Chef's Pantry, Inc. *and* United Food and Commercial Workers District Union No. 346, United Food and Commercial Workers International Union, AFL-CIO-CLC. Cases 9-CA-16368-1 and 9-CA-16705

11 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 8 September 1982 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent filed exceptions[1] and a supporting brief, the General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions, and the Charging Party filed a brief in response to the Respondent's exceptions and in support of the General Counsel's cross-exceptions and brief.[2]

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions to the extent consistent with the Decision and Order.[4]

The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing on or after 15 January 1981 to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit. He further found that the Respondent committed additional violations of Section 8(a)(5) by the unilateral changes it made in the employees' terms and conditions of employment, without notice to or consultation with the Union, on or after 10 November 1980 (the date on which the Union won the representation election). These changes included rescinding the use by its employees of the kitchen and food storage facilities, prescribing a new system of compulsory overtime, and implementing a new rule requiring medical certificates from employees who are absent from work due to illness. In addition, the judge found that the Respondent violated Section 8(a)(3) by discharging employees Michael Slatzer and Marshall Farmer[5] for engaging in protected union activity. We agree with the judge's conclusions concerning all of these violations[6] except that concerning the system of compulsory overtime. In addition, we agree, for reasons stated below, with certain of the General Counsel's and the Charging Party's contentions that the judge erred in dismissing allegations that the Respondent committed additional violations of Section 8(a)(3).

A. *Dismissal of Violations of Section 8(a)(5)*

Contrary to the judge, we do not find that the Respondent violated Section 8(a)(5) of the Act by prohibiting employees from leaving their jobs unless they had completed their work or obtained the permission of their supervisors.[7] The Respondent's action did not change an established term and condition of employment. Accordingly, the Respondent was not obligated to bargain over this matter with the Charging Party.

It is undisputed that on 21 and 24 November 1980 the Respondent posted notices to employees stating that they were not to leave work unless they had completed their job assignments or obtained the permission of their supervisors. While employees Slatzer and Allen testified that the Respondent had no prior policy of requiring employees to work overtime, the judge relied instead on

[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] The Charging Party contends that the routine 8(a)(3) and (5) order is not appropriate in this case and that the Respondent should be ordered to reimburse the Charging Party for organizing costs and litigation expenses it incurred as a result of the Respondent's illegal conduct We find that the facts in this case do not warrant such a remedy

[3] The Respondent has 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

[4] The judge failed to require the Respondent to expunge from its records any reference to the unlawful discharges found herein Our Order shall include the direction that the Respondent expunge any such reference from its records, including the personnel files of employees Michael Slatzer and Marshall Farmer

We conclude that the Respondent's egregious and widespread misconduct demonstrates a general disregard for its employees' fundamental statutory rights and warrants a broad order *Hickmott Foods*, 242 NLRB 1357 (1979)

[5] We have found below that the Respondent unlawfully transferred employee Farmer from his position as assistant to the plant supervisor to working on the dock Thus, we shall order the Respondent to reinstate Farmer to the position from which he was removed on 24 November 1980 because of his union activities

[6] The General Counsel excepts to the judge's failure to find that the violations of Sec 8(a)(5) are also violations of Sec 8(a)(3) We find it unnecessary to pass on this exception, as the remedy would not be affected

The General Counsel and the Charging Party except to the judge's failure to pass on and find the 8(a)(5) allegation in the complaint based on the Respondent's failure to bargain with the Union prior to effecting the rule in January 1981 requiring night-shift employees to submit memoranda justifying the necessity for overtime We find merit in this exception The record establishes that, before January 1981, night-shift employees worked overtime as required by the job with no explanation required It is undisputed that the January rule requiring written memoranda to justify overtime was implemented without prior notice to or consultation with the Union As a change in rules concerning overtime constitutes a change in "wages, hours and terms and other conditions of employment," as defined in Sec 8(d), the Respondent's unilateral implementation of the new rule violates Sec 8(a)(5)

[7] The judge found that the Respondent violated Sec 8(a)(5) by stating in a 21 November notice that employees were not to leave work without permission from their supervisors until they finished the job they were working on This statement was repeated in a 24 November memo concerning shift changes The judge failed to pass on the alleged unlawful statements in the 24 November memo As set forth below, we find nothing unlawful in either memo

the testimony of Supervisor Bennis that the Respondent's practice before November 1980 was to require employees to stay on the job and work overtime if their remaining job duties could be accomplished in a relatively short period of time. While the judge found that "[t]he testimony of the employees is that there are times when it is an inconvenience to be compelled to remain for an extended overtime period in all circumstances," the record reveals no evidence that any employee was ever required to work any "extended" overtime. Nor was there evidence presented that employees have generally worked more overtime since the posting of the notices.

It is thus clear that the record will not support a finding that the Respondent has applied a new policy as to overtime. Further, while the language of the Respondent's notices to employees specifically requires that employees obtain supervisory permission before leaving unfinished work, such a requirement is consistent with, and comprehended within, the previously existing discretion of supervisors to require completion of those job duties which could be performed in a relatively short period of time. For these reasons, we do not find that the Respondent's 21 and 24 November 1980 notices to employees changed established conditions of employment and, accordingly, we dismiss this allegation of the complaint.[8]

The General Counsel and the Charging Party contend that the judge erred in dismissing the allegations that the following changes violated Section 8(a)(5): (1) on 3 December 1980, the Respondent issued a notice which informed employees that they could make and receive telephone calls only during their work breaks and restricted their incoming calls during work to emergencies; (2) on 16 January 1981, the Respondent instituted a rule requiring that employees clock out when use of the restroom would involve "in excess of 2 or 3 minutes"; (3) on 1 January 1980, the Respondent converted a 2-day employee holiday to a single-day holiday with an additional day of personal leave to be taken later in the year. We agree with the judge that these changes are not unlawful.

