agent receives no reimbursement for these expenses. He is paid on a commission basis, and whether he makes a profit is dependent upon the amount of business he produces. It is clear from the record that when the commissions are paid to the agent there is no withholding of taxes or social security. In the sale of insurance, the agent is not required to follow suggestions of Farmers but is free to devise his own techniques. Similarly, the agent is free to attend or not attend sales meetings Farmers might have. Finally, the agent is not required to submit any report of any kind to Farmers either accounting for his time spent in selling insurance or explaining any lack of sales.

I think what the Court of Appeals for the Seventh Circuit stated in *United Insurance Company of America* v. *N.L.R.B.*, 304 F. 2d 86, 90–91, in finding agents of United Insurance to be independent contractors, apropos here. The court said:

> There are many businesses, and the sale of insurance is one of them, where management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose "tools" are their own initiative and personality and who work on their own time and at their own expense. However, some insurance companies have established an employer-employee relationship such as the company in *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company*, *supra*. In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do.

I think it clear both from the agent contract and from the manner in which the parties conducted themselves that Farmers "has chosen to operate its business on the basis that its agents are independent contractors" and I would so find.

Because I would find the agents to be independent contractors, I would dismiss the instant petition seeking an election among the agents.

X-Ray Manufacturing Corporation of America *and* Amalgamated Union Local 55, Mechanics, Novelty, Retail and Maintenance Employees, affiliated with District 5, Petitioner. *Case No. 2–RC–12125. June 27, 1963*

DECISION ON REVIEW

Pursuant to a Decision and Direction of Election issued by the Regional Director for the Second Region dated July 24, 1962, an election by secret ballot was held on August 8, 1962, among the em-

ployees in the appropriate unit. At the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that of approximately 60 eligible voters, 53 cast valid ballots, of which 23 were for the Petitioner, 29 were for the Intervenor, Local 475, International Union of Electrical, Radio & Machine Workers, AFL–CIO, and 1 was against the participating labor organizations. One cast a challenged ballot, which could not affect the election results. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the Board's Rules and Regulations, the Regional Director conducted an investigation, and on September 27, 1962, he issued a Supplemental Decision on Objections and Certification of Representatives, in which he overruled all of the Petitioner's objections and certified the Intervenor as the bargaining representative of the employees in the appropriate unit. Thereafter, the Petitioner, in accordance with Section 102.67 of the Board's Rules and Regulations, as amended, filed with the Board a timely request for review of the Regional Director's Supplemental Decision.

The Board by telegraphic order dated November 26, 1962, granted the request for review solely as to the Regional Director's disposition of objections Nos. 2, 3, 5, and 6. Thereafter, the Intervenor filed a brief in support of its position as to the issues under review.

The Board has considered the entire record with respect to the issues under review, including the Intervenor's brief, and hereby affirms the Regional Director's Supplemental Decision with the following modification.[1]

In its objection No. 6, Petitioner alleged that on August 2, 1962, the Employer permitted the Intervenor to conduct a meeting on company time and premises while denying the Petitioner equal opportunity to engage in like activity. The Regional Director found that such a meeting was held during the employees' lunch period and extended about 10 minutes into their working time. There was conflicting evidence as to whether this occurred on August 2 or on August 7, the day before the election. The Regional Director, without resolving this conflict, concluded that inasmuch as the meeting ended more than 24 hours before the balloting, it did not violate the rule in *Peerless Plywood Company*, 107 NLRB 427. The Petitioner, in its request for review, contends that the Employer's denial of its request for the same privilege of holding a meeting on company time and property was prejudicial to the conduct of a free election.

It is not clear whether the Regional Director considered the disparate treatment aspect of objection 6 in his Supplemental Decision. We have reviewed the facts and conclude in the circumstances of this

[1] For the reasons expressed by him, we affirm the Regional Director's findings that objections Nos. 2, 3, and 5 raised no material and substantial issues affecting the election results.

case that the Employer's denial to the Petitioner of the privilege of holding a campaign meeting during the employees' lunch period within the plant, whether viewed alone or in conjunction with other conduct found unobjectionable by the Regional Director, forms no basis for setting aside the election. The record is not clear as to whether the Intervenor sought and the Employer granted permission to hold a meeting. However, assuming *arguendo* that such was the case, we deem it significant that the purpose of the subject meeting was not expressed to the Employer; that the Employer's consent, if given, was subject to the condition that the meeting not extend beyond the employees' lunch period; that the Intervenor had previously held meetings of employees in the plant without obtaining prior permission; that a few days subsequent to this meeting the Employer notified the Intervenor that it should not have allowed this meeting to extend beyond the employees' lunch period and admonished Intervenor that it was not to permit this to happen again; that the number of employees at the plant was relatively small, about 60; and that the Employer did permit the Petitioner to electioneer at the loading platform on company premises at times when employees were present at that location. Further, we note the facts that the Intervenor, the incumbent union, had a natural advantage over a rival union in reaching employees within the plant by virtue of its undisputed right of access to the plant; and that on election day the Intervenor requested the Employer to eject the Petitioner's representatives from the company premises at a time when they were electioneering among employees, and the Employer refused to do so. These factors indicate that the Employer maintained a neutral status as to the pending election and did not accord Intervenor a prestige which enhanced Intervenor's stature and position in this organizational campaign.

