

Vokas Provision Company d/b/a The Rich Plan of Western Reserve and District Union 427, United Food & Commercial Workers International Union. Case 8-CA-14741

15 August 1985

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 24 August 1982 Administrative Law Judge Phil W. Saunders issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief in opposition.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint in its entirety finding that the Respondent did not interrogate or confer new benefits on employees in violation of Section 8(a)(1) and that the discharge of six employees for leaving to attend a representation hearing in defiance of the Respondent's explicit instructions did not violate Section 8(a)(3) or (4) of the Act. We agree with the judge's 8(a)(1) findings but we find merit in the exceptions of the General Counsel and Charging Party to the judge's dismissal of the 8(a)(4) allegation.

As found by the judge the Respondent's business in March 1981 was undergoing extremely rapid expansion. The Respondent made efforts to step up production to meet the demands of increased sales including the doubling of the staff and facilities of the meat processing department which the Respondent considered the bottleneck and cause of its growing backlog of unfilled and undelivered customer orders. In that month the Union first began obtaining signed authorizations from the meat processing and delivery employees, and on 17 March filed a representation petition with the Board.

The Union's counsel and a business representative met with meat processing employees Gelliarth, Heckel, Cannon, and Has after work on 30 March to ask them to attend and be prepared to testify at

the hearing scheduled on 1 April. They instructed the employees as to the general nature of the testimony they might be called on to give, and further requested them to ask leadman Redling and delivery driver Blakeway to attend and testify at the hearing. Redling and Blakeway were notified of the Union's request on 31 March, and Redling promptly advised Plant Manager Bishop that some of his employees were scheduled to go to the National Labor Relations Board on the following day and would not be at work. Bishop relayed the information to President Vokas who held a meeting at the end of the work shift on 31 March for the employees who planned to attend the hearing.

At that meeting Vokas read from a written statement which stated that the employees would not all be permitted to leave work unless they had subpoenas, but that they could choose one representative who would be allowed to attend the hearing. Vokas explained that they could not afford to allow production to be stopped and that if all the employees left, and did not have subpoenas, they would be discharged and would not be rehired. Vokas then asked if the employees had subpoenas. The employees responded in the negative, but said they would contact the Union which requested their attendance and report back. After work on 31 March the employees contacted the Union and were assured that subpoenas would be served on them the next morning when they arrived at the Board's offices where the hearing was scheduled.

On 1 April the six reported to work at the usual time. Cannon and Redling advised Bishop that all their subpoenas would be waiting for them at the hearing. At 8:30 a.m., as the employees were preparing to leave, Vokas called them into the employee lunchroom and reread the same statement to them. The employees responded that they had subpoenas. Vokas asked to see them, and was informed that the subpoenas were waiting for them at the Board's office. Vokas again read the statement and discharge warning. Employee Cannon told Vokas at that point that he believed the employees would be in contempt if they did not go to the hearing. The employees punched out and left; Vokas collected their timecards and discharged them. The subpoenas were issued on the morning of 1 April and served on the employees on their arrival at the Board's Regional Office. No hearing was held, however, because of the filing of the instant charges. The employees set up a picket line that same day.

The judge found that the Respondent's assertion of its need for uninterrupted meat processing, underlying its refusal to allow more than one employee to leave work, outweighed the employees' inter-

¹ The General Counsel and Charging Party have excepted 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

est in voluntarily attending a Board hearing during working hours.² He therefore concluded that the Respondent lawfully discharged the six employees for disregarding its order not to leave work rather than for attending the hearing. The judge emphasized the Respondent's willingness to release all subpoenaed employees, but noted that the subpoenas were not served on the employees until after they left work and had been discharged even though the Union had ample opportunity to obtain subpoenas between 17 and 31 March. In addition, he observed that there was no realistic need for the employees' testimony because the parties had no apparent disagreement as to the unit description and the Union was there to protect the employees' interests in any event. Accordingly he recommended dismissal of the 8(a)(4) complaint allegation.

We find, contrary to the judge, that the six employees' conduct in leaving work against the Respondent's order was not an act of insubordination. Rather, it is evident that on 1 April they reasonably believed that they were legally bound to obey the subpoenas which the Union was obtaining to compel their appearances at the hearing. They communicated this belief to the Respondent that day first by responding affirmatively to Vokas' inquiry whether they were subpoenaed, and second by answering Vokas' demand to see their subpoenas with the explanation that the subpoenas were awaiting them at the Board's offices. Finally, Cannon expressly stated to Vokas the belief that the employees would be held in contempt if they failed to appear. In the face of these employee responses, the Respondent neither attempted to verify whether subpoenas had been issued for the employees nor made any effort to correct their misimpressions concerning when subpoenas become effective.³

In these circumstances where the employees felt as compelled to appear as if they had been served and the Respondent did not advise them concerning any infirmity based on lack of service, we would not require the employees to have subpoenas in hand in order to be within the protection of Section 8(a)(4). Rather, it was sufficient that the subpoenas were awaiting the employees at the Board offices, and that the Respondent was not in-

² The judge found that the Respondent communicated its valid business reason for ordering the employees to remain at work.

³ Simply stated we have found that the Respondent agreed to release all subpoenaed employees, the six employees believed they were under subpoena and told the Respondent so, and the Respondent precipitately terminated them without explanation. Contrary to the judge, we deem it unnecessary to indulge in speculation as to whether the employees' testimony was really necessary or which party should bear the responsibility for the lack of earlier service of the subpoenas.

formed.⁴ We therefore find that the Respondent's discharge of the six employees for leaving to attend the Board hearing violated Section 8(a)(4) of the Act.⁵

CONCLUSIONS OF LAW

1. Vokas Provision Company d/b/a The Rich Plan of Western Reserve is an employer engaged in commerce and a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. District Union 427, United Food and Commercial Workers International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employees for disobeying an order not to leave work to attend a Board hearing during working hours for which they were subpoenaed the Respondent has violated Section 8(a)(4) and (1) of the Act.

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

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

As we have found that the Respondent unlawfully discharged employees Herbert Cannon, Gail Gelliath, Janis Heckel, Sareth Has, Walter Blakeway, and Frank Redling,⁶ we shall order that it offer each of them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. We shall also order that the Respondent expunge any references to their unlawful discharges from its files and inform them in writing that it has been done and that evidence of the discharges will not be used as

⁴ Unlike our dissenting colleague, we do not deem it appropriate to countenance these discharges based solely on the technical lack of service of the subpoenas. Further, we do not, as he suggests, "implicitly" concede that the Respondent had business justification for its conduct. Because the employees had substantially complied with the Respondent's requirement that they have subpoenas in order to be excused from work, we do not reach the question of the Respondent's business justification.

⁵ We find it unnecessary, in view of our 8(a)(4) finding, to determine whether these discharges violated Sec. 8(a)(3) of the Act.

⁶ We cannot properly evaluate the merits of the Respondent's contention that Frank Redling engaged in picket line misconduct and should therefore be disqualified from reinstatement and backpay, in the absence of findings and credibility resolutions by the judge with respect to the relevant record testimony. Accordingly, we will defer that issue to the compliance stage of this proceeding.

a basis for future personnel action against them. We shall further order that the Respondent expunge any references to their unlawful discharges from its files and inform them in writing that it has been done and that evidence of the discharges will not be used as a basis for future personnel action against them. We shall further order that the Respondent make the discriminatees whole for any loss of earnings suffered as a consequence of their illegal discharges in the manner provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, Vokas Provision Company d/b/a The Rich Plan of Western Reserve, Bainbridge, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for leaving work during working hours to attend a Board hearing for the purpose of testifying.

(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 which the Board finds will effectuate the purposes of the Act.

(a) Offer Herbert Cannon, Gail Gelliath, Janis Heckel, Sareth Has, Walter Blakeway, and Frank Redling immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of their unlawful discharge, such backpay to be determined in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Expunge from its files any reference to the unlawful discharges of Herbert Cannon, Gail Gelliath, Janis Heckel, Sareth Has, Walter Blakeway, and Frank Redling, and inform them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, on 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.

(d) Post at its Bainbridge and Charing Falls, Ohio facilities copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

CHAIRMAN DOTSON, dissenting.

I agree with the judge that the Respondent lawfully discharged six employees who left work to attend the Board hearing in disregard of its explicit order that it could allow only one (rather than 50 percent) of its meat processing employees to leave work unless they were subpoenaed.

The rights of these unsubpoenaed employees to appear at a Board hearing during working hours must be balanced against the Respondent's legitimate interest in operating its business without disruption. The majority implicitly concedes that the Respondent had ample business justification for enforcing its order against employee group attendance at the Board hearing in the absence of a showing that they had been subpoenaed to testify. There is no countervailing evidence which establishes any substantial necessity for the participation of all six employees except possibly as spectators. The six employees included one leadman meatcutter and two other meatcutters, two meat wrappers, and one driver. There was no dispute between the parties on 1 April as to the unit placement of these job classifications or with respect to the nonsupervisory status of the leadman. Moreover, the employees themselves expressed uncertain knowledge, if any, as to the substance or nature of their potential testimony. The foregoing evidence and the Petitioner's failure between 17 and 31 March to request subpoenas or give notification to the Regional Director or the Respondent that it desired any witnesses reveal that there was no necessity for disrupting the Respondent's entire meat processing

⁷ 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."

department which was the acknowledged bottleneck in its operation.

I agree with the judge that this case is similar to *Standard Packaging Corp.*, 140 NLRB 628, 630 (1963), in which the Board found similar discharges to be lawful, stating:

[The employees] were under no subpoena to appear at the decertification hearing. Nor was any real need for their appearance at the hearing otherwise demonstrated to Respondent at the time their release was requested or at any later date before their discharge.

The majority here has mistakenly found that the Respondent violated Section 8(a)(4) based on its substitution of the employees' reasonable belief (that they were under legal compulsion to appear) for the lack of service of the subpoenas. I can find no reason for the sudden departure from the universally established and accepted objective legal requirement of service. Accordingly, I find that the employees who were not served with subpoenas therefor left work voluntarily against the Respondent's order. The evidence shows that in discharging the six employees the Respondent was motivated solely by their departure from the plant in disregard for its order. Therefore I would affirm the judge's dismissal of the 8(a)(4) allegation.

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 employees for leaving work during working hours to attend a Board hearing for the purposes of testifying pursuant to Board subpoena.

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 National Labor Relations Act.

WE WILL offer Herbert Cannon, Gail Gelliath, Janis Heckel, Sareth Has, Walter Blakeway, and Frank Redling immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings or other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the unlawful discharges of Herbert Cannon, Gail Gelliath, Janis Heckel, Sareth Has, Walter Blakeway, and Frank Redling, and WE WILL inform them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

VOKAS PROVISION COMPANY D/B/A
THE RICH PLAN OF WESTERN RESERVE

DECISION

STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Law Judge. Based on a charge filed on April 1, 1981, by District Union 427, United Food & Commercial Workers International Union, herein the Union or Local 427, a complaint was issued on May 29, 1981, against Vokas Provision Company d/b/a The Rich Plan of Western Reserve, herein Respondent or Company, alleging a violation of Section 8(a)(1), (3), and (4) of the Act. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. All the parties filed briefs in this matter.

On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, a corporation organized under and existing by virtue of the laws of the State of Ohio with its principal office and place of business in Bainbridge, Ohio, where it is engaged in the business of selling foods and meats, freezers and microwave ovens to retail customers. Annually, in the course and conduct of its business, the Employer has a gross volume in sales in excess of \$500,000 and receives goods valued in excess of \$5,000 directly from points located outside the State of Ohio.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.¹

¹ The motion by the General Counsel to amend and correct the transcript is only granted to the extent noted in Respondent's memorandum filed in connection therewith.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

It is alleged that about March 26 or 27, 1981, Jerome Vokas, Respondent's president, unlawfully interrogated employees about their union activities, sympathies, and/or desires; that about March 30, 1981, Jerome Vokas unlawfully granted employees an additional paid holiday, improved paid vacation benefits, the right to be polled regarding the scheduling of the annual plant shutdown, and an employee suggestion program, in order to encourage employees to refrain from supporting the Union. It is further alleged that about April 1, 1981, the Respondent unlawfully discharged its employees Frank Redding, Herbert Cannon, Gail Gelliath, Janis Heckel, Sareth Has, and Walter Blakeway, and at all times since said date has refused to reinstate said employees to their former or substantially equivalent positions of employment. It is also alleged that about April 17, 1981, Respondent released employees from work several hours early with full pay in order to encourage them to refrain from supporting the Union.