While we disagree with the judge's characterization of the Respondent's 3 December memo restricting employee calls as trivial, we conclude that the record does not support the finding of a violation here, where outgoing calls had been restricted previously. Similarly, while we disagree with the judge's characterization of the rule concerning use of bathrooms as not warranting consideration, we conclude that the record does not support the finding of a violation inasmuch as employees had always been required to clock in and out for numerous breaks. Finally, with respect to the Respondent's actions with regard to the 1980–1981 Christmas and New Year's holidays, we note that the complaint alleges and the Respondent admits that on or about 1 January 1981 the Respondent withdrew 1 day of a "traditional"[9] 2-day employee holiday and substituted a personal leave day in its place. According to the uncontroverted testimony of Supervisor Bennis, before 1978 or 1979 the Respondent did not give 2-day holidays at Christmas and instead permitted employees to take a single-day holiday with credit for a day of personal leave to be used at a later time. While Bennis recalled that employees were permitted during the 1979–1980 Christmas and New Year's holidays to take 2-day holidays on consecutive days during the workweek, there is no evidence that the Respondent's actions took place pursuant to an announced change in its holiday policies. Under these circumstances, we do not find that the evidence in regard to the 1979–1980 holidays is a sufficient basis on which to conclude that the Respondent maintained a practice or policy of granting 2-day holidays during the Christmas and New Year's holiday season. As the Respondent's actions conformed to its stated practice before the 1979–1980 holidays, and did not result in the loss of holiday time by employees, we conclude that the Respondent did not change an established condition of employment and was therefore not obligated to bargain with the Charging Party before giving employees a single-day holiday with a day of personal leave to be used at a later time.

B. *Additional 8(a)(3) Violations*

Following the election on 10 November 1980, the Respondent took action which was clearly in violation of Section 8(a)(3) of the Act.

(1) On 5 December 1980, employee Slatzer, a known union activist, received a written warning for an error he made on 28 November 1980 in stocking pizza. The error resulted in destruction of some of the pizza by the night crew who could not remove the product without breakage. Slatzer, in

[8] Member Dennis dissents from the majority's finding that the Respondent did not violate Sec 8(a)(5) of the Act by posting notices on 21 and 24 November which prohibited employees from leaving their jobs unless they had completed their work or obtained permission While her colleagues accurately state that there were times prior to the posting of the notices when the Respondent required an employee to stay on the job and work overtime if the job could be completed within a relatively short period of time, they fail to note that this was not a fixed and binding obligation until the notices were posted Thus, in Member Dennis' view, the notices transformed the nature of the work requirement and constituted a unilateral substantive change in working conditions

[9] The complaint does not further define the General Counsel's use of the term "traditional" as applied to the holidays at issue

unrebutted testimony, asserted that some time prior to the election he had made a similar stocking error which caused destruction by the night crew and he had not received a warning. In addition, on 22 January 1981, Slatzer received a warning for being 5 minutes late to work. The warning noted that Slatzer also had been 14 minutes late on 13 January 1981, and 6 minutes late on 6 January 1981. Slatzer testified that because he has to pass a railroad crossing he was sometimes late, but that prior to the election he had not received a warning. Further, John Bennis, the Respondent's plant supervisor, testified that the Respondent's normal disciplinary procedure was to give three verbal warnings for minor infractions and that a written warning was issued on the fourth infraction. When asked for an example of a minor infraction, Bennis answered coming in a few minutes late.

It is clear from the foregoing that the above instances of misconduct would not have warranted a written warning prior to the 10 November 1980 election.[10] Accordingly, we find that because Slatzer's efforts on behalf of the Union, both during its organizing campaigns and after the 10 November election, were well known to the Respondent and the warnings the Respondent issued to Slatzer on 5 December 1980 for the stocking error, and on 22 January 1981 for tardiness, were contrary to its usual disciplinary policy, these warnings were in response to Slatzer's union activities and thus violated Section 8(a)(3) of the Act.

(2) The General Counsel alleges that employee Farmer, another known union activist, received written warnings from the Respondent as a result of his union activities. The warnings were issued on 16, 20, and 21 January 1981, ostensibly for Farmer's misuse of the plant telephone. The warnings issued on 16 and 20 January resulted from the many calls Farmer made to the Respondent's Sandusky office in which he sought information concerning the employees' company-paid insurance program in preparation for expected contract negotiations. The 21 January warning was issued to Farmer for using the telephone in the plant garage for a nonbusiness call

With respect to the 16 and 20 January warnings, the record indicates that Plant Supervisor Bennis suggested that Farmer call the Respondent's Sandusky office for the insurance information and that only after several calls to this office did Mel Saferstein, a Respondent representative, inform Farmer that his information would not be available to him. Thereafter, the Respondent issued a warning to Farmer for making excessive telephone calls, and at Saferstein's insistence a second warning was issued to Farmer because of the same incident. As to the 21 January warning, Farmer testified that he made the call from the plant garage after he checked out for the day, that no one was waiting to use the telephone, and that prior to that warning there had been no restriction on the use of the garage telephone. Farmer's testimony is unrebutted. We conclude, therefore, that it was the Respondent's failure to cooperate, and not misuse on Farmer's part, which was responsible for the large number of calls Farmer made to the Sandusky office in his unsuccessful attempt to get information about the employees' insurance plan,[11] and that until the Respondent issued the warning to Farmer there had not been a rule restricting the use of the garage telephone. Accordingly, we find that the written warnings issued to Farmer on 16, 20, and 21 January 1981 resulted from Farmer's efforts on behalf of the Union and violated Section 8(a)(3).

