

**RCN Corporation and Communications Workers of America, Local 13000.** Cases 4-CA-28091 and 4-CA-28157

February 13, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND WALSH

On December 30, 1999, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party and the General Counsel filed answering briefs and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, RCN Corporation, Northampton, Pennsylvania., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*William E. Slack Jr., Esq.*, for the General Counsel.

*Terence P. McCourt, Esq.* and *Laurie J. Hurtt, Esq. (Hanify & King)*, of Boston, Massachusetts, for the Respondent.

*Paula R. Markowitz, Esq. (Markowitz & Richman)*, of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On November 4, 1998, the RCN Employee Union (RCNEU), which had a collective-bargaining agreement with Respondent RCN Corporation, affiliated with the Communications Workers of America (CWA). It then became known as Communications Workers of America, Local 13000 (the Union or Local), the Charging Party in this proceeding. A half-year later, on May 3, 1999, Respondent withdrew recognition of the Union. The complaint alleges that and other alleged acts to be violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 1947.<sup>1</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The hearing was held in Philadelphia, Pennsylvania, on September 1-3, 1999. The charge in Case 4-CA-28091 was filed on April 14,

Respondent, a corporation, with headquarters in Princeton, New Jersey, provides cable television, local and long-distance telephone, Internet, and other telecommunication services. During the year ending July 14, 1999, Respondent received gross revenues in excess of \$500,000 and performed services valued in excess of \$50,000 outside New Jersey. I conclude that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act. Respondent has a facility in Northampton, Pennsylvania, which is the facility involved in this proceeding. The Northampton business had two predecessors. In 1970, it was a family owned company operating under the name of Twin County Trans Video, Inc. (Twin County). Its stock was purchased in May 1995 by C-Tec Cable Systems of Pennsylvania, Inc., doing business as Twin County Cable (C-Tec), which changed its name to RCN Corporation in October 1997.

In the late 1970s or early 1980s, some of Twin County's employees formed the Twin County operating employees' committee (TCOEC), and Twin County recognized TCOEC and commencing in the early 1980s entered into collective-bargaining agreements, one of which was effective from January 15, 1994, through January 14, 1998. C-Tec continued to honor this contract after its acquisition of Twin County and entered into addenda on December 6, 1995, and June 21, 1996, in which it specifically agreed to honor the agreement with certain modifications. On November 26, 1996, C-Tec and TCOEC agreed to extend the contract through January 14, 2001; and Respondent, under its present name, continued to honor that agreement, except as set forth herein. When TCOEC, which had been without a constitution, adopted one for the first time on October 14, 1998, it changed its name to the RCNEU.<sup>2</sup> I conclude that the Union, TCOEC, RCNEU, and CWA are labor organizations within the meaning of Section 2(5) of the Act. The following employees, who include the employees covered by the subsisting collective-bargaining agreement, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All cable operating employees at RCN Corporation's Northampton facility, including construction workers, installers, technicians and splicers: excluding all office and clerical employees, program origination employees, bench technicians, maintenance employees, guards and supervisors as defined in the Act.

The theory of the complaint is that all of Respondent's unfair labor practices began because RCNEU sought to affiliate with the CWA commencing in mid-September 1998, when TCOEC Chief Steward Richard Gubish telephoned Edward Mooney, the president of unit 13 of the Union,<sup>3</sup> to express an interest in af-

1999; and the charge in Case 4-CA-28157 was filed on May 3 and amended on June 21, 1999. The complaint issued on July 14, 1999.

<sup>2</sup> In this decision, even though some of the union representatives did not, I have referred to the Union prior to October 14, 1998, as TCOEC, the Union after then and up to the date of the affiliation as RCNEU, and the Union after the affiliation as the Union.

<sup>3</sup> The Union has a membership of about 9000 employees in Pennsylvania and consists of units and branches, the size of which depends on the size of the individual collective-bargaining unit. Respondent's

filiating his union with the CWA. On September 23, Mooney met with Gubish and other TCOEC members and agreed to review the Union's collective-bargaining agreement to see what could be done. A week later, there was a conference call among the representatives of the CWA, Gubish, and two stewards, Brent Godschalk and Bruce Richards, to talk more about the affiliation; and further discussions took place in the first half of October, which resulted in an affiliation agreement being drafted. The agreement provided that the TCOEC "members shall continue to bargain their own contracts, process their own grievances, [and] elect their own representatives," with CWA to "provide any assistance required in bargaining and grievance handling upon request from the" TCOEC. One of the issues was whether the affiliation agreement would provide the employees with coverage by the CWA defense fund, which would pay the employees \$200 a week in the event of a strike. If that option were chosen, the employees would have to pay dues to the CWA immediately. Instead, the stewards chose to skip the defense fund and pay no dues immediately.

Although the employees had been talking about the benefits of affiliating with a larger labor organization for some time, there now began a period of more intense discussion by the employees about the benefits of affiliation with the CWA, including the distribution of pro and anti-affiliation literature and a petition expressing certain employees' unhappiness with Gubish and seeking another vote on his office, as well as opposing the affiliation, as the respective groups attempted to gather support for their positions. And during this period, Respondent attempted to stop TCOEC's discussion of the merits of the affiliation. In late September or early October, Tim Rappert, Gubish's immediate supervisor, told him that Greg Jancsak, senior manager of network operations, did not want Gubish talking about union business on company property anymore. He wanted Gubish to leave the property after his shift. Jancsak confirmed that advice 2 days later, telling Gubish that he would have to take all union business off the company property and that he was not allowed to stay there after his shift. Jeff Minnich, Respondent's senior manager of installation and repair, also mentioned it in the same time period, that Gubish was to take all union business off company property and not talk in the parking lot anymore. On October 9, Jancsak talked to Gubish about "using company time to talk to fellow workers about a union" and told him that he could not use company copiers to do his printing. If he needed to have something printed, he was to bring the material to Jancsak first. Jancsak also told Gubish that he had to tell Jancsak of any kind of meeting before he held it. In late October, Minnich told Richards that he was not allowed to remain on the parking lot off the clock to talk to people. Minnich did not want him "discussing the union." Before these conversations, Gubish, as well as other employees had regularly and frequently remained for up to 30 or 45 minutes in the parking lot after the end of the shift, talking about work and personal matters. Gubish testified that em-

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employees are in unit 33 and became the sole members of branch 10, the others being units of employees employed by Bell Atlantic and Ray Communications. Local 13000 holds an annual convention. Unit 33 elects four representatives to that convention.

ployees still remain in the parking lot, and that no other employees have been told that they cannot remain in the parking lot.

Gubish decided to hold the affiliation vote on November 4, 1998, and at least 5 days before<sup>4</sup> posted a notice of the RCNEU meeting on the RCNEU bulletin board,<sup>5</sup> and at three other places in the same room which employees used to enter and exit the warehouse when they reported at the beginning and end of their shifts, giving a specific agenda that it was an "important vote for affiliation with the" CWA, adding that the affiliation was "a very important step in the strengthening of OUR union," and asking that the employees make every attempt to attend "this important meeting," which was to be held at a nearby banquet facility.

At the meeting,<sup>6</sup> Gubish announced its purpose and introduced CWA District 13 organizing coordinator, Marge Krueger, who passed out copies of the agreement to all present and then reviewed and explained its contents. She also explained that the RCNEU had been offered two affiliation agreements, but the stewards had rejected the one with the defense fund coverage. At that point, she was asked a question about dues. Union secretary-treasurer, Pat Maisano, answered, specifically promising that the employees would not pay dues until the CWA bargained a contract, or a reopener, and the employees ratified that contract. After that, CWA District 13 vice-president, Vince Maisano, spoke about the history of the CWA, noting that the Union, too, had originally been an independent union that affiliated with the CWA. There followed about 1 hour or more of questions from the audience and answers from the CWA representatives, a session that was closed only when Vince Maisano asked whether there were any more questions, and no one had a question. At that point, Maisano turned the meeting back to Gubish, who announced that the question of the affiliation would be put to a vote. The CWA representatives left the main part of the restaurant, where the

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<sup>4</sup> Gubish identified the day of posting as a Friday. He believed, however, as did Richards, that the date of posting was October 30, which was a Thursday.

<sup>5</sup> Gubish had requested a bulletin board for the TCOEC in September 1998. It was installed about mid-October. Respondent contends that Gubish's testimony about posting the notice of the October 14 meeting about RCNEU's new constitution on the bulletin board must have been false. I agree that it was inaccurate, but it would appear that he erred only in respect to the location at which he posted the notice. Thirty members attended that meeting, so they appear to have been advised ahead of time. In light of Gubish's testimony that, for the affiliation meeting, he posted the notice at various other places, such as on each side of the door leading into the warehouse, by the warehouse window where employees receive their parts, and at the mailbox, it is likely that the employees still had written notice. Other than this testimony, I had no problem with Gubish's credibility and reject Respondent's numerous attacks as lacking merit.

<sup>6</sup> What transpired at the meeting was the subject of some difference of recollection between the witnesses for the respective sides. I found the General Counsel's witnesses generally reliable and many of Respondent's witnesses so passionate in their opposition to the affiliation and to Gubish personally that I am convinced that they attended the meeting to vent their anger and did not listen carefully to what those who favored the affiliation were saying.

meeting was being conducted, and went around a partition, which separated the restaurant from a bar, at which they waited for the voting to be conducted.

Gubish announced the voting procedure and designated two observers to run the election, one (Jim Rex) from the group that favored the affiliation, and one (Harold Reed) from the group that opposed it. The employees agreed with Gubish's choices, who then handed out ballots, which were small pieces of paper (3-1/4" by 2") with the words "yea" and "nea"<sup>7</sup> written on them and boxes next to those words for the employees to make a checkmark or cross. The members took the ballot for voting, which they could do anywhere in the room, sitting in their seats, or privately. There was no testimony that any employee was able to see, or saw, how another employee voted. Rex or Reed, using a sheet that apparently was a seniority list initially prepared by Respondent, then called the names of the employees. As their names were called, the employees came to the front of the room, initialed the sheet with their names on them, and placed the ballots in a taped cardboard box which had a slit in it. Gubish selected three other members whom he believed were opponents of the affiliation, Tom Hanby, Larry McGuinness, and Kevin Reph, to witness the opening of the box and counting of ballots. Reed opened the box and announced each vote, which Rex then tallied. When the count had been completed, Rex announced the results: the members voted for affiliation, 32-24. There were some people who were happy and some who were unhappy with the result. Mooney urged the members to get together and resolve their problems. The CWA representatives and Gubish, Assistant Chief Steward Chris Almond, and Godshalk then signed the affiliation agreement. Stewards Young and McElroy, who opposed the affiliation, refused to do so.

There were no complaints raised at the meeting about the procedure used, except that one employee said that two employees, Randy Hepner and Todd Pitts, were unable to attend the meeting. He represented that he had proxies for them to cast their vote. Vince Maisano said that the committee should take those ballots, which should be put to the side. If they were determinative of the results of the vote, then they should be counted. In addition, there was a question raised about whether Mike Smith was eligible to vote. Other than those two employees, only three other employees did not cast their ballots,<sup>8</sup> and the vote of Smith was not counted because Respondent contended that he was not employed within the bargaining unit, so his name was not on the seniority list. No employee asked for a delay of the vote. TCOEC and RCNEU never had any rules in writing that governed the conduct of its meetings, and the meeting appears to have been conducted according to the procedures that they normally followed up to then.

