North American Dismantling Corp., North American Demolition Corp. *and* Jeffrey G. Powell *and* Robert W. Giltrop *and* Jayson Zeitz. Cases 7–CA–39923, 7–CA–40151(1), and 7–CA–40151(2)

August 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 10,1998, Administrative Law Judge Leonard M. Wagman 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 as modified.[2]

The Respondent excepts to the judge's finding that the discharges of Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz violated Section 8(a)(1) of the Act. The Respondent contends that these discriminatees engaged in an economic strike when they walked off the job and that they were not discharged by the Respondents. Contrary to the Respondent and our dissenting colleague and for the following reasons, we agree with the judge that Powell, Giltrop, and Zeitz were unlawfully discharged for engaging in protected concerted activity within the meaning of Section 7 of the Act.

The relevant facts are set forth in detail in the judge's decision. In summary, they are as follows.

The Respondent, North American Demolition Corp. (Demolition) and Respondent, North American Dismantling Corp. (Dismantling), are construction companies engaged in the performance of demolition work. Rick Marcicki is the owner and president of both companies. Demolition is a unionized company which has collective-bargaining agreements with various locals of the Laborers' Union in Michigan and Ohio. Under Demolition's union contracts, the hourly rate for laborers is in excess of $17 an hour. Dismantling is nonunion and pays its laborers at a substantially lower rate.

On May 8, 1997, while they were working for Respondent Demolition on a union job at a site called Botsford Commons, employees Powell, Giltrop, and Zeitz were informed by their supervisor, Daniel Borashko, that they were getting a new assignment and were to report the following morning to a different jobsite in Lake Angelus, Michigan. As found by the judge, Borashko did not tell the crew that the job would be nonunion and indeed deflected specific inquiries as to the status of the job.[3]

Based on his credibility resolutions, the judge found that on the morning of May 9, when Powell, Giltrop, and Zeitz arrived at the job, they surmised that the job was nonunion and that they would be paid less than the union scale. Borashko continued to claim uncertainty as to the status of the job. The employees made several calls to union offices in Ann Arbor and the Pontiac districts that exercised jurisdiction over union jobs in those areas. The Ann Arbor local advised them to try and negotiate a union pay scale. The Pontiac local advised them to walk off the job if their employer refused to pay them the union scale. Late that morning, they informed Borashko that they wanted to telephone Marcicki, the owner, but Borashko informed them that this was not necessary and that he could handle their questions. Powell, speaking for the group, informed Borashko that the Pontiac local had told them to walk off the job if the Respondent refused to pay them union scale. A discussion ensued between Borashko and the employees regarding the issue of union versus nonunion pay, with Borashko finally refusing to pay union scale. Borashko then stated that if the employees did not like that, they should leave and find another job.

Based on this credited record testimony, the judge found, and we agree, that these employees intended to stage a walkout, but that Borashko averted this prospect by "rejecting the three employees' demand for a higher wage and telling them that if they did not accept the lower wage scale, they should leave and find another job." We agree with the judge's conclusion that "Powell, Giltrop, and Zeitz reasonably interpreted Borashko's remarks as their conditional discharge. That is, they were fired unless they were willing to accept the lower nonunion wage scale."

The Board has held that the fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.,* 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer "would logically lead a prudent person to believe his [her] tenure has been terminated." *NLRB v. Trumbull Asphalt Co*., 327 F.2d 841, 843 (8th Cir. 1964). Here the Respondent, having been informed by the employees that they were on the verge of a walkout in support of their demand for union wages, told them that unless they were willing to work on the terms the employer was offering, they would have to leave and find another job. We agree with the judge that the statement

[1] The Respondent has accepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's Order to conform to the conditional notice posting provisions set forth in *Excel Container,* 325 NLRB 17 (1997).

