Caval Tool Division, Chromalloy Gas Turbine Corp. *and* Diane Baldessari. Case 34–CA–8702

July 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 21, 2000, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting 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[1] in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Caval Tool Division, Chromalloy Gas Turbine Corp., Newington, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William E. O'Connor, Esq., for the General Counsel.
Richard I. Manas, Esq. (Oppenheimer, Blend, Harrison & Tate), of San Antonio, Texas, and *Robert J. Christopher, Esq.,* of Sequa Corp., for the Respondent.
Diane Baldessari, pro se.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on September 22 and 23, 1999. Diane Baldessari, an individual, filed the charge on February 2, 1999, and amended it on May 6, 1999. The complaint, which issued May 28, 1999, and was amended at the hearing, alleges that the Respondent, Caval Tool Division, Chromalloy Gas Turbine Corp., violated Section 8(a)(1) of the Act by suspending Baldessari on August 14, 1998, and, on August 28, 1998, by placing her on indefinite probation and prohibiting her from engaging in concerted activities during her probation. The complaint further alleges that the Respondent maintained an unlawful rule regarding employee solicitation and distribution. On June 18, 1999, the Respondent filed an answer to the complaint denying that it had violated the Act as alleged and denying further that Baldessari had engaged in any concerted activity that was protected by the Act.[1]

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures aircraft parts at its facility in Newington, Connecticut, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Solicitation/Distribution Rule

There is no dispute that the Respondent maintained, as one of its plant rules in effect during the period September 1, 1998, through September 17, 1999, a rule prohibiting employees from "[p]osting, distributing, or selling unauthorized material on Company property without proper authorization from Human Resources." On September 17, 1999, the Respondent notified its employees, by memorandum, of a new rule regarding solicitation, distribution, and posting of materials which replaced the above rule.[2] The General Counsel alleges that the rule which existed until September 17, 1999, was unlawful because it required employees to obtain prior approval from their employer before engaging in protected concerted activity. The Respondent contends that no violation of the Act was established because there is no evidence that any employee was adversely impacted by the rule or that any desired posting or distribution was ever denied.

The Board has held that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on the employees' own time and in nonwork areas is unlawful. *Brunswick Corp.,* 282 NLRB 794 (1987), and cases cited therein. Moreover, the mere existence of such rules tends to interfere with and restrain em-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

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

The Respondent has also excepted to the judge's conduct at the hearing, asserting that it evidences bias and prejudice. On our full consideration of the entire record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his conduct at the hearing or in his analysis and discussion of the evidence.

[3] In adopting the judge's finding that the Respondent's 1998–1999 no-solicitation and distribution rule was unlawful on its face, Member Hurtgen notes that this conclusion is consistent with his concurrence and partial dissent in *Lafayette Park Hotel*, 326 NLRB 824 (1998).

Member Hurtgen adopts the judge's finding that the conditions that the Respondent placed on Diane Baldessari's probation were unlawful in their entirety because they were in retaliation for her exercise of Sec. 7 rights. Member Hurtgen finds it unnecessary to pass on whether—absent such retaliation—the conditions, or any of them, would be unlawful.

[1] On October 4, 1999, after the close of the hearing, the Respondent filed an answer to the amended complaint which I have received as R. Exh. 21.

[2] At the hearing, the General Counsel stated his intention to amend the complaint to allege that the new rule was also unlawfully overbroad because, inter alia, it prohibited the distribution of literature or other materials on the Respondent's premises "at any time." By the close of the hearing, the parties had agreed that the Respondent would revise its rule again to conform to the Board's decision in *Our Way, Inc.,* 268 NLRB 394 (1983), and the General Counsel would not amend the complaint to allege that the rule announced on September 17, 1999, was unlawful.

ployees in the exercise of their statutory rights even if not enforced. Id. at 795, citing *Schnadig Corp.,* 265 NLRB 147, 157 (1982). The Respondent's rule, as it existed prior to September 17, 1999, required "proper authorization from Human Resources" for any posting or distribution of "unauthorized material" on company property without any limitation as to time and place. On its face, this rule would prohibit employee distribution of materials in nonwork areas on an employee's free time unless such authorization was obtained. Thus, the rule violated the Act as interpreted by the board in *Brunswick Corp.,* supra. Accordingly, I find that the Respondent's maintenance of this rule violated Section 8(a)(1) of the Act, as alleged in the complaint.

