

Local 389 because bargaining on that subject, and any agreement based thereon, would be a violation of the antitrust laws of California and the United States. In this connection counsel cites the case of *Local No. 24 International Brotherhood of Teamsters, etc. v. Revel Oliver, et al.*, 78 S. Ct. 1007, in which *Oliver v. All States Freight Inc.*, reported at 42 LRRM 4024, is subject for review. In the latter named case, the Ohio Court of Appeals found a carrier-union contract which fixes prices for the lease of equipment to be a violation of the antitrust laws of Ohio. He urges the rationale of the Ohio decision here.

The argument, and the citation on which it is based, is noted here for the benefit of the Board. However, I deem such considerations to be outside the province of the Trial Examiner.

For all of the reasons set forth above, it is recommended that the complaint be dismissed in its entirety.

The Great Atlantic & Pacific Tea Company and Meat Cutters, Packinghouse and Allied Food Workers Union, Local No. 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Case No. 12-CA-341. April 15, 1959

DECISION AND ORDER

On December 29, 1958, Trial Examiner Sydney S. Asher, Jr., issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.²

¹ Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Jenkins]

² Because the Trial Examiner found that the matter was not covered in the complaint and was not "fully litigated," he did not pass upon whether Smith, the Respondent's meat department manager at its Herschel store, unlawfully interrogated his assistant, Chapman. As no exceptions were filed, we also need not determine whether Chapman was illegally interrogated. However, we do not adopt the Trial Examiner's test as to whether or not this issue was fully litigated.

The complaint, as amended at the hearing, alleged that the Respondent engaged in unlawful interrogation during a meeting between employee Harriett and a group of management officials, which included the Respondent's counsel. This meeting was requested by Harriett and was held less than a week prior to the hearing. As Harriett voluntarily related his own union activities and an isolated question was interjected by the Respondent concerning Harriett's knowledge of the union activities of other employees, assuming that such interrogation was made, we agree with the Trial Examiner that under the special circumstances herein, the interrogation was not violative of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Great Atlantic & Pacific Tea Company, Jacksonville, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Enforcing any rule prohibiting any employee in the Jacksonville, Florida, area (as defined in 121 NLRB 1193) from soliciting any other such employee on behalf of Meat Cutters, Packinghouse and Allied Food Workers Union, Local No. 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, in nonpublic nonworking areas, during the nonworking time of both.

(b) Warning its employees to refrain from talking to anyone about any labor organization during nonworking time.

(c) Enforcing any rule forbidding its employees in the Jacksonville, Florida, area to exchange with one another, or to furnish to any labor organization, the names, addresses, or telephone numbers of their fellow employees, where such information has been obtained from sources other than the Respondent's records.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union or any other union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Revoke its rules dated January 6 and June 5, 1958, insofar as they prohibit any employee in the Jacksonville, Florida, area from soliciting any other such employee on behalf of any labor organization, in nonpublic nonworking areas, during the nonworking time of both.

(b) Revoke the above-described rules, insofar as they forbid its employees to exchange with one another, or to furnish to any labor organization, the names, addresses, or telephone numbers of their fellow employees, where such information has been obtained from sources other than the Respondent's records.

(c) Post at all its stores in the Jacksonville, Florida, area (as defined in 121 NLRB 1193) copies of the notice attached hereto marked

“Appendix.”³ Copies of the said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent’s representative, be posted by it immediately upon receipt thereof and 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 the Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director in writing, within 10 days from the date of this Order, as to what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed, insofar as it alleges that the Respondent violated Section 8(a)(3) of the Act, or violated Section 8(a)(1) of the Act in any manner other than found herein.

³ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words “Pursuant to a Decision and Order” the words “Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order.”

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, you are notified that:

WE WILL NOT warn our employees not to talk to anyone about Meat Cutters, Packinghouse and Allied Food Workers Union, Local No. 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union, during nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union or any other union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right might be affected by a contract requiring membership in a union as a condition of employment, as permitted by Section 8(a)(3) of the National Labor Relations Act, as amended.

