it will be recommended that the Respondent cease and desist from in any manner infringing upon the rights of the employees guaranteed in the Act.

It will be recommended that the Respondent offer Reikard and Fish immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of a sum of money equal to that which she would have earned as wages, absent the discrimination, from September 13, 1961, to the date of offer of full reinstatement, less her net earnings during said period, and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289.

In his brief General Counsel urges that interest be added to the backpay award. His argument is persuasive and well-documented. The Trial Examiner is in agreement with it and urges that the Board give it full consideration in the event this proceeding comes before it. In his opinion, however, it would be improper for him to add to the usual recommended order a provision contrary to or inconsistent with established Board policy [8] And so far as he has ascertained, the Board has not altered its position on the interest issue since 1951, when it reversed on precisely the same issue Trial Examiner Reeves Hilton in *Earl I. Sifers, an individual doing business as Sifers Candy Company*, 92 NLRB 1220.

Upon the basis of the foregoing findings and conclusions of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
2. By discriminating against employees Reikard and Fish to discourage membership in and activity on behalf of the above-named labor organization and by depriving them of rights guaranteed by Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

[8] Despite the Supreme Court's ultimate reversal of the Board on the merits of the case, the Trial Examiner does not consider that he is absolved of the duty to follow Board policy, of which he was specifically and pointedly reminded in *Insurance Agents' International Union, AFL–CIO (The Prudential Insurance Company of America)*, 119 NLRB 768

Marsh Supermarkets, Inc. *and* Retail Clerks International Association, Local Union No. 1441, AFL–CIO

Marsh Supermarkets, Inc. *and* Charles D. Dowling, Petitioner *and* Local No. 1441, Retail Clerks International Association, AFL–CIO

Marsh Supermarkets, Inc. *and* Local No. 1441, Retail Clerks International Association, AFL–CIO. *Cases Nos. 25–CA–1407, 25–RD–120, and 25–RC–1865. January 28, 1963*

DECISION AND ORDER

On February 16, 1962, Trial Examiner Horace A. Ruckel issued an 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, and recommending further that the election held on April 21, 1961, in Case No. 25–RD–120, be set aside and a new election held, as set forth in the attached Intermediate Report. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect to such allegations, and further recommended that the election held on April 21, 1961, in Case No. 25–RC–1865, not be set aside. Thereafter, the Respondent, the General Counsel, and the Union filed exceptions to the Intermediate Report and supporting briefs.

Subsequently, by order dated June 7, 1962, the Board remanded the cases herein to the Trial Examiner for the preparation of a Supplemental Intermediate Report containing resolutions of credibility, findings of fact, and conclusions of law which the Trial Examiner had not made concerning certain testimony.

On June 21, 1962, the Trial Examiner issued his Supplemental Intermediate Report finding that the Respondent had engaged in certain additional unfair labor practices, as set forth in the attached Supplemental Intermediate Report. Thereafter, the Respondent, the General Counsel, and the Union filed exceptions to the Supplemental Intermediate Report, and the Respondent and General Counsel filed supporting briefs.

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

The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Supplemental Intermediate Report, the exceptions and briefs, and the entire record herein, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.

As stated in the Intermediate Report, the Union on April 21, 1962, lost both a decertification election (Case No. 25–RD–120) among grocery employees at the Respondent's six retail stores in Muncie, Indiana, and a representation election (Case No. 25–RC–1865) among production, maintenance, and warehouse employees in the Respondent's Yorktown, Indiana, Food Center, or warehouse.

The Trial Examiner found, and we agree, that the Respondent interfered with the Muncie election. For reasons stated herein, we find, contrary to the Trial Examiner, that the Respondent interfered also with the Yorktown election.

The Trial Examiner found, and we agree, that the Respondent engaged in the following conduct at two of its stores which violated

8(a)(1) of the Act: (1) On April 14, 1961, Kenneth Raisor, the Respondent's supervisor of operations for all the stores, unlawfully interrogated employee Roy Taylor at store No. 18, as to how he was going to vote, and (2) Merritt Marsh, store manager at store No. 9, on the day before the election, unlawfully promised a benefit to employee Katherine Swoveland if she voted against the Union. The Trial Examiner also found that such Respondent officials as President Estel Marsh, Vice President Chan Kintner, Personnel Director William Ast, and Director of Retail Operations David Somers, during the week preceding the elections, made speeches to the employees at the warehouse and the stores in the course of which they referred to strike violence at other companies, commented about the disadvantages of unions, and the benefits accorded by the Respondent without a union, and quoted excerpts from a book entitled "Power Unlimited—The Corruption of Union Leadership," which charged that unions are corrupt and destroy competitive enterprise. While the Trial Examiner found that these speeches, standing alone, did not inhibit a free election, he concluded that the unlawful statements of Merritt Marsh and Kenneth Raisor, when considered against the background of the speeches, did improperly influence the result of the Muncie stores' election. As the Trial Examiner found no independent violations of Section 8(a)(1) of the Act occurred at the warehouse, he concluded that the speeches at that location did not by themselves prevent a free and untrammeled choice of bargaining representative.

However, the Trial Examiner also stated that there was conflicting testimony as to whether the speeches at the warehouse and the stores included such statements as "If a union got in and we started negotiating, that everything would be wiped clean—all the benefits," and "If the Union got in you will have to start from scratch." The Trial Examiner did not find it necessary to make credibility findings as to the foregoing because he found that, even if such statements were made, they would not be violative of Section 8(a)(1) of the Act as they were no more than a statement of the situation arising from the impending expiration of the collective-bargaining contract on May 1, 1961. We therefore ordered the Trial Examiner on June 7, 1962, to make credibility findings as to the conflicting testimony in order to enable the Board to decide whether the foregoing statements violated Section 8(a)(1) of the Act.

Accordingly, the Trial Examiner prepared a Supplemental Intermediate Report in which he made the following findings of fact. Estel Marsh and William Ast, at the warehouse meeting on April 15, 1961, and at the various stores of the Respondent in the week preceding the election, stated, in effect, that if the Union won the elections on April 21, 1961, Respondent's employees would lose some of the benefits which they then enjoyed, particularly the existing vacation

plan, and would have to "start from scratch." The Trial Examiner found that in certain instances such statements were coupled with references to the expiration of the Union's contract on May 1, 1961.

We have recently found in *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, that preelection statements similar to those made by the Respondent herein generated an atmosphere of fear of economic loss and hostility to the Union which destroyed the laboratory conditions in which the Board must hold its elections and prevented the employees' expression of a free choice in the elections. We therefore find in accordance with *Dal-Tex Optical* that the Respondent's speeches contained threats of loss of benefits and economic reprisal which interfered with the conduct of both elections. In addition, we find that these threats violated Section 8(a)(1) of the Act. We also find that the unlawful statements of Respondent officials to store employees Taylor and Swoveland, which violated Section 8(a)(1) of the Act, interfered with the election at the Muncie stores. Accordingly, we shall order that both elections be set aside and that new elections be held.

2. The Trial Examiner found in his Intermediate Report no merit in the General Counsel's contention that Respondent discriminated against employee Zelpha Wulff, a union steward, by reducing her straight-time hours of work at store No. 25 during the 3 weeks ending June 3, 1961, and at store No. 69 for the succeeding 4 weeks. We disagree with the Trial Examiner to the extent that we find for the following reasons that Respondent was discriminatorily motivated with respect to the hourly reduction for the 2-week period ending June 3, 1961.