But Respondent raises a number of complaints about the procedure. One complaint was that Mooney was in the room while the voting was going on. I doubt that that was so, Mooney credibly testifying that he returned from the bar only

<sup>7</sup> No one argues that this meant anything but "nay" or that any person was at all confused by the ballot.

<sup>8</sup> The parties did not litigate whether those employees attended the meeting, but did not vote.

when the voting had ended. Even if he had returned early, Respondent did not demonstrate that his presence interfered with or could have interfered with the votes of the members. Furthermore, no one, including employees Chris Mormak and Ken Peters, both of whom opposed the affiliation and testified that Mooney was there, but at the side of the restaurant, complained that he was in a place that he should not have been. Accordingly, I find that this did not interfere with the conduct of the election. Another complaint was that 32 employees signed petitions asking for Gubish's removal as chief shop steward and stating that they did not want Gubish representing them to management or speaking for them. The petitions were presented to the CWA representatives, who ruled them out of order and not germane to the affiliation vote. Respondent shows nothing to indicate that the purpose of the meeting was other than to vote on the affiliation agreement. The fact that some employees may have been unhappy with Gubish's efforts to seek the affiliation in the first place was undoubtedly adequately reflected in the vote on the affiliation itself.

Following the vote, RCNEU was placed in unit 33, branch 10, of the CWA, and the RCNEU chief steward and other stewards continued to hold the office in the branch.<sup>9</sup> Gubish posted a notice on the union bulletin board on November 5, describing the result of the affiliation vote, and so advised Respondent's city general manager, Ed Kuczma, on November 16, adding that the affiliation would not affect the contract or RCNEU's officer structure in any way, and that: "Per our agreement, our chief steward and stewards remain in office and will continue to handle all business, including grievances and bargaining as applies to the bargaining unit of RCN." Kuczma replied on December 7, 1998:

It is RCN's position, which appears to be consistent with your letter, that notwithstanding any such vote, a valid collective bargaining agreement is in effect between RCN Corporation and the Twin County Operating Employees Committee for a term ending January 14, 2001.

In the meantime, on November 10, Kuczma issued to Respondent's Pennsylvania managers its no-solicitation/no-distribution policy, a copy of which he gave to Godshalk on November 13, which was "inclusive of all company bulletin boards, employee mailboxes and the unauthorized solicitation of any non-RCN products and services." It read:

In an effort to assure a productive and harmonious work environment, C-TEC prohibits solicitation or distribution of any kind on C-TEC property by non-employees.

Additionally, distribution of literature to, or solicitation of, an employee by another employee is prohibited while either the employee performing the distribution or solicitation, or the employee receiving the literature or being solicited, is on working time (i.e. when they are working or are supposed to be performing their duties.) Further, the distribution of literature is also prohibited at all times in all working areas of C-Tec's facilities.

The rule applies to distribution of all types of literature, except official documents, including but limited to

<sup>9</sup> Gubish became the Union's representative in unit 33.

advertising materials, handbills, and other printed material; and to all types of solicitation, except as may be specifically authorized by C-TEC.<sup>10</sup>

Gubish testified that he had never seen this rule before; and the General Counsel's witnesses testified, without contradiction, that employees had frequently engaged in the warehouse and on the parking lot, on worktime and nonworking time, and in the presence of other supervisors, in soliciting other employees to buy candy and Girl Scout cookies. One employee put up a sign-up sheet on the bulletin board for employees to order hoagies to benefit the Little League, and the hoagies were distributed by employees to other employees at Respondent's facility. Another placed an advertisement for a pool filter on the bulletin board. One supervisor, Jay Daptula, ran a local football pool in 1997 on worktime.

In late January 1999, Gubish and several of the union stewards began to ask other employees if they were interested in CWA hats or shirts. At a stewards meeting<sup>11</sup> on February 2, 1999, Minnich reminded them of Respondent's no-solicitation rule, that they could not engage in solicitation on company property. On February 5, Respondent gave warnings to Richards and Godshalk for "solicit[ing] clothing to employees on company time and property." As a result of these warnings, Gubish decided not to approach the employees directly. Instead, in mid-February, he posted a seniority list on the union bulletin board for the employees to express their interest in purchasing a CWA shirt and to write in their shirt size. On March 2, Dave Smith, the new manager, and Minnich told Gubish that the notice violated Respondent's no-solicitation/no-distribution rule and that "all Union issues are to be handled off company time and property" and asked him to take the notice off the bulletin board. Gubish twice refused to do so.<sup>12</sup> Respondent prepared a memorandum which it placed in its files and gave it to Gubish and Almond on March 7.

On the same day that Smith and Minnich were warning Gubish of his violations of Respondent's rule, March 2, 1999, at the stewards meeting, Smith and Earl Monk, Respondent's senior manager of human resources, stated that Respondent did not recognize the CWA and that it had a contract with and would recognize only RCNEU. Whether in response to that statement or merely by coincidence, on the same day, Dennis Carney, the CWA representative for District 13, wrote Smith to introduce himself as the person assigned to work with the Union and to ask to meet with Smith and the Union's stewards to introduce himself and the Union's unit president, Mike Wolvington. Carney looked forward "to working with RCN management and building a workable relationship." The feeling was not mutual. Smith wrote back on March 12 reviewing the past

correspondence between Gubish and Kuczma, Smith's predecessor, who stated that "RCN's . . . contractual relationship is with" TCOEC, and not CWA, and closing:

Therefore, in light of Mr. Gubish's assurances that nothing will change, and in light of RCN's position that it has no contractual relationship with the Communications Workers of America, please inform me of the purpose of a meeting with your union.

Carney did not reply. Instead, a stewards meeting had been scheduled for April 6, and Carney and Wolvington showed up unannounced. Respondent's reaction was abrupt. The two CWA representatives were told that Respondent had no intention of meeting with them—Monk said, "You can't be here." Minnich said that Respondent had a binding contract and that there was no need for the CWA—and Monk escorted them off the premises. On May 3, Mark Haverkate, Respondent's executive vice president, wrote to Carney, in part, as follows:

In the months since November of 1998, the representations made in Mr. Gubish's letter have proven to be inaccurate. Specifically, and without limitation, the officer structure has been affected, and the same stewards have not remained in office. Moreover, the chief steward and stewards have not continued to handle all business.

In short, what was first reported to RCN management as an innocuous affiliation has, in fact, resulted in dramatic changes. The CWA, an outsider to the relationship between RCN and the Twin County Cable Operating Committee, has sought to establish a presence in Northampton, and has sought to take control of the day-to-day administration of the Twin County Contract. Additionally, in the months since November 1998, information has been presented to RCN management indicating that the so-called affiliation vote violated fundamental due process rights of our employees. We have also received a number of reports that certain employees, perceived as not supportive of the CWA, have been threatened and harassed. Moreover, employees have come forward and stated unequivocally that they do not wish to be represented by the CWA. While, in the past, RCN has made every effort to work with representatives of the Twin County Cable Operating Committee in a cooperative and productive manner, the CWA's recent actions have created ambiguity regarding the current status of that entity, thereby calling into question the viability of any ongoing collective bargaining relationship with the Twin County Cable Committee.

He further wrote that Respondent did not recognize the CWA as the representative of its production employees, that Respondent did not enter into a contract with the CWA, and that at no time has the CWA been elected as the collective-bargaining agent of Respondent's employees. He insisted that Respondent had no legal obligation to recognize the CWA and may have a legal obligation not to recognize it and suggested that the CWA file for an election with the Board. On the same day, Haverkate met with all the union-represented employees and announced that Respondent

<sup>10</sup> There was another document, issued on January 1, 1997, almost 2 years before, which was attached to the warning given to one employee. It was exactly the same as the quoted policy, except that "RCN" was substituted for "C-TEC."

<sup>11</sup> The union stewards met on the first Tuesday of each month with representatives of Respondent's management to discuss issues of common interest.

<sup>12</sup> Gubish ultimately took the list down because it had served his purpose.

was taking the position that we were not recognizing the so-called affiliation with the CWA, that we didn't think that it was done properly, that we had lots of indications from a large number of employees that they were uncomfortable with it. They didn't think that the CWA represented them. And therefore, we thought that the best thing to do would be to take the action of not recognizing them in the best interest of all the employees of the company, and move forward from there to see what happened.

Haverkate added that, because the TCOEC had affiliated with the CWA and because Respondent was not recognizing the CWA, therefore, Respondent also was not recognizing the collective-bargaining agreement. Haverkate also gave the employees a letter addressed to them, dated May 3, in which he wrote:

In recent months, however, since the so-called affiliation vote with the CWA, there have been dramatic changes in the handling of day-to-day workplace issues. We now find ourselves dealing with the CWA, an outside organization that has never entered into a contract with RCN, is not staffed by your fellow employees, and has never been selected by you in a legally recognized open election process. Moreover, we have learned of irregularities, threats, intimidation, and harassment related to the so-called affiliation process. This is not an environment that permits us to work together effectively.

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Accordingly, we are informing the CWA, and all of our employees, that RCN has no legal obligation to recognize the CWA as your bargaining agent, and does not intend to recognize or deal with the CWA under these circumstances.

As Gubish was leaving the meeting conducted by Haverkate, Minnich and Jancsak stopped him and told him to remove all material from the union bulletin board, which had been installed for the Union's use for a half year, Jancsak adding that Gubish could not post anything on that board anymore. Gubish did not remove anything. The next day, May 4, Installation and Repair Manager Bob Brungard gave Gubish an envelope containing all the material that had been posted on the bulletin board. Although the bulletin board has remained, it has since been used only for postings by Respondent.

On the same day, Gubish complained to Minnich and Jancsak that employees were not receiving prevailing rates, and they replied that they did not have to pay them. Gubish attempted to serve them with two grievances. They rejected them, saying that Respondent was not going to accept any more grievances "because there is no steward and you have no contract." On May 6, Minnich, accompanied by Human Resources Manager Sharon Thole, told Richards that there was no longer a contract, there was no longer a grievance procedure, and he was no longer a steward. In mid-May, Richards attended a meeting at which Minnich announced that the construction department was now reporting to the technical network and development group. After the meeting, Richards asked Jancsak if this meant that the construction employees were "out of the contract." Jancsak responded: "You don't have a contract." (Whether these statements were carried out is unclear, inasmuch as

Haverkate stated on May 3, 1999, that Respondent "wasn't trying to use this situation to go back on any of the operating conditions or financial terms and conditions in the agreement. And that, until some future day when all of this is settled, we would continue to stand by the terms of the agreement relative to the financial terms and raises and other things like that.")

