

Ideal Macaroni Company and Teamsters Local No. 407, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.¹ Cases 8-CA-19186 and 8-RC-13426

January 31, 1991

DECISION, ORDER, AND DIRECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 24, 1988, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ only to the extent consistent with this Decision and Order.

A. *The 8(a)(1) Allegations*

1. We adopt the judge's findings that the Respondent violated Section 8(a)(1) by more stringent enforcement of its dress code and by announcing and posting a restrictive no-distribution policy.

2. The Respondent has excepted to the judge's conclusion that the Respondent's president, Ippolito, violated the Act by mentioning in a speech to employees that he had given interest-free loans to some employees. In addressing this allegation, the judge stated that "[t]he General Counsel contends that although such loans had evidently been made in the past" the statement violated Section 8(a)(1) by virtue of its timing. The judge agreed with the General Counsel, with the citation "[S]ee *NLRB v. Alumina Ceramics, Inc.*, 690 F.2d 136 (8th Cir. 1982)." We find merit in the Respondent's exception.

During the campaign, Ippolito gave four speeches to employees, including the May 16⁴ speech at issue. In that speech, Ippolito stated that, "some of you—especially those who have not been with us very long—may not be aware of all this company does for you today." The speech then detailed various benefits, including the company-paid life insurance; the company-

paid health, accident, and disability insurance, including the full cost of family medical coverage; the company-paid pension plan; the company-paid profit-sharing plan; paid holidays and vacations; the Company's attendance bonus; and wages, including Christmas bonuses and yearly wage increases. Ippolito continued:

There are probably some other little things that I have forgotten, like the Christmas luncheon, the birthday cakes, the company-paid uniforms, and even the no-interest loans that I have given to some of you over the years, but I do not think every detail of that is important. I think what I am really trying to say today is that Ideal Macaroni has honestly tried hard to be a good company to work for.

There is no dispute that Ippolito had in fact granted interest-free loans to various employees over the years, usually for automobile-related purposes, and that several long-term employees were aware of the fact that others had received such loans.

The Board has recently reiterated that "prohibiting an employer from publicizing existing benefits merely because employees had not previously been made aware of such benefits would deprive the employer of a legitimate campaign strategy" *Weather Shield of Connecticut*, 300 NLRB 93, 97 (1990); *Scotts IGA Foodliner*, 223 NLRB 394 (1976), enfd. mem. 549 F.2d 805 (7th Cir. 1977). Because the Respondent was referring to existing benefits, rather than granting or announcing new benefits, that reference does not in itself violate the Act.⁵ Accordingly, we shall dismiss this allegation of the complaint.

B. *The Warning Notices*

The judge concluded that the Respondent violated Section 8(a)(3) and (1) by issuing warning notices on March 18, 1986, to employees Janet Gage and Dawn Tyree for absence and tardiness, and by issuing a warning notice on the same date to employee Elizabeth Tyczynski for poor job performance. We disagree.

1. In assessing the warnings given to Gage and Tyree for tardiness and absence, the judge reviewed their attendance records. He found that Gage's attendance record showed that she was off sick on March 7, February 20, and on two dates in January, and that Tyree's record revealed "sick" absences 5 days in February and 2 days in late January. The judge compared those records with those of two other employees who also received warnings. The judge noted that em-

¹On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³In the absence of exceptions, we adopt pro forma the judge's dismissal of the 8(a)(1) allegation regarding the conversation between the Respondent's chief executive officer and employee Johnson.

⁴The judge erroneously listed the date of this speech as March 16.

⁵The court of appeals' decision in *Alumina Ceramics*, 690 F.2d 136 (8th Cir. 1982), cited by the judge, is easily distinguishable. The court enforced that portion of the Board's decision, *Alumina Ceramics*, 257 NLRB 784 (1981), finding that the respondent had granted employee Sledd a benefit to influence his opinion of the union and the company. The respondent cosigned a loan that the respondent's president arranged for Sledd at a bank—something it had never done before. The instant case does not involve any action by the Respondent that was inconsistent with past practice.

ployee Barnes was sick on 3 days each in January and February and 2 days in March and that employee Jeanie Bussy received a first warning on January 1 after she was sick and took a leave of absence during late December 1985.

The judge observed that the attendance warnings given to Gage and Tyree “could be found to be supported by valid indications of excessive use of sick leave, however, most of the infractions were in January and February” From the timing of the warnings, which he placed “in late March,” the judge inferred that the union organizing campaign was a motivating factor because the warnings were issued after the employees had worn union T-shirts. The judge then found that Plant Manager Sarkissian “did not provide a plausible explanation” for his method of selection of attendance cards for review, because the judge perceived an inconsistency between his testimony and the actual cards selected. As he found animus elsewhere in his decision, the judge accordingly concluded that the warnings were unlawful. We do not agree.

Initially, we note, contrary to the judge, that the record does not show the inconsistency that the judge perceived between Sarkissian’s method of selecting timecards for review and the results.⁶ The cards were placed in stacks in the office, arranged by department and seniority. Sarkissian’s usual practice was to pick up several cards and go through them when he had the opportunity.

We do not agree with the judge’s apparent inference of disparate treatment based on his description of the attendance records. The judge was correct in finding that Gage missed 2 full days in January, 1 in February, and March 7. But in addition she was out on March 12 (a date not noted by the judge) and, in the preceding 3 months, had missed partial days on seven more occasions not mentioned by the judge.⁷ The judge correctly noted that Tyree missed 2 full days in January and 5 full days in February. She was also out 2 full days and 3 partial days in December, and an additional 9 partial days from January until her warning on March 18. Employee Barnes, whom the judge compared with Tyree, had been out 1 more day than Tyree since January 1 (but the same number of full days since December), and 1 less partial day than Tyree. Tyree conceded that Sarkissian had previously told her (prior to the advent of the union activity) that she was missing too much time. Tyree’s warning was a first notice with the comment “Please improve your attendance” written at the bottom. Barnes’ warning, also dated March 18, was a second notice which stated at

the bottom “You must make improvements or be dismissed.” Thus, Tyree and Barnes had almost identical attendance records; each received a warning dated March 18, a date on which each had an infraction. The differences are that Tyree got a first warning asking that she “Please improve” her attendance, and Barnes received a more stringent second notice stating, “You must make improvements or be dismissed.” Tyree’s warning is alleged to be a violation. No such allegation is made regarding the stricter second warning given to Barnes. As to employee Bussy, we note that she received a warning dated January 6, 1986 (not January 1 as stated by the judge), notwithstanding the facts that she had fewer partial days off or latenesses (three) and fewer full days off than either Tyree or Barnes, and that Bussy’s warning notice itself acknowledged that 3 of those days off had been given to her as a leave of absence. Bussy’s warning occurred prior to the advent of union activity and is not alleged as a violation.

Contrary to the judge, we conclude that a comparison of the warnings given to Gage and Tyree with those given to Barnes and Bussy does not support a finding that Gage’s and Tyree’s were discriminatory. Indeed, if there is any distinction to be drawn in comparing their circumstances, it is that both Bussy and Barnes, whose warnings are not alleged to be unlawful, received more stringent treatment than did either Gage or Tyree. We conclude that even in the absence of antiunion animus, the Respondent would have given Gage and Tyree warnings for tardiness or absence. Accordingly, we shall dismiss those allegations.

