Quality Packaging, Inc. *and* Janice Craig *and* Warehouse, Mail Order and Retail Employees Union, Local 853, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Gloria Williams. Cases 32-CA-3735, 32-CA-3767, and 32-CA-3770

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 7, 1982, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Quality Packaging, Inc., Union City, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Giving written and oral warnings to employees and restricting them to a particular work area because of their activities on behalf of Warehouse, Mail Order and Retail Employees Union, Local 853, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) Discharging or otherwise discriminating against employees because of their union or other protected concerted activities.

(c) Failing to recall employees from layoff in order of their seniority because of their union or other protected concerted activities.

(d) Unilaterally altering its method of recalling employees from layoff without notice to or bargaining with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees including packers, cookers, roasters, shipping and receiving clerks, quality control employees, custodial employees, truck drivers, machine operators, machine assemblers and maintenance employees employed by the Respondent at its Union City, California facility; excluding all other employees, all office clerical employees, guards and supervisors as defined in the Act.

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

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

(a) Offer Gloria Williams, Janice Craig, and Denise Baca immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole employees Gloria Williams, Janice Craig, Denise Baca, Rita Lozano, Tomilyn

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In fn. 8 of his Decision, the Administrative Law Judge inadvertently erred in describing the testimony recounted in the accompanying text as having been given by Personnel Manager Milano and corroborated by employee Williams. The record shows that the testimony was in fact given by Williams and corroborated by Milano.

In sec. III,C,5, par. 2 of his Decision, the Administrative Law Judge inadvertently erred in stating that Coolidge, Respondent's executive vice president, had espoused a union-shop clause in a meeting with employees. The record shows that Coolidge had in fact espoused an open-shop clause.

In sec. III,B,7, par. 7 of his Decision, the Administrative Law Judge found that employee Baca testified that seniority was followed in the past when Respondent laid off and recalled its employees. While the record does show that Baca testified that Respondent followed seniority in recalling its employees, it is not clear that she also stated that seniority was followed in effecting layoffs. Inasmuch as the two other employees relied upon by the Administrative Law Judge for his finding did testify that seniority was followed in both layoffs and recalls, we find that the record adequately establishes that seniority was also used to effect layoffs.

[2] We hereby modify the third par. of the Administrative Law Judge's remedy to include the traditional citation to *Florida Steel Corporation*, 231 NLRB 651 (1977), the case which states the rule regarding the amount of interest due on backpay awards.

Inasmuch as the recommended Order does not contain all the language traditionally used by the Board in remedying violations of the nature found herein, we will issue a new Order in lieu of that of the Administrative Law Judge. We will also issue a new notice to employees which conforms with the new Order.

Member Jenkins finds it unnecessary, contrary to the Administrative Law Judge, to apply *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), in considering the discharges of employees Williams and Craig, inasmuch as the reasons advanced by Respondent to justify their discharges in fact either did not exist or were not relied upon. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Sardella, Sylvia Ancona, Sheila Vigil, Alicia Olgin, and Nigar Kahn for any loss of earnings they may have suffered due to the discrimination practiced against them by paying each of them a sum equal to what he or she would have earned absent such discrimination, less any net interim earnings, plus interest, as provided in "The Remedy" section of this Decision, as amended.

(c) Expunge from its files any reference to the discharge of Gloria Williams and Janice Craig on June 1, 1981, and to the warning notice given to Esther Bueno on May 6, 1981, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

(d) Upon request, bargain collectively with the Union as the exclusive bargaining representative of employees in the unit described in paragraph 1(d), above, regarding the method of recalling employees from layoff.

(e) 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 amount of backpay due under the terms of this Order.

(f) Post at its facility in Union City, California, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT give written or oral warnings to employees or restrict them to a particular work area because of their activities on behalf of Warehouse, Mail Order and Retail Employees Union, Local 853, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against employees because of their union or other protected concerted activities.

WE WILL NOT fail to recall employees from layoff in order of their seniority because of their union or other protected concerted activities.

WE WILL NOT unilaterally alter our method of recalling employees from layoff without notice to or bargaining with the Union as the exclusive bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time employees including packers, cookers, roasters, shipping and receiving clerks, quality control employees, custodial employees, truck drivers, machine operators, machine assemblers and maintenance employees employed by the Employer at its Union City, California facility; excluding all other employees, all office clerical employees, guards and supervisors as defined in the Act.

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

WE WILL offer Gloria Williams, Janice Craig, and Denise Baca immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent

positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole employees Gloria Williams, Janice Craig, Denise Baca, Rita Lozano, Tomilyn Sardella, Sylvia Ancona, Sheila Vigil, Alicia Olgin, and Nigar Kahn for any loss of earnings they may have suffered because of our discrimination against them, with interest.

WE WILL expunge from our files any references to the discharges of Gloria Williams and Janice Craig on June 1, 1981, and to the warning notice given to Esther Bueno on May 6, 1981, and WE WILL notify them that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

WE WILL, upon request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the unit described above, regarding the method of recalling employees from layoff.

QUALITY PACKAGING, INC.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Oakland, California, on March 2, 1982. The charge in Case 32-CA-3735 was filed on June 26, 1981, by Janice Craig, an individual. The charge in Case 32-CA-3767 was filed on July 8, 1981, by Warehouse, Mail Order and Retail Employees Union, Local 853, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), and a first amended charge was filed by the Union on July 21, 1981. The charge in Case 32-CA-3770 was filed on July 9, 1981, by Gloria Williams, an individual.