On June 28, Minnich gave Richards, in writing, a "verbal consultation" for approaching a new employee on company time on June 24 to "solicit literature" not authorized by Respondent. The consultation reiterated Respondent's no-distribution/no-solicitation rule. Despite the language of the memorandum, Minnich said only that Richards was talking about the Union to a new hire. On August 25, Thole issued a memo stating that many employees, particularly new employees, had been approached by other employees and asked to sign membership cards in the Union. She advised that employees were not obliged to sign those cards, that employees "have the right to work in an environment free from harassment and intimidation," and that they should speak to their manager or a representative of human resources if they feel they "are being harassed concerning these cards or any other matter."

Respondent's first efforts to enforce its various rules coincided with Gubish's initial contacts with CWA. Respondent quickly applied in succession its no-access and no-solicitation/no-distribution rules. Those were followed by its enforcement of rules prohibiting its employees from wearing CWA apparel or leaving anything in their vehicles that would show their support for the CWA. Ultimately, the crisis, at least in management's minds, became so serious that the decision was made to quash completely the employees' efforts to affiliate with the CWA by withdrawing recognition of the Union and refusing to abide by its collective-bargaining agreement.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that, "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." Id. The Board further stated that a no-access rule concerning off-duty employees is valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

Respondent's rule violated all the tests of *Tri-County Medical Center*, supra. It was not limited solely to the interior of Respondent's facility and other working areas. Gubish and the other union representatives were specifically told to take their union-related conversations off the property and not to conduct union business even in the parking lot. The rule was not "clearly disseminated" to all the employees. Indeed, Respondent claims that it does not have a no-access rule, a claim that may be accurate, but for what Minnich, Jancsak, and Reppert told the union representatives. Until then, the representatives were unaware of any such rule. Rather, it seems that it was limited to the union representatives, for other employees were freely permitted to stay on the parking lot and talk. For this reason, it also violates the third of the three principles set forth above.

Respondent contends in its brief that it “only attempted to restrict access by employees who were harassing and intimidating other employees.” Respondent relies on Minnich’s testimony that

[t]he employees were being approached in the parking lot after their shift had ended. And after numerous times of telling these stewards of not being interested and information they were being told, cards that they were asked to sign, they brought it to management’s attention that, you know, if this could be addressed in any way. And at that time, we approached the personnel that we felt were possibly doing some of the solicitation and indicated to them that, after their shift had ended, that there was really no business left and, you know, they should leave the property.

Other than these generalities, which do not refer to a specific time or place, there is no factual support for Minnich’s assertions. No employee called by Respondent testified to “harassment” and “intimidation.” Minnich could name none of them. He insisted at yet another part of his testimony that some employees’ cars had been boxed in, but named neither the employees who owned those cars nor the persons who were alleged to have committed the “boxing in.” The only specific proof on which Respondent relies is the testimony that, at the affiliation meeting, the employees were told that they could not leave the meeting because there was some talk about violence and damage to vehicles in the parking lot. But that was otherwise not explained, and the meeting was not held at Respondent’s premises, in any event, so the fear of foul play at another parking lot is hardly persuasive in demonstrating that there was some foul play at Respondent’s facility. Finally, the impression I received from Minnich’s testimony was that he was complaining about the effort of Gubish and others to obtain membership cards from the employees, cards that certain employees continually refused to sign.<sup>13</sup> But the drive to obtain cards did not start until about March 1999, long after Respondent imposed its unlawful limitation.

In addition to being factually unsupported, Board law does not otherwise sustain Respondent’s position. Its prohibition was clearly imposed on the union representatives in response to their union activity. *Nashville Plastics Products*, 313 NLRB 462, 462–463 (1993). Persistent union solicitation is an activity protected by the Act even when it disturbs or annoys the individuals being solicited. *Cement Transport, Inc.*, 200 NLRB 841, 845–846 (1972), enfd. 490 F.2d 1024 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974); *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972).

Finally, except for one conversation between Minnich and Gubish in early 1999,<sup>14</sup> harassment and intimidation were not

<sup>13</sup> For example, Minnich testified that “new employees are being approached continually to sign union cards. After being told ‘no’ several times, they are still being approached and felt a little intimidated . . . .”

<sup>14</sup> Minnich testified that he told Gubish “not to approach employees after their shift has ended in the parking lot, that we were getting some new employees feeling possibly intimidated or harassed.” Although not specifically denied by Gubish, there is nothing in any of Respondent’s warnings that sustains the notion that employees were “feeling” that way.

mentioned by Respondent as reasons for its prohibition of the activities of the union representatives (and they were never told that they were prohibited from conducting their activities because of harassment and intimidation—they were told only to cease all union activities after work) until the Thole memorandum of August 25, which asked employees to speak to their managers if they felt they were being harassed concerning “[u]nion” cards. The General Counsel contends that such a request “could be interpreted by some employees as broad enough to cover lawful attempts by union supporters to persuade employees to sign union cards” and is “tantamount to a request that the employees report persistent attempts to persuade,” which would “restrain the union proponent from attempting to persuade any employee for fear that his conduct would be reported to management,” citing *Arcata Graphics*, 304 NLRB 541 (1991). I agree. The memorandum violates Section 8(a)(1) of the Act. *Nashville Plastics Products*, 313 NLRB at 462.<sup>15</sup> The no-access rule, enacted at the beginning of Gubish’s efforts to affiliate with the CWA and long before the Union’s March 1999 attempt to solicit membership cards from employees, violated Section 8(a)(1) of the Act.

The General Counsel does not contend that Respondent’s written no-solicitation no-distribution rule violates the Act. An employer may ban solicitation on worktime and distribution of literature on worktime and in working areas. However, prohibitions against solicitation on nonworking time and distribution in nonworking areas are improper absent a showing of special circumstances making such rules necessary to maintain production or discipline. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Corp.*, 138 NLRB 615 (1962).

And that is what happened here, as Respondent expanded the scope of its lawful rule to instances where it barred union representatives from discussing on Respondent’s time and property—late September 1998, Reppert did not want Gubish talking about union business on “company time,” Jancsak and Minnich confirmed this a few days later, telling Gubish to take all union business off “company property” and not to talk in the parking lot; October 9, Jancsak told Gubish that he could not use “company time” to talk with other employees; February 2, 1999, Minnich told union representatives that they could not solicit on “company property” and “company time”; February 8, Respondent issued a verbal warning to Gubish for soliciting employees on February 2 to buy CWA shirts and hats on company time and property; March 7, Respondent gave Gubish and Almond a memo which stated that “all Union issues are to be handled off company time and property”; March 12, Minnich and Smith asked Gubish, who was in the parking lot and not working, not to distribute “CWA information on company property”; and June 28, Minnich warned Richards for talking to another employee on company time to “solicit literature.”

The effect of Respondent’s rule was obvious. Gubish had been elected as the installation steward. He used to conduct union business throughout the facility, and during working

<sup>15</sup> The complaint does not allege the memo as a separate unfair labor practice, but the issue was fully litigated. *Hi-Tech Cable Co.*, 318 NLRB 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997).

hours and after. When Gubish was elected chief steward, he continued to transact union business in the same manner, until in early October 1998 Minnich and a few days later Jancsak told him that they did not want Gubish talking about union business on company property.<sup>16</sup> And so, in early October 1998, in response to Gubish's request for more phase money, Respondent presented a proposal, which the Union, in accordance with its normal procedures, posted for a vote. But, this time, the vote and meeting were to be held at a bar, because Gubish had been told that he had to take all business off the premises. Furthermore, he was forbidden by Respondent's no-access rule to remain on company property after his shift had ended. As a result, meetings that the union had held on company property in the parking lot after a shift had ended, which had occurred twice weekly, and on company time, such as meetings to elect union officers, which had previously taken about 15 minutes and were held in the warehouse on worktime, were scheduled for other places, typically a restaurant or bar. And, while Gubish was told to hold his union business for later and at other locations, other employees were regularly remaining after their shifts, anywhere from a few minutes to one-half hour.

As a result, company property clearly encompasses, and reasonably meant to Gubish, both working and nonworking areas. The prohibition of union solicitation on "company time" is overbroad, as, in the words of the Board, *M. J. Mechanical Services*, 324 NLRB 812, 813 (1997), it "is subject to the reasonable construction that solicitation at any time, including break times or other nonwork periods, is prohibited." Thus, limitations on company time solicitation are presumptively unlawful, *Id.*; *Gemco*, 271 NLRB 1190 (1984); as is the discipline that was meted out for activities that occurred in the parking lot and when the union representatives were not scheduled for work. So, for those reasons alone, Respondent's rule, as applied, is unlawful under Section 8(a)(1) of the Act.<sup>17</sup>

The General Counsel also contends that the rule, albeit lawful on its face, was unlawful because it was enacted to thwart the affiliation movement. Respondent contends, to the contrary, that its rule had nothing to do with the affiliation. Rather, Kuczma, who was first employed at the Northampton facility in May 1998, noticed a posting advertising a car for sale on one of the bulletin boards in the facility in July or August 1998. As a result, he called Respondent's human resources department, asked if there was a policy against solicitation, and was told that a policy existed. Kuczma testified that he reviewed the policy with the manager of the customer care group, the implication being that the managers were told to spread the word of the policy among the employees. But no one, neither manager nor employee, testified that the managers did any such thing.

<sup>16</sup> Although Gubish was told that he could not discuss union business on Respondent's property, he was never expressly told, in haec verba, that he had to take all his union business off the premises.

<sup>17</sup> I recognize, by this finding, the complaint's allegation regarding the prohibition of union activity on Respondent's premises is time-barred by Sec. 10(b). However, Respondent did not allege that as an affirmative defense or at the hearing and has waived it. *Leisure Knoll Assn.*, 327 NLRB 470 fn. 3 (1999), citing *Public Service Co.*, 312 NLRB 459, 461 (1993).

Indeed, no manager testified that Kuczma told him or her anything; and the union representatives who were disciplined for the violation of this rule denied that they had been told anything. There was an event that followed, someone with a Philadelphia Eagles vanity plate on the front of a company-owner vehicle. Kuczma testified that "[w]e had an employee meeting again," without testifying earlier to any employee meetings, and advised the employee that Respondent was trying to project a certain image to the customers, requested that he remove it, and further advised that only company-authorized material could be on the vehicles.

At any rate, in mid-October, Kuczma discovered that his administrative assistant was selling candy from her desk in front of his office. That caused him, he testified, first, to reprimand her (she did not testify either) and, second, to distribute the no-solicitation policy to all employees a month later. Why, at that point, Kuczma should have still waited another month was not explained, and the entire story—generalized, vague, not specific, unsubstantiated—smacks of a fabrication to cover up the real gist of the policy, to stop further efforts to promote what was seen to be a strengthening of an inherently weak employee organization. If in fact Kuczma had really attempted to advise the employees about the no-solicitation policy, one wonders that Kuczma's administrative assistant was wholly unaware of it.

