

McGuire and Hester and Local Union 159, of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Case 32-CA-4538

21 November 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 28 April 1983 Administrative Law Judge Roger B. Holmes issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McGuire and Hester, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In agreeing with the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Eugene Gifford, we find it unnecessary to rely on the cases cited by the judge at pars. 7 and 8 of his "Conclusions" section. Here, it is clear that Gifford was discharged for performing a steward function and, as the Supreme Court has stated, "Holding union office clearly falls within the activities protected by Section 7" *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467, 1474 (1983), citing *General Motors Corp.*, 218 NLRB 472, 477 (1975).

DECISION

ROGER B. HOLMES, Administrative Law Judge: The unfair labor practice charge in this case was filed on May 27, 1982, by Local Union 159, of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

The General Counsel's complaint was issued on August 30, 1982, against McGuire and Hester. The General Counsel alleges that the Respondent has engaged in conduct which violates Section 8(a)(1) and (3) of the Act. In summary, the General Counsel alleges in his complaint that, on May 20, 1982, the Employer terminated Eugene Gifford because he had engaged in union activities or other protected concerted activities. In the answer to the complaint allegations, the Respondent denies the commission of the alleged unfair labor practices.

The trial in this proceeding was held on February 17, 1983, at Oakland, California. The time for the filing of post-trial briefs was set for March 17, 1983.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The jurisdiction of the Board over the business operations of the Employer is not an issue in this proceeding. The Employer is engaged in the engineering and construction business, and the Employer has an office and place of business located in Oakland, California. The Employer's operations meet the Board's direct inflow jurisdictional standard.

The status of the Charging Party as being a labor organization within the meaning of Section 2(5) of the Act also is not in issue in this proceeding. Such status was admitted in the pleadings.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Four persons were called as witnesses to testify at the trial in this proceeding. In alphabetical order by their last names they are: Don Austin, who is the operations manager of the Employer, and who previously had been the project superintendent for the Employer at the San Pablo Sewage Treatment Plant project at the times material herein; William Coss, who has been the assistant business manager of the Union for the past 9 years; Eugene Gifford, who is the alleged discriminatee in this case; and Pete Pillsbury, who is a foreman for the Employer, and who previously was foreman for the Employer at the San Pablo Sewage Treatment Plant project at the times material herein.

The findings of fact to be set forth in the sections to follow will be based on portions of the testimony given by each one of the four witnesses who testified at the trial. Understandably, each witness viewed the events from his own perspective as those events occurred and, thus, this may explain some of the differences among the witnesses in relating their accounts. In deciding on the portions of the testimony which appear to be credible, accurate, and reliable, I have given consideration to the demeanor of the witnesses on the stand as they related their versions of the events involved in this proceeding. In addition, I have also considered whether the testimony of one witness corroborates the version given by another witness; whether a witness would likely have interest in the outcome of the proceeding because of his position held with one of the parties to the litigation, and whether the record reflects the basis for the witness' knowledge of the matters about which he testified. (See, for example, *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), with regard to the acceptance of some, but not all, of the testimony of a witness.) While all of the testimony and the documentary evidence have been considered, the findings of fact will be limited to the credited evidence in this proceeding. (See, for example, *ABC Specialty Foods*, 234 NLRB 475 fn. 2 (1978).)

In some instances, punctuation has been added for clarity to some of the material quoted herein from the transcript. The spelling of certain words in the quoted material also has been corrected where the meaning has not been changed. For example, "mill rights" has been corrected to read "millwrights." There are other minor errors in the transcript, but each one of the errors may

be easily recognized, and none of the errors are truly significant to a determination of the issues in this proceeding.

III. THE EVENTS PRIOR TO MAY 20, 1982

Work on the construction of the San Pablo Sewage Treatment Plant began in June 1981. The initial phase of the work involved a great deal of dirt moving. By mid-summer of 1981, the Employer had hired carpenters, electricians, and some pipefitters. At that time, sluice gates were delivered to the jobsite. Later in the summer of 1981, Roney Bailey, who was employed by the company as a pipefitter at the jobsite, talked with Project Superintendent Austin with regard to who was going to install the sluice gates. At that time, Austin told Bailey that it was Millwright's work.