Thereafter, on August 17, 1981, the Regional Director for Region 32 of the National Labor Relations Board (herein called the Board) issued an order consolidating cases, consolidated complaint and notice of hearing, consolidating the captioned matters for hearing, and alleging that Quality Packaging, Inc. (herein called Respondent), has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act).

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for Respondent.

Upon the entire record,[1] and based upon my observation of the witnesses and considerations of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation, with an office and principal place of business located in Union City, California, and has been engaged in the nonretail processing and packaging of seeds and nuts. Respondent, in the course and conduct of its business operations, annually sells and ships goods valued in excess of $50,000 directly to customers located outside the State of California. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are: (1) Whether Respondent violated Section 8(a)(1) of the Act by various acts and conduct; (2) whether Respondent violated Section 8(a)(3) of the Act by the discharge of two probationary employees; and (3) whether Respondent violated Section 8(a)(3) and/or (5) of the Act by its method of recalling or failing to recall, employees from layoff.

B. *The Facts*

1. Background

In January 1981,[2] at Respondent's Union City plant, certain employees requested a meeting with Respondent's executive vice president, Weston Coolidge, to discuss wage increases. All the packers, about nine employees, were present. Coolidge denied the employees' request for a wage increase.

About 6 weeks later, in March, four employees, including Esther Bueno, contacted and met with a representative of the Union, Rome Aloise. Authorization cards were signed. The next day, Bueno passed out cards at work, and gave Supervisor John O'Teter a card. O'Teter accepted the card, but apparently no conversation ensued. Thereafter, some four or five union meetings were held, and several of the meetings were attended by company supervisors in addition to the unit employees.

On April 3, the Union sent a letter to the Company stating that it represented a majority of employees in an appropriate unit, and requesting recognition. Thereafter,

[1] The General Counsel's unopposed motion to correct the transcript, as set forth on p. 2 of the General Counsel's brief, is hereby granted.

[2] All dates or time periods hereinafter are within 1981 unless otherwise specified.

a representation petition was filed. The election was held on May 29. The Union prevailed by a vote of 21 to 7. On June 8, the Union was certified as the exclusive collective-bargaining representative of the employees in an appropriate unit.[3]

2. Esther Bueno's warning

Esther Bueno was hired in July 1977 and, with the exception of one other individual, was the most senior employee on Respondent's payroll. In April, Bueno was assigned to work at Respondent's Hayward plant as an inspector, picking debris from processed peanuts prior to packaging. Part of the job entailed bringing the foreign matter, on a daily basis, to Plant Manager Tony Lewis at the Union City plant.

On the afternoon of May 5, shortly before quitting time, Bueno was attempting to locate Lewis at the Union City plant where she had gone to deliver debris. Another employee, Gloria Ramirez, called her over. A conversation ensued, and after "a minute or two," according to Bueno, Ramirez noticed Lewis and indicated that they had better discontinue the conversation. Immediately thereafter, Lewis told Bueno to "leave the girls alone, not to talk to them." Bueno said okay. Bueno volunteered that Lewis had a reputation for being a stern supervisor, but testified that it was common for employees from one plant to converse with employees from the other plant.

The next day, Lewis delivered a written warning to Bueno at the Hayward plant, and read the warning to her.[4] He brought Nick Milano, personnel manager, as a witness. Bueno, believing the warning was unfair, refused to sign it. Lewis told her to thereafter refrain from going to the other plant whatsoever; that if she had any business there at all she should go to the front office; and that, beginning that very day, he was going to send someone to pick up the foreign matter. Gloria Ramirez received no verbal or written warning regarding the incident.

Coolidge, Respondent's executive vice president, testified that Bueno is an excellent worker and one of the best packaging employees. She was assigned to straighten out a quality control problem at the Hayward plant. On May 5, while Coolidge was talking to Nick Milano, personnel manager, in the plant area, he observed Bueno talking to two or three employees, including Gloria Ramirez, while the employees were performing their cleanup work.[5] Coolidge called this to Lewis' attention, and Lewis went over and spoke with Bueno. Subsequently it was decided to advise Bueno in writing of her misconduct, and also to instruct her to remain at the Hayward plant and not to give her the opportunity to interrupt employees' work. Also, according to Coolidge, it made more economic sense for someone to come from the other plant to collect the debris from Bueno. Coolidge characterized the matter as "really a very minor incident," and testified that Bueno was given the warning to avoid "misunderstandings like this in the future."

Coolidge testified that Bueno initiated the aforementioned meeting in January during which the packing employees requested a wage increase. He stated that, insofar as he was aware prior to the election, Bueno was the only person who was supporting the Union as she was very outspoken about it, and even attempted to solicit supervisors to support the Union.

The Company's disciplinary procedure, contained in a written policy manual, is as follows:

> The purpose of the Disciplinary Procedure is to provide an orderly means whereby each employee can have proper notice and warning regarding unacceptable conduct or work performance on the job.
>
> *Step 1—Verbal Warning*: Your supervisor will verbally discuss your unacceptable conduct or work performance with you before any other action is taken.
>
> *Step 2—Written Warning*: (White Copy) If you fail to correct your poor conduct or work performance after you have been verbally warned, you will receive a Written Warning.