2. The Respondent has excepted to the judge’s finding that a warning given to Elizabeth Tyczynski on March 18 for failing to weigh lasagna violated Section 8(a)(3). We find merit in the exception.

The Respondent’s product is packaged by weight. Thus, packages that do not contain the listed weight may be expected to create difficulties with customers, while packages containing excess amounts may increase the Respondent’s costs. For this reason, employees packaging lasagna are required to weigh each quantity they pack. Tyczynski was one such employee.

The judge’s discussion of the alleged violation is somewhat abbreviated. He considered Tyczynski’s testimony that she did not deserve the warning. He noted that she had previously been told to button up her uniform smock to cover a union T-shirt, which he found to be a violation. He concluded that she was warned for a “single apparent [sic] minor infraction of work practices,” and inferred that the warning would not have occurred were it not for the union organizing campaign.

The judge referred to the testimony of Plant Manager Sarkissian, who stated that he gave Tyczynski the March 18 warning for not doing her job properly, after watching her continuously for 5 minutes and observing

⁶The judge apparently misconstrued the testimony to indicate that Hunter’s timecard was reviewed on the same day as those of Gage and Tyree, which would not have been consistent.

⁷The warning notices to Gage, Tyree, and Barnes all cited both “absence” and “tardiness.” The judge’s analysis, however, addressed only full days out marked as “sick.”

that she did not weigh every quantity of lasagna she packed, as was required. Instead, according to Sarkissian, whose testimony was not discredited, Tyczynski skipped weighing some of the lasagna she boxed. Sarkissian testified, however, that the employee on the other side of the conveyor from Tyczynski, who was also weighing and boxing lasagna, was keeping up well.

Tyczynski did not dispute that she was guilty of the infraction for which she was warned. Indeed, she admitted in her testimony that this was not the first time she had been told her work was substandard. Her excuse, according to Sarkissian, was that the lasagna was "bad," that it was hard to get the lasagna off the belt, and that it stuck to her fingers. Sarkissian testified without contradiction, however, that the lasagna could not be "bad" for all of the 5 minutes he was watching Tyczynski's work.

In our opinion the infraction was by no means "minor," as Tyczynski's failure to weigh each box of lasagna could have impinged directly on customer satisfaction and the Respondent's profitability. Further, Tyczynski's failure to weigh the lasagna was not limited to an isolated box. She was observed over a 5-minute period weighing boxes only intermittently and Tyczynski herself admitted that she previously had been cautioned about substandard work. The General Counsel did not contend, nor did the judge find, that the Respondent deviated from its usual disciplinary procedures, and there is no direct evidence of disparate treatment in Tyczynski's case. In these circumstances, we are persuaded that that warning was justified. Thus, we conclude that, even in the absence of antiunion animus, the Respondent would have given Tyczynski the warning.⁸ Accordingly, we shall dismiss this allegation.⁹

C. The Layoffs

The judge found that on March 31 the Respondent laid off employees Gage, Tyree, and Lillian Nash for their union activities. He rejected the Respondent's defense that there were valid business reasons for the

⁸ Contrary to our colleague's dissent, the Respondent's requirement of accuracy as to the amount of its product in a box that is sold by weight (i.e., quality control) is, in our view, in "furtherance of an established policy." Further, as noted above, there is no showing of disparate treatment, or indeed that anyone other than Tyczynski failed to weigh the lasagna properly before it was put into boxes.

⁹ Member Cracraft would affirm the judge's finding that Tyczynski's March 18 warning violated Sec. 8(a)(3). The General Counsel presented a prima facie case based on Tyczynski's union activities, the Respondent's knowledge of those activities, the Respondent's antiunion animus demonstrated during this period and the timing of the warning. Contrary to her colleagues, Member Cracraft does not agree that the Respondent has rebutted the General Counsel's prima facie case. Unlike the situations presented with regard to Gage and Tyree's warnings, the Respondent has not established that the warning to Tyczynski was in furtherance of an established policy or in accord with any past practice. Rather, there is no evidence that any employee had ever been disciplined for failing to weigh every box of lasagna. Thus, she would find a violation.

layoffs. We are persuaded, however, by the Respondent's explanation for the layoffs that the three alleged discriminatees would have been laid off even in the absence of their union activity.

As noted by the judge, the Respondent began a modernization program in 1984. This involved the installation of additional production capacity for long goods and new packaging equipment for short goods.¹⁰ New, state-of-the-art, long-goods packaging equipment was ordered and installed in 1985, but was plagued with operational problems. As a consequence of these problems and of the Respondent's embarking on a promotional campaign for lasagna in the fall of 1985, which resulted in a large influx of orders, the Respondent hired more workers. The number of employees in the packing department more than doubled in the fall of 1985, and employee work-hours in the packing department increased dramatically from September through October and November. With the end of the lasagna promotional campaign, and a concomitant falling off in orders, and with the elimination of some of the operational problems involving the long-goods packaging equipment, employee work hours declined in December. The hours leveled off in January, but then dropped again in February and March and declined substantially in April.¹¹

Gage, Tyree, and Nash were hired by the Respondent at the end of October, during the period the Respondent was increasing its work force in the packaging department. On March 31, when they were laid off, they were the junior employees in the packaging department. The judge credited the testimony of Gage and Nash that at the end of the day on Monday, March 31, Sarkissian told them that "Due to lack of needs of the company, they [were] being laid off," "solely on the basis of seniority." Sarkissian explained that the company had "hired too many people and none had quit as was usually the case," so Gage and Nash would have to be laid off. Sarkissian advised them, however, that although they were not entitled to a vacation because they had not worked the required 6 months, they would receive 1 week of vacation pay. Because Tyree was not at work at the time, the Respondent sent her a telex, which she received April 1, advising her that she was laid off.

The judge concluded that the General Counsel had made a prima facie showing under *Wright Line*¹² that the layoffs were discriminatory. He then rejected the Respondent's principal defense that it had valid busi-

¹⁰ The Respondent's pasta business comprises three separate product lines: Long goods (e.g., spaghetti and linguini); short goods (e.g., elbow macaroni and rigatoni); and lasagna.

¹¹ Total monthly hours worked in the packing department, as pertinent here, were as follows: August 1985, 1042 hours; September, 1194; October, 1709; November, 2788 (5-week total); December, 2187; January 1986, 2254; February, 1999; March, 1963; April, 1607; May, 1967 (for 5 weeks); June, 1627; July, 1140 (for 3 weeks).