With regard to his assignment of the work of installing the sluice gates at the jobsite to the employees who were Millwrights, Austin gave the following explanation of his position: "The initial assignment was made by me without question because I've installed sluice gates in at least three different States, and we have always used Millwrights, and I've never heard the question brought up before."

It should be noted that the foregoing testimony, and testimony on that subject from other witnesses, as well as the General Counsel's Exhibit 2, were not received for the purpose of making a determination of a jurisdictional dispute such as might be done under the provisions of Section 10(k) of the Act in appropriate circumstances. All of the experienced parties in this proceeding were knowledgeable of that fact. However, the parties stipulated that there was a disagreement between the Company and the Union as to whom the work properly belonged, and that disagreement resulted in the conversations in the office trailer on May 20, 1982. (See the stipulation and see sec. iv, herein with regard to those conversations.)

Due to adverse weather conditions for several months during the winter of 1981-1982, work at the construction site halted. Bailey was among those employees who ceased to work for the Employer at that time. (See sec. v, herein with regard to Bailey's subsequent return to work for the employer at the jobsite.)

About the middle of April 1982 or early May 1982, work resumed at the jobsite. At that time, one pipefitter was requested by the Company to be dispatched from the Union. Thereafter, a second pipefitter was employed at the project. Austin believed that there were possibly three pipefitters working at the jobsite at one time, but "for the bulk of the summer we had basically two men."

During the week prior to May 17, 1982, when Eugene Gifford went to work for the Employer at the jobsite, there was an incident at the jobsite between Project Superintendent Austin and Gifford's nephew. The incident resulted in the Company's sending Gifford's nephew back to the union hall, rather than hiring him to work for the Company at the jobsite. Austin's testimony described that event as follows:

Q. Before Mr. Gifford was dispatched to your job, were there any other plumbers from Local 159 that were dispatched?

A. Yes, we had one that was dispatched out the previous week.

Q. What was his name?

A. It was also a Gifford. I don't recall his first name, he was only on the job a brief period of time.

Q. And, why was he only on the job a brief period of time?

A. I was on another job the first thing in the morning, and we had a major earth moving operation that had just gotten underway, and we had trucks hauling import material into the job. In the process of doing this, we had to relocate some of our parking, and we had--basically the employee parking area was in a given location. And, the important trucks needed a large area to turn around when they made a turn, and we had all the traffic cleared out of one area.

When I arrived on the job, there was a vehicle that had pulled in right in the area that the trucks were turning around, and it was holding up traffic. I arrived on the job and my Dirt Foreman on the job flagged me down and said we had some problems with something at one end of the job that we were going to go take a look at.

I got in with him and about this time this vehicle pulled in and parked in the area that the trucks were turning around and was blocking traffic. And, he pulled up, rolled down the window, and informed this person that he was going to have to move and park his vehicle down where the other cars were.

One thing led to another and we got in an argument, and Gifford told us, he said, "I've been dispatched out from the Plumbers Union and I'll park any place I want to." And, subsequently we sent him back to the hall without signing him up.

Q. And, then the next plumber that was dispatched out to the job was Eugene Gifford?

A. Yes.

Q. Do you know whether these three Giffords are related, Dennis Gifford and the other two Giffords?

A. It's my understanding that the one that we ran off the day before is the Business Manager's son and that Gene Gifford is his brother.

At the time of the trial in this proceeding, Eugene Gifford had been a plumber for about 12 years, and he had been a member of the Charging Party local union for 7 years. His brother, Dennis Gifford, is the business manager of the local union. Prior to the time that Eugene Gifford went to work for the Company on May 17, 1982, he had served as a union steward on other jobs on at least a dozen occasions.

On Monday, May 17, 1982, Eugene Gifford was dispatched by his brother to work as a plumber for the Respondent Company at the San Pablo Sewage Treatment Plant construction project. At the time of his dispatch, Gifford received a dispatch slip, and he was designated

by his brother to be the steward for the local union on that project. His brother also gave him a union steward's button at that time. According to Eugene Gifford, that was the way he had been designated as a union steward on all of the other jobs where he had worked as a steward.

According to Gifford, a union steward wears a "steward button" as identification while he is on a job. At the trial, Gifford produced the button which he had worn on the front of his coveralls at the project in question here. The button also was described as being white in color with the title "steward" in large letters and also with the logo of the local union's name.

