

Wisconsin Beef Industries, Inc. and United Food and Commercial Workers International Union, AFL-CIO¹ and Wisconsin Beef Industries, Inc. Employee Committee, Party in Interest. Case 18-CA-5962

May 2, 1980

BY MEMBERS JENKINS, PENELLO, AND
TRUESDALE

DECISION AND ORDER

On November 13, 1979, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

The Administrative Law Judge concluded that Respondent had engaged in numerous acts in violation of Section 8(a)(1), (2), and (3) of the Act. With one exception, we affirm these findings of the Administrative Law Judge.²

¹ The name of the Charging Party, formerly Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is amended to reflect the change resulting from the merger of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, on June 7, 1979.

² In agreeing with the Administrative Law Judge that Respondent violated Sec. 8(a)(2) of the Act by, *inter alia*, dominating the Wisconsin Beef Industries, Inc. Employee Committee, we note that the vice of a dominated labor organization "is that an employer can discourage collective bargaining by holding [the organization] out to his employees as an instrument for that purpose which they can adhere to without incurring his disfavor." *Grafton Boat Company, Inc.*, 173 NLRB 999, 1003 (1968). In effect, the dominated labor organization discourages genuine collective bargaining by giving employees only the semblance of collective-bargaining strength while ultimate control is still maintained by the employer. The Employee Committee at Respondent clearly demonstrates this vice. Plant Manager McDevitt repeatedly made known to employees that he viewed the Employee Committee as a means of solving Respondent's problems without a union. McDevitt testified that the Committee was never recognized as a bargaining representative and that he did not consider his meetings with the Committee to be negotiations. The record shows only one instance in which a suggestion of the Committee was approved by McDevitt. This fact, along with McDevitt's position during meetings, sitting behind a desk placed in front of the employee representatives, and his role in opening meetings and initiating discussion of specific topics, inevitably led employees to the conclusion that it was Respondent through McDevitt who was in control of the organization. This is graphically illustrated by the fact that when an employee representative resigned from the Committee because she felt it was ineffectual, she first told McDevitt and asked him what employees to tell and how to select a new representative. On the facts before us, the Administrative Law Judge was justified in finding that Respondent unlawfully dominated the Employee Committee.

On October 24, 1978, the Union filed a second petition for an election in a production and maintenance unit at Respondent.³ On November 3, 1978, 10 days after the Union had filed its most recent petition, Respondent announced to the employees that they were receiving a wage increase, retroactive to October 29, 1978, and would receive another wage increase in July 1979. The Administrative Law Judge found this announcement and grant of the increase to be a violation of the Act. In finding a violation, the Administrative Law Judge did note that Respondent had announced in September 1978, several weeks prior to the filing of the October 1978 petition, its intention to conduct an industry wage survey and to adjust its wages accordingly. Respondent's officials testified that in mid-October 1978, and before the petition was filed, Respondent decided upon the amount of the increase, but, according to its officials, awaited advice from counsel concerning the impact of President Carter's wage price guidelines on the proposed increase before announcing any increase. The employees were told in late October that an increase would be given and, as noted, on November 3 the increase was announced.

In finding a violation in the announcement and granting of the increase, the Administrative Law Judge first noted that Respondent had offered as a defense to its earlier July 1978 layoff its precarious financial condition. He then found it "startling" that in so short a period of time after a layoff for alleged economic reasons Respondent could afford the 50-cent increase which it granted. He further noted the timing of the increase, and Respondent's previous unlawful action directed toward the employees' organizing efforts. Based on these factors, he found it "impossible to credit" Respondent's defense that the increase was decided on prior to its knowing of the employees' resurgent interest in unionization as demonstrated by the second petition, and was not intended to have an effect on the Union organizational efforts. In its exceptions Respondent argues that in finding a violation the Administrative Law Judge failed to consider all the relevant evidence. We find merit in Respondent's exception.

Thus, we conclude the Administrative Law Judge failed to take into account that the announcement of the wage survey to the employees in September 1978, coincided with a marked improvement of Respondent's financial condition,

³ The Union had earlier withdrawn a petition for an election in such a unit after the July 21, 1978, layoff of the production and maintenance employees. The Administrative Law Judge found this layoff violated Sec. 8(a)(3) and (1) of the Act. We are affirming that finding.

