

Robert M. Anderson, an Individual Proprietorship d/b/a Anderson Plumbing and Heating Company and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, Local 412, AFL-CIO.
Case 28-CA-2619

April 19, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING
AND PENELLO

On November 28, 1972, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a "Brief in Answer to Respondent's Exceptions."

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 briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.

1. The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) by briefly posting new work rules on April 10, 1972, and by coercively interrogating employee Spitzer on April 20; violated Section 8(a)(3) and (1) by locking out employees on April 20; and violated Section 8(a)(5) and (1) by posting unilaterally promulgated work rules on April 25.

2. We also agree with the Administrative Law Judge's conclusion that Respondent discriminatorily discharged² six employees on April 28, 1972,³ but do

not agree with his further finding that Respondent's subsequent offer to reinstate them was conditional. The record shows that shortly after the employees were discharged, Respondent spoke with them about "if we were going to act like men or boys" and stated that they could all come back to work, except Spitzer. From these facts, the Administrative Law Judge found that Respondent's offer of reinstatement was conditioned on the employees' acting "like men and not boys" and inferred that this condition meant that the employees must comply with one of the unlawfully promulgated work rules; i.e., the rule requiring the loading of trucks on their own time. The Administrative Law Judge, accordingly, concluded that the employees remained discharges and recommended a make-whole order.

We do not agree that Respondent's offer to five of the six discriminatees was conditional and, consequently, we do not adopt the recommended remedy. Instead, we find that Respondent's vague reference to acting like men and not boys set no specific preconditions to returning to work, nor does the record reveal that it was understood by the employees as imposing any conditions upon their reinstatement. The sole reason the employees gave for not accepting the reinstatement offer was that Respondent was unwilling to reinstate one of their group, Spitzer.⁴ Under these circumstances, we conclude that Respondent's reinstatement offer was unconditional and constituted a valid offer to return to work.

We, agree, however, with the Administrative Law Judge's conclusion that Respondent's refusal to offer reinstatement to Spitzer was not justified by Spitzer's earlier argument with Superintendent Pohl over whether the latter was responsible for breaking Spitzer's thermos bottle, while closing the gate to the yard, in the course of discharging the employees because of their failure to comply with the requirement of loading their trucks on their own time. Spitzer's conduct, while not to be condoned, was understandable in the light of his just having been unlawfully discharged, an event that for him was aggravated by his having his thermos bottle broken in the process. His ensuing argument with Pohl in no way harmed or inconvenienced the Respondent. Nor do we believe that in the event of his reinstatement the strain created in his relations with Pohl by their argument would, with the passage of time and cooling of tempers, necessarily persist so as to lead to possible disruption of Respondent's operations. In these circumstances, we

Union's certification and that their discharges for noncompliance with the new rule in these circumstances tended to discourage membership in the Union

⁴ Respondent apparently refused to reinstate Spitzer on the advice of his superintendent, who was still irritated over an argument he had with Spitzer that morning.

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, eafd 188 F.2d 362 (C.A. 3) We have carefully examined the record and find no basis for reversing his findings

² Chairman Miller, concurring in the result, would not adopt the Administrative Law Judge's rationale that since the employees were discharged for not complying with a rule unlawfully promulgated under Sec. 8(a)(5) and (1) of the Act, their discharges were *ipso facto* violative of Sec. 8(a)(3) and (1) of the Act. He would, instead, find the discharges to be in violation of Sec. 8(a)(1), since the record supports the Administrative Law Judge's finding that the employees clearly were engaged in protected concerted activity when Respondent discharged them.

³ Contrary to the implication of our dissenting colleague, we do not find that the discriminatory discharges of these employees resulted *ipso facto* because they had not complied with a rule violative of Sec. 8(a)(5) The Administrative Law Judge found, and we agree, that the rule imposed changed working conditions unilaterally upon the employees 1 week after the

find that Spitzer's argument with Pohl was not of such a serious nature as to warrant departure from the Board's normal remedial order.⁵ Accordingly, as Spitzer was also entitled to an unconditional offer of reinstatement, but was not offered such with the other five employees, we find that he continued in the status of a discriminatorily discharged employee, and we will adopt the Administrative Law Judge's recommended make-whole remedy with respect to him.