[3] At the time of the events at issue, Powell was a member of the Detroit Laborers local and Giltrop and Zeitz were members of the Ann Arbor Laborers local. The record reflects that all three had in the past worked both on union jobs for Demolition and on nonunion jobs for Dismantling.

was reasonably interpreted by the employees to mean that if they walked off the job they would be discharged.[4]

We also agree that the employees were in fact discharged when they elected to walk off the job rather than accept the employer's terms. In this regard, we note, as did the judge, not only the statements made by Borashko at the time of the walkout, but also that the Respondent did nothing after the events in question to dispel the employees' reasonable conclusion that they had been discharged. Indeed, at a hearing before the Michigan Employment Security Board of Review regarding Powell's claim for unemployment, Marcicki testified that Powell had been discharged and that one of the reasons for his discharge was that he incited other employees to walk off the job and refuse to work. Powell was also told when he called on May 22 to inquire about work that as far as Maricki was concerned, he no longer had a job with the Respondent.

Our dissenting colleague argues that because the Respondent gave the three employees a choice between staying and working at the nonunion wage scale or finding other employment, its actions were not unlawful. We reject that contention. In any situation in which employees are considering whether to strike in support of a demand for improved wages or working conditions, they must weigh that option against the alternative of staying on the job and continuing to work on the employer's terms. The point is, however, that if they decide they are unwilling to work on the terms the employer is offering, they have a statutorily protected right to engage in a concerted refusal to work without losing their status as employees and without being subject to discharge or threats of discharge. The Respondent here denied the employees that right by telling them that their only option was to accept the Respondent's terms or find other work and then discharging them when they walked off the job.

Accordingly, we affirm the judge's findings that the Respondent violated 8(a)(1) by discharging these three employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North American Dismantling Corp. and North American Demolition Corp., Lapeer, Michigan, its officers, agents, successors, and assigns, or shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at their facility in Lapeer, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 1997."

MEMBER HURTGEN dissenting.

Contrary to the judge and my colleagues, I cannot conclude that the Respondent discharged employees Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zietz. Since there was no discharge, there was no unlawful discharge.

As fully recounted by the judge, the three employees confronted Supervisor Daniel Borashko and insisted that they be paid union scale for their work. They advised Borashko that their union local had advised them to walk off the job if the Respondent refused to pay them union scale. Borashko rejected their demand for union scale. He told them that if they did not accept the lower wage scale, they should leave and find another job. The employees thereafter left the jobsite.

The issue in this case is whether Respondent discharged the employees for seeking a union wage scale *or* gave the employees the option of working at a lesser rate or not working for Respondent. In my view, the General Counsel has not established the former proposition. Indeed, the evidence affirmatively indicates the latter. Borashko informed the employees that Respondent would only pay the lower nonunion scale. Unlike the cases cited by the judge, the Respondent did not require that the employees leave—it only said that it would not

[4] The judge's focus on whether the employees reasonably believed they would be discharged if they walked off the job is consistent with well-established Board and court precedent. As the Board has stated:

> In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the strikers to believe they were discharged. If those acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer. [Citations omitted.]

Apex Cleaning Service, 304 NLRB 983 fn. 2 (1991), quoting from judge's decision in *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982). Accord: *NLRB v. Cement Masons Local 555*, 225 F.2d 168, 172 (9th Cir. 1955); *NLRB v. Central Oklahoma Milk Producers Assn.*, 285 F.2d 495, 498 (10th Cir. 1960); *NLRB v. Trumbull Asphalt Co.*, supra at 843.

This is not to suggest, however, that we believe the employees here misunderstood the Respondent's true intent. Rather, we agree with the judge that the Respondent intended to and did discharge the employees when they decided to engage in a walkout rather than stay and work on the Respondent's terms.

pay union scale. Thus, the Respondent did not convey to employees the message that they were discharged.[1]

Certainly, a discharge may occur in the absence of the use of the words "fire" or "terminate" or "discharge." As the court suggested in *Ridgeway Trucking*, the test of whether an employee was discharged depends on the reasonable inferences that the employees could draw from the language used by the employer.