Although the record shows that Wulff and Herbert Franklin, manager of store No. 25, had conversations on April 28 and June 1, 1961, as well as on May 15, 1961, the Trial Examiner in his Intermediate Report did not refer to their conversations on the first two dates. Accordingly, in our order of June 7, 1962, we instructed the Trial Examiner to make findings concerning these conversations.

The Trial Examiner found in his Supplemental Intermediate Report that on April 28, 1961, Wulff asked Franklin how she would be affected by the impending shutdown of store No. 1 and the transfer of employees to other stores. Franklin replied that he did not know what the effect would be, but that so far as Wulff was concerned he had heard from "the boys" prior to the election on April 21, 1961, that she would resign if the Union lost, and that it would "make it easier on everyone" if she did so. Wulff denied having any such intention. When Wulff pressed Franklin as to who "the boys" were, he became profane and abusive, and upbraided her for criticizing the Respondent during the election campaign, and stated that if he were Wulff he would resign. The Trial Examiner found, and we agree,

that Franklin's statements amounted to an implied threat of discharge because of her union activity and constituted a violation of Section 8(a)(1) of the Act.

As indicated in the Intermediate Report, the Trial Examiner also found that when Wulff returned from her illness on May 15, 1961, and asked about a posted schedule of work hours according to which her straight time was cut back from 31 to 23 hours a week, Franklin explained that this was because she had been sick and he wanted to see if she could carry her workload. He stated, however, that her hours would be restored the following week. When this was not done, she pointed this out to Franklin who said she could take it or leave it.

The Trial Examiner found in his Supplemental Intermediate Report that Wulff again approached Franklin on June 1, 1961, concerning her reduction in hours, and asked him why he continued to take hours away from her and give them to employees with less seniority. Franklin cursed her and told her that there was no union any more and that he would assign hours of work to whomever he pleased. Franklin also stated that he would run the store to suit himself and that he wanted her to quit or transfer to another store,[1] reminding her again that he had heard that she would quit if the Union "went out," i.e., lost the election. The Trial Examiner found, and we agree, that Franklin's statements to Wulff on June 1, 1961, violated Section 8(a)(1) of the Act.

It is clear from Franklin's statements to Wulff that his failure to restore her straight-time hours during her last 2 weeks of employment at store No. 25 was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act. As the decrease in hours for the week ending May 20, 1961, appears to have been occasioned by Franklin's desire to ease Wulff's workload because of her recent illness, we do not find the reduction during that week discriminatory. In the absence of evidence that any curtailment in hours after Wulff's transfer to store No. 69 was discriminatorily motivated, we do not find such reduction to be unlawful.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner with the following modifications:

(1) The backpay obligation of the Respondent shall include the payment of interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(2) Insert the following paragraph after Section 2(a) of the Order:

[1] The record shows that at Wulff's request Raisor transferred Wulff to store No. 69 following the week ending June 3, 1961.

Make Zelpha Wulff whole for any loss of pay she may have suffered by reason of the reduction in straight time during the 2-week period ending June 3, 1961.

(3) Insert the following paragraph after Section 2(c) of the Order:

IT IS FURTHER ORDERED that the elections held on April 21, 1961, in Cases Nos. 25–RD–120 and 25–RC–1865 be, and they hereby are, set aside. The Regional Director for the Twenty-fifth Region is directed to conduct new elections at such time as he deems appropriate. The eligibility period shall be the payroll period preceding the date of issuance of the notice of elections.

(4) The following paragraph is added to the notice:

WE WILL make Zelpha Wulff whole for any loss of pay suffered by reason of the reduction in straight-time hours during the 2-week period ending June 3, 1961.

(5) The following note shall be added to the bottom of the notice immediately below the signature:

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

(6) The following paragraph shall be substituted for the present penultimate paragraph appearing in the notice:

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

INTERMEDIATE REPORT AND RECOMMENDED ORDER AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

On April 21, 1961, a representation election was held among the production, maintenance, and warehouse employees of Marsh Supermarkets, Inc., herein called Respondent, at its Yorktown, Indiana, Food Center (Case No. 25–RC–1865) The Petitioner, Local No 1441, Retail Clerks International Association, AFL–CIO, herein called the Union, lost the election, 87 to 69. On the same day, pursuant to a decertification petition, an election was held among all grocery employees of Respondent in its six retail stores located in Delaware County, Indiana (Case No. 25–RD–120). The employees voted to decertify the Union by 66 to 64. Thereafter the Union filed objections to both elections, the Regional Director for the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, filed his report on objections to which report objections were filed by both the Union and Respondent. The Board, on August 15, 1961, directed that a hearing be held on certain of the objections and that the hearing officer conducting the hearing should prepare and cause to be served upon the parties a "report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of said objections."

On June 22, 1961, the Union filed a charge of unfair labor practices by Respondent (Case No 25–CA–1407), and on August 11 the Regional Director issued

a complaint thereon. On August 31, 1961, the Union filed an amended charge and on September 7 the Regional Director filed an amended complaint. At the hearing the complaint was again amended. On September 1, the Regional Director issued an order consolidating the complaint in Case No. 25–CA–1407 with the objections to the election in Case No. 25–RD–120 and Case No. 25–RC–1865, for the purposes of hearing.[1]

The complaint, as amended, alleges that Respondent committed unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 *et seq.*), herein called the Act, by discharging John Farinella on June 2, 1961, by reducing the number of hours worked by employee Zelpha Wulff, and on various dates by interrogating its employees regarding their union activities, by threatening them with loss of economic benefits if the Union won the election, and by promising them economic benefits if the Union lost the election. In its duly filed answer, as subsequently amended, Respondent denies generally that it has engaged in any unfair labor practices.

Pursuant to due notice, a hearing was held on the consolidated cases before Trial Examiner Horace A. Ruckel at Muncie, Indiana, on October 31 and November 1, 2, 3, 6, and 7, 1961. All parties were represented at the hearing and were afforded full opportunity to be heard and to examine and cross-examine witnesses. The parties waived oral argument but filed briefs which I have fully considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Indiana corporation, has its principal office, warehouse, and plant at Yorktown, Indiana, and various other plants, retail stores, warehouses, and other facilities in the States of Indiana, Ohio, South Carolina, North Carolina, and Georgia, at all of which it is engaged in the manufacture, sale, processing, and distribution of groceries, foodstuffs, and related products at retail. Respondent's northern division, which is serviced out of Yorktown, Indiana, comprises 54 stores.

Annually, Respondent has sold and distributed products, the value of which exceeds $500,000. Annually, Respondent shipped products valued in excess of $1 million from its places of business in interstate commerce directly to States of the United States other than the State of Indiana. During the same period of time, Respondent received goods valued in excess of $1 million transported to its place of business in interstate commerce directly from States of the United States other than the State of Indiana.

