

**Michael Palumbo d/b/a American Homes Systems  
and Steve L Zambory and James Baroni Cases  
8-CA-6860 and 8-CA-6950**

December 29, 1972

## DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS  
FANNING AND PENELLO

On August 14, 1972, Administrative Law Judge<sup>1</sup> Josephine H Klein issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions of the Administrative Law Judge and to adopt her recommended Order.

## 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 Administrative Law Judge and hereby orders that Respondent, Michael Palumbo d/b/a American Homes Systems, Aurora Shores, Ohio, his officers, agents, successors, and assigns, shall take the action set forth in the said Order.

<sup>1</sup> The title of Trial Examiner was changed to Administrative Law Judge effective August 19, 1972.

<sup>2</sup> In adopting the finding of the Administrative Law Judge that Respondent's business meets the Board's standards for assertion of jurisdiction we rely additionally on *H E Droese d/b/a R & H Cabinet & Building Company* 182 NLRB 518, fn 1.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

JOSEPHINE H KLEIN, Trial Examiner. Upon charges filed on February 11, 1972, and April 3, by Steve L Zambory and James Baroni, respectively,<sup>1</sup> respectively, complaints were filed against American Homes Systems, a sole proprietorship, on March 23 and April 10, 1972. The first charge and complaint related to the discharge of Zambory and Jerome C DiCarro. The second charge and complaint covered Baroni's discharge. The complaints were consolidated by order issued April 10.

A hearing was held in Cleveland, Ohio, on May 9 and 10,

<sup>1</sup> Since the record establishes that Respondent's business is operated as an unincorporated individual proprietorship the caption is hereby amended to read as indicated.

<sup>2</sup> In a context unrelated to any jurisdictional question, there was testimony indicating that Respondent is not the owner of houses but rather

erects them for an unidentified owner, who apparently does the selling. No specific finding is made in this connection, however in view of the pleadings and the further fact that the decision on the jurisdictional issue would be the same under either set of facts.

1972. The parties waived oral argument, and thereafter briefs were filed on behalf of the General Counsel and the Respondent.

Upon the entire record and consideration of the briefs, the Trial Examiner makes the following

## FINDINGS OF FACT

### I JURISDICTION

The complaints allege and the answers admit that Respondent "is engaged in the construction industry as a general contractor for the purpose of constructing and selling residential homes."<sup>2</sup> The complaints also allege and the answers, as amended at the hearing, admit that Respondent has an annual indirect inflow of materials in commerce valued in excess of \$50,000.

The admitted allegations thus establish that Respondent meets the Board's standards for the assertion of jurisdiction over nonretail operations. However, there is no allegation of facts satisfying the jurisdictional standards for retail establishments.

In *Harry Tancredi*, 137 NLRB 743, 745, the Board said

Although a portion of the buildings which he constructs and sells are governmental or commercial, and thus falls into the classification of "nonretail" operations, Tancredi, by his stipulation and by his evidence, admits that a portion of his business involves the construction and sale of residential homes to users. This latter aspect of his operations comes within the characterization of a retail enterprise. The totality of Tancredi's operations evidence to us that the business is a single integrated enterprise, encompassing both retail and nonretail operations.

From this passage it is clear that (1) construction and sale of governmental or commercial buildings are "nonretail", and (2) sale of residential homes to users is retail. *Tancredi*, however, does not clearly state whether construction of residential buildings is retail or nonretail.

The question left open in *Tancredi*, as heretofore formulated, appears to have been answered in a dictum in *United Slate Tile, Local 57 (Atlas Roofing Co)*, 131 NLRB 1267. Reversing the Trial Examiner, the Board, applying the retail jurisdictional standards, assumed jurisdiction over a company which constructed residential homes for sale to the users. In a footnote, however, the Board expressed its agreement with the Trial Examiner's view that "under *Man Products, Inc*, 128 NLRB 546, the Board could have asserted jurisdiction if the indirect inflow of [the employers] would have met nonretail standards." In *Man Products* the Board held that either the retail or nonretail standards for the assumption of jurisdiction could be applied to a company "engaged in the manufacture and retail sale of cellar doors and prefabricated garden sheds," even though "99 percent of all sales were made directly to homeowners and other ultimate consumers." In reaching its conclusion, the Board said

erects them for an unidentified owner, who apparently does the selling. No specific finding is made in this connection, however in view of the pleadings and the further fact that the decision on the jurisdictional issue would be the same under either set of facts.