WE HEREBY rescind our rules dated January 6 and June 5, 1958, insofar as they prohibit any employee in the Jacksonville, Florida, area from soliciting any other such employee on behalf of

any union, in nonpublic nonworking areas, during the nonworking time of both.

WE HEREBY rescind the above-described rules, insofar as they forbid our employees in the Jacksonville, Florida, area to exchange with one another, or to furnish to any union, the names, addresses, or telephone numbers of their fellow employees, where such information has been obtained from sources other than the Company's records.

All of our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union, or any other union, except to the extent that this right might be affected by a contract permitted by Section 8(a) (3) of the National Labor Relations Act, as amended.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

This case involves allegations that The Great Atlantic & Pacific Tea Company, Jacksonville, Florida, herein called the Respondent, has interfered with, restrained, and coerced its employees in certain specified respects since on or about January 3, 1958; and that it discharged employee Hazel Avalyn Vandling on or about January 23, 1958, and has since failed and refused to reinstate her, because of her membership in, and activities on behalf of, Meat Cutters, Packinghouse and Allied Food Workers Union, Local No. 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, the Charging Party, herein called the Union. It is alleged that this conduct violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. After the issuance of a complaint by the General Counsel¹ and the filing of an answer by the Respondent, a hearing was held before me on various dates between July 1 and August 26, 1958, inclusive, at Jacksonville, Florida. All parties were represented and participated fully in the hearing. After the close of the hearing the Respondent filed a brief, which has been duly considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

There is no dispute, and I find, that the Respondent is engaged in commerce within the meaning of the Act and its operations meet the Board's jurisdictional standards,² and that the Union is a labor organization within the meaning of the Act.

¹ The designation "General Counsel" refers to the General Counsel of the National Labor Relations Board and his representative at the hearing.

² The Respondent is an Arizona corporation engaged in the operation of retail food stores in various States, including stores in Jacksonville, Florida. The Respondent's gross annual sales exceed \$10,000,000, and the Respondent annually causes goods valued at in excess of \$2,000,000 to be shipped in interstate commerce. The Board has previously found that the Respondent is engaged in commerce. See 117 NLRB 554; 117 NLRB 1337; 117 NLRB 1542; 118 NLRB 1018; 118 NLRB 1495; 119 NLRB 603; and 121 NLRB 1193.

A. *The discharge of Vandling*

1. Facts

The Union began to organize the employees of the Respondent's Jacksonville stores late in December 1957. At that time Hazel Avalyn Vandling was head cashier of the store located at 3766 Blanding Boulevard, herein called the Blanding store. She attended a union meeting on January 18.³ There Robert Akerman, a representative of the Union, requested those present to supply him with the names and addresses of employees of the Respondent's Jacksonville stores, so that he could compile a mailing list. He cautioned them to obtain this data from personal contact, the telephone book, or the city directory, but not from the Respondent's records. Accordingly, on January 20 Vandling furnished Akerman with the names and addresses of some employees of the Blanding store (obtained from their union applications, the telephone book, and the city directory) and the names and addresses of some employees of another of the Respondent's Jacksonville stores (obtained by telephone from an employee of that store).

On January 23 O. F. Blalock, a supervisor for the Respondent of several stores (including the Blanding store), asked Vandling if she had given anyone the names and addresses of any of the Respondent's employees. Vandling answered "Yes." Blalock then discharged Vandling, stating that she had thereby "violated company policy."

2. Contentions of the parties

The complaint alleges and the General Counsel maintains that the Respondent discharged Vandling on or about January 23, and has thereafter failed and refused to reinstate her, because of her membership in, and activities on behalf of, the Union. The answer admits that the Respondent discharged Vandling on or about January 23, and has thereafter failed and refused to reinstate her, but denies that this was because of her membership in, or activities on behalf of, the Union. At the hearing and in its brief the Respondent took the position that, at the time of her discharge, Vandling was not an employee within the meaning of the Act, but was instead a supervisor.