Upon the basis of the above-admitted facts, I find, as Respondent admits in its answer, that Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Retail Clerks International Association, Local Union No 1441, AFL–CIO, admits employees of Respondent to membership The complaint alleges, the answer admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES AND THE OBJECTIONS TO THE ELECTION

A. *Interference, restraint, and coercion*

The election among the employees at the Yorktown, Indiana, Food Center (Case No. 25–RC–1865) and the election among the employees in Respondent's six retail stores in Muncie, Indiana (Case No. 25–RD–120), were both held on April 21, 1961 A few days prior to the election Respondent undertook a course of action calculated to influence its employees in their choice of a bargaining representative. Whether in its pursuit of this objective Respondent went beyond permissible limits, is one of the questions posed by this case.

Respondent launched its campaign by convening a meeting of Yorktown employees in the cafeteria on the evening of April 15, at which Estel Marsh and Chan Kintner, Respondent's president and vice president, respectively, spoke. The highlight of

[1] On October 25, 1961, Respondent moved to sever the unfair labor practice case from the representation cases At the opening of the hearing, the Trial Examiner denied this motion

Marsh's address consisted of reading excerpts from a book: "Power Unlimited—The Corruption of Union Leadership," [2] by Sylvester Petro, a professor of law at New York University. Some of the more lurid of the excerpted passages are as follows:

> . . . Unions do nothing for anyone but their own members; those members are but a small minority, less than one fourth of the working force.
>
> * * * * * * *
>
> . . . The truth about the big industry-wide trade unions is that they threaten the health, the well-being, and the survival of American society to a degree never before approached by either internal or external enemies. They are spreading corruption of every kind and at every level—Freedom is the victim, freedom as an idea and freedom as a way of life.
>
> * * * * * * *
>
> . . . America has less cause to fear Russia than Russia has to fear us—if we fail, it will be from internal corruption and the powers and privileges accorded—trade unions will be among the principal causes of the collapse——
>
> * * * * * * *
>
> . . . Put simply, the Communists are saying that the big trade unions and their leaders, socialists and antisocialists alike, are helping to destroy America as a free nation—Communists are professionals in destruction.
>
> * * * * * * *
>
> . . . Unions are destroying the competitive enterprise system by imposing upon it a rigid monopolistic structure, to the infinite abuse of the public, and to the great national peril. Our survival is at stake.
>
> * * * * * * *

This communication from the academic grove was relayed to the marketplace and delivered to the grocery clerks, dairy clerks, errand boys, and others assembled in evening meetings at the six Muncie stores to receive it. To the accompaniment of "Power Unlimited," Marsh and Kintner, as well as Personnel Director Ast and David Somers, director of retail operations, called attention to violence in the Kohler and Perfect Circle strikes and gave their own opinions of the disadvantages of unions and the benefits accorded by Respondent's management, all in the *American Tube Bending* tradition.[3]

While the Union's brief characterizes "Power Unlimited" as "unlimited slander," the General Counsel does not contend that its utterance by Respondent's officers, or the expression of their own opinions in the above vein, constitute, in themselves, an unfair labor practice, since they do not contain threats of reprisal or promises of benefit. I find that they do not, and that they are privileged under the free speech provision of Section 8(c) of the Act. No finding of a violation of Section 8(a)(1) may be based upon them. The question remains whether they are of such a character as to warrant setting aside the election under the *General Shoe* [4] doctrine on the ground that they "created an atmosphere calculated to prevent a free and untrammeled choice by the employees" of their bargaining representative. The differences between the situation here and that existing in *General Shoe* are principally two: In *General Shoe* the employer's activities were more varied and widespread, and took place on the day before the election without an opportunity for the Union to reply, whereas in the instant case the comments were uttered 5 or 6 days beforehand. Under these circumstances, I do not find that, standing alone, they were calculated to inhibit a free choice by Respondent's employees.

There is in the record, however, evidence of other statements by Respondent's representatives to individual employees which are alleged to be coercive. Several witnesses testified that Marsh told the employees present at the warehouse meeting that "if a union got in and we started negotiations, that everything would be wiped clean—all the benefits" including Respondent's vacation program, and that Ast, at a meeting at store No. 9 stated: "If the Union gets in you will have to start from scratch." Other witnesses present on these occasions denied that Marsh or Ast made these statements. I do not find it necessary to resolve these contradictions. Assuming that they were made, they were not violative of Section 8(a)(1) as constituting interference, restraint, or coercion, since they were no more than a statement of the situation arising from the impending expiration of the collective-bargaining contract on May 1, 1961. These were statements which Respondent had a right to make

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[2] The Ronald Press Company, 1959

[3] *American Tube Bending Co., Inc.*, 44 NLRB 121

[4] *General Shoe Corporation*, 77 NLRB 124

since they were merely expressions of its legal position.[5] Collective bargaining would start from scratch.

Veda Schaef, checker at store No. 44, testified that on April 19 her store manager, Leonard Cook, told her that no matter which way the election went the Respondent would still "be the same" and that everything would be run according to seniority. Her testimony was not denied. I find Cook's statement to be innocuous.

Zelpha Wulff testified that at a meeting at store No. 25 in March 1961, Ast said that on a previous occasion when a union was trying to organize employees at the Yorktown warehouse, Respondent got rid of the "troublemakers" after the election. This testimony is unsupported by any other witness, and several witnesses, including Ast, denied that any such statement was made. I credit the denials.

Barbara Erdel, employed at store No. 18, testified that at a meeting of employees at store No 18 about April 13, after hours, President Marsh said that there was no chance of employees being advanced so long as the Union was in the plant. Marsh and others present testified that Marsh did not make this statement. I credit their denials. Moreover it was known that advancements had occurred after the advent of the Union.

Katherine Swoveland, cashier at store No. 9, testified that Merritt Marsh, store manager, on the day before the election told her that the store would be a better place to work without the Union, and that she would not have to work nights as much if the Union was voted out. Night work was something which Swoveland had objected to. Marsh denied making such a statement. Swoveland's testimony was circumstantially given and I was impressed by her demeanor as a witness. I credit her testimony. Marsh's statement constituted a promise of benefit to her if she voted against the Union, and is violative of Section 8(a)(1) of the Act.

Roy Taylor, not presently employed by Respondent, but who at the time of the election worked as a carryout boy at store No. 18 and voted in the election, testified that on the evening of April 14, 1961, a week before the election, Raisor, operational supervisor for the Muncie stores, came to him and asked him if he had any questions about the election, and if he was "going to make the right vote" Taylor replied that he thought and hoped that he would. Taylor was not cross-examined and his testimony was not denied. I credit it In the context of Respondent's open campaign of opposition to the Union, the "right vote" meant a vote against the Union Interrogation of an employee as to how he is going to vote in a collective-bargaining election is violative of Section 8(a)(1) of the Act.

Conclusions

I have found that Store Manager Marsh at store No. 9, shortly before the election among the employees in the Muncie stores, unlawfully promised a benefit to employee Swoveland if she voted against the Union, and that Raisor, Respondent's supervisor of operations for all the stores, unlawfully interrogated employee Taylor, at store No. 18, as to how he was going to vote, and that these activities of Respondent were violative of Section 8(a)(1) of the Act. Respondent, in its brief, argues that these should be considered only as isolated instances, insufficient to set aside an election. I cannot agree. Against the background of Respondent's systematic campaign against the Union, which penetrated into the six stores whose employees constituted the voting unit in the decertification election (Case No. 25–RD–120), and in the context of Respondent's undisguised hostility to the Union as illustrated, among other things, by the publication to its employees of the quoted passages from "Power Unlimited," these statements to Swoveland and Taylor were calculated to have a force and an effect which, absent this background and this context, they might not have had. It must be assumed that they influenced the result of the election.