On May 17, 1982, Gifford reported with his dispatch slip to Project Superintendent Austin at the jobsite office. Gifford filled out a withholding form, and then Foreman Pillsbury took him in a truck to the part of the project where Gifford and Dave Martinez, who is another plumber, were to work that morning. Gifford estimated that the distance from the office trailer to the particular working site that day was three or four blocks. Gifford stated, "We were all over this—just a big flat area—we were all over the job. But where he was working that morning was about three or four blocks."

Pillsbury introduced Gifford to Martinez, and Gifford said that he already knew Martinez. Pillsbury explained what work was to be done. At the time, the work involved the installation of plastic pipe. At that point in time, Martinez had not yet been designated as the foreman by the Company. Subsequently, on May 20, 1982, the Company designated Martinez as the plumber foreman over Gifford. Just those two persons were working as plumbers at the project during the period of time which is in issue in this proceeding.

At the work location on the morning of May 17, 1982, Gifford put on his coveralls with his union steward button at the place where the coveralls are snapped. With regard to whether Pillsbury was informed that Gifford was a union steward, Pillsbury stated, "Verbally, I don't remember him telling me that he was a Steward. I did notice, I think on the 18th or 19th, I noticed that he was wearing the Steward button that was shown earlier." Pillsbury also testified later in the trial, "Once I first noticed the button, which is I would say the 18th or 19th, I'm sure, everytime I saw him he had the same button." Pillsbury also said that Gifford had the button on when Gifford was in the office trailer. (See sec. iv., herein for the conversations in the office trailer.)

According to Gifford, there were six sets of sluice gates to be installed below the ground level at the project. He described the sluice gates as being located "about the middle of the project." On either Monday, May 17, 1982, or Tuesday, May 18, 1982, Gifford and Martinez were riding in a vehicle at the project in order to get a generator from the yard. On the way to the yard, Gifford observed a crane with a line hanging down into a hole, and he asked Martinez to stop the vehicle. Gifford then looked down into the hole, and he observed that between five and seven people were installing sluice gates. In Gifford's opinion, he believed those persons were not plumbers or pipefitters, but he did not know what their craft was. At the trial, Gifford estimated that

it took 5 or 10 minutes for him to observe the work being done in the hole at that time.

Gifford next had a conversation with Pillsbury about the work being done on the sluice gates. Gifford testified:

As Dave and I were backing out, Mr. Pillsbury pulled up and walked up to the truck. And I asked him who was doing the—who was putting up sluice gates in. And he told me that it was assigned to the millwrights.

And I told him that I believe that it was our work. And he told me, well, it had been assigned, and to do whatever [I had] to do, to take care of it.

According to Union Assistant Business Manager Coss, the Union had given instructions to its members to bring to the Union's attention any violations of the agreement between the Union and the Millwrights. He said the practice then was to try to settle the matter with management at the jobsite.

IV. THE EVENTS ON MAY 20, 1982

Gifford began work at 7 a.m. on Thursday, May 20, 1982, at the jobsite. At that time, Gifford and Martinez were installing controls at a location "on the other end of the jobsite" from the office trailer.

According to Austin, Martinez and Gifford were supposed to work together as a team. As to what they were to do on May 20, 1982, Austin testified:

I couldn't specifically say. I do recall seeing him earlier that morning down at the north end of the project. On that particular morning, I believe they were installing shear gates on sludge outlet piping. They are a rather a large cut-off valve that regulates the flow of sludge in the pounds.

Q. And, does that require two men working on it?

A. Yes.

Q. And, when one man is away from the project can the other man do the work by himself?

A. Not basically.

If he can, it definitely hampers the project, and essentially what he would have to be doing is other things or tightening bolts on them, perhaps. But basically it had to be a two man job.

With regard to the two-man nature of the work being done, Pillsbury stated, "The majority of the time it is, yes." Because of other duties, Pillsbury was not assisting Martinez and Gifford at that time. Pillsbury explained at the trial, "I would assign them their areas, but I mainly just rotated. You know, I had structures going in, going over and watching the structures, digging those out, maybe other ditch work."

About 8 a.m. on May 20, 1982, Gifford and Martinez left the area where they had been working in order to pick up some materials in the yard. At the trial, Gifford acknowledged during cross-examination, "I knew that work was being performed, still the union hall does not open until 8:00, and that is why I waited until eight."

