Spartan Plastics, Inc. *and* Tim E. Kasel and Oil, Chemical and Atomic Workers International Union. Case 7-CA-21183

28 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 August 1983 Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed cross-exceptions, a brief in support of the cross-exceptions, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.

1. The judge, relying on *T.R.W. Bearings*, 257 NLRB 442 (1981), found that by maintaining a rule that prohibited the distribution of literature during "working time" the Respondent violated Section 8(a)(1) of the Act. However, *T.R.W. Bearings* was recently overruled by our decision in *Our Way, Inc.*, 268 NLRB 394 (1983). We shall therefore reverse the judge's finding that by maintaining the rule the Respondent per se violated the Act. Accordingly we dismiss the allegation of the complaint.[4]

2. We agree with the judge that the interrogation of several employees interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act. However, the judge applied the wrong standard in reaching his conclusion. *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), relied on by the judge, sets forth the standard under which an employer may question employees in order to investigate issues raised in an unfair labor practice complaint and prepare for a hearing. The proper test in the instant case is whether, under the circumstances, the interrogation reasonably tended to restrain or interfere with the employees' exercise of the rights guaranteed them under the Act. *Florida Ambulance Service*, 255 NLRB 286 fn. 1 (1981). Accordingly we conclude that the Respondent's interrogation of employees concerning the authorship of the questionnaire restrained and interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act.

3. Finally, the complaint alleges that about 20 August 1982 the Respondent violated Section 8(a)(1) of the Act by suspending its employee Kasel and thereafter discharging him. The judge

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Both the Respondent and the General Counsel 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent argues that counsel for the General Counsel unethically obtained a sworn statement from one of the Respondent's managers without prior notification to the Respondent's counsel, and that the same counsel prosecuted the case at the hearing before the judge. It also alleges that the judge improperly allowed the General Counsel to excise a portion of a witness' affidavit involving issues not connected with the alleged violations, without affording the Respondent's counsel an opportunity to examine the contents of the affidavit. Further, it argues that the judge improperly permitted the General Counsel to use a witness' affidavit to refresh his recollection. Pursuant to Sec. 102.118(b)(2) of the Board's Rules and Regulations we have carefully examined the affidavit from which portions were excised and are satisfied that the judge's ruling was correct. Making available to a declarant his own material in order to refresh his recollection is a permissible practice under the Federal Rules of Evidence. Thus there was nothing improper in the judge's ruling in this regard. The General Counsel argues persuasively that counsel did obtain permission from the Respondent to take affidavits from management officials and that the matter was not raised at the hearing. Moreover, there has been no showing that this action legally prejudiced the Respondent or that the integrity of the proceeding was compromised. Further, the fact that the same person performed the roles of investigator and trial attorney is inconsequential in this proceeding. Thus the Respondent's averment in this regard is without merit.

[3] Because we agree with the judge's finding that fellow employees "conferred and collaborated" with Kasel "in preparing the typewritten, if not all of the questions presented" to the Respondent during the company-sponsored meeting, we find it unnecessary to rely on the judge's alternative rationale that, even if Kasel had acted alone, his activity was concerted because the questionnaire related to concerns shared by the other employees. Nor do we rely on the judge's citation of *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215 (1977), in fn. 3 of his decision, because that case has been overruled by our recent decision in *Meyers Industries*, 268 NLRB 493 (1984).

As we stated in *Meyers Industries* at 497:

> Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[23]

[23] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. approved in *NLRB v. Transportation Management Corp.*, 113 LRRM 2857, 97 LC ¶ 10,164 (1983).

Under this standard, an employee "may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated, "*NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

By distributing a written response to the questionnaire among all the employees the Respondent demonstrated that it perceived that Kasel's action was concerted. Cf. *Ajax Paving Industries*, 261 NLRB 695 (1982), enfd. 713 F.2d 1214 (1983).

[4] The judge found that on occasions unauthorized distribution in the Respondent's plant had been tolerated. However, the amendment to the complaint made during the hearing to add the unlawful distribution rule allegation did not include "unlawful enforcement" of the rule as an unfair labor practice. Accordingly, because there is no allegation that the rule was discriminatorily applied by the Respondent, we shall not pass on the issue.

found that by discharging Kasel because of his protected concerted activity the Respondent committed an unfair labor practice. However, he did not make findings regarding the employee's prior suspension. Because we agree with the judge that the Respondent's actions in discharging Kasel were unlawful and because the underlying facts leading to the suspension are the same that led to the employee's discharge several days later, we also find that by suspending Kasel because of his engagement in protected concerted activity the Respondent violated Section 8(a)(1) of the Act. We shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Spartan Plastics, Inc., Holt, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set out in full.