¹² 251 NLRB 1083 (1980).

ness reasons for the layoff. In so doing, the judge refused to accept the Respondent's explanation for the layoffs—that it had determined that the number of employees would have to be reduced by the end of the first quarter. The judge was not persuaded that the Respondent's packing statistics supported the assertion of valid business reasons for the layoffs. He opined that the decrease in April production and packing, which Respondent had attributed to the end of its promotional campaign for lasagna, “demonstrates merely that Respondent failed to make any new or additional promotional efforts, a matter under its control” He also relied on the fact that the Respondent did not tell the several employees hired in the fall of 1985 that they were being brought on as temporary employees, but were informed that the Company had never had layoffs. Although acknowledging that it was “likely that some layoffs would occur” at a future time, the judge concluded that the Respondent had failed to show that the decision to lay off the three employees at the end of March was based on specific, meaningful business factors. Noting that the Respondent did not have an established layoff-selection policy, the judge also intimated that the Respondent should have used some basis other than strict seniority for laying off employees.

We find merit in the Respondent's contention that the layoff was justified by business reasons. Examination of the undisputed sales and packing figures for 1985 and 1986, not discussed by the judge, support the Respondent's defense. First, the total sales and packing of bulk “long goods,” which was labor intensive insofar as packing was concerned, declined by approximately one-third from 1985 to 1986 inclusive. Second, beginning in January 1986, new state-of-the-art long-goods packaging machinery, known as “Fast Freddie,” accounted for packing 72 percent of the Respondent's retail long-goods production. The record shows that “Fast Freddie” had a substantial impact on Respondent's manpower needs. Fast Freddie operated at a rate of 80 boxes per minute as opposed to the approximately 55 to 60 boxes per minute packed under the old system. That considerable increase in packing speed was achieved with the additional benefit that it required fewer employees. The Fast Freddie packaging line needed only three employees,¹³ rather than the six or seven employees required for the old packaging line. Thus, although total long-goods production actually increased slightly, fewer employees were required to package more goods. Due to the purchase and installation of additional automated machinery in 1985, the Respondent also experienced a considerable shift in

¹³The machine was designed to be operated by only two employees. To anticipate continued, occasional problems after the major operational difficulties were remedied, however, the Respondent continued to use three employees rather than two.

packaging short-goods from boxes to cellophane bags, thus permitting it to employ fewer employees to package short goods at faster rates.

Finally, although not discussed by the judge, we rely on the fact that three additional employees in the packing department were laid off in 1986, prior to the hearing in this proceeding. Those additional layoffs are not alleged to be unlawful. These additional layoffs tend to substantiate the Respondent's contention that it needed fewer employees to maintain its production levels.

We do not agree with the judge's suggestion that the Respondent was responsible for the decline in production because it did not make additional promotional efforts in early 1986. We are unwilling to substitute our business judgment for that of the Respondent in assessing what, if any, additional promotional efforts the Respondent might undertake in the conduct of its business. Further, we reject any implication that the Respondent somehow engineered the reduction in work hours to coincide with the union campaign, with a view to eliminating active union adherents by laying them off. The evidence shows that the need for fewer packers—which had begun before the start of the union campaign—continued for the next several months.¹⁴

We also reject the judge's implication that the Respondent should have relied on some other basis for the layoffs than strict seniority. Seniority was widely used in the plant. For example, the record shows that overtime was offered to employees on the basis of their seniority. Seniority was also the basis for selection of the floor leader during the sudden, albeit short-lived, expansion in the number of employees in the packing department. Finally, we disagree with the weight the judge gave to the fact that the new employees hired in October 1985 were not told, at the time, that they were being hired as temporary employees, but rather were informed that the company had not had layoffs. We do not find this of much importance in deciding whether these employees' services were required about 5 months after they were hired, and in admittedly different circumstances.

We conclude, contrary to the judge, that the Respondent's layoff of Gage, Tyree, and Nash was not unlawful.

D. *The Challenged Ballots*¹⁵

1. In the representation election in Case 8-RC-13426 the Board agent challenged Gage, Tyree, and

¹⁴The judge relied on his determination that employee packing hours increased in May over the March levels. His analysis is flawed, however. Although the figures cited by the judge for May were 4 hours more than those recited for March, the judge's analysis did not consider the fact that the May figures were for 5 weeks rather than March's 4 weeks. The record discloses that no 4-week period in May reflects as many hours as the 4 weeks listed for April or the 4-week totals in March.

¹⁵Having found that the layoff was based on legitimate business considerations related in large part to a permanent change in the automated equipment

Nash, whose names were not on the eligibility list.¹⁶ We have reversed the judge's finding that these three employees were unlawfully laid off.

Alternatively, the judge found that at the time of the election the three employees had a reasonable expectation of reemployment within the foreseeable future, and that their ballots should accordingly be opened and counted. He found that the three employees were not told when they were hired the previous October that they were temporary employees, and that at the time of the layoff they were not specifically told that the layoff was permanent. Rather, they were told "somewhat vaguely" that recall could be in days, weeks, or months. The judge also noted that under the Respondent's recall policy the three employees had an apparent right to recall equivalent to the time already worked for the company, in this case approximately 5 months. The election was conducted approximately 2 months after the layoff. On these facts, and in agreement with the judge's alternative finding, we find that the three employees had a reasonable expectancy of recall. Accordingly, we shall direct that their ballots be opened and counted.

2. The Charging Party challenged Hope Pepus on the basis that she was a supervisor. Pepus was hired as a packer in 1972, and was named floor leader in the fall of 1985. Her job involved assisting Packing Foreman Seaman, particularly in training the influx of new employees hired during October. Job assignments to the employees were made by Foreman Seaman. Pepus generally assisted in training new employees, in relieving other employees on the packing lines for breaktimes, and in checking the weight sheets and packing tickets. None of these duties is supervisory.

The judge nonetheless concluded that Pepus was a supervisor. He relied on what he characterized as her other "apparent duties" including, among other things, signing warning slips, asking employees to work overtime, and giving employees permission to leave early. The record is to the contrary. It is true that Pepus on three or four occasions was asked to sign a warning slip *as a witness*. The record discloses, however, that nonsupervisory clerical employees also witnessed warning slips. The determination of whether overtime would be worked was made by Sarkissian and Foreman Seaman. Pepus then simply asked the employees

at the plant, Member Cracraft would sustain the challenges to the ballots of the laid-off employees. Although the statements made to each of the employees on the occasion of their layoffs were vague as to when and if these employees were to be recalled, they do not, in light of other evidence presented, support a finding that the layoffs were temporary. Rather, the Respondent has established on the basis of the surrounding objective facts (those which are relied on in reversing the judge's finding that the layoffs were not discriminatory), that there is not a reasonable expectancy of recall. In this regard, she notes that the changes at the facility which necessitated the layoff were not the types of changes that are reflective of fluctuations in the workload which would support a finding that employees could reasonably expect that the workload would increase and employees would thus be recalled.

¹⁶The judge inadvertently stated that the Employer challenged them.

if they wished to work overtime, in the order of their seniority. If no one wanted to work overtime, Pepus reported that fact to Seaman or Sarkissian, who would then determine how to proceed. The record also shows that Pepus merely acted as a conduit for transmitting to supervision requests to leave early. She did not authorize such leave. Although Pepus' hourly pay increased slightly when she became floor leader, she continued to wear the same nonsupervisory uniform, use the same locker, and punch the timeclock. She also continued to enjoy the same benefits as other hourly nonsupervisory employees, which were different from the benefits provided to supervisory employees. She did not attend, nor was she asked to attend, any of the regular management meetings.