All of Respondent's limitations on its employees' conduct started shortly after Gubish's first contacts with the CWA in September 1998. Respondent did nothing to explain this sudden enforcement of its rule. I infer, therefore, that it was directly related to the attempt to affiliate, as that clearly was the focus of Respondent's activity well into 1999. The ban on solicitation and distribution, to inhibit activity by CWA supporters, was announced shortly after the affiliation vote; and the only times that it has been enforced by discipline has been for union activities, which have also been dealt by Respondent in a variety of ways, including the ultimate withdrawal of recognition. I thus conclude that the timing of the enforcement of the no-solicitation rule was meaningful, directed at the employees' concerted and union activities, and find an independent violation of Section 8(a)(1) of the Act.

Respondent's efforts to censor what the union representatives placed on the bulletin board fail for similar reasons. The no-solicitation rule was enacted to thwart the affiliation efforts of the employees, and Respondent's ban of the bulletin board notice for the employees to express their interest in purchasing a CWA shirt, pursuant to its illegal no-solicitation rule, violated Section 8(a)(1) of the Act. In addition, the General Counsel argues that the bulletin board was not a work area; there was no showing that employees wrote on the notice on worktime; and Respondent, having agreed to permit the Union access to the bulletin board, could not demand removal from the board of items it found distasteful, citing *Container Corp.*, 244 NLRB 318, 321 (1979), *enfd.* in part 649 F.2d 1213 (6th Cir. 1991). I agree. Thus, inasmuch as Respondent relied on its illegal expansion of the rule to prohibit postings on company time and property, Respondent also violated Section 8(a)(1) of the Act.

There are a number of other violations alleged in the complaint, all relating in one way or another with the affiliation, but

dealing with Respondent's rules concerning dress policy and the wearing of CWA buttons and the wearing and storing of CWA hats. Twin County issued rules about uniforms as early as 1993. It required employees to wear safety shoes and, as of January 4, 1993, its jackets had to be worn on the outside of the employees' clothing, except when the temperature was below 32 degrees. At some point after, but before August 1, 1995, employees were required to wear the pants and shirts that the company provided. On August 1, 1995, the employees were permitted to wear jeans instead of the company-supplied pants. By May 6, 1997, Twin County had been purchased by C-Tec, which issued new clothing with its name and prohibited its employees from wearing "any non issued T-shirts, etc., during their normal work schedule." With the change of Respondent's name to RCN in late 1997, the logos on the shirts changed, but the basic clothing requirement remained the same: a company-issued shirt, jeans, and OSHA approved boots. Although RCN hats were issued, the wearing of those hats was preferred, but not required, at least Minnich so advised the employees in late 1998. (This contradicted Minnich's earlier testimony that employees were required to wear hats.)

Richards and Gubish began to wear CWA hats on February 5, 1999. At the end of the shift, Richards' supervisor, Installation Repair Manager Keith Williams, told Richards that he had to remove his hat because it was in violation of Respondent's dress code. Richards and Gubish received in their mailboxes a memo, issued that day, adopting the same prohibition that C-Tec had issued, with instructions that they should "be wearing appropriate RCN company attire while on [their] scheduled shift." The memorandum had never been issued before, even though, when RCN became the owner of the business, it issued its own shirts and employees knew to wear those shirts, as well as to wear safety boots. (Williams also told employee Bryan Mann to remove his CWA hat twice in February.)

Not being able to wear his CWA hat, Gubish placed his hat on the dashboard of his company-owned vehicle. On February 18, 1999, 2 weeks later, Ron Heller, Respondent's safety manager, issued a new memorandum to all "Line Personnel" relating to "Safety Security" of Respondent's vehicles which included the following direction: "NO ARTICLES OR EQUIPMENT ARE TO BE LEFT ON DASHBOARD OR REAR-VIEW MIRROR (BLOCKING DRIVERS VIEW)." Twelve verbal warnings were handed out on February 24 and 26, with the supervisor (Brungard and Todd Kropf, Respondent's installation and repair manager) threatening the employees, including Gubish and Godshalk, the only ones warned on February 24, that the next warnings would be written to all who violated Respondent's "policy in place with having objects on the dash board." (Mann also put his hat on his dashboard. He was told by Jancsak to put it on the seat or on the floor, but was issued no verbal warning.)

The final issue regarding what employees could wear arose on March 16 and 24, 1999, when Gubish wore a CWA button<sup>18</sup> on his company shirt, over his right breast. It did not cover the initials "RCN," which were embroidered over the left breast. Respondent asked him to remove it on both occasions; and on

March 24, Respondent gave him a written warning, cautioning that the next violation would result in a suspension. Godshalk, too, wore a CWA button for 7 to 10 days in March. Brungard told him to take it off, and Godshalk has not worn it since. Richards also wore his CWA button in late February or early March for 1 day, when Williams told him to "lose the button." Richards nonetheless wore his button again on June 15. Minnich saw it and told Richards to remove it. Richards insisted that he had the right to wear it, but Minnich told him that if he did, he would be sent home. In June 1999, Gubish obtained a CWA keychain with the words "CWA Mobilize," which he wore from his pocket. He was told by Williams and Brungard to put it away. After that, he wore it around his neck and still wears it there.

Before February 5, employees wore hats daily, often baseball caps, with the names of battery and truck companies, NASCAR, the Schuykill Community Water Authority, sports teams (Eagles, 76ers, Phillies, and Broncos), Hardrock Café, and one with Fred Flintstone on it. Gubish asked Brungard whether Respondent's issuance of the February uniform memo was in reference to the CWA hat. Brungard said that it was. I find that Brungard's admission accurately reflected that Respondent's sudden change of policy, now prohibiting other kinds of hats—particularly hats with the CWA name on it—was in continued response to the employees' union activities. An otherwise valid rule violates the Act when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline. *Harry M. Stevens Services*, 277 NLRB 276 (1985), *enfd.* 793 F.2d 1288 (5th Cir. 1986). Respondent had exhibited its desire that employees not talk about the affiliation on company property and now wanted to ensure that even the name of the CWA not be seen by its employees.

Thus, the prohibition on CWA hats was followed by the ban of any visible item with the CWA name on it in company-owned vehicles. Heller attributed the prohibition to a driving accident that occurred on July 8, 1998, resulting in an employee's suffering a collapsed lung and loss of several teeth, and a report that he issued the following day. Because the employee was allegedly injured by something that was on his dashboard, Heller wrote, in part: "Inside the van any objects not secured such as step-ladders, cable boxes, tools and equipment become projectiles upon impact. Make sure your equipment is properly stowed and restrained before travel." This memorandum clearly did not refer to items as small as baseball caps; and, even though the memorandum had issued in July 1998, nobody had paid any attention to it. Employees had daily left items on the dash board, such as gloves and sniffers,<sup>19</sup> and smaller items such as maps and work orders, and before February 5 had never been told that they could not leave items on their dashboards. But, shortly after Heller issued his new February 18, 1999 memorandum, within several weeks of the ban on CWA hats, Minnich ordered Brungard and Kropf to conduct spot checks of all the vehicles in the parking lot, including the vehicles of those who had worn the hats.

<sup>18</sup> The button was 1-1/2 inches in diameter.

<sup>19</sup> A sniffer is a tool used to detect cable leakage. It is a box about 10-inches deep, 5-inches high, and 8-10-inches across.

Heller and Kropf testified that they had performed similar examinations of the employees' vehicles before, but Heller, although claiming that he found employees who violated the rule, could not recall whom he talked to and did not produce any record to substantiate his claim that employees had been told that they were doing something wrong. I thus find it difficult to believe him. Similarly, I do not credit Kropf, because there were no warnings issued by him prior to the February incident.<sup>20</sup> Surely, his once or twice weekly spot checks would have resulted in the finding of one violation, especially because there was un rebutted testimony by the employees, supported even by Heller, that the rule had often been violated. To support its argument that its enforcement of this new rule had nothing to do with the employees' protected and union activities, Respondent makes what is now a familiar argument that it imposed discipline on those who did not support the affiliation, as well as union supporters. Indeed, some of the opponents had left items even more harmless than the baseball caps, such as a piece of paper; but the evidence supports a finding that the inspection of all these vehicles would never have been performed had it not been for the CWA baseball caps, which undoubtedly offended Respondent. That some innocent bystanders were punished in the process is inconsequential. *Demi's Leather Corp.*, 321 NLRB 966, 966 fn. 5 (1996). The thrust of the discipline was aimed at the employees who supported the affiliation, Gubish and Godshalk, who were disciplined 2 days before the other 10 employees.

Respondent apparently considered the CWA buttons as dangerous as the hats and barred the employees from wearing them, too. As opposed to the issue concerning the hats, there was no testimony that the employees had worn buttons before. However, I do not find that a reasonable reading of the dress code, which required only a RCN T-shirt, and otherwise permitted jeans, prohibited the wearing of a button. In addition, the Board has made clear that an employer may not prohibit employees from wearing union insignia absent evidence of special circumstances. *St. Luke's Hospital*, 314 NLRB 434, 435 (1994). The burden of demonstrating such circumstances rests on the employer and "general, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances.'" *Caterpillar, Inc.*, 321 NLRB 1178, 1180 (1996), quoting *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990). Special circumstances exist where an insignia might interfere with production or safety, convey a message which is obscene or disparages a Company's product or service, or interferes with an employer's attempts to have its employees project a specific image to customers, hindered production, caused disciplinary problems in the plant, or had any other consequences that would constitute special circumstances under settled precedent. *Escanaba Paper Co.*, 314 NLRB 732 (1994), enfd. sub nom. *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996). No special circumstances were shown here.

Respondent contends that the imposition of these warnings resulted from the confusion of new management and Respon-

dent's lack of experience in dealing with its employees wearing buttons. Furthermore, it contends that it withdrew its warnings and that it is well established that an employer may "undo" conduct violative of Section 8(a)(1), citing *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993); and *Distillery Workers Local 42 v. NLRB*, 951 F.2d 1308, 1312 fn. 1 (D.C. Cir. 1991). Neither decision is on point, except that both refer to the Board's recognized rule in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978), that, to be effective, a repudiation must be timely, unambiguous, and specifically address the unlawful conduct; that the employer must adequately publicize the repudiation to all employees involved; and that the repudiation should assure the employees that the employer will not interfere with their protected rights in the future. Respondent did not meet these requirements. Furthermore, Respondent never fully withdrew all of its warnings. Gubish thought enough of what Respondent did to discontinue wearing his pin. The mere fact that he now wears a CWA key chain around his neck does not indicate that Respondent's newly-enacted policy regarding the wearing of buttons has changed. Furthermore, there is no indication that Godshalk was told anything, and Richards was told for a second time in June to take his button off, long after "new management" should have become experienced with the requirements of the Act. Accordingly, I find nothing in Respondent's conduct that excuses its violation of the Act in forbidding its employees to wear union insignia. There was no proof submitted that Respondent imposed its rules, as its brief contends, "in order to create [or 'professionalize'] a particular public image." Furthermore, I find all of its prohibitions a blatant attempt to keep its employees from showing support for the CWA, a labor organization that, seemingly as a first priority, it wanted to get rid of. I conclude that Respondent violated Section 8(a)(1) of the Act in adopting its rules regarding hats and buttons and its alleged safety rule about what could be displayed on the dashboards.