which had previously been poor.⁴ Indeed, since it began operation in February 1978, Respondent had lost money during every month except June. But, in September, Respondent began recouping these losses, and by the end of November it was making profit.⁵ The Administrative Law Judge also failed to give adequate weight to the fact that Respondent's initial announcement in September 1978 concerning the wage survey (which was to be completed as soon as possible), and future salary adjustments antedated the Union's second petition and followed withdrawal of the first petition by almost 2 months. According to uncontroverted evidence, the decision to give the increase was made a week before the second petition was filed. In spite of this, the Administrative Law Judge chose to discredit Respondent's claim that the increase was decided on prior to its ascertaining knowledge of the renewed organizational activities. We cannot agree with his basis for doing so. The Administrative Law Judge concluded that Respondent knew about the second organizing effort prior to its decision to grant the wage increase because, during October, one employee had worn a union sticker on her hard hat, while another had asked whether she would be "hassled about the Union" when she was recalled from layoff. Contrary to the Administrative Law Judge, we are not persuaded that knowledge that one employee was wearing a union sticker establishes knowledge of organizing activity. Furthermore, in view of the first organizing campaign, Respondent may have understood the second employee's statement as an expression of fear of retaliation for union activity in connection with the first campaign. In sum, neither incident establishes Respondent's knowledge of renewed organizing effort. Thus, although the timing of the increase and Respondent's prior unfair labor practices are cause for suspicion, they do not, without more, establish a violation in the face of evidence that the employees were told an increase was forthcoming and that the increase was decided upon before the petition was filed. Accordingly, we shall dismiss this allegation of the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

⁴ We stress, however, that this characterization of Respondent's prior economic situation in no way signals a disagreement with the Administrative Law Judge's finding of an 8(a)(3) violation in the July 1978 layoff and his rejection of Respondent's economic defense offered there as a justification for that layoff.

⁵ Respondent's balance sheet for the month of October appears to indicate additional losses. However, Respondent's vice president of finance, James Coulombe, testified without contradiction that this was due to a change in accounting methods adopted on the advice of Respondent's auditors, who had just conducted a fiscal year audit.

lations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wisconsin Beef Industries, Inc., Eau Claire, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(e) and renumber the subsequent paragraphs accordingly.
2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

Following a hearing at which all sides had the opportunity to participate and offer evidence, it has been found that we violated the Act and we have been ordered to post this notice and to abide by the following.

WE WILL NOT fire or layoff employees for engaging in union and concerted activities among themselves and with other employees for their mutual aid and protection.

WE WILL NOT vary or abandon benefits granted to our employees through the medium of the Wisconsin Beef Industries, Inc. Employee Committee.

WE WILL NOT unlawfully interrogate our employees about their union activities or sentiments or their knowledge of the union activities or sentiments of other employees.

WE WILL NOT threaten our employees with loss of work or closure of the plant to inhibit their union activities.

WE WILL NOT create the impression of surveillance of the activities of our employees nor will we request employees to attend union meetings and report about them to us.

WE WILL NOT warn or threaten employees that we would only operate our plant non-union and would close the plant before operating with a union.

WE WILL NOT tell employees that we laid them off and did not recall some of our employees because of the union activities of our employees.

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

WE WILL offer Daniel L. Mayer and all the employees who were laid off on July 21, 1978,

immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL reimburse them for the pay they lost as a result of our action, with interest.

WE WILL withdraw and withhold recognition from and completely disestablish the Wisconsin Beef Industries, Inc. Employee Committee, or any successor thereto, as a representative of the employees.

Our employees are free to become or remain members of United Food and Commercial Workers International Union, AFL-CIO, or any other union they desire.

WISCONSIN BEEF INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge: The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein called the Union or Charging Party, filed a charge on September 1, 1978,¹ and an amended charge on December 12, against Wisconsin Beef Industries, Inc., herein called Respondent or the Company, alleging that Respondent had violated Section 8(a)(1), (2), and (3) of the Act. The Regional Director issued a complaint on December 20 alleging that Respondent had interrogated and threatened its employees; created an impression that it surveilled their union activities; promised and granted wage increases and other benefits; fostered, promoted, and assisted in the formation of, and recognized Wisconsin Beef Industries, Inc., Employee Committee, herein called the Committee, as a representative of its employees; discharged employee Daniel L. Mayer; laid off all its employees on July 21; and failed and refused to reinstate a substantial portion of them to equivalent employment positions because of their union activities, in violation of Section 8(a)(1), (2), and (3) of the Act.

Respondent's timely answer, as amended at the hearing, admitted the service and commerce allegations; the status of the Union and the Committee; the supervisory status of certain Respondent officers and agents; the discharge of Mayer; and the shut down of the plant, but denied that it had violated Section 8(a)(1), (2), and (3) of the Act.

In its post-hearing brief, Respondent stated that it had made clear to General Counsel prior to the hearing and to me during the hearing that it did not contest the allegations relating to 8(a)(1) statements and interrogations engaged in by its former Plant Manager Eugene McDivitt and his subordinates, nor did it contest the 8(a)(3) allegation concerning Daniel Mayer. Respondent further did not contest the discriminatory nature of the recall of

employees following the July 21 shutdown except with respect to two employees. Specifically, Respondent contests the 8(a)(2) allegation, the 8(a)(3) allegation, as regards the layoff of its employees on July 21, and that the granting of a wage increase on November 3 violated Section 8(a)(1).