The gist of this case involves the discharge of six employees because they "clocked-out" and left work, over their employer's objections, to participate as witnesses for the Union in an "RC" hearing and after conveying to management that subpoenas would be waiting for them, and would be served on them, when they arrived at the Regional Office of the Board for the hearing. Respondent maintains that it had to continue its production schedules in order to keep up with its increased business.

Respondent is engaged in the business of selling and delivering foods, frozen cuts of meat, and related appliances directly to its retail customers' homes. This business is conducted at the plant as well as at several sales offices scattered throughout the State of Ohio. The plant consists of four major departments—sales, meat processing, warehousing/truckdriving, and office staff. It appears that the satellite sales office consists of independent contractors working on a commission basis for the sales they procure.

Customer orders for food, frozen meat, or appliances are initially placed with the sales department or one of the commissioned outlying salespeople. If the order included meat, it would be forwarded to the meat processing department and the meatcutters and meatwrappers in that department would cut, wrap, and "blast freeze" the necessary cuts after their receipt of the order from the salespeople.

Next, the meatwrappers would package up the frozen cuts for each order, and then the warehouse staff would add any other ordered foods and load the packaged orders onto the delivery trucks. The operation was geared so that meat cut and frozen on one day would be generally delivered soon thereafter, but the customers were repeatedly notified of Respondent's policy that between 14 and 18 days could elapse between the placing of their order and its delivery.

Sometime shortly prior to March 10, 1981, the Union began to organize certain employees at Respondent's plant, and about March 10, 1981, meatwrappers Gail Gelliath and Janis Heckel, meatcutter Herb Cannon, and warehouseman/driver Walter Blakeway signed union authorization cards. Cannon and Blakeway had asked other employees to sign cards as well. Frank Redding started working for Respondent as a meatcutter, but was later designated as a leadman in the meat processing department—where all the other employees involved herein worked with the exception of Walter Blakeway. Shortly after organizational activities started, Carl Bishop, Respondent's plant manager, was informed about the ongoing union organizational activities and Bishop then relayed this information to Jerome Vokas and Vokas instructed Bishop "to keep his eyes open" for any other union activity and report it to him.

On March 17, 1981, the Union filed an RC petition with the Regional Office and supported it with a sufficient showing of interest, and soon thereafter, Vokas posted a notice about the petition on the plant's bulletin board notifying employees as to the filing and that the Board was investigating the validity of the petition.²

In the latter part of March 1981, the Board's attorney, Allen Binstock, and Respondent's attorney Edward Simerka had a series of conversations in order to resolve issues concerning the petition, and at the end of these conversations the parties agreed to schedule the representation hearing for April 1, 1981, but the election date was still open.

Further background evidence reveals that Vokas frequently talked to employees on almost a daily basis during coffeekes and at other times, and in addition held general meetings with meat processing employees, warehousemen, drivers, and office employees, and that the practice of meeting with employees was developed to discuss production problems. Vokas testified that this practice continued into 1980 (and beyond) with meetings of meat processing and warehouse employees.

Vokas further testified that in January 1981 he held a meeting with all available salespersons, office employees, warehouse employees and with meat processing employees, and in this meeting announced Respondent's interest in working out a profit-sharing plan and also discussed production problems involving orders, deliveries, and mistakes being made, and then he asked for suggestions for solving production problems.

Vokas also testified that, in view of continued production problems, he had another meeting with production employees in about mid-February—that the meat processing employees were called into his office individually due to the fact that the January meeting had apparently been ineffective, and therefore he decided to talk to the employees on a personal basis to attempt to determine whether they had any suggestions to increase efficiency in putting up orders and to increase productivity of processed meat products. He stated that during these February meetings suggestions were made to him that more wire baskets and dollies be purchased. Gail Gelliath, an

² See G.C. Exh. 6.

alleged discriminatee herein, admitted a meeting with Vokas in February. Gelliarth testified Vokas discussed profit sharing, asked what was needed to improve working conditions, asked for suggestions in improving working conditions, asked for suggestions on improving productivity, and that Vokas also talked about mistakes being made in the processing room and in delivery. At this time Gelliarth was aware that February sales were higher than sales in January. She testified the discussion on these problems in the March 30 meeting (to be detailed later) was no different from the discussion in February, and Gelliarth also said that she or someone else had also suggested in the February meeting, and prior to that, that additional dollies were needed. Alleged discriminatee Herbert Cannon claimed he was not at the plant in February although he was rehired on February 5, but agreed that employees met individually with Vokas in his office to try to help improve production and working conditions. He said this had occurred many times, but he could not say when. In fact, he testified it was a regular practice to call people in one by one to see how things were going and what they could suggest to help improve production and that in the past it had happened to him many times.

Alleged discriminatee Janis Heckel was not sure that Vokas held a meeting in January 1981, but admitted there was a meeting sometime prior to March 30, 1981—it could have been more than 2 weeks before—with all meat processing room employees, and wherein Vokas asked for suggestions on how to improve production. She stated that suggestions or requests were then made asking for additional freezer space, more dollies, and for additional carts and another table, and that Vokas also mentioned the fact that he was checking with his accountant in order to establish a profit-sharing plan.

Respondent's witness Plant Manager Carl Bishop testified there were frequent informal meetings held by Vokas (normally at coffeebreak) with meat processing, warehouse, and delivery employees, and on these occasions Vokas would ask how things were going and would ask for suggestions. He stated that such informal meetings were held in 1980 along with scheduled meetings of all employees which occurred once a month or every 6 weeks, and occasionally, maybe every 2 months, employees were asked to stop work and attend a meeting. In addition, Carl Bishop, as plant manager, called meetings himself of plant employees as the need arose to discuss safety, production, suggestions for needed materials, and mistakes that were being made.

It is manifest on this record that Respondent had a well-established policy of having frequent meetings with its employees, both individually and as a group, to discuss production problems and to solicit suggestions from employees on improving work performance, and testimony from several of the alleged discriminatees is even in support thereof, as aforesaid.

There is an allegation in the complaint that about March 26 or 27, 1981, Vokas interrogated employees about their union activities.

Herbert Cannon testified that about 10 days after he had signed a card for the Union, Vokas came into the lunchroom where he and Janis Heckel were eating and

told them, "I don't know why you people want a union in here, because I think it's completely unnecessary," and then waited for a response from them before leaving the lunchroom. Cannon stated that Vokas had also made similar remarks before. Heckel gave like testimony in corroboration of Cannon.

The General Counsel concedes that in other contexts Vokas' remarks to Cannon and Heckel on this occasion would be considered free speech protected by Section 8(c) of the Act, but the circumstances of his remarks to Cannon and Heckel created a coercive atmosphere. The General Counsel also argues that Vokas did not just speak in passing, nor did he present his views so as to assure the employees that he was not soliciting their thoughts, but on the contrary, Vokas made his remarks to Cannon and Heckel and then "intentionally hovered over them," waiting for some sort of response, and he left only after it was clear that none would be forthcoming. Moreover, maintains the General Counsel, his lunchroom remarks were not a matter of letting his employees know his position as he had made such statements in the past, and they were made during the pendency of a representation petition.

The General Counsel notes in his brief that if I find that the lunchroom remarks to Cannon and Heckel by Vokas were sought to solicit their views about the Union, then as such, he engaged in unlawful interrogation of employees in violation of Section 8(a)(1) of the Act.

Herbert Cannon, a witness for the General Counsel, who gave confused and contradictory testimony with regard to several incidents (detailed later), was called to support their allegation and testified as previously set forth herein, but rather than testifying to an event on Thursday, March 26, Friday, March 27, Cannon testified that the incident occurred on a *Wednesday* morning and that he could not recall the date. Cannon testified he had signed a union card on March 10—that the incident on Wednesday was about 10 days after he signed the union card and happened after the Union filed its petition for an election on March 17. It is noted that this would place the date about March 18, not March 26 or March 27. Cannon explained that he remembered the incident because in previous meetings Vokas had stated that he thought a union was unnecessary in the plant. As pointed out, the witness then turned to general plantwide meetings called by Vokas, but the record does not show any meeting called by Vokas in which the Union was mentioned until March 30, and which, obviously was not a "previous" meeting.

I am in agreement that the evidence produced by the General Counsel fails to support this allegation of the complaint. There is no evidence that any interrogation occurred on March 26, 27, or thereafter or, in fact, that any interrogation took place at any time. In any event, the remarks made by Vokas on the occasion in question constitute a mere statement of opinion and cannot be characterized as unlawful interrogation. Furthermore, Vokas' statement was not made in an atmosphere of union animus or hostility. As indicated, the only other statement concerning the Union which Vokas made was

in his talk of March 30 when he asked employees not to vote for the Union because he felt it was unnecessary to have one.

In the final analysis here, there was no question even directed to Cannon or Heckel, nor was there any effort to obtain information having a tendency to impede them in the exercise of their statutory rights. On the contrary, the remark by Vokas was a statement of his opinion protected by Section 8(c) of the Act.

Turning now to the meeting on March 30, 1981, wherein it is alleged that Vokas granted several additional benefits in order to encourage employees to refrain from supporting the Union.

On March 30, 1981, Vokas initiated a plantwide employee meeting. All the employees working in the meat processing department, who usually started work at 6:30 a.m., as well as nearly all other plant employees, except for the sales staff, office staff, and a few drivers, were in attendance. Vokas began the meeting by speaking at length about the history of how he started the Company and its development over the years, and according to employee witnesses Vokas spoke on this subject for approximately 1 hour.

The General Counsel concedes that it is possible that this discussion was somewhat related to the problems of mistakes in filling orders or to general production questions but, given the circumstances, it is more likely that Vokas hoped to win the sympathy of employees and lay a groundwork for demonstrating to them that he was a cooperative employer willing to make changes for the benefit of employees if they would forsake the Union. The General Counsel also points to various decisions by the Board wherein it has been held that an employer violates Section 8(a)(1) of the Act, if, while a representation election is pending, benefits are conferred for the purpose of inducing employees to vote against the Union.

In the discussion that followed, Vokas spent some time talking about employee benefits. An employee profit-sharing plan was brought up that he hoped to institute during the coming year, and he explained that the payoff to employees would be tied to profits during the coming year, and depending on Respondent's profitability employees would hope to gain as much as \$2000 in profit sharing sometime during the beginning of 1982.³

There is testimony in this record by witnesses for the General Counsel that, during the next phase of this meeting in question on March 30, Vokas instituted at least four new improvements in the employees' benefits—a paid birthday holiday; 2 weeks of paid vacation after only 2 years of service instead of the prior 5 years; formal polling of the employees' preferences as to the timing of the annual plant shutdown instead of merely mandating it for the week of Fourth of July each year, and that Vokas also initiated the first formal written system for employee suggestions when he announced

³ Vokas had mentioned the possibility of a profit-sharing plan in previous meetings with employees beginning in January 1981, but the General Counsel maintains that the plan was discussed in much greater detail during the meeting of March 30, but that since the issue of a profit-sharing plan had been raised prior to the union campaign, no allegation as to this issue was alleged in the complaint.

that henceforth a clipboard and pad for suggestions would be mounted outside William Petrucz' office.

Vokas testified that he called this meeting to compliment the employees for doing a good job, but he was also trying to get them to do a better job in the production of meat products as such items were not being properly frozen, and to get suggestions in efforts to help them do this—the meat processing room was “the bottleneck” in getting out the orders to customers.