It is clear, of course, that the Employer's business has an aspect of a retail enterprise because it sells to the ultimate nonbusiness consumer. But it is also clear that in all other respects its activity possesses elements of a nonretail manufacturing enterprise, concerned with its sources of supply of raw material, its recruitment of employees with skills required in manufacturing or in handling material other than at a purely retail level, and its competition for such skills with other nonretail enterprises in the labor market. In such situations, the Employer's activities also offer considerations for the assertion of jurisdiction on the basis of the Board's nonretail standards.

Thus, under *Atlas Roofing*, construction and sale of residential houses is a mixed retail and nonretail operation and the Board will assume jurisdiction if either of its applicable standards is met. Since Respondent admittedly meets the Board's nonretail standards, the Trial Examiner finds that it will effectuate the purposes of the Act to assume jurisdiction in this case.<sup>3</sup>

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>4</sup>

## II THE UNFAIR LABOR PRACTICES

### A The Issues

On February 7, 1972,<sup>5</sup> Steve L. Zambory, James Baroni, Jerome C. DiCarro, and George Sangrik, the four carpenters employed by Respondent, all arrived at work shortly before the usual 8 a.m. starting time. Shortly thereafter, having conferred together, the four men announced to the foreman, Dwayne Liezert, that it was too cold to work and they were leaving, which they then proceeded to do. They all reported at the usual time the next day. After a short discussion, Respondent informed Zambory, Baroni, and DiCarro that they were fired. None of them has been recalled or offered reemployment.

Respondent concedes that the employees acted in concert and that they were discharged. He maintains, however, that the walkout was not "protected activity" because the men did not act in "good faith" and that they were discharged for reasons other than the walkout.

The issue, therefore, is whether Respondent violated Section 8(a)(1) of the Act by discharging the three men for engaging in protected concerted activities, i.e., a 1-day strike to protest working conditions.

The complaints also alleged that on February 9 Respondent threatened "employees with permanent loss of employment and other reprisals because they had engaged in protected concerted activities."

<sup>3</sup> *A fortiori* it is appropriate to assert jurisdiction if Respondent is actually engaged in construction under contract with a third party owner who sells the houses to the users. See fn. 2 *supra*.

<sup>4</sup> National Labor Relations Act as amended (61 Stat. 136; 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*)

<sup>5</sup> Unless otherwise stated, all dates herein are in 1972.

<sup>6</sup> The General Counsel initially objected to the receipt of this chart on the ground that it reports as of the Cleveland Hopkins International Airport, which is around 30 miles away from the building site. The General Counsel, however, subsequently withdrew his objection. The precise figures

### B The Discharges

Respondent constructs residential single-family dwellings. They are A-frame structures, erected by a semifabricated method, at least in part unique to Respondent. In the early part of February 1972, Respondent had about 12 houses in various states of completion, and 5 or 6 additional ones immediately projected. According to the foreman, there were four houses with carpentry to be done on February 7.

The four men here involved were all rough carpenters (as distinguished from finish carpenters, who do primarily interior finish work). As rough carpenters, the men were required to work a great deal of the time outside or in the partial shelter of open, unfinished, and unheated buildings.

All the witnesses, particularly those called by Respondent, testified that in December 1971 and January 1972 Respondent had on occasions decided that the weather was too inclement for the men to work and had permitted them to go home. Respondent's witnesses, particularly Sangrik, testified that the carpenters frequently, if not continually, complained about the cold. The most recent episode before the date here involved was Thursday, February 3. On that day, Zambory and Baroni worked together constructing a roof on a house. They started around 8 a.m., the customary starting time, and finished the job at around 12:30 or 1 p.m., having worked through their customary lunch hour because Zambory, to the pleasure of Palumbo, had decided that it was advisable to get the job done as soon as possible. Since there had been a steady and relatively heavy rain during all that time, Zambory announced that he was soaking wet and was going home. Palumbo said that since Zambory was already wet, he might as well stay the rest of the day. Zambory, however, left. Baroni said he would dry out in his truck and then remain the rest of the day, which he did.

Friday, February 4, was very cold. According to a Department of Commerce Environmental Data Service chart introduced into evidence by Respondent, the average temperature that day was 15 degrees, or 13 degrees below normal. The average wind was 22.9 m.p.h. and there was generally steady, though light, precipitation.<sup>6</sup> The men complained among themselves about having to work outside in the cold. They asked Liezert if they could work inside, but he replied that there was no inside work available. They all worked throughout the day.

