

New Era Cap Co. and Valerie Baldwin and CWA, PPMW Sector. Cases 3–CA–21227 and 3–CA–21274

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On July 9, 1999, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs. 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 the 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, and adopts the recommended Order as modified.¹

1. We adopt the judge's finding that Buffalo Plant Manager Farallo impliedly threatened to close or move the Respondent's business if employees voted in favor of affiliation with the Communication Workers of America (CWA), in violation of Section 8(a)(1) of the Act. Contrary to the judge, however, we do not find that Supervisor Mike Selinski threatened employees with plant closure and informed them that it was futile to attempt to affiliate with the CWA, in violation of Section 8(a)(1). These allegations were not set forth in the amended complaint. It was not until the General Counsel's posthearing brief that these statements were alleged to be unlawful. Thus, the Respondent was never placed on notice that it needed to defend against those allegations, nor did the Respondent have the opportunity to call Selinski or others as witnesses to rebut the allegations. See *Tel-Data Corp.*, 315 NLRB 364, 371 fn. 3 (1994). In these circumstances, we do not find that the allegations were fully and fairly litigated. Therefore, we reverse the judge and dismiss the allegations.

2. Also contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) of the Act by reimbursing its employees for their time and expense in voting, while urging employees to vote against affiliation. The Respondent, on the morning of the affiliation election, posted a notice. The notice urged the employees to vote against affiliation, and offered all on-duty employees free transportation to and from the polling station and

reimbursement of one-half hour wages to compensate the employees for the time it took them to vote. Board law is clear that an employer may provide transportation to and from a polling station, provided that the benefit is offered on a nondiscriminatory basis, and the employees are free to accept or reject the offer. *Heintz Mfg. Co.*, 103 NLRB 768 (1953). In the instant case, the Respondent offered the transportation to all on-duty employees at the Buffalo facility regardless of their sympathies. They were free to accept or reject the offer.

The Respondent's failure to offer or provide transportation to employees at the Hamburg facility, a facility employing roughly 35 unit employees out of roughly 485 unit employees, does not establish discrimination. Thus, that failure does not make the offer to Buffalo employees unlawful. There is no evidence that the Hamburg facility was staffed primarily with proaffiliation employees. The evidence is insufficient to establish that the Respondent's failure to include them in the offer was an intentional effort to prevent proaffiliation employees from voting. We find insufficient evidence on which to base a finding that the Respondent acted on a discriminatory basis, or that it was offering the transportation in exchange for a "no" vote.

The transportation was offered to virtually all employees and did not discriminate based on their sympathies. Both pro and antiaffiliation employees were offered rides on, and rode, the bus. Moreover, the omission was without consequence, as the Respondent's witnesses testified that the majority of Hamburg employees drove to work and would most likely not have availed themselves of the bus in any event, unlike the Buffalo employees who primarily relied on public transportation.

The notice announced transportation and paid time off. These were "attempts to encourage employees to take an interest in an issue of common concern," *Westinghouse Electric Corp.*, 232 NLRB 56 (1977)—i.e., the affiliation election—and are not rendered coercive solely by their association with an "internal union matter." Nor is a different result compelled by *Amoco Production Co.*, 239 NLRB 1195 (1979), cited by the judge. *Amoco* stands for the proposition that a union-affiliation vote is an internal matter, in the sense that a union can restrict voting to members. *Amoco* says nothing at all about an employer's freedom to take measures such as the offer of transportation and paid time off to employees to vote.

In our view, the employer is also free to compensate employees for their time in coming to the polls where the purpose of the compensation is to encourage employees to vote. Here, the Respondent provided both the Buffalo and Hamburg facilities one-half hour paid time off re-

¹ We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

ardless of their sympathies. The paid time off was valued at only about \$5 per employee.²

Contrary to our dissenting colleague, we find that the Respondent's privilege to provide each of these benefits was not lost simply because the Respondent violated the Act in other respects. The letter announcing the transportation and time off contained no coercive or threatening language. The 8(a)(1) statements by Farallo and the other supervisors were not made in conjunction with the distribution of that letter.

Dyna Corp, 223 NLRB 1200 (1976), on which our dissenting colleague relies, is inapposite. In that case, an employer was found to have violated Section 8(a)(2) and (1) by recognizing and offering unlawful assistance to a minority union. In addition, each of the acts there, as listed by our colleague, was independently violative of the Act. There was no finding that these violations tainted otherwise lawful conduct.

We do not agree that employer conduct that would be privileged in the context of a representation campaign would be rendered unlawful in the context of an affiliation campaign. In both cases, the employees are exercising a Section 7 right. In both cases, the employer cannot interfere with, restrain or coerce the exercise of that right. Short of that, there is nothing to prohibit the employer from taking a position and/or encouraging employees to vote.³

3. Contrary to our dissenting colleague, we agree with the judge that the suspension of Valerie Baldwin violated Section 8(a)(3) of the Act.⁴ Valerie Baldwin, an open and outspoken member of the affiliation committee, was disciplined—by a 3-day suspension—for her conduct relating to the affiliation campaign, i.e., posting a notice documenting the identification required to vote. The Respondent was aware of her union activity, as admitted by Plant Manager Farallo. Anti-CWA animus is clearly demonstrated by Owner David Koch's statements to the Respondent's management and its employees, by 8(a)(1) surveillance of pro-CWA activity and by 8(a)(1) statements made by the Respondent. Thus, the General Counsel has met his initial burden of showing that Baldwin

was disciplined for her protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

We disagree with our colleague that the Respondent would have taken the same action in the absence of her proaffiliation activity. Assuming *arguendo* that Baldwin's conduct was in part racially motivated, there is no evidence that the Respondent would have disciplined her by giving her a 3-day suspension, absent her proaffiliation activity. Assuming, however, the seriousness of the Respondent's claimed efforts to police racial harassment in as diverse a workplace as the Respondent's,⁵ the Respondent has not explained why so few employees were made aware of its rule prohibiting harassment or the consequences for such action. The Respondent posted the rule in only two locations, and only in English, despite the fact that a majority of the employees could not understand English.

Moreover, Baldwin had complained of harassment in 1994 and no discipline other than an unrecorded verbal warning was taken against her accused. In fact, that employee was later promoted to supervisor. Plant Manager Farallo testified that he was unaware of the Baldwin incident. However, considering the seriousness with which the Respondent asserts that it dealt with harassment incidents, the fact that lower management did not report such conduct to Farallo, as had been done in the instant case, belies the Respondent's true motive for Baldwin's suspension. It was not her harassment that the Respondent found intolerable, but rather her affiliation efforts.

Finally, even were we to accept that some discipline was warranted, we would find, contrary to our colleague, that the punishment the Respondent chose was so disproportionately harsh as to suggest an illicit motive. We do not substitute our business judgment for that of the Respondent. Rather, under the Respondent's progressive discipline policy, Baldwin should have been verbally warned for a first violation. Only after the third incident would she have been suspended. Admittedly, the rules permitted the Respondent to vary the punishment for "gross misconduct." However, in the only other documented instance of punishment being imposed for harassment, Yvette Small's threatening of Valerie Baldwin, the punishment was a first-step verbal warning. Clearly, but for Baldwin's union activities, she would have suffered no more than a verbal warning for her conduct.

Thus, we conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending Valerie Baldwin for her union activities.

² The fact that the Hamburg employees received this pay, along with Buffalo employees, is another indication that the failure to provide them with transportation was not discriminatorily motivated but rather was prompted by the nondiscriminatory considerations described above.

³ There is no allegation in this case, nor evidence, that the employer's conduct violated Sec. 8(a)(2). For example, the employer did not attempt to interfere with such matters as eligibility to vote.

⁴ In so concluding, we find it unnecessary to rely on the judge's observation and his reason for this observation that the Respondent's alleged reasons for distrusting the CWA were "inconsistent and arguably irrational or distorted."

⁵ The Buffalo plant has 450 employees with a plurality of these employees being Asian and the remainder composed of Caucasians, African-Americans, and Hispanics.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New Era Cap Co., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act by placing employees under close observation, threatening employees with plant closure, and engaging in surveillance of employees.”