According to Pillsbury, it was not unusual for Gifford and Martinez to leave the area where they were working and go to the yard to pick up something related to their work. Pillsbury said, "It was quite common; we had all of our tools in the main yard, our tool shacks. And it was common for Dave and Gene to go down to the yard to pick up—maybe they would need a grinder or a generator or something on that order." Pillsbury also said, "And I would see their vehicle go to the yard, or come back from the yard, and I really wouldn't think to much of it."

Before Gifford and Martinez left the yard that morning with the materials, Gifford went inside the Company's jobsite office, which is located in a trailer, and he telephoned the union hall. Martinez waited outside. Gifford estimated that his telephone conversation with his brother at the union hall lasted, "five minutes, at the most, if it took that long." Regarding his telephone conversation with his brother, Gifford testified:

I asked him, in regards to the work being done if it was our work. And he informed me that it was composite with Millwrights, with the plumbers and the fitters. And I explained that it was being performed by other than plumbers and pipefitters.

And, so he said that he would send an agent to the job, which he did.

After the conversation between Gifford and his brother, Gifford and Martinez got into the truck, and they returned to their working area with the materials.

With regard to the use of the company telephones, Austin testified, "Well, generally it's not allowed. Except for business calls by supervisory people." Austin said that he was not asked by Gifford for permission to use the Company's telephone that morning, and that Austin did not authorize Gifford to do so.

About 9 a.m. on May 20, 1982, Union Business Agent Red Griffin arrived at the project site and drove to the area where Gifford and Martinez were working "on the far end of the jobsite," according to Gifford. Gifford then got into Griffin's car, and they drove to the jobsite office.

At the office, Gifford and Griffin spoke with Austin. Pillsbury also was present. Gifford was wearing his union steward button. Gifford introduced Griffin, and then Griffin showed a copy of an agreement to Austin. The agreement is between the United Brotherhood of Carpenters and Joiners of America and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. (See G.C. Exh. 2.) It is dated June 17, 1968. In part, the document states:

AGREEMENT

SLUICE GATES

Whenever the term "sluice gate" is referred to on sewage treatment plants, water treatment plants, power houses, flood control projects and jobs of a similar nature, these gates, including the wall thimble or sleeve operating stem, stem guide, operating

mechanism, etc., and whether or not they have piping formations attached to them, such gates will be received, unloaded, handled, stored, assembled, leveled, aligned and adjusted by a composite crew consisting of equal numbers of Millwrights and Pipefitters. Where an electric limit torque is used as the operating mechanism, such electric limit torque shall be set, leveled, aligned and adjusted by Millwrights.

The limited purpose for the receipt of General Counsel's Exhibit 2 should be noted here. It should also be noted that, while the Company is signatory to the Master Labor Agreement, it was brought out on the record that the document, which was introduced at the trial as General Counsel's Exhibit 2, is not set forth in the Master Labor Agreement.

Austin examined the document, which was introduced as General Counsel's Exhibit 2 at the trial, and Austin made a copy of the document. According to Gifford, Austin told Gifford and Griffin "that he would have to get with his office, with McGuire and Hester, and he would get back to either to Red or myself. And they will let us know the decision, what they said." Gifford estimated at the trial that the conversation in the office lasted about 10 or 15 minutes that morning.

Gifford and Griffin together left the office and rode in Griffin's car to the area where Gifford had been working that day. Gifford estimated at the trial that he returned to his work area about 9:15 a.m. or 9:20 a.m. Gifford worked on the pipe for the rest of that morning.

Gifford recalled at the trial that Austin drove by the area where Gifford was working on a couple of occasions that morning. However, Gifford said that Austin did not talk with him on those occasions. As a result, Gifford decided to make another telephone call to the union office after his lunch period. Gifford made the second telephone call at 12:30 p.m. from the inspector's trailer, which Gifford estimated to be at the most three blocks from where he had been working. During that second telephone call, Gifford left a message with a secretary at the union hall to the effect that nothing had changed, and Gifford asked if anybody would come out to the jobsite. Gifford estimated that his second telephone call lasted for "a couple of minutes." He then returned to work.