I turn, then, to what is the principal issue in this proceeding, the status of the affiliation. In order for Respondent to refuse to recognize the Union lawfully, Respondent has the burden of proving (1) that the affiliation vote was accomplished without adequate procedural safeguards or (2) that continuity of the collective-bargaining representative was lost as a result of the affiliation. *CPS Chemical Co.*, 324 NLRB 1018 (1997), enfd. 160 F.3d 150, 156 (3d Cir. 1998). Adequate due process safeguards typically include notice of the election to members, a sufficient opportunity to discuss the question of affiliation before voting, and reasonable precautions to maintain ballot secrecy. *Seattle First*, 475 U.S. at 199; *Sioux City Foundry Co.*, 323 NLRB 1071, 1081 (1997), enfd. 154 F.3d 832 (8th Cir. 1998); *State Bank of India*, 262 NLRB 1108 (1982).

Respondent's brief attacks the affiliation vote on four grounds. The first is that "there was inadequate notice concerning the subject matter of the November 4, 1998 meeting." Respondent claims that the notice of the meeting was ambiguous in that it did not actually state that a vote for affiliation was going to take place. In support, employees Peters, Mormak, and Patrick Eisenhard testified that they were not aware of the purpose of the November 4 meeting, thinking that it was just to be

<sup>20</sup> The General Counsel subpoenaed all of Respondent's warnings and offered in evidence all the documents that Respondent produced in compliance with the subpoena.

a discussion, and not a vote, about affiliating with CWA. Their testimony is unbelievable. They had to know that there was going to be a vote. The notice, which was posted at least 5 days before the meeting, about the amount of notice that RCNEU had traditionally given,<sup>21</sup> stated that the agenda was an “important vote for affiliation with the” CWA and emphasized that the meeting was very important. It was posted at locations that the employees could hardly ignore, and at least one of these three witnesses read the notice. More importantly, these three signed a petition, stating that their signatures constitutes a “proxy no vote” against the affiliation. They would not have signed the petition had they not known that there was, in fact, going to be a vote. In fact, Mormak testified that Young had telephoned the prior night and “informed me of the affiliation vote pending for the following evening.” Monk knew, too, having reported to the RCNEU’s stewards that morning that he had heard that there was going to be a vote on union affiliation that night and reminding them that there was a contract in place and that Respondent intended to honor and stand by that contract.<sup>22</sup> Finally, 56 employees voted, out of a possible 62 who were eligible, indicating that the employees fully recognized that the meeting was not simply about discussion, but was about voting. I thus find that Respondent’s first ground for upsetting the affiliation vote has no merit.

Respondent’s second ground is that “employees were not provided a sufficient opportunity for discussion either before or at the November 4 meeting.” Respondent first objects that Gubish held his initial discussions with the CWA in private, not inviting other elected TCOEC stewards whom he felt might be opposed to affiliation. Respondent cites no authority for the proposition that preliminary meetings about affiliation must be held in the presence of all the representatives of a labor organization. Not only might that be awkward but preliminary discussion and exploration of the benefits of an affiliation among members of a union’s executive board is not where the Board places its emphasis, which is whether there was a fair opportunity given for the union members to discuss the affiliation.<sup>23</sup> That discussion about affiliation had been going on for 2 months, according to Respondent’s witness, Eisenhard. Not only had those who favored affiliation distributed literature, but those who were opposed distributed their own literature.

Furthermore, full discussion was permitted at the meeting. Despite the criticism of Peters and Eisenhard that they were denied a sufficient opportunity for discussion, it appears that what they were really upset about is the answers that they were given to the questions that they posed and the responses to the opposition that they expressed. That constitutes merely a failure to convince a majority of the audience, not a lack of due process. I find this objection of Respondent to be groundless. I find that the Union’s discussion of the merits of affiliation immediately prior to the vote, accompanied by 2 months of discussion

<sup>21</sup> Notice of many meetings and elections prior to November 4 was given by word of mouth over 2 to 5 days.

<sup>22</sup> I discredit Monk’s later effort to change this testimony.

<sup>23</sup> *Quality Inn Waikiki*, 297 NLRB 497 (1989), cited by Respondent, is not to the contrary.

by the employees before, was more than ample to flush out the issues and arrive at a reasoned conclusion.

The third ground is that “employees were not provided sufficient information, and in some cases, were provided misinformation at the November 4 meeting.” The basis for this objection is a factual dispute that nothing in writing was handed out to the employees about the affiliation agreement. I have found, contrary to the testimony of a number of Respondent’s witnesses, that the affiliation agreement was, in fact, distributed and that all its terms were reviewed. That finding is supported by one of Respondent’s witnesses, employee Repp. He had earlier filed an unfair labor practice charge against the Union and signed an investigatory affidavit in which he stated that he had no complaints with the manner that the vote was conducted, adding: “The CWA reps told us why we should join the CWA and what the terms of the affiliation would be.” That supports the testimony of the General Counsel’s witnesses, and I find that the agreement was read, distributed,<sup>24</sup> and explained.<sup>25</sup> Respondent objects that Krueger, the CWA representative who explained the agreement, did not testify and asks that I draw an adverse inference from her absence. I decline the invitation, noting that so many testified at the hearing about what occurred at the meeting that I declared, *sua sponte*, the evidence to be cumulative. The adverse inference should be invoked when the missing witness, peculiarly within the power of one of the parties to produce, is needed to resolve a fact. *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998). Here, when so many saw and heard what occurred, her attendance was unnecessary.

Furthermore, I find that no one misrepresented the nature of the affiliation agreement. Assuming that “CWA officials told the employees that at any time up to one year after the affiliation, with a 50% plus 1 vote, the CWA could be voted out,” as testified to by only one of Respondent’s witnesses, that does not constitute a material misrepresentation. The CWA constitution does not bar votes to disaffiliate. The failure to consider the petition that had been signed by 33 of Respondent’s employees did not constitute a flaw in the procedure. Because there was an actual vote taken on the affiliation, it was unnecessary to use the proxies for 31 of those employees, because they attended the meeting and voted. As to those employees who did not attend the meeting but who signed the petition, it was agreed that the proxies would be counted if they would determine the results of the election. In sum, there was nothing

<sup>24</sup> Hanby, although denying that the agreement was distributed, testified that there may have been a handout by the CWA representatives.

<sup>25</sup> Respondent attempts to discredit the General Counsel’s witnesses by constructing a timeline which purportedly shows that Krueger could not have read the affiliation agreement. My 20-plus years of experience has shown that witnesses do not recall lengths of time with great accuracy. Respondent has taken the most favorable estimates—a late start of and an early end to the meeting and the estimates of the longest times for each segment—to ensure that Krueger had no time even to speak, no less to discuss the elements of the agreement in detail. By using different estimates, less favorable to Respondent, the meeting would have lasted more than 30 or 45 minutes more, giving Krueger ample time to say what the General Counsel’s witnesses and Repp testified that she said.

that occurred at the meeting that denied the members of their due process or their right to vote meaningfully on the proposed affiliation.

The final ground urged by Respondent was that the affiliation agreement was not entered into by authorized representatives of the RCNEU. All the stewards had previously signed the collective-bargaining agreements with Respondent. Respondent claims that the affiliation agreement was invalid and ineffective because it was not signed by all the stewards. Rather, Young, who opposed the affiliation and who later became one of Respondent's supervisor, and McElroy refused to sign the agreement. I find that this claim lacks merit because it has nothing to do with whether the employees obtained due process. That goes to the method of the affiliation, whether it was approved by the membership, not whether a recalcitrant union representative intended to tie up the entire vote by withholding his signature, thus denying due process to the majority that voted for affiliation. Furthermore, the affiliation agreement is not an agreement of the stewards. They act merely as representatives of the RCNEU and not on their own accord. The RCNEU membership voted for affiliation. It is their wish that had to be carried out by the stewards, even those who opposed the membership action.<sup>26</sup> Accordingly, the fact that the agreement was not signed by all the stewards is inconsequential. Respondent also complains that Almond signed as assistant chief steward, which is a position that is not provided for in the collective-bargaining agreement or the bylaws of the Union. Once again, the agreement was duly voted upon by the membership of RCNEU and must be honored, even though signed by Almond.

The Board wrote in *CPS Chemical Co.*, 324 NLRB at 1020:

In the absence of substantial irregularities, . . . the Board normally will not concern itself with a union's internal voting procedures.<sup>16</sup> The reasons for this policy were well stated by the judge in *Insulfab Plastics* [274 NLRB 817 (1985), *enfd.* 789 F.2d 961 (1st Cir. 1986)]:

Since the participants in the election did not object to the manner in which the vote was taken, the Respondent [employer] is in a poor position to do so now simply because it does not like the way the vote turned out. The Union was under no obligation arising out of statute or regulation to conduct its affiliation vote in a manner deemed suitable by the Respondent. The fact that it did not act in strict conformity with the procedures required for a representation election and chose instead to conduct its business more informally in accordance with the traditions of New England town meeting democracy is no basis for post hoc faultfinding. While flying the flag of "due process," the Respondent should bear in mind that one element of fundamental fairness is that the majority should rule and that its stated wishes should be accorded full weight. In question here is not free employee choice but

whether petty obstructionism should be allowed to nullify that choice.<sup>17</sup>

<sup>16</sup> *Sullivan Bros. Printers*, 317 NLRB [561] at 563 [(1995), *enfd.* 99 F.3d 1217 (1st Cir. 1996)], citing *Ocean Systems*, 223 NLRB at 859.

<sup>17</sup> 274 NLRB at 823.

I find not only no "substantial irregularities" but also no minor irregularities. For all the foregoing reasons, I conclude that Respondent's objections to the method used to vote on the affiliation have no merit.

Respondent contends that the continuity of the employees' representative was lost because of RCNEU's affiliation with the CWA. To relieve itself of its obligation to bargain with the Union, "Respondent must demonstrate that the affiliation resulted in changes that were sufficiently dramatic to alter the identity of [RCNEU], and thus in the substitution of an entirely different union as the employees' representative." *CPS Chemical Co.*, *supra* at 1020, citing *Western Commercial Transport*, 288 NLRB 214, 217-218 (1988). *CPS Chemical Co.*, *supra* at 1020-1021, quoted from its observations in *Sullivan Bros. Printers*, 317 NLRB at 563:

[M]ost affiliations or mergers would change a union's organizational structure to some extent, but clearly such natural and foreseeable consequences would not automatically raise a question concerning representation. *Action Automotive*, 284 NLRB 251, 254 (1987). As the [Supreme] Court in [*NLRB v. Financial Institution Employees*, 475 U.S. 192, 209 (1986) ("*Seattle-First*")] recognized, change is the natural consequence of ordinary, valid reasons for affiliations and mergers, such as increased financial support and bargaining power. *Seattle-First*, 475 U.S. at 199 *fn.* 5. In sum, as we have stated, "[t]he notion that an organization somehow loses its identity and becomes transformed . . . because it acquires more clout and becomes better able to do its job is an absurdity and one which flies squarely in the face of a clearly stated congressional objective. . . ." *Insulfab*, 27[4] NLRB at 823. [Footnote omitted.]

