

**F.H. Bevevino & Co., Inc. d/b/a Bevaco Food Service and Joseph J. Skwara.** Case 4–CA–23382

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

The issues presented to the Board in this case are whether the judge correctly limited the remedy for Charging Party Joseph J. Skwara, based on the judge's finding that Skwara had conclusively indicated an intent to resign from the Respondent before he was unlawfully discharged, and whether the judge correctly dismissed the allegation that the Respondent violated Section 8(a)(1) of the Act by creating the impression among its employees that their protected concerted activities were under surveillance.<sup>1</sup>

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,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

Contrary to our dissenting colleague, we agree with the judge that the backpay of employee Skwara should toll on January 1, 1995.

In June 1994,<sup>4</sup> Skwara was hired under a limited term employment agreement set to expire on December 31. In November, Skwara notified the Respondent that he had problems at work which, if unresolved, would result in his resignation. Thereafter, on November 22, Skwara presented the Respondent with a proposed 2-year personal employment contract for the period from January 1, 1995, to January 1, 1997. When presenting this proposal, Skwara stressed to the Respondent that he needed a response by December 1. In the absence of a response, Skwara said that he needed to be ready to leave his job by January 1, 1995.

Consistent with his November 22, 1994 statements to the Respondent, Skwara informed a fellow employee on November 25 that he would resign if the

Respondent's response to his proposed employment contract was not favorable.

On November 29, Skwara unequivocally informed the Respondent that, because his November 22 proposal had not yet been accepted, he was resigning. Specifically, Skwara notified the Respondent that "I haven't heard from you, so I guess that means you're not accepting my proposal and that I resign."

Although we agree with the judge that the Respondent unlawfully discharged Skwara on November 29, 1994, we disagree with the dissent that his backpay for the unlawful discharge should not be tolled as of January 1, 1995. Thus, contrary to our colleague, we find that Skwara clearly, repeatedly, and unequivocally indicated that he would resign effective January 1, 1995, unless his employment and contract demands were met, or at least responded to within a specified period. Further, prior to the agreed-upon time for response, Skwara precipitously notified the Respondent that he was resigning. Unlike the dissent, we do not find that Skwara's use of the word "guess" in his November 29 message somehow nullified the resignation or required the Respondent to treat it as mere posturing.

We recognize that the Respondent could have rejected the resignation on November 29 on the ground that the Respondent had 2 more days in which to respond. However, the fact is that the Respondent did not do so. To the contrary, the Respondent discharged Skwara on that day. Thus, the resignation announcement still stood, albeit it was short circuited by a discharge. Because Skwara's resignation was short circuited by a discharge, he is entitled to backpay from the time of discharge to the time of the scheduled resignation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, F.H. Bevevino & Co., Inc. d/b/a Bevaco Food Service, Boothwyn, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(b)–(e).

"(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

"(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

<sup>1</sup>On March 6, 1996, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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

<sup>2</sup>The General Counsel 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup>We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

<sup>4</sup>All dates are in 1994 unless otherwise indicated.

“(d) Within 14 days after service by the Region, post at its facility in Boothwyn, Pennsylvania, copies of the attached notice marked “Appendix.”<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 1994.

“(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

2. Substitute the attached notice for that of the administrative law judge.

MEMBER BROWNING, dissenting in part.

Contrary to my colleagues, I would provide a reinstatement order to remedy the 8(a)(1) discharge the Respondent committed.

In mid-November 1994 the Respondent and employee Joseph Skwara began negotiations over renewal of Skwara’s employment contract. In commencing negotiations, Administrative Law Judge Richard H. Beddow Jr. credited testimony that Skwara stated that if no agreement were reached “he was going to be resigning—it was either December 1st or January 1st.” On November 22, 1994, Skwara indicated that he needed a response to his proposal by December 1, 1994, “because if I don’t hear by then I need to be ready to go by January 1st. I got to plan some other things, get some things in place.” On November 29, 1994, Skwara left a phone message with the Respondent stating, “I haven’t heard from you, so I guess that means you’re not accepting my proposal and that I resign.”

On November 29, 1994, after receiving the phone message, the Respondent precipitously discharged Skwara. The judge found that the discharge was in retaliation for Skwara’s protected concerted activity and violated Section 8(a)(1), but the judge did not recommend a reinstatement order, on the grounds that “the record indicates that [Skwara] tendered a resignation to be effective January 1, 1995.”