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because they protest against changes in working conditions.

(b) Interrogating employees under circumstances when such interrogation reasonably tends to restrain or interfere with the employees' exercise of the rights guaranteed them under the Act.

(c) Distributing, maintaining in effect, or enforcing Plant Rule 23 involving the making or publishing of "false" statements.

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

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

(a) Offer Tim E. Kasel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his suspension until the date of the Respondent's offer of reinstatement, less net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) Remove from its files any reference to the unlawful suspension and discharge of Tim E. Kasel, on 20 August and 27 August 1982 respectively, and notify him in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way. See *Sterling Sufars*, 261 NLRB 472 (1982).

(c) Withdraw and abolish its Plant Rule 23 involving the making or publishing of "false" statements.

(d) 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.

(e) Post at its facility at Holt, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

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

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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, suspend, or otherwise discriminate against employees in regard to hire or tenure of employment because they protest against changes in working conditions.

WE WILL NOT interrogate our employees under circumstances when such interrogation reasonably tends to restrain or interfere with the employees' exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT distribute, maintain in effect, or enforce Plant Rule 23 involving the making or publishing of "false" statements.

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

WE WILL offer Tim E. Kasel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Tim E. Kasel that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL withdraw and abolish Plant Rule 23.

SPARTAN PLASTICS, INC.

DECISION

WALTER J. ALPRIN, Administrative Law Judge. The complaint in this case was issued on October 22, 1982,[1] and was amended at the hearing. The issues here are whether the Employer maintained unlawful work rules and interrogated employees, and unlawfully discharged an employee in violation of Section 8(a)(1) and (3) of the Act. The case was heard by me at Lansing, Michigan, on March 9, 1983.

On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and by counsel for Respondent on May 16, 1983, I make the following

FINDINGS OF FACT

Spartan Plastics, Inc. (the Respondent) is a corporation organized in the State of Michigan, manufacturing, selling, and distributing self-adhesive decorative trim products from its sole office at Holt, Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Oil, Chemical and Atomic Workers International Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

Respondent maintains plant rules, the violation of which may lead to discipline or discharge, which prohibit the following:

> Rule 18. Unauthorized distribution of literature, written, or printed matter of any description during working time or in working areas.
>
> Rule 23. The making or publishing of false, vicious, or malicious statements concerning any employee, supervisor, the Company, or its products.

There have been instances in the past of unauthorized distribution of literature or printed matter during working time and/or in working areas with no discipline imposed or employees discharged.

Respondent maintains relations with its 86 manufacturing employees through a plant employees' committee, not a labor organization within the meaning of the Act. Several times each year the management, in conjunction with the committee, calls a "mass meeting" for all employees, held at company facilities during nonworktimes, with attendance being voluntary. Oral questions are accepted from employees at these meetings, but written questions never were submitted.

Tim Kasel, the Charging Party, was employed by Respondent in 1978 and operated a rotary die-cutting machine. He holds a Bachelor of Arts degree in industrial relations and labor. On May 1, 1981, he contacted the Union in an attempt to organize Respondent. A meeting was held at his home and authorization cards distributed, but there was no further organizational campaign. Kasel's participation in the attempt was known to Respondent.

In the summer of 1982 there were rumors in the plant that Respondent was going to do away with paid sick leave and paid personal leave, and that a mass meeting would address these issues. Respondent did in fact have these matters under consideration, with a target implementation date of January 1, 1983, but had not planned a meeting. Kasel began discussing these issues with other employees, and preparing questions which he and other employees agreed should be submitted in writing to Respondent's president at the mass meeting. Kasel wrote and had typed some questions and kept about 20 photocopies in his car.

On August 12, Respondent and the committee agreed that there should be a mass meeting the following day, after working hours, at 3:30 p.m., to discuss general economic matters, not to consider sick or personal leave. Committee members were as usual to advise the employees in their respective divisions. Kasel testified that he learned of the meeting only on the morning of August 13, and immediately after work that afternoon went to his car, got the photocopied questions, and in conference with other employees added additional handwritten questions. He then proceeded to the meeting, where he gave a photocopy of typed and handwritten questions to Troyle Anderson, Respondent's comptroller, with a re-

[1] All dates are in 1982 unless otherwise stated.

quest that they be handed to Charles Kraus, Respondent's president.