(3) The General Counsel further alleges that the Respondent's discriminatory conduct toward Farmer was not limited to the above-described warnings, and that his union activities were also responsible for his reassignment from training for a supervisory position to working on the dock. The judge failed to address this issue in his decision. According to the record, prior to the 10 November 1980 election, Farmer worked directly with the plant supervisor, and the training he received in that capacity, particularly in inventory control, placed him under consideration for supervisory positions at some of the Respondent's other facilities. However, 2 weeks after the 10 November election, Farmer's working hours were changed, and he was reassigned to work on the dock. The Respondent has provided no explanation for its reassignment of Farmer. Thus, in light of the absence of such an explanation, together with Farmer's notoriety as a union activist and the closeness of the date of Farmer's reassignment to the date of the election, we are compelled to conclude that it was his connection with the Union that was the true explanation for Farmer's reassignment. Accordingly, we find that the Respondent's reassigning Farmer from assisting the plant supervisor to working on the dock violated Section 8(a)(3) of the Act.

(4) The General Counsel alleges that the Respondent violated Section 8(a)(3) on 17 March 1981 by issuing a "Notice-Warning" to six employees in the bargaining unit admonishing them to start their

[10] Although the judge found that the Respondent unlawfully discharged Slatzer 5 months after the election, he failed to evaluate these warnings in light of the election and the Respondent's past practice

[11] We note that to the extent the judge considered these matters, he failed to evaluate them in connection with the election and preparations for expected negotiations

work on time and not to disturb other employees who were working, and threatening them with disciplinary action for infraction of these rules. The judge concluded that the warning merely informed employees that "working time is for work" and as such did not rise to the level of a violation of the Act. The wording of the notice supports this conclusion. However, the means by which the Respondent disseminated its message belies an innocent purpose. Although there is no evidence in the record that these six employees were guilty of wrongdoing with respect to the rules set out in the "Notice-Warning," the Respondent first issued these warnings individually to each of the six employees and placed copies in the employees' personnel files. When Michael Slatzer, who had been designated shop steward, questioned Bennis on the reason for the warnings, Bennis conceded that there was no justification for the warnings being placed in the employees' personnel files. Then and only then were the warnings removed from the employees' files, and the "Notice-Warning" was posted on the plant bulletin board. Since there appears to have been no justification for the issuance of these warnings, we find, in agreement with the General Counsel, that the Respondent's purpose in issuing them was to punish the six employees because the bargaining unit[12] had selected the Union as its bargaining representative, and that by such conduct the Respondent violated Section 8(a)(3) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Chef's Pantry, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Food and Commercial Workers District Union No. 346, United Food and Commercial Workers International Union, AFL–CIO–CLC as the exclusive representative of the employees in the following appropriate unit:

> All freezer employees employed by the Respondent at its Columbus, Ohio, facility, including the shuttle driver, but excluding the sales servicemen, advance salesmen, swingmen, telephone salesmen, all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally depriving its employees of previously enjoyed kitchen and food benefits.

(c) Unilaterally establishing a new rule requiring employees to submit memoranda justifying overtime work.

(d) Unilaterally establishing a new rule requiring medical certificates of all employees absent from work because of illness.

(e) Unilaterally instituting a new rule prohibiting employees from receiving compensation for work performed during their off-hours from truckdrivers delivering merchandise to the Respondent's facility.

(f) Discouraging membership in the above-named labor organization of its employees by discharging employees, or by transferring employees to a less desirable position, and by more stringently enforcing the tardiness rules, work rules, and rules with respect to telephone calls against employees because of their membership, support, or activities on behalf of the above-named Union.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Recognize and, on request, bargain collectively with the Union, as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Michael Slatzer immediate and full reinstatement to his former position, and to Marshall Farmer immediate and full reinstatement to the position he held before his transfer about 24 November 1980 or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole Slatzer and Farmer for any loss of earnings which they may have suffered by virtue of the discrimination against them. Backpay shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[12] We note that the warning was directed to six employees in a bargaining unit of nine and that included among the six employees were Farmer and Slatzer, who the judge found were discriminatorily discharged

(d) Rescind the disciplinary warnings given to Marshall Farmer on 17 December 1980, 16, 20 and 21 January 1981 and to Michael Slatzer on 5 December 1980 and 22 January 1981, and expunge from their personnel and other records all references to these warnings and notify Marshall Farmer and Michael Slatzer in writing that this action has been taken.

(e) Remove from the bulletin board at its Columbus, Ohio facility the disciplinary notice placed there on 17 March 1981.

(f) Expunge from personnel and other records all references to the discharges of Michael Slatzer and Marshall Farmer on 7 April 1981.

(g) 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.

(h) Post at its Columbus, Ohio place of business copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

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

[13] 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 refuse to bargain with United Food and Commercial Workers District Union No. 346, United Food and Commercial Workers International Union, AFL-CIO-CLC as the exclusive representative of our employees in the following appropriate unit:

All freezer employees employed by the Respondent at its Columbus, Ohio facility, including the shuttle driver, but excluding the sales servicemen, advance salesmen, swingmen, telephone salesmen, all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change conditions of employment, without prior consultation with the above-named Union, by depriving our employees of previously enjoyed kitchen and food facilities, by establishing a new rule requiring medical certificates of all employees absent because of illness, or by unilaterally establishing a new rule requiring employees to submit memoranda justifying overtime work.

WE WILL NOT discourage membership in the above-named Union by discharging any of our employees, or by transferring any of our employees to a less desirable position, and by more stringently enforcing the tardiness rules, work rules, and rules with respect to telephone calls against employees, because of their membership, support, or activities on behalf of the above-named Union.