Meanwhile, subsequent to his meeting with Gifford and Griffin that morning, Austin had telephoned the company office "and explained the situation to them and the information on this Joint Board ruling that I'd never seen before." Austin said that he also telephoned the AGC office for information and also the Carpenter's business agent. Austin further testified, "I couldn't get all those people right away, it was in the early afternoon before I'd gotten answers back from all three of them, and the answer from all three parties was the same, that the sluice gate installation was Millwright's work."

About 2 p.m. on May 20, 1982, Union Assistant Business Manager Coss arrived at the area where Gifford was working on the jobsite. Gifford testified, "Yes, we were on the other end of the pond and closer to the trailer by then. We were, like I say, moving around on

the job that day. We were at different areas. When Mr. Coss showed up, we were at the far end of the job, closer to the job trailer." Gifford got in Coss' car, and they drove the jobsite office. At the time that Coss picked up Gifford at the jobsite, Coss noticed that Gifford was wearing his union steward button on his coveralls.

Inside the office trailer, Coss and Gifford met with Austin and Pillsbury. Coss stated that he had met with the Millwright's International representative and the Carpenters business manager, and that both of them had told Coss that they were not claiming the work, and that the work belonged to the plumbers. (It should be understood that this testimony from Coss was not received in evidence in order to prove the truth of the matters attributed to the out-of-court declarants. (See Rules 801, Fed. R. Evid.) In view of the written agreement between the two Unions, Coss expressed his view that he could not understand the assignment of the work to the Millwrights. Coss had a copy of the agreement with him at the time. Austin said that the company's office had made the decision. Coss asked if Austin had seen the agreement, and Austin replied that Red Griffin had brought a copy of the agreement to him that morning. Austin also said that he had been going to reply to Griffin or to the shop steward. According to Coss, Austin "said that his office was well aware of this agreement, and they were going to continue using the craft they had on the job." Coss then "told my shop Steward to keep track of the hours, and there would be a grievance hearing through our Joint Conference Board." Coss estimated at the trial that their conversation in the office lasted 10 minutes.

Coss and Gifford then left the office trailer and got into Coss' car. Before they drove away, there was a brief conversation between Pillsbury and Coss. Coss testified:

Mr. Pillsbury came down and wanted to know why I had Gene in the car with me and not Dave Martinez. And I informed him that he was the Shop Steward, and that's the Shop Steward's responsibility, to be the agent on the job, and not Dave Martinez, he's a Foreman.

He said, well, he had never got that in writing.

Following the brief conversation between Pillsbury and Coss, Coss said, "I took Gene back to his station where he was working, and I left." Coss also said that he drove Gifford "directly back to the job site."

Prior to the brief conversation at Coss' car, Gifford said that neither Austin nor Pillsbury had raised any question as to why Gifford was present during the morning and afternoon meetings.

Following Pillsbury's conversation with Coss at Coss' car, there was a conversation between Austin and Pillsbury in the office trailer. Austin testified with regard to his conversation with Pillsbury, "He stayed around for a few minutes, and we talked about, you know, just basically the problems. And, we decided that we couldn't have Gifford around any more, and I told him to lay him off that night."

A few minutes after Coss had left Gifford at the area where Gifford had been working, Gifford observed that

Pillsbury drove up to that area. According to Gifford, Pillsbury "told me his boss had informed me to come in, and pick my check up at the end of the day." Gifford then asked Pillsbury that he be given a termination slip.

Gifford finished his workday at 3:30 p.m., and then he and Martinez went to the jobsite office. At the office, Gifford had a very brief conversation with Austin. Austin asked Gifford what he wanted. Gifford replied that he had been told to come and get his check. At that time, Gifford was given a paycheck and also a termination slip, which stated as the reason for his termination: "Failure to follow directives."

According to Gifford, he had never been warned, reprimanded, or otherwise told that he was failing to follow directives during his brief employment with the Company. Gifford said at the trial that he was never told that he should not be driving around the jobsite with business agents in their vehicles. He further testified that he was never challenged with regard to his right to be present at either one of the meetings with the Company on May 20, 1982. Gifford also said that he was never told not to go to those meetings, and he was never told to return to his work station on those occasions.

After the termination of Gifford, Austin telephoned the union hall that same Thursday afternoon, and he requested the dispatch of another plumber. However, the plumber did not report for work until the following Monday. (See sec. v, herein.)