B. The Respondent's Discipline of Baldessari

The Charging Party, Diane Baldessari, has worked for Caval Tool for approximately 31 years and has been an NC programmer for about 26 years. In 1989 Chromalloy Gas Turbine Corp., the Respondent, purchased Caval Tool. There is no dispute that Baldessari has a reputation for being outspoken, frequently criticizing management decisions which she perceived to be unfair to herself or other employees. On many occasions, she has acted alone in her questioning of management representatives. Despite her reputation, she has received very little discipline during her tenure with the Respondent.

The allegations of the instant complaint are based upon actions taken against Baldessari admittedly in response to her statements and conduct at a meeting of employees held by Paul Pace, the Respondent's president of OEM operations, on August 14, 1998.[3] The General Counsel alleges that Baldessari's conduct at the meeting was concerted activity protected under Section 7 of the Act, whereas the Respondent contends that her actions were neither concerted nor protected. As in most cases of this type, the respective versions of what happened at the meeting are in conflict.

On August 11, the Respondent posted a notice advising employees of a series of "mid-year meetings" about the status of the Respondent's business to be conducted by Pace on August 14. There were 11 meetings, with small groups of employees, scheduled at 30-minute intervals throughout the day. There were approximately 25 employees in each group. Pace determined the schedule of meetings based on the order in which he wanted to disseminate the information, starting with the managers and supervisors at 8:30 a.m. and ending with second-shift employees at 5 p.m. Some of the meetings were held at the Respondent's Richard Street facility and some at the New Britain Avenue facility. Pace used an overhead projection with charts and graphs to provide information to the employees and intended to follow the same format at each meeting. A period for questions and comments from employees was included in each meeting.

Baldessari was scheduled to attend the 11:30 a.m. meeting at New Britain Avenue with employees in engineering, engineering support and production planning, planners, and other programmers. By the time she went to the meeting, it was already common knowledge that Pace had announced a new work schedule with two 10-minute breaks to replace the old schedule which provided for only one 15-minute break in the morning. It is undisputed that, at least up to the date of this meeting, employees had been permitted to leave their work area to get coffee from the vending machines whenever they wanted throughout the day. There had been no discussion at any of the meetings before the one attended by Baldessari whether that practice would change.

There is no dispute that, among the topics discussed by Pace during the meetings were productivity and scrap rates. As to both matters, Pace indicated his dissatisfaction with the current rates and told employees there was a need for improvement. In particular, he mentioned the amount of downtime and the fact that employees were often seen lingering around the vending machines. The change in the work schedule and breaktimes was announced, at least in part, as a means to address productivity. According to Pace, there had been no questions or comments from any employees at the earlier meetings over the announced new breaktimes. At the 11:30 a.m. meeting that Baldessari attended, this issue provoked the exchange which ultimately led to her discipline.

According to Baldessari, when Pace announced the new schedule, he told the employees that they would now have two breaks instead of one during which they could all their personal business done that needed to get done. Baldessari raised her hand and was recognized by Pace. She asked if this meant that the employees could no longer go for coffee during the day. Pace replied that is what it meant. Baldessari then asked if employees would be written up if they were caught going for coffee at other times during the day. Pace replied that they would. Baldessari then asked if this new policy would apply to the office employees. Pace asked if she would like it to. When Baldessari responded affirmatively, stating that it would be nice if things were fair for a change, Pace said that the policy would apply to the office. Baldessari continued questioning Pace, next asking him if the new break policy was a way of punishing the workers for the high scrap rate and code 6, i.e., downtime. Pace asked Baldessari what she meant. She told him that he was taking things away from the workers who have no control over the work and when it is given to them. She said it is the managers who schedule the work and, if they don't schedule it properly, it is not the workers' fault if they don't have work to do. Pace responded to these comments by asking Baldessari what she would like him to do, fire all the managers? Baldessari replied that would be a start, except for Ted Cichy whom she said was a good manager. At this point, according to Baldessari, Pace said he was getting sick of her complaints about management. He asked her why she didn't quit if she was so unhappy. Baldessari responded that she was not going to quit because she liked her job and the people she worked with, she only had a problem with management. At this point, Pace turned to Frank Conti, the Respondent's manager of employee relations who was also at this meeting, and said, "[M]aybe you and I should get together after the meeting and come up with a package so Diane can leave."[4] According to Baldessari, she stopped talking at this point and the meeting continued without further incident. She recalled that, at the end of the meeting, several other employees asked questions. She denied shouting, or using any vulgarities or profanities, or making any threats

[3] All dates are in 1998 unless otherwise indicated.