The General Counsel maintains that, rather than discussing employee errors, Vokas continued to dwell on the subject of employee benefits, and Respondent's contention that the discussion of benefits originated through employee questions posted to Vokas is irrelevant—it is the substance of Vokas' statements that is pertinent. In summary, the General Counsel's argument is as follows:

Any doubt as to Respondent's motivation for granting these new benefits can easily be dispelled by the words of Jerome Vokas. At the end of the meeting on March 30 Vokas admittedly told the employees that he did not think a Union was needed in “our organization” and that “we were doing the best we could as it was.” According to Gail Gelliath and Walter Blakeway, Vokas also encouraged employees not to vote for the Union. Vokas did not deny having made this remark. The circumstances of the March 30 meeting are clear. Vokas assembled the employees in the proposed bargaining unit and shut down his plant for two hours. Such formal interdepartmental meetings in the front office were uncommon. The substance of the meeting involved a discussion of how Vokas built the business up from the ground. He continued by soliciting suggestions from employees, apologizing for the ineffectiveness of past suggestions made to him, and promising to act effectively in the future on such suggestions. Vokas then established a formal written suggestion program and granted three other new benefits. The meeting ended with a plea to support the Company and vote for the Union. Clearly this meeting was part of an anti-Union effort and not held, as Respondent claimed, to remedy any problems of production. As such the granting of new benefits, as described above, should be held in violation of Section 8(a)(1) of the Act.

It is alleged in the complaint, as aforesaid, that on March 30, 1981, Respondent unlawfully granted employees improved vacation benefits. The General Counsel pointed out that, during the meeting here in question, Vokas announced, for the first time, a newly revised policy concerning paid vacation benefits—that in the past Respondent had offered its employees 1 week of paid vacation after 1 year of service and 2 weeks of paid vacation after 5 years of service. However, Respondent maintains that sometime in January 1981 it had revised this policy to provide for 2 weeks of paid vacation after 2 years of service rather than after 5 years. Vokas testified that the reason the change had not been reported to employees was that a decision had also been made to withhold the announcement until July 1981, and then tes-

tified that the change was mentioned on March 30 only because an employee had inquired about such benefits.⁴

The General Counsel argues that "it is curious" that Respondent had originally decided to wait 6 months before announcing the revised policy, and no reasoning was provided as to why some newly hired employees were told but no others informed, and further it is not clear why newly hired employees were told when the change did not immediately affect them. Finally, contends the General Counsel, if a July announcement had been decided on and no employees were affected, it seems odd that the new policy was raised by Vokas on March 30—odd, that is, unless the obvious antiunion motivation behind the announcement is considered.

As indicated, Respondent's vacation policy had been 1 week of vacation after 1 year of service and 2 weeks of vacation after 5 years, but in January 1981 a new vacation policy was adopted and placed into effect for all employees and employees hired after that date were informed of the policy at the time of being hired. The new policy was 1 week's of vacation after 1 year of service and 2 weeks' vacation after 2 years of service.

It further appears that Respondent's comptroller William Petrucz participated in the decision establishing the new vacation policy. Petrucz also hired some employees for the office and the plant. He credibly testified that in January and February 1981 he hired two employees for the office and one delivery man, and when these new employees were hired they were informed by him of the new vacation policy. There is no testimony in this record to the contrary.

Respondent points out that in March 1981 there were only 12 full-time employees, and both Redling and Gelliath had been employed for more than 15 months as of March, and Herbert Cannon had been employed previously and had worked from February 1975 into 1980 and was then rehired in February 1981, and that it is "preposterous" for these witnesses to claim they were not

aware of the benefits available to them as employees, including the changed vacation benefits as of January 1. It is pointed out that Office Manager Brenda Cunningham was aware that the vacation policy had been changed and implemented in January 1981, as she so testified, and after the new policy was known to Cunningham and the newly hired employees, it is "incredible to believe," in a group of only 12 full-time employees, that information regarding that policy would not have been communicated to all employees.⁵

In summary, Respondent submits that the testimony of the General Counsel's witnesses to the effect that they had no knowledge of Respondent's vacation policies in January, February, and March 1981, prior to the March 30 meeting, is contrived and must be disbelieved.

Further, that it is well recognized that in a small business operation, such as that of Respondent, no formal printed communique is needed to inform employees regarding pertinent policies—that in numerous cases the Board has found that in small organizations, such as Respondent's, knowledge of union activities will be presumed and will be imputed to the employer, and the same principle applies here concerning the Respondent's policies and activities becoming known to employees—that Respondent's vacation policy was changed in January, and the change in policy was known by Cunningham and by three employees who were hired after January 1 and before the meeting of March 30, and during that period and prior to the commencement of the union organizing campaign employees became fully aware of the vacation policy and that Vokas' discussion of it in the meeting of March 30 did not constitute an announcement of any new change in vacation policy designed to defeat the Union.

It appears to me that there is ample evidence in this record showing that in January 1981 Respondent had formulated a new vacation policy and had done so prior to any union activity, but since there was a delay in the announcement of the new policy to older employees for reasons as duly explained by Vokas, as aforesaid, there may be some question of whether they knew about it, but in view of all the surrounding circumstances this appears quite unlikely.

In the final analysis, the new policy was adopted prior to union activity, it was announced to recently hired employees, and at the meeting on March 30, 1981, new employee Terry Murray asked about company benefits (Vokas did not bring up the subject), and as a result of this inquiry by an employee Vokas then mentioned the new vacation policy here in question, and, in fact, had he done otherwise, there is the possibility that the Respondent could have been charged with discrimination against

⁴The record in this respect reveals the following:

Q. Mr. Vokas, you testified that a new vacation policy was implemented on January last, 1981; is that correct?

A. Yes, sir.

Q. And that people who were hired after that date were informed of the new vacation policy; is that correct?

A. Yes, sir.

Q. How about everybody else in the plant? Did you tell them about it?

A. Since everybody wasn't—they didn't have enough time for the second week, we were going to have a big thing about it on the vacation program that we started in July this last year, '81. We were going to post it and say something new. That is what we were going to do. Because nobody at that time had enough time for the second week, okay, and at that time, we were going to post it.

Q. What time?

A. In the vacation, in July.

Q. So, you implemented it in January and were going to announce it in July?

A. Yes.

Q. But you chose to announce it in March instead?

A. Yes, sir, because I was asked.

Q. Two weeks after the Union filed an election petition?

A. Sir, that has nothing to do with it. I was in the Union myself. I don't have anything against Unions.

Q. Mr. Vokas, didn't you testify that the Union was not necessary?

A. Yes, but if it was to be, it was to be. I think Mr. Delasanta knows me from Fisher Foods years ago.

⁵ Gelliath testified that she had talked to other employees and found out that the 2-week vacation previously had come after 5 years, which had allegedly been her understanding. Cannon testified that in the meeting in the van at Fisher's Big Wheel on March 30 (more later on this meeting) Respondent's benefits were discussed. Janis Heckel disclaimed any knowledge of Respondent's vacation policy for the alleged reason that she had only been there 5 months, but when hired she admitted that Plant Manager Bishop told her that she would get three raises at 30, 60, and 90 days, but she claimed she was told nothing about any other benefits.

employees by withholding vacation benefits because of the employees' union activities.

It is also alleged in the complaint that at the meeting on March 30, 1981, the Respondent unlawfully granted employees the right to be polled regarding the scheduling of the annual plant shutdown.

The record in this case reveals that for many years it had been Respondent's policy to close the plant for 1 week during the week in which the Fourth of July holiday fell in order for employees to take their vacations, and customers were always notified by the Company regarding these vacation periods through an advertising brochure or flyer. As indicated, the vacation shutdown always included the week in which the Fourth of July 4th fell and always involved at least the weekend before the holiday or the weekend after the holiday. The vacation shutdown in 1980 was June 30 through July 7. In 1979 the vacation shutdown was July 1 through July 10. However, in 1981, July 4 fell on Saturday and accordingly July 4th did not fall on a regular workday during the workweek of either June 29, 1981, through July 3, 1981, or July 6, 1981, through July 10, 1981. Obviously, the shutdown would of necessity have to be scheduled to cover a regular workweek in which July 4 did not fall.

Alleged discriminatee Gail Gelliath testified that there was a discussion at the March 30 meeting about when the plant would be shut down for vacations. She further stated that a vote was then taken on which week in July the employees would like for a plant shutdown, and that prior to the meeting of March 30, 1981, the scheduling of the plant shutdown was always decided by management and not by the employees.

Herbert Cannon testified that he had never had an opportunity to vote in the past on his preference regarding a plant shutdown for vacations, and further testified that the question raised in the March 30 meeting was when to start the vacation holiday. He also testified that the vacation period was always identical, starting the same day and ending the same day, and that it never varied.

Janis Heckel testified that "to her knowledge" no one had an opportunity to vote on the plant shutdown before. She said that at the meeting on March 30 Vokas offered a choice of dates for a plant shutdown for a 2-week period around July 4, but she did not remember what the choice was. On cross-examination, Heckel admitted that she did not work for Respondent at vacation time in 1980, so she would not know what discussion took place then. Walter Blakeway testified from what the other employees told him—that before there had not been any choice in the vacation shutdown period.

The General Counsel maintains his evidence shows that the annual plant shutdown had always been set by management without consultation with plant employees and points out that Respondent's contention, to the effect that it had sounded out employees in the past about their preferences with respect to the timing of the shutdown, is different from the circumstances here, and that the vote taken on March 30, 1981, was unprecedented. Moreover, that Carl Bishop testified ambiguously when he stated that he may have been present when Vokas individually asked some employees over coffee about the timing of the shutdown as he could recall no specifics

and further acknowledged that no polling of employees had occurred with respect to the shutdown in July 1980, and that Office Manager Brenda Cunningham admitted that as far as she was aware only office employees had previously been offered the benefit of expressing their views on the timing of the shutdown, and finally, Respondent's comptroller William Petrucz stated that he knew of only office employees being asked in the past rather than meat processing, sales, warehouse, or delivery employees.

In summary, the General Counsel contends that the timing of Vokas' statements belies Respondent's defense—the shutdown was planned for July, yet Vokas offered the employees a novel opportunity to vote on the shutdown at the meeting of March 30. Surely, argues the General Counsel, if a lawful motivation were involved, Respondent could have delayed this action until after a resolution of the representation case, but Respondent's true motive was to offer employees in the proposed bargaining unit a new benefit which it hoped might discourage their support for the Union.

Plant Manager Bishop testified that at the meeting on March 30 there was a question asked of "exactly" when the plant shutdown would be—whether it was to be the week before July 4 or the week after. Bishop then stated, "So, if we put it up for suggestion, who wanted when, and we took a vote on it, I don't recall which way it went." The plant manager further testified that, in the summer of 1980, the employees were informally offered a choice as to the week in which they preferred to have a plant shutdown, and this was done by Vokas talking with employees over coffee and in Bishop's presence.

Office Manager Brenda Cunningham was asked if there were ever any discussions with Vokas as to when the annual shutdown of the plant would occur so employees could take their vacations (or at least 1 week of it), and she replied as follows:

Q. Were there any discussions as to when that shutdown would occur?

A. It was always for the Fourth of July week.

Q. Were there ever any discussions with Mr. Vokas as to when that shutdown would occur, when it would start and when it would end?

A. Oh, yes.

Q. Tell the Judge what that was.

A. We always had like an extra day. In other words, the Fourth of July, we had our vacation over the Fourth of July so that we would have a longer time because we had an extra day there. We would always discuss this day we would take off where we would start it on Friday, or, you know, go an extra day like on Monday. We would always discuss it with him [Vokas] and he would always discuss it with us which day we would rather have to add on to this week that we would have off.

JUDGE SAUNDERS: Were these vacations one week, two weeks, or what?

THE WITNESS: One week, but it was that we always had that extra day for the Fourth of July, that is why we did it then.

Q. Who would discuss that with you?

A. Mr. Vokas, Mr. Jerome Vokas.

Q. Was it only with you?

A. Oh, no, it was everybody in the office.

Q. This occurred in 1980?

A. Yes.

Q. Had it occurred in any prior years?

A. Yes.

Q. How far back that you can remember?

A. When I first started working there.

Q. It had occurred that year when you first started?

A. The first year I worked there, I didn't have a vacation, but the first vacation that I had, we were asked.

Comptroller William Petrucz was also asked about the closing of the plant for vacations, and he replied that it had been the company policy for many years to close during the week of July 4, but that management always tried to get "the feel" of the employees as to when they felt they would like to have vacation—either the week before or the week after the holiday, and that he talked to the office people on this matter.