2. Substitute the following for paragraph 2(c).

“(c) 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, 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.”

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

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues except as follows:

I disagree with my colleagues concerning the 3-day suspension of Valerie Baldwin. I assume arguing that the General Counsel has established a prima facie case for an 8(a)(3) violation. However, the Respondent has met its burden of rebuttal under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Baldwin posted a notice which said that a green card and a picture identification were required in order to vote. The posting was false. Neither item was in fact necessary for voting. Baldwin acted to disenfranchise an ethnic group. The Respondent reasonably believed that the conduct violated its policy against invidious harassment. The fact that its policy was written only in English does not change the fact that this was the Respondent's policy. In light of this, and the infraction of the policy, I conclude that Baldwin would have been suspended even in the absence of union activity.

Further, in the one prior incident of racial harassment, the Respondent also acted by issuing a verbal warning to employee Smalls. Concededly, the suspension of Baldwin was greater than the verbal warning issued to Smalls. However, the offense of attempted disenfranchisement of an ethnic group was more substantial than the mere verbal threat by Smalls. Thus, I do not find that the 3-day

suspension of Baldwin was so disproportionate a punishment as to reflect disparate treatment. The Respondent, under its disciplinary policy, had reserved its discretion to establish discipline for gross misconduct, such as ethnic harassment. In the Respondent's view, a 3-day suspension was required for this offense. I find it inappropriate for the judge and the Board to substitute their view of appropriate discipline for that of the Respondent. Accordingly, I would dismiss the 8(a)(3) allegation.

MEMBER LIEBMAN, dissenting in part.

I agree with the majority in all respects, except that I would affirm the judge's conclusion, for the reasons discussed below, that the Respondent unlawfully attempted to influence employees to vote against affiliation with the Communications Workers of America, AFL-CIO (CWA), while at the same providing employees with free transportation to the polls and providing employees scheduled to work that day with paid time off to vote.

Facts

My colleagues and I agree on the relevant facts:

During the 6 months leading up to the March 25, 1998¹ affiliation election, the Respondent engaged in open and unlawful surveillance of the activities of proaffiliation employees in its Buffalo plant, in violation of Section 8(a)(1) of the Act.

Plant Manager Vincent Farallo unlawfully threatened the employees that the Respondent would close or relocate the Buffalo plant if they voted to affiliate with the CWA. More specifically, Farallo held a meeting with employees in February where he told them that they did not need a union² and that the Respondent did not want a union at the facility to intrude in the employees' jobs. He told them that he thought that the CWA was a bad idea for them. He pointed out that other unionized employers had already left the Buffalo area, and he repeatedly emphasized to them that the Respondent itself was getting ready to open its new plant in Alabama, which would do the same work as the Buffalo plant. On March 23, 2 days before the election, Farallo held a meeting with employees where he told them that they did not need the CWA because they already had an independent union. He told them to think about the fact that other local employers had relocated out of the Buffalo area because their work forces were unionized. He ended the meeting by telling them that if they still wanted to have jobs they should think carefully about the things that he had told them before they voted in the affiliation elec-

¹ All dates are 1998, unless otherwise stated.

² The employees were, however, represented at this time by the Buffalo Plant Independent Union (BPIU).

tion. My colleagues and I agree that Farallo's statements violated Section 8(a)(1).³

Finally, on the morning of the March 25 affiliation election, the Respondent distributed a letter from Farallo to the employees, giving them the time (2:30–5:30 p.m.) and place (261 Swan St, about 4 blocks from the plant) of the election, and advising them that “You may vote on paid time.” The letter went on to state (all emphasis in original):

IT IS VERY IMPORTANT THAT YOU VOTE!!

The outcome of the election could be determined by as few as 10% of the bargaining unit employees (less than 50 people). So, for example, if only 50 people vote in the election, and 26 vote for the CWA, everyone (all of the 460 unit employees) would end up paying dues to and being controlled by the CWA.

DON'T LET ANYONE *BULLY* YOU INTO DOING SOMETHING THAT MIGHT BE BAD FOR ALL OF US.

In my opinion, you should say NO to the CWA.

In an effort to help people get down to vote and back we will be providing transportation to and from 261 Swan St. You will be given time-out to go and vote.

If you have any questions please don't hesitate to ask someone from management.

Analysis and Conclusions

The judge found that the Respondent unlawfully interjected itself into the internal affairs of the independent union (BPIU), and interfered with the employees' right to determine their own union activities and with their free choice in the affiliation election, in violation of Section 8(a)(1), by promising and providing the employees with paid time off and free transportation to the polling place in conjunction with urging them to vote against affiliation with the CWA.

My colleagues disagree with the judge. They reverse this unfair labor practice finding on the grounds that an employer may lawfully offer employees optional transportation to and from a polling place where a union affiliation election will be conducted, and may lawfully compensate employees for their time in coming to the polls, where these benefits are provided on a nondiscriminatory basis for the purpose of encouraging employees to vote.

³ *Cold Heading Co.*, 332 NLRB 956 (2000) (Member Liebman dissenting on other grounds).

I agree with my colleagues that if the General Counsel had proven that the Respondent had discriminated among employees, based on their affiliation sympathies, in facilitating participation in the union's election, then a violation of Section 8(a)(1) would be established, without more.

I am not prepared to say, however, that an employer always may take the same measures to promote participation in a *union affiliation* election that would be permitted in connection with a Board-conducted election. There is an important difference between the two types of election: a union affiliation election is an internal union matter. See *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 194, 209 (1986) (rejecting Board rule requiring unions to permit nonmembers to vote in affiliation elections: “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”). If an employer's legitimate interests are implicated at all in such a matter, then it is not in the same way and to the same degree that they are implicated by a Board election.⁴

Accordingly, I would find a violation not only where intentional discrimination based on affiliation sympathies was established, but whenever the employer offered affiliation election-related benefits such as travel costs and paid time off to less than all of its union-member employees, since that fact strongly suggests (to employees, among others) an attempt to interfere with the outcome of the election. That, of course, was the case here.

But I would also find a violation regardless of the issue of discrimination. In the days leading up to the election, the Respondent took steps that tainted its election-day offers of transportation and paid time off, by engaging in ongoing open unlawful surveillance of proaffiliation employees and threatening plant closure or relocation if the employees voted for affiliation. Thus, the Respondent's overall anti-affiliation message to its employees was unmistakably clear and unlawfully delivered: Vote against

⁴ Indeed, some of the concerns that animate Sec. 8(a)(2) of the Act—which makes it an unfair labor practice for an employer “to dominate or interfere with the . . . administration of any labor organization or contribute financial or other support to it”—arguably come into play in this context. Cf. *World Wide Press, Inc.*, 242 NLRB 346, 361–362 (1979) (employer violated Sec. 8(a)(1) and (2) by, among other things, encouraging employees to select negotiating committee on behalf of moribund union, and by providing paid time to do so, where rival union sought to organize employees); *Bee Line Engineering, Inc.*, 217 NLRB 367 (1975) (employer violated Sec. 8(a)(1) and (2) by, among other things, attempting to bring about election of officers in dormant union and by paying employees for time spent in officer election, where rival union sought to organize employees).

affiliation or lose your jobs. It is disingenuous, then, for the Respondent to argue that there was “no coercion implied” in the offer of transportation from the plant to the polling place and back again, that compensating employees for their time spent voting was not “a reward” for their having done so, and that it was simply “taking actions designed to do nothing more than ensure full participation in the affiliation vote.”

As I have suggested, it is not clear to me what statutorily cognizable interest an employer can have in the extent of employee participation in a union affiliation vote, an internal union matter. The majority cites *Westinghouse Electric Corp.*, 232 NLRB 56 (1977), as support for the idea that Respondent’s notice to employees and the transportation and paid time off it provided were proper “attempts to encourage employees to take an interest in an issue of common concern.” But *Westinghouse* involved an employer’s letter addressing a strike-authorization vote and a vote on the employer’s bargaining proposal. The Board rejected the argument that these were purely internal union matters. Its reference to “an issue of common concern” was premised on the idea that both the employer and the employees (not simply employees as a group) had a legitimate interest in the votes. Moreover, the Board observed that the employer had engaged in no other unlawful conduct. This case is different. The issue of union affiliation was not clearly a matter of proper concern to the Respondent. And the Respondent did engage in other unlawful conduct.