Shortly after the layoffs at the end of March, Pepus requested that she be removed from the floor leader position because she did not "have the authority to tell the girls what to do" and they did not listen to her. About a week later, Sarkissian told her she did not have to worry about being the floor leader any more.

We find, contrary to the judge, that Pepus was a senior employee and skilled worker whose position as floor leader did not involve supervisory responsibilities within the meaning of Section 2(11) of the Act.¹⁷ Accordingly, we overrule the challenge to Pepus' ballot, and we shall direct that her ballot be opened and counted.¹⁸

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. By more strictly interpreting and enforcing its dress code to require the covering or removal of union T-shirts and by announcing and posting a rule restricting the distribution or posting of notices the Respondent violated Section 8(a)(1) of the Act."

Delete the judge's Conclusions of Law 4, 5, and 6, and renumber Conclusion of Law 7.

ORDER

The Respondent, Ideal Macaroni Company, Bedford Heights, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of Section 7 rights by announcing and posting a more restrictive policy concerning

¹⁷ *House of Mosaics*, 215 NLRB 704, 712-713 (1974).

¹⁸ We note that on April 15, 1986, the Petitioner and the Respondent Employer entered into a stipulation, attached to the Stipulation for Certification upon Consent Election, that neither Pepus nor employee John Puskar had any supervisory authority, as enumerated in Sec. 2(11) of the Act. The parties further stipulated that neither would, by challenge or otherwise, raise any supervisory eligibility issues, absent a substantial and material change in the duties and responsibilities of Pepus and Puskar occurring after the execution of the agreement. Because we find that Pepus is not a supervisor, we find it unnecessary to pass on the question of whether the stipulation is binding in this proceeding.

the bringing in or posting of notices or by more strictly interpreting or enforcing its dress code.

(b) In any like or related matter interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Post at its Bedford Heights, Ohio facility and mail to all employees who were working or on layoff status on May 21, 1986, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

DIRECTION

It is directed that Case 8-RC-13426 is severed from this proceeding and remanded to the Regional Director for Region 8, who shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Hope Pepus, Janet Gage, Dawn Tyree, and Lillie Nash. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

¹⁹If 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 National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act by announcing rules that restrict the bringing in or posting of notices or by more strictly interpreting or enforcing our dress code because of our employees' activities in pursuit of union affiliation.

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

IDEAL MACARONI COMPANY

Mark F. Neubecker, Esq., for the General Counsel.
Andrew C. Meyer, Esq., of Cleveland, Ohio, for the Respondent.
Peter A. Joy, Esq., of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. These consolidated cases were heard in Cleveland, Ohio, on 15 through 18 December 1986. Subsequently, briefs were filed by all the parties. The proceedings are based on a charge filed 27 May 1986,¹ by Teamsters Local No. 407 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The Regional Director's complaint dated 11 July alleges that Respondent Ideal Macaroni Company of Bedford Heights, Ohio, violated Section 8(a)(1) and (3) of the National Labor Relations Act by announcing to employees that interest-free loans were being made available; by stating that working conditions, benefits, and its seniority system would be improved;² by interrogating an employee as to his union activity and promising a benefit to discourage the activity; by requiring employees to cover or remove T-shirts indicating employees' union sympathies; by promulgating a rule restricting the posting of written materials without obtaining prior approval from Respondent; and by issuing written warnings to and laying off named employees.

Subsequent to an election on 21 May and the challenge of ballots by both parties, the Regional Director determined that "a substantial factual and legal issue was presented by the four challenged ballots which should be resolved at an evidentiary hearing" and the matter was consolidated with this complaint proceeding.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

¹ All following dates will be in 1986 unless otherwise indicated.

² At the close of the General Counsels presentation this issue was dismissed in response to Respondent's motion.

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio corporation engaged in the manufacture and distribution of macaroni and other pasta products. It annually purchases and receives goods valued in excess of \$50,000 directly from points outside Ohio and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Respondent, a family owned business, was purchased in 1969 by American Special Foods, Inc. (ASF), a holding company that also owns three other food processing companies, Weiss Noodle Company, Roll-ups Inc., and DeMarco Frozen Foods, all located in northeastern Ohio. Certain employees of Weiss Noodle Company and Roll-ups are represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 880.

James Price is president of Special Foods, he is chairman and president of Weiss Noodle and acts as its general manager, and he is also an officer in each of the four food processing companies and a member of the Special Foods board of directors. In his capacity as an executive officer Price is involved in establishing labor policy at each of the four food processing companies, and in representing the financial interest of the parent company, and in approving all major acquisitions of equipment.

Pat Ippolito, a family member of the founding past owners, is president of Respondent Ideal Macaroni and is responsible for the day-to-day operation of the Company. Richard Sarkissan is the plant manager in charge of all production, packing, and maintenance activities at the plant. Iggy Semean is foreman of the production and packing departments. In the fall of 1985 Hope Pepus was designated as floor lady for the packing department and served in that capacity until sometime in April or May 1986.

Respondent's pasta business is divided into three distinct product lines, long goods (spaghetti, fettuccine, and linguini), short goods (elbow macaroni, rigatoni, and mostacelli), and lasagna. Historically, most business has been in long goods products, but in recent years there has been a trend in the marketplace toward short goods.

Ideal sells its products to retail customers, particularly supermarkets, where it faces competition for retail shelf space, to industrial purchasers who utilize the pasta as an ingredient in their own product line, and to institutional customers like restaurants and hospitals. Respondent's production department at the Company, where the raw ingredients are mixed and dried, operates on a three-shift, 24-hour-per-day basis. Most packing is done during an 8-hour day shift, however, since much of the production process is automated, production employees are utilized to do some packing on the second and third shifts. Other support departments (sanitation, shipping, receiving) work staggered shifts of 8 to 9 hours. The Company delivers about 10 percent of its product to its customers, while the rest is picked up at the plant.

On 22 February Respondent's employees attended a union organizational meeting. Several employees signed authorization cards at the time and an organizational drive was started. Authorization cards and union materials were distributed at work and several additional meetings were held, generally attended by between 10 and 15 employees.

The Union filed an election petition on 18 March and an election was held on 21 May. The tally of ballots shows that 15 votes were cast for the Union, 15 for the Respondent, and 4 ballots (those of Hope Pepus, Janet Gage, Lillie Nash, and Dawn Tyree), were challenged. Prior to the election the Company held several group meetings with its employees and it engaged in certain conduct, discussed in detail below, alleged to have interfered with the employees' rights. It also gave several employees disciplinary warnings and on 31 March it laid off several employees.

III. DISCUSSION

The issues in this case arise from the above-described events which occurred during a union organization drive among Respondent's employees, the subsequent layoff of three employees who were apparent union supporters and election results which probably would favor the Union over the Respondent by a close margin, if the ballots of the laid-off employees were counted.

Respondent asserts that the employees were laid off prior to the election for valid business reasons with no expectation of recall and were therefore ineligible to vote. It also contends that Pepus did not hold a supervisory position. It denies engaging in any unfair labor practices and asserts proper business reasons for the warnings and the layoffs.