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

WE WILL recognize and, on request, bargain collectively with the Union, as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL rescind the disciplinary warnings given to Marshall Farmer on 17 December 1980, and 16, 20, and 21 January 1981, and to Michael Slatzer on 5 December 1980 and 22 January 1981, and expunge from personnel and other records all references to these warnings and notify Marshall Farmer and Michael Slatzer in writing that this action has been taken.

WE WILL remove from the bulletin board at our Columbus, Ohio facility the disciplinary notice placed there on 17 March 1981.

WE WILL expunge from personnel and other records all references to the discharges of Michael Slatzer and Marshall Farmer on 7 April 1981.

WE WILL offer to Michael Slatzer immediate and full reinstatement to his former position, and to Marshall Farmer immediate and full reinstatement to the position he held before his transfer about 24 November 1980 or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Slatzer and Marshall Farmer whole with interest, for any loss of earnings they may have suffered in consequence of our unlawful discrimination against them.

CHEF'S PANTRY, INC.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held at Columbus, Ohio, on June 15 and 16, 1982, on separate complaints of the General Counsel against Chef's Pantry, Inc. (the Company or the Respondent). The first complaint issued on February 6, 1981 (Case 9-CA-16368-1), upon a charge filed by United Food and Commercial Workers District Union No. 346, United Food and Commercial Workers International Union, AFL-CIO-CLC (the Union or the Charging Party). The second complaint (Case 9-CA-16705) issued on June 9, 1981, upon a charge filed on April 17, 1981, by the same Union. The issues are whether the Respondent violated Section 8(a)(1), (3), and (5) of the Act. Briefs were filed after the close of the hearing by all parties.

On the entire record, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Chef's Pantry, Inc., an Ohio corporation, has an office and place of business in Columbus, Ohio, where it is engaged in the nonretail sale and distribution of frozen food and related products. During the 12-month period before issuance of the complaints, a representative period, the Respondent in the course of its business sold and shipped from its Columbus, Ohio facility products and goods valued in excess of $50,000 directly to points outside the State of Ohio. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that United Food and Commercial Workers District Union No. 346, United Food and Commercial Workers International Union, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Case in Brief*

Pursuant to a Decision and Direction of Election issued on October 9, 1980 (Case 9-RC-13417), a Board election was held among nine employees in the Respondent's plant in Columbus, Ohio. The election took place on November 10, the Union won, and the Board certified it as exclusive bargaining agent on January 2, 1981. During that same month the Union asked the Company to bargain with it but the Company refused. Also after the election the Respondent made a number of changes in the conditions of employment of the employees involved in the bargaining unit, all called unfair labor practices in the complaint because the actions were taken unilaterally, i.e., without first bargaining with the Union as the statute commands. In April the Respondents discharged two employees who had been very active in the Union's organizational campaign. The discharges are said to have been in violation of Section 8(a)(3) of the Act.

B. *Refusal to Bargain*

In its first demand letter, dated January 7, 1981, Bobby Ross, designating himself "Secretary-Treasurer District Union No. 346," reminded the Respondent that the Board had certified Union Food and Commercial Workers, District Union No 346, and said the Union wished to "enter into meaningful negotiations for a labor agreement . . . after January 11, 1981." A second letter, dated January 15, designated the same way, said, "Negotiations should commence as soon as possible." The Respondent's sole answer to those demands was that it was "not in a position to consider bargaining negotiations . . . ."

I find that by refusing to bargain with the Union on request the Respondent violated Section 8(a)(5) of the Act. In its brief the Respondent articulates four defenses to this part of the complaint. They are all without merit. (1) It says the demand was made by a union other than the one certified by the Board. The documents in evidence clearly prove otherwise (2) The Respondent also contends that the demand letter asks for "recognition" only, and is not an "unequivocal demand for bargaining." Again, the record does not support the assertion. (3) The Respondent disputes the appropriateness of the unit as found by the Board in its Decision and Direction of Election. That matter is not litigable at this stage of this proceeding.[1] (4) Finally, the Respondent argues that because an earlier Board proceeding, involving an earlier election held by the Board in 1978, was still in litigation, the November 11, 1980 election which the Union won must be ignored The argument misconceives fundamen-

[1] I find that the appropriate bargaining unit in which the Respondent illegally refused to bargain is

> All freezer employees employed by the Employer at its Columbus, Ohio facility, including the shuttle driver, but excluding the sales servicemen, advance salesmen, swingmen, telephone salesman, all office clerical employees and all professional employees, guards and supervisors as defined in the Act

tal Board law A union is entitled to a second election after 12 months have passed since the first. To permit earlier litigation, no matter what issues are raised there, to frustrate the right of employees after such 12-month period to prove majority status would be a denial of the basic rights set out in this statute

C *The Discharge of Two Employees*

Michael Slatzer and Marshall Farmer worked on the dock, where food in large quantities is received by truck delivery and, in the warehouse freezer where it is stored and then shipped out to customers Each had worked for the Respondent for over 5 years, and each had been, admittedly, very "outspoken and visible" in trying to bring the Union into the plant. Slatzer had been the Union's observer in the 1978 election, had testified for the Union in a prior unfair labor practice hearing before another administrative law judge, had been with the Union's attorney at a Board hearing leading to the 1980 election, and had acted as the Union's steward when employees later had difficulties with members of management—once persuading the Company to remove a reprimand from the personnel file of an employee and once calming a dispute arising from acrimony between another employee and a supervisor Farmer, too, testified against the Respondent in the earlier unfair labor practice proceeding, and acted as the Union's observer at the 1980 election

On the morning of April 6, 1981, there arrived a large semitrailer full of chickens for delivery to the Company It was an unusually large load—1000 trays, 1000 boxes or 10,000 pounds of food—the record is ambiguous as to exactly how much it was, with the witnesses using conflicting phrases. But clearly it was greater than the usual loads that come A question arose as to how to get the chickens off the truck and into the warehouse. The upshot was that the driver—an hourly paid employee of a trucking company—agreed to pay Slatzer and Farmer $100 to do the necessary work either after their regular hours with the Respondent, or early the next morning before they went on the clock in their regular employment Donald Craine, the plant manager, heard about the arrangement and told Slatzer and Farmer they should not do that, should not take any money from the driver, should do whatever was necessary on the Company's time instead They did as they were told and the chickens were processed into the warehouse that day At the end of their shift the next day both men were summarily fired The complaint alleges they were discharged in retaliation for their prounion activity. In defense, the Respondent contends they were sent away only because they had agreed to accept money from that driver.