It appears to me that the evidence in this record duly establishes that employees have always been asked, albeit informally, about their preference as to when the July 4 shutdown and vacations should begin or end, and these discussions occurred in part because July 4 sometimes falls on a Saturday or Sunday. Bishop, Cunningham, and Petrucz testified that employees had always been informally polled or asked before concerning this matter, that this practice was not anything new, these people were the most senior individuals in the plant, and their knowledge concerning this practice antedates that of the General Counsel's witnesses, most of whom had only been employed for a comparatively short time.

In the final analysis, the employees received nothing in the way of plant shutdowns and vacations that they did not have in prior years, and while the taking of a vote on March 30 relative to a choice employees might have as to when such shutdown would take place was unprecedented—nevertheless, the occurrence was in general compliance with past customs and practices only that here their preference was ascertained by a hand vote at a meeting rather than seeking out their wishes individually or by groups. Under such circumstances, and especially when management did not initially raise the matter, there is lacking sufficient probative evidence to support the allegation of the complaint that employees were granted the right to be polled concerning vacation shutdown as a weapon against the Union. The credible evidence establishes that for many years employees had been offered this opportunity to express an opinion and preference concerning the plant shutdown period for vacations.

It is alleged in the complaint that at the meeting on March 30 Respondent unlawfully granted employees an additional paid holiday.

Gail Gelliarth testified on direct examination that, "It was brought up that these holidays would include employees' birthdays." On cross-examination she was asked to state as to what Vokas actually said, but could not then testify about any detail of what really transpired.

Gelliarth stated that prior to March 30 she had never before heard that paid holidays included employees' birthdays. She then testified that "an employee " had asked which of the holidays they got off.

Herbert Cannon's version is that he himself brought up the subject of the birthday being a paid holiday. He then said he did not recall how it came up but that he "believed" he raised this topic. According to Cannon's direct testimony, Vokas granted the birthday holiday as an added benefit, but had never mentioned it before. Later in his testimony Cannon agreed that Vokas said he thought there were seven legal holidays and then started to count them off and started with Memorial Day, Fourth of July, Thanksgiving, and Christmas, and counted off six legal holidays, and "thought" the seventh legal holiday might be the birthday holiday, but at this time Cannon corrected Vokas saying, "That is not right. We don't get birthday holidays." On redirect examination Cannon repeated that he told Vokas employees never had a paid birthday holiday and that Vokas replied, "I stand to be corrected." Cannon testified that Vokas then volunteered that he would have the birthday holiday as an added benefit.⁶

Janis Heckel, another witness for the General Counsel, testified that at the meeting on March 30, 1981, Vokas named off the holiday that employees had, and mentioned the fact that they had their birthday off as a paid holiday, but that she had not been so informed at the time of her birthday several months prior thereto. On cross-examination Heckel admitted she "believed" that Vokas stated that there were seven legal holidays and that he started to count them off on his fingers, but she could not then remember how many holidays Vokas counted or whether he said there were only six when he finished counting. She claimed to know only about Christmas, Thanksgiving, and New Year's as the holidays although Vokas mentioned additional ones.

Walter Blakeway stated that at the meeting here in question paid holidays were mentioned and that Vokas informed them that they would be paid for New Year's, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas, and that birthdays would also be a paid holiday.

The General Counsel maintains that Vokas should not be credited in his testimony on this allegation—that Vokas admitted he had been president of his Company for 19 years, and during that time Respondent had consistently granted employees the same six paid holidays, but nevertheless, on March 30, in the midst of a union campaign, Vokas suddenly assumed that there were seven holidays with the seventh being a paid employee holiday. The General Counsel argues that it is difficult to believe that an experienced businessman like Vokas could have such a lapse of memory especially when he claimed that the question of a birthday holiday had been discussed in the past, and that Vokas surely knew his employees did not have their birthday off as a paid holi-

⁶ From the demeanor of Cannon while testifying, it appears to me he was a disgruntled employee who was unhappy about returning to work as a meatcutter when he had formerly been the meat processing room leadman.

day—that in telling them otherwise on March 30, he was attempting to discourage their support for the Union, and this grant of a new benefit, or in the alternative, promise of a grant of new benefit, was made in violation of Section 8(a)(1) of the Act.

As indicated, the meeting here in question on March 30 was called to discuss the production problems and mistakes that were occurring and to get suggestions on how to correct such problems, as had frequently been done in the past, and as a result Vokas did not anticipate talking about benefits and was not prepared to do so. He had no notes or prepared text since it was unnecessary for the purpose of discussing production problems, and after a discussion of production and delivery problems had occurred, new employee Terry Murray raised a question about company benefits, as aforesaid, and this question led to others and eventually to a discussion of paid holidays. Herbert Cannon testified:

Yes. Mr. Vokas said, well—I brought it up about the birthday being a holiday with pay, paid holiday.

Being caught off guard when the subject was brought up, Vokas said employees had the legal holidays off and that he thought there were seven. He then began to count them off on his fingers, and named them as Thanksgiving, Christmas, New Year's, Memorial Day, Labor Day, and Fourth of July, but which added up to only six. Vokas then searched for a seventh holiday and in doing so stated, "Gee, I thought there were seven," and mentioned that he knew at one time they were talking about a birthday holiday. At this point Cannon quickly corrected him and said, "We do not have our birthday off" as a holiday, and to this remark Vokas responded, "You're correct" or that he "stood corrected" and that there were only six legal holidays.

From my evaluation of all the relevant testimony on this allegation, I have concluded that Vokas credibly denied stating in his March 30 talk that a birthday holiday would be put into effect. Other than Cannon, and I have discredited his version, no other witnesses for the General Counsel gave any reliable testimony as to any direct statement by Vokas wherein he granted or promised this birthday holiday benefit, and I am in agreement that the reason for their inability to do so is that Vokas did not grant or promise such a benefit, and I am in further agreement that their testimony consists of nothing more than unsubstantiated and mistaken assumption and conclusions drawn from the accidental and erroneous reference by Vokas to seven legal holidays instead of six, which statement was then immediately corrected by one of their own people.⁷

⁷ During the hearing several witnesses demonstrated the ease with which such an error could be made. Although the witnesses were aware that the six legal holidays were in issue, Gelliath could only name five, Cannon could only name four, and Heckel could only name three and did not "recall" if July 4 was a paid holiday, and Carl Bishop named only five. As explained by Vokas:

How many people in this courtroom would do the things as I did, try to name the holidays and not make a mistake?

In summary, the matter of paid holidays was raised by an employee. In fact, Cannon admitted he raised the subject of birthday holidays, and the best interpretation of all of the testimony concerning this matter is that after it was raised by Cannon, it was then only mentioned by Vokas when he attempted to list what he thought were the seven legal holidays, and in his confusion he said that maybe the seventh holiday was for birthdays, but he was quickly corrected by Cannon and then Vokas admittedly stated that he stood corrected, and as a result all in attendance knew fully well that there were only six paid holidays and, in the final analysis, no change or promise to change this policy was made.

The final allegation of paragraph 7 of the complaint is that on March 30 Respondent unlawfully granted an employee suggestion program.

Gail Gelliath testified that toward the end of the meeting on March 30, Vokas took a clipboard and a legal pad and informed employees that he was going to post it next to one of the offices, and it was going to be used as kind of a "suggestion box idea"—and if employees had any suggestions which would help to improve their work, to write it down and eventually it would be looked over. Gelliath stated that before this meeting there was "nothing formal" in writing down your ideas.

Herbert Cannon testified that at the meeting here in question, Vokas took a clipboard and with a nail put it on the wall next to the office of William Petrucz and then requested that employees note on the pad any items that were needed in the plant and also to note any suggestions they might have. Cannon said that before this time management had no formal procedure for receiving written suggestions from employees. Janis Heckel and Walter Blakeway gave similar testimony.

As to the allegation that Respondent granted employees a suggestion program, Vokas testified as follows:

So, about 7:00 o'clock the drivers arrived and the wrappers arrived, so we actually started the meeting around 7:00 o'clock.

Q. And then, what happened, what did you say?

A. Well, prior to that, since we had a little time, I did talk, since we had six new employees in the room, I did tell them about the Company, how I started the Company, so I would have a little pre-time wait for all of the other people to get into the meeting room. And that is when I spoke to them about the Company. Then, that is when I went into asking for suggestions on helping and how we could better increase productivity.

And that is the point where Mr. Cannon and Gail were asking me about baskets and also about a new freezer for more storage, and I said I have to apologize, I had forgotten about the baskets and the carts. That is when I said, "I'll try not to let this happen again, I will take this board." And I picked up this board and I put it against the wall. I felt that if I walked by that board every day, and if they would write this down on the board, I would look at it every day and take care of it. I put this board against the wall by the comptroller's office, which is right about there. [Indicating.]

Q. This was what kind of a board?

A. Regular clipboard.

Q. Where did you get it?

A. It was laying on the desk behind me.

Q. Did the employees use clipboards like that in the performance of their work?

A. Yes.

Q. Well, now, you put that up on the wall?

A. Right. I believe I put it right against the wall. I went in my office, I think, and got a nail and put the thing right on the wall so we could try to get these problems and suggestions out so we wouldn't forget them. Anything I had in the past didn't work, so that is why I put it on the wall.

Q. Were there some arrangements in the past for suggestions?

A. Well, the suggestion board in the lunchroom and also the suggestion box we had earlier in the lunchroom, the old lunchroom, didn't seem to work.

Q. After you put up the clipboard, what happened next, if anything.

A. I told everybody to write anything they had, any suggestions they had, down on this clipboard and I would follow through. And I would definitely order baskets immediately, and the dollies, and I would set up priority on getting more freezer space, which I did.

Q. Did you receive any other suggestions of any kind in improving production?

A. Somebody mentioned electric scale.

Q. Any others that you can think of right now?

A. No.

Plant Manager Bishop was in corroboration of Vokas, and as to this allegation Office Manager Brenda Cunningham testified as follows:

Q. In your six years of employment with the Company, had you ever had any meetings where Mr. Vokas asked for suggestions from you or other office employees?

A. Yes

Q. How often do these occur?

A. Well, we have a suggestion place where we can make suggestions. He is always asking for suggestions, if we have anything helpful or something, anything we are dissatisfied with, or whatever. We have a place where we can make suggestions.

Q. Where is that?

A. At this particular time?

Q. Well, let me direct your attention to early 1981, January-February, where was there a place then?

A. It was in what we call the lunchroom, where the employees go eat their lunch.

Q. What kind of place or arrangement is made for suggestions as of January-February 1981?

A. There is just a sheet that you can put suggestions on if you have any suggestions.

Q. How long had that been in effect?

A. Well, I would say it had been in effect for quite awhile. Before that, we had a suggestion box where we put suggestions in.

Q. And about how long ago was it that a suggestion box was in the plant.

A. Well, I'd say it was about, maybe four years ago.

Q. Then, there has been that place in the lunchroom where you could write down suggestions?

A. Right.

Q. Have you and other employees used that place where suggestions are written?

A. Yes.

Q. Were there any bulletin boards or any other locations where suggestions were made—could be written down?

A. Well, it was on a bulletin board in the lunchroom.

The General Counsel argues that the posting of the suggestion box clipboard by Vokas was not an innocent gesture—that clearly any suggestion program instituted by Respondent in the past had been discontinued or fallen into disuse, and Vokas' statements on March 30 apologizing to employees for forgetting their previous suggestions, indicates that he may not have always listened well in the past and his remarks also indicate a promise of sorts to change his ways. Moreover, maintains the General Counsel, the suggestion program announced by Vokas on March 30 involved the creation of a mechanism where none before existed, and as a result Vokas clearly hoped to deflect employee discontent about lack of equipment and other problems, and in establishing this program in the midst of a union campaign, Vokas sought to discourage support for the Union.

It appears to me that it has been well established on this record that for many years Respondent maintained a communication program with its employees consisting of conversations and meetings, both individually and in groups, and in maintaining bulletin boards and suggestion boxes in various locations in its original and present plants.

The record shows that in February Vokas had met individually with processing room employees to obtain their suggestions concerning the continuing production problems which were becoming more serious as business increased, and suggestions were made to Vokas in the February discussions as was true at other times. Two of the suggestions were that additional wire baskets and dollies be purchased, but Vokas had not followed through at that time because of construction and other problems. As pointed out, in the meeting on March 30, he again asked for suggestions as was his normal practice, and Cannon and Gelliarth suggested more baskets and freezer storage.⁸ Vokas then remembered that in

⁸ Cannon admitted that he had made suggestions many times concerning improvements in work flow in the meat processing room, and even testified regarding a written drawing that he had prepared for Vokas suggesting a work flow and equipment layout for the processing room.