Although the judge credited testimony that Skwara, during the course of bargaining, stated an intention to resign if bargaining was not successful, I fail to see

how a finding that such statements were made is tantamount to a credibility finding that Skwara irrevocably resigned as of January 1, 1995. Rather, the judge has drawn an inference that Skwara would have resigned January 1, absent the Respondent’s unfair labor practice. Disagreeing with this inference would not require setting aside a credibility determination.

In my view, the mid-November<sup>1</sup> and November 22 statements were posturing at the beginning of bargaining. Skwara’s November 29 phone message was a continuation of bargaining—“I guess that means . . . I resign” invites a response; it does not emphatically close a door. Instead of precipitously discharging Skwara almost immediately after he left the phone message, the Respondent could have responded to the message by replying that it did not in fact accept his proposal to resign, and making a counteroffer. The Respondent’s unfair labor practice was a significant intervening act. By drawing the inference that Skwara would have resigned in the absence of that unfair labor practice, the judge has acted contrary to the well-established principle that uncertainty must be resolved against the wrongdoer. See *Bakersfield Memorial Hospital*, 305 NLRB 741, 748 (1991). I would resolve that uncertainty by making the Respondent responsible for the consequences of its illegal act, and ordering it to reinstate Skwara.<sup>2</sup>

In all other respects, I agree with my colleagues’ decision.

## 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.

<sup>1</sup> The only credibility finding the judge made concerned this conversation. The judge implicitly discredited Skwara’s testimony denying that he referred to resigning in this conversation. But, as noted above, I cannot agree that a statement of intention to resign if bargaining is not successful is the same thing as a resignation.

<sup>2</sup> My colleagues find that Skwara “clearly, repeatedly, and unequivocally” resigned. The judge did not even go this far; he found only that Skwara “tendered a resignation.” As set forth above, even this finding was based on an inference that I am not willing to make. In any event, having made their own factual finding, the majority then dismisses the Respondent’s unfair labor practice as simply a “short-circuiting” of Skwara’s resignation, by which they must mean that they believe Skwara’s employment would have ended even absent his firing. This is another inference in which I am not willing to indulge, because it assumes that Skwara would have followed through on what the judge characterized as his “plan to resign” if he was not fired, and that assumption resolves uncertainty in favor of the Respondent.

- 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 discharge or otherwise discriminate against employees because they engage in concerted activity protected by Section 7 of the Act.

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

WE WILL make Joseph J. Skwara whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Joseph J. Skwara, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

F.H. BEVEVINO & CO., INC. D/B/A  
BEVACO FOOD SERVICE

*Linda Rose Carlozzi, Esq.*, for the General Counsel.  
*David S. Fortney, Esq.* and *Eric Lemont, Esq.*, of Philadelphia, Pennsylvania, for the Respondent.

#### DECISION

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on December 13 and 14, 1995. Subsequent to an extension in the filing date briefs<sup>1</sup> were due, briefs were filed by the Respondent and the General Counsel. The proceeding was based on a charge filed December 28, 1994,<sup>2</sup> by Joseph J. Skwara, an individual. The Regional Director's complaint dated February 28, alleges that Respondent F.H. Bevevino & Co., Inc., d/b/a Bevaco Food Service violated Section 8(a)(1) of the National Labor Relation Act (the Act) by discharging Joseph Skwara because of his protected concerted activity and by creating the impression among its employees that their protected concerted activities were under surveillance by telling an employee that the Respondent had known for weeks about an employee meeting.

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

<sup>1</sup> The General Counsel's unopposed motion to correct the transcript to reflect the correct number of the case as Case 4-CA-23382 is granted.

<sup>2</sup> All following dates will be in 1994, unless otherwise indicated.

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Pennsylvania corporation, with its principal place of business in Pittston, Pennsylvania, and with a facility located in Boothwyn, Pennsylvania, is engaged in distributing food products, chemicals, and nonalcoholic beverages to businesses located both within and outside the Commonwealth of Pennsylvania and it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Pennsylvania. 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.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent employs approximately 12 sales employees at its Boothwyn location who service sales territories in both Pennsylvania and New Jersey. In the fall of 1994, Robert Schofield was Respondent's president, Robert Reusche was regional sales manager, Christopher Wanding was district manager, and Lee Eckert was sales manager. All are admittedly statutory supervisors.