The Board’s decision in *Dyna Corp.*, 223 NLRB 1200 (1976), cited by the General Counsel in his answering brief to the Respondent’s exceptions, provides better guidance here. In that case, the employees were contemplating affiliating their independent union with a district lodge of the International Association of Machinists (IAM). Immediately upon learning of this possible affiliation, the employer unlawfully (1) interrogated independent union officials and stewards about the matter, (2) offered to assist the independent union in “fighting” the IAM, and (3) reminded the independent union officials of the existence of the employer’s unlawfully broad no-solicitation rule. The Board affirmed the judge’s finding that the employer’s offer to assist the employees in “fighting the IAM” clearly constituted unlawful conduct that violated Section 8(a)(1) by interfering with the employees’ rights to determine their own union activity and choice.

Here, the Respondent’s offers of transportation to and from the polls and compensation for lost time while at the polls are inextricably intertwined in this case with the Respondent’s earlier threats about the potentially harmful

consequences of not voting at all. Accordingly, I would find this violation.

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 their own mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by placing employees under close observation and engaging in surveillance of employees, and by impliedly threatening to move or close our business if employees affiliated with the CWA.

WE WILL NOT suspend any employee because or in retaliation for having engaged in union or other activity protected by Section 7 of the Act.

WE WILL make Valerie Baldwin whole for the losses incurred as a result of the discrimination against her, with interest.

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

NEW ERA CAP COMPANY, INC.

Rafael Aybar, Esq., for the General Counsel.

Robert A. Doren and Christian P. Jones, Esqs., of Buffalo, New York, for the Respondent.

Mark G. Pearce, Esq., of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Buffalo, New York, on January 25–28, 1999. Subsequent to an extension in the filing date, briefs were filed by the parties. The proceeding is based on a charge

filed April 3, 1998, by Valerie Baldwin, an individual, and on April 23, 1998, by Communications Workers of America Printing and Media Workers Sector. The Regional Director's amended consolidated complaint dated November 3, 1998, alleges that Respondent New Era Cap Co., Inc., of Buffalo, New York, violated Section 8(a)(1) and (3) of the National Labor Relations Act by engaging in surveillance of employees engaged in union activities, interrogation of employees about their union activities, coercing employees to divulge their positions concerning the affiliation election threatening employees at closure of the facilities should affiliation be successful, issuing a letter to its employees urging them to vote against affiliation with the Union as well as promising them paid time off for work and free transportation to vote in the affiliation election; providing employees with paid time off from work provided employees with free transportation to the poles in order for them to vote in the affiliation election, and by suspending employee Valerie Baldwin because she actively supported affiliation.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture of baseball caps at facilities in Buffalo and Derby, New York. It annually ships goods valued in excess of 50,000 from its Hamburg, New York distribution facility to points outside New York and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that Communications Workers of America, Local 14177, AFL-CIO, CLC and the New Era Cap Co., Inc., Buffalo Plant Independent Union, each are a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a family owned company that has manufactured baseball style caps for 60 years and 55 percent of its business comes from contracts with the Major League Baseball. It has two manufacturing plants, Derby and Buffalo, and a distribution plant in Hamburg, New York, near Buffalo. Additionally, it operates a new manufacturing plant employing approximately 200 employees in Annapolis, Alabama, that became operational approximately 9 months prior to the hearing. The Buffalo, Derby, and Hamburg plants have unionized work forces. The Buffalo and Hamburg employees are a part of the same bargaining unit and are represented by the Buffalo Plant Independent Union. Generally, there are between 450 and 500 production employees at the Buffalo plant (where there is a distinct multicultural work force including several different Asian and Latin ethnic groups), and between 30 and 75 employees at the Hamburg facility. The Derby plant employs approximately 550 production employees and prior to July 1997, they were represented by an independent union of plant employees. In July 1997, after two elections, the Derby plant employees voted to affiliate with the CWA.

David Koch is the Respondent's CEO and chairman. He does not get involved in day-to-day operations as he used to and is principally concerned with maintaining his and the company's longstanding relationship with major league baseball associations and in negotiating contracts with them. At Buffalo, Vincent Farallo is the plant manager, Janine Nowak is personnel manager, Brian Friedmann is production manager, Jeremy Tirado is a floor supervisor, and Frank Zieminick was production manager until June 1998; Michael Selinski, John Farallo, Raymond Walker, and Steve Heinrich (until about August 1998) also held positions as supervisors.

A few weeks after the successful affiliation election at the Derby plant, Robert Rozler, CWA's staff representative, was contacted by employees expressing an interest in having the CWA represent the production employees at the Buffalo plant. Actual meetings regarding affiliation started in October 1997. An affiliation committee of approximately 12 to 15 employees was established, which included Cecilia Quiros, Paul Kulbacki, Carmen Santiago, and later Valerie Baldwin, among others. In October this committee was designated by Independent Union President Nancy Burkhard to bring information back to the union members on affiliation. Burkhard solicited volunteers for this committee, which also included Sheila Burnett, John Trippi, and Hamburg plant employees Pam Fuller and Gene Kloder.

The affiliation committee began to keep regular contact with representatives of the CWA, and held meetings at its district office right until the date of the affiliation vote, March 25, 1998.

Meanwhile, on September 17 the Respondent's management met with CWA Representatives Al Rudy and Robert Rozler in order to get to know each other and to discuss the future plans of the Company and the Derby plant. One of the many subjects discussed was the Company's ongoing negotiations with major league baseball to obtain a new 5-year agreement to be the exclusive franchise for the manufacture and sale of baseball caps (the existing agreement was due to expire December 31). The Union offered to assist the Company in its negotiation by contacting major league baseball, however, CEO Koch said that he did not wish the Union to be involved whatsoever; that such negotiations were very sensitive and that their involvement would not be beneficial and the CWA representatives agreed they would respect his wishes.

Daniel Geary, former president of the Derby independent union that became a local of CWA, testified that in January 1997 Koch sent a letter to the offices of the union expressing concern about the success of the contract negotiations with major league baseball in which described the contract as Respondent's "life blood," and expressed fear of competition from offshore or Mexico. The letter Koch stated: "You as union officers have the fate of 600 members in your hands. It is your obligation to work with the company so that you can protect their jobs and their livelihood. . . . A January 15, 1997 memo to all production employees, which stated, among other things, the following: I think that you all know that we are fighting for our lives trying to work out a new deal with major league baseball that will insure our futures for the years to come. Part of these negotiations are insuring baseball THAT WE CAN DELIVER CAPS

WHEN THEY ARE NEEDED AND WHERE THEY ARE NEEDED. We must prove to baseball THAT THEY CAN DEPEND UPON US.” Geary (who was laid off in May 1997) testified that in late July he was among a contingent of Derby union representatives that went down to Washington to sign the affiliation agreement with CWA. During that time period he met the president of the CWA, Morty Bahr. Geary asked Bahr, among other things, whether he could help secure the contract with major league baseball and New Era Cap, and Bahr stated that he would see what he could do. At the time that he made this request, nobody in New Era Cap’s management informed him that his assistance in securing the contract was not welcome. Geary said that he did so because: “It was very clear that we were in danger of losing the contract, and we were fighting for our lives throughout all the membership.” On September 18, 1997, Koch observed a TV news truck stop and began to “pull out” cameras. Koch personally questioned what the reporter was doing. The reporter said that he understood that they were going to do a story on New Era Cap and their major league baseball negotiation or contract that we were negotiating. Koch asked who told you we were negotiating a new contract? This isn’t common knowledge and the reporter said that he understood that they were going to do a story on New Era Cap and their major league baseball negotiation or contract that we were negotiating. Koch asked, “[W]ho told you we were negotiating a new contract? This isn’t common knowledge and the reporter allegedly said they got a call from the CWA.” Koch ordered the reporter to put his “stuff” back and threatened, “[I]f in fact you put something on TV that’s picked up by the AP, and goes all over this country; and these guys I’m negotiating with get wind of this that I’m playing some hardball, I’m going to sue Channel 2, and I’m going to sue the CWA. Now get the hell out of here.”

