

The Southland Corporation and Charlotte Moneagle.
Case 9-CA-18293

23 August 1983

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On 17 March 1983 Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, the Southland Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

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*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's conclusions, we find it unnecessary to rely on the Administrative Law Judge's findings that Moneagle's endorsing and posting of the anonymous letter constituted protected concerted activity since we agree with the Administrative Law Judge's findings that Moneagle was discharged for her other protected concerted activity.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we

have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

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 coercively interrogate our employees concerning their protected concerted activities.

WE WILL NOT threaten employees with discharge because they engage in protected concerted activities.

WE WILL NOT discharge employees because they engage in protected concerted activities.

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

WE WILL offer Charlotte Moneagle immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or other rights and privileges and WE WILL make her whole for any loss of earnings she may have suffered as a result of our discrimination against her, with interest.

WE WILL expunge all references to her discharge on 20 April 1982 from our personnel and other files and WE WILL notify her in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against her.

THE SOUTHLAND CORPORATION

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Dayton, Ohio, on January 3, 1983, based on an unfair labor practice charge filed by Charlotte Moneagle, an individual, on May 5, 1982, and a complaint issued by the Regional Director for Region 9 of the National Labor Relations Board, herein called the Board, on June 22, 1982. The complaint alleges that The Southland Corporation, herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by suspending and discharging Moneagle because of her protected concerted activities

and by interrogating employees concerning such protected concerted activities. Respondent's timely filed answer denies the complaint's substantive allegations.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS—PRELIMINARY CONCLUSION OF LAW

Respondent is a Texas corporation with an office and places of business in Dayton, Ohio, where it is engaged in the operation of retail grocery stores. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent's store 17209, a corporate-owned "7-11" store, located at 3501 East Third Street, Dayton, Ohio, is the only facility involved in this proceeding.

The employees involved herein are not represented by any labor organization.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. *The Facts*

Charlotte Moneagle had been employed by Respondent for about 3-1/2 years prior to her discharge on April 20, 1982. She had worked at the Third Street Store since January 1981 and had been promoted to assistant manager in September of that year. She generally worked on the day shift under the supervision of Rhonda Hensley, an admitted statutory supervisor; her duties were those of a store clerk: stocking shelves and operating the cash register. She also prepared daily reports and was familiar with the banking procedures.¹

In March 1981, Moneagle complained to a district manager, Jim Matthias, that she had worked regular but unpaid overtime for almost 2 years; she claimed that her store manager had discouraged her from claiming overtime compensation. Respondent made arrangements to pay her for the claimed time.

In early March 1982² Hensley told Moneagle that some of the other supervisors she had met at a seminar were dissatisfied. In response, Moneagle told Hensley "that really the only thing that the company needed was a union, because otherwise they could do exactly what they wanted to . . . the employees needed a union to back them up otherwise they wouldn't be able to get anything . . . raises or whatever."

In mid-March, Moneagle complained to District Manager Daniel Kerinuk that the frequent replacement of store managers had resulted in her missing some of the semi-annual performance reviews and accompanying wage increases to which she believed she was entitled.

¹ There is no contention or evidence that Moneagle possessed statutory supervisory authority.

² All dates hereinafter are 1982 unless otherwise specified.

According to her uncontradicted testimony, Moneagle told Kerinuk that she did not think it fair that she and the others in the store had not received these raises.³ Kerinuk pointed out that she had received a performance review and wage increase approximately 6 months earlier, indicated that he could not help her, and referred her to his supervisor if she wished to pursue the matter further. He also asked her whether she was interested in going into management with the Company; she stated that she would be interested but only at some later date.

In late March, Moneagle's performance was reviewed and she received another wage increase.

Included among Moneagle's duties was the receipt and opening of the daily mail. In the mail, delivered between 9:30 and 10 a.m. on Saturday, April 3, was what has come to be known as a "mystery writer letter." That letter, copies and at least one other version of which were sent to various of Respondent's stores, was addressed to Respondent's employees. As Moneagle recalled the letter, the writer urged the employees to band together to do something about working conditions, stated that the conditions were not what they should be, and suggested that the employees "shouldn't take this crap." The writer, she said, also referred to Respondent's zone manager, Ron Becker, in derogatory terms. Moneagle wrote "right on" at the bottom of this letter and laid it upon the counter.⁴ Subsequently, at the suggestion of a police officer-customer, she scratched out the words she had written on the letter, took it off of the counter, and posted it on the back of a cigarette display, where employee messages are sometimes posted. Her notation remained legible despite the scratchout.

