Chinese Daily News *and* Communications Workers of America, AFL–CIO. Cases 21–CA–36178, 21–CA–36181, 21–CA–36630, 21–CA–36632, 21–CA–36635, 21–CA–36919, 21–CA–36920, 21–CA–36981, and 21–CA–37114

December 22, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 26, 2007, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. In response, the Respondent and the General Counsel filed answering briefs, and, thereafter, both filed reply briefs.

The Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges, inter alia, that during depositions taken in connection with a Federal class-action lawsuit[3], the Respondent violated Section 8(a)(1) by interrogating employees about their union support and activities. The judge found no violation and dismissed this allegation. For the reasons discussed below, we reverse the judge and find that the Respondent violated Section 8(a)(1) in this respect.

Relevant Facts

On March 5, 2004, employee Lynne Wang and two other employees brought a class-action wage-and-hour lawsuit in Federal district court against the Respondent on behalf of themselves and similarly situated employees. Employees Shieh-Sheng Wei and Jeffrey Sun provided declarations in support of the motion for class certification. Wang, Wei, and Sun were longstanding and open union supporters.

The Respondent sought to disqualify the plaintiffs as representative plaintiffs. The Respondent asserted that the class action was a pretext for the plaintiffs' "real" motivation--advancing the Union's organizing interests among the Respondent's employees—and, therefore, that the plaintiffs would not act in the best interests of the class.

After the Federal district court certified the class in November 2004, the Respondent filed a motion for reconsideration. In denying the Respondent's motion, the court found that the Respondent had failed to establish that the class-action suit was filed to pressure the Respondent to unionize, and further found that the plaintiffs' alleged involvement in bringing unfair labor prac-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. *See* Sec. 3(b) of the Act.

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

In the absence of exceptions, we adopt the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) by issuing a written warning to employee Shieh-Sheng Wei and by refusing to assign Wei to certain shift rotations and assignments. Also in the absence of exceptions, we adopt the judge's recommended dismissal of the allegation that the Respondent's no-solicitation/distribution policy violated Sec. 8(a)(3)

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining an unlawful dress code policy, we find it unnecessary to pass on the judge's finding that that policy also violated Sec. 8(a)(3). Because the allegations surrounding the dress code policy pertain only to the promulgation and maintenance of the policy, and not to any specific instances of unlawful enforcement or other adverse action, the finding of an 8(a)(3) violation would not require any further remedies beyond those that are awarded for an 8(a)(1) violation.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining an overly broad no-solicitation/distribution policy. In its exceptions, the Respondent argues that this policy should be deemed presumptively valid because its prohibitions apply only to "work time," during which time employers may lawfully prohibit employees from engaging in solicitation and distribution activities. *See Our Way, Inc.,* 268 NLRB 394, 394–395 (1983). We find it unnecessary to address this argument, however, because we find that the policy violates the Act by prohibiting employees from soliciting and distributing literature "at [the] workplace." "[T]he workplace" is reasonably read to include nonwork areas, such as lunch/break rooms and other areas of the Respondent's facility where employees may be present when they are not working. It is settled that Sec. 7 protects the right of employees during nonworking time to solicit on company premises and distribute literature in nonwork areas of the premises, unless the employer can demonstrate unusual circumstances that warrant restricting that right for the purpose of maintaining production or discipline. *John H. Swisher & Son, Inc.,* 211 NLRB 777, 778–779 (1974). In this case, the Respondent has made no assertion that its no-solicitation/distribution policy was necessary to maintain discipline or production. We therefore find that the policy violates the Act.

[3] The lawsuit included both Federal claims under the Fair Labor Standards Act and State law claims under California labor laws. The class-action challenges at issue in the underlying proceeding pertained to the state law claims.

tice charges against the Respondent would not conflict with their ability to adequately represent class members in a wage-and-hour lawsuit. *See Wang et al. v. Chinese Daily News, Inc. et al.,* 231 F.R.D. 602 (C.D. Cal. 2005), affd. 159 Fed. Appx. 750 (9th Cir. 2005).

Following the court's dismissal of the Respondent's motion for reconsideration, litigation of the case proceeded.[4] The Respondent deposed plaintiff Wang and supportive declarants Wei and Sun in connection with the wage-and-hour allegations.[5] During the depositions, the Respondent's attorney, Mark Palin, asked Wang, Wei, and Sun questions related to their union sympathies and union-related activities. Those questions are summarized below.

Wei was deposed on June 14 and July 26 of 2005. During the depositions, Palin asked Wei numerous questions about his role with regard to the Union, his involvement in organizing activities such as union meetings, and his role in filing unfair labor practice charges against the Respondent.[6] In addition, Palin asked Wei whether he had voted in the Board election conducted among the Respondent's employees, and whether he had voted for the Union.[7]

Sun was deposed on June 28, 2005. During the deposition, Palin asked Sun about his involvement in the union organizing campaign and whether he was, or considered himself to be, a shop steward.

Wang was deposed on August 24, 2005. Palin asked Wang about a letter that had been written to the chairman of the Respondent's parent company in Taiwan asking him to meet with the employees in California and about Wang's trip to Taiwan for a labor conference. Palin also questioned Wang at length about her involvement in the filing of a number of unfair labor practice charges against the Respondent and about the disposition of those charges.

Judge's Findings

The judge found that the Respondent's questioning of Wang, Wei, and Sun in the course of their depositions in the class-action lawsuit did not violate the Act. The judge applied the test set forth in *Guess?, Inc.,* 339 NLRB 432, 434 (2003), petition for review dismissed without prejudice, 2003 WL 22705744 (D.C. Cir. 2003). Under that test, the Board considers whether the questioning is relevant to the lawsuit, and, if so, whether it has an illegal objective. If the questioning is found to be relevant and without an illegal objective, the Board must then consider whether the Respondent's need for the information outweighs employees' Section 7 rights. Id. at 434.

Applying this test to the facts of this case, the judge found that the Respondent's questioning of Wang, Wei, and Sun about the extent of their involvement with the Union and union-related activities was relevant to the Respondent's defense that the plaintiffs in the case should be disqualified as class representatives. The judge also found that the General Counsel had presented no evidence of unlawful motivation, and that the Respondent did not give any indication that it would take retaliatory action following the depositions.

The judge further found that Wang, Wei, and Sun did not have substantial confidentiality interests under Section 7 to weigh against the Respondent's need for the information at issue. The judge reasoned that, because the deponents were open and longstanding union supporters who had "confronted" the Respondent with a class-action lawsuit, they could not have been expected to remain "anonymous," nor could they have expected that their support for the Union was considered "unknown" or "confidential."