On Saturday, February 5, the average temperature was 13 degrees, or 15 degrees below normal. The average wind speed was 15.7 m.p.h. There was some precipitation until 9 a.m. and there was an inch of ice or snow on the ground. With the exception of DiCarro, who was absent for the day, the men worked that day.

On Monday, February 7, the minimum temperature was

as to temperature, precipitation, and wind speed are not determinative. The Trial Examiner takes official notice of the fact that, at least generally, weather conditions are similar within such a radius. In the absence of contrary evidence, the Trial Examiner accepts the chart produced by Respondent as accurately reporting the weather at the time and place here involved. Palumbo worked with the men that afternoon. At one point, he was climbing a ladder which was being held by one of the men. He complained of the cold and was quoted as having said that the men were "crazy or fools" to work outside in such weather.

1 degree below zero, the maximum 18, with an average of 9 degrees, or 19 degrees normal. The average wind speed was 12.8 m.p.h.; there was precipitation until 7 a.m., and there were 7 inches of ice and snow on the ground at 7 a.m.

DiCarro and Baroni were the first of the carpenters to arrive at work. They sat for awhile talking in DiCarro's truck. Sangrik arrived a little later and joined them. Zambory arrived shortly thereafter. The three men talked some about the weather, when Zambory left in response to a request by the foreman, Dwayne Liezert. Zambory and Liezert went up on the roof of a house under construction to investigate a leak. They discovered that the leak was caused by accumulated snow which was melting around a chimney. Apparently they made the necessary repairs.

Zambory then rejoined the other three carpenters, who had meanwhile moved into a heated house, where they conferred. They informed Zambory that they had decided to leave and Zambory agreed to join them. DiCarro, as spokesman for the four men, told Liezert that it was too cold to work and the men were therefore leaving. Liezert said that it was not too cold to work and that if the men were unwilling to perform their work Respondent would find other people who were willing to do so. The men left.

Palumbo arrived on the job at about 8:30 a.m. When he asked where the carpenters were, Liezert replied that they had left, saying it was too cold to work. Palumbo asked if they were coming back, and Liezert said that he did not know. Sometime that day, Palumbo took steps to have an advertisement for carpenters placed in a newspaper to appear the next morning.

On Tuesday, February 8, the four carpenters all arrived, as usual, sometime before 8 a.m. Liezert arrived shortly thereafter. He testified that, as he got out of his car, one of the men asked him if they were fired. He replied that as far as he knew they were not, but they were to take whatever tools they had belonging to Respondent to the office, which was located in a model house about a quarter of a mile away from building site. When asked the purpose of that request, Liezert testified:

We wanted to take a check on just what tools we had, but the main purpose was so we would have our tools there when we needed.

At another point in his testimony, he stated that after the men left on Monday he had worked inside, being unable to perform the work originally planned because the carpenters had some of the necessary tools in their possession. He did not at any point indicate when, if at all, Palumbo had told him there was to be an "inventory" of tools and equipment.

Palumbo arrived while Zambory, DiCarro, and Baroni were standing near DiCarro's truck. Palumbo's testimony at this point was:

I asked them what was happening. They said to me, Are we going to work? I said to them, "No. We are not going to work. It is too cold to work today. It was too cold to work yesterday."

I then told them to take the tools and equipment

they had that belonged to us and put them up at the model.

According to Palumbo, the men proceeded to the model house, followed by Palumbo. While the men were unloading the tools from the truck, Palumbo told Sangrik to go back to the building site, where Palumbo would talk to him later. Sangrik did so and the other three men finished unloading the tools. Palumbo's testimony continued:

I started to leave, and, as I left, Steve Zambory approached me, and he said, "Do you want us to work tomorrow? I said to him, "No, I don't think so. It is probably going to be as cold tomorrow as it is today."

He says to me, "How about the next day?" I don't believe I answered.

Then he says to me, "Do you want us back at all?" I thought for a second, and then I answered him, "No, I don't want you back at all."<sup>7</sup>

Palumbo returned to the building site, where he talked to Sangrik. In this connection, Palumbo testified:

The conversation was that if he wanted to go with these guys or—at the beginning, I asked him if it was too cold to work Monday. He said to me, "No."

I says to him, "Why did you leave?" He says to me, "I don't know. I just thought I should go along with the rest of the guys. They suggested it."

At that point, I told him that I put a lot of faith in him, and I think that is all I said except I asked him if he wanted to stay at work, and he said he did, and that was it.