About 11 a.m., Salvador Ruiz, a supervisor whose responsibilities included the Third Street store, came in to pick up the store's paperwork. He saw the letter and, pursuant to instructions from Kerinuk, removed it.⁵

³ She further testified that she had discussed this matter with another clerk, Lucille Harris.

⁴ At least two similar but different letters were circulated. Respondent introduced one which it contended was identical to the letter received and written upon by Moneagle. In that letter, the "mystery writer" complained of pressure from Becker, the swapping of positions and other turmoil, obliquely referred to Becker as an "anal-porte," and suggested that Respondent's employees "are much too good to be treated as such." Moneagle denied that that letter was identical to the one she had seen; she acknowledged that there were some similar references but noted that Respondent's exhibit contained no suggestion that the employees band together to improve working conditions, a statement which was contained in the letter she received. Ruiz, the supervisor who picked up the letter in Moneagle's store, could not recall any specifics concerning the second letter; he did not deny the possibility that it contained references to the employees "banding together." Respondent no longer possessed and did not introduce the actual letter written on by Moneagle and had not retained any copies of the second letter. From the foregoing, and noting as discussed *infra*, that Hensley referred to the references in the letter to "banding together" when talking to McClendon, I must conclude that Moneagle has more accurately described the letter which she received, wrote upon, and posted than has Respondent. It was a letter different from Resp. Exh. 2.

⁵ Respondent admits that it was aware of the distribution of these letters, had objections to their posting, and had instructed its supervisors to pick them up whenever they saw them. About 40 copies of each of two different letters were collected.

After reading the letter, Ruiz asked Moneagle whether she had written "right on" on the letter. She denied that she had done so and stated that she did not know who had. Moneagle was the only employee in the store between the arrival of the mystery writer letter and Ruiz' arrival. Moneagle testified that Ruiz repeated his question a few minutes later and stated to her that she had to be the one because she was the only employee present. Ruiz did not testify about any subsequent conversation with Moneagle concerning the letter that morning. While I credit Moneagle, at least in the absence of a specific denial by Ruiz, it is clear from the circumstances that, whether or not he made any further statements to her, he had to suspect, if not know, that Moneagle had been the one. Ruiz took the letter with him when he left the store.⁶

Moneagle next worked on Monday, April 5. At the end of her shift, Walter McClendon came in to relieve her. He took over on the cash register while she completed other chores in the back of the store. When she noticed that a number of customers were beginning to line up at the register, she went forward to help out. One customer sought to purchase six to eight money orders totaling \$510, a transaction which would take a single clerk between 5 and 10 minutes to complete. Moneagle took her money and rang up the sale while McClendon, working under the counter so that other customers would not be able to observe him, made up the money orders. Moneagle did not mark the register tape so as to indicate that she was now the cashier. With McClendon bent over beside her, Moneagle counted the money, placed it in a numbered drop envelope, recorded and initialed the transaction on a drop sheet, and dropped the envelope in the safe under the counter.⁷ Ruiz conceded that Moneagle's procedure as to the money drop itself was proper. He also conceded that, while it had been a practice at one time for the cashiers to mark the register tapes so as to indicate who is manning the register, signing or otherwise marking the register tapes was no longer required.⁸ She had, however, contravened a practice precluding one employee from using a cash register while another was in charge of it, according to Ruiz.

Moneagle assisted McClendon in one further transaction and made another money drop before she left the register.

Moneagle's next workday was Wednesday, April 7. That morning, Hensley who, along with Ruiz, had the only keys, opened the safe and withdrew all of the money drop envelopes which had been deposited in it on both Monday and Tuesday. Hensley took the contents from the safe into the backroom for counting and, when she came back out, told Moneagle that Moneagle's \$510

drop of Monday night was missing. An unsuccessful search was made for the missing envelope and Hensley took the remainder of the money to the bank. Ruiz came in to the store at or about 11 a.m. and was told of the loss. Moneagle told him that she had no idea where the money was; he indicated that there would be an investigation.

