

**Tawas Industries, Inc. and International Union,
United Automobile, Aerospace and Agricultural
Implement Workers of America (UAW), AFL–
CIO.** Case 7–CA–39862

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On June 2, 1998, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. Contrary to the judge, we find that the Respondent violated Section 8(a)(5) by refusing to recognize Tawas Independent Workers Association (TIWA) as an affiliate of the United Auto Workers (UAW) and by refusing to allow a UAW representative to attend a grievance meeting at the grievant's request. We also find, contrary to the judge, that the Respondent violated Section 8(a)(1) by predicting that other employers would not give their business to the Respondent if the employees voted to affiliate TIWA with the UAW and by posting a notice encouraging employees to report the protected conduct of other employees to management. In other respects, we affirm the judge's decision.¹

Background

The Respondent's employees have been represented for many years by TIWA, a small independent union. The parties' most recent collective-bargaining agreement was effective from October 1, 1996, to September 30, 1999.

On March 16, 1997,² the Respondent's employees voted to affiliate TIWA with the UAW.³ TIWA immedi-

¹ No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by suspending Kenneth MacMurray, and that the Respondent did not violate Sec. 8(a)(1) by telling MacMurray that he had to choose between it and TIWA.

The judge inadvertently failed to specify the formula for awarding make-whole relief for MacMurray or to provide for the payment of interest. We shall make the appropriate modifications in our Order. We shall also modify the recommended Order and notice to be consistent with *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 325 NLRB 142 (2001).

² All dates refer to 1997.

ately notified the Respondent of the results of the election. Citing "substantial questions regarding the validity of [the] vote to affiliate," the Respondent informed TIWA that it was "investigating and reviewing [the] matter." The Respondent stated that it would continue to recognize TIWA as the employees' bargaining representative and to operate under the existing collective-bargaining agreement.

Shortly after the affiliation vote, a number of employees evidently began to have second thoughts about the wisdom of affiliation and/or the manner in which the affiliation election was conducted. A movement to undo the effects of the election ensued. It culminated on April 3 when employees presented the Respondent a petition, signed by 23 of the 30 to 33 members of the bargaining unit, stating that they did not wish to be affiliated with the UAW. That same day, the Respondent informed TIWA that it had concluded, on the basis of its investigation, that the affiliation election did not meet the due process requirements of the Act, and that a majority of the employees had stated that they did not support the affiliation.

By letter dated April 18, UAW International Representative Don Petro informed the Respondent of the affiliation. He expressed optimism concerning the UAW's new bargaining relationship with the Respondent, along with the hope that the parties could soon hold an introductory meeting. By letter dated April 24, the Respondent notified Petro that it refused to recognize the affiliation.

On April 21, Kenneth MacMurray was suspended for 2 days, allegedly for harassing another employee. MacMurray filed a grievance, which was denied. He appealed and, at the third step of the grievance procedure, requested representation by Petro. The Respondent refused to allow Petro to represent MacMurray because it refused to recognize the UAW.

I. THE 8(A)(5) VIOLATIONS RELATED TO THE
UNION AFFILIATION ISSUE

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with TIWA as an affiliate of the UAW. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by refusing to allow Petro to attend grievance meetings.

³ The employees had previously voted for affiliation at a meeting on March 2. However, the UAW organizer and TIWA president, MacMurray, decided afterwards that, because they had not notified the employees in advance that affiliation would be discussed at that meeting, they would hold a second meeting on March 16 at which affiliation would again be the principal topic, this time with advance notice of the subject matter.

The judge found that the affiliation with the UAW had been accomplished with adequate due process safeguards and that there was substantial continuity between the pre- and postaffiliation union. He therefore concluded that the affiliation was valid.⁴ No exceptions have been taken to those findings, and we adopt them.

The judge also found, however, that a majority of the employees later decided that they did not want to be represented by the UAW and that they had so informed the Respondent before the UAW had committed any time or resources to representing them. He therefore found that the Respondent had not acted unlawfully by refusing to recognize the UAW. As a result, he also found that the Respondent did not unlawfully refuse to allow Petro to represent MacMurray. The General Counsel and the UAW have excepted, and we find merit in their exceptions.

We hold that the Respondent could not base its refusal to recognize TIWA's undisputedly valid affiliation with the UAW on the employees' subsequent disaffiliation effort, even if that effort is regarded as untainted, objective evidence that the *affiliated* union had lost majority support. Our holding is informed by the principle that affiliation or disaffiliation decisions involve essentially internal union matters: matters that are to be governed by the union's own procedures and that are not effectively subject to an employer's veto. *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986). Here, of course, union procedures were used to accomplish TIWA's affiliation with the UAW. For reasons that are unclear, they were *not* used to undo the affiliation. Nevertheless, the Respondent—which, as explained below, violated Section 8(a)(1) in the course of opposing the affiliation—treated the employees' disaffiliation efforts as if they had been perfected and so refused to recognize the affiliation. As we will explain, there was no lawful basis for this step, which amounted to a form of self-help.

The starting point for analyzing whether the Respondent unlawfully failed to recognize the UAW is the judge's finding—to which no party has excepted—that the decision to affiliate with the UAW by the TIWA members was valid. Traditionally, the Board has found that an employer's duty to bargain with a recognized union continues after an affiliation, unless the employer can demonstrate that the affiliation vote was conducted without adequate due process safeguards or that the resulting organizational changes are so dramatic that the union lacks substantial continuity. See, e.g., *Sullivan*

Bros. Printers, 317 NLRB 561 (1995). Here, the judge found that the affiliation vote met minimal standards of due process and that there was substantial continuity between the preaffiliation and postaffiliation unions. Accordingly, as of March 16, the Respondent was obliged to recognize the affiliation.⁵ TIWA, as an affiliate of the UAW, could "legitimately claim to succeed as the employees' duly selected bargaining representative." *Seattle-First National Bank*, *supra*, 475 U.S. at 203. As the Supreme Court has approvingly noted, the Board has recognized that after affiliation, "the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date." *Id.* at 203 fn. 10 (citation omitted).

Nothing that followed destroyed the effectiveness of TIWA's valid affiliation with the UAW or otherwise privileged the Respondent's refusal to recognize the affiliation. When, on April 3, the employees presented a petition to the Respondent seeking to undo the affiliation, this was certainly evidence of a change of heart. However, as a purported disaffiliation, this showing failed. Because disaffiliation, like affiliation, reorganizes the legal and institutional relationships between a union and another labor organization, it must be the official action of the labor organization. Generally, such decisions are carried out in accordance with formal, internal procedures, contained in the union constitution and bylaws: a membership meeting and a vote, for example.