In addition, the judge found that the Respondent's questioning of the deponents was not coercive. In so finding, the judge found that the Respondent's questions were "clearly intended to create a legal record," and that "neither the deposition questions nor their context suggests any element of coercion or interference with protected rights." She also observed that the Respondent's questioning of Wang, Wei, and Sun focused only on the deponents' own personal union activities and not on those of other employees.

The judge concluded that, in light of the deponents' limited interest in confidentiality and the Respondent's significant interest in defending itself against the class-action lawsuit, the Respondent's depositions questions did not constitute unlawful interrogation under the Act.

Analysis

For the reasons discussed below, we reverse the judge and find that the Respondent violated the Act by unlawfully interrogating Wei during his deposition. Specifically, we find that the Respondent's question to Wei—"[D]id you vote for the union to win the election?"—violated Wei's Section 7 rights. We express no opinion on whether any other deposition question posed by the Respondent, or indeed the Respondent's entire line of

[4] As the litigation proceeded, the Respondent continued to challenge the appropriateness of the class certification.

[5] Wang, Wei, and Sun were represented by attorneys during these depositions, and their attorneys counseled them not to answer some of the deposition questions now at issue.

[6] The General Counsel appears to challenge the Respondent's entire line of questioning. In his brief in support of exceptions, the General Counsel does not list specific questions that he views as unlawful, but rather cites to and includes excerpts of the deposition transcripts as evidence of the Respondent's unlawful interrogation of the deponents.

[7] Wei answered that he had voted for the Union.

inquiry, was relevant to the litigation or ultimately was unlawful under the controlling legal standard. Additional findings of unlawful interrogations with respect to those questions would be cumulative and would not affect the Order.

As did the judge, we apply the test set forth in *Guess?*. We begin by assuming *arguendo* that the Respondent's questioning of Wei whether he voted for the Union was relevant to the litigation, either as bearing on Wang's appropriateness as a representative plaintiff or on Wei's potential bias as a witness. We also find, consistent with the judge's decision below, that the Respondent's questioning did not have an illegal objective.

We turn, then, to the final prong of the *Guess?* analysis: whether Wei's Section 7 interest in the confidentiality of his vote outweighs the Respondent's need for this information.

We find, contrary to the judge, that Wei's interest in maintaining the confidentiality of his vote in the election was substantial. The Board has recognized that "the secrecy of balloting . . . is a hallmark of our election procedures." *See Fessler & Bowman, Inc.,* 341 NLRB 932, 934 (2004). The Board has also consistently recognized that an employer's interrogation[8] of an employee concerning how that employee intends to vote, or has voted, in a secret-ballot election violates the Act, notwithstanding the employee's open advocacy for the Union. *See, e.g., Gladieux Food Service,* 252 NLRB 744, 746 (1980) ("Employer questions and statements relating directly to an employee's vote in a Board election . . . violate Section 8(a)(1) in that such interrogation tends to undermine the principle of the secret ballot."). Thus, even though Wei was an open union supporter, he retained a substantial Section 7 interest in preserving the confidentiality of his vote.

We next find that the Respondent has not shown that its need for the information concerning Wei's vote justified the infringement on his Section 7 right to maintain the confidentiality of his vote. As noted above, the Respondent contends that its questioning of Wei was necessary to develop two aspects of its litigation defense: (1) that the class should not be certified because the plaintiffs would not represent the best interests of the class, and (2) that Wei, Wang, and Sun had an inherent bias against the Respondent due to their union support. Although we assume arguendo that Wei's support for the Union may have been broadly relevant to the Respondent's defenses,[9] it is nevertheless clear that the Respondent has not demonstrated that its ability to establish how Wei voted in the election substantially furthers either of those two defenses. The Respondent does not dispute the fact that it had otherwise established that Wei, Sun, and Wang were open and active union supporters. With that established, it is difficult to see—nor does the Respondent explain—how asking Wei about his confidential vote would appreciably further the Respondent's effort to disqualify Wei. Thus, we find Wei's substantial interest in maintaining the confidentiality of his vote outweighs the Respondent's need for that information.

Accordingly, we find that, during its deposition of Wei, the Respondent unlawfully interrogated Wei in violation of Section 8(a)(1) by asking him to reveal how he voted in the election.

ORDER

The National Labor Relations Board orders that the Respondent, Chinese Daily News, Monterey Park, California, its officers, agents, successors, and, assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an unlawful dress code policy prohibiting employees from wearing union insignia.

(b) Promulgating and maintaining an overly broad no-solicitation/distribution policy prohibiting employees from engaging in solicitation and distribution of literature in nonwork areas.

(c) Directing employees to stop talking about terms and conditions of their employment with coworkers.

(d) Unlawfully interrogating employees about conduct protected by Section 7 of the Act.

(e) In any like or related manner, interfering with, restraining, or coercing its 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) Rescind the unlawful dress code policy prohibiting employees from wearing union insignia.

(b) Rescind the unlawful no-solicitation/distribution policy prohibiting employees from engaging in solicitation and distribution of literature in nonwork areas.

(c) Within 14 days after service by the Region, post at its facilities in Monterey Park, California, copies of the attached notice marked "Appendix."[10] Copies of the

[8] We disagree with the judge that the Respondent's questioning of the deponents was not coercive because it was undertaken "to create a legal record." To the contrary, we find that the circumstances under which the Respondent interrogated Wei--an adversarial legal proceeding during which Wei was under oath--created an environment with an element of coercion.

[9] The mere fact that an employee is an open and active union supporter is not probative of bias against the Employer.

[10] 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 Judg-

notice, on forms provided by the Regional Director for Region 21, 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.[11] 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 any of the Monterey Park, California 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 January 29, 2004.

(d) 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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 22, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain an unlawful dress code policy prohibiting employees from wearing union insignia.

WE WILL NOT promulgate and maintain an overly broad no-solicitation/distribution policy prohibiting employees from engaging in solicitation and distribution of literature in nonwork areas.

WE WILL NOT direct employees to stop talking about terms and conditions of their employment with coworkers.

WE WILL NOT unlawfully interrogate employees about their conduct protected by Section 7 of the Act.

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

WE WILL rescind our unlawful dress code policy prohibiting employees from wearing union insignia.

WE WILL rescind our unlawful no-solicitation/distribution policy prohibiting employees from engaging in solicitation and distribution of literature in nonwork areas.

CHINESE DAILY NEWS

Irma Hernandez and *Ami Silverman, Esqs.,* for the General Counsel.

Steven D. Atkinson and *Thomas A. Lenz, Esqs. (Atkinson, Andelson, Loya, Ruud & Romo),* of Cerritos, California, for the Respondent.