3. Conclusions

In January, James A. Coleman was manager and Troy Moody was assistant manager of the Blanding store. Ernest L. McLeroy was manager of the meat department (sometimes called the market) and Vandling was head cashier. There was a total of approximately 26 full-time and part-time nonsupervisory employees, including checkers and about 14 part-time clerks (also called bag boys and package boys). The checkers totaled the cost of purchasers made by customers. The part-time clerks sometimes placed the purchased merchandise in bags or carried loaded bags for customers, and sometimes worked elsewhere in the store performing various other functions. The store had six registers or checking stands in front, a dairy register, and a register in the office. Each checking stand had two buzzers, one of which buzzed in the office and the other in the "back room" (a nonpublic area in the rear of the store). The office was just inside the door, at the end of the line of checking stands. This was Vandling's normal workpost. It was elevated and was situated so as to afford anyone in it a view of the checking stands. It contained a bell and a buzzer which buzzed in the "back room."

Vandling's duties included computing invoices on incoming merchandise, preparing bank deposits, preparing payrolls and timecards for the employees, opening, sorting, and distributing the mail, filing correspondence, making out various reports (including forms when employees were hired, terminated, or given a wage increase), approving customers' checks for cashing, checking the readings on the registers and posting them on the account books, counting the amount of cash in the registers, and furnishing the checkers with new setups (consisting of \$50 cash) when they took over a register.⁴ She had a copy of the combination to the office safe, and received a salary higher than that paid to the checkers and part-time clerks.

There was a great deal of testimony regarding the extent of Vandling's authority over the checkers and part-time clerks while the latter were assisting the checkers by bagging purchases or carrying out loaded bags. It would unduly burden this report to describe the testimony of each witness on this subject in detail. However, from the combined testimony of all witnesses who described the relationship of

³ All dates herein relate to the year 1958 unless otherwise noted.

⁴ Some of these functions, such as approving customers' checks for cashing, were also performed by the manager and assistant manager.

Vandling to the checkers and part-time clerks (excepting, of course, those witnesses whose testimony was stricken), I make the following findings: Vandling had authority to direct a checker who was temporarily assigned to other duties in the store to open up an empty checking stand when she deemed it warranted by increased business, or to relieve the girl at the dairy register when necessary. She did so by using the bell or buzzer. If no other checker was available and she considered the need sufficient, she sometimes performed checking herself. If a checker needed help in bagging or carrying loaded bags, and buzzed the office, or if Vandling noticed the customers "backing up" at a stand, she called for a part-time clerk by buzzer and assigned him to help at a designated checking stand. She had authority to make minor variances in scheduled lunch or "break" periods of checkers, and to approve refunds to customers of over 50 cents. Occasionally, she received complaints from customers or other checkers regarding the conduct of checkers⁵ and, if the matter was minor, endeavored to adjust it. If a checker failed to perform his duties properly or ran an excessive number of shortages, Vandling had authority to talk to the checker and try to straighten out the matter. If the checker's dereliction continued, she would report this fact to the manager. If a vacancy occurred for a checker, Vandling could recommend part-time clerks for promotion to checker. She also had authority to recommend that a checker who was not performing satisfactorily be transferred to another job, and that a checker who was doing a good job should be given a wage increase. Her recommendations in these respects, given to the manager, were accorded weight.⁶

In view of Vandling's authority to exercise independent judgment in responsibly directing the work of the checkers and that of the part-time clerks while assisting checkers; her power effectively to recommend the promotion of part-time clerks to checkers; and her authority effectively to recommend wage increases for, and transfers of, checkers, it is found that at the time of her discharge she was a supervisor within the meaning of Section 2(11) of the Act.⁷ It follows that Vandling's discharge under the circumstances described above did not constitute a violation of the Act, regardless of whether or not her furnishing of data to Akerman violated the Respondent's rules. It is so found.

B. Alleged warnings by Coleman and Moody against indicating union sympathy

The complaint alleges, and the answer denies, that on or about January 3 the Respondent, through Coleman and Moody, "warned its employees against making statements or engaging in other activity indicating sympathy toward the Union." The only evidence submitted on this phase of the complaint was testimony tending to show that, late in December 1957, Coleman and Moody warned Vandling not to express any union sympathy. As Vandling was then a supervisor,⁸ and as these

⁵ In one instance a checker reported to Vandling a theft by another checker. Vandling reported the matter to the manager. It is perhaps of some slight significance that this report was first made to Vandling rather than to the manager.