In this case, the disaffiliation effort was not made by and through the Union, but by employees dealing directly with the Respondent. Their petition sought to have their employer recognize a different representative. This attempt to reverse the earlier, valid affiliation was not made in a union meeting or through other union processes, by union members acting as such, or through union officers acting as such.⁶ For example, there was no vote, and there is no showing that a union meeting, with

⁵ At times, the Board has required union affiliations to be accompanied by due process safeguards such as advance notice, opportunity for discussion, and secret-ballot elections. See, e.g., *Newspapers, Inc.*, 210 NLRB 8, 9 (1974), *enfd.* 515 F.2d 334 (5th Cir. 1975); *J. H. Day Co.*, 204 NLRB 863, 864 (1973). The Board has also suggested that disaffiliation decisions must have equivalent due process safeguards. See, e.g., *A. W. Winchester, Inc.*, 226 NLRB 1006, 1013 (1976), *enf. denied* on other grounds 588 F.2d 211 (6th Cir. 1978); and *Ocean Systems, Inc.*, 223 NLRB 857, 859–860 (1976). At other times, however, the Board has questioned its authority to impose due process requirements, especially since the Supreme Court's 1986 decision in *Seattle-First National Bank*, *supra*. See, e.g., *Sullivan Bros. Printers*, *supra*, 317 NLRB at 562 fn. 2; *Hammond Publishers*, 286 NLRB 49, 50 and fn. 8 (1987).

⁶ One of the leaders of the disaffiliation movement was the former vice president of TIWA, who refused to sign the letter informing the Respondent of the affiliation vote and who ultimately resigned his office.

⁴ See, e.g., *Sullivan Bros. Printers*, 317 NLRB 561, 562 (1995), *enfd.* 99 F.3d 1217 (1st Cir. 1996).

advance notice, ever was held to discuss the proposed disaffiliation. In no sense, then, was the petition the equivalent of an institutional decision of a labor organization.⁷

Ironically, the employees who opposed affiliation had set out to place their concerns before the UAW. Thus, approximately 1 to 2 weeks after the March 16 affiliation vote, the employees sent a letter to the UAW stating that a majority of the TIWA members opposed affiliation. The letter also asked for a “letter of dissolution” from the UAW. The employees sent a copy of the letter to the Respondent’s president. The Respondent therefore knew that the employees were attempting to disaffiliate through internal union channels. Rather than allow internal union processes to work, however, the Respondent on April 3 abruptly refused to recognize the affiliation. In so doing, the Respondent unilaterally, and therefore unlawfully, undertook to negate an internal union decision (which had not yet been undone). To hold to the contrary, as the judge did, would effectively give the Respondent the “power to veto” a union’s decision to affiliate, “thereby allowing the [Respondent] to directly interfere with union decisionmaking Congress intended to insulate from outside interference.” *Seattle-First*, supra, 475 U.S. at 209.

Even were we to view the employees’ petition not as an attempt to disaffiliate, but rather as an expression that a majority of the unit did not wish to be represented by TIWA as a UAW affiliate, we would still find that the Respondent was not privileged to honor the petition by withdrawing recognition. At bottom, this case, despite its unusual facts, is no different than a more common situation in which, during the term of a collective-bargaining agreement, a majority of employees demonstrate to the employer their support for a different union. Well-established Board law makes clear that whatever the employer’s dilemma, when faced with competing representational claims, it cannot withdraw recognition from an incumbent union during the term of the agreement.⁸

⁷ We find it unnecessary to address the issue of whether due process safeguards must be provided for the “disaffiliation” in this case to be valid. Rather, the disaffiliation effort was ineffective because it was not carried out through internal union procedures of any sort.

⁸ See, e.g., *Avne Systems, Inc.*, 331 NLRB 1352, 1359–1360 (2000); *Dominick’s Finer Foods*, 308 NLRB 935, 944–946 (1992), enfd. 28 F.3d 678 (7th Cir. 1994); *Interstate Material Corp.*, 290 NLRB 362, 362 fn. 3 (1988), enfd. 902 F.2d 37 (7th Cir. 1990); and *Ana Colon, Inc.*, 266 NLRB 611, 613 (1983). As the Board’s decisions in *Avne Systems* and *Dominick’s Finer Foods* demonstrate, the contract-bar principle applies in such situations even when the “new” union has the same leadership as the old and apparent majority support among employees.

We recognize both the dilemma of the Respondent faced with competing representational claims and the fact that a majority of employees apparently had second thoughts about their affiliation vote, after the Respondent expressed strong opposition. But neither the employees nor the Respondent followed the path the law permits for resolving their uncertainties. In cases like this one, if an employer has doubts about his duty to continue bargaining with the incumbent union, it is his responsibility to petition the Board for relief at the appropriate time. If, for their part, employees want to undo a union affiliation, they can—and must—pursue their goal through internal union channels. On matters of the union’s institutional organization, they are not entitled to take self-help. And, while they naturally are free to change their representative, they may do so only at certain times.⁹

Our dissenting colleague protests that, by this decision, we are elevating form over substance and denying employee free choice. We reject this reasoning. As we have explained, a disaffiliation is a change in the legal and institutional relationships between two unions. It cannot be carried out externally to the unions. In a real sense, where disaffiliation decisions are concerned, form is substance: for such a disaffiliation to have legal substance—for it to *be* a disaffiliation—it must be effected through the proper channels. This no more restricts employee free choice than does requiring employees to go through union channels in effecting a merger or affiliation of two unions.

In summary: Because TIWA’s affiliation was valid and the later disaffiliation effort was ineffective, the Respondent’s refusal to recognize TIWA as an affiliate of the UAW was unlawful. To the extent that the Respondent’s action amounted to a withdrawal of recognition during the term of the contract, it was also unlawful. TIWA as a UAW affiliate had succeeded to the rights of TIWA as an independent union. The Respondent was therefore required to recognize affiliated TIWA as the employees’ bargaining representative. In addition, the collective-bargaining agreement to which TIWA was a party remained in effect. Under well-established principles, the Respondent could not lawfully withdraw recognition from the union while the collective-bargaining agreement was in effect, even if a majority of bargaining unit members no longer supported TIWA as a UAW-affiliated labor organization.