The Board defines its test as requiring a determination whether the changes made by the affiliation are so great that a new organization has come into being. If so, that would require the labor organization to establish its status to act as the employees' bargaining representative through a Board-conducted election. *Western Commercial Transport, Inc.*, 288 NLRB 214, 217 (1988). The Board does not apply "a mechanistic approach" or use "a strict checklist," *CPS Chemical Co.*, *supra* at 1021, to determine whether the affiliation has dramatically changed the nature of the organization. Rather, the Board analyzes "the totality of [the] circumstances in order to give paramount effect to [the] employees' desires." *Sullivan Bros. Printers*, 317 NLRB at 563. That totality includes, "whether the union retained local autonomy and local officers, and continued to follow established procedures," and whether "the organizational changes accompanying affiliation were substantial enough to create a different entity," thereby raising a question concerning representation. *Seattle-First*, *supra*, 475 U.S. 199-200.

<sup>26</sup> Respondent's witness Eisenhard testified: "Whether I agreed with what the rest of the stewards believed or not, it was the body who made the decision on what would go through." Respondent's brief states: "Majority rule governed the outcome—stewards never acted without authorization from the employees they represented."

Employees were members of RCNEU simply as a result of their being employed within the crafts designated in the collective-bargaining agreement with Respondent. They paid no dues. As a result, RCNEU had no money; and, when the affiliation occurred, there was no transfer of assets because there were no assets that could have been transferred. But the employees became members of the CWA, nevertheless, because the affiliation agreement provided that RCNEU members automatically became full members of CWA, “enjoy[ing] all associated rights and privileges,” without any immediate obligation to pay dues or fees. Although employees were asked to sign CWA membership cards months after the affiliation, this appears to be more a formality rather than a matter of significance, because the affiliation agreement explicitly granted CWA membership to all RCNEU members.

The affiliation agreement also provided that RCNEU stewards were to remain in office. TCOEC always had a chief steward and a steward for each of the departments established by Respondent and alternate stewards who served when the stewards for whom they were alternates were unavailable. The collective-bargaining agreement provided for stewards and alternate stewards in the following departments: splicing, advanced technician, installation, technician, underground construction, and overhead construction. However, stewards and their alternates often resigned or left employment or were promoted to management positions, and there was a procedure established for their replacement by other employees who were elected at specially called meetings of the TCOEC. Before those meetings, a list was posted advising employees of the vacancy and requesting anybody who was interested in the position to sign.

Gubish was elected TCOEC’s chief steward in early September 1998. Later the same month, Almond was elected as assistant chief steward, and Richards as assistant steward for the installation and repair department. The other stewards at the time of the affiliation were Godshalk (installation and repair), McElroy (underground construction), and Young (technician II). There was a vacancy in the steward’s position in splicing. Will Bachman had been promoted into a management position in September; and he was not replaced, according to Gubish, “Because the construction department overhead and underground were combined and had one steward, it was their decision to have one steward.” All of the employees who were stewards on the date of the affiliation continued to hold those offices after the affiliation.<sup>27</sup>

There were two later changes. McElroy resigned in early 1999 and was replaced by Scott Shander in March 1999. Despite the fact that he was employed in a different department and no employee had previously been elected to the position of steward from a different department, no one from the underground construction department offered to assume the position. It was obviously better for the construction employees to be represented by someone than to be without representation utterly. The other change was that Young resigned after November 4 to accept a management position and was not replaced.

<sup>27</sup> I reject Respondent’s contention that there were one or two other stewards. Its support was purely “word-of-mouth” hearsay of persons who had no direct knowledge of those facts.

Whether that was due to the actions of Respondent or whether that was a decision made by Gubish is unclear. He testified: “The company sort of combined the departments, they had the tech II’s reporting to the same person as the IR department was reporting to and there weren’t that many of them, so we decided that one steward was plenty.”

As a result, there were changes in the identity of the stewards following affiliation, but none of these changes resulted from the RCNEU’s affiliation with the CWA. Rather, a steward resigned, just as stewards had resigned and had to be replaced before the affiliation. But this time, an employee, not a member of the department, was elected because no one else offered to serve, and Young was not replaced because, in Gubish’s judgment, Respondent had consolidated in one person the supervision of two departments. Respondent’s argument is that, because such “changes” are not authorized by the collective-bargaining agreement, the RCNEU bylaws (which ceased to have any effect after the affiliation), or past practice, and because the Union’s bylaws permitted Gubish to appoint stewards to each supervisory group, Gubish must have been acting under the Union’s constitution to make the changes that he did, changes that were new to the Union and showed discontinuity. In fact, Gubish did not appoint any stewards. When Respondent combined departments by naming one overall supervisor, it could reasonably be argued that Gubish was merely acting in conformity with the contract by insuring that the combined department had a steward. In any event, the minor discontinuity certainly does not demonstrate that the organization had substantially changed. *Sullivan Bros. Printers*, 317 NLRB at 563–64; *CPS Chemical*, 160 F.3d at 159.

Another of the changes complained of by Respondent to demonstrate discontinuity is that Gubish renamed the alternate stewards “assistant stewards.”<sup>28</sup> Before he did so, they were to act only when their principal stewards were unavailable. Now, they appeared or tried<sup>29</sup> to act in their own capacities, rather than participating only when the principal steward was unavailable. In addition, in the fall 1998, Almond was elected the assistant chief steward, a position, Respondent contends, that was not even in the collective-bargaining agreement. However, these changes did not result as a result of the affiliation. Rather, they were made shortly after Gubish assumed his present office, and before November 4, 1998. Therefore, any change or discontinuity did not result from the affiliation.

Another of the changes that Respondent relies on to prove discontinuity is the reduction of the number of stewards, from which it makes a variety of arguments, including one that Gubish deliberately reduced the number of stewards, took on more responsibility for himself, and no longer acted as a “go-between” between the members and management, which is how a current supervisor described his functions when he was the chief steward of TCOEC. Another argument that Respondent makes is that members have lost their influence and autonomy as a result of the affiliation. However, Respondent’s premise is

<sup>28</sup> This is contrary to the RCNEU’s by-laws and the collective-bargaining agreement, which provide for “alternate stewards.”

<sup>29</sup> Respondent would not permit assistant stewards to attend the stewards meetings.

flawed. From the time before the affiliation and after, there was hardly any difference in the number of stewards. There appears to be a reduction of only one steward, which was Young's position, when Respondent combined departments, at least to the extent of having one supervisor direct the departments. Gubish had assigned one steward to two departments before the affiliation, so that what he did after the affiliation was consistent and was not a meaningful change. I note, also, that the members of the Union did not complain, at least prior to this proceeding, about those changes. Furthermore, at no time did Respondent claim that its contract was being breached or bring legal action to ensure that Gubish did not permit the conduct of which it now belatedly complains.

I reject Respondent's contentions that the members lost their "frequent communication and sharing of information between stewards and employees" and that the members no longer had "a high degree of participation in decision-making by all employees." Members always had a high degree of participation in the organization, both before and after the affiliation, but they are not availing themselves of the opportunity to serve as stewards. What greater degree do they want than being able to put their names on a sheet of paper and automatically qualify, albeit by default, as stewards? Yet none of the employees who testified for Respondent was willing to serve, and they did not mention any other member who was denied the opportunity of serving as a steward. Finally, if Gubish deliberately planned to exclude people from serving, to enhance his own power, he started even before the affiliation, as Respondent's brief concedes that his "dramatic shift" began in September 1998, at the time when Gubish began meeting with CWA officials. Respondent attempts to put the blame on the CWA for these changes—whatever they may be—but its claim was supported by sheer unproved conjecture.

As to communication, Gubish tried to maintain contact with the membership, as much as Respondent belittles Gubish's attempts to keep the employees apprised of the issues raised at the stewards meetings as "CWA propaganda." Even though Respondent does not agree with some of the issues raised by Gubish and reported by him to the Union's membership, they clearly relate to employees' wages and terms and conditions of employment. There was no proof that the employees even tried to communicate with their stewards, or that their stewards failed to talk with them. Indeed, Respondent, by prohibiting the discussion of union matters on Respondent's property, had more to do with some of these changes than any other factor. The Union was told not to conduct its business on company property and company time. That was a change that had impact. There is nothing in the mere fact of the affiliation that resulted in the kind of changes that Respondent alleges.

Unlike *Garlock Equipment Co.*, 288 NLRB 247 (1988), and *Western Commercial Transport*, 288 NLRB 214,<sup>30</sup> relied on by

<sup>30</sup> In a footnote, the Board stated in *CPS* that, because it found these earlier cases and *Chas. A. Winner, Inc.*, 289 NLRB 62 (1988), and *Quality Inn Waikiki*, 297 NLRB 497 (1989), distinguishable, "[w]e therefore need not decide, at this time, whether to overrule those cases or to find that they have been superseded by more recent decisions." 324 NLRB at 1025 fn. 52. The logic of these earlier decisions, insofar as they appear to rely on the fact that discontinuity is established by the

Respondent, there were no changes made by the affiliation that shifted the control from a small independent organization to a large division of an international union many times its size and substantially more structurally complex. The Union continued to operate independently from the CWA. Although the Union's bylaws<sup>31</sup> and the CWA constitution require CWA approval of work stoppages, there is no authority for sanctions to be imposed if there is no approval and thus the provision is not particularly meaningful. Besides, no strike can be called without employee authorization, thus continuing in the hands of the employees, and not the CWA, a vote on their own destiny. The Board has found that "reserved rights of approval, allowing the International only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs." *May Department Stores Co.*, 289 NLRB 661, 666 (1988), enf. 897 F.2d 221 (7th Cir. 1990), cert. denied 498 U.S. 895 (1990).

Respondent contends that, after affiliation, the employees were no longer represented by a small independent union, but rather a part of the large CWA organization, with complex rules for conventions and delegates and executive boards, and that the change in status from operating alone to operating as a small cog in a large machine is not one without import, citing *Quality Inn Waikiki*, 297 NLRB 497.<sup>32</sup> However, among the reasons for the very decision to affiliate is to take advantage of a larger organization's bargaining expertise or financial support or even to compensate for a lack of leadership. *Seattle First*, 475 U.S. at 199 fn. 5. So the size of the CWA has nothing to do with the effect of the merger. Nor do the CWA's different kind of structure or different policies or procedures,<sup>33</sup> or paper authority over grievance handling<sup>34</sup> or contract approval, by themselves, establish discontinuity. There must be evidence that such authority is exercised with some regularity. *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 947 (1993), enf. 32 F.3d 390 (8th Cir. 1994); *Central Washington Hospital*, 303 NLRB 404 fn. 7 (1991), and accompanying text, enf. sub nom. *NLRB v. Universal Health Systems*, 967 F.2d 589 (9th Cir. 1992). Here, there is no evidence at all.<sup>35</sup> Accordingly, reliance

increase of the independent union's size, finances, and powers through affiliation, is of questionable validity. "These factors shrink in significance if one takes seriously the Supreme Court's view that increased size, financial support, and bargaining power are the very reasons why independent unions join internationals. The very ordinariness of such factors strongly suggests that something more must change before an affiliation raises a question concerning representation." *Seattle-First National Bank v. NLRB*, 892 F.2d 792, 798 (9th Cir. 1989).