[4] It is undisputed that Conti was not scheduled to attend this meeting. He had been unable to attend the meeting for human resource personnel, scheduled for 9 a.m., because he was giving an orientation to a new employee. He testified that he attended the same meeting that Baldessari attended because it was the first one he was able to attend after completing the orientation.

during her exchange with Pace. She testified that Pace never told her to top talking.

The General Counsel also called Ray Engler, another programmer currently employed by the Respondent who works closely with Baldessari, to corroborate her testimony. Although Engler's recollection of details, such as whether overhead projections were used, or whether employees were asked to move to the front of the room, was unclear, he did have a clear recollection of the exchange between Baldessari and Pace. He testified that after Pace complained about the high scrap rate and announce the two coffeebreaks, Baldessari asked if this was the only time employees could get coffee. He recalled Pace responding affirmatively, telling Baldessari that employees "should do all their personal stuff" during the breaks. Engler recalled further that Baldessari asked if the policy would apply to the office staff and Pace said that it would and that there would be discipline for those employees who don't follow the rules. He recalled Baldessari then telling Pace that he would have a riot on his hands. Engler also recalled Pace complaining about too many employees standing around their machines not working.[5] In response to this, according to Engler, Baldessari asked Pace, "[W]hy are you blaming the workers and not the B.U.M.s?"[6] Engler recalled Pace saying, "What do you want me to do, fire the BUMs?" and Baldessari replying, "[N]ot Cichy." Engler recalled that, at this point, Pace told Baldessari that if she didn't like it there, she should leave. When Baldessari indicated that she did not want to leave, Pace said to Conti, "[Y]you and I will get together later and see if we can do something about that." Although Engler recalled that Baldessari spoke louder than normal, he testified that she was not shouting, nor using any profanities. He characterized the exchange between Baldessari and Pace as "confrontational."

The Respondent offered the testimony of Pace and Conti regarding this meeting. Conti testified that Baldessari interrupted the meeting after Pace announced the two coffeebreaks by saying that this was unfair. According to Conti, Baldessari said that it was not the employees' fault if things were chaotic on the floor, that it was management's fault. She said that employees shouldn't be punished for management's ineffectiveness in controlling production. Conti testified that these comments kicked off an exchange between her and Pace that lasted several minutes and during which Baldessari was "very critical" of management and Pace in particular for having an ineffective management team. Conti testified that Baldessari made a "clear comment" that all the managers who ran the Company could be fired except for Cichy who was the best of them. Conti testified that Baldessari also said that Pace was removed from exposure to the people on the floor, that he was not available or at the plant very often. According to Conti, each time Pace responded to one of Baldessari's criticisms, she came back with one better, making statements for example that management was not consistent or beneficial to the employees. Conti did recall that there was a discussion regarding why the new coffeebreak policy applied to the production staff and not the office personnel and that Pace tried to end the discussion by telling Baldessari that it would apply to everyone. Conti corroborated the testimony of the General Counsel's witnesses that Pace asked Baldessari why she didn't leave and she responded that she was not going to leave. According to Conti, she said if Pace wanted her to leave, he would have to fire her. Conti testified that it was his perception that Baldessari's purpose in speaking up at the meeting was to air her "disgruntlement with the company" and that she persisted in her questioning of Pace in order to embarrass him in front of the other employees at the meeting.

Pace testified that he had just finished announcing the change in break schedules when Baldessari spoke up and said, "[T]his is not fair, this is not right" and asked Pace why he was punishing the employees. According to Pace, Baldessari then "went off on a tirade from that." He testified that he and Baldessari "went back and forth" on the coffeebreaks and that she came up with the suggestion that he fire all the managers. He denied that he raised this initially. Instead, when she made this suggestion, he asked her what that would accomplish. According to Pace, Baldessari stated that all the problems the Company was having were management's fault. Pace testified that he asked Baldessari, if the Company and its managers were that bad, why did she stay. He suggested that she could leave if she did not like it there. Pace did not testify to her response and, like Conti, did not testify to any exchange between Pace and Conti regarding their getting together afterward to come up with a way to make her leave. Pace admitted that Baldessari's comments at the meeting made him "livid" because he viewed her statements as a personal attack on him. Pace also testified that he felt that Baldessari "belittled his management abilities and undermined his authority." According to Pace, had Baldessari come to his office to raise these concerns, he would have reacted differently.

