

Winter Garden, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 1196 and Sidney Key, Jr. Cases 26-CA-6444 and 26-CA-6457

March 13, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On November 15, 1977, Administrative Law Judge Herzel H. E. Plaine issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,¹ findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Winter Garden, Inc., Rossville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

It is FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.

¹ Respondent has excepted to the Administrative Law Judge's failure to take judicial notice of the record in the prior representation proceeding. Contrary to Respondent, we conclude that, while the Administrative Law Judge may take notice of facts in the representation case, the findings therein are by no means to be construed as *res judicata* or otherwise binding upon him in an unfair labor practice proceeding, which involves substantively different issues and a different standard of proof. We therefore find no merit to this exception. See *Stuttgart Shoe Corporation*, 149 NLRB 663, 664 (1964).

Respondent also argues that the Administrative Law Judge only considered those facts from the prior case which support his findings of unlawful conduct. It is clear from the record, however, that the Administrative Law Judge relied solely on the testimony adduced at the instant hearing in making his findings herein.

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

³ We note that the complaint alleges, *inter alia*, that Respondent further violated Sec. 8(a)(1) of the Act when Warehouse Manager Charles Franks informed employee Collis Arbuckle that the Company would go to court

before telling Arbuckle the reason for his discharge, and again when Assistant Warehouse Manager Eddie Watkins told the same employee that he knew the real reason for the employee's discharge. Although all the facts surrounding such incidents have been fully litigated at the hearing and were set forth on the record, the Administrative Law Judge did not render any conclusions of law as to the violations alleged. Respondent objects to the failure of the Administrative Law Judge to pass on these allegations. While the surrounding facts provide support for the Administrative Law Judge's finding that Respondent discriminatorily discharged Collis Arbuckle, we find that the statements themselves are ambiguous in meaning and therefore do not provide a basis for finding independent violations of Sec. 8(a)(1). Accordingly, we shall dismiss these allegations of the complaint as lacking in merit.

DECISION

STATEMENT OF THE CASE

HERZEL H. E. PLAINE, Administrative Law Judge: The cases were heard in Memphis, Tennessee, on February 28 and March 1 and 2, 1977. The General Counsel and Respondent have filed briefs.

The Respondent, Winter Garden, Inc., a frozen food processor and distributor, is charged with attempting to smash the union organization attempts of its freezer storage employees at its Rossville, Tennessee, plant, after the Charging Party, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Local No. 1196, filed a petition for election on their behalf on October 4, 1976, by allegedly proposing relinquishment of the petition in favor of a plant committee to achieve better working conditions, in violation of Section 8(a)(1) of the National Labor Relations Act; and, after the proposal was refused, by laying off and then discharging 10 employees in October 1976, and discharging 2 more employees in December 1976, allegedly for their union activity and sympathy, in violation of Section 8(a)(3) and (1) of the Act.¹

Respondent denied any wrongdoing, and claimed that the layoff of the 10 employees (Key and others) on October 19, 1976, was actually a discharge because the taking of an inventory, for which they were allegedly hired, was dropped; and, that the discharge of the two employees (Arbuckle and Jackson) on December 3 and 6, 1976, was the result of their refusing promotion to supervisory jobs.

Upon the entire record of the cases,² including my observation of the witnesses and consideration of the briefs, I make the following:

¹ The charge in Case 26-CA-6444 was filed by the Union on December 3, 1976, and an amended charge was filed on December 8, 1976. The charge in Case 26-CA-6457 was filed by Charging Party Key on December 16, 1976. The consolidated complaint was filed on January 5, 1977, and certain amendments were allowed at the hearing (that began February 28 and ended March 2, 1977).

However, after the close of the hearing, on motion of the General Counsel, I ordered the record reopened for the purpose of amending the consolidated complaint to include Case 26-CA-6537, based on what had been a pending charge at the time of hearing, filed February 18, 1977, by discharged employee Bobby O'Neal Jones, allegedly relating to the same events of the cases heard and deemed by an investigation completed in March to have merit. As a result, a hearing of the third case was set and opened April 25, 1977, but was settled without the taking of evidence, and severed from the two cases now concluded by this Decision.

² Errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation doing business in the State of Tennessee, with an office and place of business in Rossville, Tennessee, where it is engaged in frozen food processing, freezer storage, and distribution of frozen food.

In the year prior to issuance of the consolidated complaint, Respondent purchased and received at Rossville goods valued in excess of \$50,000 from points outside Tennessee, and sold and shipped from Rossville goods valued in excess of \$50,000 to points outside Tennessee.

As the parties admit, Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

As the parties also admit, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Respondent's Business Operations

Respondent is in the business of frozen food processing and cold storage of frozen foods at locations in a number of states, and in the distribution throughout the United States of frozen food products of its own and of others.

According to Rossville, Tennessee, Warehouse Manager Charles Franks, Respondent has four plants. The plant at Rossville was the locale of the incidents in the matter herein. The main plant and home office, from which directions for supervision at Rossville emanated, is in Bells, Tennessee, about 70 miles from Rossville.

