional talent." Neither Galvani nor Virtes attempted to explain why they did not regard Pedote's alleged reluctance to work with others as a reason to deny him a merit increase but did consider it a sufficient reason to discharge him after 14 years of service, and despite the admitted difficulty of replacing even unskilled help in the

of its retrenchment program. While such sustained curtailment of Respondent's production effort was consistent with a genuine belief that the business outlook was unfavorable, it was also consistent with a plan to simulate such belief for the purpose of the instant litigation, by continuing to limit production for a reasonable period after the discharge of the claimants, compensating for any deficiency in output by drawing on inventory. The latter interpretation is, if anything, reinforced by the fact that Respondent persisted in its retrenchment program despite the mounting volume of orders which in March reached the highest level in over 2 years. Such a course of conduct bespeaks either an apparently unrealistic refusal to recognize the need for resuming full production, despite declining inventories and soaring backlogs, or a reluctance to take action that might reflect adversely on Respondent's economic defense in the present litigation.

existing tight labor market

R Figueroa, who had worked as a machine operator since February 1966, received the same merit increase as Pedote in December. On January 4, he signed a card handed him by Pedote. Respondent's defense as to him was that he had shown no capacity for "development," and was hard to communicate with. However, when asked why, in view of these deficiencies, Figueroa was given the foregoing merit increase, Virtés offered no explanation other than that it was "just decided" to give it to him. Galvani testified that, although Figueroa had been doing a good job, he "loused up" some work about a month and a half before his discharge. However, since that would have happened before the granting of the merit raise, it could not have been regarded as sufficiently serious to warrant denying Figueroa such increase. Moreover, as already noted, Galvani acknowledged that the merit raises were given in recognition of exceptional talent, and there was no explanation of how an employee could be deemed at the same time to have exceptional talent and to have no capacity for development. Nor, was it explained why considerations that did not preclude the granting of a merit increase should be regarded as sufficient cause for discharge.

Perez, a welder and shear operator, had been employed for over 4 years. He signed a card on January 4, and participated in the distribution of the cards. On the afternoon of the 6th, Barhold asked him if he had signed a card, eliciting a denial. At the end of the workday Virtés notified him he was being laid off because business was slow. Virtés explained that, although Perez had been a good worker apparently until about September,²⁵ he at that time began to get involved in "difficulties" with other employees and Virtés described him as unable to work with others. Barhold acknowledged that Perez was "a very good" shear operator, but, also, described him as a difficult man to work with. While admitting that Perez was "better than the other fellows I had," Galvani insisted that he was a "troublemaker," had always been "a little bit of a nuisance," and could not work with others. Yet, despite Perez' alleged idiosyncracies, which had admittedly manifested themselves at least several months earlier, he was given a merit increase in December. Here, again, deficiencies, which were not deemed serious enough to disqualify the employee for a merit raise, were regarded as sufficient cause for discharge.

In view of the apparent incongruity of Respondent's decision to discharge Figueroa and Perez within a few weeks after awarding them raises in recognition of outstanding performances, it is found that they, like Pedote, were selected for discharge because of their known or suspected involvement with the Union.

As to Milord, Menard, and Rosa, none of whom received merit raises in December, and none of whom had any special skills, being classified as helpers, the matter is not so clear. Virtés explained that all three were selected because they were not "developing." Milord had worked as a helper since 1961, Menard since 1967, and Rosa since June 1968. In addition, as to Rosa, Respondent's witnesses cited the fact that he was attending barber school during off hours and was therefore not available for overtime work, and as to Milord it was pointed out that due to the cumulative effect of wage increases received by him over 7 years his rate was higher than that of his leadman,²⁶ which circumstance was a cause of dissension

among Milord's fellow employees.

While all three had signed union cards before, or, in the case of Rosa, about the time of their discharge, the record does not show what proportion of Respondent's employees had done so nor whether there were, in fact, any who had not signed cards. Thus, for all that appears in the record, all, or nearly all, of Respondent's employees might have signed cards, in which case the fact that a particular dischargee had signed a card, or that all those discharged had done so, would have little value, in itself, as evidence that he or they had been selected for discharge for that reason.²⁷ Moreover, the reasons given by Respondent for the selection of the three instant claimants are not on their face implausible. Finally, of all three, only Milord was interrogated by Barhold, to whom he denied signing a card. While it may be inferred from such interrogation that Barhold suspected Milord of being a Union adherent, and did not give any more credit to Milord's denial than he did to Pedote's, I do not believe that such inference along with Respondent's rejection of Respondent's explanation for selecting Milord. Accordingly, I do not find a preponderance of evidence that, had Respondent made its selections on a nondiscriminatory basis, it would not have selected Milord. For like reason, the same result is reached as to Menard and Rosa. It follows that, as to these three, the ultimate finding of discrimination is based solely on the fact that they were discharged pursuant to a management decision to reduce the work force in order to stem the tide of Union sentiment.