Some of Kasel's testimony in this regard is contradicted by his fellow worker, Gary Brewer, who testified that Kasel showed him a copy of all the typed and handwritten questions at 10 o'clock on the morning of August 13. I believe Brewer's testimony, since Kasel's version of adding handwritten questions at the last minute prior to the meeting does not account for his having given a photocopy of all typed and handwritten questions to Anderson for Kraus, immediately after having finished the handwritten portion that afternoon.

The questions were handed to Kraus with the advice not to attempt an oral answer, but Kraus began an attempted extempore reply. He shortly stopped, however, and announced that a written response would be forthcoming, and such a response, dated September 1, in fact was distributed. The questions, with the responses following each, were as follows:

> Please Answer/comment
> Read Aloud
> Higher Standard of Living???
>
> 1. The average retired couple in the U.S. needs $15,000/yr. to live.
>
> $18,900 in Boston. The highest paid machine operator at S. P. makes $3,200/yr. more than the $15,000 (please comment).
>
> (Response: Boston is a long way from Holt, Michigan, and has absolutely nothing to do with our area, but food for thought is our highest paid machine operator in 1981 was $26,679.00.)
>
> 2. The poverty level for a family of four in the U.S. is $12,000/yr. (Mefford).
>
> (Response: The poverty level, I have read, is as low as $6,000 up to $14,000 per year depending on where you live. Besides, what are we to do about the poverty level in the U.S.?)
>
> 3. The steel industry in the U.S. has the highest wages and benefit packages ($25/hr.). Management at S. P. has claimed in the past to pay over $20/hr. in wages and benefits to factory personnel. Is this a fact?
>
> (Response: True, the steel industry is approximately $23 per hour. It is in a shambles; highest unemployment in 50 years; McClough Steel in bankruptcy; many other companies are on the fringe of bankruptcy. As to $20 an hour, we don't know where that came from. We have averaged $12-16 an hour for the last two years—never even heard of $20 per hour.)
>
> 4. The average wage per hour for factory work, according to the Wall Street Journal, is $8.55/hr. What's S. P.'s average?
>
> (Response: Average wage per hour at Spartan Plastics is $7.60. Maintenance/machine operators are as high as $9.50 with Utility Person at $6.40.)
>
> 5. Management has claimed our wages and benefits for factory personnel are second to none. How do they compare to Avery International Tape Division, 3M Tape Division, and Ford Motor Company Parts and Service Division?
>
> (Response: Management has never claimed our wages and benefits to be second to none. That would be a foolish statement. We feel that we pay well compared to other small businesses in the area. As for comparison to $800 million to $3 billion per year companies, it would be rather hard to compare. But, the surprising thing is that Spartan Plastics does have wage scales which are very close and benefits better than those large companies. Naturally, you are always going to find some differences.)
>
> 6. "You're lucky to have a job" is a common cliche used by management. The fact of the matter is that the majority of factory personnel at S. P. hired in when another job most likely could have been secured. These people hired in on the premise and assumption that wages would keep up with inflation (as long as the company was profitable, and it is, or it wouldn't be in business) and benefits would keep getting better as the workers worked harder or less hard through technical improvement, managerial improvements are questionable at best. Every year it seems S. P. takes away something earned by the wage earners or policy becomes absolutely more dictorial (sic)(please comment).
>
> (Response: We are fortunate to be working—PERIOD. It would be interesting to poll our people as to promises that lured them away from taking another job. We would challenge anyone on that. We don't promise anything. No one has a crystal ball to predict the future. As for benefits—simply look at the record. Each year we take away something is a ridiculous statement. This is the first time in 22 years we have asked for anything back from our employees.)
>
> 7. Management has said inflation is dwindling, or our buying power is more. Please comment on the following analysis for a four year span: [Figures omitted.] Just to keep up with inflation, a wage earner making $14,000 four years ago *needs* $20,500 today.
>
> (Response: Since 1979, wages and benefits have increased 57% at Spartan Plastics. I don't feel I have to elaborate more on that.)
>
> 8. Why does the single family wage earner at S. P. have to count on overtime just to secure the basic necessities (nothing extra)?

(Response: When a person makes $20–25,000 per year and they have trouble with basic necessities, I guess you have to look within your own budget as to what basic necessities are. I am sure that there are people making $50,000 and more that also have trouble with basic necessities.)