It is my recommendation that the election in Case No. 25–RD–120 be set aside. Since there is not any evidence in the record of any 8(a)(1) violations so far as employees in the voting unit at the Yorktown warehouse (Case No. 25–RC–1865) are concerned, and since the utterances of Respondent's officers, whether original or derivative, standing alone did not in my opinion prevent the free and untrammeled choice of a bargaining representative, I do not recommend that the election in that case be set aside.

B. *The discharge of John Farinella*

1. Background

Farinella came to work for Respondent in 1951 as a produce manager. Prior to that time he had been employed for 6 years by A & P. in the same capacity. Respondent discharged him on June 2, 1961, allegedly for inadequate job performance.

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[5] *Schick, Incorporated,* 118 NLRB 1160; *Universal Producing Company,* 123 NLRB 548

At this time he had been since September 1959 in charge of the produce department at store No. 9, one of Respondent's six stores in Muncie, Indiana. Merritt Marsh was store manager. Of all Respondent's employees in its Muncie stores and its warehouse at Yorktown (the two units in which the election on April 21, 1961, was conducted), Farinella was the most active in the Union He joined it in 1957 when it first began to organize Respondent's employees, was steward for store No. 2 until he was transferred to store No. 9, served on the bargaining committee which negotiated the 1958 and 1959 contracts, and was elected president of the Union in April 1959, in which capacity he continues to serve. At the time of his discharge he had greater seniority than any produce manager in the Muncie, Indiana, area.

As produce manager, Farinella's duties were to display fruits, vegetables, and related products on racks and tables in his department, to keep them in salable condition, to replenish them from the cooler, and to order supplies from Respondent's warehouse when necessary. A produce specialist works with the produce managers in the various stores to see that the produce department is conducted in an efficient manner. Over the produce specialist is the operational supervisor who has supervision of the managers of the produce, meat, dairy, and grocery departments in all the stores. Except in unusual circumstances the produce specialist has no authority to discharge produce department heads. This rests with the operational supervisor.

The store manager is responsible for the overall operation of his store and its various departments. He does not, however, have authority to discharge department managers except under unusual or emergency circumstances not present here. His more precise authority and responsibility are hereinafter considered.

2. The events of June 2, 1961

Respondent's stores normally work a 6-day week. Tuesday, May 30, 1961, however, was Memorial Day, and the stores were not open. In lieu of pay for a holiday not worked, Respondent's instructions were not to have its employees work more than 32 hours the remainder of the week, since time above that would have to be paid at time and one-half. To conform with this, the work schedule for this week provided for Farinella's taking a day off on Thursday, June 1, which he did. Nelson, Farinella's only full-time assistant in the produce department, worked on Monday, but was on vacation the rest of the week. Farinella, though it was his day off, came to the store for an hour on Thursday afternoon to make out a delivery order for the following day. Friday is the busiest day in the store, and on Thursday evening the department managers usually set up their departments as completely as possible.

Farinella reported to the store at 6 a m on Friday, June 2, his usual starting time, and found that the work of setting up green vegetable racks and tables, and the trimming of the vegetables, had not been completed the night before. He set to work getting the produce racks and tables in proper condition. Between 6·30 and 7 o'clock, while he was so engaged, the supply truck came in from the warehouse and Farinella, with the help of the driver and Jack Hoover, the dairyboy, unloaded it. Since Nelson, the only regular full-time employee in the produce department, was on vacation, there was no one else to do the other work in the department while Farinella was unloading. As a consequence, Farinella's regular work fell behind, and about 11 a.m. according to his own testimony, he called the attention of Charles Claspell, assistant store manager, to the fact that the green rack was not yet set up, and asked for assistance. The point is in dispute. Claspell testified that Farinella did not ask for help on this occasion, though admitting that he had on various other occasions, and that he so told Raisor, director of operations, when Raisor later asked him. Merritt Marsh testified that on various previous occasions Farinella had asked for help, particularly since March when the delivery schedule of the warehouse truck was changed Previous to March, grocery department employees had unloaded the truck. Since then unloading had become the task largely of the employees in the produce department Marsh testified that Farinella had often protested this arrangement on the ground that unloading the truck resulted in his being behind in the normal work of his department. Claspell, though denying that Farinella asked for help, admitted that he did notice about noon that the produce tables and racks were not as full as they should have been It does not appear that either he or Merritt Marsh spoke to Farinella about this condition Farinella testified that he also asked George Capp, grocery stockman, for help but Capp told him he could not give him any since the grocery department was running behind. Capp was not called as a witness

In view of Nelson's absence and the resultant falling behind in the regular work of the produce department on this, the store's busiest day of the week, and in view of Farinella's frequent requests for help on other days, I find it improbable that he

did not ask for help on this occasion. I credit his testimony that he did, and so find.

At 1 p.m. Bartlett, who worked part time in the produce department assisting Farinella and Nelson, arrived. Farinella worked until a little past his usual quitting time of 3 p.m. He testified that when he left the produce department, in his opinion, was well taken care of since Bartlett was there to keep the produce racks full and Spence, another part-time employee, was due to arrive at 4 p.m ; Spence did arrive

On the previous day, Thursday, June 1, Raisor and Faye Houston, produce supervisor, had visited store No. 18 whose produce department, according to Raisor, was the least satisfactory of Respondent's various produce departments along with that at store No. 9. Goveia, produce manager at store No. 18, was told by Raisor that he would have to improve his department or his employment would be terminated,[6] and was placed on 2 weeks' probation. While at store No. 18, Raisor and Houston agreed to visit Farinella at store No. 9 on the following day.

Raisor arrived at store No. 9 shortly after Farinella had left, and proceeded to make a list of things he found wrong with the produce.[7] A few minutes later Houston appeared, the two of them further inspected the department, and they had Claspell summon Farinella. While waiting for Farinella, Raisor telephoned Chan Kintner, Respondent's vice president, and asked permission to discharge Farinella. Kintner, according to his own testimony, asked him if Farinella had asked for help during the day, and Raisor told him that he did not know but would check with Merritt Marsh and Claspell. Raisor testified that he told Kintner that Farinella had not asked for help, but rechecked to make sure. In any event, Kintner authorized Raisor to discharge Farinella if he had not asked for help. Raisor did check and, according to his testimony, was told by Claspell that this was the case.

Upon Farinella's arrival at the store, he, Raisor, and Houston discussed the condition of the produce department. Raisor testified that Merritt Marsh, manager of store No. 9, though present in the store did not take part in the conversation. Marsh's own testimony confirms this. Raisor told Farinella that Houston had found a similar condition in his department the previous week, that it could no longer be tolerated, and that "this was it." Farinella at that point, not understanding what Raisor meant by "this is it," said he had not had enough help during the day. Raisor replied, according to his own testimony, that Farinella had not made his needs known and that so far as he, Raisor, was concerned "that was besides the point now," since Farinella had just been discharged. Farinella left and Raisor and Houston proceeded to straighten up the produce department and to cancel orders for certain items of produce which Farinella had made for the following day.