Before considering the merits of either side of the issue, it is necessary to make clear what is a recurring problem that arises at this unloading platform, or dock The arriving food is most times stacked in containers—called pallets or boxes or whatever—that can be raised by forklift carriers which are pulled or rolled off the truck, onto the dock, and straight into the warehouse for storing At times, however, the food does not come so arranged, instead it is either lumped together inside the truck, sometimes called "on the floor," or placed in many small trays or pallets that cannot be transferred to the forklifts These are called throw away pallets. In such cases, the contents must all first be transferred to acceptable pallets or trays that are then placed on the company lifts or carriers for movement into the warehouse. This sometimes necessary operation was referred to at the hearing as "repalletizing." Depending on the size of the shipment or the kind of product, this necessary work can take only an hour or two, but sometimes 4 or 5 hours for more than one man

When all that has to be done is unloading the truck, the driver does part of the work and the Respondent's employees on the dock, to the extent that they had the time, help him unload. They actually go into the truck to forklift the correctly stacked food This record shows, despite the vague and oblique words of the two supervisors who testified for the Respondent, that when repalletizing is necessary, it is the essential burden of the driver, or the shipping company that sends him, to see that cargo is correctly stacked or is put on pallets that can be brought into the warehouse. And it was this kind of load that arrived at the dock that April 6 morning.

John Bennis was for several years the direct supervisor at the dock over these men. He tried to make the point that the repalletizing work that had to be done on that one truck cargo was in fact a duty for which the Respondent paid Slatzer and Farmer. In his direct examination, when called early in the hearing by the General Counsel, Bennis was evasive and not at all clear. Asked was it "primarily the driver's responsibility" to do the repalletizing, he answered, "Not necessarily " Asked again could the driver just stand by and do nothing about the needed repalletizing, Bennis said, "If that's the way it's contracted between our company and his company," which happens, he added, "In some cases." Continuing with his testimony. "Q How do you determine which case is contracted that way? A It's right on the bill of lading " Not only was the contract underlying this particular delivery not produced, but no such contract for any delivery was offered in evidence. Bennis was not telling the truth. From his later testimony:

> Q Okay Now, isn't it a fact, Mr Bennis, that on numerous occasions drivers have come to the distribution center with full loads on the floor of the truck and complained that they were too tired to unload them and they had been required to just pull the trucks away because your people weren't going to do it?
>
> A That has happened.

From his prehearing affidavit:

> Some of the loads coming in are full loads; some part. On a partial load which is on the floor, not on pallets, it is the driver of the truck responsibility to get the product on our back door and on our pallet where our forklift operator will put it up and bring it in. When we have a man available or when we need to expedite unloading one of our people [Farmer] would assist the driver Under normal circumstances this was the driver's responsibility

Craine, the manager who said it was he who decided to discharge the two men, was the first witness called by the General Counsel Repeatedly he said repalletizing was the work of his dockmen and that he had never heard of any of the Respondent's men being paid, either on or off the clock, for doing the restacking at a driver's request. But, again like his subordinate supervisor, Craine then admitted that at an unemployment compensation hearing after the two discharges, he made the following statement: ". . . the primary responsibility for restacking merchandise on acceptable pallets is that of the truck-driver if the truckdriver brings it in on pallets which are unacceptable " Craine also testified that a "lumper" is "a person that hangs around receiving docks and he hires himself out to help semi-drivers—help drivers unload their trucks." Craine even said at the hearing that at the request of the driver, Bennis, the supervisor, sometimes calls "Manpower to send a man down to unload the truck." If in truth the driver is not responsible for getting the load properly on the dock, why should he ever hire an outsider to do it?

Six employees, two still working for the Respondent today, plus a former supervisor who was in charge of this dock for several years, testified directly that the use of dockmen like Slatzer and Farmer, to help repalletize a load at the request of a driver and at the expense of the driver, was a common occurrence up to the time of the two discharges. When the testimony of Craine and Bennis is appraised together with the rest of the testimony, the credibility of both management agents suffers very badly. Craine even admitted that he knew of one occasion before these dismissals when an employee of his company while on the clock, was paid by a driver to repalletize a load. And Bennis admitted he once personally called an employee at home, again at the request of a driver, "to assist in the repalletizing of a load," and that the driver paid the man for the work. I credit the employee witnesses and Ackley, the former supervisor over the dockmen, and I find it a fact that, on occasion, with the knowledge of Supervisor Bennis, at least, the dockmen, certainly on their own time, were paid by outside truck delivery drivers to repalletize loads.[2] Certainly Craine also knew it had happened before, for he admitted as much. Did he also know it was a common practice? In all probability he did.