Koch admitted he actually may have used “more choice words.” The next day Koch was called by the local Congressman, who asked if there was anything he could do in Washington to help out. Koch said, “no.” And asked how he got wind of this and he testified that “they” said, “they” were called up by the CWA. In early October, Koch met with the head of the major league baseball negotiating team to discuss the contract proposal and was told that CWA representatives from Washington, D.C., has contacted major league baseball regarding the ongoing contract negotiations. When he expressed displeasure at this occurrence, Koch apologized for what he presumed to be union pressure tactics and said that such contact was directly contrary to his wishes. Despite Koch’s concerns, an \$80-million, 5-year contract was reached in April 1998.

In the fall of 1997, the CWA began a campaign to affiliate the Independent Union at the Buffalo plant with the CWA. An election to determine the affiliation question was subsequently scheduled for March 25. The Respondent confirms that Koch responded to the affiliation attempt in Buffalo by directing Buffalo Plant Manager Vice Farallo to address two issues. First, he wanted the employees to be informed of the CWA’s interference with the major league baseball negotiations (because Koch felt the CWA’s conduct had jeopardized the contract, that such information was of mutual concern to the Company and the employees that the employees had been threatened by the conduct of the CWA, and that they should be made aware of the “renege-

ing” which had been reached in September), and second, he wanted the decision to be made by a true majority of the employee population. Accordingly, Farallo was instructed to attempt to encourage as many employees to vote as possible, however, Koch did not give Farallo any specific instructions in terms of what actions should be taken.

As noted, a few weeks after the Derby affiliation election, employees at the Respondent’s Buffalo and Hamburg plants began inquiring about affiliating their Independent Union with the CWA and between October 1997 and March 1998, Rozler and Rudy (administrative assistant to CWA Vice President William Boarman) held a dozen or more meetings with employees concerning affiliation efforts. The employees who generally participated in the meetings were members of the CWA affiliation committee, which was established, with the approval of Independent Union President Nancy Burkhard, during a regular union meeting in October. The affiliation committee members including Cecilia Quiros, Carmen Santiago, Paul Kulbacki, Valerie Baldwin, and two employees from the Hamburg facility. Burkhard attended one of the affiliation committee meetings, but left after stating that she was not in favor of affiliation.

The Independent Union declined to provide the CWA with names and addresses of members of the Independent, and the CWA had to rely on the affiliation committee members to distribute promotional literature that Rudy provided the committee members during the various meetings and in February the CWA provided the affiliation committee members with “vote yes” buttons to distribute to fellow employees.

Cecilia Quiros started with Respondent in 1991. She is a machine operator making eyelets in baseball and earns \$11.75 per hour on first shift from 7 a.m. to 3:30 p.m. (the Respondent has other shifts from 8 a.m. to 4:30 p.m., Monday through Friday and 4 p.m. to 2 a.m., Monday through Thursday and about 300 employees work on day shifts). Before April 1998, day-shift employees had two scheduled 15-minute breaks; a morning break which could only be taken anywhere from 9 to 9:30 a.m. and an afternoon break that could only be taken between 2 to 2:30 p.m. and a half hour lunch period from 12 to 12:30 p.m. Employees work on five floors and are divided by groups that are called “cells.” Quiros usually works on the fourth floor in cell C-2 under Supervisor Michael Selinski.

In June 1997, Quiros and Carmen Santiago had begun collecting signatures from other employees in an effort to affiliate with the CWA. Quiros thereafter attended about 10 meetings with the affiliation committee. During one of the affiliation committee meetings, members agreed that because they did not know all of Respondent’s employees it would be a good idea to have employees show personal identification, like a “green card,” in order to vote at the affiliation election. In particular, Quiros pointed out that despite socializing with many employees she did not know or recognize all of Respondent’s Asian employees and noted that some of them did not understand English very well.

Quiros spoke with approximately 200 employees about voting in favor of affiliating with the CWA, generally during her breaks and lunch period in the employee cafeteria located on the second and fourth floors in the hallways or at employees’

machines and she observed that Supervisors Friedmann and Selinski were often present. Quiros also distributed over 200 pieces of CWA affiliation literature as well as “vote yes CWA” buttons in February 1998, and she posted CWA literature in various places at the facility, with heightened activity between January and March 1998. In March, she also observed Supervisor Faltisko making anti-CWA buttons available to employees in her cell.

The Independent Union only allowed the CWA to make a presentation to the membership at one meeting. This meeting was held at the Spanish hall in Buffalo, the same location of the subsequent affiliation election. In attendance at this meeting were approximately 75 employees (out of approximately 50 production employees).

Starting in February, the Respondent, in the person of Plant Manager Farallo, held meetings with employees where he stated that employees did not need a union, that the CWA just wanted employees’ money, and that Respondent did not want a union at the facility to intrude with employees’ jobs. Farallo conducted a second meeting in later March and told employees that before voting at the affiliation election they should think about the fact that Trico, Mercy Hospital, and other local unionized employers moved to other locations because they had unions. Furthermore, Farallo told employees that since the CWA began representing employees at Respondent’s Derby, New York facility, 97 grievances had been filed and 11 employees had been terminated. Farallo ended the meeting by telling employees that if they still wanted to have a job to think carefully about the things he said before voting at the affiliation election. During the meeting, Farallo made a general reference to an incident involving Quiros, when Respondent had terminated her for 3 days in September 1997, and he stated that he had gotten Quiros’ job back for her. However, Quiros spoke up and said that she had fought to get her own job back. Kulbacki also spoke up at the meeting.

Quiros testified that between January and March 1998 she saw various anti-CWA affiliation literature posted throughout the facility and Quiros said that on March 25 Supervisor Selinski gave out letters which urged employees to vote against the CWA. The letter also stated that Respondent would provide employees (but not those at the Hamburg facility), with free transportation to the affiliation election site, as well as with paid time off to vote.

The affiliation election was held on March 25, from 2:30 to 5:30 p.m., at the Independent Union hall located 4 blocks away from the Buffalo facility. Quiros was an observer and counter of ballots. The Independent Union officials handing out ballots to voters had a document listing eligible voters’ names, which they checked as employees came to vote. The CWA lost the affiliation election 325 to 113.

Several other events bearing on the Respondent’s conduct that occurred prior to the election will be set forth in more detail in the following discussion, including the facts surrounding the Respondent’s decision to discipline CWA supporter Valerie Baldwin for posting a notice just prior to the election (a notice that allegedly constituted racial harassment), and for her denying her participation in the event.

III. DISCUSSION

These proceedings arose after some members of an independent local union sought to have their union become affiliated with the CWA, an international union that recently had become the employees collective-bargaining representative at another facility operated by the Respondent. During the course of the affiliation effort it became apparent that the Respondent favored the status quo and that its CEO was adamantly against the CWA, and he instructed his managers to get out the message that the CWA had interfered with his negotiation with major league baseball and had jeopardized the reaching of a new contract. The CWA lost the election and it is alleged that the Respondent engaged in various actions that interfered with employees’ Section 7 rights in its attempts to discourage the employees from affiliating with the CWA, and that it disciplined one employee because of her involvement in support of affiliation. The Respondent, on the other hand, contends that its statements and actions were within its free speech rights of Section 8(c) of the Act that permit it to explain its views on unionization to its employees.

A. 8(a)(1) Allegations

Surveillance—Affiliation supporters Quiros and Kulbacki both testified that prior to the onset of affiliation activities, Supervisor Friedmann was generally present in their work area once a week on Thursdays in order to review boxes for orders; Faltisko once a day in the morning posting safety minutes or documents; and Zieminick about once a day going about his normal business. Friedmann acknowledged that every Thursday he spent about 20–30 minutes in each cell looking at orders to gauge employees’ bonuses.