Ruiz and Hensley went into the backroom. When they came out, Ruiz handed Moneagle a suspension notice and asked her to read it. He walked away and Hensley asked Moneagle whether she knew anything about the mystery writer letter. Moneagle acknowledged that she had received it in Saturday's mail. Hensley then asked whether Moneagle had written "right on" on that letter. When Moneagle admitted that she had, Hensley covered up her ears with her hands and stated, "Oh, I wish you hadn't told me that." Ruiz came back to Moneagle and asked her to sign the suspension notice. She refused because it set forth that she was responsible for the missing drop; she denied taking the money. According to Ruiz, she also said that McClendon could verify that she had dropped the envelope in the safe. Ruiz then told her, "Well, Charlotte, we know you wrote on that mystery letter 'right on' and . . . you have a bad company attitude and we don't need people like you anyway." Moneagle was directed to leave the store; she signed out and left.⁹

Later that same afternoon, Moneagle went to Kerinuk's office and told him what had happened. In the course of their conversation, she stated that McClendon had seen her make the money drop; her statement was based on an assumption. Kerinuk replied that, if McClendon had seen it, she had nothing to worry about.

Ruiz told McClendon, when he came to work that evening, about the missing drop, stating that they had taken the safe apart and still not found the money. According to Ruiz' testimony, which I credit, McClendon reported that he had not actually seen Moneagle drop the envelope into the safe.¹⁰ McClendon was told that he would have to speak with the district supervisor and was temporarily suspended.

On the next day, McClendon was called to Kerinuk's office.¹¹ Kerinuk questioned him about the events surrounding the money drop, particularly whether he had seen Moneagle put the money into the safe. He replied that he did not see her do so, "per se," and stated that he could not verify what was in the envelope. In response

⁹ Hensley did not testify. Ruiz, who did, did not contradict Moneagle's testimony.

¹⁰ McClendon, I am compelled to find, may have seen the money drop envelope in Moneagle's hand, and he heard the safe door open and close (like the slot on a mailbox), but he did not see Moneagle deposit the envelope in the safe. His testimony, to the effect that he saw, out of the corner of his eye, the envelope go into the safe, cannot be credited as it is inconsistent with statements in affidavits he gave both to the Employer and the Board wherein he had stated that he "did not see Moneagle make the drop because [he] was bending down behind the counter." It is also improbable that he saw it in light of his further testimony that he asked Moneagle whether she had put the money in the safe.

¹¹ McClendon initially indicated that this conversation might have occurred a week later. The circumstances, including Kerinuk's reference to this conversation when he spoke with Moneagle later on April 8 and the fact that McClendon was paid for the 1 day he had lost from work, establish that they spoke on April 8.

⁶ The testimony of Timothy Hogge, to the effect that he saw the letter with Moneagle's scratched-out writing on it when he came to work that evening, thus becomes highly suspect. I cannot credit it.

⁷ For security reasons, Respondent requires that any money over \$10 or \$20 be placed in a safe to which the employees do not have keys.

⁸ In this testimony, Ruiz, a Southland supervisor responsible for six stores including the store in which Moneagle worked, corroborated Moneagle's testimony concerning the register practices and rules. McClendon testified as to his understanding that whoever was running the cash register was supposed to mark, initial, and advance the register tape; Kerinuk also testified that this was part of Respondent's cash handling procedure.

to Kerinuk's questioning, he asserted that he did not believe that she had taken the money, pointing out that she had signed the money drop sheet acknowledging that it was her drop. He also told Kerinuk that it was not unusual for Moneagle to help him in this way or, generally, for the employees to render this kind of assistance to one another. Kerinuk then asked McClendon about Moneagle's attitude. McClendon stated that he had never observed her to have an attitude problem. Kerinuk said she had a bad attitude about raises she believed she was entitled to and asked McClendon whether she had ever discussed this with him. McClendon acknowledged that she had but argued that concern about raises did not indicate a poor attitude. McClendon agreed to meet with Respondent's security officer, Thomas Bottomley, and was told that inasmuch as he did not handle the money or make the drop he would be paid for the day he lost and could return to work.¹²