We further find, however, that the other five discriminatees' failure to accept Respondent's unconditional offer of reinstatement had the effect of changing their status from discriminatorily discharged employees to unfair labor practice strikers. Accordingly, they are entitled to full reinstatement upon application, but their right to backpay is tolled from the time the unconditional offer to them was made.⁶

3. The Administrative Law Judge further found that employee Sanchez was unlawfully discharged. We do not agree. Sanchez did not appear for work on the morning Respondent unlawfully discharged the aforementioned six employees. After the employees refused Respondent's reinstatement offer, four of them went to the home of Sanchez where they told him they had been discharged. Sanchez asked whether he too had been discharged, and they replied that they did not know. Sanchez then accompanied the group to Respondent's office where they had been told to pick up their checks. After a slight delay, all seven employees, including Sanchez, were handed their checks, although normally they would have been paid some 3 hours later. Sanchez made no inquiry of Respondent as to his status and never reported back to work nor did Respondent subsequently contact him.

The Administrative Law Judge inferred that Sanchez was discharged either because Respondent erroneously believed he had been among those discharged that morning, or because Respondent considered him allied with the others in refusing to return to work. In either case, the Administrative Law Judge concluded that Respondent violated Section 8(a)(3) and (1) of the Act. We do not adopt these conclusions for the following reasons.

The burden is on General Counsel to make out a *prima facie* case that Sanchez was unlawfully discharged. Showing that Sanchez was a union adherent and received his paycheck 3 hours earlier than normal on a day he did not appear for work is not sufficient to establish a *prima facie* case of unlawful discharge. Nor can inference be substituted for lack of evidence,

for any inference would be pure speculation. Under the circumstances, it is as reasonable to infer that Sanchez voluntarily threw in his lot with the other employees as unfair labor practice strikers as it is to infer that he was unlawfully discharged. Consequently, we find that the General Counsel has not sustained his burden of establishing that Respondent discharged Sanchez for unlawful reasons, and conclude that Sanchez took on the same status as other employees who refused Respondent's offer of reinstatement—that of an unfair labor practice striker.

REMEDY

Inasmuch as we have found, contrary to the Administrative Law Judge, that five of the employees unlawfully discharged by Respondent were offered unconditional reinstatement and thereafter became unfair labor practice strikers, and that employee Sanchez voluntarily joined these employees as an unfair labor practice striker, we will substitute for the make-whole remedy recommended by the Administrative Law Judge an order requiring Respondent to offer each of these employees, upon their unconditional application, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employee hired on or after April 28, 1972, to replace them. If, after such dismissal, there are still not sufficient positions available for all the strikers, we shall order Respondent to place the names of those employees not reinstated on a preferential hiring list. It having been found further that Respondent discriminatorily discharged Alan Spitzer, and has failed to offer him unconditional reinstatement, we shall require that Respondent offer him immediate and full reinstatement in the manner set forth in "The Remedy" section of the Administrative Law Judge's Decision.

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 as modified below and hereby orders that Respondent, Robert M. Anderson, an Individual Proprietorship d/b/a Anderson Plumbing and Heating Company, Albuquerque, New Mexico, his agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following paragraph for that presently lettered 2(b):

⁵ *Blue Jeans Corporation*, 170 NLRB 1425, *Burlington Industries, Inc.*, 144 NLRB 272, 282.

⁶ *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398; *Southwestern Pipe, Inc.*, 179 NLRB 364.

"(b) Offer to Alan Spitzer immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges, and make him whole for any loss of pay suffered by him by reason of his discriminatory discharge on April 28, 1972, in the manner set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(c), and reletter the present paragraphs 2(c), (d), and (e) and (d), (e), and (f), respectively:

"(c) Upon application, offer to Tom Clayton, Gene Evans, David Franklin, Richard Pierce, Rudy Sandoval, and Jake Sanchez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, any persons hired on or after April 28, 1972. If jobs are not available, place the names of the aforementioned employees on a preferential hiring list."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

I WILL NOT discourage membership in United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, Local 412, AFL-CIO, or any other labor organization, by discriminating against employees in regard to hire and tenure of employment or any other term or condition of employment.

I WILL NOT unlawfully interrogate employees with respect to their protected activities.