In considering all the facts in this case, I have determined that Respondent violated Sections 8(a)(1), (2), and (3) of the Act in all of the aspects alleged in the complaint.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally at the hearing held in Eau Claire, Wisconsin, on March 13, 14, and 15, 1979. Briefs from Respondent and General Counsel have been received and considered.

On the entire record in this case, including the exhibits and testimony, and noting the contradictions in testimony, and my evaluation of the reliability of the witnesses based on the evidence, I make the following:

FINDINGS OF FACT

I. COMMERCE FINDINGS AND UNION STATUS

Respondent is a Wisconsin corporation with its plant and office in Eau Claire, Wisconsin, where it is engaged in the preparation, packaging, nonretail sale, and distribution of beef and related products. During the past year, Respondent purchased and received from points directly outside of Wisconsin goods and materials valued in excess of \$50,000, and during the same period, sold and shipped directly to points outside of Wisconsin products, goods, and materials valued in excess of \$50,000.

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

Respondent admits, and I find, that the Union herein and the Committee are each labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Background and Undisputed Facts

Paul R. Schanno (since deceased) was at all relevant times chairman of the board of a corporate structure known as Consolidated Dressed Beef, and Roger B. Miller was its president. Under that corporate structure were three companies, Green Bay Dressed Beef, Huron Dressed Beef, and Fargo Beef Industries. These three companies are engaged primarily in a slaughtering operation and sale of beef carcasses.

Eugene W. McDivitt had worked at Landy's Packing Company and for other companies in the meat industry and, in January 1977, talked to Schanno and Miller about starting a boning, fabrication, and grinding operation. Consolidated Dressed Beef did not have such an operation. Following a number of discussions, Schanno and Miller agreed to establish such a business with McDivitt to run it. As set up, Respondent would provide an outlet for the three slaughtering companies' sale of beef carcasses and would round out the overall business. Work began on Respondent's plant in May 1977 and it was completed and ready for operation on February 8.

¹ Unless otherwise specified, all dates herein refer to 1978.

Donovan Fox, who had worked with McDivitt at Landy's, was the maintenance coordinator in overseeing the erection of Respondent's plant and, when it began operations, became the acting plant manager. Ed Arnsted, who had also worked at Landy's, became the supervisor foreman of the boning operation.

Landy apparently had a layoff and stopped its operations, sometime in either late 1977 or early 1978, and most of the office staff and practically all of Respondent's employees were recruited from Landy's staff, with Arnsted and McDivitt choosing and recruiting the employees whom they knew and wished to have.

McDivitt was responsible for all phases of Respondent's operations. He testified that he would consult with Respondent's corporate officers, Schanno and Miller, if he were to change the type of operation from ordinary cattle to a choice operation or if he was going to expend a large sum of money. Otherwise, complete and total control of the day-to-day operation of Respondent rested with McDivitt. In fact, Respondent pictured McDivitt as a one-man operation with no interference and with little control from Schanno and Miller.

McDivitt talked to Landy employees several months prior to the opening of Respondent's plant. In October 1977, he discussed with Kathleen Austin, who had a number of years' experience at Landy's, what her positions would be at Respondent. In November 1977, McDivitt discussed with Carol Phillippi and her husband what their positions would be and told them he wanted no unions in the plant and that if a union did come in, they would probably close the plant.

McDivitt had other conversations with prospective employees closer to the opening of the plant. Approximately a week before the opening, McDivitt interviewed Gregory Flemming and said he was going to run the plant nonunion and that they would probably have an employee committee. Velma Atchison was interviewed by McDivitt several days prior to February 8 and was told that the plant would not be union and that McDivitt would shut it down if a union came in. McDivitt said that if she was for the union, she could go out the door. A number of employees testified that in their interviews prior to the opening of the plant, they were told this would be a nonunion plant and that McDivitt wanted no union there. McDivitt admitted that in his prehire interviews with employees he told them the employer was nonunion and intended to stay nonunion and that if they did not want to work in a nonunion plant they should go elsewhere.

B. Events of February and March

On February 8, the plant operations began and McDivitt held a meeting of all employees. McDivitt testified that what he told the employees on that day concerning Respondent's nonunion philosophy was something he had discussed with Miller and Schanno prior to that time and that such represented their feelings as well. According to McDivitt, the employees were told that the policy was to be nonunion and that they wanted to keep it nonunion for at least a year and asked the employees to give him a year to see how the plant worked. He also discussed with them how much they could save on union

dues and had an employee named Progreba tell the employees how much union dues had cost him at another plant and that he was opposed to paying union dues. Also, the question of an employee committee was brought up (McDivitt states by one of the employees) and he said he would go along with whatever was comfortable with the employees. In regard to an employee committee, McDivitt testified that the concept was discussed with Schanno and Miller back in October 1977, when they were establishing Respondent's employee policies, and that there were employee committees at Schanno and Miller's other plants.