9. Every year, it's the same sing-song from management. "We're holding our own, the market is soft" or "pop costs too much." But S. P. just keeps on hiring, expanding, etc. (e.g. temporary help is hired and stays all year, or, a person is laid off on a Friday and called back to work on Monday.)

(Response: We have never pled poverty—wages, bonuses, fringes prove that out. We have only added 3 or 4 people to our full time labor force in 2 years. As for expansion, you better hope we keep expanding because it means job security if we can keep our markets growing. Temporary help averages 3–4 months and the author/authors have a better recollection of a person being laid off on Friday and called back on Monday than we have. When did it happen?)

10. What has S.P. grossed in the last ten years?

(Response: Gross profit has nothing to do with profitability. What is important is *net*—after everything is taken out. Our net last year was an all time low of 1.7%. Example: What is your gross pay before taxes, food, shelter, etc., etc.? What is left after that and you have the same thing in business.)

11. We (factory workers) work so we can have decent benefits and the personnel who administer those benefits recall them (e.g. week's vacation after 15 years—gone; paid sick/personal time—gone). We earned that time because you had to be at work for a month before you *earned* six hours, so it really wasn't a benefit, right?

(Response: PPH days have always been considered a benefit no matter how you look at it.)

12. Traditionally, it is common practice for very profitable companies to jump on the concessionary bandwagon in depressed economic times even though profit and productivity curves continue to rise steadily. Isn't this what has happened at S.P.?

(Response: If we were highly profitable, why do we owe the bank over $400,000 and are still taking 45–90 days to pay our bills? The author/authors have information that we are not aware of. Sure wish they would not keep it a secret.)

12. [Sic] Dunn & Bradstreet.
(Response: Dunn & Bradstreet. Okay, we have heard of them.)

13. Michigan Annual Reports indicates S. P. is very, very healthy. What's it take for management to admit things have never been better, financially speaking?

(Response: Again, the author/authors have information that we are not aware of. Sure wish they would not keep it a secret.)

Handwritten 1. What are the factory workers who have involuntary medical disorders to do, when they have to miss days for treatment. Are they supposed to live on a four, three or two-day paycheck. Seems Spartan is trying to foster a new breed of Super, Sickless Shoprats, master shoprat, if you will. Its been tried before.

(Response: The writer makes this sound like everyone is off 2–3 days per week all year around which is simply not true. Vacation time can still be used when an employee misses a day. As to the last part, I think it is an insult to everyone that works at Spartan Plastics.)

Handwritten 2. You say everyone must tighten their belt. Well, its pretty easy to tighten a few notches when you're (sic) income $25,000, $30,000, $50,000 plus. $18,200 kind of makes that belt tight to begin with.

(Response: We have no control over people's standard of living. We can only pay wages which are reasonable and offer a standard of living which will be comparable with everyone in the area. If a person gears their standard of living to champagne and expensive things, it is completely up to them. Spartan Plastics has only so much to give and so much to offer and still remain in business.)

Handwritten 3. Why is it that in 1982 a contemporary factory must manage its labor force with 1930, 1940, 1950, 1960's managerial techniques and policies.

(Response: I am wondering where the author/authors drew this from and what experience they can claim to make the statements as to old fashioned management techniques. They must have a lot of vast experience and knowledge that they are hiding from us.)

Handwritten 4. Do you think Spartan will last as long as Diamond Reo.

(Response: Diamond Reo was a fine company in its time and they lasted for 70 years. We certainly hope that we last as long.)

The last handwritten question obviously is a reference to Don Clemens, Respondent's plant manager, previously employed by Diamond Reo which had gone into bankruptcy.

The letter responding to the questions began with the following comments:

> As you all know, I have been asked to answer a questionnaire given to me at the end of the August 13 employee meeting. In the 23 years we have been in business, I have never been presented with such a crude/rude request at any meeting we have ever had.

Plant Manager Clemens also considered the questions malicious and inflammatory, and sought to determine their author. He learned from Anderson that it was Kasel who presented them, and on August 16 got an opinion from Kasel's supervisor that the handwriting on the questions appeared to be Kasel's. Clemens called Kasel into his office and, asked whether he had "authored" the questions.[2] Kasel denied having done so. Clemens also called in the other employees of Kasel's division and asked them three questions—whether they wrote the questions, whether they had input into the questions, and who had written the questions.