⁶ The General Counsel argues that, if Vandling possessed all this authority, Coleman and Moody "would be left with practically nothing to do." This contention lacks merit. (1) Vandling worked only 45 hours each week, while the store was open considerably longer than that; (2) Vandling's authority was limited to checkers and part-time clerks who were aiding checkers, while that of Coleman and Moody was storewide; and (3) Coleman had power to make the final decisions and, as Vandling's superior, could overrule her.

⁷ In Case No. 16-RC-2257, issued March 12, 1958 (unpublished), the Board held that head cashiers in the Respondent's Dallas and University Park, Texas, stores were supervisors, and excluded them from the appropriate unit. An opposite result was reached by the Board with respect to head cashiers in the Respondent's stores in other localities. 117 NLRB 554, 555 (Greensboro, North Carolina); 117 NLRB 1337, 1339 (Durham, North Carolina); 118 NLRB 1018, 1019-1020 (Fayetteville, North Carolina); Cases Nos. 12-RC-151 and 152, decided August 28, 1957 (unpublished; Vero Beach, Florida); 118 NLRB 1495 (West Palm Beach and Lake Worth, Florida); and 119 NLRB 603 (Knoxville, Alcoa, and Oak Ridge, Tennessee). In point of time, the Dallas case (16-RC-2257, holding that head cashiers were supervisors) is the most recent Board decision that could be found regarding the supervisory status of the Respondent's head cashiers. In 121 NLRB 1193, a later case, the Board made no resolution of the question.

⁸ It has previously been found that Vandling was a supervisor on January 23, 1958. There is no reason to believe that her functions and authority were any different late in December 1957.

alleged warnings were not shown to have been made in the presence of any non-supervisory employee, it is clear that the warnings, if made, did not constitute a violation of the Act. I so find.

C. *The rule against solicitation*

1. Facts

William L. Harriett is a meatcutter or boxman employed in the Respondent's store at 5615 San Jose Boulevard, herein called the San Jose store. He was active on behalf of the Union. On January 22, his day off, he visited and talked with employees in five other of the Respondent's stores in the Jacksonville area. In at least one of these, the Beach Boulevard store, Harriett went behind the meat counters into the meatcutting room, a nonpublic working area where meat is cut, weighed, and wrapped. Later that day Harriett returned to the Beach Boulevard store and was accosted by Mr. Fuquay, the manager of that store. Fuquay told Harriett: "I know what you are up to and I don't want any of it in my store." After adding that the Respondent "is not going to put up with it," Fuquay ordered Harriett "to get out and stay out." Harriett complied.

That afternoon Arthur Burton Hingson, supervisor of meat markets of some of the Respondent's Jacksonville stores, received complaints from the market managers of three of the stores which Harriett had visited. They informed Hingson that Harriett had been in the meatcutting room talking to employees and keeping them from their work. Hingson then telephoned to Fuquay, who related the incident described above. Hingson also contacted the market manager of the fifth store and learned of Harriett's visit there. Hingson instructed all five market managers to keep out of the meatcutting room all persons who had no business there. Hingson then reported the matter to H. E. Norman, supervisor of certain stores of the Respondent in Jacksonville, including the San Jose store.

On the following day, January 23, Hingson and Norman conferred with Harriett. Norman handed to Harriett a mimeographed sheet of paper dated January 6, signed by an officer of the Respondent, containing certain company rules. These included the following:

EXCEPT FOR AUTHORIZED, orderly and "non-interfering" solicitations by duly established worthy charitable or welfare organizations, such as Community Chests, Red Cross, Churches and Schools, NO SOLICITATIONS of employees or customers or interference with them in any way while in the stores by anyone is to be permitted.

When he had read the document, Harriett admitted that he had visited stores but denied that he had solicited. Norman replied that Harriett had been in the meatcutting rooms, visiting employees while they were working. He ordered Harriett: "Don't ever go in those stores at any time or any other store except as a customer. As a customer means that you can go in to shop and you can speak to anybody going around, but don't go in the back room or the cutting room any anything and take up the employees' time."