There was some minor disagreement among the witnesses as to whether the establishment of an employee committee was mentioned at the February 8 meeting or whether it took place 1 or 2 weeks later. In any event, the overwhelming testimony by General Counsel witnesses is to the effect that Respondent wanted an employee committee established so that it could handle whatever problems arose with its employees and not have them go to a union. Velma Atchison stated that McDivitt said he would like the employees to start a committee and told them that for the packaging department they should have one representative and other departments would have one or two, depending on their size. In any event, an employee committee was established and its first meeting was held in February.

Charles Lee, an organizer with the Charging Party, testified that he contacted Daniel Mayer on February 16 concerning the Union and gave Mayer union authorization cards to be distributed among employees. He testified that the first union meeting took place on February 24 and a second meeting was held on March 1, but he daily met with employees in the vicinity of the plant.

Donvan Fox testified that he and McDivitt knew of the union activities at the plant within a month of the plant's opening and that they saw union cards handed out and had seen some of them in Respondent's trash cans.

Daniel Mayer had a number of years' experience as a chuck boner and had worked at Landy's for more than 3 years. Arnsted had been a foreman over him at Landy's and there were never any complaints about his work. Mayer said he got blank union authorization cards from Lee in February, attended a number of union meetings, passed out the authorization cards and received completed authorization cards which he returned to Lee. Mayer was asked by Supervisor Arnsted, 1 or 2 days before he was discharged, if he was involved with the Union and Mayer said he was not.

Prior to this time, McDivitt had asked Pat Marco, who was a lead person in packaging, to go to the union meeting and report back to him on it. Marco testified that she went to the union meeting held during the first week of March and saw Mayer, who spoke out in favor of the Union, and also saw Progreba there. She stated she reported back to McDivitt on the meeting.

I conclude and find that Respondent violated Section 8(a)(1) of the Act by McDivitt's request of Marco and by receiving her later report on the meeting and by Arnsted's interrogation of Mayer.

On March 13, Daniel Mayer worked on what is termed a "turkey neck." This means a piece of meat where the backbone has been cut crookedly instead of in half. According to Mayer and others, when the bone is not split in half it becomes very difficult to remove the meat from around the bones or to disjoint those bones and on a number of occasions if a person tries to disjoint and remove all the meat their knife is broken. Most employees remove whatever meat they reasonably can and toss the "turkey neck" on the conveyor to go to the next station where employees with "whizzer" knives clean up the bones. On this occasion, Arnsted brought the "turkey neck" back to Mayer and told him he could do better than that. Mayer got a bit more of the meat off before tossing it back on the conveyor belt.

That evening, Mayer was brought to the office where McDivitt talked about his work on arm chucks and the "turkey neck," and a bit of an argument ensued. McDivitt told Mayer he was "causing a lot of waves around there" and they were dismissing him. On the same day, an experienced employee named Enslinger who supported the Union and had worked at Landy's and been brought to Respondent by Arnsted, quit following a confrontation. Enslinger's known boning style was to remove the meat and not disjoint a two-bone chuck. McDivitt spoke to Enslinger about his boning practice. Enslinger reportedly told McDivitt that was the way he had always done it and would continue to do so and if McDivitt did not like it he would leave.

Gloria Denzel, who had worked in the office at Landy's and was brought to Respondent with Office Manager Krebsbach, testified that McDivitt told some of the office employees when Mayer and Enslinger were terminated that Respondent did not need people like Mayer and Enslinger, that Mayer was an instigator and it was best to get rid of trouble before it started. Denzel testified that prior to that she had heard that Mayer and Enslinger were being watched by Arnsted, McDivitt, and Fox.

Tom Gibson was also an office employee under Manager Krebsbach. He testified, that on the day Mayer and Enslinger were terminated, he heard rumors in the office that Mayer and Enslinger were trying to bring the Union in.

As noted, *supra*, Respondent does not contest the allegation of the unlawful discharge of Mayer. The evidence is ample to demonstrate that Respondent's reason for discharging Mayer, and possibly for provoking Enslinger to quit, was because of the union activities they engaged in. I credit the testimony of Mayer, Denzel, and Gibson concerning the terminations and find that Respondent by the termination of Mayer violated Section 8(a)(1) and (3) of the Act.