Be that as it may, we come to the incident on April 6. When Tony Nave, the truckdriver, arrived he was tired after driving a long distance. On learning the chickens were not on acceptable pallets, he turned to Farmer for help. According to Farmer, Nave said he was too tired after driving all night and asked if anybody could help him. Farmer suggested calling Manpower, or going to the nearby bar for a lumper When Nave said he did not want anybody from the bar, Farmer suggested he and Slatzer would help him but that it would have to be "after work." Nave checked with his dispatcher by phone and obtained approval for the arrangement

Apparently someone from the office of the shipper who was sending the chickens telephoned Craine that morning to complain about the $100 price, or maybe about the idea of having to pay anybody for the repalletizing. Bennis, the supervisor, was on leave, and did not return until the end of the week Craine then went to the dock and talked to Slatzer and Farmer Just what the three said in that conversation is stated differently by the witnesses, but one thing is clear: Craine told the men they should not accept money from Nave under any conditions, and should instead do whatever work was necessary, including all of the repalletizing, on the Company's time. Whatever they told Craine in justification of what they had proposed to do, they obeyed the superior and together proceeded to repalletize the entire load and get it correctly into the warehouse before the day ended.

Both Slatzer and Farmer came in the next day and worked a full shift as always. Craine went on to testify that on Tuesday he consulted his superiors about the matter, and that when they asked for his opinion, he advised discharging the men. More than once he stated unequivocally that the sole reason the men were discharged, without advance warning, at the end of the shift, was because they had arranged to accept the money from the driver Bennis, their immediate supervisor, had nothing to do with the decision; he was away at the time. Only Craine and Nave testified for the Respondent about what was said by the pertinent actors at the time of the incident. In the light of all other relevant factors, and what the two men told the manager when they talked on Monday, can Craine be believed as to what truly motivated him that day. I think not.

An insight as to the reason why Craine fired these two men is revealed in major part in what was said by Slatzer and Farmer, and by Nave and Craine, in more than one conversation. When he first came to the dock in the morning, Craine spoke to Nave, and then to the two employees. Nave had already talked to Slatzer and Farmer, and he talked with them again later during that day. Also, in the afternoon, while complying with the manager's instructions to do the repalletizing on company time, both men went to Craine's office to explain again why what they had intended to do was not wrong, did not violate a company policy, and had been openly permitted by their supervisor, Bennis, in the past. In the course of their testimony the witnesses were not always precise as to which conversation they were at the moment referring to. But since the decision to fire the men was not made until the next day, April 7, it is of no great moment just when things were said during April 6. It is the thoughts that were exchanged that count.

Before the manager arrived on the scene, the driver was perfectly satisfied with the arrangement for payment he had made, even though he called it "steep." He had asked for help, he had found it, and things were going to his satisfaction. It was only when Craine began to criticize the dockmen for planning on taking any money from the driver that Nave began to think ill of Slatzer

[2] Called by the Respondent as the last witness, the following came from Bennis

> On one occasion, if I remember anything of that nature being said and that was a passing comment, "What if this guy wants to pay us for unloading your truck?" I said, "No We are going to unload it on our time and on our clock " I said, "If you want to unload it for him and it was a bluff, you get off the clock and he pays you, you get back on the clock, you finish your shift and that's it "

and Farmer. His testimony is ridden with belittling comments, in an obvious attempt to portray the men as dishonest thieves. He admitted he did not really recall what anybody said, yet kept mouthing offensive remarks Wherever his story conflicts at all with that of Slatzer and Farmer, I do not credit him. He said that his opening complaint to Craine was that "your two men are standing there at the table playing cards and messing around," "that they weren't working." Again: "I just went in to ask Mr. Craine how come the gentlemen weren't working and holding me up." The fact is Slatzer and Farmer were then on their break period. But these statements by the driver show he was not upset by the fact of payment at all Later, as he worked up his indignation as a witness, came the following·

> Q. What did you tell him [Craine]?
>
> A. I said, "What's going on here?" I said, "It's a union dock and the union man is getting x amount of dollars per hour to work and then he goes up and charges me a hundred bucks to do work that wouldn't take a half hour to unload me and get me back to the road again " I said, "It's a ripoff."

As a witness Craine argued much more than he spoke plainly. Repeatedly he evaded direct answers, injected oblique innuendoes, and more than once his earlier signed statements contradicted his oral testimony. For example· A number of times he tried to convey the thought that the two men were scheming to get money while still on the Company's clock. The question was put directly: "Q. . . . . In deciding to fire him, was your reason that you fired him wrongdoing on his part for taking money from the trucking company while being on your payroll, on your clock, or did you fault him because he had no right to do it even on his own time? Which was it? A. For taking . . . . The reason he was discharged is for jeopardizing the company with other drivers " This sort of response from the man who took sole responsibility for the discharge serves only to damage his credibility all the more.

Four critical facts are clear on this record, because they were stated directly by the two dockmen, and because, aside from diatribes and generalizations voiced by the managers, all four of the facts were truly conceded by the company witnesses Both Slatzer and Farmer told Craine (1) that the work involved was repalletizing, not just unloading the truck, (2) that they were going to do it on their own and not while on the clock, (3) that similar work assignments had been carried out before with direct payment by drivers, and (4) that their supervisor, Bennis, always knew it and had permitted it. In both the discharge entries made in the men's personnel files, and in his statement to the unemployment compensation hearing later, Craine wrote that the two were discharged "for attempting to take money from a truck driver to unload pallets without authorization from a supervisor " But he also admitted, on the record, that "the money was . . . for the purpose of repelletizing rather than unloading the pallets . . . ." Next: "Q Now, during your discussions with Mr. Farmer and Mr. Slatzer about repalletizing that chicken, they both insisted they were going to do it on their own time, did they not? A. That's right." Next· "Q Well, they did tell you that Mr. Bennis allowed them to charge the drivers to repalletize the work, didn't they? A. They said that they charged for it in the past and they had always done it, and I was not aware of anything like that going on." From Craine's investigation affidavit· "I said you guys both know we don't charge to unload trucks Slatzer, I believe, said, 'We all do that,' and that, 'We're doing what our supervisors told us.'"