On August 20, Clemens again called Kasel to his office and asked whether he had authored the questions. Clemens had retained a handwriting expert to study the handwritten questions, but had not as yet received his report. Kasel again denied authorship, but Clemens suspended him. Clemens testified he took this action not because of the form of the questions, but because he believed Kasel had twice lied to him about his part in preparing them. However, Clemens' sworn statement to a Board field employee had been that he "decided to suspend Kasel because I thought the letter was very inflammatory and very derogatory. . ." I believe the latter to be the true basis of the suspension. Clemens was out of town until August 26, and upon his return found the expert's report identifying the handwriting as that of Kasel. On August 27 Clemens phoned intending to ask him to come to the plant for a discussion regarding the suspension, but was unable to reach him. Clemens physically went to Kasel's home and asked him to come to the plant for the discussion, but Kasel was babysitting and unable to do so. Later that day Clemens phoned again, to ask Kasel whether another time could be arranged for him to come to the plant. Kasel told him that any arrangements would have to be made through his attorney. Clemens gave up the idea of an interview, and prepared and sent Kasel a letter discharging him for "Dishonesty; unprovoked insolence; disrespect on your part toward your employer; conduct contrary to the faithful and diligent performance of your employer's business; conduct which was demoralizing to your fellow employees which also obstructed your employer's business." None of the other employees interviewed, or who had entered into discussions with Respondent's president at the meeting regarding the proposed loss of sick or personal leave, was disciplined, suspended, or discharged.

Discussion

A. *Unlawful Discharge*

Respondent's position is that it suspended the Charging Party because he lied when questioned regarding his authorship or participation in preparing the written questions presented at the meeting, and discharged him both for lying and because he had in fact prepared malicious questions. The first issue is thus whether preparation of the questions was a concerted action and, if so, whether it was protected by the Act.

Respondent argues that Kasel, alone, desired and provoked a confrontation by originating, preparing, and presenting the questions. This is contrary to the uncontested testimony of fellow employees that they conferred and collaborated with Kasel in preparing the typewritten, if not all, of the questions presented. Further, even had Kasel been acting alone, the questions at least in part related to wages and fringe benefits affecting not only Kasel but responding to the concerns and inuring to the benefit of numerous employees.[3]

Though Kasel's actions thus were concerted, they may have lost the protection of the Act. It has been ruled that "flagrant conduct of an employee, even though occurring in the course of section 7 activity, may justify disciplinary action by the employer. . . . The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect."[4] The issue is whether the activity "is sufficiently egregious to remove [the employee's] activities from any protection they might have otherwise enjoyed."[5] The truth or falsity of the statements made, or whether the employer finds the statements to be embarrassing, is not material to the issue of whether they have lost the protection of the Act, unless the employee's statement constitutes disparagement or vilification deliberately intended to impugn the employer's operations."[6] Opprobrious conduct may forfeit the protection of the Act, and "[t]he decision as to whether the employee has crossed that line [and lost such protection] depends on several factors: (1) the place of the discussion; (2) the subject

[2] Kasel insists that Clemens used the verb "authored," which Clemens denies. Employees Snider and Pierce were asked who "wrote" and not who "authored" the questions. Respondent Controller Anderson gave an affidavit to a Board field employee reporting that employees were asked who had "authored" the questions, and employee McCaleb recalled that "author" was used. The word "author" might be considered to emphasize originality, but, as later discussed, authorship of the questions, in that sense, has no bearing on whether the preparation was a concerted action. It might also be considered in determining whether Kasel had lied to Clemens, but since, as also later discussed, the interrogation being improper there was no obligation for an employee to respond truthfully. Therefore, it is not here pertinent whether Clemens used the word "wrote" or "authored," but I find the weight of the evidence to be that he used the latter.

[3] *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215, 1217 (1977), that "Birdwell's conduct was concerted and protected irrespective of whether she was overtly designated by other employees to act on their behalf or informed any employee that she was doing so. . . . Birdwell's fellow employees shared her concern and interest in the subject matter of the letter and, consequently, (it is clear) that Birdwell was acting concertedly on behalf of her fellow employees."

[4] *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964); *American Telephone & Telegraph Co. v. NLRB*, 521 F.2d 1159 (2d Cir. 1975).

[5] *Fibracam Corp.*, 259 NLRB 161 (1981).