McDivitt testified that the first meeting of the Committee took place on February 22 and he and Fox attended. He thought that the committee members had been elected but was not sure and was not in attendance at their selections. A number of the employees testified that they were picked, they thought, by their fellow employees but there was no balloting. There was no testimony that they were appointed by management. McDivitt stated that Progreba and another employee met with him

prior to the first meeting and he told them that they could use the lunchroom for group meetings. The employees were all paid by Respondent for their attendance at the first and subsequent meetings. McDivitt and Fox sat behind a desk, with the employees seated facing them, and McDivitt explained to the employees the Company's policies which he, along with Schanno and Miller, had developed and drafted in October 1977. They discussed the leave policies, vacations, related subjects and he told them that he would meet with the committee to discuss disciplinary actions before taking any action against employees.

McDivitt testified that following the first meeting he met with Schanno and Miller and informed them of what had been discussed and they told him what policies could be modified.

Velma Atchison testified that Pat Marco told her the employees in the packaging area wanted her to represent them. At the first meeting, approximately 15 committee members were present with McDivitt and Fox, who said they wanted to discuss a contract. The employer's rules were read. Atchison said that during this meeting McDivitt said there would never be a union in the plant, that Respondent would shut down first and said he had been told this, in an apparent reference to the Company's owners.

After the first meeting, Atchison discussed the company rules with the other employees and they suggested some changes. There was a meeting of committee members only led by Progreba prior to the second meeting with McDivitt.

At the second meeting she suggested some changes, including a guaranteed workweek and raises. No direct answer was received on these suggestions. McDivitt stated that the Company could be a big, happy family if they resolved their difficulties within the committee and they did not need a union. He also stated that members of the committee would be notified if an employee was given a warning and they would get together with McDivitt if someone was to be terminated and that the committee would have a say-so on the discharge. According to Atchison, the committee was never given any information or called concerning any disciplinary matter, including the termination of Mayer. Further, according to her, McDivitt did not accept any of the changes proposed by committee members.

McDivitt testified he held a general meeting of the employees on March 3, and told them the Company was changing some wage rates and told them what took place at the first committee meeting. According to him, the second committee meeting was held on March 8 to get agreement from the committee on the company policies.

On March 23, a letter from the Charging Party was sent to McDivitt stating that, as McDivitt knew, the Union was engaging in an organizing campaign at its plant and that a substantial number of employees had signed union authorization cards.

McDivitt stated that other committee meetings were held; one following the receipt of the union letter; another in April; and one just prior to July 4. In the July meeting, he said he told the committee that they were

having trouble getting cattle and that some of the other operations in the area were shutting down to make changes. He asked the committee to have an employee vote on whether they should work on a Saturday prior to a holiday or on the Monday preceding the holiday.

Atchison stated that an employee vote was taken and the employees voted to work on Monday and not on Saturday. Despite this vote, the employees had to work on both days and committee members went to McDivitt and asked why. McDivitt stated that Respondent had ordered too much beef and they would just have to work a half day on Saturday. After this, Atchison told her fellow employees she was quitting the committee and they ought to get a union. She went to McDivitt and said she was quitting the committee because it was not doing any good and that the employees had no confidence in it. Another employee was picked in her place.

C. The Layoff and Recall

Patricia Marco testified that just prior to July 21 Supervisor Arnsted asked her if Jerry Gibson or another employee had anything to do with the Union. She told Arnsted that she did not know. Somewhere around the same time, Arnsted told Marco that he understood there was going to be a union meeting that night.

Both of these remarks made by Arnsted, I find and conclude, are violative of Section 8(a)(1) since one is unlawful interrogation and the other gives the impression that Respondent was engaging in surveillance of the employees' union activities.

On Monday, July 17, the Union filed a National Labor Relation Board petition for a unit of full-time and regular part-time production and maintenance employees at Respondent. The petition was served on Respondent shortly thereafter.

Donvan Fox testified that on a Tuesday or Wednesday, the week prior to the layoff, which would have been around July 11 or 12, he and McDivitt met with Schanno and Miller and one or two others and discussed the availability of meat and other economic factors. Questions were raised about what would happen to their customers if they had a layoff. Schanno said that they should use their supervisors and keep some of the supplies going to their customers. In regard to the employees, Schanno said something to the effect of letting them cool off a bit, that it would not hurt them any.

On July 20, Jerry Gibson heard from his brother Tom, who worked in the office, that there would be a layoff the following day. Tom Gibson stated that on July 21 McDivitt told the office employees, including himself, that they were being laid off for economic reasons but that they knew differently. He told them the layoff would last about 2 weeks, that their jobs were secure and they should not worry, and that Schanno had said he wanted no unions in any of his plants.

During the layoff period, Tom Gibson worked in the office and testified that other supervisory and maintenance people worked in the plant repackaging and shipping goods to customers.