Sangrik is still employed by Respondent and was called as a witness by Respondent.

Respondent's newspaper advertisement for carpenters had been published early on the morning of Tuesday, February 8. Around 8:45 a.m. a clerk in his office informed Palumbo of the 15 to 20 telephonic responses that had been received to the advertisement. At about 10 or 10:30 a.m., before Palumbo had a chance to call any of the applicants, one telephoned him and made an appointment for an interview at 12:30 p.m. Along with two somewhat inexperienced carpenters helpers, the applicant arrived at the appointed time and all three men were hired. According to Palumbo, two of the three men hired at that time were still employed by Respondent at the time of the present hearing, the third having left sometime in April. Respondent's witness, Sangrik, however, indicated that only two new carpenters were hired, reporting to work on Wednesday or Thursday, February 9 or 10.

Baroni and DiCarro each testified that on Tuesday evening he received a telephone call from Liezert stating that the men had been terminated, but Palumbo and Liezert were going to discuss the matter further. The next morning Liezert telephoned them again to say that Palumbo had concluded that Baroni and DiCarro valued their jobs and therefore they would be rehired within a few weeks. According to DiCarro, Liezert, in response to an

discharged but not necessarily in the manner stated by General Counsel—not an outright discharge." Respondent's brief also clearly concedes that the men were discharged: "They were discharged for cause . . ."

<sup>7</sup> The men quoted this interchange as having specifically included the word "fired." Whether or not that precise language was used, the message was the same and it was clear. At the beginning of the hearing, Respondent's counsel said: ". . . we would have to admit that they were

inquiry, said that Zambory would not be rehired because he had instigated the walkout

Liezert testified that DiCarro had visited the jobsite sometime on Tuesday asking Liezert's help in being reinstated. According to Liezert, DiCarro said he "thought he had blown a good job." Liezert also testified that on Tuesday Palumbo instructed him to call the two men, DiCarro and Baroni, to come in to see Palumbo to discuss their jobs. "Maybe they had put more value on their job than he had thought." Liezert testified that he was opposed to rehiring the men. Although his testimony was somewhat confused, Liezert appears to contend that he had made only one telephone call on Wednesday morning.

Palumbo's testimony conflicted somewhat with Liezert's. Palumbo testified that Mrs. Baroni telephoned him on Tuesday and Wednesday evenings to explain that Baroni had left the job on Monday because he suffered from buritis, which was aggravated by the cold. According to Palumbo, it was then that he first considered recalling the two men because "DiCarro returned for his job and showed me that he was at least interested in coming back to work." He did not specifically describe the circumstances under which he had talked to DiCarro. Mrs. Baroni's intercession and explanation satisfied him as to Baroni.

Palumbo testified that, after talking to DiCarro and twice with Mrs. Baroni, he called Liezert and "told him to get hold of these two guys and tell them [Palumbo] would like to talk with them about their jobs." However, Palumbo later testified that he did not inform Liezert of his intention possibly to rehire the men until after they had come in and spoken with him.

On Thursday afternoon, pursuant to Liezert's message, Baroni and DiCarro visited Palumbo. Palumbo's immediate reaction was to inquire if the two men felt they had to come in together to talk to him. The men said that anything Palumbo had to say to either of them he could say in front of the other. According to DiCarro, Palumbo said to Baroni "Because of organizing like you are now, this is the reason you got fired." At first Palumbo entirely denied having used the word "organize." However, his pretrial affidavit given to a Board agent, produced by the General Counsel, said, in pertinent part "I asked them if there was any reason that they felt they had to organize to talk with me." After seeing the affidavit, Palumbo testified "I believe this one is true. They may possibly have used the word. I will agree. I do not actually remember." However, Palumbo did not admit having made the statement that Baroni attributed to him, he maintained that the word "organize" was used, at most, in connection with their having come to see him together.

Palumbo's testimony concerning this meeting was

We discussed the job, or the possibility of calling them back. I explained to them both that they put me in an awkward position, that I had, in fact, hired someone to take their place inasmuch as they led me to believe that they didn't care for the job at all. I told them I would have to further consider it, I would have to think more about whether I would hire them back or not.

I was inclined to think that I would at that particular

time and told them so. However, they could not be rehired at that particular time because there was no work for them to do.

DiCarro testified that Baroni asked if Zambory would also be rehired, and Palumbo replied, "No, because he thinks he was the instigator of it and the one that pulled us all together to leave." Baroni gave similar testimony, except that he ascribed the question to DiCarro.