I find, all things considered, that Craine discharged Slatzer and Farmer on April 7, 1981, because of their prounion activities and to weaken the Union's strength among these employees, and that thereby the Respondent violated Section 8(a)(3) of the Act.

Craine was a principal witness for this same Company at an earlier unfair labor practice proceeding before the Board (*Chef's Pantry, Inc.*, 247 NLRB 77 (1980)), was discredited by the administrative law judge there, and found by the Board to have committed acts of coercion, against these same employees, violative of Section 8(a)(1) of the Act He knew the work Slatzer and Farmer were going to do was not going to be paid for by the Company, and was to be performed on their own time They obeyed him when he told them to do it without extra pay. He also heard them say—when they came to his office to explain the propriety of their action—that they had often done it before and that their supervisor had approved the practice. Maybe Craine had no direct knowledge of how often his dockmen had helped other drivers discharge what definitely was a responsibility of the outsider, although I doubt that. But even so, a more understandable behavior, since he was dealing with employees who had been perfectly acceptable for over 5 years, would have been to wait until Bennis returned, at least to ascertain whether they were telling the truth. Had he really been incensed by what at the hearing he called reprehensible behavior, he would have sent them off then and there, or surely at the end of their shift that Monday Instead he took another day to think about it. Having waited 1 day, he could have waited 3 more until Bennis returned. It is a matter of credibility. He stated what his reason was; I do not believe him.

The prima facie case in support of the complaint with respect to these two men is clear. Knowledge of their outstanding union activities, set opposition to the union movement by the Respondent as evidence by its earlier unfair labor practices, and discharge for doing no more than what they had been permitted to do in the past. In the total circumstances, I have no doubt the Company did not discharge Slatzer and Farmer as it did for the reason advanced by Craine. And when "the stated motive for a discharge is false, he [the administrative law judge] certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

After the election was held on November 10, 1980, and the Union won a clear majority, the Respondent

continued to operate its business as it always had. Changes in the rules governing conditions of employment were made, old practices were enforced, established rules were reannounced so the employees would be reminded about them In many instances the notices of violations were recorded and warnings issued to individual employees. All this, of course, was consistent with the Respondent's announced intention not to bargain with the Union regardless of its proven majority and the Board's certification. The law is clear. When majority representative status has been proven in a regular election, the employer may not make any changes in conditions of employment without first discussing its proposals with the exclusive bargaining agent *Forest Park Nursing Home*, 235 NLRB 408 (1978); *Lawrence Textile Shrinking Co.*, 235 NLRB 1178 (1978). If it ignores the union, and acts unilaterally, as the cases say, it commits a violation of Section 8(a)(5) of the statute no matter how many times it orders its employees to work under the changed terms.

The question now is which of the notices the Respondent posted, which of the warnings of rules violations issued were new, changed substantive conditions of employment, and can therefore be said to have been in each case an unfair labor practice? At the hearing the General Counsel took a blunderbuss approach. He put into the record virtually every fault-finding document placed into an employee file, every notice posted after the election, and called just about everything the Respondent did illegal. But while it is true an employer may not change conditions of employment unilaterally in these circumstances, it still may run its business as it always did. For example, one notice, dated November 24, 1980, set out the shift schedule, with some changes, for all employees It differed from the immediately preceding schedule then in effect. But the record also shows, via documents filed by the Respondent into the record, that shift rescheduling of this kind was always done from time to time as a regular method of running the business. It cannot be said, therefore, that this was change, subject to union negotiation at that time. There were other messages the Respondent conveyed to the employees that really amount to no more than what any employer in the normal conduct of any business of necessity will say to its employees. On December 5, 1980, the supervisor told a man he had failed to stack the freezer properly, an error which then caused a loss of product, and that the next time it happened he would be disciplined. The employee, Slatzer, admitted he had made the mistake when he got that warning. Then he added he had made errors before. This is hardly the sort of criticism expressed by a supervisor that merits the label unfair labor practice. In the end, in his brief, the General Counsel narrowed his contentions to the more significant things the Respondent did. We will consider them seriatim.

1 On November 13 the Company posted a notice telling the employees that from that time on kitchen facilities and food products in a freezer stored there could no longer be used by the employees for their lunch They had always been permitted to enjoy that benefit in the past. I find that by taking that kitchen and food privilege away from the employees the Company violated Section 8(a)(5)

2 On November 21 another notice was posted to all hourly employees saying that thereafter they were not to leave work without permission of a supervisor until the particular job they were on "has been completed." There was no such written rule before, although Bennis, the dock supervisor, testified there had been an unwritten one. But Bennis also said that in the past people had to stay "if there was another 15 or 20 minutes" of work to be done, and then he admitted he meant "if it was not too long." The testimony of the employees is that there are times when it is an inconvenience to be compelled to remain for an extended overtime period in all circumstances. Again, because there had been no such fixed and binding obligation about overtime hours before, I find that the posting of that rule also constituted an 8(a)(5) violation. It was a definite and substantive change in binding conditions of employment

A comment is in order here. The Respondent justifies this new rule as economically advisable and an objective business necessity. I have no doubt that is a correct statement But the true theory of illegality concerning these unilateral changes is not that they were inspired by any direct antiunion motive—the repeated hints to the contrary in the General Counsel's brief notwithstanding. The fact an employee change in working conditions is good for the business is not reason enough for ignoring the statutory mandate that the employer must first bargain about changes If the union adamantly persists in refusing to go along, the employer may then go ahead and do it. That is all this Respondent is obligated to do. It did not.