February he had received suggestions for more baskets and dollies, but told employees he had forgotten about those items and then said he would try not to let that happen again. It appears that a regular clipboard used by employees in the performance of their work was on the desk behind him, and Vokas then picked up the clipboard and put it on the wall at the office of Comptroller William Petrucz. He then told the employees to write their suggestions on the clipboard and he would follow through. He also said he would order the baskets and dollies they wanted and would set up a priority on getting more freezer space.

Counsel for Respondent suggests, and I am in agreement, that asking employees to write down their suggestions on improving productivity on a clipboard instead of making them orally, or noting them on a sheet of paper, does not constitute an unfair labor practice. Gelliath admitted that most all of the other employees in the meeting, including the drivers and herself, used clipboards and there were clipboards in the office on March 30. She also confirmed that Vokas said they could write down suggestions so that he would not forget them.

Herbert Cannon recalled that on March 30 Vokas was writing suggestions down on a legal pad during the meeting when suggestions were being made, and Cannon himself suggested that various new equipment be obtained. He told Vokas that better communication with the front office was needed and he suggested that a bulletin board be put up to facilitate obtaining needed stock or supplies. At this meeting, Cannon also suggested that the bulletin board be placed in the meat processing room and, that in addition, there would be a clipboard for making suggestions while coming to work or while leaving at night. According to Cannon, the suggestions he made from time to time were to help production in the plant, and the clipboard had the same purpose. Cannon stated that suggestions were also made to Plant Manager Bishop, and Vokas had previously told the meat room employees that they should tell Bishop of their suggestions and to "write it down in the lunchroom or whatever space we had available at the time" and Bishop would forward it to Vokas.

As further indicated, Brenda Cunningham was also familiar with Respondent's practice of requesting suggestions from employees, and stated that in January, February, and March 1981, and prior thereto, a sheet of paper was placed on the lunchroom bulletin board so employees could write down their suggestions. It appears that the suggestion sheet in the lunchroom was put up several years ago to replace a suggestion box which had been removed, but prior to using the suggestion sheet there was a suggestion box in the lunchroom area where anyone could write a suggestion and place it in the box. Vokas said that the suggestion box in the old lunchroom and the suggestion sheet in the new lunchroom did not seem to work and that was the reason he substituted the clipboard and changed the location.

In the final analysis, this record reveals that the Company always had a system for receiving suggestions from employees and that the clipboard was not a new device designed to discourage employees in their union activities. Moreover, the General Counsel's witness Herbert

Cannon readily admitted this when he stated that some time ago he had prepared a written work flow chart that he showed Vokas in order to help production in the meat processing room, and that he had made many similar suggestions in the past to improve production. His testimony was that at the March 30 meeting he again suggested new equipment that was needed and mentioned that a bulletin board be put up and also a chalkboard he installed in the meatcutting room. As pointed out, Vokas said the reason he spontaneously took a clipboard from a desk and hung it on the wall was because employees had just reminded him of suggestions they had made previously for equipment to improve production, which he had forgotten about, and the purpose of the clipboard and pad was to ensure that he would not forget similar suggestions in the future. There is no testimony that the clipboard and pad, an item in common use normally displayed throughout the plant for many years, was granted or promised as part of an arsenal to shoot down union activities.

I will dismiss allegations alleged in paragraph 7 of the complaint on the basis that all such announcements and actions were consistent with Respondent's past practices and customs, or were motivated by business matters, or that there was lacking sufficient credible evidence to support such allegation.⁹

Turning now to the allegation that on April 1, 1981, Respondent unlawfully discharged Redling, Cannon, Gelliath, Heckel, Has, and Blakeway.

Background evidence as stipulated between the parties in relation to surrounding circumstances is contained in Joint Exhibit No. 1. In essence, as of March 31, 1981, the only issues remaining were the eligibility of two new employees and the election date, and the parties also had some differences as to whether they had agreed concerning the eligibility of part-time employees and the status of Frank Redling.

Anthony Hackenberg, the Union's counsel, and Raymond DeSantis, a business representative for the Union, met with several meat processing employees after their shift ended on March 30, 1981. The meeting took place in a van at a parking lot across the street from Respond-

⁹ It should be noted that all facts found herein are based on the record as a whole on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.* Furthermore, it should be especially noted that in several instances I have not credited the circumstances and events as recalled by Herbert Cannon in that his testimony, in areas where there was conflict, revealed considerable discrepancies and was also inconsistent at times, and not as convincing and straightforward as the witnesses for Respondent who stated otherwise. Janis Heckel maintained that she was never informed as to any benefits offer by the Company and that she never inquired about benefits. Moreover, additional aspects in evaluating witnesses have been set forth and are detailed herein, and in so doing I have generally credited Respondent's witnesses as from my observations they all gave straightforward and candid testimony to the best of their abilities.

ent's facility. The employees who participated were Gail Gelliarth, Janis Heckel, Herb Cannon, and Sareth Has.

It appears that each employee present at this meeting was asked by Hackenberg and DeSantis whether they would be willing to testify on the Union's behalf at the April 1 representation hearing and were instructed that their testimony at the hearing would be useful for the Union. Gail Gelliarth testified that Hackenberg and DeSantis requested her to be prepared to offer evidence on the setup of Respondent's warehouse operation, her job classification, how orders were processed and sent out, as well as the coordination of her work with that of the warehousemen. Herbert Cannon, a meatcutter, was requested to testify about the meatcutting operation, his job duties, and more specifically Respondent's sausage making function. Janis Heckel was requested to give testimony on her job duties as a meatwrapper, and Sareth Has, a meatcutter, was asked to attend so that he could describe the meatcutting operation and the amount of production involved. During this union meeting with four employees on March 30, 1981, it was also decided that employees Frank Redling and Walter Blakeway should also be requested to provide testimony at the hearing. Frank Redling was the leadman in Respondent's meat processing room, and was knowledgeable about the operation of the meat room and the process of ordering uncut meat, and Redling had more contact than any other employee with Jerome Vokas and top management, and as a leadman the issue of Redling's possible supervisory status might have arisen at the hearing. It was decided to ask Walter Blakeway to testify about Respondent's delivery and warehouse operations. Blakeway and Redling were to be contacted the next day.

As indicated, the import of the union meeting of March 30 is that the six employees here involved were requested by the Union to attend the representation case hearing at the Board's Regional Office on April 1, and to be prepared to offer testimony, and each was instructed as to the general nature of the testimony they might be called on to give, and although Redling and Blakeway did not attend the meeting, they were told the following day that the Union had requested their presence at the hearing.

This record shows that on the morning of March 31, 1981, Frank Redling spoke with Plant Manager Bishop in the meat processing room. Redling told Bishop that certain employees were scheduled to go to the Labor Board the next day and gave Bishop a sheet of paper (R. Exh. 6), and Redling then gave Bishop notice that the employees involved would not be at work the next day during the hours of the hearing. Redling testified that he also told Bishop that he expected the hearing to end by noon or 12:30 p.m. and, as leadman, he was willing to bring the processing crew back to work afterwards to finish the work scheduled for that day.

After speaking with Redling, Manager Bishop reported to Vokas the text of their conversation and gave him Respondent's Exhibit 6. Vokas then decided to call a meeting of employees, and at the end of the workshift Vokas announced that all employees planning to attend the April 1 hearing should report to the conference room. Thus, at 3 p.m., Redling, Gelliarth, Cannon,

Blakeway, Has, and Heckel came to the meeting. Also in attendance were William Petrucz, and Greg and Gene Pomas—the latter two employees had recently been hired by Respondent and an issue had arisen during discussions between the parties as to whether they should be included in the unit.¹⁰

Jerome Vokas began the meeting by stating that Carl Bishop had given him a flyer (Vokas was referring to R. Exh. 6), and stated that he understood certain employees had been called to testify at the Board hearing the next day. Vokas then read a written statement to the employees. In so doing he stated that they would not be permitted to leave work to attend the hearing unless they had subpoenas because their absence would close the plant down, but they would be permitted to choose one of their number as a representative who would be allowed to attend the hearing. Vokas further said that he could not allow production to be stopped, and that if all the employees left to attend the hearing, without subpoenas, they would be discharged and not rehired.

As pointed out, aside from reading his statement, Vokas asked the employees present whether they had subpoenas to attend the hearing, and they responded that they did not have subpoenas, but the Union had requested they attend. Frank Redling then said that their plans were not definite and he would contact the Union again and report back.

The meat processing employees reported for work on April 1, 1981, at their normal 6 a.m. starting time. Sometime shortly after the shift began Frank Redling spoke with Manager Carl Bishop and asked Bishop if he had a response from Vokas concerning what he had told him the previous day as to the Board hearing, but that Bishop shook his head to indicate that he had no reply.

Walter Blakeway testified that when he came to work on April 1 he was told by Cannon and Redling that the Union still wanted the six employees to come to the hearing and there would be subpoenas waiting for them when they arrived downtown. Blakeway then proceeded to report to Bishop that he would be leaving work with the others, and asked Manager Bishop whether Vokas knew they would be leaving and if all was "all right." He testified that Bishop responded that everything was "O.K." It appears that Bishop then assigned Blakeway to work in the warehouse putting up customer orders, and he put Robert Vittel, another driver-warehouseman, on Blakeway's delivery truck.

Blakeway and the meat processing employees here involved continued to work until approximately 8:30 a.m., but as they were preparing to leave for the Board hearing they were called into the lunchroom by Vokas. In attendance at this meeting were Gelliarth, Cannon, Redling, Has, Blakeway, and Heckel, as well as Jerome Vokas, Leonard Vokas (Respondent's vice president), Carl Bishop, and William Petrucz. Jerome Vokas then proceeded to read the same written statement he had read to the employees at the meeting in the conference room the previous night, as aforesaid. The employees were again told that they could not leave work without

¹⁰ See Jt. Exh. 1.

subpoenas except that a single employee could attend the hearing as their representative, and if they left they would be discharged and not rehired. The employees responded that they had subpoenas, but when Vokas asked to see the subpoenas he was told that the Union had instructed the employees that they would be served when they came downtown to the Board. Cannon and Redling testified that at some point in the discussion they told Vokas that the six employees involved were willing to return to work after the hearing, and this testimony was corroborated by Walter Blakeway.¹¹ Vokas then read the written statement he had previously made, to warn employees that they would be discharged if they left to go to the hearing. Cannon informed Vokas that he believed the employees would be in contempt if they did not go to the hearing. The employees here involved then proceeded to punch out their timecards and leave the plant. Vokas collected the cards as they were punched, and all six employees were discharged.

Upon leaving the plant, the employees drove directly to the Board Office in downtown Cleveland, and when they arrived they were served with subpoenas by Anthony Hackenberg. But the representation hearing was not held on that date as the RC case was blocked by the filing of the instant charge. About April 1, 1981, a picket line was formed and set up, and the employees from then on engaged in a strike against Respondent.

The General Counsel has alleged that the six employees were discharged by Respondent in violation of Section 8(a)(3) and 8(a)(4) of the Act. This allegation is based on two theories. First, the employees were discharged for attempting to exercise their protected right to offer testimony to the Board; discharge stemming from such union and/or protected activity has been held unlawful by the Board in the past in similar situations. *Earringhouse Imports*, 227 NLRB 1107 (1977) (hereinafter *Earringhouse*). Secondly, the alleged discriminatees were subject to disparate treatment by Respondent who sought to remove, in one broad stroke, all known union supporters from his business.