Moneagle was called into Kerinuk's office in the early evening of April 8. Ruiz was also present. Kerinuk informed her that he had conducted an investigation, that her story did not agree with what he had been told by McClendon and Hensley, and that the money had not been found notwithstanding that the safe had been dismantled. Asked whether there was any reason why Hensley, McClendon, or she would take the money, Moneagle replied that she knew of none, that she had none, and that she would not be so stupid as to jeopardize her job in that way. At some point, Ruiz stated that Moneagle had been involved in a \$160 shortage back in March.¹³

When Kerinuk continued to press her about the money, and stated that Respondent had no alternative but to terminate her, Moneagle suggested that management be investigated. She pointed out that Hensley had left a bank deposit under the sink for 2 or 3 days, until it was discovered by an employee. At this point, according to Moneagle, Kerinuk began yelling at her. He stated: "You're disgusting. It's people like you that cost the company money. You come up here for your backpay and your overtime and your back raises and all you want is what you can get out of the company." He told her that he knew she had written "right on" on the mystery writer letter, asked her if she knew who wrote the letter and suggested that she had written the letter herself. He referred to the letter as a personal insult. After some discussion about further investigation, Moneagle was told that Respondent would be in touch with her later and she left.¹⁴

¹² McClendon's testimony is uncontradicted.

¹³ Moneagle testified that the reference to a shortage in March was made at her discharge interview on April 20. In her testimony, she explained the circumstances of the shortage, attributing it to confusion caused by the misringing of a transaction by another clerk. I note that Moneagle was granted a wage increase in the performance review following this shortage, which tends to indicate that she was not considered culpable in that incident.

¹⁴ Kerinuk admitted referring to the mystery letter writer as a "disgusting" person because that person had not brought the complaints first to management. Ruiz made no mention of Kerinuk having made such a statement and both Kerinuk and Ruiz testified that it was Moneagle who first mentioned the mystery writer letter. Kerinuk's response, they both testified, was that the letter was irrelevant to their conversation. Kerinuk denied referring to Moneagle's earlier complaints. In this regard, I credit

In the next week or so, Bottomley spoke with and took statements from Moneagle, McClendon, and Hensley. Moneagle repeated both her denial that she had taken the money and her assumption (not stated as such) that McClendon observed her make the money drop. McClendon described the transaction; he claimed that he heard the safe door open and close, but he did not claim to have seen Moneagle make the drop. Hensley described opening the safe, discovering that a drop was missing, connecting Moneagle to the drop, and unsuccessfully searching for the money. Bottomley reported to Kerinuk that he had narrowed the responsibility for the missing money to either Moneagle or Hensley.

In the same week, Hensley spoke to McClendon. She asked whether he had seen the mystery writer letter and what he thought about it. When he disclaimed any knowledge, Hensley described the letter, stating that it had something to do with the zone manager, Ron Becker, and contained "something about the people of Southland organizing and banding together." She further stated, "Well, we think Charlotte [Moneagle] wrote the letter and we have been watching her for some time." Ruiz also questioned McClendon as to his knowledge of the anonymous letter and told him that Respondent had "a very strong case, thinking that Charlotte wrote it." McClendon told both of them that he did not believe that Moneagle had authored the letter.¹⁵

On April 20, Moneagle was called into Kerinuk's office once again. She was told that the investigation had been completed, that the money had not been found and that Respondent had no alternative but to discharge her. She was given a discharge notice stating, as the reason, that she had violated rule 13(b), "Failure to follow proper money drop procedures." When she protested that there had been no impropriety, Kerinuk stated that there had been more than one person handling the transaction. She asserted that that was a common practice in every store in which she had worked. He then stated that she had failed to initial the detail or register tape and made reference to the earlier money shortage.

According to Kerinuk, who made the decision to terminate Moneagle, the discharge was not motivated by any belief or conclusion that Moneagle had taken the money. Rather, it was her failure to follow proper cash procedures¹⁶ which, he testified, was all part of the money drop procedure. Ruiz testified that Kerinuk discharged Moneagle because it had been improper for her to run the register after McClendon had checked in and because the money was never found. Moneagle unsus-

Moneagle, noting Kerinuk's concern with Moneagle's attitude, as expressed earlier in the day to McClendon, management's strong concern about the letter, management's knowledge that Moneagle had endorsed the letter, and management's suspicion, as expressed by Hensley and Ruiz to McClendon, that Moneagle had authored the letter, all of which are consistent with the conversation as described by Moneagle.