3. Employee Farmer testified, without contradiction, that at least twice before 1981 he had been absent 2 consecutive days for illness and had never brought in, or been asked to bring in, a doctor's certificate to prove he had been ill He was absent because he was ill on December 15 and 16, 1980. When he phoned in the second day to report he was still ill, the supervisor told him to obtain a doctor's certificate. He did, and brought it with him when he arrived for work on schedule the following morning. Bennis told him it was not enough, because the doctor had not written down the nature of the illness. Bennis then prepared a formal written warning for that offense, suspended Farmer indefinitely, and sent him away. The employee went straight to the doctor, got another certificate, brought it to Bennis, and was returned to work.

There is no need to add that this too was a new and material change in conditions of employment. I find that by establishing such a rule in December 1980, the Respondent committed another unfair labor practice. It must now rescind that rule and remove that reprimand notice from Farmer's personnel file.

4. The next item rests only upon a complaint allegation, which the Respondent admits, that "on about" January 1, 1981, it changed its holiday system by saying employees could not have two consecutive holidays, but must take one holiday at a time and the next some time later The complaint says "on about"; I take this to mean the Christmas and New Year holidays of 1980–1981,

when Christmas Day and Christmas Eve as well as New Year's Day and New Year's Eve were consecutive holidays Taking one day at a time the employees did not lose anything. The Company being in the food business, and people eating more on holidays than at other times, I can understand the Company wanting its people to work at least 4 days each of those weeks The rule was eliminated later anyway. It would have been better judgment to have left this allegation out of the complaint

5 A better example of the catchall technique of the complaints is a warning issued to Slazter on January 22, 1981. It reminded him that when he came late for work that morning it was the third time that single month—with chapter and verse to the minute—and advised him of his responsibility to get to work on time. The General Counsel suggests I find an unfair labor practice based on that warning because no warning was issued the first two times the employee came late.

6 On March 17, a notice warning was posted addressed by name to six employees. It reads:

> When you arrive at work you are to start your assigned job at your appointed starting time—not five or ten minutes later When you arrive at work early, go on break or lunch, do not disturb other employees who are working. Your break time is not necessarily theirs.

Again the General Counsel finds fault with the Respondent for telling its employees working time is for work. Surely he does not mean any employer is so restricted, but only one whose employees are represented by a union The reasoning equates union with a license to do as you please in the workplace. This sort of stuff in a Board complaint is better left without comment.

7. Two more warnings, dated January 16, were placed in evidence, one issued to Farmer and one issued to employee Allen Farmer was criticized for being in the restroom 21 minutes and Allen for staying there 19 minutes They were ordered thereafter to "check in and out" when taking such breaks for more than 2 or 3 minutes, just as they were always required to check in and out for "lunch break—coffee break—warm-up break" At the hearing neither employee denied having stayed in the restroom that long, they explained it as necessary to remove the protective clothing they had to wear in the freezer warehouse, and then having to put it on again I do believe their problem was different from the ordinary one. But it is also conceded the employees at all times are required to check in and out for lunch, coffee, and "warm-up breaks" Is going to the toilet for 20 minutes really any different from whatever was meant by the phrase "warm-up breaks?" I do not know. Twenty minutes is a long time for whatever had to be done in the toilet. There was no suggestion in the notices that the men would lose any pay even if they stayed 20 minutes, just so long as they did check in and out I do not think this little matter was such a change as to warrant any consideration here.

The major thrust of this entire consolidated proceeding is to compel the Respondent to bargain with the newly established majority representative of its employees, which is the principal concern of this statute Continuing to discuss other piddling details enumerated in the complaints would only frustrate that objective by pointless repetition of the same thing There came a time when the Respondent announced that thereafter it would no longer call employees away from their work to answer personal telephone calls that came for them in the office, except in case of emergency It also told them that they should stop using the Company's phones for personal matters This last warning came about when one man made several long-distance calls on the company phone—to Sandusky, Ohio, and to Madison, Wisconsin, two distant offices of the same company The employee had been authorized to call Sandusky for certain insurance rate information, but his total testimony does indicate he took much greater liberty on the long-distance line then could have been intended In any event, I do not believe trivial matters of this kind, perfectly reasonable in the day-to-day conduct of any business, ought to keep this case in continuing litigation. In Board proceedings it is substance that counts, not frills.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V THE REMEDY

The Respondent must be ordered to cease and desist from again committing the unfair labor practices of which it has been found responsible. Affirmatively, it must be ordered to bargain with the Union in good faith on request now It must also be ordered to offer Slatzer and Farmer reinstatement to their old position with full backpay, and to post the appropriate notices In the circumstances of the total case, the restraining order must be that the Respondent not hereafter violate the statute in any other manner

CONCLUSIONS OF LAW

1. By refusing to recognize the Union, on demand, as exclusive bargaining agent of the employees in the appropriate bargaining unit, the Respondent has violated and is violating Section 8(a)(5) of the Act The appropriate bargaining unit is:

> All freezer employees employed by the Employer at its Columbus, Ohio facility, including the shuttle driver, but excluding the sales servicemen, advance salesmen, swingmen, telephone salesman, all office clerical employees and all professional employees, guards and supervisors as defined in the Act

2. By discharging Michael Slatzer and Marshall Farmer for engaging in protected union activity, the Respondent has engaged in and is engaging in unfair labor

practices within the meaning of Section 8(a)(3) of the Act.

3. By unilaterally depriving its employees of the previously enjoyed privilege of kitchen and food facilities, by unilaterally instituting a new system of compulsory overtime work, by unilaterally establishing a new rule requiring medical certificates of all employees absent from work because of illness, all without prior opportunity given to the Union to bargain about these matters, the Respondent has engaged in and is engaging in violations of Section 8(a)(5) of the Act.

4. By all of the foregoing conduct the Respondent has violated and is violating Section 8(a)(1) of the Act.

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

[Recommended Order omitted from publication.]