The General Counsel argues, as stated by the Board in *Earringhouse*, that a proper accommodation must be made between an employee's right to attend a Board hearing during working hours and an employer's legitimate interest in operating his business without disruption; that in *Earringhouse* the Board weighed the evidence and, through use of a balancing test, found that the discriminatees therein had been discharged in violation of Section 8(a)(4) of the Act; that the discriminatees in *Earringhouse* had informed their employer that they wished to attend a Board hearing concerning a representation petition—and that in the instant case, on the day before the hearing, Vokas gathered the employees in a meeting and read a statement to them that they did not have permission to attend the hearing but could select one representative to go in their behalf; that the employees then contacted a union representative who told them that although it was too late to subpoena the employees, their testimony might be necessary and the Act protected

¹¹ Witnesses for Respondent specifically deny that such statement to return to work after the hearing was made.

their right to attend the hearing. Moreover, maintains the General Counsel, in *Earringhouse* employees reported to work the next day but signed out in the morning to attend the Board hearing, and left at 9:25 a.m. and returned at 1 p.m. to finish their work, but several hours later they were notified by the employer that they had been discharged, and the record also indicated that during the time the 13 *Earringhouse* discriminatees were at the hearing, the employer's warehouse operation was virtually stopped.

The General Counsel further argues that the facts of the instant case are far more compelling than those in *Earringhouse*—that the discriminatees in the latter case were never requested by the union to offer testimony at the hearing nor were they called to testify although some provided assistance to the union's representative, but in the instant matter the discriminatees were specifically requested by the Union to appear and testify at the hearing, and the Union prepared those potential witnesses with respect to the issues they would be asked to address in their testimony; that the *Earringhouse* discriminatees were never subpoenaed by any party to the hearing and they informed the employer that they wished to attend because their interests were at stake. However, the discriminatees in the instant case were not informed that they would be denied permission to attend by Respondent until the night before the hearing—that it was not until the meeting of March 31 when Respondent told them that they must have subpoenas in order to leave work, and that the employees then immediately contacted the Union, and Raymond DeSantis told the discriminatees that they were still requested to attend and that the Union would serve them with subpoenas.¹²

The General Counsel further maintains that it was necessary for the six employees here involved to attend the Board hearing pointing out that, as Joint Exhibit 1 indicates, there were extensive discussions between the parties prior to the hearing for the purpose of arriving at a stipulation, however, a number of issues were still unresolved on the eve of the hearing. The parties agree that there had been no resolution of the issues concerning the eligibility to vote of employees Greg and Gene Pomas as well as the date of the election. Furthermore, the record indicates that Respondent's counsel informed the Board agent on March 31, 1981, of changes he wished to make in the proposed commerce statement and unit description, and the Board agent was unable to contact the Union to solicit its position on these changes. Thus, on the eve of the hearing, no stipulation had been signed and the parties had not resolved some major issues.

In summary, the General Counsel argues that, under the balancing test enunciated in several cases, Respond-

¹² The General Counsel points out that in practical terms there was no way that DeSantis could serve the discriminatees with subpoenas prior to the time they were required to leave work in order to attend the hearing; that the Board Office would be open too late on the morning of April 1 for the Union to request and procure subpoenas from the Regional Director, but the time factor would not have been a problem had Respondent notified employees earlier that they would need subpoenas to attend the hearing. As a result, DeSantis informed the discriminatees that he would procure the subpoenas and serve them the next morning when they arrived at the Board.

ent's only defense in discharging the discriminatees must rely on whether it can demonstrate that its conduct was justified by a legitimate interest in operating its business without disruption, and the substance of Respondent's economic defense is that its business was expanding rapidly at the end of the first quarter of 1981 and an increasing backlog of customer orders would have been severely aggravated by the loss of production scheduled for April 1. However, according to the General Counsel, the exhibits and the date in this record indicate that, contrary to Respondent's assertion, orders were being received more rapidly by customers as the time for hearing approached and, in addition, the continued decline of the backlog after April 1 demonstrates that no adverse consequences were experienced immediately after the discriminatees attended the hearing and were discharged.

The Union cites *Newland Knitting Mills*, 165 NLRB 793 (1967), and *Walt Disney World Co.*, 216 NLRB 836 (1975), and argues that although these cases involved subpoenas that were actually delivered to the employee-witnesses, counsel for the Union in the instant case could locate no cases indicating that such actual delivery was always necessary. Counsel for the Union further argues that Respondent's attempt herein to establish a legitimate business justification for its conduct rested on the bare assertion that its meat processing department would have been shut down and that it was in a period of time during which Respondent was allegedly experiencing a substantial sales increase simultaneously with an increasing backlog in deliveries and a "doubling" of mistakes in putting the customers' orders together. But the substantial evidence on the record showed that the alleged sales increase, backlog growth, and packaging mistakes were mere pretexts and that any effect on production was de minimis. Moreover, argues the Union, the alleged economic disruption triggered by the leaving of six employees for the Board hearing was de minimis at most, and more likely pretextual for several reasons—that the testimony by Frank Redling conclusively demonstrated that there was only enough uncut meat in the cooler, when the employees left, for about only one more hour of work in the meat processing department and that he knew of no other meat shipments expected that day. And the record also showed that the meat processing department did not, in fact, shut down after the employees left because Gene Pomas, Frederick Schmidt, Don Shulan, and pinch-hitting Carl Bishop were available to continue processing the meat—more importantly, the uncontroverted testimony of Carl Bishop and Brenda Cunningham revealed that by rescheduling some of the deliveries, originally set for April 1, 1981, the Company was able to make all the other deliveries scheduled for that day and completely caught up on deliveries by April 2, 1981. This ability to recoup within 1 or 2 days, via rescheduling, was consistent with the Company's past record in compensating for the plant stoppage caused by the annual Christmas party and Respondent's first ever compensation for the plant shutdown on Good Friday 1981. Further, the staffing of the meat processing room also indicated that Respondent's bare assertion of production losses was mere pretext. Thus, as pointed out by the Union, it is curious to note that despite the alleged

near doubling in gross dollar amounts of sales between January and March 1981, the Company hired only two new meat processing employees after discharging three meatcutters and two meatwrappers on April 1, 1981. Counsel for the Union also maintains that the gross dollar sales figures cited by the Company are misleading because they were not adjusted for inflation and higher amounts could mean, inter alia, that customers were ordering higher priced cuts of meat or expensive appliances and not necessarily that more meat orders were coming or that the meat processing backlog was growing.

Counsel for the Union also argues that Respondent's attempt to further buttress its economic defense by conjuring up a growth in packaging mistakes "just will not wash"—first, as a percentage of sales, the number of mistakes remained substantially the same from January through March 1981 because as sales nearly doubled in gross dollar amounts the number of mistakes also doubled; secondly, the unrefuted testimony of Carl Bishop clearly established that the vast majority of these packaging mistakes were being made by the warehouse staff, and not meat processing personnel.

The Union also lists some miscellaneous factors which it maintains also severely undercut Respondent's attempt to establish a legitimate business necessity for its conduct—such as stopping production on March 30 for a meeting with employees, releasing employees at noon on Good Friday, no evidence of lost customers or complaints caused by the events on April 1, brushing aside the discharged employees' proposals to return to work after the hearing, and no consideration of any penalty less than discharge.

In summary, according to the Union, under the balancing test, the totality of the circumstances in the instant case are compelling and clearly swing the scale in favor of protecting the employees' exercise of their statutory right under Section 8(a)(4) to attend and participate in Board hearings, even without a subpoena on their person and even assuming arguendo that Respondent had established a legitimate business necessity for objecting to their participation during working time. Moreover, the employees were not coming to the hearing as mere spectators but as witnesses, and at the time the employees exercised their rights and left the plant, there was no agreement to a stipulation for a consent election and at least four outstanding issues remained that the Union felt duty bound to be prepared for at the end of the hearing.

The Union further argues that congressional intent should also be added to the employees' side of the scale for two reasons—first, Congress obviously placed a high enough regard on keeping open the employees' access to the NLRB to enact a specific section of the Act—Section 8(a)(4)—to protect it. The Board should therefore avoid constructions of that section that reduce that protection, especially in light of the Supreme Court's admonition that the approach to that section should be a liberal one. *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972).

Secondly, Congress' enactment of the election bar in Section 159(e)(2) of the Act impliedly sanctions a broader exercise of the employees' right to participate in "RC"

hearings, than perhaps other Board proceedings. Since Congress has guaranteed the employer a 1-year repose, after the disruption of his work place inherent in a union organizing drive, employers know that employees will only be pulled out of work, at most, once a year for testimony at RC hearings; and, therefore more leeway should be accorded the employees' exercise of Section 7 and Section 8(a)(4) rights to attend such hearings because they are potentially less disruptive than unfair labor practice proceedings and Congress has already adequately protected the employer's economic interests via that 1-year repose.

To fully understand the rapid development of Respondent's operations and the continual increase in its business operations, it is necessary to set out here additional background testimony.

Respondent was originally started in 1962 as a hotel-restaurant institutional type of company by Jerome Vokas, its president. Originally Vokas began by selling meats and other food products from the trunk of his automobile, but a retail store was opened in Garfield Heights and the business remained at the location until about 1973. Later, the retail store was closed and the premises were devoted to meat processing and warehousing.

In 1969, Vokas became a franchise for the Rich Plan Corporation. It appears that the Rich Plan is the nation's largest and oldest "direct-to-the home" food company. The Rich Plan provides Vokas with grade A, certified premium, high quality products such as frozen vegetables, juices, pastry, poultry, fruits, and seafoods. The Rich Plan provides Vokas with all direct selling presentation material which includes sales tools, incentive program, sales tapes, and specifications of products.

Through the Rich Plan Vokas is also able to sell a very high quality freezer, Litton microwave ovens and all other Litton products, and Kitchenmaid dishwashers and other appliances. By 1969, Vokas had about 1500 freezer customers who were demanding more product. In 1973 he built new facilities at its present location in Bainbridge, Ohio, and the business continued to grow. Volume increased by \$400,000 in 1978, by the same amount in 1979, and in 1980 total volume was increased by \$1,080,000.¹³

In 1980, it also became necessary to get additional space again and 10,000 square feet of warehousing and meat processing space was added to the Chagrin Falls facility as well as a 3000 square foot addition to the sales department.

Concurrently, with the completion of the additional facilities at Chagrin Falls, steps were taken by Respondent to expand its sales organization and the area which it served. Sales offices were established in Ashtabula, Painesville, Elyria, New Philadelphia, and Youngstown, and two additional offices were opened in January in Toledo and Delaware, Ohio. It appears that the opening of the Toledo and Delaware offices helped to create ad-

ditional growth in January, February, and March 1981, and in 1981 Respondent's sales increased by another million dollars.¹⁴

Further background evidence reveals that all of Respondent's products are sold to the customer frozen, but the transition of the addition and renovation of the processing facilities and renovation of the inner office caused problems in getting the fresh cut meat products processed and frozen properly. Vokas has always delivered all meats frozen, which is the foundation upon which it built its complete food service, and he also made sure that a high quality meat, whether it be beef, veal, lamb, or pork, was available to start with—the meat product is then blast frozen in order to retain all the natural juices.

Vokas further testified that as a result of the 10,000 square foot addition in 1980, substantial changes were made in the meat processing room, and the meat room was enlarged to twice its previous size and more freezer space was established.¹⁵ Moreover, the increase in the size of the meat processing room and freezing facilities caused the Company to hire additional employees in an effort to keep up with increased sales. Carl Bishop testified that when he was hired in April 1980 the employees in the meat processing room consisted of Gail Gelliarth, Frank Redling, Herb Cannon, and Willie Buchanan. Janis Heckel began working for Vokas on October 30, 1980. However, as pointed out, periodically additional employees were added in attempts to keep up with the increase in sales. Walter Blakeway, a truckdriver, was hired on December 18, 1980, and in January 1981 Gene Pomas was hired as a meatcutter and Greg Pomas was hired as a truckdriver and warehouse helper. Robert Vittel was hired in January 1981 as a warehouseman-driver. Terrance Murray and Charles Murray were hired on March 1, 1981, as warehouseman/driver and as a driver, respectively. Sareth Has was hired as a meatcutter in February 1981, and during the same month Herbert Cannon was rehired. Frank Redling had initially been hired as a part-time meatcutter, but by January 1981 he was the full-time processing manager and also worked as a meatcutter.

Vokas testified that as a result of the establishment of additional sales locations and the efforts of an increased number of salespersons, sales increased in February and March over the sales in January. In the first quarter of 1981, Vokas brought its independent sales agents up to a total of 50, and this meant an addition of approximately 15 independent sales agents. The 50 independents were in addition to the sales employees who worked at the Chagrin Falls facility, and the establishment of the Toledo and Delaware sales offices also caused an increase in sales activity. Vokas stated that in January 1981, total delivered food volume alone (not counting service agree-

¹³ Gail Gelliarth was employed in October 1979, and testified that from the time she first started she was aware sales had substantially increased and it was evident in April that orders increased every day. Carl Bishop testified that sales continued to climb and that there was a continual increase from April 1980 through March 1981.