3. Farinella's previous employment record

Farinella was assigned to store No. 9 in September 1959, upon the closing of store No. 2. He was transferred to store No. 2 from store No. 1 about January 1958. A bulletin issued by Respondent's produce club covering the period from March 8, 1957, to March 8, 1958, showing the relative standing of the produce departments in Respondent's stores in the northern Indiana area, is in evidence It shows the produce department in store No. 1, where Farinella was at that time produce manager, in fourth place on the basis of "contributions to store results." The same bulletin, under the heading "Big Ten in Vegetables Sales," shows Farinella's department at store No. 1 in first place among the 32 produce departments as having achieved 38.9 percent of gross store profits, which was close to management's announced goal of 40 percent.

Respondent contends that Farinella is not entitled to the credit for this showing, since he was produce manager at store No. 1 for only the last 2 months of the 12-month period covered by this bulletin. It submits evidence to show that during January 1961, the percentage of gross profits of the produce department declined from 33.3 percent the previous month to 28.8 percent, to rise again in March to 30 2 percent

On March 11, 12, and 13, 1958, during a period when Farinella was engaged in negotiations for the contract of April 28, 1958, and a few days after the yearly

[6] It was subsequently terminated about August 1, 1961

[7] Raisor's list included various items of fruits and vegetables in the cooler not enough of which were on display, thus leaving the vegetable rack partially showing; various kinds of vegetables in the cooler which needed reworking; certain kinds of vegetables received on the truck that morning which had not been put in the cooler; and several cases and bags of fruits and vegetables on hand in excess of what he believed was needed

report of the produce club, John Altman, then operational supervisor, inspected Farinella's department, made a list of things he found wrong, and procured Farinella's signature to the list. At the same time he told Farinella that his department was a poor department and that he could not understand how it got in such shape. Farinella testified credibly that during a period of 2 weeks when he was engaged in contract negotiations, Altman was in his department nearly every day.

Around the middle of 1958, while at store No. 2, Farinella was awarded a hi-fi set as first prize in a contest between the Muncie stores, for the greatest contribution to gross sales profits.

Prior to his assignment to store No. 1 Farinella was produce manager at store No. 25. He joined the Union about September 1, 1957, and was placed on the Union's negotiating committee in October. Dean Craig, then produce specialist, visited the produce department at store No. 25 and, according to his testimony, criticized Farinella's work and told him that he was being placed on probation for 3 weeks. Farinella testified that he was not told by Craig or anyone else in management that he was being placed on probation. I do not find it necessary to resolve the question of whether Craig used the word "probation" in talking to Farinella There is no evidence in the record of any formalized or graduated system of discipline in Respondent's stores in which "probation" is given any particular significance I find only that Craig did warn Farinella that his department was not in satisfactory condition, and that it would have to improve.

In June 1958, while at store No. 2 (later closed down) Richard Wade, store manager, issued a notice of corrective action to Farinella complaining of certain conditions in the produce department, which Farinella signed, although stating on the notice that in his opinion it was not accurate and the correction uncalled for.

There is no evidence in the record of any particular criticism of Farinella's work over a 3-year period from the latest of the above instances (June 1958), until May 26, 1961, a week before his discharge, except that Raisor and Houston testified that "several times" during the year prior to his discharge, when visiting the various stores (which they did about once a week), they criticized Farinella's work. The substance of their testimony is that there were always things to be criticized in all the departments in all the stores, and suggestions to be made for improvement, but that they criticized Farinella more than the average produce manager. I do not find criticisms of Farinella during this 3-year period to be more than routine. On May 26, 1961, Houston, after a visit to store No. 9, expressed his dissatisfaction with Farinella to William Ast, personnel director, and recommended that he be discharged.

In evaluating Farinella's efficiency as a produce manager, Respondent lays great stress on an exhibit which compares "dollars per man hour" in the produce department of the average store with the produce department at store No. 9. "Dollars per man hour" is derived from computing the number of hours worked in a department and comparing the result with the total sales of the department. During the year preceding his discharge, Farinella's "dollars per man hour," according to this computation, stayed close to the company average, until April 1961. For the week ending the day after his discharge, however, the average produce department was producing $28.60 per man-hour, while Farinella was producing $20 40 per man-hour.

The testimony of Ast is that this statistical method is the fairest of measuring rods because it is not influenced by store location. There is no evidence, however, as to how it may be affected by the efficiency of general store management.

Conclusions

As has been found, Farinella had been employed for 10 years, and had the greatest seniority of any of Respondent's produce managers when he was discharged on June 2, 1961, within 6 weeks after Local 1441 lost the election conducted among Respondent's employees, and a month after the expiration of the Union's contract. Farinella was the most active in the Union of all Respondent's employees. He had participated in negotiating the collective-bargaining contract and was president of the Union. As has been found in section A, above, Respondent during the period immediately preceding the election, undertook a campaign to defeat the Union. It made no secret of its hostility to unions in general and to Local 1441 in particular. It also expressed to Farinella its disfavor of Farinella's own activity in the Union. For example, Farinella testified without contradiction that about April 7, 1961, 2 weeks prior to the election and within 2 months of his discharge, Somers, director of retail operations, said to him, "John, I don't know what's come over you. Here you were a good company man and now you are president of Local 1441. We can't understand."

On the other hand it is axiomatic, as counsel's brief points out, that membership in a union, no matter how active it may be, is in no sense insurance against discipline or even discharge, the ultimate sanction. Farinella's work record, therefore, must be carefully considered, since Respondent asserts inefficiency as the reason for his termination.

Respondent, in the operation of its retail stores, is in immediate touch with the consuming public and largely dependent upon its vagaries. To some extent its business is seasonal. To a greater extent it is affected by store location and by good store management. Merchandise handled in the produce department, unlike that in other departments, is 100 percent perishable. If the items do not move promptly they must be freshened up, reduced in price, or thrown away. It is easy to overorder from the warehouse and as easy to underorder. Good judgment by the produce manager is an important factor. An ideal situation would be one where there is enough of each variety of fruits or vegetables, but not too much. This cannot be wholly attained.

In general, I am not impressed with the significance attributed by both the General Counsel and Respondent to the statistical and graphic evidence which they have adduced. On the one hand Respondent asserts in its brief that in determining whether or not Farinella was discharged for his union activity or because of inadequate job performance, it is necessary only to examine the "dollars per man hour" graph. The test imposed by the figures on which the graph is based is asserted to be the fairest available, because it is said that store location is not a factor. The factor of general store management, however, is present. Moreover, counsel mistakes the reach of the Act. The question is not whether Farinella "should" have been discharged. The question is why *was* he discharged, and this cannot be answered solely on the basis of statistics.

On the other hand, the General Counsel attaches importance to the first place award given Farinella's produce department at store No. 1 for the period of March 8, 1957, to March 8, 1958. This was 3 years before his discharge. Moreover, Farinella was at store No. 1 only during the last 2 months of this period. It is a fair conclusion, however, which I draw, that Respondent would not have assigned Farinella to what was at that time its banner produce department among all its northern Indiana stores, had it not believed that he could maintain its standard. In my judgment this largely serves to cancel out complaints, revived at the hearing, as to his performance prior to March 1958, including his "probation" in October 1957.