A. Alleged 8(a)(1) Violations

Respondent's president, Pat Ippolito, testified that he became aware of the Union's organizational drive about 6 March, by word of mouth. Thereafter, he gave four speeches to the employees, including one on 16 March in which he said he was going to talk about their fringe benefits and shortly thereafter mentioned that he had given interest-free loans to some employees. Employee Louis Brown had received such a loan in the past, however, other employees including Lamont McCannon were unaware that this benefit was available until it was mentioned in the speech. A printed statement of Respondent's plant benefits, rules, and policy signed by Ippolito does not mention loans of any sort. After the speech and prior to the election McCannon sought and received a \$300 interest-free loan.

The General Counsel contends that although such loans had evidently been made in the past, Respondent's timing in announcing this as a benefit was calculated to discourage employees' union activity, membership, and sympathy. Here, I agree that the clear effect of such an announcement under these circumstances is to discourage employees' union activities and thereby violate Section 8(a)(1) as alleged, see *NLRB v. Alumina Ceramics*, 690 F.2d 136 (8th Cir. 1982).

Respondent's plant rules provide that employees are to arrive ready for work with the correct uniform (issued at the Company's expense) clean and neat. Several employees testified that employees wore smocks with several buttons open, however, Hope Pepus testified that it was company policy to have smocks buttoned "all the way" for safety reasons so

they don't get caught in machines. After the union campaign was underway Vivian Martin wore a union T-shirt with the top three buttons of her smock unbuttoned. The second day she did so she was told by Pepus to button it all the way. Employees Robert Vondrak, John Johnson, Lamont McCannon, and Elizabeth Tyczynski all testified that the dress code was not enforced prior to the union campaign but that during March Ippolito and Manager Sarkissian told them to button up their smocks or to cover up or remove the union T-shirts they were then wearing. Two employees testified they regularly had worn other type of lettered T-shirts with partially unbuttoned smocks without admonition.

While it is clear that a dress code existed, it appears that it was not enforced to the degree that the top several buttons on employees' smocks were required to be buttoned. The more strict interpretation and enforcement coincided with the employees' wearing of union paraphernalia and I find that it was done so in order to cover the union identified T-shirts worn by several employees, and therefore infringes on employees' Section 7 rights. Accordingly, I find that the General Counsel has established that Respondent acted unlawfully as alleged in paragraph 7(c) of the complaint.

Vivian Martin testified that sometime after she wore her union T-shirt on 6 March and before the May 21 election, she distributed a union flyer to Hope Pepus at lunchtime. Shortly thereafter Ippolito questioned Martin about who had brought flyers into the building—who had put them in the kitchen and on top of the candy machine. Ippolito then said, "He didn't want them in there. That anything that was brought in had to be cleared through the office before it was brought in or posted." He then posted a notice on the bulletin board which stating that nothing could be posted unless it was cleared through the office. Martin and other employees were unaware of any prior rule to this effect and it is not a rule listed with others in the printing rules distributed to employees (G.C. Exh. 4). On brief Respondent implies that the rule may have been a reissuance of prior company policy that Martin was not familiar with, however, no evidence of the existence of such a rule was presented. To the contrary, General Counsel's Exhibit 4 shows that the Company had printed rules that omitted any reference to such a policy and, accordingly, I find that by announcing and posting a restrictive policy immediately after discovering that union flyers were being distributed, Respondent acted unlawfully as alleged in paragraph 7(d) of the complaint.

Employee John Johnson, a 7-year employee, testified that he wore his union T-shirt during the week preceding the 21 May election and that on 19 May Jim Price, Respondent's chief executive officer, spoke to Johnson privately in the warehouse and asked him why he thought the Company needed a union. Johnson then complained about not getting a particular job which he felt entitled to by reason of his seniority and Price replied that if he was given a chance he could straighten it out. Price testified that the conversation had been initiated by Johnson and that he had replied he would look into the situation.

Here, the Respondent's conversational-type question stands alone and otherwise there is no indication that it was made under circumstances that would tend to restrain, coerce, or interfere with employee rights guaranteed by the Act, see *Rossmore House*, 269 NLRB 1176 (1984). I also find that Price's alleged promise of benefits is too ambiguous to sup-

port an inference that a promise is being made, especially in view of the fact that Johnson admitted that Price otherwise stated that he could make no promises. Accordingly, I find that the record fails to support the allegations of paragraph 7(b) of the complaint and I conclude that Respondent is not shown to have violated the Act in this respect.

B. Issuance of Written Warnings

On 18 March Respondent issued written warnings to employees Janet Gage, Dawn Tyree, and Elizabeth Tyczynski. Gage testified that she attended union meetings, signed a union authorization card, passed out union authorization cards to other employees, and wore a union T-shirt to work on two occasions in March. Plant Manager Sarkissian worked alongside Gage while she was wearing her union T-shirt on 6 March and Gage testified that floor lady Pepus began to give her a difficult time after she wore her union T-shirt, asking her questions such as why she was working slow. On 18 March she was handed a white envelope (instead of the usual brown paycheck envelope) bearing a "second" warning slip signed by Pepus and Sarkissian but no paycheck. When asked, Pepus said she didn't know anything about it. When lunchtime arrived she called the Union and was advised to sign the warning but under protest. Sarkissian "stormed" in as she was eating lunch saying that he pulled her timecard, that she wasn't going to sign "this," she wasn't going to get her paycheck and that she had been late and had done poor work. Gage said she would talk to him after lunch.

Tyree and Tyczynski were separately given warnings, and their paychecks withheld, the same morning. Both had signed union cards and worn Union T-shirts that were visible under their partially unbuttoned smocks.

After lunch all three went to talk to Sarkissian. Tyczynski, who is still employed by the Respondent, testified that she was "mad" about getting the warning slip and just remembered the others doing most of the talking except for her saying that she had never received any verbal warning and that she didn't deserve the warning, which mentioned her work attitude and not keeping up with her work, and that she independently decided to sign the warning under protest so she could get her paycheck. She remembered that Sarkissian asked what the problem was between her and Hope Pepus and she replied she was unaware of a problem, that she had no verbal notice of a warning and that it was a total shock. Sarkissian then asked: "Well, do you think the power of being a supervisory or forelady to Hope, do you think it went to her head?" When asked by counsel if he used the word "supervisor" or "forelady" Tyczynski answered, "What's the difference? I mean, to me it's the same thing."

Both Gage's and Tyree's warnings were for "tardiness" and "absence" on unspecified dates. Gage's attendance record shows she was off sick on 7 March, 20 February, and on two dates in January. Tyree's record shows a "sick" absences 5 days in February and 2 in late January. Record for two other employees for 1986 through 18 March, show that Jannette Barnes was sick on three dates in both January and February and on two dates in March including 18 March. She was warned when she returned to work a day after Gage and Tyree had complained about their warnings. Employee, Jeannie Bussy, is shown to have received a first warning dated 1 January after sickness and a leave of absence during

late December 1985. She then was out sick twice in both January and March and once in February but received no second warning. None of these records were marked "x" for an unexcused absence. Gage testified that she told Sarkissian that Pepus had not said anything about her work habits and complained about Pepus' name being on the warning when Pepus had said she didn't know about them. Tyree testified that she also spoke about Pepus never having warned her and that Sarkissian said that Pepus "always signed the warning slip. You know, she was supervisor, and she signed and he approved it." Tyree agreed that Sarkissian had previously told her she had missed 4 or 5 days on a date prior to the union activity when she got sick at work and asked to leave early, however, he had allowed her to leave without giving her any specific further warning.