In Austin's opinion, he felt that Gifford was harassing the Company because of the earlier incident involving Gifford's nephew. At the trial, Austin gave his views as follows:

Q. Other than accompanying Griffin and Coss to the trailer to discuss the problem of the work assignment, was there anything else that Gifford had done that you had fault with that was a reason for his termination?

A. (Pause.)

As far as his workmanship, no. I had the distinct impression from some of the dealings, and what I was hearing going on there, that he was harassing us a little bit for some previous incidents that we had with the Plumbers Union.

Q. What do you mean by harassing?

A. Well, he was being very nitpicky about the work that was going on as to whether—what a given craft could help, or help the guys out or anything, more so than you run into with other crafts, or other jobs with even the same craft.

Q. Was he making the kind of comments that you normally would attribute to a Steward or a union representative?

A. I suppose so.

V. OTHER MATTERS

Introduced into evidence as Respondent's Exhibit 1 was a portion of the Master Labor Agreement to which the employer and the union are signatory. Section 159 of the collective-bargaining agreement provides, in part:

159. Stewards. A steward shall be a working journeyman appointed by the Business Manager or Agent who shall, in addition to his work as a journeyman, be permitted to perform during working hours such of his Union duties as cannot be performed at any other time. The Union agrees that such duties shall be performed as expeditiously as possible, and the Contractors agree to allow the stewards a reasonable amount of time for performance of such duties. The Union shall notify the Contractors of the appointment of each steward in writing.

Coss acknowledged at the trial that the union had not notified the Company in writing of the appointment of Gifford as the union steward at the jobsite.

Introduced into evidence as Respondent's Exhibit 2 was a copy of a letter dated May 21, 1982, from the Union to the Employer. In part, the letter states:

McGuire & Hester
P.O. Box 1008
Martinez, CA 94553
Dear Sir:

We have appointed RONEY BAILEY as Steward for U.A. Local 159 on your job at the Sewage Plant, Garden Tract Road, San Pablo, effective May 24, 1982.

If you have any questions with respect to the duties of the Steward contact the Union as soon as possible.

Respectfully,
s/Dennis Gifford
Business Manager
UNITED ASSOCIATION OF PLUMBING &
PIPEFITTING
U.A. LOCAL NO. 159

Coss acknowledge at the trial that the foregoing was a copy of a form letter for the appointment of stewards. Coss said that Bailey was a journeyman plumber from the local union, and that he was the replacement for Gifford. As to the normal method of delivery of such a letter, Coss explained at the trial, "Normally, we mail it. He could have brought it with him. In some cases, they'll bring it; in some cases, the man might be on the job already, and we make him a Steward later."

Austin said at the trial that Bailey brought with him on Monday, May 24, 1982, his dispatch slip and the letter, which was introduced into evidence as Respondent's Exhibit 2. Austin said that Bailey was the steward for the Union for about the next 3 weeks when Bailey voluntarily quit in order to take another job. Austin explained, "We were getting close to the end of the project at that time."

With regard to the Union's practice in giving written notice to a company of the designation of a union steward, Coss gave the following testimony:

Q. Let me ask you this: Within your knowledge, does the Local always—irrespective of whether

they're supposed to or not—does the Union always give written notice of the designation of a Steward?

A. About five percent of the time we do.

Q. Is there any particular policy reason why the Union didn't give written notice of Mr. Gifford's designation?

A. Job size mostly.

In most cases when you get two men on the job, it's so small, and there's never been no trouble with the Shop Steward's letter, you know, until after he got fired. And, the next man we sent out there we wrote a letter according to the agreement.

But, in most cases—the job was so small, just two people on the job. And, even if he wasn't Shop Steward, if there wasn't a badge on, if he wasn't a Shop Steward, it would still be his responsibility as a Journeyman Plumber or Apprentice to do the same thing.

Q. Those are the instructions the Union gives?

A. They have to do this. If I go on a job and see some man doing my work, that man's in trouble. We don't give our work away, and it's our responsibility to protect our work regardless of what you are.