Pace admitted that he made the decision after this meeting to suspend Baldessari immediately with the intention of determining whether to terminate her. He met with Eileen Morris, the Respondent's vice president of human resources, that afternoon, in between meetings, and expressed his anger and desire to terminate Baldessari for her conduct at the meeting. Morris had not been at the meeting. She testified that she was able to calm Pace down sufficiently to avoid Baldessari being terminated on the spot. Although she denied that Pace has a "short fuse," she acknowledged that he has a tendency to get angry even when she disagrees with him. According to Morris, it was determined that Baldessari would be suspended and that Conti would conduct an investigation by meeting with all the employees who were at the meeting to obtain statements from them regarding what happened.

Baldessari testified that shortly after 3 p.m. on August 14, she was called to Pace's office. Conti was also present. Pace told her he had taken his own notes at the meeting.[7] He then accused her of saying that he didn't know what was going on in the shop, and that he didn't know what he was doing. She denied making these statements. Pace then said she made him look like a fool and disrupted the meeting. He told her she was suspended. When she asked how long, Pace said he didn't know. Conti then escorted her to her work area so she could get her things and, from there, out of the building.

Engler testified that, a couple days after the August 14 meeting, he was called to a meeting with Conti and Morris. Conti asked Engler some questions about what happened at the meet-

[5] It should be noted that Pace's criticisms regarding downtime and scrap did not apply to programmers like Baldessari. Rather, these criticisms were directed and the production employees who worked in the shop.

[6] B.U.M. is the acronym for "Business Unit Managers."

[7] Apparently, Baldessari had taken notes during the meeting while she was questioning Pace.

ing and Morris asked if she could take notes. Engler did not testify regarding what he told them regarding the meeting. He did testify that, at the end of his interview, he was asked by Conti and Morris what he got out of the August 14 meeting. Engler told them what he got out of the meeting is "if you keep your mouth shut, things will be fine at work." Engler was asked if he would sign a statement and he declined. He recalled that Conti advised him to "take good notes."

Conti, who conducted the investigation for the Respondent, testified that he and Engineering Department Supervisor Jake Dutko met individually with seven employees who had been at the 11:30 a.m. meeting on August 14. According to Conti, he informed the employees of the circumstances and asked them to write a statement of what they saw and heard at the meeting. None of the employees who were asked refused to give a statement. With one exception, he and Dutko remained in the room while each employee wrote his statement. One employee, Ray Petraska, was taking so long to write his statement that Conti and Dutko left the room. In addition to these seven employee statements, Dutko and Conti prepared their own statements of what happened at the meeting. According to Conti, there had been about 16 people at the meeting, including himself and Pace. He did not interview everyone at the meeting, choosing those whom he believed would be the most objective, "people we could rely on to give neutral statements." For this reason, according to Conti, he made a conscious decision not to interview Engler. Conti testified that Engler and Baldessari were close and he expected that Engler would not be objective. Conti's testimony thus squarely contradicted that of Engler.

Morris, for her part, candidly acknowledged that she instructed Conti to speak to Engler after he presented her with a list of people he had interviewed and she noticed that Engler's name was not on it. When Conti explained to her why he had not interviewed Engler, i.e., the same reason he gave at the hearing, she insisted that he speak to Engler with her present in the room. Morris thus corroborated Engler and contradicted her colleague. I was greatly impressed with Morris' credibility, not simply because of this incident, but in general. I found her to be a witness who was candid and truthful, notwithstanding the fact the she herself had had many encounters with the Charging Party that were not always pleasant. She appeared to be someone who handled her duties in a professional manner, to the best of her abilities, even in difficult situations. The same, obviously, cannot be said about Conti. Based on Engler's and Morris' testimony, it is clear that he was not being truthful in his testimony regarding the investigation he conducted. This lack of candor raises serious questions regarding his overall credibility. In addition, I note that he testimony regarding his selection of Ray Petraska as a "neutral" witness who could be counted on to be objective is patently ridiculous given the fact that Conti was well aware of the Charging Party's prior complaints about Petraska.