I am more concerned with events nearer in time to Farinella's discharge. From June 1958, when Farinella was given a notice of corrective action, to the week before his discharge, a 3-year period, there appear to have been no serious complaints as to Farinella's work performance. The testimony of Raisor and Houston is only to the effect that during this period they expressed dissatisfaction on several occasions during their weekly rounds of the produce departments. I have found these to have been no more than routine suggestions and criticisms. Nor do I find that their inspection on May 26 resulted in much, if any, more than the usual suggestions and criticisms made of every produce department.

The same conclusions apply to the criticisms made by Marsh, manager of store No. 1. Although Marsh testified that the produce department at the time of Farinella's discharge was the weakest in his store, before he made no criticisms of Farinella different from those he made from time to time of other employees. He testified on direct examination that during the period of a year previous to June 2, 1961, when Farinella was discharged, he "several times" spoke to him about his work, but he could not cite any specific instance. He would go over the weekly operations report from the office, and if Farinella showed low gross earnings he would discuss the reasons for it with him, "just things in general like that." He also did this with his other departmental managers. Occasionally, he issued a written complaint against an employee for unsatisfactory work. He testified that he did this once with respect to Bartlett, Farinella's part-time assistant, among others; but never with respect to Farinella.

After 3 years, during which I find no serious criticism of Farinella's work in the record, Respondent on June 2, 1961, discharged him. The immediate alleged cause was the poor condition of the produce department. Farinella attributes any failure in this respect to the absence on vacation of his only full-time helper, and the necessity of his having to unload the produce truck himself. I have found that he called this to the attention of the assistant store manager and asked for help, and that this was refused.

As has been seen, Vice President Kintner made his consent to Farinella's discharge dependent upon whether he had asked for help. Raisor was told by Claspell that he had not. Farinella, however, was not asked. After Raisor told him he

was discharged Farinella protested that he had not had sufficient help, only to be told that he "had not made his needs known," and that, anyway, it was "besides the point" since he had already been discharged. Hence not only was Farinella himself not asked before he was discharged if he had requested help, but when he attempted to advance the lack of help as a reason for the condition of his department, he was cut off. I conclude that Raisor was content to believe that Farinella had not asked for help.

If there were any substantial doubt in my mind that Farinella was discharged for reasons other than his inefficiency as a produce manager, it would be dissipated by the failure of Raisor and Houston to confer with Merritt Marsh, the store manager, before the discharge was effectuated. Marsh himself testified on this point as follows:

> TRIAL EXAMINER: When was it determined that he couldn't do the work as a result of which he was discharged?
>
> The WITNESS: Well, I can't answer that.
>
> TRIAL EXAMINER: Well, let's put it this way: Was the first you knew that Farinella was going to be discharged the moment when he was told that that was it, according to his testimony?
>
> The WITNESS: That was the time I knew it, right, just before they told him, I was told.
>
> TRIAL EXAMINER: No previous discussion or decision in which you participated to discharge him? I am not saying discussion as to the nature of his work, good or bad, but you didn't participate in any decision to discharge him?
>
> The WITNESS: No.
>
> * * * * * * *
>
> Mr ROBERTS Mr. Trial Examiner, if it would save any time, I might say that the decision to discharge Farinella was made by Chan Kintner.
>
> TRIAL EXAMINER: And this witness did not participate?
>
> Mr ROBERTS This witness did not make the decision and it went on down the line from Chan Kintner to Kenny Raisor and Faye Houston and they discharged Farinella.
>
> * * * * * * *
>
> Q. When did you know that John was going—Did you know that John was going to be fired before he did?
>
> A. No, I did not.

It has previously been found that store managers do not have authority to discharge department heads. But this is the only sense in which the "line of decision," as it is referred to elsewhere in the record, does not include the store manager. If there is anything clear in this record it is that store managers are vitally concerned with the efficient operations of their several departments, since they affect the profitable operation of the whole store. Merritt Marsh, himself, on various occasions criticized the operations of the produce as well as other departments, consulted with Farinella on matters of the displaying of produce and ordering, and went over with him the weekly reports issuing from the office. He issued written complaints to store employees, recommended disciplinary action, assigned extra help, and authorized overtime work.

Herbert Franklin, manager of store No. 25, summarized as follows the responsibilities of a store manager:

> TRIAL EXAMINER: Would you please tell us what your duties as store manager are?
>
> * * * * * * *
>
> The WITNESS: Supervising all department heads and employees; making hour checking of store scheduling and time schedules.
>
> TRIAL EXAMINER: In other words, every one in the store is under your direction, is that correct?
>
> The WITNESS: Yes, sir.

John Altman, grocery merchandiser and formerly operational supervisor, the position now held by Raisor, testified as follows concerning the role of the store manager when Farinella himself was transferred to store No 1 in January 1958.

> Q. Any other gentleman who would have shared in that decision?
>
> A. Well, possibly—naturally the store manager would have been involved. . . .
>
> * * * * * * *
>
> TRIAL EXAMINER. What do you mean, would have been involved?
>
> The WITNESS: Well, he would have been involved in it, the decision. He would have been losing a man and gaining another man. So naturally he would have been in the conversation about the change.

Altman further testified as to the practice of consulting a store manager when a department head is to be discharged:

> TRIAL EXAMINER: What about the discharge of a department head, wouldn't he be consulted about that, too?
> The WITNESS: Yes, he should be, I would say. Again, it would be a rare occasion, I would think, that he wouldn't be consulted. . . .

Concluding Finding

Farinella, as president, was the most active of Respondent's employees in the Union. Respondent was openly hostile to the organization of its employees and had made this abundantly clear during its preelection campaign. It expressed to Farinella personally, less than a month before it discharged him, its disillusionment with Farinella in his role as president of the Union. It discharged him within 6 weeks after the Union lost the election, and 1 month after the termination of its contract with the Union, when he no longer had the protection afforded by its grievance procedure and arbitration provisions. It did so on the ground of inefficiency, although for a period of 3 years, or during the approximate life of its contract with the Union, Farinella's superiors made no more than routine complaints as to the operation of his department. The discharge was made without consultation with Farinella's store manager, without his recommendation, and without his prior knowledge. This was a sharp and unexplained departure from Respondent's usual practice as testified to by its own witnesses.

The discharge was made on a Friday, the busiest day of the week, when Farinella was without the help of his only full-time assistant. Even if Farinella had not asked for help, any ordinarily competent supervision would have, under the circumstances, assigned it, particularly since Claspell, assistant store manager, noted at noon that the department was behind. Kintner's authorization of Farinella's discharge was stated to be conditioned upon whether he had asked for help. I have found that he did ask for help and that it was refused. Farinella, an employee of 10 years' service as a department manager, periods of which were recognized as being outstanding, was not asked for any explanation of the assertedly poor condition of his department before being told he was discharged When he attempted to explain that he had not had sufficient help, he was told that it was "besides the point"

On the basis of these facts, and on the record as a whole, I conclude that Farinella was discharged on June 2, 1961, not for reasons of inadequate job performance, but because of his activity in behalf of the Union, and I so find.