VI. CONCLUSIONS

Without repeating here all of the findings of fact set forth previously, I conclude from those findings that the Employer had actual notice of the status of Gifford as being the Union's shop steward at the jobsite during the period of time in question in this proceeding. It is clear that the Union did not give the contractually required written notice to the Company with regard to the appointment of Gifford as a union steward. Based on the testimony of Coss and the testimony of Gifford, the Union's past practice had been not to give such written notice in most cases. It will be remembered that Coss testified that such written notice was given in only about 5 percent of such situations. In the dozen instances where Gifford previously had served as a union steward, he was simply given a steward's button, which he wore on his workclothes, like he did at the jobsite in question in this proceeding. Thus, while the contract language appears to be clear, the past practice seems to have not followed the specific requirements of written notice to an employer.

Notwithstanding the absence of written notice, Pillsbury acknowledged the fact that he first noticed the union steward button being worn by Gifford on either May 18 or May 19, 1982. Thereafter, Pillsbury said that everytime he saw Gifford, he observed that Gifford was wearing the union steward button. That observation included the time of the conversations in the office trailer on May 20, 1982. Thus, Pillsbury had actual knowledge of the fact that Gifford was wearing a union steward button, both prior to his conversations with management about the assignment of work, and during both of those conversations between the Company and the Union in the office trailer on May 20, 1982.

Gifford's participation in the two meetings between the Company and the Union on May 20, 1982, with

regard to the assignment of the work of installing the sluice gates on the project is yet another indication that Gifford was engaged in the type of activities which would come within the parameters of a union steward's activities. This seems to be particularly so when it is considered in light of the fact that there were only two plumbers or pipefitters working at the jobsite, and by that time the Company had designated the other person, Martinez, as the foreman over Gifford.

After considering the foregoing and the findings of fact previously set forth, I conclude that the Employer had actual notice that Gifford was the steward for the Union during the period of time in issue herein.

As a union steward, Gifford was given certain privileges under the terms of the collective-bargaining agreement. (See sec. 159 of the contract, which is quoted, in part, in sec. V herein.) Thus, the contractors had agreed "to allow the stewards a reasonable amount of time for performance of such duties." The working time spent by Gifford in his observation of the working being done by others on the installation of the sluice gates; the working time utilized by Gifford in making the two telephone calls to the union hall, and the working time lost because of Gifford's participation in the two meetings with management on May 20, 1982, have to be considered in light of the privileges given to a union steward by the terms of the contract.

Significantly, the evidence reveals that the Company did not raise any question with regard to Gifford's participation in the two meetings between the Company and the Union until after the second meeting had ended. It will be recalled that Coss had indicated toward the conclusion of that second meeting that the Union would pursue a grievance hearing before the Joint Conference Board regarding the Company's assignment of the work being questioned to the Millwrights. (See sec. iv, herein.) It was after that intention was stated by Coss and the meeting had ended that the Employer questioned Gifford's participation in the meetings.

In *Schiavone Construction Co.*, 229 NLRB 515 (1977), Administrative Law Judge Ralph Winkler, whose findings were adopted by the Board, stated, in part, at 517:

Recapitulation of the facts and circumstances is unnecessary in finding, as I do, that Respondent terminated Koleszar because he became a thorn in its side by his constant vigilance in seeking to protect Local 37's work jurisdiction under both the collective-bargaining agreement and the work distribution arrangement. . . . This is not to say that Koleszar was right whenever he protested or inquired about a work assignment or even that he was ever right—and I do not address such issue for it is not germane. *Diversified Industries, a Division of Independent Stave Company*, 208 NLRB 233, 238 (1974). Nor is it relevant that Respondent's annoyance with Koleszar might be deemed a reasonable reaction. The short of the matter is that union steward Koleszar's active prosecution of Local 37's contract right is protected activity under the Act and that Respondent violated Section 8(a)(1) and (3) of the Act in its effort to rid itself of Koleszar for such reason.

Morrison-Knudsen Co., supra, 290; *Diversified Industries*, supra, 238-239; *Nissan Motor Corp.*, supra.