We therefore find that the Respondent was required to recognize and bargain with TIWA as an affiliated local

⁹ See *Southern Oregon Log Scaling*, 223 NLRB 430, 433–434 (1976) (employer required to recognize incumbent, affiliated union where disaffiliation was ineffective and collective-bargaining agreement remained in effect).

of the UAW and that its refusal to do so violated Section 8(a)(5) and (1). It follows that MacMurray was entitled to be represented by UAW International Representative Petro at step 3 of the grievance process, as he requested. The Respondent's refusal to allow Petro to represent him, on the ground that it was refusing to recognize the affiliation, also violated Section 8(a)(5) and (1).¹⁰

II. THE 8(a)(1) VIOLATION ARISING FROM HUGHES' REMARKS

On March 14, 2 days before the March 16 affiliation vote, the Respondent met with small groups of employees to discuss the affiliation question. Plant Manager Larry Hughes made certain remarks that are alleged to constitute unlawful threats. The witnesses did not agree on exactly what Hughes said, but Hughes summarized his statements this way:

UAW or no UAW, these doors weren't going to close because, you know, we weren't going to have any business. I did tell them that it was my opinion, and again, I've been in this, you know, I've been part of an automotive group for years, that that particular time, let's call it time in life, there were several General Motors plants being shut down idle because of strikes of the UAW.

I told them it was my opinion that if we went that way, there was a strong possibility as Delphi looks to out source the jobs they no longer can be competitive at, why would they want to give it to a company that is in the same situation and in possible jeopardy of having strikes.

On cross-examination, Hughes admitted that he provided no support for his statement about Delphi's future conduct, which was merely his opinion. Employee Janet Kieliszewski testified that Hughes did not document his statements. The judge found that Hughes' statements were protected statements of opinion under Section 8(c). The General Counsel has excepted to that finding. We find merit in the exception.

Section 8(c) provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." The Supreme Court in *NLRB v. Gissel Packing Co.*¹¹ explained the difference between speech protected by Section 8(c) and coercive statements that violate Section 8(a)(1):

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.¹²

Accordingly, the Board has consistently held that predictions of adverse consequences of unionization arising from sources outside the employer's control violate Section 8(a)(1) if they lack an objective factual basis.¹³ The same holds for statements about what other employers will do.¹⁴

Here, as he conceded, Hughes furnished no objective basis for his prediction that other employers, fearing strikes, would not give their business to the Respondent if the employees voted to affiliate with the UAW.¹⁵ Hughes offered no documentation for his statement. He identified no companies that had withdrawn business from UAW-organized firms or that would withdraw business from the Respondent if TIWA affiliated with the UAW.¹⁶ We, therefore, find that Hughes' statements violated Section 8(a)(1).

Contrary to the judge and our dissenting colleague, *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985), is distinguishable from this case. The employer there told employees that if, as a result of unionization, it had to bid higher or customers felt threatened because of strikes, it would lose business and jobs. The Board, stressing the "if" in that statement, found that it constituted only a permissible mention of reasonably possible effects of unionization. Hughes made no such "if" statement. Instead, he straightforwardly suggested that a vote to affiliate would lead to a loss of business.

The employer in *Tri-Cast* also told employees that under union restrictions, it would lose the flexibility it needed to beat the competition and could not stay

¹² Id. at 618.

¹³ See, e.g., *Laidlaw Transit, Inc.*, 297 NLRB 742 (1990); *Long-Airdox Co.*, 277 NLRB 1157 (1985).

¹⁴ *Blaser Tool & Mold Co.*, 196 NLRB 374 fn. 2 (1972).

¹⁵ It is immaterial that Hughes referred only to a "strong possibility," or that he chose to ask a rhetorical question rather than make an out-and-out prediction; his statement was still a prediction of adverse consequences of voting to affiliate with the UAW. See *Blaser Tool & Mold Co.*, 196 NLRB at 374 (employer violated Sec. 8(a)(1) by stating that its major customer was free to withdraw its patronage at any time and that the employer was apprehensive that the customer would cease doing business with it if the employees voted for the union).

¹⁶ Cf. *Long-Airdox Co.*, supra, 277 NLRB at 1158.

¹⁰ *J. W. Fergusson & Sons*, 299 NLRB 882, 891 (1990).

¹¹ 395 U.S. 575 (1969).

healthy. The Board found that this referred to the effects of possible restrictions the *union* might seek in bargaining, which were simply a possible outgrowth of unionism, and therefore that the statement was not a threat of retaliatory conduct. The prediction of what the *union* might do is less threatening than Hughes' statement about what third parties would do, because the former conduct is within the control of the union and, ultimately, of the employees themselves.

III. THE 8(a)(1) VIOLATION ARISING FROM THE RESPONDENT'S NOTICE

Soon after the affiliation vote, the Respondent posted a notice on the bulletin board that said:

As the correspondence posted on the board states, the Company has been notified that employees have voted to affiliate with the UAW, and that the Company is in the process of reviewing this matter.¹⁷

The Company has the right under the National Labor Relations Act to challenge the vote to affiliate.

The Act also protects employees. Under the Act (Section 7), employees have the right to support or not support a union; and employees have the right to express their "views, argument, or opinion, . . . if such expression contains no threat of reprisal or force or promise of benefit." (Section 8[c]).

It has been reported that employees feel they are being subjected to threats and coercion because they are expressing their views (either pro or con) regarding the affiliation.

If you feel that you are being subjected to such actions, please report such incidents to the Company and we will take the appropriate action, or you may directly contact the Regional Office of the National Labor Relations Board[.]

The judge rejected the complaint allegation that the notice violated Section 8(a)(1) by encouraging employees to report to management the union activities of other employees. He reasoned that the notice was neutral in that it addressed both employees who were for affiliation and those who were against it. He also noted that it told employees that they could contact the Board directly. The General Counsel has excepted to the judge's dismissal of this allegation, and, again, we find merit in the exception.

The Board has frequently found unlawful employers' statements that employees who harass or pressure other

employees in the course of union solicitations should be reported to management, who will discipline the offending individuals or otherwise take care of the problem.¹⁸ As the Board has found, such statements violate Section 8(a)(1) "because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities."¹⁹ By telling employees that management will deal with the problem, such statements also indicate that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act.²⁰

Consistent with those decisions, we find the Respondent's notice to be coercive. Although the notice spoke of "threats and coercion," rather than "pressure," "harassment," or other more general conduct, the Board has found unlawful an employer's request to employees to report "coercion" in the context of union activity. *CMI-Dearborn*, supra. In that case, the Board adopted a judge's decision finding that the request to employees "included every contact that the employees might subjectively regard as . . . 'coercion' [and] that employees are unlikely to understand that by its request that acts of 'coercion' be reported, it meant only such actions as those that have been held to be coercive under Section 8(b)(1)(A) of the Act."²¹ Similarly, we find here that the notice was alluding to "subjectively offensive conduct" occurring in the context of union activity, and thus that it was likely to encourage employees to report protected conduct to management.²²

Unlike the judge and our colleague, we find it immaterial that the notice referred to threats and coercion di-

¹⁸ See, e.g., *CMI-Dearborn, Inc.*, 327 NLRB 771, 775-776 (1999); *Almet, Inc.*, 305 NLRB 626, 627-628 (1991), enfd. 987 F.2d 445 (7th Cir. 1993); and *Hawkins-Hawkins Co.*, 289 NLRB 1423, 1423-1424 (1988).