C. *The alleged discrimination against Zelpha Wulff*

Zelpha Wulff is a checker at store No. 69. She has been employed by Respondent for 4 years. She joined the Union in 1959, and a month before the election on April 21, 1961, was elected as a steward. When Wulff returned from an illness on May 15, 1961, she saw a posted schedule of work hours according to which her own hours were cut back from 31 to 23 per week Franklin, her store manager, told her that this was because she had been sick and he wanted to see if she could carry her workload. He stated, according to her testimony, that her hours would be restored the following week. Her hours were not restored the following week, however, and when she pointed this out to Franklin he said, according to her testimony, that she could take it or leave it.

On cross-examination Wulff admitted, and other evidence in the record shows, that since May 15, 1961, she has averaged 14 percent more in wages per week than she did prior to that date, although some of this was due to overtime work. There is no evidence that any reduction in straight-time hours of work was discriminatorily motivated. I shall recommend that the allegations of the complaint as to her be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V THE REMEDY

It having been found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As it has been found that Respondent discriminated with regard to the hire and tenure of employment of John Farinella in violation of Section 8(a)(3) and (1) of the Act, I will recommend that Respondent offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. (See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch,* 65 NLRB 827.) It will be further recommended that Respondent make the aforesaid employee whole for any loss of pay suffered by reason of the discrimination against him. Loss of pay shall be based upon earnings which Farinella normally would have earned from the date of his discharge to the date of his reinstatement, less net earnings, computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289; *N.L.R.B.* v. *Seven-Up Bottling Company of Miami, Inc.,* 344 U.S. 344. It will also be recommended that Respondent preserve and, upon request, make available to the Board, payroll and other records to facilitate the computation of the backpay due.

As the unfair labor practices committed by Respondent involved discrimination and are therefore of a character striking at the root of employee rights safeguarded by the Act, it will be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

So far as the decertification election of April 21, 1961, is concerned (Case No. 25–RD–120), I recommend that the result of the election be set aside, and the Regional Director be authorized to conduct another election in this unit as soon as he is of the opinion that the effects of Respondent's unfair labor practices have been sufficiently dissipated.

As to the objections to the conduct of the election among the employees of the Yorktown warehouse (Case No. 25–RC–1865), I recommend that they be overruled.

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

CONCLUSIONS OF LAW

1. Retail Clerks International Association, Local Union No. 1441, AFL–CIO, is a labor organization within the meaning of the Act.
2. By promising a benefit to Katherine Swoveland if she voted against the Union as the collective-bargaining agent of its employees, and by interrogating Roy Taylor concerning his membership in, and activities in support of, the Union, Respondent has engaged in unfair labor practices with the meaning of Section 8(a)(1) of the Act.
3. By discharging John Farinella on June 2, 1961, and thereby discriminating in regard to his hire and tenure of employment and discouraging membership in the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. Contrary to the allegations of the complaint, the Respondent did not commit unfair labor practices by shortening the hours of work of Zelpha Wulff.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Respondent, Marsh Supermarkets, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Retail Clerks International Association, Local Union No. 1441, AFL–CIO, or in any other labor organization, by discriminating against its employees in regard to their hire or tenure of employment, or any terms or conditions of their employment, or by interrogating employees as to their union activities and promising benefits for withdrawing support of the Union

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act or to refrain from any or all such activities.

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

(a) Offer to John Farinella immediate and full reinstatement to his former or substantially equivalent job, without prejudice to any rights and privileges previously enjoyed by him, and make him whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him, in the manner set forth in the section of the Trial Examiner's Intermediate Report entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due and the right of reinstatement as set forth in the section of the Trial Examiner's Intermediate Report entitled "The Remedy."

(c) Post at its office in Yorktown, Indiana, and in each of its six Muncie, Indiana, stores, copies of the attached notice marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by Respondent or its representatives, be posted by the Respondent 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 to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.[9]

It is also recommended that the Board dismiss allegations in the complaint that Respondent committed unfair labor practices by reducing the hours of work of Zelpha Wulff.

[8] In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

[9] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in Retail Clerks International Association, Local Union No. 1441, AFL–CIO, or in any other labor organization of our employees, by discriminating against our employees in regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities.

WE WILL offer John Farinella immediate and full reinstatement to his former or substantially equivalent job, without prejudice to any rights and privileges previously enjoyed by him, and we will make him whole for any loss of wages suffered as a result of his discharge.

All our employees are free to become, remain, or refrain from becoming members of the above-named Union or any other labor organization.

MARSH SUPERMARKETS, INC.,
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.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Melrose 2–1551, if they have any question concerning this notice or compliance with its provisions.

SUPPLEMENTAL INTERMEDIATE REPORT

STATEMENT OF THE CASE

The complaint in this proceeding alleges that Respondent, Marsh Supermarkets, Inc., committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), by discharging John Farinella, by reducing the number of hours worked by employee Zelpha Wulff, by interrogating employees regarding their union activities and threatening them with loss of economic benefits if the Union won a representation election then pending, and promising them economic benefits if it lost.

The Union lost the election and filed objections thereto. The Regional Director for the Twenty-fifth Region filed his report on objections, both the Union and Respondent filed exceptions to his report, and the Board directed that the objections be heard together with the evidence in the unfair labor practice case.

On February 16, 1962, I issued my Intermediate Report and Recommended Order and on the same date the case was transferred to the Board. On June 7, 1962, the Board issued an order remanding this case to me for the preparation of a Supplemental Intermediate Report containing (1) resolutions of credibility and findings of fact as to the testimony of all witnesses concerning preelection statements and speeches in the stores and the warehouse, referred to in the last paragraph on page 906 of my Intermediate Report; and (2) resolutions of credibility, findings of fact and, if necessary, conclusions of law, concerning the testimony of Zelpha Wulff and Herbert Franklin respecting their postelection consultations. Accordingly, I make the following:

SUPPLEMENTAL FINDINGS OF FACT

A. *Preelection statements and speeches in Respondent's stores and warehouse*

In my Intermediate Report I stated that several witnesses testified that prior to the elections held on April 21, 1961, Estel Marsh, Respondent's president, Chan Kintner, its vice president, and William Ast, its personnel manager, at meetings held in the warehouse and at all Respondent's stores, told employees that "If a union got in and we started negotiations, everything would be wiped clean . . . all the benefits," including vacation program, and that "If the Union gets in you will have to start from scratch." Other witnesses denied that these statements were made, or interpreted them differently. I did not resolve these contradictions, stating that, assuming that they were made, they were in my opinion not violative of the Act since they correctly stated the legal situation which would exist upon termination of the Union's contract on May 1, 1961. The Board has directed that these contradictions be resolved and that I make findings of credibility concerning them.

1. The warehouse speech

As I have found, Estel Marsh, Respondent's president, made a speech to about 100 employees in the warehouse cafeteria during which he read excepts from "Power Unlimited," by Sylvester Petro, and made comments of his own concerning the Union, in the *American Tube Bending* vein. I found Marsh's remarks privileged under Section 8(c) of the Act. Witnesses called by both the General Counsel and Respondent testified, however, as to other statements made by Marsh pertaining to certain existing employee benefits, including vacations. Hence, Alva Hoots, Howard Brose, and Denver Willis, called by the General Counsel, testified that Marsh said that the employees enjoyed many benefits which would be taken away if the Union won the election, that they would "have to start from the bottom and work up," that everything would be "wiped clean," and they would start all over again." In this connection he specifically cited Respondent's 3-week vacation program and said that it would be taken away if the Union got in and negotiations began, which Hoots understood to mean contract negotiations with the Union.