I WILL NOT promulgate or maintain work rules which constitute changes in the terms and conditions of employment (from those prevailing on April 18, 1972) of employees in the bargaining unit for which the above-mentioned Union has been certified as the bargaining representative without previously bargaining with said Union with respect thereto.

I WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of

their rights under Section 7 of the Act.

I WILL make Alan Spitzer, Rudy Sandoval, John Pierce, Richard Pierce, Tom Clayton, David Franklin, Jake Sanchez, Pedro Griego, and Greg Williams whole for any loss of pay they may have suffered by reason of the unlawful refusal to permit them to work on April 20, 1972.

I WILL offer to Alan Spitzer immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him by reason of his discriminatory discharge on April 28, 1972.

I WILL, upon application, offer to Tom Clayton, Gene Evans, David Franklin, Richard Pierce, Rudy Sandoval, and Jake Sanchez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, any persons hired on or after April 28, 1972. If jobs are not available, I will place the names of the above employees on a preferential hiring list.

ROBERT M. ANDERSON,
AN INDIVIDUAL
PROPRIETORSHIP D/B/A
ANDERSON PLUMBING AND
HEATING COMPANY
(Employer)

Dated By

Robert M. Anderson

I will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

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, 7011 Federal Building and U. S. Courthouse, P. O. Box 2146, 500 Gold Avenue, S. W., Albuquerque, New Mexico 87101, Telephone 505-843-2508.

DECISION

II THE UNFAIR LABOR PRACTICES

STATEMENT OF THE CASE

STANLEY GILBERT, Administrative Law Judge: Based on a charge filed on May 2, 1972, as amended on May 26, 1972, and May 31, 1972, by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, Local 412, AFL-CIO, hereinafter referred to as the Union, the complaint herein was issued on June 30, 1972. An amendment to said complaint was subsequently issued on August 16, 1972. The complaint, as amended, alleges that Robert M. Anderson, an Individual Proprietorship d/b/a Anderson Plumbing and Heating Company, hereinafter referred to as the Respondent, violated Section 8(a)(1), (3), and (5) of the Act. Respondent by its answer denies that it committed the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held in Albuquerque, New Mexico, on August 29 and 30, 1972. Appearances were entered on behalf of all of the parties. Briefs were received from the General Counsel and Respondent on October 4 and October 3, 1972, respectively.

Upon the entire record¹ in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

Respondent is, and at all times material herein has been, an individual proprietorship doing business under the trade name and style of Anderson Plumbing and Heating Company. At all times material herein, Respondent has been engaged in the business of providing heating and plumbing services from its place of business in Albuquerque, New Mexico. During the 12-month period preceding the issuance of the complaint, Respondent, in the course and conduct of its business operations, purchased and caused to be delivered to its place of business goods and materials valued in excess of \$50,000 from other enterprises located in the State of New Mexico which said other enterprises had received said goods and materials in interstate commerce directly from States of the United States other than the State of New Mexico.

As is admitted by Respondent, it is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED HEREIN

As admitted by Respondent, the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

The following allegations in the complaint were admitted by Respondent and it is found as follows:

8. All plumbers, pipe fitters and apprentices employed by the Respondent at its place of business located at 9905 Bell, S. E., in the city of Albuquerque, State of New Mexico, exclusive of all office employees, clerical employees, guards and supervisors as defined by the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. On or about April 10, 1972, a majority of employees of Respondent in the unit described above in paragraph 8, by a secret ballot election conducted in Case No. 28-RC-2311 under the supervision of the Regional Director for the Twenty-eighth Region of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, and on or about April 18, 1972, said Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in said unit.

The only testimony elicited in this proceeding was from witnesses called by the General Counsel; the Respondent called no witnesses to rebut any of said testimony. The findings of fact hereinbelow are based on the aforesaid testimony which is credited, except in one instance which is noted.

There are two jobsites involved in this proceeding, one the main shop of Respondent and the other a number of miles away therefrom, Respondent's Kassuba jobsite. The Kassuba jobsite pertains to a large apartment complex under construction and a yard across the street therefrom which was used by Respondent in connection with its work on the Kassuba jobsite.