Respondent contends that this testimony must be discredited as an "afterthought" because it is not recited in the affidavit given to a Board agent on February 10. The three men had gone to the Board office at about 4:40 p.m. on February 10, immediately after DiCarro's and Baroni's visit with Palumbo. At this time, Zambory filed a charge. He gave the affidavit in the first person singular, and it was then signed by the other two. Under the circumstances, the Trial Examiner finds it not at all suspect that Palumbo's statements to the other two men were not mentioned at that time but were adduced only later by counsel for the General Counsel, when he interviewed each of the men separately at length in preparation for trial. At the time the original statement was given, DiCarro and Baroni had reason to anticipate recall within the near future. Indeed, the charge then filed did not mention Baroni, who waited almost 2 months before filing a charge. There are no substantial conflicts in the testimony of the three discharges. On the other hand, there are significant conflicts in the testimony of Respondent's witnesses. Based on these considerations, together with careful observation of the witnesses' demeanor, the Trial Examiner credits DiCarro and Baroni.

The foregoing facts manifestly establish, at least *prima facie*, that the three men were discharged for having walked out to protest working conditions, i.e., having to work in extremely cold weather. Discharge for such reason manifestly violates Section 8(a)(1) of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9. It is thus in order to consider Respondent's defenses.

Respondent's first defense is that the walkout was not protected because it was not a good-faith protest against working conditions. According to Respondent, the "real" reason for the walkout was an irresponsible act of "goofing off," with the cold weather simply seized upon as a "pretext" for taking the day off. To support this contention, Respondent relies on testimony by Sangrik. Sangrik testified that when he arrived at work on February 7, DiCarro and Baroni were sitting in DiCarro's truck talking, when Sangrik walked over. His testimony continued:

Jerry [DiCarro] was saying he didn't want to work, and I remember something about his saying he was tired or something he had done on Sunday and didn't want to work, and so, we used the general excuse.

Jerry said he was tired from Sunday and he didn't feel like working, that it was too cold, and we all agreed it was too cold.

Sangrik further testified that in his opinion it was not too cold to work and he had agreed with the other men simply because "if you work with a bunch of guys you just agree with them just to get along."

In supporting his expressed opinion that it was not too cold to work, Sangrik said that they had worked during the

previous week, when it was colder. However, as shown above, the official weather record shows clearly that February 7 was the coldest day so far in the month, with the average temperature 9 degrees, which was 19 degrees below normal, and average wind speed of 12.8 m p h.<sup>8</sup>

Sangrik himself established that the men were continuously concerned about the weather, which was a frequent topic of discussion and complaint. Indeed, he accusingly said that the men "said it was too cold every day it was 20 degrees or below."

At the hearing, Respondent was at great pains to establish, successfully, that the employees often took time off without being reprimanded or disciplined. Employees frequently telephoned in the morning to say they would not be in that day, and there were no repercussions. That being so, it is difficult to understand why DiCarro went to the great effort of dressing for work and arriving at the site before 8 a.m. on a bitterly cold day if, as Respondent maintains, he was simply tired and wanted to "goof off" for the day. Further, it seems somewhat strange that Palumbo considered rehiring DiCarro, the alleged instigator of the "lark," while refusing to consider reinstatement of Zambory, a mere follower.<sup>9</sup>

In any event, the record is clear that the employees' alleged ignoble irresponsibility played no part in the discharge. Sangrik testified that he did not inform anybody of what he claimed was the "real" reason for the walkout until a month after the event. This was corroborated by Palumbo, who also testified that on February 7 he "didn't at that particular time know why they had left other than they had left because they said it was too cold to work."

Respondent apparently contends that the employees' returning to work on Tuesday demonstrates their recognition of misconduct on Monday and thus, in effect, constitutes an admission that they had simply embarked on an unprotected "lark." There is no merit to this contention. Employees may reasonably engage in a strike of limited jurisdiction as means of demonstrating the genuineness of their demands. They probably hoped to convince Respondent not to require them in the future to work outdoors in extremely inclement weather. Also, employees often cut a strike off for fear of losing their jobs to permanent replacements. Not every strike is carried on to complete victory for the workers. That they returned to work on Tuesday has no tendency to support Respondent's view that the walkout was either unreasonable or improperly motivated. See *First National Bank of Omaha v NLRB*, 413 F.2d 921, 924 (C.A. 8), quoting with approval Trial Examiner Janus' statement that "a work stoppage does not lose its presumptive protection merely because it is limited in duration." 171 NLRB 1145, 1151

<sup>8</sup> This contradicts Palumbo's testimony that there was no wind on that day.