Quiros described how in October 1997, she and other CWA committee members became involved in affiliation efforts and how thereafter Zieminick, Selinski, and especially Friedmann and Faltisko changed their previous pattern of supervision and began to closely watch and follow them around the facility on an increasing basis. In particular, Quiros noted that several times a day Friedmann would stand close to her anytime she spoke with fellow employees and would not leave her area until Quiros finished her conversation with the employee.

At that time that, Friedmann was assistant production manager with duties to ensure that production was being maintained throughout the plant. As a result, he would periodically walk around the plant to inspect the production areas. He admits that between November 1997 and March 1998, he would walk up to the fourth floor more often than he had in the past but asserts that the reason for this is that there seemed to be a considerable amount of tension created by the pro and anti affiliation employees working on that floor, with greater employee loitering. He asserts that his mere presence, as a manager, had the effect of causing the employees to cease their loitering and return to their work without his having to speak to employees. Friedmann asserts that he did this with both pro-CWA and anti-CWA employees and did not overtly attempt to curtail any employees from engaging in campaign activities. He also explained that he no longer did this after the election, as he became production manager with duties that required him to be in other areas.

Supervisor Faltisko became safety and health coordinator in November 1997 with general duties in this position including accident prevention, and ensuring that safety rules and regulations are followed. He then began to perform daily walk-throughs of every area of the plant in addition to his principal job as supervisor of employees in the sew reinforcement area on the third floor. Faltisko testified that when he did notice a potential safety hazard he tried to address it as soon as possible, and thus, it was not unusual for him to change electric plugs and light bulbs or sweep up a mess. However, other employees were assigned to assist him and he would have them do minor repairs or clean up. He also engaged in noise testing of each floor in the plant sometime in late 1997 and early 1998 to ensure that the noise level at the facility did not exceed legal limits.

During his daily walk-through of the plant, Faltisko frequently noticed employees who were not in their assigned cell and if more than 15 minutes would elapse and he saw that same employee again outside of the assigned work area, he would request that they return to their work area. He did this to many employees, including Quiros. Kulbacki¹ recalled that Faltisko increased his presence around Kulbacki's work area by engaging in menial tasks like sweeping the floor and changing switches and light bulbs and that Supervisor Selinski would eavesdrop on conversations Kulbacki had with other employees, would insert himself into the discussion, expressing the futility of affiliation with comments like, "The Company is going to do what they want with or without a Union." Similarly, Kulbacki testified that Selinski began taking breaks in the smoke room, when he previously took breaks in another area. Kulbacki also observed that supervisors would follow around other members of the affiliation committee, including Valerie Baldwin and John Trippi.

Here, the Respondent did not make any overt expression of concern about its production or about excessive breaktimes in connection with the employees' preelection activities and therefore its assertion of these generalized reasons as a justification or its extra overt attention to and surveillance of employees appears to be pretextual. The employees involved were known to be open supporters of CWA affiliation and the Respondent made no effort to inform any employees of its asserted reasons for increased managerial presence in the work area. It appears that the increased attention by Friedmann, Ziemnick, Selinski, and Faltisko was not merely coincidental, and Faltisko's substantial personal performance of maintenance and janitorial duties (the record shows that in March 1998, Respondent employed between 7 and 10 mechanics and 3 janitors who were responsible for such duties around the facility and whose working shifts coincided with Faltisko's), reasonably would appear to be a contrived excuse to observe the employees and I find the reasons lack persuasion. Here, several of the Respondent's supervisors changed their style and frequency of their observation of employees' nominal work functions (which discontin-

¹ Kulbacki also was concerned that one of the plant's regular surveillance cameras was focused on his work area, however, other testimony appears to refute this belief and, as the matter is not persuaded in the General Counsel's brief, it will not be discussed further.

ued after the election), and I find that the affected employees could objectively and reasonably believe that they were subjected to this increased attention because of their activities in support of CWA affiliation. To uncharacteristically place union activist under close and obvious observation has influence and effect upon employees that illegally interferes with their Section 7 rights. See *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995). Under these circumstances, the Respondent's marked increase in the frequency and time of supervisors' visits to the employees work areas created the impression that its employees' union activities were under surveillance, and I conclude that the Respondent's supervisors did engage in surveillance in violation of Section 8(a)(1) of the Act, as alleged.

Interrogation—On or about March 17, Respondent's supervisors, Faltisko and Farallo, distributed campaign material (vote no buttons) to employees, and it is alleged that this constitutes a form of interrogation because it required employees to divulge their positions concerning the affiliation election, citing *Kurz-Kasch*, 239 NLRB 1044 (1978). Farallo and Tirado admitted that Respondent ordered 300 anti-CWA buttons and had them shipped to its facility (which it received on March 17) and that Farallo and Ziemnick both informed supervisors about the "vote no" buttons, but told them not to hand them directly to employees."

Faltisko testified that he did not give a "vote no" button to any employees, even though he admitted he wore 6–8 such buttons at a time. Quiros credibly testified that Faltisko distributed "vote no" buttons on or about March 17 when he gave some anti-CWA buttons, which he had in a plastic bag, to employees on her line by placing the buttons on their machines and directly handing the buttons to some of them. In particular, Quiros stated that Faltisko gave buttons to employees Carmen Gordon and Kwan (last name unknown) who worked a few machines behind her. Quiros pointed out that the employees who received buttons did not appear to ask Faltisko for the buttons.

Kulbacki also saw Faltisko wearing a "vote no" button and saw him give a "vote no" button to Carmen Gordon, as well as an envelope filled with such buttons. Kulbacki then saw Faltisko and Gordon walk to Eunice Bates' machine and saw Faltisko give Bates a "vote no" button. Kulbacki also noted that he saw Faltisko give "vote no" buttons to a female Asian employee (name unknown) and another employee named Giovanni (last name unknown). Baldwin also saw Supervisor John Farallo hand "vote no" CWA buttons to two employees at work and noted that there were no conversations between him and the employees.

At this point, I note that my evaluation of the demeanor of the witnesses and the circumstances leads me to conclude that the Respondent's witnesses testimony in denying the actions attributed to them is strained and inherently unbelievable and I find that the General Counsel's witnesses were credible in their corroborative description of the events. However, although I find that the Respondent's supervisors did offer and give "Vote No" buttons to employees, I am not persuaded that the evidence is sufficient to show (by any accompanying words) that the distribution was made in a manner that would pressure employees to make an open acknowledgement of their affiliation sen-

timents. Accordingly, as there is no proof that the offers were accompanied by any threats or coercion, see *Vemco, Inc.*, 304 NLRB 911, 913 (1991), I find there is no compelling basis to find that the Respondent's action in this respect constituted unlawful interrogation.

Threats—On March 23, Plant Manager Farallo met with employees in order to discuss the CWA affiliation election. Farallo testified he held a dozen meetings with groups of between 3 and 50 employees. Previously in February, Farallo, Zieminick, and Selinski held a meeting with employees in which Farallo stated that employees did not need a union, that the CWA just wanted employees' money, and that Respondent did not want a union at the facility to intrude with employees' jobs. Farallo stated that Respondent was ready to open its plant in Alabama, which was getting ready to do the same job as the Buffalo plant, with the same production numbers. Farallo then said that he thought the CWA was a bad idea for Respondent and its employees and stated that other unionized local employers had left the Buffalo area. Farallo ended the meeting by reiterating and emphasizing that the Alabama plant was going to be doing the same production as the Buffalo plant.

Quiros described the second meeting in March and how Farallo told employees that before voting at the affiliation election they should think about the fact that Trico, Mercy Hospital, and other local unionized employers moved to other locations because they had unions. Furthermore, Farallo told employees that since the CWA began representing employees at Respondent's Derby, New York facility 97 grievances had been filed and 11 employees had been terminated. Farallo ended the meeting by telling employees that if they still wanted to have a job to think carefully about the things he had told them before voting.