The statements taken by Conti during his investigation were received in evidence, not for their truth, but as information that the Respondent had when it made its decision to reinstate Baldessari on probation. As counsel for the Respondent acknowledged, the statements can't all be true because they differ in their respective versions of the meeting. In fact, several of the statements, notably those from engineers John Ryder and Neil Taylor, tend to corroborate Baldessari and Engler. Other statements lack detail and are more an expression of the opinion of the declarant than a recitation of fact. The most detailed statement, that of Petraska, has elements that corroborate the General Counsel's version as well as the Respondent's version of the meeting. As noted above, the record indicates that Petraska and Baldessari were not on the best of terms at the time of this meeting, Baldessari having accused Petraska only 2 months earlier of defaming her in a meeting with Conti and another employee. Conti's own incident report regarding this event indicates that Baldessari had called Petraska a "liar."[8]

While she was on suspension, Baldessari received a letter from the Respondent, dated August 28 and signed by Pace, advising Baldessari that she could return from her suspension on September 8 "in a probationary status until further notice." In the first two paragraphs of the letter, leading up to the above offer, Pace reviewed his version of the August 14 meeting and described Baldessari's record with the Respondent in the 8 years since it acquired Caval Tool. He wrote that she "[R]epeatedly challenged [the Respondent's] right to set and enforce policies." Pace stated that it was clear from her record that she had been dissatisfied with the Company. He recounts efforts to "satisfy" her, including a settlement of a charge of age and sex discrimination that she had filed with the State Commission for Human Rights and Opportunities (CHRO) in 1996. Pace concluded this recitation by stating that "[n]othing appears to please you, and you have continued to be disruptive and to attempt to undermine management's authority. Logic dictates that you be discharged." However, according to the letter, the Respondent was willing to give Baldessari "one more chance to continue as an employee of Caval Tool." The letter then went on to describe the conditions of her probation as follows:

> If during the probation, you engage in any disruptive behavior, including but not limited to challenging my right or the right of managers to set policy, demanding the termination of any manager or employee, provoking arguments with management or other employees, engaging in disparaging remarks about or to management or other employees, openly criticizing management decisions, refusing to comply with policy, failing or refusing to perform assignments, failing or refusing to work a regular work schedule, or refusing to perform assigned duties—you will be discharged.

Baldessari returned to work on September 8 and met with Conti and George Gikas who had been made her supervisor while she was out. Conti asked her if she understood the letter, what was required of her, and she said she did. Conti told her that her hours would now be 7 a.m. to 5:30 p.m. He asked if Baldessari was going to apologize to Pace and the other managers and she said no, that there was nothing to apologize for. Conti then told her not to get into any arguments, not to criticize managers or management decisions, and not to question management or management decisions, that she "had to be good." Baldessari asked if she could take this to the CHRO and Conti told her to go right ahead.[9] Baldessari then returned to

[8] The Respondent did not call Petraska, or any other employee who was at the meeting, to testify at the hearing.

[9] On April 19, 1999, the CHRO notified Baldessari that it had determined, following a "merit assessment," that further action on her charge was not warranted because the actions taken against her, which are also the subject of the instant complaint, were not found to be motivated by age or gender discrimination, nor by her previous opposition to the Employer's alleged discriminatory practices. The CHRO noted that her allegation that the Respondent took action against her for

work. By letter dated August 31, 1999, Baldessari was informed that her probation had been lifted. She was still employed by the Respondent at the time of the hearing. It is undisputed that, despite Pace's statement at the August 14 meeting, there has been no change in the practice of employees being free to go to the vending machines to get coffee throughout the day.

In addition to the evidence regarding the August 14 meeting and its aftermath, the General Counsel offered evidence regarding Baldessari's prior activities which are alleged to have also been concerted and protected. Although the Respondent at the hearing and in its brief took the position that its discipline of Baldessari was motivated by her actions at the meeting, the August 28 letter does refer to her history of challenging management actions as a basis for the decision to place her on probation subject to the restrictions outlined in that letter. For this reason, it is helpful to review briefly the historical evidence.