¹⁵ Ruiz did not contradict this testimony. As previously noted, Hensley did not testify. Respondent indicated that Hensley had been placed on a leave of absence because of an arrest on a felony charge; however, there was no indication that Hensley had become either hostile to Respondent or unavailable as a witness.

¹⁶ In his statement to the NLRB investigator, Kerinuk had stated that she was discharged for her mishandling of funds.

cessfully appealed her termination to Respondent's president.

At the same time that Moneagle was discharged, Kerinuk, who had learned during this investigation that Hensley had previously failed to make a daily bank deposit, discharged Hensley for her failure to timely deposit the April 5 receipts. Hensley made an appeal to Becker, the zone manager, citing personal circumstances which made her miss the deposit on Tuesday, April 6, and she was reinstated.

B. Analysis

1. Had Moneagle engaged in protected concerted activities?

In order to prevail herein, the General Counsel must establish that Moneagle was discharged for having engaged in protected concerted activities. Respondent argues that the General Counsel has adduced no evidence to establish that Moneagle acted in concert with any other employee and postulates, from the letter's reference to problems with Zone Manager Becker, that the mystery writer may have been a supervisor. Respondent further contends that the General Counsel's evidence is insufficient to establish that the letter was directed toward concerns common to Respondent's employees.

As previously noted, I have credited Moneagle's testimony and found that the letter which she received and endorsed (both by her having written "right on" on it and by her posting of it) called on the employees to band together for the purpose of securing improvements in working conditions. If group action is to be effectively protected, the initial call for such group action must also be protected. In *Hugh H. Wilson Corp. v. N.L.R.B.*, 414 F.2d 1345 (3d Cir. 1969), enfg. 171 NLRB 1040 (1968), the court stated, at 1347-48:

"Employees shall have the right . . . to engage in . . . concerted activities . . . for the purpose of mutual aid and protection. 29 U.S.C.A. § 157."

The lines defining this right have of necessity been painted with broad strokes. To protect concerted activities in full bloom, protection must necessarily be extended to "intended, contemplated or even referred to" group action, *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683, 685 (3rd Cir. 1964) . . . lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.

The mantle of protection of concerted activities, the various circuit courts have held, extends to both union and non-union employees.

* * * * *

In *Owens-Corning Fiberglass Corp. v. N.L.R.B.*, 407 F.2d 1357, 1365 (4th Cir. 1969), the court said:

" . . . The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other."

See also *Charles H. McCauley Associates*, 248 NLRB 346 (1980), enfd. 657 F.2d 685 (5th Cir. 1981). I am thus compelled to conclude that whether the mystery writer letter was authored by a supervisor,¹⁷ a fellow employee, or by Moneagle, as Respondent apparently suspected,¹⁸ Moneagle made that letter her own and called on her fellow employees to engage in concerted activities for improvement of their working conditions. She was thus engaged in an activity both protected and concerted.

Further, I would note that Moneagle's activity in connection with the mystery writer letter was not the only protected activity in which she had engaged and of which Respondent had knowledge at the time of her termination. Approximately 3 weeks prior to the money drop incident, after discussions with other employees,¹⁹ Moneagle had complained to Kerinuk about alleged denials of wage increases due to herself and others. As such, she was engaged in a concerted activity, which was a predicate for possible group activity, protected by the Act. See *McCauley, supra*, 657 F.2d 685, 688. Further, she had told Hensley that she believed that Respondent's employees needed union representation.

2. Was Moneagle discharged for her involvement in protected concerted activities?

The General Counsel contends that it has established, *prima facie*, that Respondent terminated Moneagle because of her protected concerted activities and that Respondent has failed to sustain its burden of demonstrating "that the same action would have been taken even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 612 F.2d 889 (1st Cir. 1981). Respondent, while not conceding the validity of the Board's *Wright Line* analytical mode, argues that no *prima facie* case has been established, that no showing has been made that its reasons for discharging Moneagle were pretextual, and asserts that it has shown that Moneagle would have been discharged for her failure to follow proper cash handling procedures in any event. My analysis of the facts herein, as I have found them to exist, compels me to conclude, in agreement with the General Counsel, that Charlotte Moneagle would not have been terminated had she not become involved in protected concerted activity.²⁰

¹⁷ I would deem this to be most improbable. Both the letter described by Moneagle and the one introduced by Respondent refer to Respondent's treatment of employees. They were addressed to the employees and, in tone, appear to call for employee action. It is unlikely that they were penned by a supervisor.