Kulbacki testified that in the second meeting with Farallo and Selinski, which was a few days prior the election, Farallo said that Respondent did not need the CWA because it already had the Independent Union. Farallo then stated that employees in the Buffalo plant were training to go to the Alabama plant and tied that statement in with the CWA affiliation election. Farallo also told employees that David Koch, CEO and chairman of the board, told CWA representatives not to get involved in Respondent's contract negotiations with major league baseball, but that CWA representatives had done so anyway. Farallo admitted that he may have told employees, at some point, that many companies are taking their business to Mexico and that he may have stated that Respondent's plant in Alabama was being fitted to do the same work as was being done at the Buffalo facility, but denied that he said that Respondent's Alabama plant was performing the same work as Buffalo. Farallo testified about what he "wanted" to do in his 15-minute meetings with the various groups of employees and then, with some prompting from the bench, was asked to state what he actually said. He then testified as follows:

The first issue led into the second issue. The issue of MLB's interference into our Major League Baseball—I'm sorry, the C.W.A.'s interference into our negotiations with Major League Baseball. The conversation back in September with Dave Kooh and Al Rudy, I explained that to

them. I told them about the subsequent visits by WGR Channel 2, the call from Jack Quinn's office. I told them about the meeting with Greg Murphy in October, which was really devastating to Dave Koch, and could have really caused us to lose the Major League Baseball license. We were up against—I know we mentioned some other names, but Nike and Reebok and everybody else, but that was a formidable, formidable foe. Dave's relationships were what was keeping us alive. And when I say alive, I could not stress enough that without Major League Baseball, hundreds of hundreds of people were going to lose their job.

There's no question about it. Plants were going to close; hundreds of people were going to lose their job. It's at least 55 percent of our business, and I let everybody know that that interference almost cost their jobs. I wanted to make sure they realized that.

I also wanted to make sure, my third topic, and I knew that they would get a letter because the Derby employees got this letter. This letter was from the Major League Baseball's Players Association, and even my wife, when she showed me the letter, thought it was from Major League Baseball. She's my wife, a very intelligent woman. You know degree and everything. Thought this was from Major League Baseball. It was not from Major League Baseball. It was from the Players' Association. The Players' Association is what caused us to have hundreds of people laid off in the year of 1994 because of the strike. The man that signed that letter was, in my mind, being a baseball fan and everything else—this is what I told people—was the cause of them being laid off for an extended period, and some people never being called back. They had found other employment; their unemployment had run out.

So I pointed that out to them. Don't be fooled by this letter. This letter is coming from the union who, by the way, the owners that vote on our contract, that's who votes on a contract, they don't have a lot of good things to say about the union. Maybe in the papers they do, but they don't in reality. So that's what I pointed out to them. And those were the three topics that I covered.

He denied that he said employees "would lose their jobs and be fired—if they voted for the CWA," but admittedly said that "if we lost our Major League Baseball license, jobs would be lost."

Here, I credit the testimony by Quiros and Kulbacki regarding what was said by Farallo at the meetings they attended. Quiros made contemporaneous notes, which corroborate her recall, and their testimony tracks Farallo's version of his speeches. Farallo's testimony seems to be a blend of what he said and what he thought, or what he intended to convey, and I find that the employees' recall is more specific, reliable, and trustworthy. It is also noted that one concern raised about the affiliation campaign was the ability of various ethnic group employees to understand English, and I find that Farallo asserted explanations were most likely understood by the employees in the manner described by Quiros and Kulbacki, regardless of what Farallo "intended" to convey. Taken together,

the statements by the plant's senior official that the Company did not want the CWA (rather than the local, independent union), that other local business moved to other locations because of unions, that the Company had a new Alabama plant that could do the work of the Buffalo plant, that the CWA was untrustworthy in the eyes of the Company's CEO, that after the CWA had come into the Respondent Derby plant 97 grievances had been filed and 11 employees terminated, and that if the Buffalo employees still wanted to have a job, they should think carefully about what he had told them before voting, meant exactly what the employees interpreted his statement to mean, namely; that the Respondent did not want to deal with the CWA and would move or close the facility if employees did not reject affiliation with the CWA.

Kulbacki also irrefutably testified that Supervisor Selinski told him that the Koch family (who own the Respondent) would close the plant down if there ever was a union at Respondent's facility.³ Statements such as these are threats and they are not protected free speech. Otherwise the comments are not shown to be mere personal opinions or objective predictions of a probable consequence beyond the Respondent's control. See *Wallace International de Puerto Rico*, 328 NLRB 29, 34 (1999). The expression of threats only a few days before the election along with the Respondent's open display of favoritism for the independent Union over the CWA makes the Respondent's action coercive in nature and interferes with employee rights to choose their own collective-bargaining representative without the interference of management. Accordingly, I find that the Respondent is shown to have violated Section 8(a)(1) of the Act, in the respect, as alleged.

Futility of Affiliation—Kulbacki's un rebutted testimony showed that Supervisor Selinski made statements to employees, including Kulbacki who was an outspoken CWA supporter, as follows: "the Union isn't going to do any good; don't listen to this Union stuff: [Respondent] is going to do what it wants to with or without a Union; and you're wasting your time and efforts." Kulbacki noted that Selinski repeatedly made these remarks in February and March, just prior to the vote. Selinski's statements express Respondent's position of the futility of employees to engage in union (affiliation) activities, and violates Section 8(a)(1) of the Act as alleged. See *Schmidt Tiago Construction Co.*, 286 NLRB 342, 359 (1987).

Benefits for Voting—The Respondent admittedly urged its employees to vote and promised to and provided some of them with the benefits of free transportation and paid time off to vote at the affiliation election. In this regard, Farallo authorized the issuance of a notice to employees, wherein Respondent urged employees to vote against affiliation with the CWA and prom-

ised employees the benefits of free transportation and paid time off to vote at the affiliation election (it did not issue the notice to its Hamburg employees and did not offer or provide them with transportation, but did provide them with paid time off). Moreover, this was done despite the fact that Independent Union President Burkhard, who was responsible for running the election, told Respondent's management, including Farallo and Personnel Manager Nowak, that she did not want any campaign buttons, buses, or any interference with the Independent Union's affiliation election and that she hired security as part of her responsibility. (I do not credit Nowak's testimony that Burkhard did not tell her that the Independent Union did not want buses.)

The Respondent argues that it is privileged to urge its employees to vote against affiliation, as well as to promise and actually provide employees with benefits of free transportation and paid time off to vote at the affiliation election relying on *Westinghouse Electric Corp.*, 232 NLRB 56 (1977). In *Westinghouse*, the Board specifically held that the employer's letter to its employees, at issue therein, concerned an upcoming vote on whether to call a strike, did not occur in conjunction with any unlawful conduct which might otherwise affect its impact on employees; and was not an attempt to interfere in internal union matters.

The General Counsel, on the other hand, cites *Amoco Production Co.*, 239 NLRB 1195 (1979), where the Board held "whatever factors motivate affiliation, affiliation does not directly involve the employment relation. . . . Having no direct effect on the employment relationship, affiliation vote procedures, are internal union matters." In his concurrence, Board Member Truesdale stated, in relevant part: "The question of affiliation is therefore purely an internal union matter and, as such, is of no concern to the employer or to nonmembers of the union. Such offer of assistance reveals conduct violative of Section 8(a)(1) of the Act."

Here, I agree with the General Counsel that the Respondent has interjected itself into the internal affairs of the Independent Union, despite the fact that the Independent specifically informed Respondent that it did not want any assistance or interference with the affiliation election. The Respondent is shown to have sought to obtain favor with the Buffalo facility employees, especially Asian employees (the majority group), whom it apparently perceived would vote against affiliation with the CWA. In particular, Respondent sought to give these employees the impression that it was their guardian by playing an active role during the affiliation campaign and trying to portray the CWA in a negative light.