<sup>31</sup> The RCNEU adopted its first constitution and bylaws, consisting of one page, on October 28, 1998, only after the CWA had suggested that the Union have such a document.

<sup>32</sup> See fn. 30.

<sup>33</sup> Respondent incorrectly relies on art. XXIV of the CWA constitution to support its contention that members have lost their right to vote by proxy. That article relates to proxies used at international conventions, not to voting by members of the Union at their local meetings.

<sup>34</sup> The collective-bargaining agreement does not provide for arbitration of grievances.

<sup>35</sup> Respondent complains that a number of the responsibilities of employees changed as a result of the affiliation. It contends that, should a strike be called or picketing be authorized, the employees are obligated

on the bare provisions in the Union's bylaws or CWA's constitution to establish lack of continuity is inappropriate.

Respondent relies on various alleged changes in contract administration to show discontinuity, claiming generally that, before the affiliation, employees filed and prosecuted grievances, while after the affiliation, Gubish did so, not to help employees but to expand the collective-bargaining agreement. Thus, Respondent complains that, according to the agreement, individual employees are to bring grievances to their department steward and, if no agreement is reached with the employee's supervisor, the employee has to submit such grievance to the ruling grievance committee. Since the affiliation, Respondent alleges, no grievances were filed by individual employees, and all were filed by the chief steward alone, except for one which he was joined by Richards, and none by the grieving employee, skipping the first meeting. For example, Gubish, as chief steward, issued numerous "request[s] for information" relating to grievances on October 29, 1998, February 26, March 22 and 26, April 19-20, and May 4, 1999, as well as other grievances.

Although there was little evidence of what the stewards did after the affiliation, they continued to attend meetings with management; and there was nothing to indicate that they were not available to handle such day-to-day contract administration and negotiation, as the employees desired. Before the affiliation, if employees had a complaint, they would go to their steward. There was no change afterward, except that, instead of the employee writing the grievance, the job of writing the grievance was undertaken by the steward. Who those grievances affected was not the subject of any additional testimony. Because there was no proof that there were other grievances brought by individual employees, who were somehow denied their "right" to prepare their own grievances, I cannot determine that the strict and literal terms of the collective-bargaining agreement calling for the writing of the grievance was or was not complied with. While this may represent a change in practice, the same grievance was being presented on behalf of the same employee. Thus, the "change" hardly involves a substantial alteration in the Union's relationship with the employees which would justify finding a question concerning representation. Despite Respondent's arguments, in any event, there was not one example presented in testimony that any employee was denied the opportunity to grieve about any problem and that that employee was unhappy with the resolution of that grievance. There is no proof that anyone wished to file a grievance, at least to the written stage, and that there was nothing resolved in the meantime.

Respondent appears to be arguing that this minor change dissuaded employees from filing grievances. The evidence not

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to participate in strikes or picketing or else face a significant fine. Respondent also contends that should employees declare an unauthorized strike, they face yet another financial penalty, citing art. 14, § 1 of the Local constitution, setting forth art. XX, § 2(b) of the CWA International constitution. I have reviewed the citations and cannot find the supporting provision. Finally, Respondent contends that the dues, instead of staying within branch 10, will go to the Union's executive board, which establishes budgets and authorizes expenses. The Union has not called a strike; the members are yet to pay a cent in dues.

only does not support this thesis but also is contrary to it. Some of Respondent's witnesses, who may or may not have had grievances, did not even try to consult with their stewards. Thus, one of Respondent's witnesses, an opponent of the affiliation, testified that he "didn't feel [he] could do that now . . . [b]ecause of everybody that was pretty much stewards was very pro-CWA, was very pro-union. So, I shied away from doing anything, whether it be the Twin County Operating Committee or the CWA because the stewards all to me seemed to be with the CWA." Another does not speak with Gubish, and another did not bother to ask the Union's officials who was his steward. Respondent contends that "[n]owhere does the TCOEC Contract empower a steward to bring a grievance." The result of that contention, if valid, would be that, even if the agreement were being violated, not even the chief steward could complain, an illogical and unsustainable result.

Respondent contends that the grievances that are being filed are not about helping the employees, but about testing the collective-bargaining agreement. But the collective-bargaining agreement is, by its nature, a document that provides the rights of the employees in the bargaining unit. There is no claim that the Union's actions were taken to help Respondent, and there is no showing that Respondent willingly acquiesced in the grievances, feeling that they aided Respondent, instead of the employees. Rather, the actions taken to enforce the agreement were presumably pursued to protect the rights of unit employees. Similarly, the new awareness by Gubish that he had the right to request information (on CWA forms) to support his grievance or to determine whether to file a grievance is, I infer, merely the result of CWA's expertise that RCNEU lawfully sought from the affiliation. That does not support any theory of discontinuity. Respondent further contends that the grievances demonstrate that the Union has no intention of administering the collective-bargaining agreement, because it avoided the agreement by "fashioning a different way to process grievances." That simply does not follow. The Union may use a variety of techniques, including the filing of unfair labor practice charges, to enforce the rights of the employees whom it represents. The Union's increased awareness does not support the theory of discontinuity, which has nothing to do with the Union's right to enforce its agreement.

Respondent contends that the grievances and requests for information were prepared by the CWA, not Gubish, and that the grievances were not valid. Respondent supports its conclusion from the fact that some of Gubish's grievances refer to him in the first person, while others refer to him in the third person. I find this contention absurd. Respondent argues that "the subject matter of the grievances reflects that the author was not familiar with the TCOEC Contract." For example, in two grievances, Gubish requested bargaining about new job classifications that Respondent had created, in the face of language in the agreement's preamble that requires Respondent "to inform a representative of the Cable Operating Committee of its intent to change work hours or to create, eliminate, or consolidate job classifications." Respondent posits that the agreement does not require bargaining. The grievance and Respondent's brief demonstrates that the parties disagree. Gubish may be correct, because nothing in the agreement specifically provides that there

shall be no bargaining about new job classifications, either the duties of it or the wages to be paid for it.<sup>36</sup> On the other hand, he may be incorrect. But that does not mean that Gubish, even if incorrect, did not write the grievance.

Finally, even if he received help from the CWA, that would not result in the adoption of Respondent's position. Discontinuity is not established by the fact that an affiliation allows existing officials to request assistance from their counterparts in the organization with which they have combined. See *CPS Chemical Co. v. NLRB*, 160 F.3d at 157. The Supreme Court recognized in *Seattle First* that it is appropriate for a small union to use affiliation to gain access to greater expertise. So, his seeking aid was consistent with the very purpose of the affiliation and does not support a theory of discontinuity. For the same reason, the Union's broad requests for information in support of its grievances is not a sign of discontinuity as much as it demonstrates the Union's more aggressive stance in protecting its position and increasing its bargaining power. Nor, for the foregoing reasons, does the union exhibit that it is going beyond the terms of the collective-bargaining agreement. Rather, it is seeking to enforce its agreement, albeit its interpretation differs from that of Respondent. It has never reneged on its agreement; it specifically advised Respondent that it intended to uphold the agreement and be bound by it.

Respondent's next attack is based on alleged changes by the Union in "contract negotiations," which it notes "began . . . shortly before the affiliation," which reduces to absurdity the force of its argument that the affiliation was the event that caused the discontinuity. According to Respondent, in September 1998, Respondent presented the stewards with a pay raise proposal and Gubish unilaterally rejected it, which was at variance with the way stewards normally handled proposals, that is, they took any proposals back to the employees for a vote. From this event, because Gubish was then talking with the CWA about affiliating, Respondent contends that "it was obvious that he was acting pursuant to the directions of the CWA." Respondent does not explain how this was obvious. I find this contention more unfounded conjecture. At any event, its additional contention is based on its understanding of the CWA constitution and testimony of Carney as to how he would conduct negotiations. Of course, that never came into being because Respondent refused to deal with Carney and Wolvington on the sole occasion that they (or any other CWA representative) attempted to meet with Respondent, and rejected the Union as the employees' collective-bargaining representative.

Assuming that Carney's testimony as to how he would have conducted negotiations, if permitted, is meaningful, there may be a difference in technique, but hardly a matter that sustains the notion that the Union is something substantially different from RCNEU. Before, when management made a proposal to the stewards, the stewards would then take the proposal to the employees and take a vote of the employees a day later. If it was rejected, the stewards went back to management with that

rejection. Employees would also bring proposals to stewards who would, in turn, pass the proposals to management. The Carney method was to employ a bargaining committee, which would first poll the membership to ascertain what they wanted, and, with Carney helping them, negotiate directly with management, a method that is a traditional one utilized by many labor organizations and engaged in with employers throughout the country. If management gives the bargaining committee a final offer, the committee takes the offer to the employees for a vote. Thus, there is input by the employees under the methods utilized by RCNEU and proposed by Carney. The employees get to vote to accept management's proposal under both methods. The only difference is that RCNEU's practice was more a take-it-or-leave-it and exchange of proposals method, without discussion, whereas what Carney wanted was true bargaining, face-to-face, at the table, by the bargaining committee, and that is what the Act is supposed to protect and foster. Respondent's position, denigrating the bargaining that the CWA intended to help, is contrary to the Act and certainly does not demonstrate any discontinuity. If there is a difference, it is a minor one, which promotes bargaining.

I find, therefore, that there was no discontinuity between RCNEU and the Union and no excuse for Respondent to cease recognizing the Union or to cease honoring the collective-bargaining agreement. Whatever changes were made by the affiliation were minor and not so substantial that they would justify the finding of a question concerning representation. Respondent's answer alleges as an affirmative defense the Union's loss of majority status and its brief contends that, in light of letters that it received in April 1999 expressing the desire of certain employees that they not be affiliated with the CWA and calling for Gubish's removal as chief shop steward, it was unclear which group, RCNEU or the Union, represented a majority of Respondent's employees. As a result, it argues, it was entitled to withdraw recognition from the Union. However, a month before Respondent received the April communications, it declared that it would not recognize the affiliation, and so the issue regarding majority status could not have been the reason for Respondent's denial of recognition. Furthermore, Respondent, although it began its attempt to prove that a majority of its employees did not support the Union, abandoned that attempt and never proved anything. In any event, majority status cannot be challenged while a collective-bargaining agreement is in effect. *Syscon International*, 322 NLRB 539 fn. 1 (1996). Respondent's affirmative defense thus has no merit. Finally, Respondent denied the union representatives access to the employees and unlawfully denied its employees the right to show their allegiance to the Union. In the context of these unlawful unfair labor practices, Respondent was not entitled to withdraw recognition from the Union. *NLRB v. Frick Co.*, 423 F.2d 1327, 1332 (3d Cir. 1970); *Guerdon Industries*, 218 NLRB 658, 659, 661 (1975). I conclude that, by withdrawing recognition from the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

Two other findings of violations of Section 8(a)(5) and (1) of the Act follow. On April 6, 1999, Respondent declined to meet with CWA representatives, Carney and Wolvington, on the ground that its contract was not with the Union, but with

<sup>36</sup> In October 1999, before the merger, TCOEC asked for more money for additional duties (phone money) and Respondent made an offer. Why the Union could not ask for additional money for newly created positions was not explained by Respondent.