¹⁴ Walter Blakeway testified on cross-examination that he delivered in a lot of counties—anywhere from Toledo to Ashtabula and down south to Akron, Canton, and New Philadelphia. His territory was "all over." Indeed, the deliveries that were not made on April 1 were destined for Mansfield, Loudonville, Gnadenhutten, and New Philadelphia, all well south of Cleveland towards Columbus.

¹⁵ The Chagrin Falls facility is the only location where meat was processed for Vokas' continually growing sales in an expanding area. Vokas does not have any other locations for warehousing or freezing.

ment or appliances) was \$123,391.88. In February 1981, total delivered food volume increased to \$139,459.07, and in March 1981 total delivered food volume increased to \$193,504.92.¹⁶

Moreover, the sales reports (R. Exhs. 24, 25, and 26) reveal that, in January 1981, 30 freezers were sold, 6 microwave ovens and 1 dishwasher were also sold, and in the same period 24 independent sales agents made new sales—in February 1981, it was 36 independents who made new sales, and in March 1981 it was 38. It is pointed out that with these increased sales, as well as an increase in food customers, and with new employees on the job—all such factors caused numerous problems in

getting meat products processed and frozen properly—employees were not able to keep up with the orders coming in and Respondent was constantly falling behind in production and Vokas began running a backlog of orders which had been received from customers but had not been delivered. From January to March 1981, the backlog increased because meat processing employees could not keep up with the orders that needed to be processed.

The food that was actually delivered during the 3-month period here in question (see R. Exhs. 24, 25, and 26) shows the following:

	<i>Orders Received</i>	<i>Orders Delivered</i>	<i>Backlog</i>
Jan.	\$136,928.04 (RX 22)	\$123,391.88 (RX 24)	\$13,536.16
Feb.	144,988.32 (RX 22)	139,459.07 (RX 25)	5,529.25
Mar.	210,896.47 (RX 22)	193,504.93 (RX 26)	17,391.54
Totals	\$492,812.83	\$456,355.88	\$36,456.95

The foregoing totals do not take into consideration any backlog that was carried over from December 1980, and obviously, as pointed out, the continued running of a backlog had to be remedied if Respondent's growth was to continue.

Counsel for the Company also points out that, in addition to a constantly increasing backlog of orders that were not being processed, there was also an increasingly serious problem of mistakes being made in putting up orders—that the mistakes involved putting too much on an order, or putting the wrong frozen product on the order. Brenda Cunningham was responsible for maintaining records of these errors and for dealing with customers concerning them. Sometimes she would find out about the error through the driver, but usually it was from the customers, and on occasions a shortage slip would be issued. It appears that the shortage slip was signed by the customer and was turned in to Office Manager Cunningham by the driver. On the following day Cunningham recorded all orders that had been delivered and made a list of all shortages and overages. Respondent's policy is that if the error involves \$20 or less a refund check is sent to the customer if the customer agrees to accept the refund. If the customer does not agree to a refund or if the error involves more than \$20 the missing "balance" is scheduled for redelivery. The refund book (R. Exh. 1) lists the refunds that are made to

customers, and the number of balances and redeliveries are recorded in the scheduling book. These records were summarized in Respondent's Exhibit 12 as follows:

	<i>Jan.</i>	<i>Feb.</i>	<i>Mar.</i>
	<i>Refunds</i>		
Mistakes	52	28	50
Value	\$607.12	\$310.14	\$496.72 (RX 12)
	<i>Balances or Redeliveries</i>		
Mistakes	45	35	78
Value	\$900.00	\$700.00	\$1,560.00

Turning now to my final conclusions regarding the April 1 discharges. While employees have a statutorily protected right to file and support unfair labor practice charges and objections, they do not have a statutorily protected right to leave work without permission, thereby disrupting production, at least in the absence of having been served with a subpoena. As the Board has noted, "a balancing of the employee interest in protecting each other against the employer's interest in efficiently operating his business is required, and the securing of permission is an important element in making the balance." *Supreme Optical Co.*, 235 NLRB 1432, 1433 (1978).

As pointed out, an applicable decision by the Board is *Standard Packaging Corp.*, 140 NLRB 628 (1963). In *Standard Packaging* an employe who had filed a decertification petition requested a leave of absence for himself

¹⁶ This information comes from the monthly sales reports submitted by Vokas to its franchisor, the Rich Plan—see R. Exhs. 24, 25, and 26. These reports are required because Vokas pays a premium to the Rich Plan upon establishing new sales under its franchise agreement. There were a total of 117 new customers in January 1981, 132 in February, and 152 in March 1981. Indeed, these reports show a continuing progression of an increased number of new customers, 117 to 132 to 152, and a total of new customers alone of 401 during January, February, and March 1981. It must also be noted that these are new orders that were delivered to the customer during the month covered by the sales report. The General Counsel points to R. Exh. 21 and argues that the date contained therein indicates that the average elapsed time between the taking of an order and its delivery to the customer during the week of February 2-6 was 8.1 days—during the week of March 2-6 this figure increased to 9.9

days, and that these first two figures seem to corroborate Respondent's contention. But between March 25 and 31, 1981, the week before the Board hearing, the average dropped to 9.3 days and in the period April 2-9, it declined even further to 9.1 days. Therefore, according to the General Counsel, if an increased backlog occurred, as contended by Vokas, it developed at a later time and only because of Respondent's spiteful and cynical discharge of six employees. From the above, I think it sufficient to merely note that there might well be certain differences in the average elapsed time between taking in an order and its delivery, but this factor does not subtract from the overwhelming evidence in this record that during the critical periods Respondent was expanding rather rapidly and adding new customers at quite a consistent rate, and as a result there were increased demands on its meat processing employees and they were well aware of it.

and three other employees to testify at the Board hearing. The employer granted permission to the petitioner and agreed that he could take only *one* additional employee, and this limitation was then made known to the two other employees who were interested in attending, but they were instructed to report for work on the following day. Despite their employer's refusal to grant permission to be off work, the two employees decided to go to the Board hearing anyway and as a result they were discharged the next day.

In *Standard Packaging* the Trial Examiner found no violation of Section 8(a)(4) of the Act. The Board affirmed and found no evidence in the record which indicated any hostility on the part of Respondent toward the union activities of its employees. The Board noted:

So far as the events leading to the discharges in issue are concerned, Storms and Murray were under no subpoena to appear at the decertification hearing. Nor was any real need for their appearance at the hearing otherwise demonstrated to Respondent at the time their release was requested or at any later date before their discharge.

The Board found that Respondent's refusal to release the two employees was not motivated by any desire to interfere with the Board's processes or with any rights that the complainants may have had to attend the Board proceeding. The Board also noted, as is true in the instant case, that there had been no prior notification to the Regional Director that any witnesses were needed nor did the Union's attorney initiate any contact with Respondent to request the presence of witnesses. The Board further stated that *Standard Packaging* presented the problem of accommodating the rights of employees with the rights of an employer to regulate its production requirements and maintain discipline over its employees. The Board ruled that there was no violation of the Act—that the record supported Respondent's reliance upon its work schedule for its refusal, and that the discharges were motivated solely by the absence of the employees from work in disregard of orders.¹⁷

Another earlier decision is *Item Co.*, 113 NLRB 67 (1955). There two employees received subpoenas to attend a Board election hearing which was also scheduled for April 1. The employer granted permission only to one of the two to attend stating that only one could go at a time. One employee attended on April 1. Two days later, both employees left work and went to the hearing. The employee who did not have permission was discharged even though he had a subpoena. The Board found that there was no violation of the Act since respondent there only attempted to schedule the attendance of employees so that its business operations would not be seriously interrupted.

To a considerable extent the General Counsel in the instant case relies on *Earringhouse*, supra. In this case the resolution of the dispute required the making of a proper

accommodation between an employee's right to attend a hearing during working hours, and an employer's legitimate interest in operating his business without interruption.

In *Earringhouse* the Board noted that upon a proper construction of Section 8(a)(4) an employee may not lawfully be discharged after participation in any Board proceeding during his regular working hours (a) where an employer can establish no business necessity justifying a requirement that the employee stays on the job or (b) where a business justification is established but which in the particular circumstances is not on balance sufficient to overcome the employee's assertion of his right to attend or participate. In applying these guides the Board found that the employer in *Earringhouse* failed to establish either that any valid reasons existed to support legitimate fears on its part that the employees' absence would cause any consequential business or economic loss, or that their absence did in fact cause such loss.

However, in *Earringhouse* there was no evidence that the employer ever told the employees or otherwise claimed that fear of serious business or economic consequences lay behind the forbidding of employees to leave work so they could attend the hearing. All the employer stated was that they "wanted production to continue and the business to go on." I am in agreement that in the instant case the opposite is true, and in addition the employees themselves were well aware of the plant expansion in new facilities, the increasing sales, the increased number of employees, and of Respondent's numerous production problems which had been the subject of talks and meetings by Vokas in January, February, and on March 30, 1981, as fully detailed earlier. Moreover, from such discussions it was well known to them that the processing room was the bottleneck, and on March 31 and April 1 it is clear that Vokas based his refusal on the interruption of production in the meat processing room which he could not allow to happen—in fact, March 1981 had been the month in which Respondent had the largest sales during the history of the Company, and in order to get deliveries to the customers for the purpose of preventing further backlogs, and to enable salespersons to collect commissions to which they were entitled, he could not agree to an interruption in meat processing.¹⁸

In *Earringhouse* the Board also relied on an offer by employees to make up lost time, and the General Counsel attempted to develop a similar issue in the instant case. However, the inconsistent and vague testimony of the General Counsel's witnesses on this issue cannot support a finding of any offer to make up lost time. Indeed, Redling told Plant Manager Bishop on April 1 that the employees "would not be working there." In any event, even if this offer had been made it could not have been in good faith. As pointed out, employees were already working overtime and on Saturdays—Walter Blakeway admitted he had worked as much as 70 hours in a work-

¹⁷ As noted by Respondent, *Standard Packaging*, supra, involved a plant of 195 employees. The two absences would have had an extremely small effect (1 percent of the work force) compared with 6 of 12 full-time employees here.

¹⁸ On cross-examination alleged discriminatee Walter Blakeway admitted that in their meeting on March 31, 1981, Vokas told them he could not let them go to the hearing because "he couldn't afford to have the meatcutting room shut down."

week. Quite clearly there was no time left in which to hardly make anything up, and illustrative of the inconsistency of witnesses for the General Counsel is testimony that there was very little meat for employees to work with on April 1, but yet they allegedly agreed to come back to perform work. This is an obvious self-contradiction.

A third issue mentioned by the Board in *Earringhouse* is that the employees were not discharged until after they returned from the Board hearing and 2 hours before their quitting time, and that such sequence did not show any concern about an adverse effect upon production. Here, however, such production concerns had been shown continually, as detailed previously herein, and especially on March 30 and 31 and April 1 during talks by Vokas. Additionally, it is clear that Vokas was concerned not only in operating his business without disruption due to demands of increased sales, but also with his legitimate right to control absenteeism and maintain discipline—the employees involved did not have subpoenas in hand and he did not think he could have employees walking out of his plant, and he further informed them that this would cause an economic loss to Respondent.

The Board's recent decision in *Supreme Optical Co.*, supra, is also relevant inasmuch as in this case the employees involved had received permission from their immediate supervisor to attend an unemployment compensation hearing, but notwithstanding such permission they were disciplined for their absence. The Board found a violation but stated at fn. 9:

This is not to say that we would necessarily reach the same result if advance permission to be absent had not been sought and secured, *since a balancing of the employee interest in protecting each other against the employer's interest in efficiently operating his business is required and the securing of permission is an important element in making the balance.* [Emphasis added.]

The Court of Appeals for the Sixth Circuit enforced the Board's Order there for the reason that an employer could not lawfully fire an employee for absence from work when they had been given permission to be absent. However, in the instant case the six employees were refused permission to leave work on two specific occasions, and in accordance with the above, this refusal becomes an important factor in balancing the employee and employer interests and rights in the instant case.