¹⁸ Sec. 8(a)(1) and (3) of the Act is violated when an employer acts against an employee in the belief that the employee engaged in union or protected concerted activities, whether or not the employee actually did so. See *NLRB v. Link-Belt Corp.*, 311 U.S. 584, 589-590 (1941); *Henning & Cheadle*, 212 NLRB 776 (1974).

¹⁹ Moneagle had discussed pay raises with Lucille Harris, another clerk. McClendon had been asked by Kerinuk whether Moneagle had ever discussed raises with him. He told Kerinuk that she had.

²⁰ In light of the uncontradicted evidence concerning the missing money drop, I cannot find that Respondent's suspension of Moneagle on April 7, pending completion of the investigation, was discriminatorily motivated. I shall recommend that the allegation concerning her suspension be dismissed.

The General Counsel's *prima facie* case is well made out by Moneagle's involvement in protected concerted activity, Respondent's knowledge of and animus toward such activity as reflected by the statements of Kerinuk, Ruiz, and Hensley to both Moneagle and McClendon,²¹ the juxtaposition of those animus statements in point of time with Moneagle's suspension and with Respondent's investigation of the lost money drop,²² and her suspension and discharge, which came quickly on the heels of the protected activity.

Respondent asserts that it has overcome the General Counsel's *prima facie* case and that the General Counsel has failed to sustain its ultimate burden of proof. Whether the burden on Respondent is that of persuading the trier of fact that it would have taken the same action absent the protected activity or merely a burden of producing some credible evidence that it would have done so,²³ I am compelled to conclude that its obligation has not been satisfied and that, even if it has, the case presented by the General Counsel satisfies its ultimate burden of proof.

Respondent argues that the investigation which it conducted, and which it asserts was extensive and detailed, "indicates that [it] is indeed concerned about the possibility of misconduct and is not using allegations of misconduct as a pretext for illegal discrimination." (Resp. br. 27, citing *Anaconda Ericsson*, 261 NLRB 831 (1982).) In the instant case, however, Respondent's investigation went to the question of whether Moneagle or some other employee took the missing money and/or where the money had gone. Indeed, Moneagle was assured that, if

²¹ Without repeating the factual discussion, *supra*, I take particular note of Hensley's questioning of Moneagle concerning the mystery writer letter on April 7 and her statement, "I wish you hadn't told me that." Ruiz' confrontation of Moneagle on that same day with her endorsement of the letter and with statements to the effect both that she had a bad attitude and that such people were not needed, Kerinuk's questioning of McClendon about Moneagle's attitude and his statements attributing a bad attitude to Moneagle because of her questions about wage increases, and Kerinuk's references to Moneagle as "disgusting" because she had complained about raises and overtime. As to the latter statement, while I have credited Moneagle, I would find animus even if I were to credit Kerinuk. A statement to the effect that an employee who takes his complaints to other employees rather than to management is "disgusting" hardly shows tolerance for employee involvement in protected activity. See *Reno Sparks Cab Co.*, 266 NLRB No. 34, ALJD sl. op. 8 (1983), wherein the employer's statement that a union activist was discharged because he had distributed leaflets to the other employees rather than talking to the employer "like a man" manifested animus.

²² There is no easily discerned line between evidence supporting the General Counsel's *prima facie* case and that which might be said to support its ultimate burden of proof. That Respondent's agents referred to her protected activity and expressed animus thereto immediately after discovering the missing money drop and repeatedly thereafter while allegedly investigating that loss is evidence that may be said to support both.

²³ Compare cases rejecting the *Wright Line* burden shift, for example, *Behring International v. NLRB*, 675 F.2d 83, 88 (3d Cir. 1982); *Wright Line*, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *TRW v. NLRB*, 654 F.2d 307, 310 (5th Cir. 1981), with those cases which have adopted the shift, such as *Borel Restaurant Corp. v. NLRB*, 767 F.2d 190 (6th Cir. 1982); *Justak Brothers v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981); and *NLRB v. Nevis Industries*, 647 F.2d 905, 909 (9th Cir. 1981). The Administrative Law Judge is, of course, bound to follow Board precedent (as here set out in the Board's *Wright Line* decision) unless and until reversed by the Supreme Court. The *Wright Line* issue is presently destined for Supreme Court review in *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), denying enforcement and remanding 256 NLRB 101 (1981).