The home office is headquarters for Respondent's president, J. I. Tankersley, and its vice president for operations (or distribution), Jerry Wells.

The plant at Rossville is comprised of several departments, including a prepared foods department, where frozen foods are processed, a vegetable processing department, which was inactive at the time of the hearing, and a cold storage warehouse, the place of direct concern in this case. The cold storage warehouse stored frozen foods processed at Rossville, and frozen foods brought in from elsewhere, and it served as one of Respondent's distribution points.

In overall charge of the Rossville cold storage warehouse was Warehouse Manager Charles Franks, who was directly answerable to operations Vice President Jerry Wells at Bells, Tennessee. The supervisory assistants to Franks were Assistant Warehouse Manager Eddie Watkins, who was in charge of the shipping dock; Freezer Supervisors Eddie Walker and William Hunter; and Dock Supervisor Winbon Mason, who was in charge of the receiving dock. All of the foregoing persons were admitted supervisors within the meaning of the Act.

The cold storage warehouse had approximately 30 to 35 employees in the last several months of 1976. They were forklift operators, stackers, checkers, and other laborers engaged in the storing of the cartons and other containers of frozen foods in the cold storage freezers, and in the movement of such goods to and from railcars and trucks on the warehouse shipping and receiving docks.

B. The Union Organizing

Whereas the production and maintenance employees of the food processing departments at the Rossville plant were organized, and had been represented by a local of the Amalgamated Meat Cutters union since 1970, the unit of cold storage warehouse employees was not organized or represented by a union during 1976 or prior thereto.

Prior to September 1974, Respondent's operation of the cold storage warehouse (as distinct from the food processing departments) was conducted for Respondent by a management contractor, described as a field warehouse company. This came about by arrangement with bank lenders to whom the warehouse inventory was pledged as collateral for their loans to Respondent, and who wanted an outside manager to assure and certify the existence of the inventory. The inventory and warehouse, of course, remained the property of Respondent, and the operation of the rest of the plant was directed by Respondent.

The management contractor or field warehouse company from 1970 until September 1974 was Laurence (or Lawrence) Systems. Laurence Systems did the hiring as well as the managing of the employees. When the arrangement was no longer needed and ended in September 1974, Respondent assumed direct operation of its cold storage warehouse and retained on the payroll approximately 11 employees and some of the supervisory employees. Charles Franks became an employee of Respondent in 1974 and thereafter, in February 1975, took the position and duties of warehouse manager.

As the warehouse business and employment expanded, Franks ran into problems with the men, apparently from his manner of supervision. According to one of the senior employees, Collis Arbuckle, who began employment in 1971, and one of the less senior employees, Sidney Key, who began in mid-1976, Franks bawled and cussed out employees, would bide no explanations, coupled threats of discharge with criticism of their private lives (such as purchase of new cars by some), and in general talked domineeringly rather than man-to-man, as Key put it. Discontent with Franks' supervision came to a head in September 1976 following two discharges (for what some of the employees thought were not job-related reasons) and the employees, as a whole, asked for a meeting with Franks.

Franks held a meeting at 8:30 a.m., on September 30, 1976, with most of the warehouse employees in attendance, and heard their complaints, largely, he testified, about his abusive language. His response was, if they did not like the way he was running things, they could hit the clock; whereupon approximately 25 employees, almost the whole force, walked out and met at the home of one of the employees.

According to Key, at their meeting, the employees asked Arbuckle to call Vice President Jerry Wells in Bells, Tennessee. Arbuckle did so and, as he testified, told Wells the cold storage warehouse employees had walked out

because Franks would not talk to them concerning their grievances.³ Wells apparently had already been alerted by Franks to the fact of the walkout and told Arbuckle if he would get the men back to work there would be no disciplinary action and he, Wells, would see that Franks talked to the men or Wells would intervene.

Arbuckle reported his conversation with Wells to his fellow employees, who decided, before they agreed to go back, that they wanted union representation. Arbuckle was delegated again to be spokesman and called Union Representative Chism (or Chisholm) of Teamsters Local 1196. According to Key, Arbuckle reported that Chism suggested that the Union could help the employees if they were back at work, and had agreed to meet with them the next night. The employees then agreed to end the walkout and went back to work about 4 hours after the walkout began, and resumed work that afternoon, according to Franks.

Franks testified that Wells had informed him of Wells' phone conversation with Arbuckle, and had told him that the employees would probably come back, and that Franks should talk to them individually. Franks said he did talk to about seven or eight of the employees individually when the group returned to work and promised he would try to refrain from cursing them. Arbuckle was one of the employees to whom Franks spoke. Franks asked Arbuckle why he had telephoned Wells (though Arbuckle had not identified himself to Wells). Arbuckle admitted that he made the call, and told Franks that the men had begun to feel that his harsh talk and attitude was white against black, and that they resented it.