On June 5 the Respondent promulgated another mimeographed sheet of rules. The one concerning solicitation was identical with that dated January 6. In the absence of contrary evidence it is reasonable to assume, and I find, that this rule is still in effect in the Jacksonville area.

2. Contentions of the parties

The complaint alleges, and the answer denies, that on or about January 22 the Respondent, through Norman, promulgated and enforced "a ruling prohibiting employees of its Jacksonville, Florida, stores from soliciting for the Union at any time" on the Respondent's premises and threatened to discharge such employees "if they engaged in solicitation for the Union at any time, including non-working time, and at any place, including non-working places, on [the] Respondent's premises." The General Counsel maintains that the no-solicitation rule quoted above is invalid on its face, and that in any event it was not promulgated for any legitimate purpose, but solely to stifle union activities. In support of this latter contention, the General Counsel points to the treatment accorded Harriett and the alleged fact that the rule was first brought to the employees' attention at a time when the Respondent knew of the Union's campaign. The Respondent, on the contrary, argues that the rule is valid on its face, and had been publicized to the employees long before the Union's advent.

3. Conclusions

Let us assume, without deciding, that the Respondent had no discriminatory motive in promulgating or enforcing the rule. Let us also assume that, working time being for work, the Respondent was within its rights in prohibiting union solicitation by one employee of another during the working time of either.⁹ To what extent could the Respondent legitimately curtail such solicitation during the nonworking time of both?

Bearing in mind the retail nature of the Respondent's business, the General Counsel concedes that the Respondent had the right to limit solicitation in the front part of the store, where customers are normally present.¹⁰ And because of the hazardous conditions which might be caused thereby, in my opinion, the Respondent could legitimately curtail solicitation in working areas from which the public was excluded, such as the meatcutting rooms, refrigeration rooms, and stockrooms. There remains the nonpublic and nonworking areas of the stores—the so-called “break rooms,” set aside for the use of employees while off duty. To prohibit union solicitation by one employee of another in the “break rooms” during the working time of neither—as the Respondent's mimeographed rule appears to do—exceeds permissive bounds.¹¹ In view of the difficulty of distinguishing between customers and employees entering or leaving the stores,¹² and in the absence of any showing of special circumstances requiring such a rule in the interest of efficiency or discipline, it constitutes an unwarranted impediment of self organization.¹³ And as the Board has found appropriate a multiple-store bargaining unit in the Jacksonville area,¹⁴ the same reasoning applies to union solicitation between employees of the stores included in this unit, providing, of course, it is done on nonworking time and in nonworking nonpublic areas.¹⁵ To the extent that the mimeographed rule and the instructions of Fuquay and Norman to Harriett forbade an employee of any store in the appropriate unit from soliciting any other such employee in nonpublic nonworking areas on the off-duty time of both, they constitute an unreasonable interference with the employees' statutory right to solicit on behalf of the Union. It is accordingly found that, since at least January 22, 1958,¹⁶ the Respondent has enforced a rule illegally curtailing protected concerted activities of its employees in the Jacksonville area, in violation of Section 8(a)(1) of the Act. In view of this determination that the rule is invalid on its face, I shall not make any finding regarding the Respondent's reasons for promulgating or enforcing it.

The rule quoted above may perhaps also be invalid on its face because it shows that the Respondent reserves to itself the right to determine which solicitations are “non-interfering” and are on behalf of “duly established worthy charitable or welfare organizations,” hence outside the rule's purview.¹⁷ However, I need not decide this issue, as it would merely be cumulative.

⁹ *Peyton Packing Company, Inc.*, 49 NLRB 828, enfd. 142 F. 2d 1009 (C.A. 5), cert. denied 323 U.S. 730.

¹⁰ See *May Department Stores Company*, 59 NLRB 976, 981, enfd. as mod., 154 F. 2d 533 (C.A. 8), rehearing denied May 20, 1946, cert. denied 329 U.S. 725.