I agree with the Respondent that not all of Baldessari's prior complaints to management were concerted, but many of them were. For example, in March 1996, she protested the discharge of seven night-shift employees who were accused of drinking on the job; in February 1997, Baldessari wrote to John Caval, the former owner of the Company who at the time was working as a consultant to the Respondent, on behalf of another employee who had been accused of sabotaging the Respondent's computer system; in September 1997, she circulated a petition signed by a number of employees asking the Respondent to rescind its proposed ban on smoking anywhere on the Respondent's premises; in January 1998, she refused to attend an offsite meeting with other salaried and nonexempt employees where lunch was to be provided "in protest" over the fact that the hourly shop employees were not invited to a similar meeting; and in May 1998, she protested Morris' handling of several personnel issues which did not affect her directly. Irrespective of the merits of these complaints, they were clearly concerted because they involved the discipline of other employees, or terms and conditions of employment of concern to all employees. The Board has consistently held that an employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7 of the Act. See *Wilson Trophy Co. v. NLRB,* 989 F.2d 1502 (8th Cir. 1993); *Guardian Industries,* 319 NLRB 542 (1995).

There is evidence in the record indicating that Pace desired to terminate Baldessari even before the August 14 meeting. Baldessari testified that, in late July, John Obara, the Respondent's former operations manager, told her on his last day of work that Pace and Morris wanted her out of there and had been hoping that Obara could find a way to get rid of her. Obara told Baldessari that they didn't have a way to fire her and were hoping that she would just leave. This statement is consistent with Pace's comments to her at the August 14 meeting, suggesting that she just leave if she was so unhappy with the Company. Obara's statement to Baldessari was also corroborated by two memos that Pace had written in 1997 and placed in a secret file he kept on Baldessari. The first memo was written in February 1997 shortly after he and Morris had met with Baldessari to discuss the letter she wrote to Caval protesting the suspension of another employee. In this memo, Pace wrote:

> In my opinion Diane's letter and role as spokesperson for a group of employees who didn't know or approve of her using their names in this letter is a clear act to undermine the management of Caval Tool. Any further actions like this by Diane should be met with termination of her employment due to insubordination.[10]

About 6 months later, Pace wrote another memo in which he said:

> It has been approximately seven months since I placed 2 memos concerning Diane in my personal file, rather than her personnel file. My action was in the hope that she would embrace the new culture and support the management of Caval in reaching a world class manufacturing status with our customers. In my opinion Diane continues to undermine management and questions decisions that don't relate to her job requirements. Such as questioning new hires, terminations of employees, movement of equipment, and making statements as to the destruction of Caval due to cellular manufacturing[.] As a small company we need the support of all our people. Diane is clearly anti-change, anti-management and anti-progress. As such her employment with Caval should be terminated due to her insubordination.

Despite the tone and decisive language of these memos, no action was taken against Baldessari until she spoke up at the August 14 meeting.

Having considered the testimony of the four witnesses who were at the meeting, I find that the version of events recounted by Baldessari and Engler is more credible. I note, initially, that both Baldessari and Engler are current employees of the Respondent. Although Baldessari has a stake in the outcome of these preceedings that might color her recollection of events. Engler does not. He had nothing to gain, and everything to lose, by testifying adversely to his current employer. The Board has frequently noted that such witnesses are inherently credible. *Flexsteel Industries,* 316 NLRB 745 (1995); and *Georgia Rug Mill,* 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). In contrast, Conti's lack of truthfulness regarding his contact with Engler calls into question the reliability of his entire testimony. Moreover, his testimony regarding the meeting was replete with conclusory opinions regarding his perception of Baldessari's conduct, with very little factual testimony regarding what she did or said. Pace's testimony suffered from the same flaw and must also be considered in the context of his longstanding desire to rid himself of a troublesome employee.

In reaching my credibility resolution, I also note that the version of the meeting provided by the Respondent's witnesses dod not make sense. For example, Conti and Pace claim that Baldessari's outburst was precipitated by the mere announcement of the new break schedule, conveniently omitting any mention of the change in the practice which had permitted employees to get coffee anytime they wanted. Why would Baldes-

"standing up to management" was not encompassed by the statutes it enforces. Baldessari has appealed from this determination. This finding by another administrative agency is not binding on the Board.

[10] In her letter to Caval, which is the subject of this memo, Baldessari had requested that he speak to the employees who worked with the suspended employee before taking any action and named the employees he could contact. Baldessari had admitted, during her meeting with Pace and Morris to discuss the letter, that she had not been authorized by the named employees to speak on their behalf.

sari shout out that an increase in the number of breaks and total breaktime was "unfair" or a form of "punishment" if Pace had not also announced a change in this existing benefit? As to this part of the meeting, Baldessari's and Engler's testimony is more plausible, and is also supported by some of the statements the Respondent obtained from other employees during its investigation. Similarly, I find that it was Pace who asked Baldessari, in response to her claim that the managers were responsible for the downtime, if she wanted him to fire all the managers. At least one of the employees who gave the Respondent a statement corroborated this version. Thus, I find that it was Pace who provoked the Charging Party's comment regarding terminating management personnel.