On the night of October 1, 1976, according to Arbuckle, Key, and Crawford, a large group of the employees met at De Witt's grocery store with Union Representative Chism, signed union authorization cards, and asked that a petition for an election be filed on their behalf. (Some employees, like Milton Jackson, who did not get to the first meeting, were at a second meeting soon thereafter, and also signed union authorization cards.) Two or three days later, Chism reported to Arbuckle that a petition had been filed, which was the petition of October 4, 1976, in Case 26-RC-5377.⁴

C. Respondent's Reaction, 8(a)(1) Violations

Some days after the filing of the union petition of October 4, 1976, according to Franks, he received by certified mail a copy of the union petition. Respondent's president, Tankersley, Wells, and troubleshooter Carmichael came to the plant that day and discussed the union matter with Franks.

Arbuckle was aware of their presence in the plant that day, and so testified. At the end of his working day, about 5 p.m., said Arbuckle, Freezer Supervisor Eddie Walker, who had not been working that day, came into the plant looking for Arbuckle as he was going off work. Walker said he had

an offer for Arbuckle and suggested they talk about it at De Witt's grocery.

At De Witt's grocery, Freezer Supervisor Walker told Arbuckle that Winter Garden had offered, if the employees would drop the petition to form a union, to allow Arbuckle to form a committee, comprising four employees and a Winter Garden foreman, in order to make things at the warehouse better. Walker said it was Winter Garden's view that, since the employees had been given a chance to come back to work after the walkout, the employees should show good faith and give Winter Garden a chance to make things better.

Arbuckle replied that he was not the majority of the employees, and he would put the offer to them, but that he was not in favor of the proposal, because there was no guarantee that the Company would do what it said and no guarantee that he would not be fired after the petition was dropped.

Walker answered simply that he was telling Arbuckle what Vice President Wells had told Walker to tell Arbuckle. The conversation ended.

Neither Walker nor Wells testified, and Arbuckle's testimony was not contradicted.⁵

Respondent's offer of a plant committee to make working conditions better, if the employees would drop the petition for union representation, was motivated by a desire to frustrate the employee organizational effort by showing them that the Union was not needed to effectuate changes in working conditions (*House of Mosaics, Inc.*, 215 NLRB 704 (1974)), and violated Section 8(a)(1) of the Act. The 8(a)(1) violation was an implied promise of benefits, a promise that the problems of the employees would be resolved without the need for the Union's intervention. *Eastern Industries*, 217 NLRB 712, 715 (1975).

About the same time or shortly thereafter in October, Assistant Warehouse Manager Eddie Watkins interrogated the senior employee among the warehouse employees, Milton Jackson, on the shipping dock concerning his sympathies for the Union. Jackson testified that he had previously signed a union authorization card and that he and the other employees had been cautioned by the union representative against giving truthful answers to employer inquiries concerning employee support of the Union. Watkins asked Jackson if he would vote for the Union and Jackson replied he would not. Watkins did not testify and Jackson's testimony was uncontradicted.

The selection of Jackson for questioning concerning union support was no more happenstance than the selection of Arbuckle as the means for communicating Respondent's offer of a plant committee in place of the Union. The two employees were the most senior of the cold storage warehouse employees, Jackson first and Arbuckle second. Both had capacity for leadership and the respect of their fellow employees, as Respondent recognized in its offers of supervisory jobs to them preceding their discharges (see

certification of the Union as bargaining representative of the cold storage warehouse employees on February 7, 1977.

⁵ Franks testified that he talked to Walker about the Union but never told him to offer the employees a plant committee to supplant the Union. However no one suggested that Franks was responsible for the offer. The testimony was that the offer came from Vice President Wells, who did not deny it.

³ Arbuckle said that for fear of losing his job he declined to give Vice President Wells his name, but Wells learned of his identity and later informed Franks, as Franks admitted. Wells did not testify.

⁴ While not directly relevant to the facts of the cases at bar, it may be noted that Case 26-RC-5377 came on for hearing on December 7, 8, and 9, 1976, culminating in a Decision and Direction of Election dated January 5, 1977, an election on January 28, 1977, where the Union won, and Board

sec. E, *infra*). Interrogating a key employee during an organizational drive makes the company's antiunion message easier to read than interrogating a few employees at random, *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, 805, fn. 6 (C.A. 5, 1965), cert. denied 382 U.S. 926, citing *N.L.R.B. v. Syracuse Color Press*, 209 F.2d 596, 597 (C.A. 2, 1954), cert. denied 347 U.S. 966. And even a single question put to a single employee may be a violation of Section 8(a)(1) of the Act, if there is a background of union hostility (*ibid.*, citing *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5, 1962)). That background was evident here in Respondent's contemporaneous but unsuccessful attempt to get rid of the organizing for a union by substitution of a plant committee, and its discriminatory discharges of 12 employees (see secs. D and E, *infra*).

Moreover, the questioning of employee Jackson on how he would vote was coercive. It placed him in the position of having to declare his choice to his employer during the union campaign, in advance of an election. The assistant warehouse manager gave Jackson no explanation of the purpose of the interrogation, and no assurances against reprisal, of which the employee was fearful as shown by his untruthful answer to the question.⁶ *Camco, supra*, 340 F.2d at 807.