Sarkissian testified that a secretary prepared the warnings per his instructions after he had reviewed some employee attendance records. He asserts that Hope Pepus' signature was not on them when they were first distributed but that he subsequently had her sign them at lunchtime prior to his discussion with the employees concerning the warnings. He agrees that the employees did not want Pepus' name on the warnings and that he rewrote them without Pepus' name and that the paychecks then were distributed. His testimony did not address his use of the term "supervisor" during this conversation as recalled by employees Tyree and Tyczynski.

Sarkissian said he gave Tyczynski a warning because he watched her for 5 minutes and observed that she failed to weigh every quantity of lasagna she packed, as was required. He testified that he reviews attendance records on an apparent random basis when he gets the opportunity and goes over as many cards as he can at that particular time. The cards are selected from the pile which is organized by the department and then by either seniority or clock member. He said that in addition to Gage's and Tyree's cards he also looked at those of Bussy and Sydney Hunter on the same occasion. Hunter had received an attendance warning 26 September 1985 and is in department 3, while the warnings of 18 March were for employees of department 5 (packing) in 1986 and Hunter (clock 161, hired September 1984) otherwise is not listed as a member of the packing department. (Hunter was warned in 1985, not March 1986, and his warning said it was a final notice given prior to termination, however he is still an employee.) Gage, Tyree, and Bussey were hired in October 1985 and had clock numbers 196, 197, and 191, respectively.

Here, it is shown that Respondent gave warning to three employees who had worn union T-shirts. One, Tyczynski, had been discriminatorily told to button her smock over the shirt and was given a warning for a single apparent minor infraction of work practices based on Sarkissian's one observation (Sarkissian said that he did not consult floor lady Pepus about Tyczynski's overall work habits). The attendance warning given to the other two employees could be found to be supported by valid indications of excessive use of sick leave, however, most of the infractions were in January and February and I infer from the timing of the distribution of the warnings in late March, after the employees engaged in outward displays of union support, that Respondent's reaction to this display was a motivating factor in the issuance of the warnings. I also find that Sarkissian did not provide a plausible explanation for his alleged method of se-

lection of attendance cards to review inasmuch as the actual cards selected reflect an inconsistency with his testimony. (Hunter works in a different department, his clock number is much lower, and he is more senior than the other and his comparable violations were early in the previous year.)

As indicated below I find that the General Counsel has made an appropriate showing of antiunion animus and, under these circumstances, I infer that Respondent's 18 March warnings would not have occurred were it not for the union organizing campaign and the employees protected activity of showing support for the Union by their wearing of union T-shirts and I conclude that these discriminatory warnings violate Section 8(a)(1) and (3) of the Act as alleged in paragraph 8 of the complaint.

C. Layoffs and Terminations

In a layoff discharge case of this nature, the General Counsel must meet an initial burden of presenting sufficient evidence to support an inference that the employees' union activities were the motivating factor in the employer's decision to terminate the employees. Here, the record shows that Gage, Tyree, and Lillie Nash started work for Respondent on 28 October 1985. Nash signed a union authorization card on 5 March. She received her card from Vivian Martin in the open parking lot adjacent to the plant and returned the card to Martin in the same place. She did not wear a union T-shirt, but regularly ate lunch at a table with Tyree, Martin, Gage, and Tyczynski, when they all wore union T-shirts. Nash had specifically indicated to floorlady Pepus that she was for the Union. In view of the size of Respondent's work force and Nash's pattern of conduct and association, I conclude that the record support an inference that Respondent believed that Nash, as well as Gage and Tyree, were union sympathizers.

Gage and Nash testified that at the end of the day on Monday, 31 March, Pepus told her and Nash that Sarkissian wanted to see them. Sarkissian told them "that due to lack of needs of the Company they were being laid off, and solely, on the basis of seniority." He also said that although they were not technically entitled to vacation because they had not worked the required 6 months, the Company had decided to give them 1 week of vacation pay. He said he was sorry but right now warehouses were overstocked and they had hired too many people and none had not quit so they would be laid off. He said it might be temporary, a couple of days, a week, a month and that they would be called to work during the production shutdown (during the regular July vacation the plant undergoes an apparent annual cleaning). He also said he would have to send Tyree a telegram as she was absent that day. Nash said she never received a lay off slip although she called and asked for one about a week later. Gage testified that initially she didn't believe the layoff would be permanent and so did not draw unemployment. She testified that Sarkissian did not ask them to return their uniforms or to clean out their lockers and also said she never received any subsequent telegram to that effect. Nash said Sarkissian had said they wouldn't have been the ones laid off if the choice were his as he considered them to be very good workers. Nash also testified that several weeks or a month later she received a call from a lady in the office asking her to return her uniform, but received no written correspondence about the uniform or any communication in-

forming her that she had been terminated. Nash said she did not immediately look for another job or file for unemployment as Sarkissian suggested but instead got part-time work where she thought she could make more than under unemployment compensation and she continued with part-time work until she was promoted to a full-time seasonal position in November.

On 31 March, Tyree called Sarkissian at 7 a.m. and indicated she wanted to switch a scheduled day off for an appointment from Tuesday to Monday. Sarkissian said it was no problem and asked her phone number but said nothing about any layoff. When she came to work the next day she found no timecard and was told she had been sent a lay off telegram the previous day. Later, on 1 April, she received a telex that said she was "laid [sic] off due to lack of company need." No request was made for the return of her uniform, and nothing was said regarding the length or permanence of the layoffs. The employees also testified that they had not heard any previous reference to possibility of layoffs and that Sarkissian told them that the layoffs were a last minute decision. Previously, when they were hired, they had been told the Company had never had any layoffs.

Sarkissian testified that when he laid off Gage and Nash he also told them to clean out their lockers and hand in their uniforms and did the same with Tyree the next day. A confirmation copy of a mailgram dated 5 May requesting Gage to return her uniform was received into evidence and Sarkissian testified similar telegrams were sent to the other laid-off employees. The employees, however, deny receiving these orders, especially at the time of the initial layoff conversation.

Sarkissian denies that he indicated how long the layoff might be. He acknowledged that there had never before been layoffs at Respondent's plant and that there was no established policy regarding layoffs except that "if you didn't need people you would lay them off."

Tyree also testified that Sarkissian told her that he went by seniority and would have preferred to lay off someone else because she was a good worker, but might have to lay off other people. He offered to help her get another job and also mentioned her coming to clean the plant during the shutdown period if she wasn't called back by that time. She looked for another job right away as she "had bills to pay" and began a full time job on 24 May, 3 days after the date of the election, at the same \$4.50 an hour rate she received from the Respondent.