Here, the facts are different than in the *Westinghouse* case, supra. Here, the Respondent did not adopt a position of neutrality, instead it offered free transportation to employees, especially the Asian employees at its Buffalo plant a few blocks from its plant, while denying that offer to its apparently more diverse work force at its Hamburg plant, some 15 miles distant. The Respondent here offered and paid time off to vote while also engaging in overt support for the incumbent union over the CWA challenger, it made other violations of Section 8(a)(1); and it engaged in the overall conduct that interfered with its employees' rights to determine their own union activities and

³ The consolidated complaint did not allege Selinski's statements as violations of Sec. 8(a)(1) of the Act, however, the matter was fully litigated at the hearing and it is closely related to the complaint, as amended, which specifically alleged that Respondent made threats to close or move its facility. Accordingly, I grant the General Counsel's motion amending the complaint to allege Selinski's statements that it would be futile for employees to seek to affiliate the Independent Union with the CWA and that Respondent would close the plant down if employees selected the CWA or another union, as violative of Sec. 8(a)(1) of the Act.

free choice with respect to the affiliation election. This case does not involve a Board-conducted representation election and, under these circumstances, I conclude that the offering and supplying of benefits in combination with its urging employees to vote against affiliation goes beyond any demonstrated free speech opinion rights or safety concerns of the employer and clearly infringes on internal union matters in violation of Section 8(a)(1) of the Act, as alleged.

B. The Suspension of Valerie Baldwin

In proceedings involving disciplinary action against employees, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activities were a motivating factor in the employer's decision to discipline them. Here, the record shows that Valerie Baldwin was an open proponent of affiliation with the CWA and that the Respondent was aware of the CWA drive and of Baldwin's involvement. The record shows that, the Respondent engaged in other conduct, discussed above, that violated Section 8(a)(1) of the Act, that the Company strongly opposed the CWA's affiliation effort, and that the Company's CEO held strong opinions adverse to the CWA; opinions that were communicated to his supervisors and employees.

The basis for Respondent's announced position of mistrust of the CWA because of its unwanted contact with Major League Baseball appear to be inconsistent and arguably irrational or distorted. First, CEO Koch's apparent aversion to potential adverse publicity would seem to be at odds with its post contract (and post affiliation election), willingness to air its problems in the public forum of a Board proceeding. Also, Koch's January 1997 letters to the Derby plant union and its employees reasonably must be interpreted as seeking union and employee support "to prove to baseball," that a new production contract is in everyone's best interest. Yet in September 1997, after the CWA replaced the Derby Independent Union, Koch suddenly wanted no union involvement "whatsoever." Here, I credit former Derby Union Representative Geary's testimony that he was the apparent source of any request that the CWA support the Respondent and that he did so in late July, prior to Koch's change in attitude, because of Koch's past appeal to the Union. Contrary to Koch's inaccurate accusations, the Union did honor his September wishes and Koch apparently made no effort to learn the source or time of the comments or reporting contacts. Moreover, in September, New York area CWA representative had merely made a reasonable good-faith offer to help, apparently unaware that Geary already had made a parallel suggestion to the International president in Washington. The Respondent, however, persisted in its condemnation of the CWA's purported "reneging of the agreement" not to "interfere" and made this a centerpiece of its campaign to prevent the CWA from also succeeding the Independent Union in Buffalo.

Under these circumstances, I find that the record shows specific antiunion (CWA) animus. I also find that the General Counsel has shown that Baldwin was a CWA affiliation committee member and was known to be an aggressive CWA affiliation supporter. Supervisor Tirado acknowledged that he spoke with her about the CWA affiliation issue and observed

her speaking with other employees about the affiliation campaign and she apparently was disciplined for conduct connected with the posting or distribution of notices relating to the affiliation election and I find that the General Counsel has met his initial burden by presenting a showing sufficient to support an inference that the employee's union or other protected concerted activities were a motivating factor in Respondent's decision to discipline her. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

On March 25, the day of the election, Baldwin posted a hand drawn notice that said:

ATTENTION
 PICTURE I.D.
 AND
 GREEN CARD
 ARE REQUIRED
 TO VOTE!!!

At about 7 a.m. Baldwin received the notice, which was on a 3-1/2 x 5 or 5 x 7 piece of paper that had visibly been torn out of a spiral notebook, from Kulbacki. Kulbacki told Baldwin that he made the signs and had already posted some, but that they were torn down. Kulbacki also told Baldwin that if she wanted to post them to go ahead, but that she did not have to do so. Baldwin stated that she put Kulbacki's sign together with other CWA signs that she was carrying with her. I credit her testimony that she did not speak with Quiros about the notice or show it to her, did not know whether Quiros saw it, and never discussed Kulbacki's intentions in drafting it.

Baldwin testified that she posted one original in the second floor smoke room (and threw others away), and that there were about 10 employees in the smoke room at that time, including Bow Tran, Henry Nguyen, and Monique Adams. Bow asked her if he would need identification and Baldwin replied that if he went to her table he would not need identification because she knew who he was, but that anyone she did not recognize would need identification. Baldwin testified she did not read all of her postings and did not realize the word "and" was used and asserts that she told employees they would need a New York State driver's license "or" a green card.

The Independent Union assigned Baldwin to hand out ballots at tables "W-Z" which corresponded to the voters' last name. Baldwin stated that she had a list of voter names and that she checked the list before giving voters a ballot. During the election, Baldwin pointed out that she did not recognize a particular employee who went to her table and whom she asked him for identification he showed her his New York State driver's license. Baldwin matched up his name on the voter list and gave him a ballot. Baldwin agreed that on the day of the election President Burkhard told employees that identification would not be required, nonetheless, Baldwin said she requested identi-

fication of an employee because she could not understand how he was pronouncing his last name.

Henry Nguyen confirmed that he saw Baldwin posting the notice in the second floor smoke room. Contrary to Baldwin, Vanhnalone Ha testified that she also witnessed Baldwin and Cecilia Quiros together posting another copy of the sign in the second floor lunchroom and that a comment was made about immigrations being present; however, she never conveyed any of her information or concerns to management. Otherwise, I find this witness' demeanor and testimony to be confused and untrustworthy and, in view of the lack of timely management knowledge of her observations, I find that her testimony is of no probative value.

Kulbacki admitted that he posted one of the signs in the fourth floor men's room immediately after arriving at work the day of the election, but observed that it was ripped down the next time he went to the men's room. Burkhard, president of the Independent Union, was shown one of the signs by Doris Makeyenko and Virgie Adams, who were upset by it. She directed that any remaining copies of the sign that were still posted be taken down and she immediately began walking around the plant telling employees that the sign was not true and that identification would not be needed to vote. Around the same time, a supervisor told Personnel Manager Nowak about the sign. She said she viewed it as a direct racial attack on the Asian employees at the plant and immediately contacted Burkhard. Burkhard told Nowak that she had nothing to do with it, that it was not authorized, and that she was in the process of informing all the employees that the sign was untrue. Nowak then contacted Farallo who was at the Alabama plant. Farallo said he viewed the sign as being racist in nature and he instructed Nowak to ensure that all signs were removed. He then contacted the Respondent's attorney, and it was decided that the attorney would transmit a letter to the CWA, condemning the Union for its racist tactics. Nguyen, who felt that it was directed at the Asian employees, told Nowak that he had witnessed Baldwin posting one of the signs in the second floor smoke room. She again contacted Farallo who decided that no action should be taken until he returned to Buffalo on March 30.

Meanwhile, Supervisors Tirado, Heinrich, and Walker held a meeting of employees on the second and third floors. Burkhard arrived, informed the employees that the sign was not correct and that no picture identification was needed in order to vote. At that point, Baldwin spoke up and proclaimed that as far as she was concerned identification would be required and that anyone who came to her table to vote had better have picture identification when they. At this point, Mainthone Trieu, a Laotian employee, became involved in a discussion with Baldwin. Trieu testified that she felt the sign was directed at the Asian employees, and that she was yelling at Baldwin, telling her that she was wrong and that she was just trying to scare people off from voting. She stated that, in response, Baldwin kept insisting that anyone who came to her table would need picture identification, such as a green card.