<sup>9</sup> Respondent's brief says: "The excuse that it was too cold to work was a pretext made up by DiCarro as an excuse because he wanted to take a day off. The other men went along as a lark because it seemed to be a good idea for a Monday morning."

<sup>10</sup> If the reasonableness of the employees' conduct were of crucial significance, it would be interesting to compare their position with Respondent's. The weather chart introduced by Respondent shows that day as the extreme for the month with temperatures ranging from 6 degrees below zero to 14 degrees above for an average of 4 degrees, or 24 degrees below normal. The average wind speed was 8.6 m p h and there was 7

inches of snow and ice on the ground. It would be interesting to learn the facts about the previous occasions on which Respondent maintains it decided the weather was too inclement to work.

Respondent's contention that the men acted unreasonably, and thus lost their legal protection, because they did not speak to Palumbo personally and gave no prior notice of their walkout is also without merit. First, the evidence establishes that Palumbo's presence on the job, though frequent, was irregular and unpredictable. Further, Palumbo himself testified that "normally" in Palumbo's absence Liezert "would determine for himself when he thought the men should be sent home because of inclement weather." On the morning of February 7, Palumbo was not present when the men spoke to Liezert. They left only when he insisted it was not too cold to work. Liezert did not suggest that they wait to talk to Palumbo. No further notice was required of the employees. See *NLRB v Washington Aluminum Co.*, *supra*, 370 U.S. at 15, *Polytech, Inc.*, 195 NLRB No. 126.

Respondent's brief contains the following two statements: "The employees did not want to, or have to, organize for protection. There were no objections on the part of management or the employees to discussing or adjusting working conditions and whether or not they would work under certain weather conditions." But the fact that the carpenters walked out together demonstrates that they did "want to" organize, and Liezert's refusal to accede to their position demonstrates that they did "have to" take concerted action for protection. In any event, Respondent's past willingness to discuss the matter at most "might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." *Washington Aluminum Co.*, *supra*, 370 U.S. at 16.<sup>10</sup>

A brief word may be said of Respondent's reference to Section 502 of the Act,<sup>11</sup> as construed in *NLRB v Fruit-Colton Construction Co.*, 330 F.2d 885 (C.A. 8), holding unprotected a concerted work stoppage in violation of a contractual no-strike clause, where the condition protested was not in fact abnormally dangerous.<sup>12</sup> The statutory provision there involved is totally inapplicable to the present case, where the employees have not contracted away, in whole or in part, their basic and fundamental right to strike. That right is not limited to abnormally dangerous situations but rather concerns any and all conditions of employment.

Palumbo conceded that the men were discharged because they had made the mistake of walking out on Monday. It should further be noted that in a pretrial affidavit given to a Board agent, he said:

In summary, there were three employees who refused

inches of snow and ice on the ground. It would be interesting to learn the facts about the previous occasions on which Respondent maintains it decided the weather was too inclement to work.

<sup>11</sup> nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

<sup>12</sup> The Sixth Circuit has held that a work stoppage in violation of a no-strike clause is validated by the employees' good faith belief that there are abnormally dangerous conditions. *NLRB v Knight Morley Corp.* 251 F.2d 753 cert. denied 357 U.S. 858.

to work because it was too cold I fired them because I did not think it was too cold

Respondent now maintains that the primary reason for the discharges was that the three men were incompetent or otherwise undesirable employees. According to Respondent, for a considerable time Liezert had been complaining about these carpenters and had frequently requested that they be discharged and replaced by more competent workers. Palumbo, however, had rejected Liezert's requests. Palumbo maintained that he then found the walkout a providential occasion for adopting Liezert's recommendations without causing "hard feelings," Palumbo being sensitive about offending the employees by criticizing their ability.

Having testified that he decided to fire the men on Tuesday morning, Palumbo was allowed to state his reasons for the discharge. He said:

When Steve Zambory asked me if I wanted them any more, I thought about it and, no, I didn't want them any more. I just decided at that particular time that they were more trouble than they were worth.

I am a die-hard when it comes to getting rid of employees, but, at that particular point, it was my opportunity to get rid of them. I decided it.

Thus, on Palumbo's own testimony, the walkout was the immediate occasion and cause of the discharge. Even if Respondent had established that other considerations contributed to the discharge, a violation of the Act would be shown, since it is not necessary that improper motivation be the sole factor in establishing a wrongful discharge.