Here, the Respondent did not tell the employees that they no longer had jobs. In response to employee statements protesting the wage scale, Respondent told them that they should leave and find another job if they were unwilling to work at the rate paid by Respondent. The employees then left. There was no discharge.

My colleagues assert that the employees "reasonably interpreted" the Employer's statement to mean that they would be discharged if they struck. In response, I note that my colleagues are *not* claiming that the Respondent *intended* to convey a message of discharge. Further, the Respondent's statement could not reasonably be interpreted in the way suggested by my colleagues. Respondent told the employees that if they did not wish to accept Respondent's terms, they should find another job. Of course, the matter of finding another job is quite different from the matter of striking to get greater benefits at Respondent's job. Thus, Respondent was not even talking about striking, and thus, employees would not reasonably get the message that striking would result in discharge.

My colleagues also say that Respondent did nothing after the events to dispel the notion that the employees were discharged. However, given the uncontested conclusion that Respondent did not *intend* a discharge, there would be no reason for Respondent to disclaim a discharge. Rather, Respondent reasonably concluded that the employees had chosen to quit.

Finally, my colleagues note the fact that Respondent Agent Rick Marcicki testified before a State agency that employee Powell had been discharged. However, the question before the National Labor Relations Board is whether, on the instant record, the General Counsel has established a discharge. As discussed above, I do not believe that he has done so.

[1] In both *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enfd. 622 F. 2d 1222 (5th Cir. 1980), and *Hale Mfg. Co.*, 228 NLRB 10 (1977), enfd. 570 F.2d 705 (8th Cir. 1978), employees reasonably understood that they had been discharged. In *Hale*, the employer stated that employees are "going to have go home," and the employer said that he would mail the final paycheck. In *Ridgeway*, the employees were engaged in a strike. The employer told them to leave the property, arranged for their final paycheck, and for the removal of their personal belongings.

John Ciaramitaro, *Esq.,* for the General Counsel.
Hiram S. Grossman, Esq. (Daniel and Grossman), of Flint, Michigan, for the Respondent.

DECISION
STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Flint, Michigan, on March 26 and 27, 1998. On an unfair labor practice charge filed by Jeffrey G. Powell in Case 7–CA–39923 on June 13, 1997,[1] against Respondents, North American Dismantling Corp. (Dismantling) and North American Demolition Corp. (Demolition), and on further charges filed by Robert W. Giltrop and Jayson Zeitz in Cases 7–CA–40151 (1) and (2), the Regional Director for Region 7 issued an order consolidating cases, consolidated complaint and notice of hearing on September 30. The consolidated complaint, as amended at the hearing, alleges that Dismantling and Demolition violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act), by discharging Powell, Giltrop, and Zeitz on May 9 because they refused to work for wages below union scale. By its timely answer, as amended, Dismantling denied that the Respondents had engaged in the alleged unfair labor practices.

FINDINGS OF FACT
I. JURISDICTION

Respondents, corporations with an office and place of business in Lapeer, Michigan, engaged in the demolition commercial and residential structures. During 1996 Dismantling and Demolition, respectively, in conducting their business operations, purchased and received at the Lapeer, Michigan facility, goods valued in excess of $50,000 from local dealers of Caterpillar Corp., located in the State of Michigan, which had received these goods directly from points outside the State of Michigan. Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES
A. The Facts

At all times material to these cases, Rick Marcicki has been the owner and president of both Dismantling and Demolition. He established Dismantling in 1984 to perform demolition work as a nonunion employer. When necessary, Dismantling would sign union contracts to cover individual jobs. In 1994 after the union side of Dismantling's operations had increased substantially, Marcicki established Demolition to perform the unionized portion of his demolition operations.

Normally, the two firms employ approximately 50 full-time employees, which include the office staff, estimators, and supervisors. Also, under normal conditions, Dismantling and Demolition employ four crews to perform demolition work.