Eric D. Geist, Administrative Director to the Vice President, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on October 1 through 4, 2007, upon an amended consolidated complaint (the complaint) issued April 18, 2006, by the Regional Director for Region 21 of the National Labor Relations Board (the Board) based upon charges filed by Communications Workers of America, AFL–CIO (the Union.) The complaint, as amended, alleges Chinese Daily News (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1] Respondent essentially denied all allegations of unlawful conduct.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11] The notices are to be posted in the following languages: English and Mandarin Chinese.

[1] In her posthearing brief, counsel for the General Counsel noted that unfair labor practice charges alleging the conduct described in complaint pars. 9 and 10 were previously dismissed by the Region, and she withdrew that portion of complaint par. 11 alleging that the Respondent directed an employee to cease talking about the hiring of part-time drivers.

Issues

1. Did Respondent independently violate Section 8(a)(1) of the Act by the following acts: on February 9, 2004, directing an employee not to talk about employee overtime issues; on June 14 and 28, July 26, and August 24, 2005 respectively, interrogating employees in the course of deposing them.

2. Did Respondent violate Section 8(a)(3) and (1) of the Act by the following acts: on and after January 29, 2004, promulgating and maintaining a dress code prohibiting the wearing of union insignia and promulgating and maintaining an overly broad no-solicitation/no-distribution rule; in late June or early July 2004, refusing to assign employee Shieh-Sheng Wei certain shift rotations and shift assignments, resulting in loss of overtime pay; and on August 17, 2004, issuing a written warning to employee Shieh-Sheng Wei.

On the entire record,[2] including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACTS

I. JURISDICTION

At all relevant times, the Respondent, a California corporation, with facilities located at 1588 Corporate Center Drive, Monterey Park, California, and 1230 Monterey Pass Road, Monterey Park, California, has been engaged in the business of publishing and distributing newspapers and selling books.[3] During the 12-month period ending February 16, 2006, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross annual revenues in excess of $200,000. In addition, the Respondent held membership in or subscribed to various nationally syndicated features, and advertised nationally sold products. During the same time period, Respondent purchased and received goods valued in excess of $50,000, which goods were shipped directly to Respondent's Southern California facilities from points located outside of the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is a major Chinese-language daily newspaper published in Southern California. It is part of a multinational family of Chinese language newspapers with the primary enterprise being the Taipei-based United Daily News. The Respondent utilizes reporters and various news services to acquire news and then uses its own staff to prepare its newspaper pages and to print, bundle, and distribute copies of its paper to retail distribution points. Essentially all of the Respondent's employees and managers speak Chinese as their first language. All employee witnesses testified in Chinese, and various documents introduced at the hearing were written in Chinese, necessitating oral and written translation.

At relevant times, the following individuals served in the following positions as supervisors and agents of the Respondent:

Ming Sheng Su (President Su)	President
Bo Li (Mr. Li)	Asst. Business Manager
Ren-Shiun Wing (Group Leader Wing)	Group Leader

The Respondent's packing department handles its newspaper bundling and distribution functions. Assisted by Deputy Group Leader Ching Hwa Kao (Deputy Group Leader Kao), Group Leader Wing supervised the packing department at all relevant times. Four to six full-time and part-time packing employees operated two bundling machines.

Consequent to a representation petition filed by the Union on October 26, 2000,[4] the Board conducted an election in a wall-to-wall unit of the Respondent's employees on March 19, 2001, in which a majority of the votes was cast for the Union. Four years later, the Board overturned the election results based on the Respondent's objection to supervisory solicitation of union cards. *Chinese Daily News,* 344 NLRB 1071 (2005). On December 22, 2005, the Union lost the rerun election to which no objections were filed.

On April 17, 2006, the Board issued a Decision and Order, affirming in part the February 25, 2005 decision of Administrative Law Judge Clifford H. Anderson. *Chinese Daily News,* 346 NLRB 906 (2006), enfd. 224 Fed.Appx. 6 (D.C. Cir. 2007). The Board found, inter alia, that in 2001, the Respondent had committed numerous violations of the Act, including threats, interrogation, distribution of a memo prohibiting employees from discussing union matters, issuance of a warning letter to employee Lien-yi (Lynne) Wang (Wang) for her remarks at a union rally, and an increase in Wang's beat assignments after she led a reporters' protest against the Respondent's proposed beat changes.

Throughout and following the above-described proceedings, the Union has maintained an ongoing postelection campaign to retain employee support for the Union, regularly communicating to employees, holding rallies, and generally encouraging union activism.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Promulgation and Maintenance of Overbroad Solicitation/Distribution Rule and Discriminatory Dress Code

On December 12, 2003, the Respondent hosted a year-end buffet dinner for all employees and management on the facility's fourth floor in recognition of a visit from a top management official from Taipei. Reporter Wang, an active and known union supporter who had testified and assisted the Union in the prior representation and unfair labor practice proceedings, attended. On that occasion, Wang wore a navy blue vest with a union logo on the upper left chest and on the back in

[2] Counsel for the General Counsel's unopposed posthearing motion to correct the transcript is granted. The motion and corrections are received as ALJ Exh. 1.

[3] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, uncontroverted testimony, and findings of fact in the decision of Administrative Law Judge Clifford H. Anderson, regarding the parties herein, issued on February 25, 2005, and affirmed, as modified, by the Board at *Chinese Daily News,* 346 NLRB 906 (2006).

[4] Case 21–RC–20280.

Chinese the words, "Chinese Daily News Union" (the union vest). About nine other employees, including sales representative, Jui Jung Pao; driver, Jeffrey Sun (Sun); and part-time packing employee Shieh Sheng Wei (Wei); also wore the union vests. Wei was a prominent union supporter, participating in union demonstrations at the company and wearing a red T-shirt with the union logo and/or the union vest to work several times a week during December 2003, and January 2004.[5]

At the December 12, 2003 party, classified advertising supervisor, Karen Lee (Lee), commented on Wang's attire, saying, "What are you wearing? We don't have a union."

Wang, said, "Yes, we have a union; don't you know that?"

Wei's supervisor, Group Leader Wing, commented on Wei's attire, saying that since the union shirts were free, he, too, would have enough courage to wear them.[6]

Two days later, Wang again wore the union vest to a company welfare committee meeting attended by the human resource manager, Steven Gao (HR Manager Gao), General Manager David Liu, and Lee. Lee criticized Wang for wearing the union vest. Wang replied that the company had no dress code, and employees could wear anything. Thereafter, Wang continued to wear the union vest at work until the Respondent issued a dress code at the end of January 2004.