On April 10, 1972, the day of the election, Anderson posted in the main shop six written work rules under the heading, "Notice To All Personnel." It appears that Respondent had not prior thereto posted its work rules and that the work rules which were posted on April 10 incorporated changes from and additions to those which had been informally established prior thereto. Rule 1 prohibited alcoholic beverages of any kind on the premises and prior thereto it had been the customary practice for the men to drink beer during nonwork hours, a practice which Anderson, himself, engaged in with them. Rule 2 provided that the trucks were to be out of the yard at a prescribed starting time. It appears that the practice theretofore was for the men to start loading their trucks at the prescribed starting time. Thus, under this new rule, it was required for them to load their trucks on their own time. Rule 3 limited the use of trucks for private purposes. It appears that prior thereto use of the trucks was permitted for such things as obtaining lunch. Rule 5 required the wearing of hard hats. Although such had been the requirement theretofore, the rule further provided for instant dismissal for the failure to observe the rule which apparently was not the disciplinary action formerly applied. The other two rules apparently were consistent with prior practice.

It appears that the aforesaid six rules were only posted

¹ During the course of the hearing the complaint and amendment thereto were amended, particularly by the withdrawal of the allegation in 17(b).

during the latter part of the day of April 10. It is inferred from the testimony of Roger John Marney, Respondent's foreman at the Kassuba site, that he persuaded Anderson to remove the notice of the rules by his observation to Anderson that the men would resent the rules thereby adversely affecting their work. It is further inferred from Marney's testimony as to what Anderson stated to him as the reason² for posting the rules that he was motivated to do so in reprisal for his employees having selected the Union as their bargaining representative at the election earlier that day. It is found that posting of said rules on April 10 constituted a violation of Section 8(a)(1) of the Act in that it coerced and restrained the employees. The General Counsel urges that it was also a violation of Section 8(a)(5) of the Act in that the rules constituted a change in the terms and conditions of employment made without consultation with the Union. Inasmuch as the rules were taken down before they had any effect on the terms and conditions of the employment of Respondent's employees, it does not appear appropriate to find that the brief posting of the rules constituted a violation of Section 8(a)(5) of the Act.

As stated hereinabove, the Union was certified as the bargaining representative of Respondent's employees on April 18, 1972. On the following day, a number of the employees went down to the union offices after work hours and signed membership application cards. Shortly thereafter that day Anderson learned of their action to which he reacted angrily. The next day, April 20, Anderson refused to let nine of the employees work who, he apparently believed, had signed union membership application cards. Following is the credited testimony of Marney as to what Anderson told him with respect to the men not being permitted to work:

A. He told me, because the employees had signed, the employees on this job had signed application for membership to this local that he did not know if he was going to let them work, because he did not know what obligations he was under.

The men were instructed to report back at noon and, when they did so, they were told that it was too windy for them to work. It appears, however, that it was no more windy that day than the previous day when they had worked. Of the nine employees who did not work, eight were given 2 hours' showup pay and one was not.³ Respondent argues that Anderson did not permit employees to work because he was seeking legal advice as to what his obligations were, but offers no reasonable explanation of why he needed legal advice as to whether they should be permitted to work. In its brief, Respondent stresses the fact that some or all of the employees went to the Union to sign application cards at the suggestion of Marney, job superintendent. This fact is of no materiality to the issue. In any event, there is no showing that, at the time, Anderson had any knowledge of the fact that Marney had made such a suggestion. Since Anderson was not called as a witness,

² " . . . if they want some rules I'll give them rules "

³ The eight who received showup pay were Tom Clayton, David Franklin, Pedro Griego, John Pierce, Richard Pierce, Jake Sanchez, Rudy Sandoval, and Greg Williams. The ninth man who also was not permitted to work but apparently did not receive showup pay was Alan Spitzer

there is nothing in the record to indicate what legal problem he thought he had to resolve before permitting employees to work. Consequently, it is found that Respondent violated Section 8(a)(3) and (1) of the Act by not permitting the employees to work on April 20, 1972, because they had signed applications for union membership.