Gloria Denzel, who also worked in Respondent's office, stated that she heard from Krebsbach that there would be a layoff 2 days before it happened. Krebsbach

told her that the employees wanted a union and the layoff would be the Company's way of showing them that they did not want it, and was going to be used to scare the employees. She corroborated Gibson that they were told the layoff would be from 1 to 2 weeks and they would be called back.

After work was completed on July 21, McDivitt called the production and maintenance employees together and told them that there would be a layoff and said that there were two reasons for the layoff, that one of them was a meat shortage but then did not mention the second reason. Several employees asked him for the second reason and he refused to state it.

About 2-1/2 weeks later, Respondent recalled a number of employees and started production on Wednesday, August 9. The Union had filed a request to withdraw its July 17 National Labor Relations Board election petition on July 28 and the request was granted by the Regional Director with notice to Respondent. On August 9, prior to beginning operations, McDivitt spoke to the recalled employees. According to Kenneth Tompkins, all the recalled employees, McDivitt, Arnsted, Fox, and one other supervisor were present. McDivitt said that they were there to try again and "you'll notice there are a few employees that aren't here that were here before." He said they were not back because he knew they were heading up the Union. McDivitt continued that they had laid them off because they they had tried to bring the Union in and they would do it six more times if they had to. Other employee witnesses corroborated Tompkins' testimony. McDivitt also said that those who do not want to work nonunion could leave then and he would not fight their unemployment compensation.

Donvan Fox testified that he and Arnsted, in making up the list of employees to be recalled, used as a test both ability and whether they thought the employees supported the Union. He stated that prior to the layoff and during it they had learned from some of the employees which of them supported the union and that they did not recall employees they felt were union supporters.

As the need for additional employees developed some new employees were hired who had to be trained by others and the Company sought workers through the State Employee Commission rather than recall employees it felt were union inclined. Several union supporters were sent to Respondent through the State Employment Commission and were upset that Respondent had not recalled them. Among them were Carol Phillippi and Donna Mayer. Mrs. Mayer (Daniel Mayer's wife) said she quit after 2 weeks because she got behind in her own work since she had to show new employees how to trim meat. One such employee, Mary Marino, asked if she would be "hassled" about the Union and was given a job different from what she had previously and had to lift pieces of meat throughout the day that she was unable to physically handle. After not being given requested relief, she left at the end of the day and did not return. Other employees who were known union adherents were only kept a short time.

Employee Kathleen Austin stated that she was reemployed after the layoff and asked Supervisor Pfenning

where the other employees were. Pfenning replied that they were not there, she supposed, because of the Union. Austin stated that she had signed a union card. Pfenning said she knew that and that McDivitt had asked her why Austin had signed a card. She asked Pfenning how McDivitt knew that. Pfenning replied that McDivitt had a list of everybody who had signed a union card.

Respondent stated that it was solely for economic reasons that it closed the plant. It stated that its principal sources of supply were the Green Bay and Huron plants and, through its witnesses, estimated that 75 percent or better of its carcass beef came from those two plants. It further intimated that with it being a new operation, when it went outside of its associated plants it needed to pay cash for beef shipped because it did not have a long enough history to be accorded credit. It did not claim that this worked a hardship on it. Respondent also stated that the economic picture was bad at the time and that it could not see operating at a possible loss during this period and, since the Green Bay and Huron plants were down for repairs, it decided that it was economically feasible to close the Eau Claire plant.

In its defense, Respondent overlooks that one of its exhibits shows that the Fargo plant began to ship beef to it in the latter part of June and that by mid-July the Fargo plant was shipping in more beef than Green Bay or Huron and in the 2 weeks prior to the close down, was shipping in more beef than the other two together. It appears that the Green Bay plant apparently started cutting down its shipments prior to that time and shipped very small amounts through most of June. Respondent overlooks the Fargo shipments during this period, not claiming any inability of Fargo to keep Respondent supplied with carcass beef during the temporary closing of the other two plants. Similarly, there is no claim of a closing of the Fargo operation. Respondent's argument is that the beef source had been closed when the other two plants were down. The omission of Fargo in this setting severely damages Respondent's claim.

Further neglected by Respondent is the fact that this was not a complete shutdown, that Respondent brought its supervisors and some of its employees back to package and ship meat to its main customers throughout the period of the shutdown to keep them supplied and to keep its contacts with its main customers open.

Furthermore, McDivitt testified specifically that when Respondent reopened its plant on August 9, the beef market was then worse than when it had closed, that prospects were more bleak but despite this, they started up again because Schanno and Miller had decided it was best for the whole of the companies to reopen Respondent.