Joseph Skwara began working for the Respondent in its Boothwyn office on June 17 and was responsible for developing business in his sales territory which included central New Jersey and a few accounts in Philadelphia. He had previously worked for Woodhaven Foods and had enjoyed over 8 years of successful sales work when the Woodhaven Foods division was sold to another company. He then contacted Skip White, Respondent's vice president of sales. Thereafter, Respondent's representatives (including Eckert, Reusche, and Schofield) met with approximately 25 Woodhaven Foods' employees and several people, including Barbara Elizabeth Sweeney, began working for Respondent in June. Reusche was actively involved in hiring Skwara and the employment agreement reached was for a 6-month duration. Skwara was paid a base salary of \$2500 per week for the first 4 weeks and thereafter, Skwara's compensation was based on full commission with commission based on actual sales. The sale price minus the actual cost of the product to the Company equals the gross profit on which commission is paid. Other compensation was received through incentive programs such as "dollars per drop," which paid an incentive for large deliveries and "accounts receivable," where an incentive was paid for accounts which paid their accounts quickly, thus the fewer days an account was listed as receivable, the more the incentive to the sales representative.

Skwara testified that commission reports were received weekly and that he soon noticed that these commission reports did not correspond to his estimates. He raised this issue initially with Reusche about the second week of July and was told by Reusche that he would discuss it with Eckert and take care of it.

In October, Skwara again spoke to Reusche regarding commissions during a meeting held in the Boothwyn office with the sales force to discuss the Respondent's commission structure. Reusche explained the commission structure and how they calculated gross profit. During a question-and-answer period after Reusche's presentation, questions and com-

plaints were raised about the compensation and Skwara asked about the “dollars per drop” which was being affected by internal procedures and operations. Skwara questioned why one practice registered as a drop and asked for a solution or alternative way of doing it. Skwara also raised questions about “accounts receivable” where incentives were paid on the time that accounts were paid. In response Reusche said that he would look into it and get back to the employees.

The record also shows that the Respondent held regular monthly sales meetings to give employees product knowledge, handle housekeeping, and to address problems. Meetings usually were held in the Pittston, Pennsylvania area and generally lasted a full day. Skwara generally attended the sales meetings, but was unable to attend the November meeting due to previously scheduled travel plans which Reusche was aware of and had previously approved.

Sweeney attended the November meeting with approximately 60 other employees from various locations. The evening before the sales meetings, Reusche held a branch meeting with employees from the Boothwyn office. Sweeney testified that she had learned that employees from the Syracuse branch had left the Respondent and gone to another company, that the Boothwyn employees were concerned about the reason, and that she asked Reusche if the Syracuse employees left because of the commission program. Reusche replied no, but when asked why they left, no answer was provided. Sweeney then told Reusche that if she were writing the business she was currently writing with Respondent at Woodhaven Foods, she would be making a considerable amount more money and Reusche answered that she was not working at Woodhaven Foods anymore.

Sweeney testified that the following morning a group of about eight employees had breakfast together in the hotel’s restaurant prior to the sales meeting and discussed the commission program. She said employees were confused by the reports because they were difficult to decipher and employees were not happy with the “bottom line.”

After the November meeting Skwara and Sweeney spoke on the phone and she discussed with him the issues which were discussed at the meeting including her question about the Syracuse employees as well as her comment to Reusche about her commission. Sweeney told Skwara that Reusche would put together a memo to summarize the issues. (This was done and Reusche’s memo makes reference to several issues which were of concern to employees which lead to their protected concerted activity. In particular the memo refers to the commission program not being strong enough and further states, “Need happy people on the street.” The memo also makes reference to the credit systems.)

Since management had often stressed that employees should not just bring problems to management without solutions, Sweeney and Skwara thought it would be beneficial to ask employees to meet and to develop something to address the problems. They agreed that Sweeney would call the employees in the Pennsylvania territory and Skwara would contact those in New Jersey. During the week of November 14, Skwara contacted about six employees about having an employee meeting (he spoke to personally while leaving messages for others). After Thanksgiving, Sweeney contacted five or six employees and left voice mail messages. Some of these employees called and left messages for Sweeney on the

following Monday. Skwara received some return calls and decided to find a location for the meeting. On Monday, November 28, Skwara secured a location in Mt. Laurel, New Jersey, and reserved it for meeting on Friday, December 2. Sweeney then proceeded to call employees to inform them of the meeting location and date.