¹⁹ Id. at 1423.

²⁰ Id. at 1424.

²¹ See *Almet, Inc.*, 305 NLRB at 627-628 (employer's injunction against employees' being "bullied and threatened" by other employees and the use of "goon" and "gangster" tactics to bully, intimidate, or coerce other employees, found unlawful where the statements were based on unsubstantial rumors of employee pressure on other employees to sign union cards); *J. P. Stevens & Co.*, 245 NLRB 198, 209, 217 (1979), modified on other grounds 638 F.2d 676 (4th Cir. 1980) (employer's notice stating that employees had been threatened with physical violence for refusing to sign union cards and that such conduct would not be tolerated, found unlawful where no evidence that such threats had actually been made). Cf. *Liberty House Nursing Home*, 245 NLRB 1194, 1197 (1979) (employer's statement that it would not allow employees to be threatened by union organizers or other employees, and that employees who were threatened should tell management about it, found not unlawful, where one employee actually had threatened another).

²² *Almet, Inc.*, 305 NLRB at 628.

¹⁷ The correspondence referred to was a copy of TIWA's letter to the Respondent advising it of the outcome of the affiliation vote on March 16.

rected toward employees on either side of the affiliation issue. In the first place, employee solicitations both for and against affiliation are protected by Section 7. By singling out purported threats and coercion arising only from such conduct, rather than threats and coercion generally, the Respondent made it clear that it was interested only in finding out and taking “appropriate action” against employees who exercised their rights under the Act.²³ Second, even though the notice on its face indicated that employees who were in favor of affiliation should report threats or coercion directed at them, in view of the Respondent’s evident opposition to affiliation, a reasonable UAW adherent might have believed that the Respondent was not really interested in, and would take no action against, such conduct.²⁴ We therefore find that the notice violated Section 8(a)(1) as alleged.

ORDER

The National Labor Relations Board orders that the Respondent, Tawas Industries, Inc., Tawas City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that other companies will not give work to the Respondent, and jobs to its employees, if they vote to affiliate Tawas Independent Workers Association (TIWA) with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.

(b) Soliciting employees to report the union activities of other employees to management.

(c) Suspending or otherwise discriminating against any employee for supporting the UAW or any other labor organization.

(d) Refusing to recognize and bargain with TIWA, as an affiliate of UAW, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time and seasonal production employees employed by the Respondent at its Tawas City, Michigan facility and its facility located at 2029 N. U.S. 23, AuSable, Michigan; but excluding office clerical employees, technical/professional employees, temporary employees, guards and supervisors as defined in the Act.

(e) Refusing to recognize a representative of the UAW as the representative of its bargaining unit employees in the contractual grievance procedure.

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

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

(a) Make Kenneth MacMurray whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

(c) On request, recognize and bargain with TIWA, as an affiliate of the UAW, as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities at Tawas, Michigan, copies of the attached notice marked “Appendix.”²⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and main-

²³ Thus, we find *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), in which the D.C. Circuit found, contrary to the Board, that a company rule prohibiting the use of “abusive or threatening language to anyone on Company premises” was not unlawful, to be distinguishable. That case involved a general rule that did not refer to the context in which the prohibited “abusive or threatening language” occurs. Here, as indicated above, the allegedly unlawful rule specifically singled out “coercion” in connection with discussions involving affiliation—discussions protected under Sec. 7 of the Act—notwithstanding the absence of any evidence that employees had engaged in such coercive conduct.

²⁴ Indeed, as the judge found, that proved to be the case. The Respondent unlawfully suspended MacMurray, a UAW supporter, for relatively innocuous conduct, while taking no action at all against other employees who harassed MacMurray and whose conduct the judge found to be worse than MacMurray’s.

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

tained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 1997.

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

CHAIRMAN HURTGEN, concurring and dissenting.

I agree with my colleagues on those issues wherein they affirm the administrative law judge's decision. I disagree with my colleagues on those issues wherein they reverse the judge's decision. I agree with the judge.

1. The Respondent's employees have been represented for many years by Tawas Independent Workers Association (TIWA). The parties' most recent collective-bargaining agreement was effective from October 1, 1996, to September 30, 1999.

On March 16, 1997,¹ the Respondent's employees voted to have TIWA affiliate with United Auto Workers (UAW). TIWA immediately notified the Respondent. The Respondent replied that it would investigate and review the matter, and that meanwhile it would continue to recognize TIWA as the employees' bargaining representative and to operate under the existing collective-bargaining agreement. Shortly thereafter, the employees changed their minds about the affiliation. On April 3, they presented the Respondent with a petition, signed by 23 of the 30 to 33 members of the bargaining unit, stating that they did not wish TIWA to affiliate with UAW. Thereafter, by letter dated April 18, UAW International Representative Don Petro informed the Respondent of the affiliation. By letter dated April 24, the Respondent notified Petro that it refused to recognize the affiliation.

On April 21, employee Kenneth MacMurray was suspended for 2 days, allegedly for harassing another employee. MacMurray filed a grievance and requested representation by Petro at the third step of the grievance procedure. The Respondent refused to allow Petro to represent MacMurray because it refused to recognize an affiliation with UAW. The Respondent continued to

recognize and bargain with TIWA and to abide by its collective-bargaining agreement.

The judge found that the affiliation with UAW had been accomplished with adequate due process safeguards and that there was substantial continuity between the pre- and postaffiliation union. The judge also found that a majority of the Respondent's employees thereafter decided that they did not want TIWA to be affiliated with UAW and that they so informed the Respondent before UAW had committed any time or resources to representing the employees. The judge therefore found that the Respondent had not violated Section 8(a)(5) and (1) of the Act by refusing to recognize the affiliation with UAW, and by refusing to allow Petro to represent MacMurray. The judge noted that it is the fundamental right of employees to select their representative, and the employees here made it clear that they did not want the affiliation with UAW.

I agree with the judge. In reversing the judge, my colleagues state that "affiliation or disaffiliation decisions involve essentially internal union matters: matters that are to be governed by the union's own procedures and that are not effectively subject to an employer's veto." In so doing, my colleagues cite *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986). In that case, the Supreme Court struck down the Board's holding that an employer need not honor an affiliation in circumstances where non-member employees were not allowed to vote on the affiliation issue. The Court stated:

The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference.²

There is no such employer intrusion here. The Respondent was simply honoring the wishes of its employees. It is, after all, their Section 7 right to choose their own representatives.