RCNEU. That basis was groundless, and Respondent had no right to dictate the identity of the Union's representatives. If the Union desired Carney's and Wolvington's expertise at the stewards meeting, it was entitled to have them. *Standard Oil Co.*, 137 NLRB 690 (1962), enfd. 322 F.2d 40 (6th Cir. 1963). On May 3, 1999, Respondent removed the bulletin board that had been designated for the Union's use. The use of a bulletin board is a mandatory subject of bargaining, and Respondent had to give notice to the Union and an opportunity to bargain before removing it. *Pioneer Press*, 297 NLRB 972, 987-988 (1990). Respondent obviously did not do so. I reject Respondent's contention that it had no bargaining obligation because "the identity of its employees' representative was (and still is) uncertain." As held above, Respondent had a duty to bargain with the Union.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent's answer raised a non-Board settlement as an affirmative defense to certain allegations; but it offered no evidence regarding the terms of the settlement, so its defense fails. There was some evidence during the hearing, albeit spotty, that Respondent rescinded some discipline. The February 5, 1999, warning to Richards for solicitation of CWA hats was rescinded in May. About the end of May or beginning of June 1999, Gubish was told that the warning for wearing the CWA button would be removed from his file. Minnich told employees that the warnings for having items on their dashboards, at least for four employees, would be rescinded. Godshalk testified that 2 months after he was given the warning for having his hat on the dashboard, he was told that the program had been rescinded. In May or June 1999, Respondent told its employees that it had removed from their files the warnings that it issued regarding the wearing of the CWA buttons. Some of the discipline issued as a result of its no-solicitation rule may have been rescinded.

At least one of the warnings issued under the same rule, Bruce Richards's June 28 disciplinary notice, has not been retracted. There was evidence throughout this proceeding that employees were effectively prohibited from lawful protected activity. Even though at times they may have ignored the rule and were not disciplined, there is enough to indicate that their conduct was otherwise inhibited. For example, Gubish wore his key chain around his neck, but not from his pocket, and did not wear his CWA hat. He was told not to wear his CWA button; and he still does not, and he has never been told that he can. On the other hand, regarding certain of its rules, Respondent did nothing. As far as its employees are aware, Respondent is still enforcing those rules; there is no evidence that Respondent stopped enforcement of any of its unlawful rules; and it has never adequately cured its various violations. Respondent, for example, has not shown that it has clearly communicated to all the unit employees that employees could in fact engage in solicitations during nonworking time and on company property, specifically the parking lot. See *Ichikoh Mfg. Co.*, 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994). Accordingly, I

will order the normal relief for the violations found, including rescinding the various rules that I have found unlawful and removing the discipline imposed for violation of those rules and notifying the affected employees that it has done so. I shall also order that Respondent recognize and bargain with the Union, honor the subsisting collective-bargaining agreement, and reinstate the union bulletin board.

On these findings of fact and conclusions of law and on the entire record,<sup>37</sup> including my consideration of the demeanor of the witnesses as they testified and my review of the briefs filed by the General Counsel, the Union, and Respondent,<sup>38</sup> I issue the following recommended<sup>39</sup>

#### ORDER

The Respondent, RCN Corporation, Northampton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Communications Workers of America, Local 13000, AFL-CIO (the Union), as the exclusive representative of the employees in the unit described below and repudiating the collective-bargaining agreement applicable to employees in the unit.

(b) Denying its off-duty employees access to exterior and other nonworking areas of its Northampton, Pennsylvania premises for the purpose of engaging in union or other concerted activity protected by Section 7 of the Act.

(c) Requesting its employees at its Northampton, Pennsylvania facility to inform management if they are harassed or intimidated by their fellow employees who solicit them to sign union authorization cards or otherwise encouraging its employees to identify union supporters or discouraging employee involvement in protected activity.

(d) Maintaining or enforcing any rule prohibiting its employees at its Northampton, Pennsylvania facility from engaging in solicitation or the distribution of Section 7 protected material on company time or premises or otherwise maintaining or enforcing rules prohibiting its employees from engaging in solicitation on nonworking time or distribution of Section 7 protected material on nonworking time and in nonworking areas.

(e) Applying its no-solicitation/no-distribution rules to postings on the union bulletin board at its Northampton, Pennsylvania facility.

(f) Promulgating, maintaining, or enforcing its no-solicitation/no-distribution rules, rules requiring its employees to wear company issued uniforms or hats, rules prohibiting its employees from placing items on the dashboards of company vehicles, rules denying its off-duty employees access to exterior and nonworking areas of its premises, or any other rules at its

<sup>37</sup> The General Counsel's unopposed motion to correct the official transcript is granted, and the transcript is amended accordingly.

<sup>38</sup> I have considered each and every contention made by Respondent in its 81-page brief. Those that I have not written about have been rejected.

<sup>39</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended 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.

Northampton, Pennsylvania facility for the purpose of discouraging union activities.

(g) Prohibiting its employees from wearing union insignia at work.

(h) Refusing to meet with representatives of the Union for purposes of bargaining concerning wages, hours, and other terms and conditions of employment of its employees in the unit described below.

(i) Unilaterally eliminating the union bulletin board or otherwise unilaterally changing wages, hours, and working conditions in the unit described below without prior notice to the Union and without first affording the Union opportunity to meet and bargain concerning these matters.

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

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

(a) On request, recognize and bargain with the Union concerning wages, hours, and terms of conditions of employment for its employees in the following appropriate unit and, if agreements are reached, embody the terms of the agreements in signed written documents:

All cable operating employees at RCN Corporation's Northampton facility, including construction workers, installers, technicians and splicers: excluding all office and clerical employees, program origination employees, bench technicians, maintenance employees, guards and supervisors as defined in the Act.

(b) Honor and comply with all terms of its collective-bargaining agreement with the Union which is effective through January 14, 2001.

(c) Rescind the rules promulgated in September 1998 denying certain employees access to exterior and nonworking areas of its Northampton, Pennsylvania premises while off duty and notify the affected employees in writing that this has been done.

(d) Rescind the no-solicitation/no-distribution rule promulgated in November 1998 and notify all its employees at its Northampton, Pennsylvania facility that this has been done.

(e) Rescind the rule promulgated on February 5, 1999, applying its uniform policy to hats worn by its employees at its Northampton, Pennsylvania facility and notify all its employees in writing that this has been done.

(f) Rescind the rule promulgated on February 18, 1999, prohibiting its employees from placing items on the dashboards of company vehicles and notify all its employees in writing that this has been done.

(g) Rescind the rule promulgated in March 1999 prohibiting its employees from wearing the union insignia at work and notify all its employees in writing that this has been done.

(h) Rescind any disciplinary actions taken against its employees as a consequence of the rules referred to above in paragraph 2(c-g), remove from its files any references to such disciplinary actions, and notify the affected employees in writing that this has been done and that the rescinded disciplinary actions will not be used as a basis for future personnel actions against them.

(i) Reinstate the union bulletin board at its Northampton, Pennsylvania facility.

(j) Within 14 days after service by the Region, post at its facility in Northampton, Pennsylvania, copies of the attached notice marked "Appendix."<sup>40</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 14, 1999.

(k) 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 Respondent has taken to comply.

#### 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.

WE WILL NOT refuse to recognize and bargain with Communications Workers of America, Local 13000, AFL-CIO, as the exclusive representative of the employees in the unit described below and repudiating the collective-bargaining agreement applicable to employees in the unit.

WE WILL NOT deny our off-duty employees access to exterior and other nonworking areas of our Northampton, Pennsylvania premises for the purpose of engaging in union or other concerted activity protected by Section 7 of the Act.

WE WILL NOT request our employees at our Northampton, Pennsylvania facility to inform management if they are harassed or intimidated by their fellow employees who solicit them to sign union authorization cards or otherwise encourage our employees to identify union supporters or discourage employee involvement in protected activity.

WE WILL NOT maintain or enforce any rule prohibiting our employees at our Northampton, Pennsylvania facility from engaging in solicitation or the distribution of Section 7 protected material on company time or premises or otherwise maintain or enforce rules prohibiting our employees from engaging in solicitation on nonworking time or distribution of

<sup>40</sup> If this Order is enforced by a judgment of the 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."

Section 7 protected material on nonworking time and in non-working areas.

WE WILL NOT apply our no-solicitation/no-distribution rules to postings on the union bulletin board at our Northampton, Pennsylvania facility.

WE WILL NOT promulgate, maintain, or enforce our no-solicitation/no-distribution rules, rules requiring our employees to wear company issued uniforms or hats, rules prohibiting our employees from placing items on the dash-boards of company vehicles, rules denying our off-duty employees access to exterior and nonworking areas of our premises, or any other rules at our Northampton, Pennsylvania facility for the purpose of discouraging union activities.

WE WILL NOT prohibit our employees from wearing union insignia at work.

WE WILL NOT refuse to meet with representatives of the Union for purposes of bargaining concerning wages, hours, and other terms and conditions of employment of our employees in the unit described below.

WE WILL NOT unilaterally eliminate the union bulletin board or otherwise unilaterally change wages, hours, and working conditions in the unit described below without prior notice to the Union and without first affording the Union opportunity to meet and bargain concerning these matters.

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

WE WILL on request, recognize and bargain with the Union concerning wages, hours, and terms of conditions of employment for our employees in the following appropriate unit and, if agreements are reached, embody the terms of the agreements in signed written documents:

All cable operating employees at RCN Corporation's Northampton facility, including construction workers, installers, technicians and splicers: excluding all office and clerical employees, program origination employees, bench technicians,

maintenance employees, guards and supervisors as defined in the Act.

WE WILL honor and comply with all terms of our collective-bargaining agreement with the Union which is effective through January 14, 2001.

WE WILL rescind the rules promulgated in September 1998 denying certain employees access to exterior and nonworking areas of our Northampton, Pennsylvania premises while off duty and notify the affected employees in writing that this has been done.

WE WILL rescind the no-solicitation/no-distribution rule promulgated in November 1998 and notify all our employees at our Northampton, Pennsylvania facility that this has been done.

WE WILL rescind the rule promulgated on February 5, 1999, applying our uniform policy to hats worn by our employees at our Northampton, Pennsylvania facility and notify all our employees in writing that this has been done.

WE WILL rescind the rule promulgated on February 18, 1999, prohibiting our employees from placing items on the dashboards of company vehicles and notify all our employees in writing that this has been done.

WE WILL rescind the rule promulgated in March 1999 prohibiting our employees from wearing the union insignia at work and notify all our employees in writing that this has been done.

WE WILL rescind any disciplinary actions taken against our employees as a consequence of the rules referred to in the five immediately preceding paragraphs, remove from our files any references to such disciplinary actions, and notify the affected employees in writing that this has been done and that the rescinded disciplinary actions will not be used as a basis for future personnel actions against them.

WE WILL reinstate the union bulletin board at our Northampton, Pennsylvania facility.

RCN CORPORATION