In protesting the Employer's assignment of the work of the installation of the sluice gates on the jobsite to employees who were Millwrights, rather than to employees who were Plumbers or Pipefitters, I conclude that Gifford was engaged in activities on behalf of the Union. As indicated above, as a union steward, Gifford also had the privilege of using a reasonable amount of working time to perform his duties. I further conclude that the credited evidence shows that the reason given on the termination slip of "failure to follow directives" was not the true reason for Gifford's termination by the Employer following the second meeting on May 20, 1982, between the Company and the Union. The evidence reveals that Gifford did not fail to follow any directives which were given to him by the Employer. A similar conclusion is reached with regard to the contention that Gifford was engaged in harassment of the Employer. The evidence shows that Gifford was engaged in protected activities in protesting the assignment of the work in question in the two meetings with the Employer. After considering all of the foregoing, and the arguments advanced by the parties, I conclude that the evidence shows that the reason for Gifford's termination by the Employer was the fact that Gifford had engaged in activities on behalf of the Union. Finally, I conclude that such a termination of an employee for that reason violates Section 8(a)(1) and (3) of the Act. See *Union Fork & Hoe Co.*, 241 NLRB 907 (1979); *Postal Service*, 252 NLRB 624 (1980); *Nissan Motor Corp.*, 226 NLRB 397 (1976); *Max Factor & Co.*, 239 NLRB 804 (1978); and *Drury Construction Co.*, 260 NLRB 721 (1982).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by terminating Eugene Gifford from employment on May 20, 1982, because he had engaged in activities on behalf of the Union.
4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices.

I shall also recommend to the Board that the Respondent be ordered to take certain affirmative action in order to effectuate the policies of the Act. At the time of the trial, it was premature to delve into facts which might have an affect on remedial matters, since no determina-

tion had been made at that time as to whether any unfair labor practices had been committed. Certain conclusions could be drawn from Austin's testimony, but, properly, those matters were not fully explored because it would have been premature to do so. In other words no determination of any compliance matter is being made at this time. Those issues, if any, can best be handled by the parties during the compliance stage of the proceeding.

With the foregoing in mind, I shall recommend that Gifford be made whole and that Gifford be offered reinstatement by the Employer. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such backpay to be computed in accordance with the Board's decisions in *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980).

In accordance with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), I shall also recommend to the Board that an expunction remedy be included in the remedial order.

Pursuant to the Board's decision in *Hickmott Foods*, 242 NLRB 1357 (1979), I shall recommend to the Board that a narrowly worded cease-and-desist order, as distinguished from a broadly worded one, be imposed in this case.

ORDER¹

The Respondent, McGuire and Hester, Oakland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Terminating an employee from employment with the Company because the employee has engaged in activities on behalf of a union.

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

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Make whole Eugene Gifford for his monetary loss, including appropriate interest on such money, which has resulted from the Respondent's termination of his employment on May 20, 1982, in accordance with the provisions described in "The Remedy" section of this decision.

(b) Offer immediate and full reinstatement to Eugene Gifford to his former position of employment with the Respondent, without the loss of his seniority or other benefits but, if his former position of employment no longer exists, the offer him a substantially equivalent position of employment with the Respondent, without the loss of his seniority or other benefits.

(c) Preserve and, on request, make available to agents of the Board for examination and copying, all records needed to analyze and determine the amount of money due under the terms of this Order.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Expunge from the Employer's files any reference to the termination of Eugene Gifford on May 20, 1982, and notify him, in writing, that this has been done, and that evidence of his termination will not be used as a basis for future personnel actions against him.

(e) Post at its offices, and at its jobsites where the Employer is employing employees at the time it commences compliance with the terms of this Order, copies of the attached notice marked "Appendix."² The Regional Director for Region 32 will provide copies of the notice for use by the Respondent. After the notices have been signed by Respondent's authorized representative, it shall be posted for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material during the posting period.

(f) Within 20 days from the date of this recommended Order, notify the Regional Director for Region 32 of the Board, in writing, what steps the Respondent has taken to comply with the terms of this Order.

² If this 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."

APPENDIX

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

WE WILL NOT terminate an employee from employment with our Company because the employees has engaged in activities on behalf of Local union 159, of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, or any other labor organization.

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

WE WILL reimburse Eugene Gifford for his monetary loss, including appropriate interest on such money, which has resulted from our termination of his employment on May 20, 1982.

WE WILL offer immediate and full reinstatement to Eugene Gifford to his former position of employment with our company, without the loss of his seniority or other benefits but, if his former position of employment no longer exists, then WE WILL offer him a substantially equivalent position of employment with our Company, without the loss of his seniority or other benefits.

WE WILL expunge from our Company files any reference to the termination of Eugene Gifford on May 20, 1982, and WE WILL notify him, in writing, that this has been done, and that evidence of his termination will not be used as a basis for future personal actions against him.

MCGUIRE AND HESTER