Demolition has collective-bargaining agreements with Michigan laborers union locals in Flint, Pontiac, Ann Arbor, and Detroit. In addition, Demolition has a contract with a laborers union in Dayton, Ohio, and with operating engineers locals in Ohio and Michigan. The hourly wage rate for Demolition's unionized laborers is $17.30, plus an additional $2 per hour in fringe benefits. Dismantling's basic hourly wage rate is $10.

[1] All dates are in 1997, unless otherwise indicated.

Jeffrey Powell began working as a laborer for Dismantling on February 3, 1991, with an hourly rate of $13. Powell began working for Demolition in May 1995 and in the same month joined Laborers Local 334, based in Detroit. After May 1995 Marcicki divided Powell's working time between Demolition and Dismantling. This arrangement continued until May 9, the last day of Powell's employment by the Respondents.

Robert Giltrop, a member of Laborers Local 959 out of Ann Arbor, and Jayson Zeitz, a member of the same local, began working for Demolition in February. After employing them on a demolition site for 2 or 3 weeks, Giltrop and Zeitz were laid off. In April, Demolition recalled them. Giltrop and Zeitz remained at work for Demolition until May 9. During 1997 Marcicki assigned them to do some work for Dismantling. When they worked for Dismantling, Giltrop and Zeitz each received an hourly wage of $10.

On May 7 and 8, Demolition employed Powell, Giltrop, Zeitz, along with Jason Malady, and another laborer, whose first name was Russell, at a site identified as Botsford Commons, a union job. On the afternoon of May 8, Malady informed Powell that their immediate supervisor, Donald Borashko, had told Malady that their crew would be working at a different site on the next day. Malady told Powell that it would be a nonunion job. Zeitz also reported the new assignment to Powell on May 8. At the end of the workday on May 8, Supervisor Borashko told Powell, Giltrop, Zeitz, and the rest of the crew, to report to a demolition job at Lake Angelus, Michigan, at 7 a.m. the next morning. Borashko gave his crew instructions on how to drive to the Lake Angelus jobsite. Borashko did not tell his crew that Lake Angelus would be a nonunion job.[2] Instead, when asked, Borashko declined to tell Giltrop and Zeitz whether the Lake Angelus job was union or nonunion.

The next day Powell, Giltrop, Zeitz, and the rest of Borashko's crew reported to the Lake Angelus job at approximately 7 a.m. On their arrival, Powell, Giltrop, and Zeitz concluded that the Lake Angelus job was nonunion. Soon thereafter the men became unhappy about being transferred from a union job to a nonunion job. The employees' growing displeasure notwithstanding, Borashko persisting in telling the crew that he was uncertain as to whether it was a union or a nonunion job. Marcicki was at the site early in the day but none of the employees spoke to him about whether the job was union or nonunion, nor did they tell him or Borashko that they were unwilling to work on this site because it was nonunion. As found above, Powell, Giltrop, and Zeitz had previously worked for Dismantling on nonunion jobs. After giving the crew their assignments, Borashko left the site to get scaffolding and pick up the crew members' paychecks from the prior week.

After Borashko left the jobsite, Powell, Giltrop, and Zeitz decided to make some phone calls to find out if the job was union or not. Giltrop called his local union in Ann Arbor and was told to get in touch with the Pontiac laborers local, which had jurisdiction over the jobsite. The representative of the Ann Arbor local also advised Giltrop that he and his fellow crew members should not be on a nonunion job, and that if their employer did not agree, by noon, to pay union scale to them, they should walk off the job. Zeitz made a telephone call to Laborers Local 1076 in Pontiac. A business agent of Local 1076 advised Zeitz that he and the rest of the crew should negotiate with their supervisor at lunchtime and seek union scale.[3]

After completion of the phone calls, Powell, Giltrop, Zeitz, and the rest of Borashko's crew began working with Richard Christie, the operator of Christie Construction Company, the general contractor on the Lake Angelus jobsite. They assisted Christie in moving furniture from a house which was to be stripped and renovated. While working, Powell, Giltrop, and Zeitz complained among themselves about the job being nonunion, repeating to each other that they would not work for "scabs," meaning nonunion people.