Our dissenting colleagues found that "a glaring imbalance in opportunities for electioneering" was created when the Employer refused the Petitioner's request to address a meeting of employees in the plant subsequent to allowing the Intervenor to do exactly that. We interpret the phrase "a glaring imbalance in opportunities for electioneering" as meaning, in essence, "an imbalance in the opportunities for organizational communication." We disagree. On the record before us, it is apparent that both the Petitioner and the Intervenor were free to communicate with employees on the plant premises, and it is not suggested that the employees themselves were not free to discuss the relative merits of the competing unions. Specifically, Petitioner was able to and did communicate its cause to the employees at a loading platform on company property either through oral solicitation or the distribution of campaign leaflets, and, in fact, the Employer refused the Intervenor's request that Petitioner be prohibited from engaging in this organizational activity. As found by the Regional

Director, the Intervenor at its lunchtime meeting discussed the forthcoming election with the employees who were present and urged them to vote against Petitioner. Realistically, Petitioner was doing just the converse when it engaged in organizational activity at the loading platform, and was able generally to bring its cause to the employees without Employer obstruction. Thus, it cannot be said that the mere denial of equality in one of the available means of communication created such an imbalance as would warrant our setting aside the election. For these reasons, in accord with the Regional Director, we overrule objection No. 6, and we affirm his certification of the Intervenor as the exclusive bargaining representative of the employees in the unit.

MEMBERS RODGERS and BROWN, dissenting in part:

We disagree with our colleagues' conclusion that the Employer did not interfere with the election in this case by permitting the incumbent union to conduct a campaign meeting on its premises during the employees' lunch hour and denying the same privileges to the Petitioner. We believe that the Employer was under a duty during the preelection period to forbid the use of its premises for such a meeting, unless it was willing to extend the same privilege to both unions.[2] The Employer's denial of the Petitioner's request was a breach of this duty and constituted such disparate treatment as to warrant the Board's intercession.[3]

The very factors upon which our colleagues rely in concluding that no unfair treatment occurred convince us to the contrary. Because of the natural advantage which the Intervenor, as the incumbent union, had over a rival in reaching employees within the plant, it was incumbent on the Employer to avoid any deliberate action which would unduly enhance this position. Here, the Intervenor took full advantage of its contractual right to enter the plant, engaging employees in conversations and distributing campaign literature shortly before and on the election day. The granting of permission to the incumbent Intervenor to hold a meeting, while withholding it from the Petitioner, could only increase the Intervenor's stature in the eyes of the employees. This ability of the Intervenor to hold its meeting in the plant was in sharp contrast to the necessity for the Petitioner to reach the employees outside the plant, albeit on company property, and could only emphasize the difference in standing. Even if the Intervenor did not expressly tell the Employer the purpose of the meeting, the Employer should have been aware, in view of the imminence of the election, that the Intervenor would wish to utilize the

[2] See *Superior Sleeprite Corporation*, 117 NLRB 430, 432.

[3] *Milco Undergarment Co, Inc.*, 106 NLRB 767, 769, enfd 212 F. 2d 801 (C.A. 3), cert. denied 348 U.S. 888; *American Thread Company*, 84 NLRB 593, enfd. 188 F. 2d 161 (C.A. 5).

opportunity to campaign. And, in any event, the Employer did know of the nature of the meeting when Petitioner requested a similar opportunity. Finally, the very fact that the Employer had relatively few employees indicates to us that all the employees would be fully aware of the favored treatment, and we are also satisfied that the granting of permission to the Petitioner to hold a meeting in the plant during nonworking time would not have disrupted plant operations.

The Employer's refusal to grant the Petitioner's request, after permitting the Intervenor the privilege of holding its meeting, created a glaring imbalance in opportunities for electioneering. Having made its facilities available to the Intervenor, the Employer, in our opinion, was under an obligation to grant the Petitioner the right to address the employees under similar circumstances. We would, therefore, set aside the election and direct that a new election be conducted.

Local 1905, Carpet, Linoleum & Soft Tile Layers [James D. Gibson and Earl P. Bigham, d/b/a Southwestern Floor Co., a partnership] *and* Butcher & Sweeney Construction Co., Inc.

Local 1905, Carpet, Linoleum & Soft Tile Layers [Builders Service Co., Inc.] *and* Cain & Cain, Inc. *and* Fort Worth Chapter, Associated General Contractors. *Cases Nos. 16–CD–17, 16–CD–18, and 16–CD–19. June 27, 1963*

DECISION AND ORDER QUASHING NOTICE OF HEARING

This is a proceeding under Section 10(k) of the National Labor Relations Act following the filing of charges under Section 8(b)(4)(D) of the Act. A hearing was held before T. Lowry Whittaker, hearing officer, on January 31, February 1, 11, 20, 21, and 25, 1963. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. The rulings of the hearing officer made at the hearing are free from prejudicial error and are hereby affirmed. Briefs filed by the Employers, the Carpenters, and the Painters have been duly considered.[1]

Upon the entire record in these cases, the Board[2] makes the following findings:

1. As stipulated by the parties, Butcher & Sweeney Construction Co., Inc. (hereinafter referred to as Butcher & Sweeney), Cain &

[1] The request for oral argument made by Respondent, Local 1905, Carpet, Linoleum & Soft Tile Layers, is hereby denied, as the record and briefs adequately present the issues and the positions of the parties.

[2] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with these cases to a three-member panel [Chairman McCulloch and Members Fanning and Brown].