¹¹ *Cranston Print Works Company*, 115 NLRB 537, 540; and *Limestone Manufacturing Company*, 117 NLRB 1689, 1701. It appears from the testimony of Henry S. Burns, the Respondent's meat superintendent for the Jacksonville stores, that despite the mimeographed rule an employee was allowed to solicit another employee of the same store in the “break room” during the off-duty time of both.

¹² There is no evidence that any of the stores had separate nonpublic entrances which employees were required to use.

¹³ *Delta Finishing Company (Division of J. P. Stevens & Co., Inc., Plant No. 3)*, 111 NLRB 659, 661.

¹⁴ *The Great Atlantic & Pacific Tea Company*, 121 NLRB 1193.

¹⁵ I need not, and do not, here decide to what extent nonemployee organizers and employees of stores outside the unit must be permitted such access. See *Marshall Field & Company*, 98 NLRB 88, enfd. as mod. 200 F. 2d 375 (C.A. 7); *Associated Dry Goods Corporation (Lord & Taylor Division) formerly Lord & Taylor*, 103 NLRB 271, enforcement denied 209 F. 2d 593 (C.A.2); and *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105.

¹⁶ I deem it unnecessary to decide herein whether the rule in question had been publicized to the employees at an earlier date.

¹⁷ See *Standard-Coosa-Thatcher Company*, 85 NLRB 1358, 1364–1365, 1382; *Ford Radio & Mica Corporation*, 115 NLRB 1046, 1070–1072, remanded 258 F. 2d 457 (C.A. 2), Supplemental Decision 122 NLRB 34. But compare *N.L.R.B. v. United Steelworkers of America, CIO, et al.*, 357 U.S. 357, 363.

D. *McLeroy's alleged discussions with Westerberg*

The complaint, as amended at the hearing, alleges that the Respondent, through McLeroy, interrogated employee Josephine D. Westerberg on January 21 concerning the identity of employees at a union meeting, and on January 23 warned her "that she could be fired for soliciting for the Union, whether on her own time or not, and instructed her to cease engaging in union activities." The answer to the amended complaint denies these allegations.

The only evidence presented by the General Counsel to support these allegations was the uncorroborated and undenied testimony of Westerberg, a former meat department employee in the Blanding store who had been active on behalf of the Union, regarding various conversations she allegedly had with McLeroy.¹⁸

During her employment with the Respondent, Westerberg telephoned to Henry S. Burns, meat superintendent for the Respondent's Jacksonville area. Westerberg complained that McLeroy "wasn't treating her right," indicated that she did not want to work with him any longer, and asked to be transferred to another store. However, she never received the requested transfer. She quit the Respondent's employ on June 21, shortly before the hearing herein began. At that time she complained to McLeroy that "everyone in our meat department got a raise but me." It therefore appears that Westerberg, at the time she testified, was a disgruntled former employee who felt wronged by McLeroy. Furthermore, she impressed me as an unreliable and inaccurate witness, with a tendency to exaggerate. Although the matter is not free from doubt, and bearing in mind the General Counsel's burden of proof, I shall make no findings based upon Westerberg's uncorroborated testimony.¹⁹

E. *The conversations of supervisors with Harriett*

1. Facts

On May 22 a Board-conducted representation election was held among the employees of the Respondent's Jacksonville stores. Because he acted as union observer at this election, Harriett did not report for work that day, although he was scheduled to do so. On May 24 Burns reprimanded Harriett for his failure to give the Respondent advance notice of his intention to be absent from work on May 22. Harriett replied that he had never been through an election before and thought that the Respondent would be informed of his expected absence at a pre-election meeting. A discussion followed, during which Burns instructed Harriett that he "was not supposed to talk to anybody else about the union or union activity."²⁰

On June 21 Harriett was served with a subpoena by the General Counsel directing him to appear to testify in the instant hearing, scheduled to open July 1. On June 22 Harriett showed the subpoena to Mr. Watts, manager of the San Jose store, and asked him to arrange a private meeting for Harriett with Hingson. On June 24 Harriett was summoned to a conference attended by Hingson, D. P. Dreaden, the Respondent's personnel manager, and O. R. T. Bowden, the Respondent's attorney. Harriett said that he had given a statement to a Board investigator, had been subpoenaed to testify at the hearing, and "wanted to forget . . . the whole matter." Bowden replied that only a Board representative could effectively release Harriett from the subpoena. According to Harriett, he was then asked the connection between himself and Vandling, to which he replied; he was also asked what part other employees had played in the Union's activities, which he declined to reveal;²¹ and a threat was made that the Respondent would secure a subpoena to compel him to divulge this information.