I am guided by the principle that the Board has heretofore stated in discussing affiliation: "The Board's analysis, rather than being mechanistic and using a strict checklist, is directed at analyzing the totality of circumstances *in order to give paramount effect to employees' desires.*" (Emphasis added.)³ The Respondent here gave paramount effect to its employees' desires. Like the judge, I find no violation of the Act here.

² *Seattle First National Bank*, supra at 209.

³ *Sullivan Bros. Printers*, 317 NLRB 561, 563 (1995), enf. 99 F.3d 1217 (1st Cir. 1996).

¹ All dates are in 1997 unless otherwise indicated.

My colleagues say that the Respondent should have “petitioned the Board for relief at the appropriate time.” Similarly, my colleagues say that the employees were “not entitled to take self-help”; “while the employees are naturally free to change their representative, they may do so only at certain times.” The problem with this approach is that the contract would bar an effort to challenge the Union’s status for another 2-1/2 years. And, during that period, the employees would be saddled by an affiliated union which they do not want.

My colleagues suggest that the employees could disaffiliate only through the same mechanism that they use to affiliate, i.e., they can only do so through the Union. In my view, this represents form over substance. There is no evidence that the 23 employees who voted against affiliation would have been ineligible to vote in a union-conducted election. The heart of the matter is to effectuate employee free choice. I would not require that the free choice be registered only through the Union.

Finally, this case may well have been different if the chronology had been different. If employees vote to affiliate, and the affiliated union requests bargaining, the employer is required to honor the request. A subsequent change of heart by the employees, outside of union channels, arguably would not operate to undo the affiliation. However, in the instant case, the affiliation vote was undone by the employees before the UAW acted thereon. In these circumstances, the affiliation was effectively aborted before it began.

2. The judge also found no violation of the Act in Plant Manager Larry Hughes’ March 14 remarks to employees. The witnesses did not agree on exactly what Hughes said, but Hughes summarized his statement this way:

UAW or no UAW, these doors weren’t going to close because, you know, we weren’t going to have any business. I did tell them that it was my opinion, and again, I’ve been in this, you know, I’ve been part of an automotive group for years, that that particular time, let’s call it time in life, there were several General Motors plants being shut down idle because of strikes of the UAW.

I told them it was my opinion that if we went that way, there was a strong possibility as Delphi looks to out source the jobs they no longer can be competitive at, why would they want to give it to a company that is in the same situation and in possible jeopardy of having strikes.

The judge found that Hughes’ statement “falls within the protective parameters of Section 8(c) of the Act” citing *Tri-Cast, Inc.*, 274 NLRB 377 (1985). In that case,

the employer told employees that if, as a result of unionization, it had to bid higher or customers felt threatened because of strikes, the employer would lose business and jobs. The Board stressed the accuracy of the statement. The Board stated: “Higher bids or customer feelings of dissatisfaction because of problems caused by union strikes *can* lead to lost business and lost jobs.”⁴ The Board therefore found no objectionable conduct in “[m]aking these reasonable possibilities known to employees.”⁵

Unlike my colleagues, I find the situation here analogous with that in *Tri-Cast*, supra. Hughes told employees that UAW engaged in strikes in the past. That statement was factual. Hughes then said that customers might prefer not to give business to a company “in possible jeopardy of having strikes.” As the Board noted in *Tri-Cast*, supra, customer concern about possible strikes “*can* lead to lost business and lost jobs.”⁶ (Emphasis in original.) In this respect, I find misplaced my colleagues’ concern that Hughes furnished no objective basis for his prediction. The facts are that (1) UAW does engage in strikes and that (2) some companies prefer not to deal with contractors when strikes are possible. Accordingly, I agree with the judge, and I find no violation of the Act in Hughes’ March 14 remarks to employees.

My colleagues seek to distinguish *Tri-Cast* on two bases. First, they say that the employer statement in *Tri-Cast* was conditional, i.e., the employer used the word “if.” However, the statement herein was also conditional. The Respondent said that other companies might do business elsewhere if there were a possibility of strikes at Respondent. My colleagues also say that the employer statement in *Tri-Cast* was based on what the union might do. In the instant case, the employer statement was based on what another employer might do. However, in both cases, the employer was talking about what others (outside of its control) might do. In neither situation was the employer saying that *it* would take retaliatory action.

3. Finally, the judge found no violation of the Act in the notice the Respondent posted shortly after the March 16 affiliation vote. The notice stated:

As the correspondence posted on the board states, the Company has been notified that employees have voted to affiliate with the UAW, and that the Company is in the process of reviewing this matter.

⁴ *Tri-Cast*, supra at 378 (emphasis in original).

⁵ Id.

⁶ Id.

The Company has the right under the National Labor Relations Act to challenge the vote to affiliate.

The Act also protects employees. Under the Act (Section 7), employees have the right to support or not support a union; and employees have the right to express their “views, argument, or opinion, . . . if such expression contains no threat of reprisal or force or promise of benefit.” (Section 8[c]).

It has been reported that employees feel they are being subjected to threats and coercion because they are expressing their views (either pro or con) regarding the affiliation.

If you feel that you are being subjected to such actions, please report such incidents to the Company and we will take the appropriate action, or you may directly contact the Regional Office of the National Labor Relations Board.

The judge rejected the complaint allegation that the notice violated Section 8(a)(1) by encouraging employees to report to management the union activities of other employees. The judge noted that the notice was neutral, and that it provided an avenue of redress for employees who were in favor of and those opposed to affiliation. It also advised employees that they could go directly to the Board as well as reporting to the Respondent. These facts are absent in the cases cited by my colleagues. In *CMI-Dearborn, Inc.*, 327 NLRB 771, 775–776 (1999), the employer’s letter to employees stated that the employer would protect employees from coercion “by the union pushers to get you to join the union”, and asked employees to report the coercion to the employer. In *Almet, Inc.*, 305 NLRB 626, 627–628 (1991), enfd. 987 F.2d 445 (7th Cir. 1993), although the employer’s speech failed to refer directly to the union or its employee supporters, the Board specifically found that employees reasonably understood that the speech was addressed to their engagement in pronoun activities and that the employer’s instructions to employees to report on those activities were designed to target union supporters for retaliation. Indeed, the employer threatened to discipline those who remained silent in the face of such conduct as well as those who engaged in such conduct. In *Hawkins-Hawkins Co.*, 289 NLRB 1423, 1423–1424 (1988), the employer told employees that if they felt harassed by supporters of the union, they should inform management who would take care of the situation. In all of these cases, the employers directed employees to report to them the activity of union supporters only. Here, the Respondent referenced the activity of both those who supported affiliation and those who opposed it, and said that misconduct could be reported not only to itself but also to the Board. In these circumstances, the Respondent re-

mained neutral. I agree with the judge and would dismiss this allegation of the complaint.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that other companies will not give work to us, and jobs to our employees, if they vote to affiliate Tawas Independent Workers Association (TIWA) with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.