On January 29, 2004, President Su distributed a 1-page document in Chinese to all employees (solicitation/dress code rules), the English translation[7] of which reads, in pertinent part:

> To avoid interruptions of business operation, our employees are not allowed to do any promotion unrelated to the Company or distribute any paper advertisement at workplace or during work [time].[8] Those who are not Company employees are not allowed to enter the premises of the Company, including parking lot, to promote or distribute paper advertisement. (Business visits are excluded).
>
> During work time, the time spent in engaging in or receiving promotion or distribution of paper advertisement is deemed a violation of using normal work time; break time and meal time are not included.
>
> I would also like your attention of the following important regulation because many colleagues have reported to the management that: some employees during work time wear jackets not printed with "Chinese Daily News" name or logo instead with names or logos of other entities, including the name or logo of Communications Workers of America (CWA). This is a violation of Company regulation.
>
> It is your personal choice whether you choose to support or against workers union. Nevertheless, the Chinese Daily News' concern is those who come to work wearing jackets printed with non-Chinese Daily News name or logo; when they have contacts with customers or public for business, they may misrepresent their identities and cause unnecessary mistakes and fail to achieve the missions at work.
>
> On this note, I would like to stress again the rule we have followed always: during work, those employees who have business contacts with customers or general public are not allowed to wear CWA jackets to work. This rule applies to employees including reporters, drivers, business reporters, and those who may have direct business contacts with customers or general public.

The solicitation/dress code rules were issued to employees, including Wei, who have no contact with the public, as well as to employees who meet with the public. Prior to the issuance of the solicitation/dress code rules, the Respondent had no dress code and no rules restricting dissemination of written materials or promotion of employee activities. Employees had regularly worn T-shirts with commercial advertising imprinted such as "ATT" and "Toshiba," and both before and after issuance of the rules, the Respondent permitted employees to distribute to fellow employees such entrepreneurial solicitations as dry cleaning offers and clothing and food sales promotions. After the Respondent issued the solicitation/dress code rules on January 29, 2004, employees no longer wore clothing with union insignia.

B. Shieh-Sheng Wei: Written Warning and Alleged Work Assignment Change

In preparing the newspapers for delivery, the packing department utilizes two large machines to bundle the newspapers in two sequential stages: bundling of retail newspapers and bundling of postal newspapers. A group of two to three employees operates each machine, both of which function nonstop during each stage. If it is necessary for an employee to leave the machine during operation, the group leader or deputy group leader momentarily replaces the absent employee.

On June 14, 2004, after the packing employees completed the initial bundling stage, one of the machines stopped operating. When Group Leader Wing inquired why, Deputy Group Leader Kao told him that one of the operators, Hong Nian Gao (Hong Gao) had left to go to the restroom. Group Leader Wing took the place of Hong Gao, until the missing employee returned, whereupon he returned to his office. From his office, Group Leader Wing saw Hong Gao arguing with Deputy Group Leader Kao and returned to the bundling area where he learned that Hong Gao was upset with Deputy Group Leader Kao because he believed the deputy group leader had reported his absence from the machine. To resolve the problem, Group Leader Wing announced that henceforth packing employees would be permitted a 5-minute period to use the restroom between the two bundling stages.

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[5] Although Wei placed the celebration in January 2004, his testimony appeared to refer to the December 12, 2003 function.

[6] The General Counsel does not allege Group Leader Wing's comment to be coercive; however, it provides evidence of Respondent's knowledge of Wei's union activities.

[7] The English translation is set forth as revised at the hearing by the official translator who also provided the original translation of the document.

[8] In other parts of the solicitation/dress code rules, the Chinese character translated here as "hours" was corrected by the translator to read "time." Therefore, I have substituted the word "time" for "hours" in this sentence as well.

According to Wei, the following exchange occurred: Group Leader Wing said employees would receive no other break opportunity during the bundling cycles. Wei loudly protested, saying such a rule would deprive the workers of their born human rights. Group Leader Wing in turn loudly accused Wei of scolding and cursing him. Wei denied cursing Group Leader Wing or using foul language.

Group Leader Wing testified that Wei scolded him, saying Group Leader Wing "did not want to keep [his] face"[9] and accusing him of staying in his office and not helping with the work. Group Leader Wing said Wei publicly humiliated him by saying "F— your mother," in front of the other workers, to which he responded in a loud voice, "You all heard the profanity he yelled to me." In his 25 years of employment, Group Leader Wing said, he had never heard any other employee curse a supervisor. Deputy Group Leader Kao in pertinent part corroborated Group Leader Wing's testimony of the June 14, 2004 confrontation. Like Group Leader Wing, he had never before heard an employee speak to a group leader in that manner.[10]

Later on the day of the confrontation, Group Leader Wing prepared a report of the incident, which he furnished to the Respondent's human resources department:

> Report of an argument
>
> Time: June 14, 2004, 4:35 AM
>
> Location: Inside the packing department
>
> Description: On that day all retail newspapers was completed by 4:35 AM, and the following procedure would be to insert postal newspapers. Some employees went to the bathroom and didn't return to the workstation when other employees started to insert the newspaper. One of them was [Hong Nian Gao] who started to argue with deputy group leader [Ching Hwa Kao] when he came back from the bathroom. . . . In handling the argument, for the sake of fairness, I said that the policy from now would be that there is an extra 5 minutes of rest time and one may do anything one wishes. . . . Upon that [Wei] shouted aloud saying that won't work—what if I can't go in the time you specified? I said, "That is your business, not mine." Then he was very unwilling to be receptive and said, shame on you, why don't you come out to work on collecting newspapers, instead you are inside the office. He repeated shame on you several times. Then he humiliated and insulted me in public with [four-letter] word "[f—] your mother." I had given advice and warning to that employee because of his smoking during the bundling time at work, he was also required to pay attention during insert. Furthermore, at the book-giving campaign in January this year, the same employee had major complaints and disobeyed the instructions when I instructed all employees help to move the sorted and boxed books to the big truck to be transported to the freight station at China Airlines to be transported to Taiwan. This employee has already severely violated the company policies. I hereby request the upper level apply the most severe punishment that is to be put on the record one major strike of misconduct and, in the event of repeating the same, there will be no leniency and termination will be issued.