2. Contentions and conclusions regarding the conversation of May 24

The complaint, as amended at the hearing, alleges that the Respondent, through Burns, directed Harriett on or about May 23 not to talk about the Union to anyone in the future. The answer to the amended complaint denies this allegation.

¹⁸ This is uncorroborated because no third party was alleged to have been present. It is undenied because McLeroy's testimony (including his denials) was stricken.

¹⁹ A trier of fact is not compelled to credit the testimony of a witness simply because it is not contradicted. *N.L.R.B. v. Howell Chevrolet Company*, 204 F. 2d 79, 86 (C.A. 9), affd. 346 U.S. 482.

²⁰ This finding is based upon Harriett's credited testimony. Burns denied making such a statement. His denial in this respect is not credited. No third person was present during the conversation.

²¹ Hingson and Dreaden related different versions of this part of the conversation. However, it will be assumed, without deciding, that Harriett's version is the more accurate.

I agree with the contention of the General Counsel that Burns' direction to Harriett on May 24, not to talk to anybody else about the Union or union activity, placed an illegal restriction on Harriett's protected right to engage in concerted activities on his own time. It therefore constituted an additional violation of the Act.

Contentions and Conclusions Regarding the Conversation of June 24

The complaint, as amended at the hearing, alleges that the Respondent, through Hingson, Dreaden, and Bowden, interrogated Harriett on or about June 23 concerning the union activities of other employees. The answer to the amended complaint denies this allegation.

It is well settled that an employer may, when preparing his case for trial, question employees for the purpose of discovering facts within the issues raised by the complaint, where he does not go beyond the necessities of such preparation to pry into other matters interfering with the statutory rights of the employees.²² Applying this rule to the instant situation, we must bear in mind (a) the timing of the conference less than a week before the scheduled opening of the hearing; (b) the attendance there of the Respondent's counsel; (c) the fact that all present knew that Harriett was under subpoena to testify; and (d) the nature of the questions allegedly asked Harriett. In view of all the circumstances, I am convinced and find that, even if Harriett's version is credited, the General Counsel has failed to prove that the questioning of Harriett on June 24 exceeded permissive bounds.

F. The rule prohibiting the dissemination of data

1. Facts

The mimeographed rules dated January 6, referred to above, included the following:

NO GRANTING OF INTERVIEWS, news conferences, or giving out to anyone in any way any information on any phase of the Company's business for publication, broadcast or use for any purpose whatever.

As has been related, Vandling was discharged on January 23 for "violating company policy" by giving out the names and addresses of the Respondent's employees. On January 24 Clayton Smith, manager of the meat department of the Respondent's store at 4048 Herschel Street, herein called the Herschel store, warned the employees of the meat department not to give the names and addresses of other employees to anyone. On June 5 the Respondent promulgated another mimeographed sheet of rules. The rule prohibiting the giving out of information on any phase of the Respondent's business was repeated in substance. Additionally, these rules provided:

NO GIVING OUT to anyone in any way the NAMES, ADDRESSES or TELEPHONE NUMBERS of any employee in any store.

Presumably this rule is still in effect in the Jacksonville area.

2. Contentions of the parties

The complaint, as amended at the hearing, alleges that the Respondent on January 23 "promulgated and instituted a rule prohibiting employees of its Jacksonville, Florida, stores from giving to anyone names, addresses, or telephone numbers of any persons who are employees of Respondent. This rule Respondent later incorporated in a written notice dated June 5, 1958." The answer to the amended complaint denies this allegation. The General Counsel contends that the rule quoted above is invalid on its face, because it prohibits the dissemination of data obtained from sources other than the Respondent's records. The General Counsel further argues that, in any event, the rule was promulgated "not for . . . a valid business purpose" but only "to frustrate union organization among the employees." The Respondent takes a contrary position.