WE WILL NOT solicit employees to report the union activities of other employees to management.

WE WILL NOT suspend or otherwise discriminate against any of you for supporting the UAW or any other union.

WE WILL NOT refuse to recognize and bargain with TIWA, as an affiliate of the UAW, as the exclusive collective-bargaining representative of our bargaining unit employees.

WE WILL NOT refuse to recognize a representative of the UAW as the representative of our bargaining unit employees in the contractual grievance procedure.

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

WE WILL make Kenneth MacMurry whole for any loss of earnings and other benefits resulting from his unlawful suspension, less any net interim earnings, plus interest.

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

WE WILL, on request, recognize and bargain with TIWA as an affiliate of the UAW and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time and seasonal production employees employed by us at our Tawas City, Michigan facility and our facility located at 2029 N. U.S. 23, AuSable, Michigan; but excluding office clerical employees, technical/professional employees, temporary employees, guards and supervisors as defined in the Act.

TAWAS INDUSTRIES, INC.

Jeffrey D. Wilson, Esq., for the General Counsel.
William L. Hooth, Esq. (Cox, Hodgman & Giarmarco, PC), of Troy, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On May 27, 1997, the charge in Case 7-CA-39862 was filed by the International Union, UAW (the Union) against Tawas Industries, Inc. (Respondent).

On December 4, 1997, the National Labor Relations Board (the Board), by the Regional Director for Region 7, issued a complaint which alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), when it threatened employees, unlawfully suspended an employee for 2 days, and when it refused to recognize and bargain with the Charging Party Union following an affiliation vote.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Tawas City, Michigan, on January 28 and 29, 1998.

Based on the entire record in this case, including posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, with an office and place of business in Tawas City, Michigan, has been engaged in the manufacture of filters and related automotive parts.

Respondent admits, and I find, that at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that at all material times, Tawas Independent Workers Association (TIWA) has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent also admits, and I find, that at all material times the Charging Party Union, International Union UAW has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Respondent's Failure to Recognize and Bargain with the UAW

For many years Respondent has recognized the Tawas Independent Workers Association (TIWA), as the exclusive collective-bargaining representative of its full-time, regular part-time, and seasonal production employees.

This recognition has been embodied in successive collective-bargaining agreements, the most recent being effective from October 1, 1996, to September 30, 1999.

In late 1996, the president of TIWA, Kenneth MacMurray, contacted the UAW International Union on the issue of TIWA affiliating with the UAW.

A meeting was to be held on February 22, 1997, where UAW International Representative Diana Ketola would speak to the TIWA members about affiliation of TIWA with the UAW. Unfortunately Ketola was involved in an accident and that meeting had to be postponed.

The meeting was rescheduled for March 2, 1997. A notice was posted on the union bulletin board to that effect but the notice did not state that affiliation with the UAW would be the subject matter of the meeting.

In any event the meeting was held on March 2, 1997, and Ketola spoke to the TIWA members. After Ketola spoke, the people in attendance voted on whether TIWA should affiliate with the UAW. The vote was 20 to 0 in favor of affiliation. There are 30 to 33 employees in the unit.

Thereafter TIWA President Kenneth MacMurray and UAW International Representative Diana Ketola spoke and mutually concluded that another meeting on affiliation should take place in part because the notice for the March 2, 1997 meeting did not state that the subject matter of the meeting would be affiliation with the UAW.

Another notice was posted on the union bulletin board on March 10, 1997, announcing that there would be a union meeting on March 16, 1997, and a vote taken on whether TIWA should affiliate with the UAW or not.

At the March 16, 1997 meeting Diana Ketola spoke about the UAW and there was a question and answer session and an opportunity for discussion and then a vote was taken among the unit members in attendance. The voting was not done in a voting booth or by use of a voting machine but those voting could vote privately without anyone seeing how they voted by covering their ballot or retiring to a corner of the room to vote. There is no evidence whatsoever that anyone saw how anyone else voted. The ballots were folded and placed in a box and after everyone voted the ballots were counted. The vote was 19 to 11 in favor of affiliation. Thirty out of 30 to 33 eligible voters voted, to include employees who, at their request, voted just before the meeting but had to leave and could not stay for the meeting. The March 16, 1997 meeting took about 1-1/2 hours. The votes were counted by two TIWA members who volunteered to count the ballots.

Immediately after the vote one of the employees in attendance, Dan Rice, told how he had lost his job after the employees where he then worked chose to be represented by a union. He was told he should have brought that up earlier.

Suffice it to say I conclude that the 19–11 vote to affiliate was done with adequate due process safeguards and there was substantial continuity between the pre and postaffiliated union and I conclude this was a valid affiliation. See *NLRB v. Food & Commercial Workers 1182 (Seattle-First National Bank)*, 475 US 192 (1986); *CPS Chemical Co.*, 324 NLRB 1018 (1997), *Hammond Publishers*, 286 NLRB 49, 50 (1987).

One objection to the affiliation vote raised by Respondent was that UAW Representative Diana Ketola remained in the room when the voting took place. However, no one asked her to leave or made a motion that she leave the room. In any event, neither she nor anyone else could see how the employees voted. Prior to the affiliation vote no one in attendance made a motion to postpone the vote until the employees had an opportunity to discuss the matter further.

TIWA sent a letter to Respondent advising Respondent of the affiliation. Respondent wrote back saying it would not recognize the affiliation until it had a chance to look into the matter. Only three of four union officers signed the letter. Vice President Mike Wood had concluded that the vote to affiliate was a mistake and would not sign the letter. Indeed, he resigned his vice presidency.

It was obvious that the employees were immediately having second thoughts about their decision to affiliate with the UAW as more fully explained below. Before the UAW did anything other than request Respondent to recognize the affiliation and bargain with the UAW as an affiliate of TIWA the employees made it crystal clear and beyond all doubt that they wanted to reverse their decision to affiliate. I find that the employees voluntarily and, before the UAW had committed any time or resources to represent Respondent's employees, overwhelmingly decided to reverse the affiliation decision by submitting a petition to management signed by 23 out of 30 to 33 employees that they opposed affiliation with the UAW and, accordingly, Respondent did not violate Section 8(a)(5) and (1) of the Act when it refused to recognize the affiliation and bargain with the UAW.

The second affiliation vote had taken place on Sunday, March 16, 1997. The following Monday or Tuesday, March 17 or 18, 1997, employees Karen Cockburn, Brenda Gardner, and recently resigned TIWA Vice President Mike Wood went to the office of Jim Estes, Respondent's human resources manager, and told him they felt pressured to vote for affiliation and what could they do about it. Estes directed them to call the Board.