3. Company meetings

Respondent held four meetings prior to the election. Employee Denise Baca testified that at various meetings Coolidge said the Company had wanted to give the employees a raise in April, but was unable to grant the raise because of the Union; and that the Company would not negotiate with the Union if it were voted in.[6]

Janice Craig testified that, at the meeting the day prior to the election, Coolidge mentioned the wage increase that was requested but denied in January, and went on to say that it was his opinion the Company should reconsider the employees' request, and that the Company was thinking about doing so, perhaps in July. Nigar Kahn

[3] The unit is described as follows:

All full-time and regular part-time employees including packers, cookers, roasters, shipping and receiving clerks, quality control employees, custodial employees, truck drivers, machine operators, machine assemblers and maintenance employees employed by the Respondent at its Union City, California facility; excluding all other employees, all office clerical employees, guards and supervisors as defined in the Act.

[4] The warning notice is as follows:

On 5/5/81 before quitting time you were observed in the packing area of the Western Avenue plant talking with several different employees and creating a distraction during working hours.

ACTION TO BE TAKEN

Your presence and activity in the Packing Area of the Western Avenue Plant constitutes an act of gross misconduct. Your assigned work area is in the Hayward Plant. Your only function in the Western Avenue Plant was to deliver a box of debris which you have picked out of the processed peanuts at the Hayward Plant. In the future you are forbidden from entering the Western Avenue Plant at any time unless otherwise directed by your supervisor. You may come into the offices of the Western Avenue Plant for legitimate business purposes. Any act of leaving your assigned work area without authorization may result in further disciplinary action up to and including termination.

[5] Milano essentially corroborated the testimony of Coolidge in this regard and identified Gloria Williams as one of the employees Bueno was talking to.

[6] There is no complaint allegation that Respondent stated it would not negotiate with the Union.

testified that during this meeting Coolidge stated that the economic situation had not been good in January, but now that the Company was "catching up" it had been "thinking about giving us" a raise. Sheila Vigil also testified that Coolidge mentioned that the Company was considering a wage increase for the employees in July, depending on how things go.

Coolidge testified that at the meeting in January he advised the employees of various reasons for denying them a wage increase, explaining that their timing was bad, that Respondent had just given a bonus in December 1980, and that the job market did not warrant a raise as the employees were performing unskilled work and were easily replaceable. He further advised them, however, that the Company would take their request under consideration, and that, although there was nothing the Company could do at that point in time, their request would be reviewed at some later date.

Coolidge testified that during the election campaign Respondent held four meetings with the employees. The first and last meetings were conducted by Coolidge, the two middle meetings by Nick Milano. At the first meeting, Coolidge told the employees that management was not in favor of any union organization, that Coolidge had personal dealings with Local 853 in the past and he seriously questioned the credibility and integrity of that local, and that he could see some real problems down the road. He said that, should the Union win, the Company would be required to bargain in good faith, and would do so. He said that no one would be punished for having voted for the Union, and that he was making no promise of an increase in wages or benefits now or at any other time should the Union be defeated, as he was legally prohibited from making such promises. He also said the employees could wear whatever union buttons or insignia they desired during the campaign.

The next meeting conducted by Coolidge was held the day before the election. Coolidge stated the Company was opposed to the Union, but that the employees should not fear any retaliation for voting as they desired. He again stated that the Company would bargain in good faith to the extent required, and that the employees should consider any expectations beyond those required by law to be unrealistic, emphasizing this by telling the employees "don't think that when you walk in here Monday morning that you are going to now double your wages and have greater benefits." He also told the employees that if the Union was not elected he would include input from the employees in the wage review that the Company would be conducting in July. During the course of this meeting, one of Respondent's owners, Joe Mozingo, in an emotional appeal, exhorted the employees to vote no.

4. The peanut pins

On the day of the election, Ron Mozingo, co-owner of Respondent, indiscriminately distributed to each employee, supervisor, and member of management a small metal "peanut pin," sometimes giving employees extra pins for their husbands. The pins, estimated to be worth less than 10 cents, had been purchased as a promotional item for an upcoming trade convention, and by coincidence had been delivered to Respondent the morning of the election. Although packaged peanuts are Respondent's primary product, the pin did not bear Respondent's name or any other legend. Mozingo made no comments when passing out the pins, nor did he wait to observe whether the employees wore the pins, or in any manner indicate approval or disapproval of those employees who elected to wear or not wear the pins. Moreover, many employees who were wearing union buttons elected to also wear the peanut pin on their clothing.

5. The discharge of Gloria Williams

Gloria Williams began working for Respondent on May 1. She was hired by Plant Manager Tony Lewis, and was a probationary employee. Williams testified that, during the company meeting the day before the election, Coolidge told the employees that, in the event the Union won the election and negotiations took place, he would be the Company's bargaining representative. This prompted Williams to raise her hand and ask, "Does that mean that you could go on a four-week vacation to avoid negotiations?" Coolidge answered, "Well, that's a good question . . . they would have to negotiate with me, and I would have to be there." Williams also asked, apparently after Coolidge mentioned the possibility of a strike, whether an employee could work some days and strike some days. Coolidge answered that this could not be done.

Williams wore a union button the Friday of the election, and voted in the election.