3. Conclusions

Undoubtedly the employees' right to engage in concerted activities protected by the Act carries with it the right to exchange with one another, and furnish to labor

²² *Carl S. Shields and Sebough S. Shields, Partners, d/b/a Shields Engineering & Mfg. Co.*, 85 NLRB 168, 175-176; *Joy Silk Mills, Inc.*, 85 NLRB 1263, 1290, *enfd.* as mod. 185 F. 2d 732, 743 (C.A., D.C.), cert. denied 341 U.S. 914; and *Cold Spring Granite Company*, 101 NLRB 786, 804-805, *enfd.* 208 F. 2d 163 (C.A. 8).

organizations, such data as the names, addresses, and telephone numbers of fellow employees. It is also unquestionably true that an employer has a right to protect his personnel records from unauthorized and promiscuous copying and distribution. The vice of the rule quoted above is that it is couched in such language as to prohibit the dissemination of this type of information, without regard to source. It follows that, insofar as the rule prohibits the exchange of information obtained from sources other than the Respondent's records, it constitutes an unwarranted infringement of the employees' statutory rights, and that by enforcing it since at least January 24, 1958, the Respondent has violated the Act. I so find. As it has been determined that the rule is invalid on its face, I shall refrain from making any finding with respect to the Respondent's motive in promulgating or enforcing it.

G. Matters not covered in the complaint

The General Counsel called as a witness Thomas M. Chapman, assistant to the manager of the meat department of the Herschel store. Among other things, he testified on direct examination that Smith asked his "several times" late in December 1957 whether he "had heard anything of the Union or received any literature." The complaint does not allege any illegal interrogation of Chapman by Smith. The Board has held that "when an issue relating to the subject matter of a complaint is fully litigated at a hearing, the Trial Examiner and the Board are expected to pass upon it even though it is not specifically alleged to be an unfair labor practice in the complaint."²³ In accordance with that rule, I find that the testimony regarding Smith's questioning of Chapman relates to the subject matter of the instant complaint. The question then remains whether it was "fully litigated" at the hearing. If so, it is my duty to decide the matter on the merits, although not mentioned in the complaint.

Upon cross-examination of Chapman by the Respondent's counsel, no questions were asked regarding the interrogations by Smith late in December 1957, nor did the Respondent produce Smith to affirm or deny Chapman's testimony. Moreover, the Respondent's brief is silent on the subject. It is accordingly found that the matter was not "fully litigated" at the hearing. I therefore will not evaluate the evidence with respect to this subject.²⁴

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Meat Cutters, Packinghouse and Allied Food Workers Union, Local No. 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The above-described unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. On January 23, 1958, Hazel Avalyn Vandling was a supervisor within the meaning of Section 2(11) of the Act.

5. By discharging Hazel Avalyn Vandling on January 23, 1958, the Respondent did not violate Section 8(a)(3) of the Act.

[Recommendations omitted from publication.]

²³ *Monroe Feed Store*, 112 NLRB 1336, 1337; *Ford Radio & Mica Corporation*, 115 NLRB 1046, 1074, remanded 258 F. 2d 457 (C.A. 2), Supplemental Decision 122 NLRB 34; and *Texas Natural Gasoline Corporation*, 116 NLRB 405, 411, enforcement denied 253 F. 2d 322 (C.A. 5). I note the contrary holding in *N.L.R.B. v. I.B.S. Mfg. Co., et al.*, 210 F. 2d 634, 637 (C.A. 5). However, with due respect for the United States Court of Appeals for the Fifth Circuit, I am constrained to follow the Board's rule until the United States Supreme Court has decided to the contrary. *Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768; *Novak Logging Company*, 119 NLRB 1573; and *Scherrer and Davisson Logging Company*, 119 NLRB 1587.

²⁴ *Ford Radio & Mica Corporation, supra*, at pp. 1074-1075; and *Texas Natural Gasoline Corporation, supra*, at p. 411.