Cockburn called the Board office in Detroit and she, Mike Wood, and Denny Neumann, after Cockburn spoke with a Board agent, circulated a petition which stated, "[W]e the undersigned do not wish to be affiliated with the UAW." After 21 of Respondent's 30 to 33 unit employees had signed the petition Wood turned the petition in to Jim Estes' office on the morning of April 3, 1997. Two more employees, Brenda and Bob Gardner, went to Estes office that day and signed the petition. In all 23 of 30 to 33 employees signed the petition. In other words an overwhelming majority of Respondent's em-

ployees did *not* want to affiliate with the UAW and they made this clear both to Respondent and to the UAW *before* the UAW had committed time and resources to the representation of Respondent's employees. In her letter to the UAW a week or two after the affiliation vote Cockburn advised the UAW that a majority of the members of TIWA had voted for affiliation but "after careful consideration" had decided to reverse that decision.

Between the affiliation vote of March 16, 1997, and the presentation of the petition some 18 days later on April 3, 1997, there had been no bargaining between the UAW and Respondent and the UAW had committed no resources toward its corepresentation of Respondent's employees along with TIWA.

Respondent continues to recognize and bargain with TIWA and to abide by its contract with TIWA which expires on September 30, 1999.

Respondent did not violate the Act in refusing to recognize and bargain with the UAW. The fundamental right to chose between representation by a union or not is the choice of Respondent's employees and no one who reads the record in this case could conclude anything other than that Respondent's employees, rightly or wrongly, do *not* want to be affiliated with the UAW.¹

B. Other Alleged Unfair Labor Practices by Respondent

1. Alleged December 1996 threat

The TIWA President Kenneth MacMurray testified that in December 1996 his supervisor, Fred Landon, complained to MacMurray and his crew that cleaning up of their work area at the end of shift was unsatisfactory and if they had to work longer to clean up properly they should work 5 or 10 minutes longer. This appeared to MacMurray to be contrary to the provisions of the collective-bargaining agreement which provided for a five minute end of shift period for the employees to clean up their work area and personally wash up.

Thereafter, according to MacMurray, he and Landon went to see Ray Allen, CEO of Respondent. In the course of the meeting Allen allegedly said to MacMurray that MacMurray was going to have to chose between TIWA and the Company.

Ray Allen did not testify. Larry Hughes, plant manager, whom MacMurray testified was at the meeting, testified that no such meeting ever took place. Human Resources Manager Jim Estes, whom MacMurray testified was also at the meeting, did not recall any such meeting and that he *never* heard Allen ever say to MacMurray or anyone else that they had to chose between TIWA and the Company.

In deciding whether to credit MacMurray over Hughes and Estes I must consider, among other things, the demeanor of the witnesses. All three appeared credible. All, in a sense, had a motive to fabricate, i.e., MacMurray to bring 8(a)(1) conduct by

¹ I have read the principal cases cited by the parties in their briefs and see nothing in those decisions to modify my findings. Those cases are *J. W. Fergusson & Sons*, 299 NLRB 882 (1990); *American Mailers*, 231 NLRB 1194 (1977), *enfd.* 622 F.2d 242 (6th Cir. 1980); *A. W. Winchester, Inc.*, 226 NLRB 1006 (1976), *enf. denied* 588 F.2d 211 (6th Cir. 1978); and *Bear Archery*, 223 NLRB 1169 (1976), *enf. denied* 587 F.2d 812 (6th Cir. 1977).

Respondent into the mix and Hughes and Estes to deny 8(a)(1) conduct by Respondent.

The fact that it is two witnesses against one witness is not dispositive as to where the truth lies. However, where a fact finder like myself cannot credit one version of what was said over another the party with the burden of proof, i.e., the General Counsel in this case, loses. In addition these remarks attributed to Allen that MacMurray chose between TIWA and the company are sufficiently vague that I find that even if Allen said it that it did not constitute an unlawful threat in violation of the Act.

2. Alleged March 14, 1997 threat

Listening to the witnesses in this case it is obvious that the affiliation issue was a divisive one among Respondent's employees.

The second affiliation vote was scheduled for Sunday, March 16, 1997, at a local American Legion Hall. On the Friday before the vote, i.e., March 14, 1997 management met with groups of employees.

Larry Hughes, plant manager, spoke at these small group meetings. At one of the meetings employee Janet Kieliszewski testified Hughes said:

Well, then they just had the meeting but I remember Mr. Hughes saying you have a Union meeting coming up in a couple of days. We encourage you to go to your meeting. You should support your Union. When you're there, they'll ask you to vote whether or not you should affiliate with United Autoworkers and we just want you to know what's going on, and said our companies that buy from us don't feel that they can depend on companies that belong to big unions like the United Autoworkers because they're known to go on strike. Their buyers would feel more comfortable buying from smaller, independent union businesses.

Hughes conceded that he told the employees the following:

Well, stuff like that, that, you know, there was no way that anybody could steal their pension money² and that UAW or no UAW, these doors weren't going to close because, you know, we weren't going to have any business. I did tell them that it was my opinion, and again, I've been in this, you know, I've been part of an automotive group for years, that that particular time, let's call it time in life, there were several General Motors plants being shut down idle because of strikes of the UAW.

I told them it was my opinion that if we went that way, there was a strong possibility as Delphi looks to out source the jobs they no longer can be competitive at, why would they want to give it to a company that is in the same situation and in possible jeopardy of having strikes.

The statement of Hughes to the employees just days before the second affiliation vote borders on being a threat. However, Section 8(c) of the Act provides that "the expressing of any views, argument, or opinion, or the dissemination thereof,

² According to Hughes a rumor had been spread that Respondent could steal employees' pension moneys if there was no affiliation with the UAW.

whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit."

While the test of whether a statement constitutes a threat or not is objective and not subjective, I nevertheless note that the affiliation vote just 2 days later was 19 to 11 in favor of affiliation.

The statement of Hughes, in my judgment, falls within the protective parameters of Section 8(c) of the Act. See, e.g., *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

3. Alleged April 3, 1997 threat

On April 3, 1997, *after* the petition was submitted to management which expressed the opinion of the overwhelming majority of Respondent's employees that they did *not* want to be affiliated with the UAW management held a number of meetings with small groups of employees telling them that Ray Allen was starting up a new company named Tawas Components and it would start with one employee but maybe there would be job opportunities for Respondent's employees if the new business did well. The new business was doing something that Respondent did not do and was not taking over Respondent's business.