During mid-November, Skwara initiated contact with Reusche to discuss his employment agreement, which was approaching the end of 6 months. When Skwara indicated that if the Company did not get a handle on some of their problems, he would not have a future with the Company, Reusche encouraged Skwara to contact President Schofield because Reusche felt that Skwara was a great sales performer and a valued employee that they wanted to keep. In fact, Skwara was writing approximately \$60,000 in business a week.

Skwara testified that he called Schofield and said he wanted to discuss his future with the Company. Reusche testified that Schofield played back Skwara’s voice mail message for him and that Skwara’s message said

. . . that he was having problems, that weren’t getting fixed, and that he was going to be resigning—it was either December 1st or January 1st and he wanted to get together with Bob and discuss it.

On November 22, Skwara met with Schofield, Eckert, and Reusche and the group then went to dinner at the Sheraton in New Jersey. Skwara gave a contract proposal to Schofield and he testified that Schofield said he would get back to him on November 28. When Skwara did not hear from Schofield when he expected, he left a voice mail message for Schofield on November 29, at approximately 6 a.m. and “voiced his disappointment” that Schofield did not get back to him.

Reusche testified that he heard Skwara’s message to Schofield when it was played for him on Schofield’s voice mail and that the message said:

Bob, hi this is Joe Skwara. It’s six something in the morning. It’s Tuesday, I haven’t heard from you, so I guess that means you’re not accepting my proposal and that I resign. In addition, I want to tell you how disappointed I am in you personally as a President and chief officer of the company, something of that nature. And not getting back to me and living up to your word. It’s a real disappointment to me.

Reusche testified that at the dinner meeting Skwara said:

I need to hear, you know, before December 1st because if I don’t hear by then I need to be ready to go by January 1st. I got to plan some other things, get some things in place.

And Bob said, okay. So then I’ll get back to you next Friday then, or if—whatever. Yes, it was next Friday, which was actually December 2nd.

Joe said that he needed to hear by Monday. Bob explained then that he was going away for the Thanksgiving holidays. We were meeting on a Tuesday evening. Bob said he was leaving on a Wednesday, going to Chicago to visit relatives. That he wouldn’t be back until Monday. That he may have a chance to look

at it on the plane. But he would not be able to get back to him by Monday.

He said when do you really, really need to know by. And Joe said December 1st. Bob said okay.

At approximately 3:30 to 4 p.m. on November 29, Skwara was paged by Office Manager Pat Cooke and an immediate arrangement was made for Reusche to meet Skwara in the parking lot of a retail liquor store in Moorestown, New Jersey, that afternoon.

Skwara testified that Reusche asked Skwara to get into his car and told him that they had "decided not to accept Skwara's proposal," they were not going to give him a buyout, and that they were letting him go. Skwara then asked why he was being fired and Reusche replied because he required "too much administrative work." Skwara then proceeded to his car and Reusche held the car door and asked for the company equipment back. Skwara handed Reusche the company equipment and then said the "meeting is still going on Friday" and Reusche replied he had known about the meeting for 2 weeks. Skwara then called Schofield and asked why he was being fired. Schofield replied that after looking at the territory and the way it was developing, they realized it was not a good fit; shocked by this, Skwara replied, "What do you mean, not a good fit, I am your second top salesman in six months." Schofield responded by saying, "Oh Well."

At approximately 4 p.m. the same day, November 29, Barbara Sweeney also was terminated by the district manager.

The employee meeting scheduled for December 2 did not take place. Reusche confirmed that Skwara made a remark about the meeting, that he was surprised by the comment and that he just gave a "kind of uh-huh reaction." Reusche confirmed that he had been told about the employee meeting by two sales representatives, Mike Wirtshafter and Dan Malton, either the Wednesday before Thanksgiving or the Friday after Thanksgiving. Reusche testified that Wirtshafter came to Reusche's office and asked if he was aware of a meeting in New Jersey that Skwara was planning. Reusche replied no and Wirtshafter said he thought Reusche should know and that it was about commissions and Skwara was getting people together.

At the dinner meeting Skwara had given the Respondent a proposal that outlined his desires concerning his employment and compensation terms. Subsequent to that dinner meeting, several members of Bevaco management discussed potential responses to Skwara's proposal. On November 28, the Monday following Thanksgiving weekend, Eckert and Reusche discussed how to respond to the proposal which called for guaranteed compensation and other benefits that Eckert described as "far above and beyond our normal compensation programs even for extremely good sales people" and "ridiculous" and clearly "excessive." Eckert and Reusche discussed the alternatives of accepting Skwara's proposal in whole, agreeing to a modified version of the proposal or rejecting the proposal and buying out Skwara's business (which would terminate any employment relationship) without reaching any conclusion.