Respondent's coercive interrogation of employee Jackson concerning his support of the Union was a violation of Section 8(a)(1) of the Act.

D. Discriminatory Layoff and Discharge of 10 Employees

Two weeks after the union petition for an election was filed, Respondent laid off 10 of its storage warehouse employees on October 19, 1976, without any advance notice. The employees were: Sidney Key, William Crawford, Steve Lensey, Woodrow Spencer, Sammy Rosser, Roy Williams, Moses Stokes, James L. (David) Morton, Amos Randolph, and Ralph Kimery. All but Ralph Kimery had taken part in the September 30 walkout, according to Franks.

The employees were told, as Franks conceded, that they were laid off for lack of work, and it was stipulated at the hearing that the notices handed to each on October 19 so stated. But it was also stipulated at the hearing that there was not a lack of work, and that the 10 employees were not separated from their jobs because of lack of work. Indeed, a stipulated exhibit, General Counsel's Exhibit 11, provided by Respondent, showed a constant increase in millions of pounds of frozen foods shipped from Rossville each month from June 1976 through January 1977, from 6 million pounds in June 1976 to over 9 million pounds in January 1977. Inventory in the period March 1976 through January 1977, with monthly fluctuations, ranged from a low of over 22 million pounds to a high of over 31 million pounds.

To handle this increase in business and flow of merchandise Respondent increased the warehouse work force. Following the October 19, 1976, layoff through February 17, 1977, according to Franks, Respondent hired 37 cold

storage warehouse employees including replacements for 14 who dropped out, or a net increase of 23 employees. None of the new hires included recall or rehire of the 10 laid-off employees.

Respondent presented Franks at the hearing as its only witness to defend the layoff action of October 19, 1976, though the admission that Vice President Wells had decided who was to be laid off was wrung from Franks after contradictory testimony and persistent cross-examination. The defense was that the layoffs were actually discharges, because the 10 employees had been specially hired for the taking of a year-end inventory and since the inventory was canceled just prior to October 19, there was no further need for the services of the 10 employees.

The defense was obviously decided on after the layoffs and in the interval before the hearing, since Respondent's records of hiring and termination between September 1, 1974, and February 17, 1977, prepared in response to the Board's investigatory request, show that the 10 employees were terminated on October 19 because the "project ceased." The notices of termination handed out on October 19 (as admitted by Franks and stipulated by Respondent) told the employees they were laid off for lack of work. The box in each notice for indicating discharge and the reason for discharge was left blank.

The proof established that the employees were not specially hired for taking inventory or discharged because an inventory was not taken.

Franks initially testified that he told Walker, about August 7, 1976, to hire 12 extra employees specifically for taking inventory, and that the employees laid off were 10 employees specifically so hired, when it was decided not to take the inventory. Franks changed his testimony to say he started building the force for inventory July 1, and when it was pointed out that 2 of the 10 laid-off employees, Woodrow Spencer and Sidney Key, were hired earlier, in May and June, respectively, Franks admitted that none of the laid-off employees had been told he was hired for taking inventory and that no record was kept of who was hired for taking inventory. At that point, Franks also indicated that there was nothing different or special in training for inventory, which comprised straightening the warehouse, tagging the cartons or other containers, and taking a physical count, and that any employee and all employees could participate. In this connection Franks testified that all 10 laid-off employees had done regular warehouse work and worked overtime as did all other employees. Finally, Franks admitted that the discontinued inventory purpose for which the 10 laid-off employees were allegedly hired had nothing to do with who was laid off, that he simply reduced the work force when he learned that Respondent would not take the inventory.

⁶ Quite apart from the effect of the union representative's advice to employees on answering the Employer's questions, Jackson had a fear of reprisal for engaging in concerted or union activities because he had a

family to support, which fear he expressed to his fellow employees and which they apparently accepted when he did not participate in the September 30 walkout, but joined them in the union organizing.

As already noted, the employees laid off were not told that the layoff was because of a decision not to take an inventory,⁷ but rather that it was on account of a lack of work; and Franks testified that they were further told the layoff was by seniority (see also like testimony by Key). However, Franks conceded that seniority was not followed in the retention of three employees—James Jackson, Willie Watkins, and Frank Stiggers, Jr.—two of whom, Jackson and Stiggers, did not take part in the September 30 walkout. Rather, said Franks, seniority was only a factor along with qualifications, meaning, he said, that stability and attendance were the main qualities needed. The employees were not told of their lack of these qualities or lack of qualification when laid off, said Franks, it had to do with not rehiring them.

This latter explanation also fell apart under scrutiny. Franks claimed he discharged the 10 employees on October 19. Key testified that Franks had told him on October 19 that he was laid off (with no mention of discharge), that he was a good man who would be called back at the first opening, and to keep checking with Franks and bring along laid-off William Crawford. Both Key and Crawford testified to checking with Franks several times thereafter without success. Franks admitted, after this testimony, that the testimony of Key and Crawford was substantially correct, that Walker had advised him that both Key and Crawford had done well as employees, and that Franks wanted them back, even though in Crawford's case there had been a 3-day suspension for an unexcused absence. Indeed, Crawford had been laid off earlier on July 23, 1976, and was recalled on August 16, 2 months prior to the layoff of October 19.