On the day following the incident, June 15, 2004, Wei gave Group Leader Wing a letter written in Chinese, which Wei desired him to present to various managers, including President Su. The English translation of the letter, in pertinent part, is as follows:

> On June 14, department leader [Group Leader Wing] of the Packing Department made a public announcement at the workplace that the employees of the Packing Department are only allowed to go to bathroom after the retail newspapers are sent out, and the bathroom time is set for 5 minutes. If the bathroom break is not used, it is deemed to be waived. No one is allowed to use bathroom at any other time during work . . . . It is an abuse to limit the duration and set the specific time for bathroom. Even the prisoners do not have this rule, why would the Newspaper allow it to happen?[11]

After reviewing Group Leader Wing's report, HR Manager Gao, who knew Wei was a union supporter, instructed Group Leader Wing to get a report of the incident from another witness. Group Leader Wing had already asked the Deputy Group Leader Kao to provide a report, which Group Leader Wing thereafter submitted to HR Manager Gao. The report, as translated in pertinent part into English, read:

> Report of argument that occurred.
>
> Time: 6/14/04 4:35 a.m.
>
> Location: Packing Department.
>
> Description of occurrence: On that day, when . . . the insertion of the retail newspaper was complete . . ., one insert machine did not operate because [employees Hong Gao and Zhou Lan] left the location without telling anyone. At the time, the group leader did ask the whereabouts of the two employees and to make the inserting machine to operate normally, he came over to support. But unexpectedly, when [Hong Gao] came back, he misunderstood that I reported something to the group leader and became angry and ballistic. . . . The group leader repeated that from that time on, there is a five minute time for break, so that hoping no one will leave the work station without notifying other people. However, at that time, [Wei] used this rea-

[9] This idiom reflects the English equivalent of shame on you.

[10] Deputy Group Leader Kao has been retired from the Respondent since January 1, 2007. As a retired employee, the former deputy group leader may reasonably be expected to have little personal interest in the outcome of this hearing, which tends to make his testimony inherently trustworthy, and I found him to be straightforward and sincere. I did not find Wei to be as reliable. In a deposition given on July 26, 2005, Wei was somewhat vague about what he said during his exchange with Group Leader Wing, testifying that he did not remember whether he had used foul language or profanity, although he denied using profanity to his supervisor. While his vagueness had disappeared by the time of the hearing, the earlier tergiversation reflects on his credibility. I credit former Deputy Group Leader Kao's account, and by logical extension, that of Group Leader Wing.

[11] Wei received no response to this letter.

son to start an argument with the group leader and started using words that is not proper and started scolding with insulting words. With the handling of this situation: on 6/15/04, [Hong Gao] voluntarily came to apologize.

Group Leader Wing appended a disciplinary recommendation to Deputy Group Leader Kao's report: "The above is all true. I ask upper management to use most severe written warning, so that if there's any recurrence, the person will be terminated."

After reviewing Group Leader Wing and Deputy Group Leader Kao's reports, HR Manager Gao sought permission from President Su to issue "severe" warnings to the two employees involved. On August 17, 2004, the Respondent issued nearly identical written warnings to Hong Gao and Wei.[12] The warning to Wei, over the signature of Group Leader Wing, read:

> After reviewing the incident that took place on June 14, 2004, [y]ou are being placed on disciplinary action effective August 11, 2004. The decision to place you on disciplinary action is due to verbal misconduct and insubordination towards your supervisor. If these type of similar verbal misconduct and/or insubordination happen again, you may be consider[ed] for termination.[13]

According to Wei, thereafter the Respondent no longer assigned him to begin work at midnight rather than 2:50 to 8 a.m., effectively reducing his work hours. Group Leader Wing denied reducing Wei's hours. According to the group leader, Wei was unwilling to come in early. On several occasions, Group Leader Wing testified, Wei told him he could not handle the extra hours because he was unable to sleep well. Wei also requested reduced work hours or days because of child care issues. Wei denied requesting reduced hours, testifying that only prior to the year 2000, had he requested a Sunday off every 2 months so he could visit a handicapped child. Wei asserted that the Respondent has continuously reduced his work hours because of his union activity since the year 2000, but Wei also admitted he told Group Leader Wing he preferred to work only two of the three weekend shifts (Friday, Saturday, and Sunday), as they involved very heavy work. Wei agreed that since 2004, part-time packing employees rarely began work at midnight and that employees who work the weekend shifts generally have more work hours than those who do not, as the heavier weekend work load generates longer shifts.

The parties introduced extensive payroll records into evidence, and both the Respondent and the General Counsel argue that the records support their respective positions. The records fail to demonstrate any clearly discernible pattern of inequality in Wei's weekly shifts as contrasted with those of other part-time packing employees that would not be consistent with Wei's preferring to work only two of each week's three longest shifts. The records do show that following August 17, 2004, Wei did not work any midnight shifts.

C. Alleged Prohibition on Employee Discussion of Overtime

Sun, one of the Respondent's drivers was an active union supporter, who wore the union vest to work almost daily from December 2003, to the end of January 2004.[14] Sometime prior to February 2004, the Respondent hired several part-time newspaper delivery drivers, which limited the overtime hours available to the full-time drivers. The full-time drivers, including Sun signed and submitted to management a letter complaining about the reduced overtime.

In late January or early February 2004, a driver named Chen (driver Chen) discussed an overtime concern with Sun, who encouraged him to report fully all of his overtime. On February 9, 2004, Assistant Business Manager Li called Sun into his office with the director of the circulation department, Bobby Hsu (Hsu) present. Li showed Sun a copy of driver Chen's timecard, saying that driver Chen had complained about overtime and had mentioned Sun's name. According to Sun, Li told him the company had to hire part-time drivers for the good of the newspaper and that he hoped in future Sun would not talk to his coworkers about overtime and rights, so that their work morale would not be affected.

Li did not testify about the conversation. Hsu denied that Li had told Sun not to talk about overtime. According to Hsu, Li told Sun he had heard rumors were circulating that the company did not pay overtime, which was untrue. According to Hsu, Li told Sun the company must and did pay overtime if overtime was worked and the Respondent did not want "these kinds of rumors just spread out." Li told Sun he could talk about anything to his coworkers but it must be based on the truth, that he could not tell untruthful things—nonsense—to employees.[15]

D. Deposition of Employee/Plaintiffs

On March 5, 2004, employees Wang, Yu Fang Ines Kai, and Hui Jung Pao (employee/plaintiffs) on behalf of themselves and all others similarly situated filed a class action complaint (class action lawsuit) against the Respondent in the United States District Court of the Central District of California, for, inter alia, violations of the Fair Labor Standards Act. Represented by Mark T. Palin, of Atkinson, Andelson, Loya, Ruud & Romo, the Respondent sought to disqualify the employee/plaintiffs on grounds that the class action was a pretextual strategy for the true motivation of advancing the Union's organizational interest among Respondent's employees and that the employee/plaintiffs did not intend to act in the best interests of the class. The Respondent believed the union activities of the employee/plaintiffs to be relevant and material to its defense posi-

[12] HR Manager Gao explained that the 2-month gap between the incident and the warnings was a result of work distractions coupled with an overabundance of caution in issuing warnings during a period of union organization.