During Borashko's absence from the Lake Angelus jobsite, Powell approached General Contractor Christie and complained that it was a nonunion job, but that as far as Powell was concerned, it would become a union job. Powell also stated to Christie that he and his fellow employees would not work on this job for nonunion wages. Continuing, Powell asserted that his hourly wage rate on this job was only $13 and that the union scale was $17.30. He asked if Christie would make up the difference. Christie answered that he had an agreement with Dismantling and Marcicki. When Powell asked for details of that agreement, Christie declined to provide them. After assuring Christie of his determination to obtain a union wage rate, Powell declared that he could do the job for Christie "a lot cheaper than Rick [Marcicki] is." When Christie asked for an explanation of this remark, Powell responded that he could "put some people together and do this job for you for cash." I find from Christie's testimony that Powell repeated his offer to Christie five or six times in the course of the morning of May 9.[4]

Borashko returned to the jobsite at between 11 and 11:30 a.m. When he came upon his crew, Borashko suggested that it was time for lunch. Powell said he and his colleagues wanted

[2] Giltrop and Zeitz testified that when they asked him on May 8 if the Lake Angelus job was union or nonunion, Borashko declined to disclose that information. Borashko testified on direct examination that he told his crew on the afternoon of May 8 that the Lake Angelus job was nonunion. At first, Powell testified that Malady had told him that Borashko had disclosed to Malady that the Lake Angelus job would be nonunion. However, on further reflection, Powell testified that Malady had not disclosed the source of this information. Malady's testimony offered by Respondents, shows that he did not receive that information from Borashko. Instead, Malady credibly testified that he knew from his experience with the Respondents that the type of work they would be performing at Lake Angelus was nonunion. Marcicki testified that Borashko told him that he had told the employees that the Lake Angelus job was nonunion. However, as Marcicki was not present to hear whatever Borashko told the employees on May 8, I have accorded little weight to this testimony. As Giltrop and Zeitz impressed me as candid witnesses and in light Malady's testimony, I find that Borashko did not disclose to his crew on May 8 whether the Lake Angelus job was union or nonunion.

[3] According to Powell's testimony, Zeitz told him that the Pontiac local had advised the employees to stay on the job until a business agent appeared. According to Zeitz, the Pontiac local told him that the employees should negotiate with their supervisor at lunchtime and seek union scale. As it was Zeitz, who engaged in conversation with the Pontiac local, and as he seemed to have a firm recollection of its content, I have credited Zeitz's testimony in this regard.

[4] I based my findings regarding Christie's exchanges with Powell on Christie's testimony. When cross-examined about his remarks to Christie, Powell seemed evasive and reluctant to disclose their content. Powell was also quick to answer that he did not recall details of his May 9 encounters with Christie. These responses suggest that Powell was not doing his best to search his recollection. In contrast, Christie testified about these encounters in a candid manner, seeming to search his recollection. I also noted that employee Malady's testimony provided some corroboration for Christie's testimony in this regard.

to telephone Marcicki. Borashko replied that they had no reason to contact Marcicki. Borashko stated that he, as their boss, could answer any questions that the employees had. Powell told Borashko that the Pontiac local had advised Powell, Giltrop, and Zeitz to walk off the job if Dismantling refused to pay them at the union scale. Giltrop and Zeitz echoed Powell's remarks. The three insisted that they wanted union scale wages for their work at Lake Angelus. Borashko became indignant and said the employees would not get union scale and if they did not like that they should leave and find another job. The three employees left the job.[5] At the time of this confrontation, Borashko had not yet heard about Powell's remarks to Christie.[6] At the hearing before me, Marcicki admitted that Powell was discharged on May 9. I find from Giltrop's and Zeitz's testimony that they understood from Borashko's final statement to them on May 9, that he had fired them when he told them to find another job if they were not willing to work for the nonunion rate.