[6] *Tyler Business Services*, 256 NLRB 567, 568 (1981).

matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[7]

The first, second, and eighth typewritten questions imply that Respondent pays workers less than the amount required to sustain a retired couple, and not much more than the poverty level for a family of four. The 5, 7, 9, 12 (first), and 13 typewritten questions imply that Respondent is making false statements to its employees. These comments are disparaging and insulting but not so insolent as to be grossly disrespectful. The first handwritten question implies that Respondent is deliberately fostering subhuman working conditions, and the third and fourth handwritten questions are personally insulting to Respondent's management in general and its plant manager in particular. I find that these questions, while intentionally disparaging, were presented for the purpose and with the effect of arguing against a change in the sick and personal leave policies of Respondent, and not for the purpose or with the effect of impugning Respondent and its operations. The concerted activity did not lose the protection of the Act.

The next issue is whether Kasel's discharge was based on the protected activity. Respondent has at various points claimed that the discharge was for lying in response to interrogation, and for promulgating malicious statements. Neither defense is valid. As is hereinafter found, the interrogations were themselves violations of Section 8(a)(1) of the Act. The employee is obviously under no obligation to respond to unlawful coercion in any particular manner. It can be no defense to Respondent to recite a wrong by Kasel in responding to an action of Respondent which itself constituted a violation of law. As for the defense that the discharge was for promulgating malicious statements, I have above found that the questions were not so malicious as to have lost the protection of the Act. Kasel's discharge was therefore based solely on his protected concerted activity protesting changes in working conditions, and was in violation of the Act.

B. *Interrogations*

A number of the questions presented related directly to wages and benefits, legitimate areas of concerted employee concern protected by the Act. These questions, not being egregious, did not lose such protection, but Respondent, in interrogating Kasel and the other employees' did nothing to discriminate between legitimate inquiries on the one hand, and improper inquiries on the other.

In *Johnnie's Poultry*[8] the Board held that an employer may interrogate employees on matters concerning their Section 7 rights for the purpose of either verifying a union's claim of majority status or . . . to prepare a defense for use in an unfair labor practice trial. In balancing this employer privilege against the "inherent danger" to employees of coercion, the Board requires that:

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis . . . ." [*W. W. Grainger, Inc.*, 255 NLRB 1106 (1981)].

In the matter at hand the interrogation was not for a proper purpose, and the employees were given none of the required assurances. The interrogation of Kasel and of the other employees was therefore an improper interference with, or restraint or coercion, of employees engaging in concerted activity, and constituted a violation of Section 8(a)(1) of the Act.

C. *Unauthorized Distribution Rule*

The General Counsel alleges that the rule against unauthorized distribution of cited material during working time or in working areas is invalid on its face as overly broad. The Board held that nonsolicitation rules referring to either "non-working time" or "non-working hours" are overly broad and presumptively invalid in that they are ambiguous regarding an employee's right to engage in protected concerted activity "during periods of the workday when they are properly not engaged in their work tasks (e.g., meal and break periods)." *T.R.W. Bearings*, 257 NLRB 442, 443 (1981). Maintaining the rule is therefore a violation of Section 8(a)(1) of the Act.

D. *Malicious Statements Rule*

The General Counsel also alleges that the rule against making or publishing false, vicious, or malicious statements concerning any employee, supervisor, the Company, or its products, is per se in violation of the Act. Again, the Board has indeed held invalid rules which punish statements which are "merely false" and that "false and inaccurate employee statements are *protected* so long as they are not malicious." *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978), affd. 600 F.2d 132 (8th Cir. 1979). The rule is therefore in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Tim E. Kasel because of his protected concerted activity protesting changes in working conditions, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

3. By interrogating employees on matters concerning their Section 7 rights other than for the purpose of verifying a union's claim of majority status or to prepare a defense for use in an unfair labor practice trial, and by failing to communicate to the employees the purpose of the questioning, failing to assure the employees that no reprisals would take place, and failing to obtain the participation of the employees on a voluntary basis, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[7] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

[8] *Johnnie's Poultry Co.*, 146 NLRB 770 (1964).

4. By maintaining a rule prohibiting distribution by its employees of unauthorized literature, written or printed matter during working time, Respondent has engaged in and is engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By maintaining a rule prohibiting the making or publishing of statements concerning any employee, supervisor, the Respondent, or its products which are merely false and not vicious or malicious, Respondent has engaged in and is engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged Tim E. Kasel I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his termination until the date of Respondent's offer of reinstatement, less net earnings, to which shall be added interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[9]

[Recommended Order omitted from publication.]

[9] See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).