As further indicated, another Board's recent decision on this issue is *Nestle Co.*, 248 NLRB 732 (1980). There it was contended that the employer's threat of discipline to employee Larson if she went to the Board office to furnish evidence in support of the Union's charges and objections was a violation of the Act. The Board adopted the following finding and conclusion by the administrative law judge (248 NLRB at 740):

I must conclude, however, that Parker's threat of a written warning to Larson related not to the fact that she was scheduled to give testimony to the Board, but to the fact that she intended to leave work without permission in a group so large as to

interfere with Respondent's production. While employees have a statutorily protected right to file and support unfair labor practice charges and objections, *they do not have a statutorily protected right to leave work without permission, thereby disrupting production, at least in the absence of having been served with a subpoena.* As the Board has noted, "*a balancing of the employee interest in protecting each other against the employer's interest in efficiently operating his business is required and the securing of permission is an important element in making the balance.*" [Emphasis added.]¹⁹

In final summary, and in making a balance of interest determination here, there can be no question that production matters were of prime concern to management because of the increase in customers and the employees were continually and fully informed regarding these matters and suggestions asked for and received, in groups and individual meetings, in efforts to better their needed production and to reduce mistakes.

It must be further noted that on April 1, 1981, on the critical day here in question, orders and deliveries were scheduled to New Philadelphia, to Loudonville, and to other places and had to be rescheduled for delivery on April 2.²⁰ Obviously future orders from customers could not be processed when such a large percentage of processing room employees were gone without rearrangements of other employee schedules, which, in fact, was done in order to keep production going, as aforesaid. Moreover, there is no credited testimony showing any offer to make up the day's work, in any event there was little time to do so, and about the only alternative would have been more overtime at increased cost to Respondent, and taking discharge action to support Respondent's right to operate its business, to continue production, and to maintain discipline, was also necessary to retain control of the plant and especially so when the employees here did not have permission to leave work, and, in fact, had twice been specifically informed and warned not to do so.

This record also clearly reveals that none of the employees involved, nor the union representatives, gave any serious consideration to Respondent's production problems or the need to keep the plant going. As pointed out, not one of the involved employees requested permission to leave work to go to the hearing. Instead, they just told Bishop that they planned to be gone and would not be at work. At the meeting on the morning of April 1, 1981, very similar to the meeting on the previous day, Vokas stated that he understood the employees were all leaving at 8:30 a.m. to go to the NLRB hearing. He said he could not allow this to happen because he needed the production and could not allow the processing room to be closed, but then told them if they had subpoenas they

¹⁹ It is noted that there were over 330 employees in the bargaining unit involved in *Nestle*, and the absence of one employee would have had an infinitesimal effect on production as compared with the effect on Respondent's meat processing room operations in the instant case by the absence of over 50 percent of the full-time employees working there.

²⁰ See R. Exhs. 14 and 15.

would be able to go, and he asked if they had any, and when he then asked to see the subpoenas, no one produced any. Instead, one or more of the employees replied that they had subpoenas waiting for them downtown. Vokas then again told them they could choose *one* of their group and he would give that person permission to go even though he did not have a subpoena, but he could not allow everyone to go. At this time none of the employees had been actually subpoenaed to testify although the Union had an ample opportunity to do so. It also appears that there never was any serious issue about including meatcutters, wrappers, drivers, and warehousemen in the proposed bargaining unit, but *more importantly* none of the employees informed *management why* they were going to the hearing, and neither Blakeway nor Redling had any direct contact with the Union before making their decision to attend. Finally, Respondent's offer to allow one employee to attend without a subpoena was not even discussed with any union representative. As pointed out, it was the employees themselves who discussed that offer and it was the employees themselves who rejected it on the basis that all six supposedly could give "valid" testimony at the hearing.²¹

In the final analysis, this record merely shows that subpoenas were served on the employees *after* they had been discharged for insubordination—*after* they had left Respondent's premises without consent or permission in violation of strict instructions not to do so—and only *after* they had arrived at the offices of the Labor Board. Moreover, the credited testimony of Vokas reveals that had the employees been served subpoenas, on or by the time of the morning meeting on April 1, 1981, they then would have been permitted to leave the plant. It is also noted that most of the cases relied on by the General Counsel and the Union show circumstances wherein either the employees had actually testified, or they were subpoenaed beforehand, and, therefore, these cases are readily distinguishable of their facts from the instant case.²²

In essence, the employees in the instant case insisted on attending a Board hearing during working hours and did so in the face of Respondent's explicit prohibition against their leaving work because of needed production requirements, and further without demonstrating to Vokas any substantial reasons for attending the hearing. There are also reasons in this case, as has been noted, for finding that the employees' attendance at the hearing was not in any realistic sense at all necessary. In the first place, the employees had not yet been actually subpoenaed

and thus were under no compelling legal obligation to attend, and secondly, as I have emphasized, the employees in the instant case were discharged for leaving work contrary to express orders not to do so, rather than for going to the hearing. Additionally, the employees' interests were represented at the hearing by their union and its counsel at all times. In circumstances such as these, I fail to see how any statutory purpose would be served by holding that the employees were protected by the Act in leaving work to attend the hearing in defiance of Respondent's order that they stay on the job, and especially so in the presence of a rapidly growing business, and also strong evidence by management of actual and probably consequential economic loss of serious business disruption and production resulting from their absence.

Under the controlling circumstances here, and balancing the interest of the alleged discriminatees with the interest of Respondent, I am unable to conclude that the Company violated Section 8(a)(4) of the Act.

The General Counsel and the Union further maintain and argue that the discharges were also in violation of Section 8(a)(3) of the Act as they resulted from union animus and disparate treatment on the part of Respondent—that Vokas knew who the union supporters in his plant were when the six employees stated that the Union had requested them to come to the Board hearing, and although willing to release employees and halt production on Christmas Eve, New Year's Eve, and Good Friday (those are planned and scheduled holidays)—Vokas refused to allow them to exercise their Section 7 rights on April 1. Moreover, argues the General Counsel, this occasion offered Vokas the opportunity to rid himself of the union threat in one swift and broad stroke, and that his economic defense is belied by evidence that Respondent had adjusted its production needs on the holidays referred to above and could easily have done so on April 1, 1981.

In *Wright Line*, 251 NLRB 1083 (1980), the Board has provided a clear explanation as to the distinction that must be maintained between "pretext" and "dual motive." It is pretextual when the evidence reveals that what the employer had advanced as a legitimate business reason for its action is in fact a sham, in that the purported circumstances advanced by the employer did not exist or were not in fact relied on. However, in the instant case, I have found a preponderance of evidence by the Company which shows that there was no unlawful motivation under the particular circumstances here, and that Respondent was fully entitled to assert and protect its legitimate business interest in continued production to prevent economic loss and in order to meet the growing demands of its customers. In the final analysis, the employees here in question were discharged for leaving work contrary to direct orders not to do so.

Turning now to the allegation in the complaint that about April 17, 1981, Respondent released employees from work several hours early with full pay in order to encourage them to refrain from supporting the Union.

On April 17, which was Good Friday, both office and plant employees were released early and full-time employees were paid for the balance of the workday, but

²¹ It appears that the only real issues remaining on March 31 involved the date of the election, which does not require any testimony whatever, and the status of Gregory Pomas and Gene Pomas.

²² "Once an employee has been subpoenaed," the Supreme Court has said, "he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified." *NLRB v. Scrivener*, 405 U.S. 117 (1972). At the time of the discharges in the instant case, no subpoena to appear at the hearing had been served on any of the employees involved. In *Walt Disney World Co.*, 216 NLRB 836 (1975), the Board, in its decision, refers to the rights and obligations of an employee *who has been served* with a subpoena, but the discussion in *Walt Disney* revolved around persons duly served and which, of course, is readily distinguishable from the factual circumstances here. However, the right to participate in a hearing, absent a subpoena, may be balanced against production needs. See *Newland Knitting Mills*, *supra*.

part-time employees were paid only for actual time worked.

It appears that on April 17 the full-time plant employees (processing, warehouse, and delivery) received pay varying from 1-1/2 hours to 2-3/4 hours, or a total of 18-1/2 hours, and for an average of about 1.85 hours pay per employee, while not working.

It is the contention of the General Counsel that the granting of this benefit was motivated by Respondent's desire to discourage support for the Union, and was therefore in violation of Section 8(a)(1) of the Act. The General Counsel points out that Respondent's office employees normally worked from 9 a.m. until 5 p.m., but on Good Friday, April 17, 1981, they were released sometime between 12 noon and 1 p.m. and were paid for a full day's work, and that plant and sales employees were also released from work early on this date with full pay, and that these plant employees, who normally would have been released between 2:30 and 3 p.m., were also sent home between noon and 1 p.m., and only part-time employees among them did not receive a full day's pay.

The General Counsel also refers and points to Respondent's contention to the effect that the Good Friday benefit was in accord with its past practices—the Company had traditionally held parties for its employees on Christmas Eve and New Year's Eve and released them from work several hours early with pay—but the General Counsel argues this practice does not pertain to Respondent's policy for Good Friday and points to the testimony of Brenda Cunningham and William Petrucz who testified that plant employees had previously been permitted to take an hour off on Good Friday in order to attend church.

As indicated, it was established that Respondent's granting employees time off on Good Friday was nothing new. Cunningham testified that since she started at Vokas employees always had time off on Good Friday prior to 1981, and in prior years employees had time off during the middle of the day to go to church or to leave an hour early. Vokas testified that he started giving employees time off on Good Friday back when he had the original plant and at that time a sign was put in the window stated "Closed from 2 to 3" or from "3 to 5" but in any event employees always received time off to go to church.

Other occasions where employees were permitted to stop work early and were paid for the full day included Christmas and New Year's Eve. Respondent also recognized Jewish holidays for Jewish employees who were in the sales department, and were paid for the entire day. As pointed out, prior to such holidays Vokas tried to get production in advance, working overtime if necessary, so

that abbreviated delivery runs could be scheduled to enable drivers to participate.²³

This record further shows that the time off granted by Vokas on April 17 was not only for the plant employees, as would have been the case had Vokas been motivated by union considerations, but *all office* employees were also allowed to quit work at 1 p.m. and they were paid for the balance of the day. As indicated, office employees worked from 9 a.m. to 5 p.m. and on the date here in question there were five or six office employees and at least four clerical employees who were released from work on April 17 at 1 p.m. and who were paid 4 hours on that day for work not performed. In other words, Vokas paid approximately 40 hours' pay to clerical employees on Good Friday, an average of about 4 hours per employee, as compared with only 1.85 hours of pay for prospective unit employees.

I am in agreement that the time off granted by Vokas on Good Friday, April 17, was a substantial continuation of former practices. It is also noted that in past years the employee benefits for both office and plant groups had been the same. Yet, as aforesaid, Vokas did not grant 4 hours' time off with pay to the plant employees, but these employees were merely allowed to quit work at approximately the same time and without regard to starting times, and, as further argued by the Company, it is illogical to contend, as the General Counsel appears to do here, that 40 hours' paid time was given to (non-union) office employees, in an effort to affect the full-time *plant* employees who may have had an interest in the Union.

In the final analysis, it appears that plant or production employees received less than 2 hours of paid time off on April 17, and in prior years had also been granted comparable time off on Good Friday.²⁴

CONCLUSIONS OF LAW

Respondent has not violated the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

²³ In addition to the above, a special arrangement was also made by Vokas for Herbert Cannon, but Cannon's testimony concerning the arrangement was inconsistent, vague, and contradictory. On cross-examination he first claimed he had never been paid by Vokas for time off that was not a legal holiday. Then he said he got a day off to go to the doctor, but he was not paid. Later he admitted he went to the Veterans Administration Hospital, during working hours, for treatment. Finally, he admitted that he was paid for the time he was away from the plant during working hours.

²⁴ The Company contends that Frank Redling is not eligible for reinstatement and backpay because of his picket line misconduct during the strike and testimony was taken on both sides bearing on this matter. However, in view of my conclusions and finding that the discharges were for legitimate business reasons, there are no reinstatement rights for any of those involved and, therefore, I need not consider this ancillary matter relative to Redling.