Eckert testified that the next day after listening to the phone message from Skwara Schofield went "ballistic." Schofield discussed the matter with Eckert and Reusche and they concluded that they would resolve the matter by accept-

ing Skwara's asserted "resignation" and Reusche was instructed to handle the situation. Reusche specifically testified that:

When I called back Bob said, did you get the message. I said yes, I did, and he said, what do you think. And I said well I guess he resigned. He said, well what do you want to do. I said, I guess accept his resignation. And he said, okay, and today's the day. We'll set the date. And I said, okay.

Reusche specifically asserted that at no time in discussing how to respond to Skwara's message did he ever mention to Schofield, or anyone else, Skwara's planned employee meeting.

### III. DISCUSSION

This proceeding arose after several employees discussed together and voiced concern to management about certain terms and conditions of employment and two of them set up a meeting for employees to further discuss these concerns. At the same time, one of the employees engaged in these discussions and in setting up the meeting also independently presented management with a 2-year proposal of terms and conditions for his continued employment on and after January 1, 1995, to supersede the terms and conditions set forth in his original employment agreement (which was considered to be essentially a 6-month agreement). Then, a few days prior to the planned meeting both of the organizers were terminated.

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden presenting sufficient evidence to support an inference that the employee's decision to terminate him. Here, the record shows that the Respondent's management was well aware that Skwara, as well as Sweeney, were raising questions at meetings with management that expressed employee concerns over its compensation practices and management noted these concerns in management generated memos and it admitted that it was attempting to address these concerns. Reusche also specifically testified that he was told by two employees, of the employee meeting that Skwara was planning. Although Reusche denied that he mentioned this meeting when he was discussing how to respond Skwara call to President Schofield, Schofield in an affidavit dated February 13, 1995, said that he had received a phone call from another salesman in the Philadelphia area and had been informed of Skwara's planned meeting but not its subject matter (he then asserted that "the content of the meeting had no factor in my decision").

It is well settled, however, that a supervisor's knowledge of an employee's activities is imputed to the employer by law, see *Pinkryon's, Inc.*, 295 NLRB 538 fn. 2 (1989), cited by the General Counsel. Here, I conclude that Skwara and Sweeney engaged not only in the concerted activity of planning the meeting but also in the separate concerted activities of engaging in discussions about the employer's compensation practices with other employees and therefore I find that the Respondent was aware of and potentially motivated by at least two separate occasions of protected concerted activity by the Charging Party.

Moreover, Skwara's activities in speaking to management about how such things as commissions and cost are cal-

culated were issues not only of personal interest but were issues related to general conditions of all employees.

Although Sweeney's discharge is not an issue in this proceeding (a settlement was reached in Case 4-CA-23416 and the matter was severed from this formerly consolidated case), the fact that she was a co-activist in concerted activity may be considered as well as the fact that she also was terminated on the same day that Skwara was, despite the further fact that she was not involved in any other behavior similar to that attributed to Skwara by the Respondent in its attempt to justify his termination. Otherwise, I find below that the Respondent's rationalizations concerning Skwara's demands for a new personnel agreement and his alleged resignation are pretextual. I conclude that all these factors and especially the timing of both of the terminations' within a few days after the time the Respondent learned of the employees' concertedly planned meetings and a few days before the meeting was to occur, all show that the General Counsel clearly has met the threshold requirements for showing protected concerted activity and motivation for the Respondent's sudden decision to terminate one of its top sales representatives only a few days after it had entered into negotiations with him about a new employment agreement: See *Circle K Corp.*, 305 NLRB 932 (1991), enf. 989 F.2d 498 (1993); *Monongahela Power Co.*, 314 NLRB 65 (1995); and *Compuware Corp.*, 320 NLRB 101 (1995), all following the broad definition accepted by the Board in *Meyers Industries*, 281 NLRB 882 (1986).

Accordingly, the testimony will be discussed and the record evaluated, 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 the Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

The Respondent's principal defense is based on its contention that Skwara resigned his employment with the Respondent in his phone call to President Schofield on Tuesday, November 29.