McClendon observed her make the money drop, she would have nothing to worry about. The investigation, however, was essentially inconclusive and Moneagle's discharge was not predicated on any belief or conclusion that she had taken the money. Kerinuk testified that Respondent had no evidence that Moneagle had taken the money and had never accused her of doing so. Respondent's investigation, therefore, was essentially irrelevant to the discharge.

The notice of discharge given to Moneagle attributed her termination to a violation of company policy 13(b), "Not following proper money drop procedures." Failure to follow proper money drop procedures, Respondent established, was a specific and separate ground for dismissal set forth in the Employee Awareness Form and Respondent argued that its action could not be found to have been discriminatorily motivated where it was merely following such an established rule. However, as Ruiz acknowledged, Moneagle's money drop procedure was not defective. She did with that drop exactly what she was supposed to do. Apparently recognizing this flaw in its argument, Respondent claimed that the money drop rule encompassed all manner of cash handling procedures and referred, throughout its brief, to Moneagle's alleged dereliction as a "failure to follow proper cash handling procedures." Respondent's rule, under which it purported to discharge Moneagle, is very simple, very direct, and very specific.²⁴ I cannot credit Respondent's unsupported assertion that the rule went beyond its plain language and encompassed every violation of cash handling procedures, including those which did not involve a defective money drop. I must therefore reject Respondent's argument concerning the effect of its rule upon evidence of discriminatory motivation.

Even assuming that rule 13(b) went beyond the money drop procedure, however, Respondent's claims concerning Moneagle's alleged improprieties are shifting, inconsistent, and unconvincing. Kerinuk's statement of position in regard to the unfair labor practice charge asserts that she was discharged for mishandling funds. At the discharge interview, he told her that it was because of an improper money drop procedure and, when she disputed that, asserted that it was improper for more than one person to handle a transaction and further, that she should have initialed the register tape. Ruiz, however, testified that initialing of the tape was not required. Moreover, it was credibly established that employees frequently helped each other. It was certainly to Respondent's and the customers' benefit that they do so. As noted, Kerinuk testified that Moneagle was not discharged because of any suspicion or belief that she took the money. Ruiz, however, testified that her discharge was partly motivated by the fact that the money was never found. Little weight can be given such shifting reasons; indeed, the shifting nature of Respondent's defenses tends to establish discriminatory motivation. See, for example, *McClellan Trucking Co.*, 261 NLRB 793, fn. 2 (1982).

²⁴ I note, too, that the rule regarding money drop procedures appears to address the problem of security and robbery prevention rather than cash register procedures.

The General Counsel argues that Respondent treated the various participants to the April 7 incident disparately, thus evidencing discriminatory motivation. Both Moneagle and Hensley, who had violated a company policy requiring that each day's cash be deposited in the bank, were discharged. Respondent's brief acknowledges that the difference between Hensley's dereliction and Moneagle's was "slight." Kerinuk testified that they were discharged for the "same thing, only a different variation." Both appealed their discharges, albeit through different routes. Hensley, whose prior violation of this same policy had become known to Kerinuk during the investigation of the missing money drop, was reinstated. Moneagle was not.

Additionally, I note that if the conduct for which Moneagle was discharged was her involvement in a single transaction together with another employee, Moneagle was accorded treatment entirely disparate from that accorded the other employee, McClendon. It was his transaction which she assisted; he had begun to operate the register. He was as guilty of turning the register over to her as she was of taking it. He was suspended until it was determined that he did not handle the money and was then reinstated with backpay. He suffered no penalty for handling the transaction jointly with Moneagle. Thus, Moneagle was treated differently from both of the other participants to the incident. She was no more guilty of an infraction of company rules than either of them. Such disparate treatment supports an inference of discriminatory motivation. *NLRB v. Sikes Corp.*, 692 F.2d 34 (6th Cir. 1982), *enfg. sub nom. Florida Tile Co.*, 255 NLRB 360 (1981).