Respondent's president, Price, acknowledged that in February 1986, one of his other companies had a strike over the issue of union recognition. He also said that the Respondent spent a lot of its energy directed toward the union election and both Price and Ippolito stated to employees that they did not need a union. As noted above, the Respondent also engaged in a series of unfair labor practices and I conclude that the General Counsel has shown that Respondents had feelings of antiunion animus. The General Counsel also has shown that three union supporters, otherwise vulnerable because of a lack of seniority, were laid off shortly after two of them wore union paraphernalia and prior to the scheduled election. After the election, where the results thereof hinged on whether or not their votes were counted, their ballots were challenged and they were not offered recall. Under these circumstances, I find that the General Counsel has met

his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union activities were the motivating factor in Respondent's decision to terminate them. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's principal defense rest on alleged valid business reasons for its actions. It contends that it hired additional packaging employees in the fall of 1985 because of operational problems with new packaging equipment and an influx of orders generated by a new promotional campaign. It explains that when the latter campaign ended and the new equipment began operating efficiently, the need for the additional employees was alleviated and the three least senior employees were laid off.

The record shows that the Respondent began implementation of a modernization program in 1984 with the installation of additional production capacity for long goods and new packaging equipment for short goods. New, "state of the art" long goods packaging equipment was ordered and installed in June 1985, however, it was plagued with operational problems. Respondent asserts (inaccurately) that 6 new packing employees were hired in October 1985, bringing the total number of employees in the packing department to 12. Price testified that when the new machine was operating more effectively in January 1986, he suggested to Ippolito that with anticipated further improvements the work force could be reduced to nine packers at the end of March (no written company records corroborated this testimony). Price asserts that he decided to implement a layoff in March, by selecting the three least senior employees (despite the apparent fact that there was no significant difference in the hiring date for the six least senior employees). Price also said that Respondent's recall policy was to equate the time in which an employee would be subject to recall to the length of service with the Company (here, the three employees each had 5 months).

Respondent maintains monthly records that reflect the number of packers and the regular and overtime hours they work. Prior to October 1985, seven to eight packers worked regularly. This work force increased to 16 during the last week in October when 8 new names were listed (the lists often include 3 persons from other departments that also do packing work). The week ending 2 November lists 18 names including Nash, Gage, and Tyree. Total packing hours in November were 2787. January record showed 14 employees and 2254 total hours. Employee B. Cales is not listed after mid-February and total packing hours for that month are reported as 1999. Thirteen employees worked a total of 1964 hours in March, 54 of which were overtime. April figures reflect 10 employees and 1607 hours, while May hours were up to 1967 for 10 employees (with 89 hours of overtime). Four employees worked 41 hours of overtime the last week of May (after the election) and these employees had 31 hours of overtime the following week, however, no laid-off employee was offered recall. Subsequent figures for August through November generally reflect 10 employees and approximately 1600 packing hours monthly.

Here, I am not persuaded that Respondent's packing statistics support its assertion that valid business reasons dictated layoffs on 31 March and I find that Price's testimony that a firm decision was made to lay off employees prior to the union campaign is not consistent with the overall record. I do not credit his testimony in this regard and I find that Respondent's overall rationale for executing layoffs on 31 March is pretextual.

First, I find that Respondent did not give the several employees that were hired in October 1985 any indication that they were being brought on as temporary employees. To the contrary, they were accurately told that the company had never had layoffs. Also, at the time they were laid off, they were not told or given the impression that the layoffs were permanent. I credit the forthright testimony of the several employees that they initially were given the impression they could be called back in a few days, weeks, or a month and also their testimony that they initially were not requested to turn in their uniforms. No written evidence of notification of any sort is shown to have been given to employees Gage and Nash except for a copy of a mailgram to Gage dated 5 May requesting a return of her uniform (Gage denied receiving it). Although Tyree was sent a Telex (received 1 April), that mentions her layoff, it made no reference to its duration and it did not request a return of her uniform. Significantly, when Tyree asked Sarkissian on the morning of 31 March to switch her planned day off, he gave her permission and failed to say that she would be laid off that same afternoon. Sarkissian told the employees that the lay off were a last minute decision and I infer that the decision to act was made Monday, 31 March, the day of the layoff.

It is clear that none of the employees were given any indication that possible layoffs were imminent, the laid off employees were given no advance notice but were laid off precipitously on a Monday at the end of the first full day of a new pay period, and the lay off occurred within a few weeks of the beginning of union activities and Respondent's commission of several unfair labor practices.

Although it is likely that some layoffs would have occurred at some future time when Respondent's packaging equipment began to consistently operate more efficiently, there is some testimony that problems continued during the months after the layoffs and I find that Respondent has failed to persuasively show that its decision to layoff three employees on 31 March was based on specific, meaningful business factors. Respondent's statistics show that while April packing hours were down to 1607 hours, figures for May show an increase to 1967 hours, slightly more than prior to the layoff in March. The increased work load in May was handled not by the recall of one or more laid-off employees but by overtime for some packing department employees and the use of production employees for packing duties on weekends and during the night shifts. This reaction fails to support Respondent's rationale and, to the contrary, supports the inference that its decision was made precipitously and motivated by antiunion consideration rather than the suggested business reasons.

I also find that Respondent did not have an established layoff selection policy and that its arbitrary selection of Gage, Nash, and Tyree on the alleged basis of seniority is inconsistent with its comments that they were better workers

than other employees with no significantly greater amount of seniority (who were not laid off).

I find that the apparent decrease in April production, attributed to an ending of Respondent's promotional efforts, demonstrates merely that Respondent failed to make any new or additional promotional efforts, a matter under its control, and that this action contributed to a decline in its need for packers following the start of the union campaign and following the layoff of the alleged discriminatees. Moreover, employee packaging hours returned to near the March level in May but not one laid-off employee was offered recall, although over 89 hours of overtime was given to other employees.

Under all these circumstances, I find that Respondent would not have laid off three employees on 31 March were it not for the union organizational drive and I find that Respondent has failed to meet its burden of showing that the 31 March layoff and subsequent failure to recall employees Gage, Tyree, and Nash was not primarily motivated by the illegal and discriminatory reasons demonstrated by the General Counsel and discussed above. I therefore conclude that the General Counsel has met his overall burden and shown that Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 8 of the complaint.

D. Voting Eligibility of the Laid-off Employees

As noted, an election was held on 21 May and 34 ballots were cast: 15 in favor of union representation, 15 against and 4 challenged. The Company challenged the eligibility of Janet Gage, Dawn Tyree, and Lillie Nash, the three employees who were laid off on 31 March.

As set forth above, I have found that these three employees were unlawfully laid off on 31 March and therefore should be considered as eligible voters and their votes counted. I also find that the record otherwise supports the conclusion that at the time of the election these employees had a reasonable expectation of reemployment within a reasonable time in the future.