When, to the foregoing, we add the overwhelming nature of McDivitt's remarks at the August 9 reopening plus the admission that Respondent sought to bring back only those it was sure were not union supporters, it is clear that the shutdown was principally motivated by Respondent's desire to cool the ardor of its employees for a union. Certainly the Union's filing of an election petition 4 days before the layoff must certainly have been considered by Respondent, as undoubtedly its withdrawal of the petition prior to the reopening of the plant

may have helped in that decision. As McDivitt had stated at an earlier time, Respondent would shut down because of the Union but the announced reason would not be that. The testimony of McDivitt and Donovan Fox was undenied by others in presenting Respondent's defense.

In these circumstances, I find that Respondent violated Section 8(a)(1) and (3), both in initiating the layoff and in its recall of employees. Those employees who were recalled later than August 9, or who were reemployed through the Wisconsin Unemployment Commission and possibly some who were recalled on August 9, were not properly dealt with by Respondent since both the layoff and the recall were designed to scare employees and exclude union sympathizers. Since the purpose of the layoff and recall was unlawful, the genuineness of all reinstatements is in question, particularly the late reinstatements and those employed through the Wisconsin State Agency, and it will probably take a backpay proceeding to determine to whom Respondent owes a valid offer of reinstatement since there appears to be genuine questions concerning the reemployment of some, if not most, of the employees.

Respondent's testimony in regard to the decision being made to close the plant in the absence of McDivitt and while he was sick do not ring true and were contrary to the testimony of both McDivitt and Fox. The shutdown, according to McDivitt, was based on his recommendation and of the shutdown, as the "one-man show" running Respondent (as he was designated by Respondent witnesses) clearly demonstrates, and demonstrated to the employees, that his antiunion statements as the reasons for the shutdown were accurate.

Respondent specifically contests a duty to reinstate Patricia Marco and Conrad Olson. Marco was termed a leadperson; however, her testimony indicated that she had no true independent supervisory authority. She suggested names of persons for possibly hiring. She went over the orders to make sure things were cleaned up at the end of the day and, according to Respondent, could allow persons to leave during the day. Such authority is within the ordinary capacity of a leadperson in working on the assembly line with others, but it was not demonstrated that she had any true supervisory indicia or exercised independent judgment in any of her tasks. Respondent alleges in its brief that attempts were made to recall Olson to his former position but that he was unavailable for work and had apparently moved from the area. Respondent says that since there was no evidence that he was involved in union activity or that the Company knew that he was involved in union activity, that it had no duty to reinstate him.

Contra to Respondent, I have found above that the layoff violated Section 8(a)(1) and (3) of the Act and that therefore Respondent owes a duty to reinstate and make whole all who were laid off, and this includes both Marco and Olson, and I so find.

D. Post Recall Events

In September or October 1978, Respondent held a meeting of employees during which Chairman Schanno

told employees that a wage survey was being made and that adjustments in the salary structure would follow in the future.

William Lefcowitz was hired by Respondent as an assistant to McDivitt just prior to the Schanno meeting with employees. He succeeded to McDivitt's position at the end of November. Lefcowitz testified he was at the meeting and said Schanno announced Respondent was contemplating a wage increase.

According to the employees, there were some outside persons in the plant asking questions of the employees in October.

According to Respondent, an announcement was made in late October that there would be an increase but that the amount had not been determined. It states it was awaiting advice from counsel on President Carter's wage and price guidelines before it decided on the amount of the increase. Nevertheless, Respondent maintains that during the week of October 16 it decided that it would give an increase of 50 cents an hour of which 30 cents an hour would be paid at the beginning of its fiscal year and a 20-cent increase would be given 6 months later. Although claiming that this was decided, it did not announce its decision until November 3, after the start of its fiscal year.

On October 24, the Union filed a second petition for a P & M unit at Respondent, and Respondent received copies of the petition. Following such receipt, on November 3, McDivitt announced to the employees that they were receiving a wage increase retroactive to October 29 and would receive another increase in July. The announcement did not comport with Respondent's testimony about a 6-month second increase.

Respondent maintains that this wage increase was perfectly proper and was not meant as an inducement to the employees to abandon their union activities.

General Counsel and the Charging Party maintain that the announcement of the wage increase coming immediately after the filing of the union petition is extremely suspicious, particularly when it was a substantial amount coming so soon after the Company had laid off employees because of its bleak prospects. Up until this time, Respondent was claiming to its employees that it could not grant wage increases because of the problems it had in keeping the plant going, its problems with the beef supplies and its overall financial picture. It seems startling that 2 months after a layoff for "economic reasons" and with worse prospects when it restarted, Respondent was able to announce that the employees were receiving a 50-cent wage raise.

In view of Respondent's previous actions toward the union organizational efforts of its employees and in view of the new petition filed by the Union just prior to the announcement that the employees would receive wage increases, I find it impossible to credit Respondent's defense that it was providing this wage increase without any thought to its effect on its employees' union organizational activities and that it had been decided upon prior to knowing of such.