Williams was discharged the following Monday morning, June 1. Tony Lewis called her in. Milano was present. Lewis said he was sorry but Respondent had to let her go, that "It's just not working out." Williams asked what he meant, and Lewis said he did not have time to explain then, as he was busy, and left the office. He came back with her check and Williams, who had been sitting there crying, asked "can't you talk to me," and explained that she did her work and needed the job. Lewis said, "Well, your machines are always breaking down." Williams said that was not her fault,[7] and Lewis said that is the way it goes. Williams asked when she could come back, and Lewis said, "Probably in about a year."

Milano said he would show her out and Williams requested permission to go to the restroom first in order to compose herself. She remained in the restroom about 10 minutes, and then decided to go into the lunchroom to talk to the other employees, disobeying Milano's directive not to enter the lunchroom. She announced to the employees in the lunchroom that she had been discharged and asked for Janice Craig, as she had Craig's jacket. As she exited from the lunchroom, Milano advised her, "That's one of the reasons why, you know, you're going, because of your attitude." Williams said she had to get something out of her locker, and proceeded to do so. When Milano requested the return of her locker key, Williams refused to hand it to him, and said

[7] Williams testified that as a packer she had nothing to do with the operation of the machines.

she was going to return the key to the secretary in the main office who had issued it to her. She then went to where the employees, who had apparently returned from their break, were packing peanuts, and said she wanted to give them her phone number. Finally, Milano was able to escort her out.[8]

Williams testified that she had been given no verbal or written warnings, or told that her performance was not good, or that she had a poor attitude, or was criticized in any other way. Moreover, on May 7, Williams approached Lewis and asked him whether she was going to become a permanent employee, "because I see people coming and going all the time." Lewis said, according to Williams, that he could not discuss the reasons for the turnover of employees, and indicated that punctuality and proper attendance were of paramount importance. He also said, however, "you are a permanent employee."

According to Coolidge, Lewis left the Company 3 or 4 months prior to the hearing under congenial circumstances, and has remained in the area. Lewis did not testify in this proceeding, and there is no explanation in the record for his failure to do so.

Regarding Williams' discharge, Coolidge testified that on the Wednesday prior to the election Lewis mentioned to Coolidge that he did not like Williams' attitude; that he had seen her talking with other people while she was supposed to be working; that she was a "smart ass" and seemed to have a hostile, arrogant, and belligerent disposition toward her supervisors; and that because of these considerations he was going to let Williams go. Lewis related no specific instances of these matters to Coolidge. Coolidge instructed Lewis to wait until after the election, as he wanted to avoid a potential problem with the Union regarding the discharge.

Coolidge recalled that Williams did ask a question at the company meeting the day before the election about whether an employee could strike and work at the same time.

Milano began working for Respondent on April 1. He was present during Lewis' discharge conversation with Williams, and testified that Williams was discharged for her attitude, for a disregard for certain supervisory staff, and for spending more time talking to other employees at other machines than being at her own machine. However, he never personally observed any occasions when Williams was allegedly disrespectful, and only saw her talking on one occasion; namely, to Bueno on the occasion of Bueno's May 5 warning. Milano had no personal knowledge of whether Williams was unwilling to take directions from supervisors, and was not consulted by Lewis regarding Williams' termination.

6. The discharge of Janice Craig

Janice Craig was hired as a packer on May 19 by Tony Lewis. She told Lewis that she had three sons, and was looking for a permanent job. Lewis said as long as she got along with her fellow workers, had a good work record, and did not miss work there should be no problem.

Craig spoke to employees about the Union, expressing her opinion that she could not blame them for wanting union representation. She attended the company meeting the day before the election. During the course of the meeting, according to Craig, Coolidge stated that should he be required to bargain with the Union he would request an open shop. Craig asked him what "open shop" meant, and when Coolidge replied that employees would thereby have their choice of whether or not they should belong to the Union, Craig responded that she had never heard of such a thing. Coolidge then asked another employee, who apparently was knowledgeable about the matter, whether he (Coolidge) was correct in his explanation, and the employee agreed that he was. Thereupon, Craig reiterated that she had never heard of such a thing, and Coolidge "yelled" at her, according to Craig, "Well, you're not from here, are you?" Craig replied, "Well, I've been here a while."

Craig wore a union button on the date of the election. She also received a peanut pin from Ron Mozingo, and put it on. Craig further testified that on the day of the election Tony Lewis came by, "walked straight toward me and stopped right in front of me, and asked me very, very bluntly, you know, 'What's your name?'" Craig said she responded "the same way he asked me."

Craig was fired the following Monday, apparently immediately prior to Williams' discharge. During the discharge conversation, witnessed by Milano, Lewis told Craig that her work had been reviewed, and that it was not up to par. He said Respondent was going to have to let her go, and handed her her check. She asked if she could have the reason in writing. Lewis replied that she would have to come back when Coolidge was present, and that Milano would see her off the premises. She left, and did not again request a written statement of the reason for termination.

Craig testified that she never received any complaints about her work performance or attitude. She acknowledged, however, that during her first week at work she observed that employees sometimes used their teeth to open defective bags of peanuts for repackaging. On one occasion during this first week she was observed opening packages with her teeth by Milano, who said, "Don't you think that's rather unsanitary?" At the same time she did not know who Milano was, and made no reply to him. She never again opened bags with her teeth. Craig was insistent that it was Milano, rather than Coolidge, who spoke to her about opening bags with her teeth.