At about 3 or 3:30 p.m. on the same day, Marcicki arrived at the Lake Angelus jobsite. He spoke with Christie and Borashko and learned that Powell had offered to perform Dismantling's work at the site for less money and for cash. Marcicki also heard from Borashko that Powell, Giltrop, and Zeitz had complained about their wage scale and had demanded union scale. Borashko reported to Marcicki that he had told Powell, Giltrop, and Zeitz that if they did not want to work for nonunion wages, they should go and find another job.

After May 9 neither Marcicki nor any other representative of either Demolition or Dismantling contacted Giltrop or Zeitz. Powell did call Demolition on May 22 and asked to speak with Marcicki.[7] A secretary, Toni Francis, answered the telephone. After a brief pause during which Francis conferred with Marcicki, the secretary returned to the phone. Francis told Powell that Marcicki was busy and had no time to talk to Powell, and that as far as Marcicki was concerned, Powell no longer had a job with the Respondents.

In June 1997 Powell filed an unemployment compensation claim against Dismantling with Michigan's Employment Security Commission. In response to that claim, which arose from Powell's discharge on May 9, Dismantling's representative, the Gibbens Company, provided two reasons for the discharge. In a letter to the Commission dated June 25 Gibbens asserted that Dismantling discharged Powell for inciting other employees to walk off the job and refuse to work, and for offering "his own personal services as a carpenter to do work for [Christie]" on the Lake Angelus job.

B. Analysis and Conclusions

Section 7 of the Act guarantees employees the right to engage in "concerted activities" not only for self-organization, but also "for the purpose of . . . mutual aid or protection." The broad protection of Section 7 applies with particular force to unorganized employees, who, because they have no designated bargaining representative have "to speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Section 8(a)(1) of the Act protects an employee's right to engage in concerted activities by making it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." Thus, an employer violates Section 8(a)(1) of the Act by discharging an employee for engaging in concerted activities protected by the Act. *JMC Transport,* 272 NLRB 545 fn. 2 (1984), enfd. 776 F.2d 612 (6th Cir. 1985). It is well established that employees' concerted activities directed toward improving their terms and conditions of employment are protected by the Act. *JMC Transport,* supra at 550. See also *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981). Such protected concerted activities includes that directed at improving wages. *JMC Transport,* supra at 550.

The record shows that on May 9, Powell, Giltrop, and Zeitz engaged in protected concerted activity. Soon after their arrival at the Lake Angelus jobsite, they decided to find out if the jobsite was union or nonunion. They made telephone calls to local unions in Ann Arbor and Pontiac. They received advice from the locals to talk to their employer and try to obtain the union scale wage. The Pontiac local told them to walk off the job if their employer refused to pay them the union scale. As they worked, the three discussed the situation and resolved to seek union scale.

When Borashko returned to the jobsite, Powell, Giltrop, and Zeitz approached him. Powell sought Borashko's help in contacting Marcicki. Borashko insisted that it was not necessary to contact Marcicki. Borashko claimed that he could handle the questions of Powell, Giltrop, and Zeitz. Speaking for Giltrop and Zeitz as well as himself, Powell told Borashko that the Pontiac local had advised them to walk off the job if Dismantling refused to pay them union scale. In the ensuing discussion Powell, Giltrop, and Zeitz insisted that they wanted union scale for their work at Lake Angelus. Thus, the three employees