[13] The warning issued to Hong Gao was identical to that issued to Wei, except that the words "verbal" and "and/or insubordination" were omitted from the second sentence.

[14] Although Sun's Board affidavit stated that he wore the union vest about 1 day per week, he credibly testified that he had weekly worn the vest nearly every day.

[15] Given the manner and demeanor of the two witnesses who testified concerning the conversation, and in light of the unexplained failure of Li to testify, I find Sun's account credible.

tions regarding the employee/plaintiffs' conflicts of interest and other improprieties.

In the course of defending the class action lawsuit, the Respondent deposed Wei, Sun, and Wang. Although only Wang was a named plaintiff in the class action lawsuit, Wei and Sun were two of six employees whose declarations the employee/plaintiffs submitted to District Court Judge Consuelo B. Marshall in support of the motion for class certification. See *Wang v. Chinese Daily News, Inc.,* 231 F.R.D. 602, 608, 615 (9th Cir. 2005), appeal denied 159 Fed.Appx. 750 (9th Cir. 2005). The three employees were deposed on the following dates:

June 14 and July 26, 2005	—	Mr. Wei
June 28, 2005	—	Mr. Sun
August 24, 2005	—	Ms. Wang

During the depositions of Wei, the Respondent questioned him about his role and involvement in the Union, whether he voted for the Union in the election, whether and how many union meetings he attended, and where the union meetings were held.

During the deposition of Sun, the Respondent questioned him about whether he was involved in the union organizing campaign and whether he was or considered himself to be a union shop steward.

During the deposition of Wang, the Respondent questioned her about the filing and disposition of nine unfair labor practice charges filed with the Board that alleged the Respondent's unlawful conduct toward her because of her union activities, about an employee letter presented to the chairman of the Respondent's parent company, and about a 2002 trip to Taiwan to educate Taiwanese people about the Union.

IV. DISCUSSION

A. Alleged Independent 8(a)(1) Violations

1. Alleged prohibition on employee discussion of overtime

The General Counsel contends the Respondent violated Section 8(a)(1) of the Act on February 9, 2004, when its assistant business manager, Li, expressing concern for employee work morale, told employee Sun not to talk to his coworkers about overtime and rights.

Employees have a protected right to discuss among themselves the terms and conditions of their employment of which overtime is one. Where, as here, the Respondent has expressly prohibited employee discussion of overtime wages and other terms and conditions of employment, the rule plainly infringes on Section 7 rights and violates the Act. *Double Eagle Hotel & Casino,* 341 NLRB 112, 115 (2004). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when Li directed Sun not to talk to coworkers about overtime and other employee rights.

2. Alleged interrogation in the course of depositions

The General Counsel argues the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employees Wei, Sun, and Wang during the course of depositions taken in connection with the class action lawsuit.

In determining whether deposition inquiries about union activities violate the Act, the Board looks at whether the questioning is relevant and if so, whether it has an illegal objective. If the questioning is found to be "both relevant *and* lacking an illegal objective, the analysis must then consider whether the Respondent's need for the information outweighs the employees' rights under Section 7 of the Act." *Guess?, Inc.,* 339 NLRB 432, 434 (2003); see also *Allied Mechanical,* 349 NLRB 1077 fn. 1 (2007).

When the Respondent took their depositions, Wei, Sun, and Wang were longstanding conspicuous union adherents who openly espoused the class action lawsuit, Wang as a plaintiff and Wei and Sun as supportive declarants. The Respondent argued, albeit unsuccessfully, that the employee/plaintiffs should be disqualified from bringing the class action lawsuit because their true motivation was to advance the Union's organizational interests and because they did not intend to act in the best interests of the class. In order to develop its position, the Respondent needed to establish the union advocacy of the employee/plaintiffs and the supportive declarants. Inquiry into the individuals' union support was, therefore, relevant to the Respondent's defense. As to whether the Respondent had an illegal objective in asking the deponents about their union activities, the General Counsel has presented no evidence aside from the Respondent's general union animus. The General Counsel has cited no authority for the proposition that the existence of union animus alone demonstrates an illegal objective. Where, as here, the interrogation was relevant and gave no impression that retaliatory action might ensue, I cannot find an illegal objective. Therefore, as directed by the Board, further analysis must balance the Respondent's need for the information against the employees' rights under Section 7 of the Act.

In weighing employer need against employee rights, the Board's decisional stance on interrogation is instructive. In the Board's view, an employer's questioning of employees about their union sentiments is not a per se violation of Section 8(a)(1) of the Act, particularly where employees are open and active union supporters. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House,* 269 NLRB 1176, 1177–1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). The Board considers criteria referred to as the "*Bourne* factors,"[16] which examine whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. The Board has not considered employer interrogation to be coercive in the following circumstances: questioning of open and active union supporter about prounion mailgram he sent to employer, *Rossmore House,* supra; asking employee with a union-embossed hard hat if he supported the union, *Tradesmen International, Inc.*, 351 NLRB No. 37 (2007); asking about the union membership of an applicant whose membership was already obvious, *Boydston Elec-*

[16] *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964).

tric, 331 NLRB 1450 fn. 5 (2000); and inquiring into whether misconduct had occurred during a discussion about the union, *Bridgestone Firestone South Carolina,* 350 NLRB 526 (2007). But see *Allied Mechanical,* supra, where deposition questions irrelevant to the civil action inquired into confidential, protected conduct, and *Guess? Inc.,* supra, slip op. 6, where deposition questions about the identities of other employees who attended union meetings violated Section 8(a)(1) of the Act.

Here the union advocacy of the three deponents was open and longstanding; the employees had confronted the Respondent in a class action lawsuit certain, if not calculated, to attract intracompany attention. None of the deponents could reasonably have expected that he/she could remain anonymous in the matter, and the deposition questions posed by the Respondent's attorney could not have been intended to expose any unknown or confidential information. The Respondent's questions focused on the deponents' union activities, not those of others.[17] The questions were clearly intended to create a legal record, and neither the deposition questions nor their context suggests any element of coercion or interference with protected rights. Upon applying the Board's balancing test, I find the confidentiality interests of the three deponents were not substantial inasmuch as they had, long prior to the depositions, overtly revealed their union sentiments to the Respondent and fellow employees and signified, through their previous union activities as well as their participation in the lawsuit, their intentions of championing employee rights. On the other hand, I find the Respondent's interest in obtaining the information was significant, as the union partisanship of the three employees was a basic element of its preliminary defense to the lawsuit. The Respondent's interest therefore outweighed the employees' confidentiality interest under Section 7 of the Act. Accordingly, I find the Respondent did not violate Section 8(a)(1) of the Act when Palin deposed Wei, Sun, and Wang in connection with the class action lawsuit.