Based on the above credibility resolution, I find further that Baldessari's questions and comments at the August 14 meeting were a form of concerted activity recognized by the Board in *Whittaker Corp.,*[11] a case remarkably similar factually to the instant case, the Board held that, "particularly in a group meeting context, a concerted objective may be inferred from the circumstances." The Board there found that an employee's questions and comments at a group meeting called by the employer where changes in employees' terms and conditions were announced clearly fell within the definition of concerted activity. Id at 934. Accord: *Grimmway Enterprises,* 315 NLRB 1276, 1279 (1995); *Neff-Perkins Co.,* 315 NLRB 1229 fn. 1 (1994); and *Enterprise Products,* 264 NLRB 946 (1982).

The cases cited by the Respondent, including the *Meyers* line of cases,[12] are inapposite to the facts here. Baldessari's questions regarding the announced change in breaks and the impact on employees and its application to office personnel were not purely personal concerns. In fact, Pace's statements about downtime rates did not even apply to someone in her position. Just as she did in January 1998 when she refused to attend the offsite meeting with other salaried and exempt employees, Baldessari espoused the cause of the hourly shop employees whom Pace was accusing of standing around their machines drinking coffee instead of working. Her comments about the impact of the managers' scheduling on the production employees productivity flowed from these concerns that production employees were not being treated fairly. Thus, this is not a case where an employee is seeking benefits solely for herself, or contacting an outside agency individually to file a complaint about working conditions. Nor can Baldessari's comments at the meeting be characterized as "mere griping."[13] On the contrary, her questioning of Pace about the details of the new break policy and its application looked toward changing this policy to be fair to all employees. Moreover, in *Whittaker,* supra, the Board found that the objective of "initiating . . . or . . . inducing group action . . ." may be inferred from the context of the group meeting where the comments are made. As noted by the Board, a meeting such as the one here where changes in employees' terms and conditions are announced is usually the employee's first opportunity to protest the employer's proposed changes.

Baldessari's comments, in response to Pace's question about firing all the managers, is more problematic. The Board has held that employee activity aimed at bringing about a change in management hierarchy is normally unprotected because it lies outside the sphere of legitimate employee interest. See *NLRB v. Oakes Machine Corp.,* 897 F.2d 84 (2d Cir. 1990). However, such activity may be protected if there is a direct relation to employees' terms and conditions of employment. Id at 89, and cases cited therein. Accord: *Midland Hilton & Towers,* 324 NLRB 1141 (1997). Here the suggestion to get rid of all the "B.U.M.s" originated with Pace during his discussion with Baldessari regarding the casue of the high rate of downtime. Baldessari, in her comments, was attempting to convince Pace that the shop employees were not the cause of the problem, rather it was the result of the manner in which the managers scheduled work. Under these circumstances, a direct relation has been shown between the identify of the managers and the terms and conditions of employment of the employees. Thus, even assuming Baldessari suggested that Pace terminate the current managers, with the exception of Cichy, in order to improve the productivity rates, her comments would be protected.

Having found that Baldessari's questions and comments at the August 14 meeting were concerted, it must still be determined whether they were protected by the Act. The Board has held that there are limits to how far an employee may go in the course of exercising their concerted activity to be protected even where the employee or employees are rude, argumentative, use vulgarities or profanities, or make statements which are perceived to be insulting or demeaning to their bosses. Id. See also *Neff-Perkins Co.,* supra; *United Enviro-Systems,* 301 NLRB 942 (1991); *Churchill's Restaurant,* 276 NLRB 775 (1985). The test is whether the employee's conduct renders him "unfit for further service." In the present case, Baldessari's persistent questioning of Pace at the meeting and her comments suggesting that the Respondent fire its managers did not exceed the bounds of permissible concerted activity. Although argumentative and confrontational, she did not engage in any acts which were threatening in nature, or threatened plant discipline. It is also clear that her activities did not render her "unfit for further service" since the Respondent has retained her in its employ up to the date of the hearing. I note that there has never been any claim that Baldessari failed to perform any duties of her job, sabotaged any work, or otherwise demonstrated a lack of diligence in performing her job. In fact, the only complaint about Baldessari from the Respondent's management appears to be her reputation for outspokenness and her termerity in challenging management actions affecting the employees. It is precisely this activity that the Act protects.