[5] I based my findings regarding the confrontation between Borashko and employees Powell, Giltrop, and Zeitz on the testimony of the three employees. On direct examination, Borashko testified that he attempted to contact Marcicki at the employees' request and that he was unable to reach Marcicki. However, on cross-examination, when asked to recall his exchange with Powell, Giltrop, and Zeitz, Borashko omitted any reference to his attempt to contact Marcicki or any report of such efforts to Powell. I also note Malady's testimony to the effect that Borashko attempted to reach Marcicki before the three employees had left the jobsite. This testimony does not support Borashko's testimony that he made the attempt at the outset of his confrontation with Powell. Further, Powell, Giltrop, and Zeitz seemed to be giving an accurate account of what was a dramatic confrontation between them and their supervisor. On the other hand, Borashko did not seem to be making a serious effort to relate either the nature of, or the details of the confrontation. In sum, I found from their demeanor that Powell, Giltrop, and Zeitz were more reliable witnesses than Borashko was in recalling this confrontation.

[6] According to Christie, he met Borashko upon the latter's return to the Lake Angelus jobsite at close to 11:30 a.m. on May 9 and reported Powell's effort to take the job away from Dismantling. On cross-examination, Borashko admitted that he did not receive Christie's report until after Powell, Giltrop, and Zeitz had departed. The record shows that Borashko considered the report of Powell's attempt to wrest the Lake Angelus job from Dismantling as serious misconduct. Yet the testimony regarding Borashko's confrontation with Powell on May 9 shows that the supervisor did not mention it in their conversation. This fact, combined with Borashko's recollection of having been told after lunch, convinced me that Christie did not mention Powell's efforts to take over the job from Dismantling until after the three crewmen had left the jobsite.

[7] Powell testified that he telephoned Marcicki on May 13. However, Toni Francis testifed credibly that the date of the call was May 22. She recalled that on the latter date, Marcicki was preparing a bid that was due on the following day. As Francis impressed me as a conscientious and candid witness, I have credited her testimony in this regard.

showed their shared concern about the wage scale they were to receive for their work at Lake Angelus and acted in concert to attain a higher wage. They apparently intended to stage a walkout if Dismantling rejected their demand.

I find, contrary to Respondents' contention in their brief, that Powell, Giltrop, and Zeitz did not engage in a strike. Rather, I find that Borashko averted a strike by rejecting the three employees' demand for a higher wage and telling them that if they did not accept the lower wage scale, they should leave and find another job. Powell, Giltrop, and Zeitz interpreted these remarks to constitute their discharge. I find that Powell, Giltrop, and Zeitz reasonably interpreted Borashko's remarks as their conditional discharge. That is, they were fired unless they were willing to accept the lower nonunion wage scale. *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1224 (5th Cir. 1980); and *Hale Mfg. Co.,* 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). By walking off the job, the three employees showed they were not willing to accept the lower wage. Simultaneously, Borashko discharged them.

At a hearing before the Michigan Employment Security Board of Review involving Powell's claim for unemployment benefits, Marcicki testified that he discharged Powell on May 9. Any May 9 decision by Marcicki, though, only ratified what Borashko had already done. Thus, it was Borashko who discharged Powell and informed Marcicki of that fact only after Powell had left the site.

The record also shows that Marcicki ratified Borashko's discharge of Giltrop and Zeitz. Neither Marcicki nor any other representative of Respondents made any effort to contact Giltrop or Zeitz after the May 9 incident. No representative from Respondents ever sought to notify Giltrop or Zeitz that Borashko had not in fact discharged them. Accordingly, I find that Respondents discharged Giltrop and Zeitz.

Under Board policy, where the record shows that an employer's hostility toward concerted activity protected by Section 7 of the Act was a substantial or motivating factor in a decision to discharge an employee, the discharge will be found unlawful, unless the employer demonstrates, as an affirmative defense, that it would have discharged the employee even in the absence of the protected activity. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 402–403 (1983), affg. *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996). Where it is shown that the business reason or reasons advanced by the employer for the discharge were pretextual—that is, that the reasons or reasons either do not exist or were not in fact relied upon—it necessarily follows that the employer has not met its burden and the inquiry is logically at an end. *Wright Line,* supra at 1084.