B. Alleged 8(a)(1) and (3) Violations

1. Promulgation and maintenance of overbroad solicitation/distribution rule and discriminatory dress code

An employer has a right to impose some restrictions on employees' statutory right to engage in union solicitation and distribution. Such restrictions, however, must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in nonwork areas. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983).

In its solicitation/dress code rules, the Respondent informed its employees that they were prohibited from engaging in any promotion unrelated to the Company or from distributing "any paper advertisement *at workplace or during work [time]* [emphasis added]." This phrase in the solicitation/dress code rules is susceptible to a reasonable construction that solicitation on company premises, at any time, is prohibited.[18] The Respondent's rule relative to solicitation/distribution is, therefore, unlawful on its face. Since the rule is presumptively unlawful, the Respondent has the burden of showing that it communicated or applied the rule in such a way as to convey clearly its intent to permit solicitation at the workplace during break times or other nonwork periods. *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993). The Respondent has not met that burden. The evidence shows that following its solicitation/distribution ban, the Respondent neither explicated nor retreated from its published rules. Since the Respondent's ban was overbroad, I find the Respondent violated Section 8(a)(1) of the Act by promulgating its solicitation/dress code rules. There is, however, no evidence of discriminatory enforcement. See *Federated Logistics & Operations,* 340 NLRB 255 (2003). I shall, therefore, dismiss the 8(a)(3) allegations of complaint paragraph 6(b).

The Respondent also implemented a dress code by its solicitation/dress code rules. Employees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. For purposes of proving an 8(a)(1) violation, the General Counsel need not show that Respondent's insignia prohibition was unlawfully motivated; "rather, the test is whether an employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act." *St. Luke's Hospital,* 314 NLRB 434 fn. 4 (1994). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores,* 342 NLRB 378 (2004). The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co.,* 331 NLRB 640 fn. 3 (2000).

In its solicitation/dress code rules, the Respondent purports to direct that employees with public contacts may not wear "jackets printed with non-Chinese Daily News name or logo." However, on its face, the dress restriction is ambiguous as to whom, when, and where it would apply. Introductorily, the notice states, "[S]ome employees during worktime wear jackets not printed with 'Chinese Daily News' name or logo instead with names or logos of other entities, including the name or logo of Communications Workers of America (CWA)." This asserted violation of company policy encompasses all employees in the workplace and can be construed to apply to employees who have no public contact. In the next paragraph, the notice explains, "[W]hen [employees wearing non-company identifying clothing] have contacts with customers or public for

[17] Although the Respondent's counsel asked Wei where union meetings were held, it is clear those questions were intended to elicit information as to whether the meetings were held at the homes of two of the employee/plaintiffs, Pao and Wang. As such the questions related to the union advocacy of the lawsuit instigators.

[18] Given the overbreadth of the "workplace" restriction, it is unnecessary to address the presumption the Board attaches to the words "worktime." See *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983). I note however, that in circumstances where nearly all employees speak the Mandarin language and where the official translator struggled with the meaning of the Chinese character ultimately translated as "time," the juxtaposition of the words "workplace or worktime" was likely to restrain employees from engaging in protected solicitation/distribution even during nonworktime. In this context, therefore, the words "worktime" cannot be presumptively valid.

business, they may misrepresent their identities and cause unnecessary mistakes and fail to achieve the missions at work," but the brief explanation does not make it clear that only employees with public contact are prohibited from coming to work wearing clothing with noncompany insignia. Finally, in repeating the rule in the penultimate paragraph of the notice, the Respondent stresses that "during work, those employees who have business contacts with customers or general public are not allowed to wear CWA jackets to work [emphasis added]." Although this sentence facially restricts employees with customer contact, it also specifically targets union insignia for prohibition, which signals a discriminatory purpose having little to do with avoiding identity confusion. The Respondent's pointed bias against union identifying clothing is likely to restrain all employees who are apt to infer that the prohibition has more to do with union animus than with public image. Taken as a whole, the dress code is so ambiguously worded that employees may reasonably construe it as prohibiting all employees from wearing union-identifying clothing at the workplace. The solicitation/dress code rules are therefore overbroad.

The Respondent has presented no evidence that it clearly communicated to employees, by application of the rules or otherwise, its intent to apply the clothing restrictions in a lawful manner. Moreover, the Respondent failed to establish any special circumstances to justify the rule. The Respondent's general concern about potential misrepresentation of employee identity by the wearing of noncompany-enscripted clothing fails to meet "the Respondent's burden of establishing the presence of 'special circumstances' to justify the rule's broad proscriptions." *Albertsons, Inc.,* 351 NLRB No. 21, slip op. 5 (2007). Accordingly, I find Respondent violated Section 8(a)(1) of the Act by issuing a dress code that over broadly restricted employees' wearing of union insignia.

In determining whether the solicitation/dress code rules also violate Section 8(a)(3) of the Act, as the General Counsel alleges, discriminatory intent must be shown. Allegations that turn on employer motivation must be analyzed under *Wright Line.*[19] Under that standard, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *United Rentals, Inc.*, 350 NLRB 951, 951 (2007). As to the 8(a)(3) allegation relating to the Respondent's promulgation and maintenance of a dress-code rule prohibiting the wearing of clothing bearing union insignia, the General Counsel has met his initial burden under *Wright Line.* The Board's decision in *Chinese Daily News,* supra, which found the Respondent had committed multiple violations of the Act demonstrates the company's union animus. Moreover, in December 2003, the Respondent demonstrated its animosity toward its employees' wearing of union-supportive apparel when Supervisor Lee twice criticized Wang for wearing the union vest, saying, on the first occasion, "We don't have a union." Further, the solicitation/dress code rules on their face reveal the underlying union animus by specifically and selectively targeting "CWA jackets" in the penultimate paragraph. The burden of proof therefore shifts to the Respondent to demonstrate a nondiscriminatory basis for establishing a dress code that restricted the wearing of clothing bearing union insignia. Respondent has failed to show that it would have issued its dress-code rules even in the absence of its employees' union activity. I therefore find the Respondent violated Section 8(a)(3) by promulgating and maintaining a discriminatory dress code in February 2004.