When questioned as to why preference in retention was given to Frank Stiggers, who had not taken part in the walkout and who was junior to three of the laid-off employees (Key, Crawford, and Woodrow Spencer), Franks answered, because he had no problems with Stiggers' attendance. However, Franks was shown Stiggers' personnel file which Franks admitted revealed (prior to Stiggers' reemployment on July 19, 1976) a record of chronic lateness, and a note in the file, dated July 20, 1976, to keep an eye on Stiggers for a serious problem of chronic tardiness not stopped by 3-day suspensions.

On the other hand, Franks admitted there was no problem, on the job or of attendance, with Key, who was senior to Stiggers and was laid off; nor did Franks check, as he admitted, any records of Spencer to determine if he had a problem or compare him with any other employee, though, said Franks. Spencer was a qualified worker with seniority over retained employees including Stiggers, as was Crawford, whom Franks conceded was qualified and whom, with Keys, he ostensibly encouraged to inquire about returning to work at least for a period following the layoff.

Coming down to the ultimate reason given at the hearing, Franks stated that he did not think any of the 10 laid-off employees were dependable or stable. He admitted he would not know this without advice of the immediate supervisors of the men and claimed, at first, that he

discussed who would be the layoffs with supervisors. However, on being taken through examination of what the problems were with specific laid-off employees, Franks admitted that he had not checked with the employees' supervisors. For example, regarding laid-off Samuel Rosser, Franks agreed there was no absentee problem with Rosser, that he had not discussed Rosser with his immediate supervisor before layoff, and that there were others among the layoffs whom he had not discussed with their supervisors, but he could not remember who they were. Additionally, said Franks, his decision to lay off Rosser was not based on personal observation of Rosser by Franks or any specific things, just a personal belief that Rosser would not be dependable for the job.

Franks testified that Wells told him to use his judgment as to whom he should lay off. However, Franks further testified that on the day of the layoff, October 19, he went to the headquarters plant at Bells, Tennessee, and discussed with Vice President Wells each one of the employees who were to be laid off that day. To this discussion Franks brought no records of any employees, and their work records were not discussed with Wells, said Franks. Finally, said Franks, when he decided not to recall any of the employees he did not check their records.

The effect of the layoff on the remaining staff of the employees was immediate. With the continued increase in business, overtime increased (testimony of Arbuckle, Jackson, and Franks) and though the night shift had to be temporarily discontinued for lack of manpower, it was started up again in November, according to Franks. In the increased hiring that followed (discussed above) none of the laid-off employees were recalled and for all practical purposes they became discharged employees.

Conclusion

Clearly, Respondent has been unable to explain the October 19, 1976, layoff of the 10 warehouse employees and its failure and refusal to recall them when it started new hirings shortly thereafter.

The reason Respondent gave to the employees on October 19 was lack of work, and by Respondent's own admission this was false. Respondent needed more rather than fewer employees to meet its increasing business needs and had hired more, meantime ignoring the 10 laid-off employees and in effect discharging them. The accompanying representation to the employees that the layoff was by seniority was proven not true, coupled with evidence of favoring junior employees, who did not take part in the walkout of September 30.

The reason assigned immediately before and at the hearing was that the 10 employees were hired specifically to take a warehouse inventory, and were discharged rather than laid off on October 19, because Respondent canceled taking the inventory. This reason was an afterthought that also was false. Largely on Respondent's own admissions at the hearing, it was established that the 10 employees were not specially hired for taking inventory, that no record of hiring for that purpose was kept, that the decision to skip

⁷ While the decision to omit the inventory was allegedly made October 14, 1976, the warehouse employees were never notified of the decision.

though they had been notified in writing in September that inventory would commence November 1, 1976 (testimony of employee Arbuckle).

taking the inventory was not related to the selection for layoff of those among the total employees chosen for the layoff, and that the termination of October 19 was indeed a layoff when it occurred with a promise of recall held out to some of the employees.

The final reason offered by Respondent at the hearing, that the 10 employees lacked qualifications to do the warehouse work, proved equally false. Respondent acknowledged that there were no problems in the performance of work by the 10 employees, in fact some were very good workers; rather the claimed problem was attendance at work and dependability. This claim proved to be without substance, and was asserted without reference to the written records kept on each employee, or consultation before layoff with the immediate supervisors of the employees.

It was established that the final decision on who should be laid off was made by Respondent's vice president for operations, Wells, who was responsible for the unaccepted offer to the employees of a plant committee to cure their grievances if they would forego organizing for the Union. In his decision he had only the advice of the warehouse manager, Franks, who was well informed on who took part in the employees' walkout of September 30 but not on the individual capabilities and attendance histories of the employees.