Coolidge testified that his only contact with Janice Craig took place 10 days or so after she was hired. He was walking through the plant and noticed one of the employees opening bags with her teeth. He advised her that such a practice was unsanitary. The employee made some "flip" comment and treated him with a little hostility. He called the matter to Lewis' attention, and pointed out Craig whom he did not know at the time, and said he did not like the way she responded to criticism. Lewis said he did not like the way she acted either, that she tended to be hostile toward him, and that he had been thinking of letting her go. Coolidge told Lewis to keep an eye on her. A few days before the election, at

[8] Although the above account was given by Milano, Williams' testimony indicates that it is essentially correct.

the same time Lewis advised Coolidge that he was going to discharge Williams, he also stated he was going to discharge Craig. Coolidge told him to wait until after the election to effectuate both discharges, so the Union would not be able to raise this as an issue.

Milano testified that he had no personal knowledge of Craig, and that at the discharge interview Lewis indicated to Craig that she was being discharged because of her attitude and unsanitary practice.

Nigar Kahn testified that she has worked for the Company since 1979, that all the supervisors, including Lewis, have observed the employees opening bags with their teeth, and that this longstanding practice has been permitted. Kahn stated that employees open bags with their teeth on a daily basis.

7. The layoff and recall

In early June, shortly after the election, Business Representative Rome Aloise met with Coolidge and Milano to discuss preliminary matters concerning the negotiations. Thereafter, on June 22, Aloise sent a letter to Respondent naming the employees who would be on the union negotiating committee, requesting a seniority list and other information, and suggesting that bargaining commence the first week in July. Also, Aloise enclosed for Respondent's consideration a proposed contract containing a conventional departmental seniority clause governing layoffs and recalls.

The first negotiating meeting was held on July 6 or 7, and Respondent provided the Union with a seniority list. No mention was made that Respondent had apparently commenced laying off employees on July 2. By July 7 or 8, the entire complement of packers, with the exception of Patti Silva and Esther Bueno, the two most senior packers, had been laid off.

The next negotiating session was held in or about mid-July. There was some discussion regarding seniority. Coolidge stated that the Company did not recognize seniority and customarily selected employees to be laid off or recalled on the basis of other criteria. The parties continued to meet periodically, but at no time was the Union notified of Respondent's plans to recall the employees, or of the manner in which the recalls were to be conducted.

On July 20 and 21 eight employees were recalled to work. Each had less seniority[9] than the remaining seven employees, who had been employed by Respondent from 8 to 27 months. Five employees of this latter group were not recalled until various dates in August; one, Nigar Kahn, was not recalled until October after persistent efforts to obtain reemployment; and one, Denise Baca, was never recalled, as discussed below.

Respondent acknowledged that it was aware of the prounion sympathies of each of these employees, particularly because they all wore union buttons on the day of the election. In addition, it is clear that various supervisors attended union meetings and observed the presence of these employees, and that many of the more senior employees were involved in requesting the January pay raise, the denial of which prompted the union activity.

Three employees, namely, Esther Bueno, Sheila Vigil, and Denise Baca, testified without contradiction that seniority was followed during numerous previous layoffs, which occurred about twice a year, both in laying off and recalling the packaging employees. Further, during a layoff situation in January 1979, Respondent posted two different memos to the employees announcing the necessity for the layoffs and stating that callbacks would be made in order of seniority.

Coolidge testified that he was "really not sure" how the layoff was handled in 1981. However, he stated that company policy had always been that the plant manager, in this case Lewis, was to use his judgment in the matter, and to lay off and recall employees according to their attitude and ability to do the work; and that their seniority date would be determinative only if the aforementioned factors were equal among two or more employees. Regarding the aforementioned 1979 memos, Coolidge testified that the memos were issued and posted by the controller and that he does not know what the controller meant by "seniority," or what authority the controller had to speak for the Company.

C. *Analysis and Conclusions*

1. The warning to Bueno

I find that the warning letter given to Bueno was violative of Section 8(a)(1) and (3) of the Act, as alleged. Bueno was admittedly an excellent employee. She had been employed by Respondent since 1977, longer than all but one other unit employee, and had no history of being reprimanded, warned, or disciplined for any reason. Respondent was well aware of her outspoken support of the Union. Indeed, Respondent's executive vice president, Coolidge, claimed that prior to the election, to his knowledge, Bueno was the only employee who was actively promoting the Union.

Respondent's animus toward the Union is clear, as exhibited by Coolidge's remarks during his talks to the employees. Moreover, Respondent has offered no explanation for failing to simply give Bueno a verbal warning for her alleged misconduct, which Coolidge characterized as "really a very minor incident." Rather, Respondent reacted by issuing a written warning to Bueno which, according to the established disciplinary procedure, is to be given only if the employee fails to correct poor conduct following a verbal warning. Moreover, there is no explanation for Respondent's inconsistency in describing the incident as very minor, yet issuing a strongly worded warning for "gross misconduct" which threatened discharge should Bueno leave her assigned work area without authorization.