In any event, there is no evidentiary support for a claim that the men were fired for incompetence. Their employment histories belie any such reason.

DiCarro had been hired around April 1971. In November or December 1971, he was made a "group leader,"<sup>13</sup> with an increase in pay. Zambory was hired on December 4, 1971. Within about a month, Palumbo approached Zambory about the possibility of his becoming a supervisor or group leader, which position would have resulted in a raise. Zambory, however, refused to make any definite commitment at that time. Accordingly, he remained at his existing job and pay rate. At the hearing, Palumbo acknowledged that Zambory "had ability to supervise. He had quite a bit of ability." Baroni had been hired in May 1971 as a carpenter. His work proved less than satisfactory and, about a month or 6 weeks later, Liezert recommended that he be discharged. Palumbo, however, took the alternative course of allowing Baroni to remain on at a reduced rate of pay until he had acquired sufficient proficiency to perform the full duties of an experienced carpenter. Palumbo acknowledged that Baroni's performance improved thereafter and in the later fall or early winter of 1971 his pay was increased.<sup>14</sup>

<sup>13</sup> At one point Palumbo indicated that the greatest cause of his annoyance was Baroni's goofing off when he was supposed to be one of our supervisors. However, there is no contention that Baroni was supervisor within the statutory definition.

<sup>14</sup> Palumbo denied any great improvement in DiCarro's performance and maintained that he gave Baroni a raise in anticipation of the fact that he would get better. This is hardly consistent with DiCarro's prior pay reduction.

### C The Threat

As stated above, the complaints also allege that on or about February 9 Palumbo "threatened [Respondent's] employees with permanent loss of employment and other reprisals because they engaged in protected concerted activities." The General Counsel does not specifically address himself to this allegation in his brief. Since, as heretofore found, the men were discharged early on February 7, superficially it appears somewhat difficult to find a threat of discharge or other reprisals thereafter. However, the distinction made between Zambory and the other two dischargees does, in the Trial Examiner's opinion, constitute a prohibited threat for the exercise of statutorily protected rights.

As previously stated, at Palumbo's request, relayed by Liezert, DiCarro and Baroni visited Palumbo and discussed the possibility of their reinstatement. Palumbo indicated that they would probably be recalled within a month. Respondent made it clear from the beginning, however, that Zambory would not be recalled. According to Respondent, the reason for this distinction was the fact that Zambory was not interested in a permanent job with Respondent. Had Respondent been insistent on having just permanent employees in order to achieve its announced purpose of building an organization, presumably Zambory would have been replaced as soon as possible after he refused to commit himself to remaining in December when Palumbo spoke about a group leader or supervisory position. So far as appears, no steps had been taken to find a potential replacement.

The record suggests more plausible reasons for Respondent's total refusal to consider the possibility of recalling Zambory, namely, his proclivity to organizational activity. On cross-examination, Palumbo testified as follows:

Q Did you at any time tell [DiCarro and Baroni] you suspected that Mr Zambory had instigated the walkout?

A Only after Mr DiCarro indicated that to me.

Q Did you tell them that, because Mr Zambory instigated the walkout, you would not rehire him again?

A No.

At that point, Palumbo was confronted with his pretrial affidavit, which reads in part:

When Jerry and Jim came to my office on Wednesday, I told them that, in my opinion, Steve Zambory was responsible for them walking off the job. I came to that conclusion because on Tuesday morning Steve acted as spokesman and that Jerry told me that he had listened to Steve. I cannot recall telling them that I would not hire Steve again, but, if they said that I told them, I probably did. I did not hire him again because I believe he caused the trouble.<sup>15</sup> Moreover, he was a

The evidence is clear that the three men reported to work by 8 a.m. on Tuesday February 8. At that point the strike was ended. Their discharge thereafter was thus clearly illegal. No replacements had been hired, or indeed even interviewed, before the strikers reported back to work. Thus, they are entitled to reinstatement.