The testimony of Brose was the same, except that he testified that at the point where Marsh said that if the Union came in the benefits which the employees had would be taken away, and "they" would have to negotiate vacations from scratch. He turned to Kintner, Respondent's vice president who was present, for confirmation, and Kintner nodded his head in agreement.

Willis' testimony as to Marsh's statements and their confirmation by Kintner was similar to that of Hoots and Brose.

The testimony of these witnesses was contradicted by that of witnesses whom Respondent called. Paul Allman, a rank-and-file employee, denied that Marsh said that if the Union came in fringe benefits such as vacations would be taken away, or that the board would be wiped clean if the Union won the election, but that he did refer to these benefits as having been granted by Respondent. Allman stated that Marsh said nothing in this contention about contract negotiations.

The testimony of John Hensley was similar to that of Allman, but he testified additionally that Marsh added that regardless of the election employee benefits would not change.

Richard Richards testified similarly and in addition that Marsh said nothing about negotiations or a contract in connection with employee benefits.

Rollin Ward also contradicted the testimony of the General Counsel's witness on these points, and stated that union negotiations were not mentioned in connection with fringe benefits.

Estel Marsh testified that he told the assembled employees that Respondent had one of the most liberal vacation programs in the country but denied threatening to abandon it if the Union won the election. He stated he did not recall saying anything about contract negotiations, though he may have, and thought Kintner did so. He believed that he might have made other statements which he could not recall. Marsh's account of his speech was corroborated by that of Kintner and Ast who were present. Each testified that Marsh said nothing about benefits being lost if the Union won the election.

2. The speeches at the stores

During the week prior to the elections Marsh, and on occasion Ast, repeated the substance of the warehouse speech at employee meetings at each of Respondent's Muncie stores, varying it somewhat according to circumstances of time and place. Marsh could not recall whether at any of these stores he mentioned contract negotiations, but stated that he might have made reference as to what would happen to vacation and other benefits if the Union won the election, though he could not recall having done so because he had delivered about 30 similar speeches over a 2-year period during organization drives at other of Respondent's stores.

Barbara Erdel testified that at a meeting at store No 18 Marsh said that there was no chance for advancement so long as the Union was in the plant. Marsh and two rank-and-file employees who were present denied that Marsh made this statement I find that he did not.

Margaret Wedmore testified that Ast, at a meeting at store No. 9 said that if the Union came in the employees would "have to start from scratch," but that she did not know what he meant by this statement. Her testimony was contradicted by that of Charles Bartlett and Jack Hoover, as well as Ast, but substantiated by that of John Farinella.

Zelpha Wulff testified that at a meeting at store No. 25 Ast stated that Respondent got rid of "troublemakers" at the Yorktown warehouse after a Teamster strike in 1954. This was denied by Ast as well as by two rank-and-file employees. Marcella Mong, a witness called by the General Counsel, could not recall this statement having been made. I find that it was not.

Concluding Findings

Except where I have specifically found to the contrary, I credit the witnesses called by the General Counsel as to the statements of Marsh and Ast, and find that Marsh and Ast, at the warehouse meeting on April 15 and at various Respondent's stores in the week preceding the election, stated in effect, among other things, that if the Union won the election on April 21 Respondent's employees would lose some of the benefits which they then enjoyed, particularly the existing vacation plan and would have to "start from scratch." In certain instances I find that he coupled such statements with references to the expiration of the Union's contract on May 1, 1961. I do not find that he explained what the connection was, or whether the effect of the expiration of the contract upon employee benefits would be permanent or temporary, pending a renegotiation of the contract.

B. *Postelection conversations between Zelpha Wulff and Herbert Franklin*

In my Intermediate Report I alluded to a conversation between Wulff and Franklin, manager of store No. 25, which took place around May 15, 1961, concerning a cutback in her hours of work from 31 to 23 per week. I found that thereafter Wulff, because of more overtime, averaged 14 percent more per week in wages than

previously, and that Respondent did not discriminatorily reduce her hours. I did not discuss two conversations with Franklin, one of which took place on April 28, and the other about June 1, 1961.

1. The conversation on April 28, 1961

Wulff, who was union steward in store No. 25, testified that on April 28, 1961, she asked Franklin how she would be affected by the impending shutdown of store No. 1 and the transfer of employees to other stores, including store No. 29, stating that she had more seniority than most of those who would be transferred. Franklin, according to Wulff, said that he did not know what the effect on the employees would be, but that so far as Wulff was concerned he had heard from "the boys," prior to the election on April 21, that she would resign if the Union lost, and that it would "make it easier on everyone" if she did so. Wulff denied having any such intention Still according to Wulff, when she pressed Franklin as to who "the boys" were, he became profane and abusive, upbraided her for criticizing Respondent during the election campaign, and stated that if he were Wulff he would resign.

Franklin, while testifying, admitted having a conversation with Wulff on this date concerning employees being transferred to store No. 25, and that he did state that he had heard that she might quit. He denied demanding that she resign or requesting that she do so, or that he used profane and abusive language.

I credit Wulff's account of this conversation and find that Franklin made in substance the statements attributed to him, which are in part admitted by Franklin. While Franklin did not in so many words demand that she quit her job, he did in effect urge her to do so, basing it on her activity on behalf of the Union and the fact that the Union had lost the election the previous week. In this context, I find that Franklin's statements amounted to an implied threat of discharge because of her union activity, and constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

2. The June conversation

About June 1, 1961, following Wulff's reduction in hours on or about May 15, 1961, the conversation attending which I summarized briefly in my Intermediate Report, Wulff approached Franklin again concerning her reduction in hours, and asked him why he continued to take hours away from her and give them to employees with less seniority. Franklin, according to Wulff, cursed her and told her that there was no union any more and that he would assign hours of work to whomever he pleased. Upon Wulff's reminding him that Ast, Respondent's personnel manager, and Somers, director of retail operations, had said in preelection speeches that regardless of the result of the election things would remain the same, Franklin replied that he would run the store to suit himself, and that he wanted her to quit or transfer to another store. When Wulff asked him if she could transfer, Franklin said that he did not know, but to "get out one way or the other, either quit or transfer, just get out," reminding her again that he had heard she would quit if the Union "went out," which I find Franklin equated to the Union's loss of the election.[1]

Franklin testified that he told Wulff that the reason her hours and those of other employees were cut was because of the opening of a new store by Respondent which was cutting into the business done by store No. 25. He denied using profane language or demanding that Wulff quit. I find Wulff's account of this conversation to be substantially in accord with the facts, and that Franklin's statements to her constitute interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

RECOMMENDATION

Since in my original Intermediate Report and Recommended Order I made formal conclusions of law and recommendations as to remedial action to be taken by Respondent designed to effectuate the policies of the Act, I do not find it necessary to repeat such conclusions and recommendations here, since the supplemental matters are only cumulative. I therefore recommend only that the Board take cognizance of them in considering my Intermediate Report and Recommended Order and in issuing its Order.

[1] On June 4, Wulff was transferred to store No. 69, where she worked at the time of the hearing.