2. Shieh-Sheng Wei: written warning and alleged work assignment change

Paragraph 8 of the complaint alleges the Respondent unlawfully issued a written warning to Wei on August 17, 2004. The question of whether Respondent violated Section 8(a)(1) and (3) of the Act by issuing Wei a written warning rests on its motivation. Therefore, the analytical framework of *Wright Line,* supra, must be applied.[20] The General Counsel must first persuade, by a preponderance of the evidence, that Wei's protected conduct was a motivating factor in any reduction of work hours and in the issuance of the warning. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; *Donaldson Bros, Ready Mix, Inc.,* 341 NLRB 958, 961 (2004).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Verizon,* 350 NLRB 542 (2007); *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Here, the elements are clearly met as to Wei, of whose open union support the Respondent was aware and toward which, as noted above, the Respondent had general animus. Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference"[21] that Wei's protected activity was a motivating factor in the Respondent's post June 14, 2004 alteration of Wei's work hours[22] and its decision to issue him a warning notice on August 17, 2004. The burden therefore shifts to the Respondent to demonstrate that it would have issued the August 17 warning notice to Wei even in the absence of his union activity.

The Respondent contends that on June 14, 2004, Wei engaged in verbal misconduct and insubordination toward his

[19] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[20] The General Counsel also proffers the and/or argument that Wei's protest of the 5-minute limitation constituted protected concerted activity and that retaliatory discipline for his protest violates Section 8(a)(1) of the Act. While agreeing with both of the General Counsel's legal propositions, I find it unnecessary to make an analytical distinction.

[21] *Wright Line*, supra at 1089.

[22] The General Counsel alleges in the complaint that sometime after the June 14, 2004 incident that gave rise to Wei's written warning, the Respondent refused to give Wei shift rotations and assignments, resulting in loss of overtime pay. A complicated dispute exists as to whether the Respondent manipulated Wei's work hours to his disadvantage or merely complied with his scheduling requests. In light of my findings regarding the discipline imposed on Wei, it is unnecessary to resolve those issues.

supervisor, Group Leader Wing, for which the Respondent issued him a warning notice dated August 17, 2004. Credited testimony establishes that on June 14, 2004, in the course of a dispute over restroom breaks, Wei scolded Group Leader Wing in front of the other employees, saying Group Leader Wing should be ashamed, and profanely insulting the group leader's mother. Employers may discipline employees for profane language, provided such discipline is administered in a nondiscriminatory fashion. *Bridgestone Firestone South Carolina,* 350 NLRB 526, 532 (2007) (citations omitted).

The Respondent maintains Wei's behavior was so egregious that his discipline was justified. The issue, however, is not whether the Respondent acted reasonably in issuing Wei a written warning, but whether the Respondent would have taken the same action, even if Wei were not an active union supporter and/or had not engaged in the protected activity of protesting the restroom break. See *Wal-Mart Stores, Inc*., 351 NLRB No. 17 (2007). "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 protected activity." *Weldon, Williams & Lick, Inc.*, 348 NLRB 822, 826 (2006).[23] In the managerial communications regarding the discipline, no discriminatory motive can be discerned. No evidence was adduced of disparate treatment, as no evidence was presented that any employee had ever before used profanity to a supervisor. Counsel for the General Counsel argues that the delay between incident and discipline warrants an inference of unlawful intent. While it is true that 2 months elapsed before Wei received a written warning for his misconduct, the Respondent explained the lag time as resulting from press of business and hypercaution, a not unreasonable response to the Respondent's ongoing labor problems. I cannot therefore infer improper motive from the timing of the warning. Counsel for the General Counsel further argues that HR Manager Gao's failure to interview Wei before imposing discipline reveals the Respondent's unlawful motive. Although HR Manager Gao did not ask for a statement from any employee witness to the incident except Deputy Group Leader Kao, there is no evidence that Respondent sought to shape or distort the investigation or that there was not genuine fact gathering.[24] The Board declines to tell an employer how to investigate allegations of employee misconduct, and failure to investigate in a particular manner before imposing discipline does not establish an unlawful motive. *Chartwells, Compass Group, USA, Inc*., 342 NLRB 1155, 1158 (2004). I find the Respondent has met its shifted burden of proof as to the discipline imposed on Wei.

Paragraph 7 of the complaint alleges that since late June or early July 2004, the Respondent discriminatorily refused to give Wei shift rotations and shift assignments, which resulted in loss of overtime pay. Even assuming the Respondent disregarded Wei's shift preferences and assigned him work hours that resulted in lost overtime pay, the evidence does not establish that the Respondent had an improper motive in doing so. If involuntary alteration in Wei's hours occurred, any change would presumably be linked, as counsel for the General Counsel argues, to his restroom-break confrontation with Group Leader Wing. I have determined that the Respondent did not unlawfully discipline Wei for his conduct during that confrontation, and it follows that the Respondent did not unlawfully alter Wei's hours or refuse him shift assignments. Accordingly, I find the Respondent did not violate Section 8(a)(1) and/or (3) of the Act by its discipline of or shift assignments to Wei. I shall, therefore, dismiss the complaint allegations of paragraphs 7 and 8.

CONCLUSIONS OF LAW

1. The Respondent, Chinese Daily News is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union, Communications Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Beginning on January 29, 2004, the Respondent violated Section 8(a)(3) and (1) of the Act by promulgating and maintaining a dress-code rule prohibiting the wearing of union insignia.
4. Beginning on January 29, 2004, the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting employees from engaging in protected solicitation/distribution during nonworktime and in nonwork areas.
5. In February 2004, the Respondent violated Section 8(a)(1) of the Act by directing an employee to stop talking about terms and conditions of employment.
6. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Chinese Daily News, Monterey Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a dress-code rule unlawfully prohibiting the wearing of union insignia.

(b) Promulgating and maintaining a rule prohibiting employees from engaging in protected solicitation/distribution during nonworktime and in nonwork areas.

[23] *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

[24] Though unsolicited, Wei provided management with his statement of what had occurred.

[25] 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) Directing any employee to stop talking about terms and conditions of employment.

(d) 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) Within 14 days after service by the Region, post at its facilities in Monterey Park, California, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.[27] Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 2004.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[26] 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."

[27] The notices are to be posted in the following languages: English and Mandarin.

Dated, Washington, D.C. December 26, 2007

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT announce and/or maintain a dress-code rule that unlawfully prohibits the wearing of union insignia.

WE WILL NOT announce and/or maintain a rule prohibiting employees from engaging in union or other protected solicitation or distribution during nonworktime and in nonwork areas.

WE WILL NOT tell any employee not to talk with other employees about terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL rescind our January 29, 2004 dress-code and no-solicitation/no-distribution rules.

CHINESE DAILY NEWS