Also, in the morning of April 20, Anderson asked Spitzer if he "had been down to the union to sign the card." When Spitzer told him that he had, he was told by Anderson that he could not work that morning. Although this is the only incident of interrogation of an employee with respect to protected activity, nevertheless, it is found to have been violative of Section 8(a)(1) of the Act inasmuch as it was accompanied by the unlawful refusal to let Spitzer work because he had signed a membership application card. Thus, the interrogation had the effect of unlawfully restraining and coercing Spitzer as well as the other employees.

Marney resigned shortly after the April 20 incident and Isabio Pohl replaced him as the Kassuba job superintendent or foreman for Respondent. On April 25, Pohl posted a "Notice To All Personnel" which notice stated that, "As of this date April 25, 1972," certain rules were to be followed. The rules contained the six mentioned hereinabove as having been posted temporarily on April 10, and an additional three rules (the contents of which are not material to the issues in this case). As explained hereinabove, three of the first six rules constituted changes in the terms and conditions of employment and a fourth rule incorporated the penalty of discharge for failure to wear hard hats which apparently had not been invoked theretofore. There was no attempt on the part of the Respondent to consult with the Union with respect to imposition of these changes in terms and conditions of employment despite the fact that the Union had been certified as the bargaining representative of the employees a week prior thereto. Consequently, it is found that by posting said rules on April 25, 1972, thereby changing the terms and conditions of the employment of the employees in the bargaining unit without consulting the certified bargaining representative, the Respondent violated Section 8(a)(5) and (1) of the Act.⁴

It appears that employees at the Kassuba jobsite particularly resented the new work rule which required them to load their trucks on their own time; i.e., prior to the start of the workday for which they were paid. Before the start of the workday on April 28, employees Spitzer, Sandoval, Richard Pierce, Clayton, Franklin, and Evans⁵ discussed

⁴ Respondent in its brief argues that the rules posted on April 25 were not new rules because they had been previously posted on April 10. However, with respect to the posting of the rules on April 10, Respondent in its brief argues that the rules were taken down the same evening, and "Thus, at the most, the rules were posted for only one day, April 10th." The inconsistency in the above two arguments is obvious. In any event, it has been found hereinabove that the rules were not put into effect on April 10, because of their removal after only a short period of posting, and were therefore not implemented. Thus, the rules that were posted on April 25 which constituted changes in the terms and conditions of employment were new rules and there is no merit to Respondent's argument that Respondent had no obligation to bargain with the Union with respect to imposing such changes in the terms and conditions of employment of the employees in the bargaining unit.

⁵ The record is not clear whether John Pierce was or was not included. However, for the reason indicated hereinbelow, it is not necessary to make a determination with respect thereto.

the requirement that they load their trucks on their own time and agreed that they were not going to do it, that they wanted to be paid for the time required in loading their trucks. They delayed going into the Kassuba yard until shortly before the start of worktime, a few minutes before 7. When they approached the gate, they were informed by Pohl that they were fired because they had not complied with the rule requiring them to start work sufficiently before the workday so as to load their trucks by the start of the workday. Pohl then added that "if Anderson wants to hire you back, it is up to him." At the time Pohl refused to let the employees work, he closed the gate to the yard and it appears that Spitzer's thermos bottle was broken while he was doing so. It further appears that Spitzer believed that Pohl had broken his bottle in closing the gate and engaged in a heated argument with Pohl with regard thereto.

At this point the aforesaid employees were in the status of discharges and their discharges were violative of Section 8(a)(3) and (1) of the Act in that they were motivated by the employees' failure to comply with a rule which was hereinabove found to have been unlawfully imposed in violation of Section 8(a)(5) and (1) of the Act and thus their discharges tended to discourage membership in the Union.

Shortly after they were discharged, Anderson appeared on the scene and offered them reinstatement (except for Spitzer). However, there is an issue as to whether or not the offer was unconditional. Anderson stated to the employees that they could all come back to work, at which point Pohl indicated that the offer did not apply to Spitzer, to which reservation apparently Anderson acceded. However, it is found from credited testimony in the record that Anderson conditioned their reinstatement upon their acting like men and not boys. It is inferred that this condition could only reasonably have been intended and understood to have meant that the employees would have to comply with the rule requiring them to load the trucks on their own time.⁶

Consequently, it is concluded that the offer of reinstatement was not unconditional and that the employees, including Spitzer,⁷ remained in the status of discriminatees; i.e., employees who were discharged in violation of Section 8(a)(3) and (1) of the Act. Although the record discloses that the employees refused to accept the offer unless it included Spitzer, this does not alter the conclusion that the offer nevertheless was not an unconditional offer of reinstatement and the fact that the offer was refused on another ground does not affect the finding with respect to the ineffectiveness of the offer to remedy the unlawful discharges.