Accordingly, for all of the foregoing reasons, including Respondent's repeated references to Moneagle's protected activity when suspending her and thereafter while purporting to investigate the lost money drop, I must conclude that the General Counsel has sustained its burden of proving, by a preponderance of the evidence, that Respondent discharged Charlotte Moneagle because of her protected concerted activities.

3. Other coercion

The General Counsel contends that Respondent, in four particulars, interrogated and otherwise coerced its employees in violation of Section 8(a)(1) of the Act. Thus, it is argued that Ruiz' questioning of Moneagle on April 5 concerning whether or not she had written "right on" on the letter, together with his repetition of that question and his accusation that only Moneagle could have done so, Ruiz' subsequent statement to Moneagle to the effect that Respondent knew she had endorsed the mystery writer letter, that she had a bad company attitude and that such people were not needed by Respondent, Kerinuk's statements to Moneagle wherein he referred to her as "disgusting" because she was the kind of person who cost the company money seeking backpay, overtime, and raises, and Hensley's April 7 questioning of Moneagle concerning the writing on the mystery letter and her response, "I wish you hadn't told me that" when Moneagle admitted her role in writing on that letter, are violative of Section 8(a)(1) of the Act. Respondent contends that the General Counsel's evidence

concerning the foregoing, to the extent that it is contradicted by Respondent's witnesses, is unworthy of belief and, to the extent that it is not contradicted, or is admitted, constitutes questioning of such an isolated and casual nature that an 8(a)(1) remedy is not warranted.

In agreement with the General Counsel, I am compelled to find the foregoing events both violative of the Act and of sufficient gravity to warrant a remedial order. In this regard, it must be noted that not only did Hensley question Moneagle concerning her role in regard to the mystery writer letter, she also implied that Moneagle's truthful answer placed her in jeopardy. Similarly, Ruiz coupled his questioning with an accusation that Moneagle had a bad company attitude and as such was not needed by Respondent, impliedly threatening her job security. Kerinuk's statements to Moneagle similarly implied that Respondent deemed her to be an undesirable employee and, coming in the midst of an investigation concerning her involvement in the lost money drop, could not help but be coercive.²⁵ Accordingly, I find, as alleged in the complaint, that Respondent has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By coercively interrogating employees concerning their protected concerted activities and by threatening them with discharge because they have engaged in such activities, Respondent has violated Section 8(a)(1) of the Act.
2. By discharging Charlotte Moneagle because she engaged in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
4. Respondent did not engage in any unfair labor practices not specifically found herein.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent discriminatorily discharged Charlotte Moneagle because she engaged in protected concerted activities, I shall recommend that Respondent be required to offer her full and immediate reinstatement to her former position or, if that is not possible, to a substantially equivalent position without prejudice to her seniority or other rights and privileges and to make her whole for any loss of pay or other earnings she may have suffered as a result of the discrimination against her. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel*

²⁵ The statement of Kerinuk to McClendon, concerning Moneagle's complaints about raises indicating an attitude problem, made in the course of the investigation, and Hensley's statement to McClendon concerning Respondent's watching of Moneagle because of its "strong case" leading it to believe that she had written the mystery letter are similarly coercive.

Corp., 231 NLRB 651 (1977).²⁶ Additionally, I shall recommend that Respondent be required to rescind and expunge from its personnel files and other records any reference to the April 20, 1982, discharge of Charlotte Moneagle.

Upon the foregoing findings of fact and conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²⁷

The Respondent, The Southland Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their protected concerted activities or threatening them with discharge because they engage in such activities.

(b) Discharging employees because they engage in protected concerted activities.

(c) In any like or related manner interfering with employees in the exercise of the rights guaranteed them under Section 7 of the Act.

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

(a) Offer Charlotte Moneagle immediate and full reinstatement to her former position or, if that is not possi-

ble, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its personnel files and other records all references to the April 20, 1982, discharge of Charlotte Moneagle and notify her in writing that this has been done and that evidence of the unlawful discharge will not be used as the basis for future personnel actions against her.

(c) Post at its store 17209, located at 3501 East Third Street, Dayton, Ohio, copies of the attached notice marked "Appendix."²⁸ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's 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.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

²⁶ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

²⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²⁸ 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."