From the foregoing, it is clear that the warning notice was issued to Bueno because of her union activity, and indeed constituted an effort to isolate Bueno from the other unit employees. Moreover, I find that, but for her union activity, Bueno would not have received even a

[9] All of the eight employees recalled on July 20 and 21 had been hired in May and June and were therefore still within their 500-hour probationary period; one had been hired on May 28, the day before the May 29 election; and five had been hired after the election on various dates between June 3 and 15.

verbal warning for speaking to Ramirez.[10] The record shows that such conversations were not contrary to established procedure, and neither Ramirez nor any other employees received warnings regarding the matter. Thus, I find the verbal warning to also be violative of the Act. See *Keller Manufacturing Company, Inc.*, 237 NLRB 712, 726–727 (1978); *St. Alphonsus Hospital*, 261 NLRB 620 (1982); *Hedison Manufacturing Company*, 249 NLRB 791, 810 (1980); *Dutch Boy, Inc., Glow-Lite Division*, 262 NLRB 4 (1982).

2. The promise of a wage increase

None of the various employees who testified regarding the company meetings appeared to have an accurate or complete recollection of Coolidge's remarks, and several employees gave very abbreviated and confused accounts of what they believe Coolidge said concerning the wage increase. Moreover, no one contradicted Coolidge's claim that at the first meeting he specifically told the employees he was making no promise of an increase in wages or benefits then or at any other time, or that in January, prior to the union activity, he told the employees that their request for a wage increase would be reviewed at some later date.

I credit Coolidge's admission that at the last meeting, the day before the election, he told the employees that, in the event the Union was not elected, he would include input from the employees in the wage review that the Company would be conducting in July. However, I do not conclude that this latter statement, in context, is violative of the Act. Rather, it appears to be nothing more than a reiteration of his prior statement to the employees, in January, that their request would be considered in the future. Moreover, I find that he did tell the employees at the company meetings that he would bargain in good faith with the Union. Thus, I find that Coolidge's statement, coupled with the representation that he would bargain with the Union in good faith, and absent any other threats or promises of benefit, is not violative of Section 8(a)(1) of the Act.

3. The peanut pins

It is clear that on the day of the election one of Respondent's owners passed out peanut pins to employees and supervisors alike. Employees were free to wear them or not as they saw fit, and many elected to wear them along with their union badges.

The General Counsel contends that the distribution of the pins constitutes a subtle form of coercive interrogation in violation of Section 8(a)(1) of the Act. I disagree. As the Board has stated in *Quemetco, Inc.*, 233 NLRB 470 (1976), the gravaman of unlawful interrogation stems from "the effort to ascertain the individual employee's sympathies by the employer who wields the economic power over that individual." The manner and the circumstances under which the pins were distributed do not warrant the finding of a violation, as the pins, even if worn, did not purport to show employees' sympathies. See *McIndustries, Inc.*, 224 NLRB 1298, 1299–1300 (1976); cf. *Great Western Coca Cola Bottling Company, d/b/a Houston Coca Cola Bottling Company*, 256 NLRB 520 (1981). Therefore, I shall dismiss this allegation of the complaint.

4. The layoff and recall

It is not alleged that the layoff in early July was discriminatorily motivated. Rather, it appears that the layoff was for economic reasons, due to a decline in business, which occurred several times annually. Moreover, the record indicates that the layoff of employees, commencing on July 2, was in accordance with their seniority.

However, the recall from layoff was admittedly unique. Respondent contends that on prior occasions employees were laid off and recalled as a group, thus obviating the need to be selective. However, according to Coolidge, the situation in July did not lend itself to a group recall,[11] as business and therefore the need for additional employees increased gradually. As a result, the recall from layoff, solely the prerogative of Plant Manager Lewis, was governed by factors such as attitude and work performance, rather than seniority which, according to Coolidge, has never been used as the primary basis for layoffs or recalls.

Moreover, it is significant that Lewis, the only person who had actual knowledge of Respondent's motivations for recalling employees virtually in inverse seniority, did not testify. In addition, the record indicates that the packaging employees had supervisors other than Lewis, but no other supervisors were called to testify regarding the work performance of the employees in question. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977); *Wm. Chalson & Co., Inc.*, 252 NLRB 25, 34–35 (1980).

I discredit Coolidge's testimony. Respondent proffered no documentary evidence to corroborate Coolidge's testimony that prior recalls were made in groups rather than on an individual basis, and the credible testimony of several employees, Bueno, Vigil, and Baca, shows that they were recalled by seniority on all prior occasions. This conclusion is reinforced by Respondent's memos which explicitly notify the employees that they will be recalled by seniority. Moreover, Coolidge's testimony that Respondent's comptroller had no authorization to issue such memos is patently incredible. I thus find that, in fact, Respondent had an established policy of following seniority in such matters.

No specific reasons were given for Respondent's failure to recall employees by seniority. Indeed, Coolidge said he left this up to Lewis and he was not privy to Lewis' reasons for recalling the employees as he did. Further, it appears contrary to commonsense and good business practices to select employees for recall who had worked merely a few weeks and were in their probationary period, rather than proven employees with acceptable work records who had been employed for substantial periods of time.[12] It is equally improbable that Re-

[10] It appears unncessary to determine whether Beuno was speaking only with Ramirez, or also with other employees.

[11] Respondent did not proffer a rationale for laying off but not recalling the employees in accordance with seniority.

[12] While some of these employees had occasionally been given verbal or written warnings for various reasons during their tenure with Re-

Continued

spondent, without exception, would find all of the senior employees who were laid off to be inferior on the basis of attitude and work performance to all the new hires.