In the light of Respondent's union animus, Respondent's explanations for the layoffs and resulting discharges that have failed to stand scrutiny, *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5, 1962), and Respondent's shifting explanations for the layoffs and discharges, *N.L.R.B. v. Georgia Rug Mill*, 308 F.2d 89, 91 (C.A. 5, 1962), strengthen the inference, and the conclusion I reach, that Respondent's true reason for the layoffs and resulting discharges of the 10 employees, as the union organizing campaign began to peak, was Respondent's purpose to decimate the ranks of the supporters of the Union and to discourage further employee support for the Union. The layoff of the 10 employees on October 19, 1976, and the resulting discharges, was a violation of Section 8(a)(3) and (1) of the Act.⁸

E. Discriminatory Discharges of Employees Arbuckle and Jackson

Respondent took its next step in an attempt to blunt the unionizing movement among the warehouse employees by removing the employee leadership.

The two most senior employees in the unit were, first, Jackson, who began employment with Respondent in 1970, under the management contractor, as a forklift operator and was promoted to checker on the front dock (his job at the time of discharge); and, second, Arbuckle, who also

⁸ The fact that Respondent did not lay off or discharge other participants in the walkout, as Respondent urges in its defense, does not disprove Respondent's discriminatory motive, *Nachman Corp. v. N.L.R.B.*, 337 F.2d 421, 424 (C.A. 7, 1964), nor absolve Respondent, *Rust Engineering Co. v. N.L.R.B.*, 445 F.2d 172, 174 (C.A. 6, 1971). The concern is with the *in terrorem* effect, on other employees, of the discriminatory layoff and discharge of any one of them. *Id.* at 174.

⁹ It was explained to Arbuckle that, with business expanding, Supervisor Windon Mason, then in charge of the receiving dock, would move to take charge of the shipping dock, and Assistant Warehouse Manager Eddie

began his employment with Respondent under the management contractor in 1971, and who was a forklift operator throughout his employment, working in the freezer or cold storage area. Arbuckle took the leadership in the walkout of September 30, 1976, and the ensuing organizing for the Union, of which fact Respondent was aware.

On December 2, 1976, Franks offered Arbuckle a promotion to a supervisory job, which would put him in charge of the receiving dock.⁹ Franks told Arbuckle he was qualified and it was time he should move up. Franks testified that where he had two men equally qualified for a supervisor's job he used seniority as the deciding factor. He knew, he said, that Jackson as a checker on the dock was a good employee and qualified, and that Arbuckle was a good employee and qualified, and using seniority he offered the job to Arbuckle, the junior of the two! Respondent's records show that employee Jackson had 20 months' seniority over Arbuckle, but, said Franks, he did not go by the records. He testified that Wells told him to offer the supervisory job to Arbuckle and told him the salary to offer. Wells also told him, said Franks, if Arbuckle did not accept the promotion, there was no job for him, that this was company policy. Franks admitted this was the first time he had heard of such a policy and that the employees did not know of it.

Arbuckle testified that when Franks offered him the supervisor's job he told him the pay was \$175 per week (Arbuckle was earning \$3.45 per hour) plus benefits, in addition to an employee's benefits, and asked for his decision. Arbuckle answered he needed time—a week—to think about it. In Arbuckle's presence, Franks immediately called Wells at Bells, Tennessee, who said, for relay to Arbuckle, that his decision was needed the next day. According to Arbuckle, Franks told him if he turned the promotion down it would not be offered to him again.¹⁰

The next day, December 3, Franks asked Arbuckle for his decision. Arbuckle answered that he did not want to make the big step then, that he was under the impression that he was next in line for the checker's job on the dock. Franks responded, as he admitted, that there was no other job for Arbuckle if he did not accept the supervisor's job, and he could consider himself fired.

Franks testified that he discharged Arbuckle because he refused the promotion to supervisor, but conceded that he did not tell Arbuckle that it was company policy to discharge an employee who refused a promotion, and further conceded he had never seen such a policy written down anywhere, or had even heard of it until his conversation with Wells about offering the job to Arbuckle. In explaining that portion of his conversation with Wells, Franks said Wells told him there was a company policy not to retain an employee trained for a supervisory job who

Watkins, then in charge of the shipping dock, would move to take charge of the increasing night shift.

¹⁰ Franks claimed he told Arbuckle that there would be no other job for him if he did not accept the supervisory job. Arbuckle denied this was said when the offer was made on December 2. In view of Frank's unreliability as a witness, I am inclined not to believe that Franks told Arbuckle in advance that he would be fired if he declined the promotion. However, I note in passing that even if Franks had told Arbuckle in advance that he would be fired if he refused the promotion, the fact would not make the total conduct, including the subsequent firing, any less an unfair labor practice.

declined the job after training, but Franks further explained that none of the warehouse employees, including Arbuckle, were or are given training for supervisory jobs, and that Arbuckle was never told he was being trained for a supervisory job.