The following day, Tirado and Heinrich told Nowak that Baldwin had been telling employees that if they came to her table, they would need a green card to vote, even after it had

been said that there would be no such requirement. Following Farallo's return, Nowak and Farallo called Tirado, Heinrich, and Nguyen into the office where they recounted the events they witnessed involving Baldwin. They then called Independent Union Representatives Burkhard and Adams to the office, along with Baldwin. Baldwin apparently had one of the notices with her and Farallo asked her where she had acquired it, but she said she would not reveal her sources. Farallo then asked her if she had ever posted the sign and if she had ever stated that employees would need a green card to vote, and she denied both. Farallo explained that the Company had investigated the matter, and that the investigation did not support her denials. Baldwin continued to deny all involvement and demanded to face her accusers. Tirado, Heinrich, and Nguyen were then brought back in the office, and each one again related the events. According to Baldwin after hearing Nguyen, she "remembered" that she had in fact posted a sign but admitted at the hearing that she continued to lie by stating that she had no involvement with the sign and she replied that the Company was going to believe them anyway, so they should just get on with it.

Farallo then informed her that she was being suspended for 3 days for racial harassment. Baldwin claimed that she herself had been harassed in 1994, and that nothing had been done about it. Farallo responded that he did not know anything about that and Baldwin subsequently signed her suspension notice and left the office.

The Company maintains an antiharassment that provides, among other things, that offensive language and behavior regarding an individual's race or national origin will not be tolerated. Farallo, however, had never before suspended anyone for racial harassment. The policy also explains that any complaint of such harassment should be brought to the attention of management, and that management will fully investigate each complaint and take forceful and appropriate remedial measures when necessary to redress any harm done. (The policy is posted in the glass cases found on the second, third and fourth floors, but it was not otherwise distributed to employees). Here, I find that the issues of racial harassment for which Baldwin was disciplined is based principally on the "Green Card" "Required to Vote" language of the sign she posted and the green card comment she made at the meeting, and, otherwise, I find that other alleged comments attributed to her, principally by Asian witnesses, played no part in the disciplinary process and, accordingly, are not relevant herein. The Charging Party points out that Baldwin (who is African-American) had no animosity towards Asians and testified that she associated with approximately 50 Asians in the workplace. Mainthone Trieu, "Mo," a Laotian employee, testified that she has known Baldwin for 5 years, that she liked Baldwin, thought Baldwin was a nice person, and that Baldwin had Laotian friends and everyone was friendly in the plant. The Charging Party then argues that Baldwin was not motivated by a desire to racially harass employees but to be able to verify the identity of voters before she gave out a ballot. It also points out that the harassment policy was not distributed to all employees, that the employers' Asian witness had not seen the policy, the posted policy was only in English, and that Plant Manager Farallo had

discussed the policy only with supervisors. The General Counsel points out that the applicable collective-bargaining agreement describes a progressive disciplinary procedure to be utilized by Respondent in issuing discipline. In particular, article 6.01(b) provides, “Except in cases of gross misconduct, for which the Employer may vary the disciplinary steps, the employer will issue warning slips in the following orders.” Step 1= written warning; Step 2= written warning; Step 3 = three (3–day suspension; Step 4 = dismissal. The Respondent, however, argues that it suspended Baldwin for violating its anti-harassment policy, a subject matter failing under the progressive disciplinary procedure, because it determined that Baldwin’s conduct was an “overt racist act” and constituted gross misconduct.

While Farallo did not personally know about the harassment Baldwin had complained about in 1994, Manager Nowak had received the complaint which involved verbal abuse and name calling at the plant and in phone calls to Baldwin’s home by Yvette Smalls who was apparently an acting supervisor (she was made a supervisor after the incident). Nowak was basically dismissive about the significance of the complaints; Ziminack, however, did speak to Smalls; and Smalls asserts she received a verbal warning (apparently not reflected in her personal record). As pointed out by the Court in *Transportation Management Corp.*, supra, “An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity conduct.” Here, I am not persuaded that the Respondent has met its burden and I conclude that Baldwin would not have been suspended for the “green card” incident in the absence of her union activity.

The Respondent makes much of the point that it has a diverse work force at its Buffalo plant—37 percent Asian, 34 percent Caucasian, 21 percent Black, and 17 percent Hispanic. Any one of these groups, however, could include recent immigrants that would have a green card as a form of identification. On its face, no particular group would appear to be singled out by such a reference and the notice, while lamentable, is not objectively so inflammatory as to constitute illegal conduct. The Respondent, however, reacted to the complaints of some Asians (the group it considered to be essentially for the continuation of the Independent Union), and reached the conclusion that a crude sign that referred to both a picture ID and a green card constituted not only anti-Asian racial harassment but gross misconduct.

The investigation showed (or should have shown) that Baldwin’s alleged involvement was tied into her concerns with the verification of identification of voters in voting on a matter of internal union affairs. A fair investigation also might have shown that Baldwin accurately spoke about “identification” not only a “green card” at the meeting and it appears that Supervisors Tirado and Heinrich comments to Nowak were incomplete or inaccurate. The employer had made no previous overt efforts to concern itself with potential racial harassment matters beyond a bland posting in English, and some instructions to supervisors (but not to employees in general). Moreover, the employer had no past record of dealing with or en-

forcing its harassment policy and, in fact, had dealt with Baldwin’s own complaint in a cursory fashion, with an apparent verbal warning as its choice of discipline. While it is obvious that Baldwin did not help her own cause by denying her involvement with the notice, it appears that the Respondent already had reached its conclusion that the incident was an “overt racist act “and” “gross misconduct.” The notice was quickly taken down and appropriate corrective action and assurances were made by the president of the Independent Union and the voting occurred without incident or anyone being denied or discouraged from participation. The Respondent, however, chose to further publish and amplify the matter by posting a notice (in several languages), signed by CEO Koch that indicated that actions had occurred during the union affiliation campaign that constituted discrimination “toward Asian employees.”

Under all these circumstances, I find that the Respondent’s reaction was pretextual and overblown, certainly in comparison to its past conduct, and I find that Plant Manager Farallo, was influenced by Koch’s animosity against the CWA when he chose to escalate the incident from one that could have been handled under step one of its progressive disciplinary system to step three and an immediate suspension. I find that the Respondent seized on this incident to further insert itself into internal union affairs and its efforts to keep the CWA out of its Buffalo facility and I conclude that it would not have departed from its progressive disciplinary system were it not for its intense animus toward the CWA and Baldwin’s own effects on behalf of the CWA in the affiliation campaign.

Here, the Respondent has not overcome the strong prima facie showing by the General Counsel and I conclude that the Respondent otherwise has failed to show that Baldwin would have been suspended absent her CWA activities. The General Counsel has met its overall burden of proof and I further conclude that Respondent’s suspension of this employee is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Independent Union and the CWA, PPMW Sector, both are labor organizations within the meaning of Section 2(5) of the Act.
3. By suspending Valerie Baldwin because of her union or other protected activity, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.
4. By placing employees under close observation and engaging in surveillance of employees, by impliedly threatening to move or close its business if the employees affiliated with the CWA, by implying that it would be futile to chose to affiliate with the CWA and by interfering with internal union matters by urging employees to vote against affiliation in combination with offering benefits the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and that it take certain affirmative action set forth below to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that the Respondent be ordered to make employee Valerie Baldwin whole for any loss of earnings she may have suffered because of the discrimination practiced against her by payment to her a sum of money equal to that which she normally would have earned, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),⁴ and that Respondent expunge from its files any reference to her suspension and notify her in writing that this has been done and that evidence of this unlawful discipline will not be used as basis for future personnel action against her.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, New Era Cap Co., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending any employee because of or in retaliation for their engaging in union or other activity protected by Section 7 of the Act.

(b) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by placing employees under close observation and engaging in surveillance of employees, by impliedly threatening to move or close its business if the employees affiliated with the CWA, by implying that it would be futile to chose to affiliate with the CWA, and by interfering with internal union matters urging employees to vote against affiliation in combination with offering benefits.

⁴ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1997 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁵ 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.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of 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 Valerie Baldwin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

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

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

(d) Within 14 days after service by the Region, post at its facilities in Buffalo, Hamberg, and Derby, New York, copies of the attached noticed marked "Appendix."⁶ Copies of the notice in English, Spanish, Laotian, and Vietnamese, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent and any time since October 1997.

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

⁶ 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."