After the above incident, the employees went to the union hall where they were given "termination slips" and advised to have Anderson sign them. They then returned to the

Kassuba jobsite and saw Pohl, who said that Anderson would have to sign the termination slips. They then saw Anderson, who told them that he would sign the cards later and they could pick them up at his office about noon.

Four of the employees then went to the home of Sanchez who had not reported for work that morning. They told Sanchez that they had been discharged, whereupon he asked if he had been discharged, too. The employees told him that they did not know. Sanchez then accompanied the employees to Anderson's office. The six employees who had been discharged earlier that day and Sanchez were told to wait. After a delay all seven employees, the six who had been discharged that morning and Sanchez, were handed their checks. Sanchez made no inquiry as to his status and no statement was made to him by Anderson or anyone in management with respect to his status.

It appears that in ordinary circumstances Sanchez would not have received his paycheck until the end of the workday at 3:30 p.m. Sanchez testified that he thought he was discharged. It is noted at this point that Sanchez was one of the employees who was not permitted to work on April 20 because they were believed to have signed membership application cards for the Union, as found hereinabove. It is inferred from the record that the Respondent considered Sanchez to be in the same status as that of the other six employees and that he was discharged on April 28. Since Respondent called no witnesses, no explanation was offered on the record as to why Sanchez was given his paycheck at the same time the other six employees were given theirs or as to why he was not asked his reason for reporting to the office for his paycheck before the time it was ordinarily issued. Since there is no explanation on the record as to why Sanchez was treated in the same manner as the other six employees, it cannot be determined whether Respondent mistakenly assumed that he was among the men who refused to comply with the work rule that morning and had been discharged with the others who refused to do so, or was discharged because he was considered to be allied with them in refusing to return to work unless Spitzer was reinstated. If he was discharged because of the mistaken belief that he was among those who refused to report early that morning, then his discharge was violative of Section 8(a)(3) and (1) of the Act as were the others. If he was discharged because he was considered to be allied with the others in refusing to return to work in protest of the failure to reinstate Spitzer, it was because he was engaged in a protected concerted activity and thus in violation of Section 8(a)(3) and (1) of the Act.⁸ Consequently, it is found that Clayton, Evans, Franklin, Richard Pierce, Sandoval, Spitzer, and Sanchez were unlawfully discharged on April 28, in violation of Section 8(a)(3) and (1) of the Act.⁹

⁶ Although Spitzer testified that Anderson specifically referred to compliance with the new work rules, the General Counsel in his brief makes no mention of this testimony. While this testimony is not rebutted, it was not corroborated by any other witness and there is no reference to such a statement by Anderson in Spitzer's pretrial affidavits. Spitzer was not a convincing witness on this point and, therefore, I do not believe it appropriate to rely on this aspect of his testimony. However, I do believe that it was predicated on Anderson's statement that they act like men, not boys, which he reasonably construed to mean they would have to abide by the new work rules.

⁷ Spitzer was not offered reinstatement and it cannot be appropriately contended that there was no obligation to offer him reinstatement. His quarrel with Pohl did not make him unemployable.

⁸ Since the protected concerted activity was closely allied to the union activity of the employees and thus tended to discourage membership in the Union, it is considered that Sec. 8(a)(3) as well as Sec. 8(a)(1) was violated by his discharge.

⁹ It is noted from credited testimony that Franklin was one of the employees who were discharged at or about 7 in the morning on April 28 for not reporting to work in accordance with the above-mentioned invalid rule. It is also noted that the complaint includes Franklin among the employees who were alleged to have been unlawfully discharged that day. However, it is further noted that his name appears on G.C. Exh. 9 among the names of

IV THE EFFECT OF THE UNFAIR LABOR
PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V THE REMEDY

It will be recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found herein and take certain affirmative action, as provided in the recommended Order below, designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged Alan Spitzer, Rudy Sandoval, Richard Pierce, Tom Clayton, David Franklin, Gene Evans, and Jake Sanchez, it will be recommended that Respondent be ordered to offer them immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. It will be further recommended that Respondent be ordered to reimburse them for any loss of pay they may have suffered as a result of their discriminatory discharges in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, 291-293, together with 6-percent interest thereon in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It will be further recommended that Respondent be ordered to reimburse Spitzer, Sandoval, John Pierce, Richard Pierce, Clayton, Franklin, Sanchez, Pedro Griego, and Greg Williams for any loss of pay they suffered on April 20, 1972, when Respondent unlawfully refused to allow them to work.