When Arbuckle asked for his termination papers in the discussion with Franks on December 3, Franks said he would have to telephone Wells at Bells to get them. Franks testified he told this to Arbuckle because Wells wanted to know Arbuckle's decision, and while separation notices for Rossville plant employees are usually prepared at Rossville, in this case everything he had done regarding the discharge of Arbuckle was at the direction of Wells and, having no personal knowledge of the company policy that Wells had talked about, he felt Wells would want to handle it. Wells did want to handle it, and prepared the separation notice, and sent it down to Rossville that afternoon for signing by the local personnel officer. The termination notice simply had a check mark in the "discharge" box but left blank the space for explanation.

When Franks handed the discharge paper to Arbuckle that same afternoon, Arbuckle protested that the reason for the discharge was not stated. According to Arbuckle, Franks replied that he would go to court before he would tell Arbuckle why he was fired.¹¹ When Arbuckle answered that he would go to the Labor Board, Franks replied there was nothing more he could tell Arbuckle because his own job was on the line.

As Arbuckle left Franks' office he talked with Watkins, and told Watkins he had been fired for refusing to take a foreman's job. Watkins replied he had never heard of anything like that and probably knew the real reason but would not elaborate on it then. (Watkins did not testify.)

Franks testified that when Arbuckle refused the promotion to the supervisory job he told Arbuckle there was no other job for him. Arbuckle had been a forklift operator throughout his whole employment in Respondent's cold storage warehouse. On the day he was fired, December 3, 1976, Respondent hired forklift operator Thomas Graves. (Franks first said he did not remember that, but later said he hired Graves to do forklift work on the dock and not in the freezer.) Beginning on December 5, Respondent advertised in Tennessee and Mississippi newspapers for experienced forklift operators preferably with cold storage experience. On December 6, Respondent hired two more forklift operators. Between December 8 and 22, Respondent hired an additional 12 forklift operators. And in early January 1977, Respondent hired five more forklift operators. None of these jobs was offered to Arbuckle.

On the day he fired Arbuckle, Friday, December 3, 1976, Franks then offered the job of supervising the receiving dock to Jackson at the salary and benefits offered Arbuckle (Jackson also earned \$3.45 per hour). Jackson had become part of the group who organized for the Union after

missing the first meeting. Jackson said he would let Franks know on Monday.

On Monday, December 6, Franks asked Jackson for his answer, and Jackson said he would not take the job. Franks said he would talk to him later. Later in the day Franks talked again with Jackson, told him he had made a mistake in not accepting the supervisory job, that Respondent had no further use for him, and that he was fired.¹² Jackson was handed a separation notice dated December 6, 1976, that had checked off the space entitled "discharged" but left the reason for explanation blank.

Franks testified that in discussion with his warehouse supervisors it was felt that the next most senior man, J. T. Morton (third, after Jackson and Arbuckle), was the next best qualified employee for the supervisory post; but that it was also his supervisors' view that Morton would not accept the promotion. As a result, and following discussion of Morton with Wells, said Franks, it was decided to pass over Morton and to dispense with the alleged discharge policy in his case.¹³

Conclusion

It is obvious from the foregoing recital of events that, under the directions and guidance of its top management at the home office, Respondent sought first to take the two recognized leaders among the organizing employees out of the warehouse unit at Rossville by offering them jobs as supervisors and, when the two employees declined the offers, fired them under pretense that refusing a promotion to a supervisory job was a breach of Respondent's employment policy.

There never was such a policy; indeed, the concept was concocted specially for this case as justification for the removal of Arbuckle and Jackson, and disappeared as an alleged policy when the next offer of promotion of a unit employee was considered in the case of employee Morton. The pretense was made more pronounced by Respondent's refusal to specify the reason for the discharges in the notices accompanying the discharges. Neither Arbuckle nor Jackson were trainees for supervisory jobs and if Respondent had a policy affecting trainees it did not apply to Arbuckle or Jackson.

The discriminatory purpose was made even more obvious in offering the supervisory job first to Arbuckle, who was junior to and less broadly experienced than Jackson. Under the Rossville management's normal practice Arbuckle would not have been preferred over Jackson. But Arbuckle was the known leader of the employees in organizing for the Union, and the object of the offer of promotion by Respondent's home office was to remove him as employee leader either by absorption into supervision or by firing when he declined to change sides. The suggestion that Respondent had no other work for forklift operator Arbuckle was a farce in view of the simultaneous

that there had never been any discharge for refusing promotions before or after the discharges of Arbuckle and Jackson. Moreover, as already noted, Franks testified that he had not been previously aware of any such policy and the warehouse employees had not been informed of any such policy.

¹³ Ultimately, according to Franks, the supervisory position was filled by James Kimery.

¹¹ Franks admitted saying that if Arbuckle had any complaints about the absence of a reason for the discharge he would see Arbuckle in court.

¹² Franks claimed he told Jackson it was company policy to require employee acceptance of the promotion on penalty of discharge, but Jackson testified there was no mention of such a policy nor was he told in advance he would lose his job if he refused the promotion. I credit Jackson's testimony. The parties stipulated that there was no such written company policy, and

advertising for forklift operators with cold storage experience, and the hiring of 20 additional forklift operators immediately following the firing of Arbuckle.