The record is devoid of probative evidence establishing any lawful business justification for Respondent's *modus operandi* in recalling the senior employees as it did and, from the foregoing, it appears that the only rational conclusion to be drawn from Respondent's conduct is that such a method of recall was discriminatorily motivated. The record clearly shows that more senior employees were instrumental in bringing in the Union, and Respondent was well aware of their efforts. Obviously, Respondent was attempting to rid itself of the staunch union adherents, at a time when initial contract negotiations were proceeding, hoping that the employees would obtain other employment during the protracted layoff or, at the least, attempting to punish them for selecting the Union as their bargaining representative. By such conduct I find that Respondent has violated Section 8(a)(1) and (3) of the Act as alleged. See *Overnite Transportation Company*, 261 NLRB 650 (1982).

It is also contended that Respondent's unilateral departure from its established past practice, found herein, of recalling laid-off employees in order of seniority constitutes a violation of Section 8(a)(5) of the Act. I agree.

Although there was bargaining over this matter to some extent, neither party has maintained that a bargaining impasse was reached either over this issue or over the entire contract. Indeed, there were only several negotiating sessions prior to the recall, and sometime after August, according to Union Representative Aloise, Respondent changed its position regarding seniority, and apparently agreed to recognize the concept of seniority, with certain qualifications.

Respondent's unilateral change of this existing condition of employment by failing to recall employees in July in accordance with their seniority is clearly violative of the Act, regardless of its motive. *Allen W. Bird II, Receiver for Caravelle Boat Company, a Corporation, and Caravelle Boat Company*, 227 NLRB 1355, 1357 (1977); *Hamilton Electronics Company*, 203 NLRB 206, 209 (1973); *Amoco Chemicals Corporation*, 211 NLRB 618, fn. 2 (1974). By such conduct I find that Respondent has violated and is violating Section 8(a)(1) and (5) of the Act, as alleged.

Sheila Vigil began working for Respondent in September 1980. She was involved in an automobile accident on June 2, prior to the layoff, and was granted a month's sick leave. On June 10, Respondent sent her a letter informing her that her name had been removed from the payroll, and that "When your doctor releases you to full unrestricted duty we will consider rehiring you for the first available opening." Vigil was released by her doctor, and on July 6 reported back to work with a doctor's release. Lewis told her that employees were on layoff, and she would be called when everyone returned to work. She was not recalled until August 13. Respondent does not maintain that she was treated as a new employee, and apparently takes the same position regarding Vigil as it takes with the other more senior employees; namely, that Vigil was not recalled in accordance with her seniority because of her attitude and work performance. It is therefore clear, and I find, that, by such conduct toward Vigil, Respondent has violated Section 8(a)(1), (3), and (5) of the Act for the reasons set forth above.

Respondent maintained that it attempted to phone laid-off employee Denise Baca on the mornings of August 12 and 13 in order to recall her to work. Baca testified that she was away from home at these particular times. However, she testified without contradiction that prior thereto she had remained at home since the layoff, waiting for Respondent's call. Apparently it was the practice of employees who had been laid off to wait for the anticipated phone call each morning so that they would not forfeit their recall position. Had Respondent recalled her in accordance with her seniority, it is probable she would have been recalled on July 20 or 21, and that she would have been home to accept the call. Any uncertainty in this regard must be resolved against Respondent. *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575-576 (5th Cir. 1966); *Southern Household Products Company, Inc.*, 203 NLRB 881 (1973); *Gulf States United Telephone Company*, 253 NLRB 603, fn. 2 (1980). Moreover, having found that Respondent's failure to recall employees, including Baca, in order of seniority constituted an unlawful attempt to, in effect, discharge them, it is clear that Respondent had an affirmative duty to contact Baca and offer her reinstatement. Therefore, simply placing a telephone call to Baca under the circumstances was insufficient.

5. The discharge of Janice Craig

I credit Coolidge, and find that it was he, rather than Milano, who admonished Craig for opening packages of peanuts with her teeth. There is no contention that this admonition was motivated by Craig's union sympathies. Indeed, at that point, a week or 10 days after Craig's employment commenced, there is no evidence of Respondent's knowledge that Craig favored the Union. I further credit Coolidge's assertion that he was somewhat piqued at Craig's admitted failure to respond in what he deemed to be an appropriate manner. Following Coolidge's admonition, however, there is no reliable record evidence that Craig gave Respondent any legitimate reason to question her attitude or work performance, both Coolidge and Milano professing total ignorance of any direct knowledge concerning Craig.

Although Craig was ineligible to vote in the election, she was supportive of the Union. On the day prior to the election, at a company meeting, Coolidge "yelled" at Craig for the outspokenness she exhibited in persistently asserting her apparent disregard for a union-shop clause which Coolidge espoused; and, on the following day, while Craig was wearing a union button, Lewis pointedly asked her name for no apparent reason. That very evening her final check was prepared.

Further, I credit Craig and find that during the discharge conversation Lewis did not mention unsanitary practices as one reason for her discharge. The record

spondent, primarily for attendance, the record shows that such warnings had not previously been utilized as a basis for recall selection. Rather, as found above, seniority, not work performance, was determinative.

shows that this practice, namely, employees' opening bags with their teeth, was accepted by Lewis, and was frequently engaged in by other packaging employees. Respondent's assertion of a false reason for the discharge lends further support to the contention that Respondent's motive was other than legitimate.