<sup>15</sup> This is inconsistent with Respondent's present position, based on Sangrik's testimony that DiCarro initiated the walkout because he was tired from his weekend activities. In the conclusion of its brief Respondent says

Union carpenter He was working with me only until he found other employment

On cross-examination of Zambory, Respondent's counsel had adduced the information that Zambory is "a union carpenter" and Respondent is "a non-Union builder" In cross-examining Zambory, Respondent's counsel attempted to show that Zambory informed Palumbo that he wanted only temporary employment and "didn't want to get tied down because [he was] 'moving' " Nonetheless, Zambory was hired and was retained after he refused to commit himself to staying on for a supervisory position In view of this, it is a reasonable assumption that Palumbo's refusal to consider reinstating Zambory was motivated by something other than his impermanence The evidence as a whole indicates that Palumbo's special displeasure with Zambory's stemmed from his aggressiveness as an employee, as evidenced by his union membership and ability to organize the employees

Accordingly, on February 10, when Palumbo told Baroni and DiCarro that they would be rehired, but that Zambory would not be because he was the instigator of the walkout, Respondent clearly, if only impliedly, threatened drastic reprisals for past or future concerted activities In so doing, Respondent violated Section 8(a)(1) of the Act

#### CONCLUSIONS OF LAW

1 Michael Palumbo d/b/a American Homes Systems is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

2 By discharging Steve L Zambory, Jerome C DiCarro, and James Baroni because they had engaged in protected activities, Respondent has interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and is thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act

3 By threatening employees with permanent discharge or other reprisals for engaging in protected activities, Respondent has interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and is thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act

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

#### THE REMEDY

Having found that Steve L Zambory, Jerome C DiCarro, and James Baroni were improperly discharged and thereafter denied reinstatement, the Trial Examiner will recommend that Respondent be required to offer them immediate and unconditional reinstatement with backpay for the period commencing on February 8, 1972, and continuing until Respondent offers them full and uncondi-

that the real reason they left was that DiCarro was tired from the weekend and talked the three others into taking a day off with him

<sup>16</sup> In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings conclusions and recommended Order herein shall, as provided in Sec 102.48 of the Rules and Regulations, be adopted by the Board and become its findings conclusions and Order, and all objections thereto shall be

tionally reinstatement to their former jobs Backpay is to be computed in accordance with *FW Woolworth Co*, 90 NLRB 289, and shall carry 6 percent per annum interest in accordance with *Isis Plumbing & Heating Co*, 138 NLRB 716

In addition, the Trial Examiner will recommend the cease-and-desist and notice-posting requirements customary in cases such as the present

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, the Trial Examiner hereby issues the following recommended

#### ORDER<sup>16</sup>

Respondent, Michael Palumbo d/b/a American Homes Systems, his agents, successors, and assigns, shall

1 Cease and desist from

(a) Interfering with, restraining, or coercing employees by discharging or in any other manner discriminating against employees for striking or engaging otherwise in concerted protected activity, or by threatening to take any such action

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act

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

(a) Offer to reinstate Steve L Zambory, Jerome C DiCarro, and James Baroni to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges

(b) Notify any of the above-named employees who are 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 of 1948, as amended, after discharge from the Armed Forces

(c) Make whole Steve L Zambory, Jerome C DiCarro, and James Baroni for any loss of earnings each of them may have suffered by reason of the unlawful action against him in the manner set forth in the section of this Decision entitled "The Remedy"

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

(e) Post at its office and at each of the houses under construction by Respondent copies of the notice attached hereto and marked "Appendix"<sup>17</sup> Copies of such notice, on forms to be provided by the Regional Director for Region 8, shall, after being duly signed by Respondent, be

deemed waived for all purposes

<sup>17</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

posted immediately upon receipt thereof and be maintained for a period of 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 said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 8, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith<sup>18</sup>

<sup>18</sup> In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 8, in writing within 20 days from the date of this Order what steps the Respondent has taken to comply herewith."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a trial in which all parties had the opportunity to present their evidence, it has been found that we violated the law and we have been ordered to post this notice about what we are committed to do.

The National Labor Relations Act gives all employees these rights:

- To organize themselves
- To form, join, or help unions
- To bargain as a group through a representative of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT discharge or threaten to discharge any employees, or otherwise discriminate against them, for

engaging in concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer to Steve L. Zambory, Jerome C. DiCarro, and James Baroni immediate and full unconditional reinstatement to their former positions, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed by them, and WE WILL pay them for any loss of pay they may have suffered as a result of their discharge on February 8, 1972, together with interest.

WE WILL notify Steve L. Zambory, Jerome C. DiCarro, and James Baroni if they are serving in the Armed Forces of the United States, of their right to employment, upon application, after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

MICHAEL PALUMBO D/B/A  
AMERICAN HOMES SYSTEMS  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

This is an official notice and must not be defaced by anyone.

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. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Building, 1240 E. Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3715.