IV THE REMEDY

It having been found that Respondent violated Section 8(a)(1), and (3) of the Act, it will be recommended that it be required to cease and desist therefrom and take appropriate, affirmative action. Such action shall include an offer of reinstatement to all six claimants and their reimbursement for any loss of earnings suffered since January 6, 1969, by reason of the discrimination against them. Backpay shall be computed in accordance with the formula stated in *F W Woolworth Company*, 90 NLRB 289, interest shall be added to backpay at the rate of 6 percent per annum (*Isis Plumbing & Heating Co.*, 138 NLRB 716).

In view of the language barrier, it will be recommended that the usual posted notices be accompanied by French and Spanish translations.

In view of the nature of the violations found herein, particularly the discriminatory discharges, a threat of future violations exists, which warrants a broad cease and desist provision.

CONCLUSIONS OF LAW

1. By coercively interrogating employees about their union sentiments or activities, and threatening them with reprisals for such activities, Respondent has violated Section 8(a)(1) of the Act.

2. By discharging Pedote, Perez, R Figueroa, Menard, Milord, and Rosa in reprisal for employee union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

²⁵This was apparently Moise, who had worked 4 years for Respondent, and whose rate was only \$2.50 an hour as compared with Milord's \$2.75.

²⁷For this reason, in the case of Figueroa I attach more weight to the implausibility of Respondent's explanation for his selection rather than to the mere fact of his having signed a card. In the case of Perez, I also give more weight to the same factor, as well as to the fact that he participated with Pedote in the distribution of the cards.

²⁶In testifying on April 1, 1969, Virtés gave the date of this incident as about "6 or 8 months ago."

RECOMMENDED ORDER

Upon the entire record in the proceeding and the foregoing findings of fact and conclusions of law, it is recommended that American Sanitary Partition Corp., Long Island City, New York, agents, successors, and assigns, shall be required to

1 Cease and desist from.

(a) Discouraging membership in, and concerted activities on behalf of, Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, or any other labor organization, by discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment

(b) Threatening employees that it will discharge them because of their concerted or union activities

(c) Coercively interrogating employees about their union sentiments.

(d) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid of protection, or to refrain from any or all such activities, except to the extent permitted by the provisos in Section 8(a)(3) of the Act

2 Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act.

(a) Make whole Frank Pedote, Felix Perez, Rolando Figueroa, Eugene Milord, Emile Menard, and Julio Rosa, in the manner set forth in the Section of the Trial Examiner's Decision entitled "The Remedy," for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, and offer them immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges

(b) Notify the foregoing employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Selective Service Act, as amended, after discharge from the Armed Forces

(c) Preserve, and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at Respondent's plant in Long Island City, New York copies of the attached notice marked "Appendix," together with a companion notice containing French and Spanish translations thereof.²⁸ Copies of said notices, on forms to be provided by the Regional Director for Region 29, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Order, what steps Respondent has taken to comply herewith.²⁹

²⁸In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words, "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

²⁹In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a trial at which all sides had the chance to give evidence, the Trial Examiner decided that we violated the National Labor Relations Act, and ordered us to post this notice.

The Act gives all employees these rights

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection, and

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT fire, or threaten to fire, employees because of their membership in or support of a union.

WE WILL NOT ask you whether you are for the union or how you feel about the union.

WE WILL offer to take back Frank Pedote, Felix Perez, Rolando Figueroa, Eugene Milord, Emile Menard and Julius Rosa at their old jobs and pay them for all the wages they lost because we discharged them on January 6, 1969

All our employees are free to belong, or not to belong to Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO

AMERICAN SANITARY
PARTITION CORP.
(Employer)

Dated

By

(Representative)

(Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Fourth Floor Brooklyn, New York, Telephone 212-596-3535.