Respondent knew that its employees still had some interest in the Union following the layoff and recall. It knew that from the statement of one of the persons who

was recalled at a late date, wondering whether she would be "hassled" because of her pronoun sentiments. Another employee wore a hardhat at work with pronoun stickers on it following the recall and Respondent asked her to remove the stickers and finally provided her with a new hardhat when they could not be scraped off the helmet. Efforts by Respondent to say that it was afraid the stickers might fall off and get into the meat are rather ridiculous on the face of the fact that the stickers could not be removed from the hat when the employee tried to do so.

Respondent's statement in regard to the wage raise cannot be credited under all the circumstances present here.

I find that Respondent violated Section 8(a)(1) of the Act by promising and granting its employees a wage increase for the purpose of undermining their union affiliations.

E. Summary

In sum, I find that the allegations in the complaint concerning violations of Section 8(a)(1), (2), and (3) of the Act have been fully proved and will issue an appropriate Order to remedy such.

III. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section II and therein found to constitute unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act, occurring in connection with Respondent's business operations, as set forth 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.

THE REMEDY

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

Having found that Respondent discharged Daniel L. Mayer on March 13, 1978, and did not thereafter offer him reinstatement and that it laid off its complement of employees on July 21, 1978, and did not thereafter offer to all of its employees full and immediate reinstatement, I recommend that Respondent offer Mayer and all its employees immediate and full reinstatement to their former positions or, if such positions have been abolished, then to any substantially similar positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and that Respondent make them whole for any loss of pay they may have suffered by reason of Respondent's discriminatory actions by payment to them of a sum equal to that which each would have normally received as wages from the dates of their termination, or layoff, until Respondent offers them reinstatement, less any net earnings for the interim. Backpay, plus interest, is to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289

(1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).² I further recommend that Respondent make available to the Board, upon request, payroll and other records in order to facilitate checking the amounts of backpay due them and other rights they might be entitled to receive.

CONCLUSIONS OF LAW

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

2. Respondent violated Section 8(a)(3) and (1) of the Act by the discriminatory termination of Daniel L. Mayer and by both the layoff method of its complement of employees and by its recall methods because they engaged in union and concerted activities among themselves and with other employees for the purposes of mutual aid and protection.

3. Respondent violated Section 8(a)(2) and (1) of the Act by forming, dominating, assisting, supporting, and recognizing the Wisconsin Beef Industries, Inc., employee committee.

4. Respondent violated Section 8(a)(1) of the Act by:

(a) Unlawfully interrogating employees about their union activities and sentiments and their knowledge of the union sentiments and activities of other employees.

(b) Threatening employees that unless employees ceased their union activities, they could lose their jobs.

(c) Promising and granting wage increases and other benefits to induce employees to withdraw their support for the Union.

(d) Creating the impression that it surveilled its employees' union activities, and by requesting an employee to attend a union meeting and report about it to its plant manager.

(e) Warning employees that it would only operate its plant on a nonunion basis and would close its plant before operating with a union.

(f) Telling its employees that it laid them off and did not recall some of its employees because of its employees' union activities.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case considered as a whole, I hereby issue the following recommended:

ORDER³

The Respondent, Wisconsin Beef Industries, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminatorily terminating or laying off employees because they engage in union and concerted activities among themselves and with other employees for their mutual aid and protection.

(b) Forming, dominating, assisting, supporting, and recognizing the Wisconsin Beef Industries, Inc., employee committee. Nothing in this Order will require Respondent to vary or abandon any benefits granted to the employees through the medium of the committee.

(c) Unlawfully interrogating employees about their union activities and sentiments and their knowledge of the union sentiments and activities of other employees.

(d) Threatening employees that unless employees ceased their union activities they could lose their jobs.

(e) Promising and granting wage increases and other benefits to induce employees to withdraw their support for the Union. Nothing in this Order will require Respondent to withdraw granted wage increases to its employees.

(f) Creating the impression that it surveilled its employees' union activities, and by requesting an employee to attend a union meeting and report about it to its plant manager.

(g) Warning employees that it would only operate its plant on a nonunion basis and would close its plant before operating with a union.

(h) Telling its employees that it laid them off and did not recall some of its employees because of its employees' union activities.

(i) In the same or any other manner interfering with, restraining, or coercing employees in the exercise of rights under Section 7 of the Act.

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

(a) Offer full and immediate reinstatement to and make Daniel L. Mayer and all of the employees it laid off whole for the loss of pay they suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Withdraw and withhold recognition from and completely disestablish Wisconsin Beef Industries, Inc., employee committee, or any successor thereto, as the representative of the employees for the purpose of collective bargaining, including grievance settlements.

(c) Post at all customary places in its plant and office copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

² See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁴ In the event that 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."