In the instant cases, I find that the General Counsel has shown that Powell, Giltrop, and Zeitz engaged in concerted activity protected by Section 7 of the Act on May 9 when they approached Borashko and insisted on union scale wages for their work at the Lake Angelus jobsite. *NLRB v. Lloyd A. Fry Roofing Co.,* supra. The record also shows that this insistence upon union scale as a condition of employment was a motivating factor in Respondents' decision to discharge these three employees. Borashko rejected the demand and advised the three employees that if they did not accept the lesser wage scale they should leave and seek employment elsewhere. In their explanation of Powell's discharge to the Michigan Employment Security Commission, Respondents admitted that one of the reasons for his discharge was that he incited other employees to "walk of the job and refuse to work on . . . Friday, May 9." I also find from the testimony of Respondents' witness, Gerald Jason Malady, that on May 9, Borashko warned Powell that Powell, "would be gone" if he walked off the Lake Angelus job. In sum, I find ample evidence that Borashko's decision to discharge Powell, Giltrop, and Zeitz was motivated by their insistence on union scale wages for their work at Lake Angelus.

The Respondents have not sustained their burden of persuasion by showing that they would have discharged the three employees even if they had not engaged in protected activity. As to Giltrop and Zeitz, the Respondents have not advanced any business reason to explain their decision to discharge the two employees on May 9. In an effort to rebut the General Counsel's evidence, the Respondents proffer Powell's offers to replace Dismantling as the subcontractor on the Lake Angelus job as misconduct justifying his discharge. However, Borashko did not rely on that misconduct on May 9, when he decided to discharge Powell. Indeed, Borashko did not know of Powell's overtures to Christie until after Powell and his colleagues had left the jobsite. I also note that when Powell telephoned Respondents on May 22, Marcicki's response to Powell was that he no longer had a job there. Absent from Marcicki's remarks was any reference to Powell's overtures to Christie. Marcicki's neglect to mention these overtures suggests that he was ratifying what Borashko had done on May 9, and, was not attaching any importance to those overtures. Accordingly, I find that by discharging Powell, Giltrop, and Zeitz on May 9, Respondents interfered with, restrained, and coerced them in the exercise of the rights guaranteed in Section 7 of the Act. *Dayton Typographical Service,* 273 NLRB 1205 (1984), enfd. in pertinent part 778 F.2d 1188, 1193 (6th Cir. 1985).[8]

CONCLUSIONS OF LAW

1. Respondents, North American Dismantling Corp. and North American Demolition Corp., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employees Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz on May 9, 1997, Respondents have violated Section 8(a)(1) of the Act, and such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondents have not violated Section 8(a)(3) of the Act by discharging employees Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having unlawfully discharged employees, Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz, they must offer each of the three employees reinstatement and make

[8] The consolidated complaint alleged that the three discharges violated Sec. 8(a)(3) of the Act. However, the record did not show that Respondent's decision to discharge the three employees was motivated by a desire to encourage or discourage membership in a labor organization. Absent such a showing, I cannot find a violation of Sec. 8(a)(3) of the Act. Accordingly, I shall recommend dismissal of that allegation.

them whole for any loss of earnings and other benefits each may have suffered as a result of his unlawful discharge. Backpay shall be computed on a quarterly basis from the date of their respective discharges to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondents, North American Dismantling Corp. and North American Demolition Corp., Lapeer, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining their employees because of their exercise of protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Such restitution shall be made in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharges of Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz, and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents 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 of this Order.

(e) Within 14 days after service by the Region, post at their facility in Lapeer, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discipline our employees because of their exercise of protected concerted activities.

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 Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz whole for any loss of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz and, WE WILL, within 3 days thereafter, notify each of them, in writing that this has been done and that the discharges will not be used against them in any way.

NORTH AMERICAN DISMANTLING CORP.,
NORTH AMERICAN DEMPLITION CORP.

[9] 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.

[10] 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."