Employee Patricia Cooke credibly testified that on Friday, November 25, Skwara told her about his meeting with Schofield and said he expected an answer by Wednesday and that if the answer was not good or in his favor he would be leaving but did not say when (Cooke was former Woodhaven employee who had moved to the Respondent in June, on Skwara's recommendation).

It appears likely that Skwara was confused or forgot about when Schofield would have a response to his proposal and he precipitously called before the Company had reached a decision on what course of action to take and that in that call he may have implicitly reiterated his previously announced plan to resign.

Otherwise, however, a review of the Respondent's personal records and its regularly used form entitled "Notice of Personnel Change" shows an entry of "voluntary resignation" for one employee yet on the forms for both Skwara and Sweeney shows "termination."

Here, my review of the overall record lead me to conclude that the Respondent, acting through both Reusche (who recommended his departure) and Schofield (who endorsed that recommendation), made their own precipitous reaction to Skwara's phone call, one based not on Skwara's announced plan to resign but based on their annoyance with his engage-

ment in concerted activities which cumulated in their apparently independently acquired awareness that he (and Sweeney) were arranging a meeting with other employees.

Eckert's testimony that he was concerned over the inordinate amount of time Reusche was spending with Skwara is testimony that is consistent with Skwara's testimony that Reusche told him he was being fired because he required "too much administrative work." This testimony also supports the inference that this "administrative work" was dealing with Skwara's protected concerted activity in voicing concerns about the Employer's method of implementing it for all of the sales representatives.

Schofield (in his affidavit)<sup>3</sup> also said:

Since Mr. Skwara had previously indicated that should I not accept his contract, he would quit in January, I decided that his negativism did not belong in the Company and made the decision to accept his resignation effective immediately. This information was further communicated to Mr. Reusche and then to Mr. Skwara through Mr. Reusche.

Here, I find that "negativism" is a mere euphemism for Skwara's protected activity.

When Skwara asked Schofield if he was being fired, Schofield did not mention anything about a resignation but lamely offered a pretextual platitude about the development of his sales territory "not being a good fit."

Reusche also failed to mention his purported resignation to Skwara and, as noted, his company records were endorsed as a termination rather than a resignation.

There is no indication that Skwara volunteered or agreed to resign immediately or at a date earlier than January 1. The terms of Skwara's proposed new agreement specifically bear the dates of January 1, 1995, through January 1, 1997, and otherwise the preponderance of the evidence shows that the Respondent (including both President Schofield and Regional Sales Manager Reusche), shows that they considered Skwara's expression of a plan to resign (if they did not reach a new agreement) to be effective January 1, 1995.

As pointed out by the Court in *Transportation Management Corp.*, supra:

[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity conduct.

Here, I am not persuaded that the Respondent has met its burden and I conclude that the Respondent has not shown that it would have prematurely "accepted" a proposal resignation by a top sales representative were it not for their motivation triggered by his involvement in several protected concerted activities. Under these circumstances, I find that the Respondent has not overcome the strong prima facie showing by the General Counsel and I conclude that the General Counsel has met its overall burden of proof. Accordingly, I further conclude that Respondent's termination of this employee 32 days prior to the date of his proffered offer

<sup>3</sup> Schofield was not available to testify, however, his affidavit was accepted into evidence.

to resign is shown to have been in violation of Section 8(a)(1) of the Act, as alleged. Otherwise, however, I find that Reusche's bare comment after Skwara was terminated is insufficient to show a separate violation of the Act and, accordingly, this allegation is dismissed.

#### CONCLUSIONS OF LAW

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

2. By discharging Joseph J. Skwara on November 29, 1994, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. The Respondent is not shown to have otherwise violated the Act.

#### THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it will not be recommended that the Respondent be ordered to reinstate the Charging Party because the record indicates that he tendered a resignation to be effective January 1, 1995. However, because the Respondent illegally terminated him prior to that date it is recommended that the Respondent be ordered to make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discharge to January 1, 1995, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),<sup>4</sup> and that the Respondent remove from its files any reference to the termination and notify him in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action regarding his past employment history.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

<sup>4</sup>Under *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 January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

#### ORDER

The Respondent, F.H. Bevevino & Co., Inc., d/b/a Bevaco Food Service, Boothwyn, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating any employee for engaging in concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make Joseph J. Skwara whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section of the decision.

(b) Remove from its files any reference to his termination on November 29, 1994, and notify him in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action regarding his employment history.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Boothwyn, Pennsylvania facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized 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.

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

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup>If 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."