It will be further recommended that Respondent be ordered to rescind the work rules which were promulgated on April 25, 1972, which constituted changes in the terms and conditions of employment of the employees in the bargaining unit, and, if it wishes to promulgate such rules in the future, bargain with the Union with respect thereto.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

employees who worked on April 28. It is determined that the inclusion of his name on G. C. Exh. 9 was an inadvertent error

It is not clear from General Counsel's brief whether or not he contends that John Pierce was among those who were unlawfully discharged on the morning of April 28. While the record tends to indicate that he may have been among the group of employees who were discharged at that time, his name does not appear among the alleged discriminatees in the charges filed herein nor does it appear in par. 15 of the complaint among the names of those who were alleged to have been unlawfully discharged. The record will not support a finding that the issue of whether or not he was among those unlawfully discharged was fully litigated or even that Respondent was sufficiently alerted to a contention by General Counsel that John Pierce was unlawfully discharged. Consequently, his name is not included among those who are found to have been unlawfully discharged

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act on April 10, 1972, by posting work rules some of which constituted changes in the terms and conditions of employment of its employees in the bargaining representative.

2. Respondent violated Section 8(a)(1) of the Act by interrogating Alan Spitzer on April 20, 1972, as to whether he had signed an application for membership in the Union.

3. Respondent violated Section 8(a)(3) and (1) of the Act by refusing to permit Alan Spitzer, Rudy Sandoval, John Pierce, Richard Pierce, Tom Clayton, David Franklin, Jake Sanchez, Pedro Griego, and Greg Williams to work on April 20, 1972, because Respondent believed they had signed applications for membership in the Union the previous day.

4. Respondent violated Section 8(a)(5) and (1) of the Act by promulgating new work rules on or about April 25, 1972, which constituted changes in terms and conditions of employment, without consulting the Union as the certified representative of the bargaining unit of employees affected.

5. Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Clayton, Evans, Franklin, Richard Pierce, Sandoval, Spitzer, and Sanchez on April 28, 1972.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:¹⁰

ORDER

Respondent, Robert M. Anderson, an Individual Proprietorship d/b/a Anderson Plumbing and Heating Company, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, Local 412, AFL-CIO, or any other labor organization, by discriminating against employees in regard to hire and tenure of employment or any other term or condition of employment.

(b) Unlawfully interrogating employees with respect to their protected activities.

(c) Promulgating or maintaining work rules which constitute changes in the terms and conditions of employment (from those prevailing on April 18, 1972) of employees in the bargaining unit for which the above-mentioned Union has been certified as the bargaining representative without previously bargaining with said Union with respect thereto.

(d) In any other manner interfering with, restraining, or coercing the employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make Alan Spitzer, Rudy Sandoval, John Pierce, Richard Pierce, Tom Clayton, David Franklin, Jake Sanchez, Pedro Griego, and Greg Williams whole for any loss

¹⁰ 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 deemed waived for all purposes

of pay they may have suffered by reason of the unlawful refusal to permit them to work on April 20, 1972.

(b) Offer to Tom Clayton, Gene Evans, David Franklin, Richard Pierce, Rudy Sandoval, Alan Spitzer, and Jake Sanchez immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by them by reason of their discriminatory discharges on April 28, 1972, in the manner set forth in the section hereinabove entitled "The Remedy."

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll and other records containing information concerning Respondent's backpay obligation under this recommended Order.

(d) Post at his place of business in Albuquerque, New Mexico, copies of the attached notice marked "Appen-

dix."¹¹ Copies of said notice on forms furnished by the Regional Director for Region 28, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof and maintained by Respondent 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 said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹¹ 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."