While the record indicates that Craig was outspoken and perhaps was not entirely deferential to supervision, I conclude from the foregoing, including the additional serious unfair labor practices found herein, that the General Counsel has presented a *prima facie* case supporting the inference that Craig's favoritism toward the Union was a "motivating factor" in Respondent's decision to terminate her. Accordingly, under the precedent of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the burden shifts to Respondent to demonstrate that, even in the absence of Craig's prounion conduct, she would nevertheless have been terminated.

It is clear that Respondent has not met this burden of proof. Thus, Respondent presented no witness with any direct knowledge of Craig's conduct or attitude subsequent to the first week of her assignment. Obviously, something else occurred after that time which occasioned Craig's discharge and, given the failure of Respondent to provide any evidentiary justification for terminating Craig, I conclude that her discharge was motivated by her clearly expressed favoritism for the Union. As noted, this conclusion is further supported by Respondent's demonstrated propensity to engage in similar violations of the Act.

On the basis of the foregoing, I find that Janice Craig was discharged in violation of Section 8(a)(1) and (3) of the Act, as alleged.

6. The discharge of Gloria Williams

The unrebutted record evidence shows that early in her employment Williams had been told by Lewis that she indeed was a permanent employee even though she was within her probationary period. Williams was also outspoken at the company meeting the day before the election, and wore a union button on Friday, the day of the election.

I credit Williams and find that the following Monday, during the discharge conversation, after persistently asking why she was being discharged, Lewis' only response was that her machines were always breaking down. However, the unrebutted record testimony shows that the packagers are in no way responsible for the operation of the machines.

It is probable that Respondent's various assertions that Williams was fired because of her "smart ass" attitude reflect Respondent's disapproval of Williams' outspokenness at the company meeting conducted by Coolidge, during which meeting Williams implicitly questioned Coolidge's comments that he would bargain with the Union in good faith. Moreover, the only record evidence regarding Williams' talking to other employees, another asserted reason for discharging her, is Milano's testimony that Williams was seen talking to Bueno. Again, in this regard, Williams' conduct is related generally to union activity as Bueno received a verbal and written warning, and was unlawfully restricted to her work area, as a result of this conversation with employees, allegedly including Williams.

Williams' conduct in disobeying Milano and not leaving the premises immediately upon her discharge may be indicative of her attitude toward supervision. However, such behavior, occurring upon being summarily discharged for an obviously erroneous reason, may simply reflect temporary indignation rather than a general disregard for supervision. Moreover, there is no evidence that prior to her discharge this attitude was exhibited outside the context of the aforementioned company meeting, during which she, in effect, confronted Coolidge.

Again, I believe that the General Counsel has presented a *prima facie* case supporting the inference that Williams' union activity was a "motivating factor" resulting in her discharge, and that Respondent has not met its burden under *Wright Line* of demonstrating that Williams would have been terminated even in the absence of such activity. In short, Respondent presented insufficient probative evidence supporting its proffered motivation for the discharge. Thus, neither Lewis, who was solely responsible for Williams' discharge, nor any other supervisors or employees were called upon to provide testimonial support for the conclusionary hearsay testimony presented by Coolidge and Milano regarding the reasons for the discharge of Williams.

On the basis of the foregoing, including the additional unfair labor practices found herein, I conclude that Williams was discharged in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by issuing a verbal and written warning to employee Esther Bueno, and by restricting her to a particular work area.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging employees Gloria Williams and Janice Craig, and by failing to properly recall from layoff in order of seniority employees Rita Lozaro, Tomilyn Sardella, Sylvia Ancona, Sheila Vigil, Alicia Olgin, Nigar Kahn, and Denise Baca.

5. All full-time and regular part-time employees including packers, cookers, roasters, shipping and receiving clerks, quality control employees, custodial employees, truck drivers, machine operators, machine assemblers, and maintenance employees employed by Quality Packaging, Inc. at its Union City, California, facility, excluding all other employees, all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. Since June 8, 1981, the Union has been the certified collective-bargaining representative of all employees in the aforesaid appropriate unit for the purposes of collec-

tive bargaining within the meaning of Section 9(a) of the Act.

7. Respondent has failed to bargain with the Union, and thereby has violated Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of employment of the employees in the aforesaid appropriate unit without first bargaining to impasse over its method of recalling employees from layoff.

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

THE REMEDY

Having found that Respondent violated and is violating Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and take certain affirmative action described herein, including the posting of an appropriate notice attached hereto as "Appendix."

Having found that Respondent unlawfully discharged employees Janice Craig and Gloria Williams, it is recommended that Respondent make them whole, with interest, for any loss of pay they may have suffered as a result of the discrimination against them, and offer them immediate reinstatement to their former positions without loss of seniority or other benefits. Said backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that Respondent, in violation of Section 8(a)(1), (3), and (5) of the Act, unlawfully delayed the recall from layoff of employees Rita Lozano, Tomilyn Sardella, Silvia Ancona, Sheila Vigil, Alicia Olgin, and Nigar Kahn, and that Respondent has unlawfully failed to recall employee Denise Baca from layoff, it shall be recommended that Respondent offer Denise Baca immediate reinstatement to her former position and pay to each aforementioned employee a sum of money equal to the amount he or she would have earned from the date he or she would have been recalled, less his or her earnings during said period, to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

IT IS FURTHER RECOMMENDED that Respondent expunge from its records the warning notice issued to Esther Bueno, and also expunge from its records any reference to the discharges of Janice Craig and Gloria Williams.

[Recommended Order omitted from publication.]