The discriminatory purpose in removing Jackson from the employee unit was also evident. Jackson was affiliated with the unionizing movement, was the most senior employee, and enjoyed the respect of his fellow employees. Firing him, because he too refused to change sides by declining the supervisory job offer, was likewise done under pretense of breach of the nonexistent employment policy and in the face of the fact that Respondent needed qualified and experienced employees and was hiring an expanded work force.¹⁴

The pretexts for the firings of employees Arbuckle and Jackson coupled with Respondent's union animus lead to the conclusion that both were fired in retaliation for their activity on behalf of the Union and to discourage employee support of and membership in the Union, in violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Ulbrich Stainless Steels*, 393 F.2d 871, 872 (C.A. 2, 1968).

CONCLUSIONS OF LAW

1. By offering better working conditions and resolution of grievances through a plant committee if the employees would drop their organizing for the Union, and by coercively interrogating a key employee during the organizing campaign on whether he would vote for the Union, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By discriminatorily laying off 10 employees during the organizing campaign for the Union and then discharging them without recall because they engaged in concerted activities for mutual aid and in support of the Union, and by discriminatorily discharging two additional employees in retaliation for their leadership of the Union organizing campaign, and in order to discourage support of and membership in the Union, Respondent has committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It will be recommended that the Respondent, Winter Garden, Inc.:

(1) Cease and desist from its unfair labor practices.

(2) Offer to reinstate each of the 12 discharged employees, if not already reinstated, and give backpay to each from the time of his discharge; namely, from October 19, 1976, for Sidney Key, William Crawford, Steve Lensey, Woodrow Spencer, Sammy Rosser, Roy Williams, Moses Stokes, James L. (David) Morton, Amos Randolph, and Ralph Kimery; from December 3, 1976, for Collis Arbuckle; and from December 6, 1976, for Milton Jackson; said backpay to be computed on a quarterly basis as set forth in

¹⁴ Franks testified that in late February 1977 (after the election and certification of the Union as bargaining representative of the employees) Wells offered Arbuckle and Jackson back the jobs from which each had been discharged, effective February 28, 1977 (the day the hearing began), or whenever the hearing was completed.

¹⁵ See, generally, *Isis Plumbing & Heating Co.*, 231 NLRB 716 (1962).

F. W. Woolworth Company, 90 NLRB 289 (1950), approved in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁵

(3) Post the notices provided for herein.

(4) Because Respondent violated fundamental employee rights guaranteed by Section 7 of the Act, and because there appears from the manner of the commission of this conduct an attitude of opposition to the purposes of the Act and a proclivity to commit other unfair labor practices, it will be further recommended that the Respondent cease and desist from in any manner infringing upon the rights guaranteed by Section 7 of the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941); *P. R. Mallory and Co. v. N.L.R.B.*, 400 F.2d 956, 959-960 (C.A. 7, 1968), cert. denied 394 U.S. 918; *N.L.R.B. v. Bama Company*, 353 F.2d 323-324 (C.A. 5, 1965).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:

ORDER¹⁶

The Respondent, Winter Gardens, Inc., Rossville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their interest in or voting for the Union.

(b) Offering better working conditions and resolution of employees grievances by plant committee if employees drop the Union.

(c) Discharging or laying off employees because they engage in activities for or support of the Union.

(d) Discouraging employees from support of or membership in the Union or other labor organization by discharge, layoff, or other discrimination affecting their tenure or conditions of employment.

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

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

(a) Make employees Sidney Key, William Crawford, Steve Lensey, Woodrow Spencer, Sammy Rosser, Roy Williams, Moses Stokes, James L. (David) Morton, Amos Randolph, Ralph Kimery, Collis Arbuckle, and Milton Jackson whole, in the manner set forth in the section of this Decision entitled "The Remedy," for any loss of earnings incurred by each of them as a result of their discharges on October 19, December 3 and 6, 1976, respectively.

(b) Offer to each of said 12 employees (unless already reinstated) immediate and full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges of each.

¹⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(d) Post in the warehouse and plant at Rossville, Tennessee, copies of the attached notice marked "Appendix."¹⁷ Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by its representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board having found, after a hearing, that we violated the National Labor Relations Act:

WE WILL NOT coercively interrogate you concerning your interest in or voting for the Union.

WE WILL NOT offer you better working conditions and resolution of your grievances by plant committee if you drop the Union.

WE WILL NOT discharge or lay you off because you engage in activities for or support the Union.

WE WILL NOT discourage you from support of or membership in the Union or other labor organization by discharge, layoff, or other discrimination affecting your tenure or conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights to belong to or be active for a labor union or to engage in concerted activities, or to refrain therefrom.

WE WILL offer Sidney Key, William Crawford, Steve Lensey, Woodrow Spencer, Sammy Rosser, Roy Williams, Moses Stokes, James L. (David) Morton, Amos Randolph, Ralph Kimery, Collis Arbuckle, and Milton Jackson their former or like jobs (unless already reinstated), because the Board found that we unlawfully discharged them.

WE WILL give each backpay with interest from the time of their discharges on October 19, December 3 and 6, 1976, respectively.

WINTER GARDEN, INC.