Allen told the employees that for Respondent to be successful employees would have to get "on the train" that he was the engineer of rather than any other train. The language of Allen was so vague that I cannot make an 8(a)(1) threat out of it.

In other words, *after* and not *before* the petition was submitted to management which advised management that 23 of its 30 to 33 employees did *not* want to be affiliated with the UAW Respondent, through CEO Ray Allen, talks to the employees about a new company he is starting. The employees were told in small group meetings that the new Company which was to be called Tawas Components and would be a distribution center whereas Respondent was a manufacturing company and that Tawas Components would operate out of the warehouse, some 15 miles or so from Respondent's manufacturing plant and would have in the beginning one employee, namely, Jessie Wilson, one of Respondent's supervisors. Further, that employment opportunities may in the future be available for Tawas Industries' employees if the new company does well. I do not see an unfair labor practice in this.

4. Notice to employees regarding threats and coercion

As noted above the issue of affiliation with the UAW was a very divisive issue among Respondent's employees. Vice President Mike Wood immediately resigned after the March 16, 1997 vote and a petition began being circulated within a day or two seeking to reverse the affiliation vote of March 16, 1997.

It is with this backdrop that Respondent posted a notice on the bulletin board which stated as follows:

As the correspondence posted on the board states, the Company has been notified that employees have voted to affiliate with the UAW, and that the Company is in the process of reviewing this matter.

The Company has the right under the National Labor Relations Act to challenge the vote to affiliate.

The Act also protects employees. Under the Act (Section 7), employees have the right to support or not support a union; and employees have the right to express their views, argument, or opinion, . . . if such expression contains no threat of reprisal or force or promise of benefit. (Section 8[c]).

It has been reported that employees feel they are being subjected to threats and coercion because they are expressing their views (either pro or con) regarding the affiliation.

If you feel that you are being subjected to such actions, please report such incidents to the Company and we will take the appropriate action, or you may directly contact the Regional Office of the National Labor Relations Board (313-226-3200).

The complaint alleges that this notice encouraged employees to report other employees to management for engaging in union and protected concerted activity. I don't read it that way.

The notice is neutral in the sense that it seeks an avenue of redress for employees whether those employees are in favor of or opposed to affiliation and also informs employees that they may directly contact the Labor Board. I do not find an unfair labor practice in the posting of this notice.

5. 2-day suspension of Kenneth MacMurray

TIWA President Kenneth MacMurray was involved on Friday, April 18, 1997, in an incident with fellow employee Denny Neumann. Neumann never testified.

Neumann circulated on second shift the petition to set aside the affiliation vote and on April 18, 1997, he posted a notice asking employees what union officer positions they wanted to run for to include to MacMurray's position as president.

MacMurray at the end of shift when he was leaving and Neumann was just coming in approached Neumann to ask on what grounds his removal as president was being sought and to give Neumann the name and telephone number of a lawyer TIWA had consulted in the past. MacMurray then handed in a report and moments later returned to where Neumann was to tell him he should also check with the Board. The area was noisy due to machinery and MacMurray tapped Neumann on the shoulder. Neumann overreacted and told MacMurray never to touch him again. MacMurray went home and Neumann went to management and complained that he was being harassed by MacMurray and that MacMurray "started poking me in the back threatening me about the union things going on in the shop." Neumann gave management the names of three witnesses to his encounter with MacMurray, i.e., Mike Schwalm, Scott Remender, and Earl Allen.

When MacMurray came to work the following Monday, April 21, 1997, he was suspended pending an investigation regarding the incident with Neumann.

On Tuesday, April 22, 1997, MacMurray was called and told to come to work the next day, Wednesday. On Wednesday, April 23, MacMurray gave a statement to management and later in the day was told he was suspended without pay for 2 days, April 21 and 22.

In Mike Schwalm's statement to management he said MacMurray lightly tapped Neumann on the shoulder to get his attention. In Scott Remender's statement to management he

said he saw MacMurray begin to reach his arm around the labeler (a piece of machinery) to touch Neumann and Neumann then said, "Don't touch me." Remender added that this kind of encounter occurred daily between shifts. In Earl Allen's statement to management he said he didn't see anything of the encounter between MacMurray and Neumann but did hear someone swearing very loudly.

The evidence at trial reflects that Neumann, who did not testify, is at 5' 9" the same height as MacMurray but outweighs MacMurray by more than 80 pounds. A physical confrontation between the two would be a mismatch with MacMurray at the disadvantage.

Based on the fact that the witnesses support MacMurray more than Neumann Respondent should not have suspended MacMurray for 2 days without pay following its investigation and taken no action whatsoever against Neumann. Although the investigation revealed that Neumann verbally abused MacMurray who had simply tapped him on the shoulder.

MacMurray was well known to management to be in favor of TIWA affiliating with the UAW. Management was opposed to the affiliation. And Neumann was active in seeking to reverse the affiliation vote.

In light of the above I find that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended Kenneth MacMurray for 2 days without pay and took no action against Neumann.

This is especially true in light of MacMurray's uncontradicted testimony that he was later cornered and verbally abused on June 5, 1997, when he was trying to punch out and go home by three female coworkers in the presence of General Foreman Steven Cline who did nothing about it whatsoever. This is disparate treatment. This harassment of MacMurray was worse than the harassment, if any, of Neumann.

On October 9, 1997, MacMurray voluntarily quit his employment with Respondent and currently works elsewhere.

6. Kenneth MacMurray's grievance

MacMurray grieved his 2-day suspension up to the third step receiving no relief. At the third step MacMurray requested representation by Don Petro, a UAW International representative. Respondent would permit and did permit MacMurray to be represented by TIWA members. Respondent would not permit representation by Don Petro from the UAW because at this point having receiving the employee petition early on April 3, 1997, Respondent was refusing to recognize the UAW as a co-collective-bargaining representative of its employees along with TIWA.

Under the collective-bargaining agreement in effect between Respondent and TIWA a steward represents the grievant at steps 1 and 2 of the grievance procedure and at step 3 those in attendance "include a Union officer, Tawas Industries management and any other parties mutually agreed to." (GC Exh. 2; art. VII.)

Since the employees chose to reverse the affiliation decision there was no affiliation with the UAW and it was not an unfair labor practice for Respondent to refuse to agree to UAW International Representative Petro's attendance at step 3 of the grievance.

REMEDY

The remedy in this case should include a cease-and-desist order, posting of an appropriate notice, and an order to remove MacMurray's unlawful suspension from his personnel file and reimburse him for 2 days lost pay with interest.

CONCLUSIONS OF LAW

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

2. The UAW International and the Tawas Independent Workers Association (TIWA) are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act when it suspended for two days Union President Kenneth MacMurray for engaging in protected concerted activity.

4. The above violation of the Act is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]