When Gage, Tyree, and Nash were hired they were told the Company had never had layoffs. They were not told, at any time, that employment levels in the packing department were only temporarily increased for a short period while Respondent installed and brought into effective operation new machinery. They were not told they were temporary employees and, at the time of the layoff in March, they were not told that the layoff was to be permanent. To the contrary, I credit the employees' testimony that they instead were told, somewhat vaguely, that recall could be in days, weeks, or months. Significantly, Respondent's contention that the layoffs were permanent is unsupported by any documentary evidence except, indirectly, the single mailgram to one employee dated 5 May, requesting the return of her uniform. Otherwise, however, Respondent clearly told them that they could come back to work during the plant shutdown in July. Moreover, under Respondent's recall policy, they had an apparent right to recall equivalent to their time with the Company, in this instance until approximately 31 August. Therefore, if other employees had quit or been terminated one or more of the three could have been recalled as management had indicated to each that they were considered to be good workers.

Although the Respondent may have had a subsequent valid business reason to reduce staffing levels at a later date, I infer that it laid off precipitously three employees on 31 March not only because of operational and production level requirements but because of antiunion consideration related to the union campaign and the forthcoming election.

I find that the employees' participation in the vote on 21 May also indicates their expectation of returning to work and, under all these circumstances, I find that the laid-off employees did have a reasonable expectation of recall, I find that the employees on lay-off status on 21 May were entitled to vote. I conclude that the challenge to the ballots of Janet Gage, Dawn Tyree, and Lillie Nash should be overruled and the ballots counted.

E. Supervisory Status of Hope Pepus

The Union challenged the ballot of Hope Pepus contending that she was a supervisor. Section 2(11) of the Act defines a supervisor as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The existence of any one element can be sufficient to convey supervisory status, however, sporadic or occasional exercise of supervisory authority is insufficient to make an employee a supervisor. Also, investiture with a title and theoretical power which may imply supervisory authority does not automatically transform a rank-and-file employee into a supervisor.

Pepus was hired as a packer in February 1972, and in 1985 was the second most senior employee in the packing department. With the increase of employees in October 1985, from 8 to 16 packers, Supervisor Iggy Seaman, who also had authority in the production department, was unable to handle all his responsibilities, especially training, and the Company named Pepus as "floorlady" to assist Seaman.

It is shown that when the new employees were hired they were told that Pepus was their supervisor, that Plant Manager Sarkissian specifically referred to Pepus as a "supervisor," when he discussed the warnings given to employees, and that she exercised various supervisory functions in directing their day-to-day activities, including telling employees which of several functions to perform on a particular machine at any particular time (employees regularly changed between machines and activities such as boxing, packing, or weighing every 2 hours). She generally did not spend time on a machine unless she was relieving another employees to go to the rest room and she exercised her own judgment in selecting when to do so. She spent time watching to see that the employees' work was done properly. Other apparent duties performed included signing warning slips, warning employee to button up uniforms, reporting horseplay, asking employees to work overtime, and giving permission to leave early. Her hourly pay was increased slightly when she became floorlady

but she continued to wear the same uniform and use the same locker.

Sometime in April Pepus complained to Sarkissian that she didn't "have the authority to tell the girls what to do and they don't listen to me because I don't have the authority" and told him she no longer wanted to be floorlady and he said he would look into it. Sarkissian said about a week later, he told her she did not have to worry about being floorlady anymore, however, Pepus also testified that she recalled the election was near "Mothers day" and that she was relieved of her floorlady duties after the election. She also said it was a week or so after she told Sarkissian and thereafter testified that she could not remember if she was still floorlady the day before the election.

She did not revert back to her former hourly pay when she return to regular packing duties, and no company records reflect the date of her change in status, however, two employees who regularly worked with Pepus testified that she did not return to regular packing work with them until June or after the election.

While it is apparent that Pepus was not entrusted with a full range of supervisory duties when she became floorlady, she was something more than a mere senior employee. She was not a rank-and-file employee and did not perform regular packing work with the other employees (except on a sporadic, fill-in basis) but engaged in general oversight duties where she exercised at least a minimal use of independent judgment in instructing newer employees and in directing the work assignments and standards of all packing department employees. She was referred to as a supervisor by the plant manager and was introduced to new employees by that title and, under the circumstances, I conclude that the functions exercised by Pepus as floorlady are sufficient in this instance to show that she was a statutory supervisor.

Although Sarkissian asserts he told Pepus in April that she "didn't have to worry" about being floorlady, his testimony falls short of being an unequivocal statement that she was relieved of her duties at that time. Pepus did not receive a cut in pay when she reverted to her former status as a packer, sometime after mid-April, and there is no documentary evidence to show when the change occurred. Pepus own testimony is contradictory on this point, however, in response to the questions on cross-examination by the General Counsel she recalled that she still was floorlady the week that Mother's Day was celebrated. Two employees that were still working at that time independently recalled that Pepus did not join them in regular packing work until June or after the election and, accordingly, I find that the most credible evidence shows that Pepus was still acting as a supervisor on the date of the election and I therefore find that the Union's challenge to her ballot should be sustained.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 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. By announcing the availability of previously unpublicized company benefits during the union campaign, by more strictly interpreting and enforcing its dress code to require the covering or removal of union T-shirts, and by promulgating a rule restricting the bringing in or posting of

any notices the Respondent violated Section 8(a)(1) of the Act.

4. By issuing warning slip to employees Janet Gage, Dawn Tyree, and Elizabeth Tyczynski on 18 March 1986, and by laying off employees Gage, Tyree, and Lillie Nash on 31 March 1986, Respondent violated Section 8(a)(3) and (1) of the Act.

5. On 21 May 1986, and all times material, floorlady Hope Pepus was a supervisor within the meaning of Section 2(11) of the Act and was not an employee within the meaning of Section 2(3) of the Act, eligible to vote in the representation election and her ballot should not be counted.

6. On 21 May 1986 employees Janet Gage, Dawn Tyree, and Lillie Nash were eligible voters as a result of their unlawful layoff and their eligibility and reasonable expectation to be recalled from layoff, their ballots should be counted, and a certification of result of election should be issued in Case 8-RC-13426.

7. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off and failed to recall employees Janet Gage, Dawn, Tyree and Lillie Nash, must make them whole for any loss of earnings and other benefits during the period between 31 March and 31

August 1986 (the last date of their eligibility for recall under company policy) as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),³ and shall offer them reinstatement or recall to any additional or current packing department position held by any employee hired subsequent to 31 March 1986, discharging, if necessary any less senior employee and shall place the discriminatees on a preferential hiring list, for a period of 1 year from the date of such notice, and inform the discriminatees, in writing, of such listing. In view of the nature of the violations I find it unnecessary to issue a broad Order, see *Hickmott Foods*, 242 NLRB 1357 (1979).

As part of the relief sought, the General Counsel also seeks imposition of a "visitorial clause" whereby the Board would be authorized to engaged in certain discovery activities in order to monitor compliance. Although a request for the imposition of such a provision recently has become a common practice, there is no showing that it is of particular applicability or usefulness in dealing with the type of unfair labor practice involved in this proceeding. Accordingly, the request is denied and no visitorial clause will be imposed as part of the order, see *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[Recommended Order omitted from publication.]

³Under *New Horizons*, interest is computed at the "short-term Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).