In *Howell Metal Co.,*[14] the Board held that disciplining employees for having the temerity to ask questions at a group meeting with the employer violates the Act except where there is a scheme to disrupt the meeting. In *Hicks Ponder Co.,*[15] the Board found there was such a scheme where the evidence showed that the employees repeatedly interrupted speaker, calling him a liar, despite several requests that they show respect and several requests to be quite. The evidence indicated that the employees had plotted beforehand to disrupt the meeting in order to prevent the employer from communicating his position on a union's organizational campaign to the employ-

[11] 289 NLRB 933 (1988).

[12] *Myers Industries,* 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Industries,* 281 NLRB 882 (1966), enfd. sub nom. *Prill v NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), and its progeny.

[13] See *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683 (3d Cir. 1964), and its progeny.

[14] 243 NLRB 1136 (1979).

[15] 168 NLRB 806 (1967).

ees. Baldessari's conduct at the August 14 meeting fell far short of such conduct. Respondent's own witnesses indicate that her questions and comments were a spontaneous reaction to Pace's announcement of the new break policy. Moreover, Pace, rather than asking Baldessari to hold her questions or comments for another time, instigated the continued dialogue by making comments that only provoked a further response from her. Baldessari's conduct here was well within the parameters of protected activity as found by the Board in *Howell Metal Co.,* supra, and similar cases.[16]

Having found that Baldessari was engaged in protected concerted activity at the August 14 meeting, it necessarily follows that her suspension that day was unlawful. It is clear from the testimony of Pace and Morris that it was the events of the August 14 meeting that motivated the initial decision to suspend Baldessari pending an investigation. Moreover, the investigation focused exclusively on what transpired at the meeting. As the Board has held, where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line*[17] analysis is not required. *Neff-Perkins Co.,* supra, 315 NLRB 1229 fn. 2; *Circle K Corp.,* 305 NLRB 932, 934 (1991); and *Mast Advertising & Publishing,* 304 NLRB 819 (1991). The Respondent's decision to reinstate Baldessari on September 8 in an indefinite probationary status was likewise unlawful because it was motivated, at least in part, by Baldessari's actions at the August 14 meeting. Although Pace, in his letter, referred to Baldessari's "report" of repeatedly challenging the Respondent's right to set and enforce policy, it is clear that the Respondent would have taken no action against Baldessari absent her questions and comments at the meeting. Thus, Pace had been unhappy with Baldessari's attitude and her frequent challenges to his authority for almost 18 months, as evidenced by the memos he kept in her "personal" file, yet no action had been taken against her. It was only after she had the temerity to question him during a meeting with other employees that Pace determined that action was necessary. Moreover, as noted above, many of the incidents cited by Pace and Morris involved activity by Baldessari that was proteted under Section 7 of the Act. Thus, even if this "record" influenced the decision to place Baldessari on probation, that decision would be unlawful.

The restrictions that the Respondent placed on Baldessari during her probation, when considered in the context of the reason she was placed on probation in the first place, were clearly unlawful. Although some of the restrictions, such as those prohibiting Baldessari from "provoking arguments with management or other employees," "refusing to comply with policy," "failing and refusing to perform assignments," etc., are on their face reasonable limitations on employee conduct, in Baldessari's case they could easily be interpreted as impinging on her right to engage in activity protected by the Act. This is because the Respondent had already interpreted such activity as improper conduct warranting discipline. Under these circumstances, the restrictions placed on Baldessari were unlawfully overbroad and were intended to reach activity she had a right to engage in. See *Lafayette Park Hotel,* 326 NLRB 824 (1998); *Cincinnati Suburban Press,* 289 NLRB 966 (1988).

Accordingly, based on the above, and the record as a whole, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, by the actions it took against the Charging Party in response to her activities at the August 14 meeting.

CONCLUSIONS OF LAW

1. By maintaining a rule that required employees to obtain company authorization to engage in protected activity in nonwork areas on the employees' own time, the Respondent has engaged in unfair labor practices affecting commerce with in the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By suspending Diane Baldessari on August 14, 1998, by placing her on indefinite probation on August 28, 1998, and prohibiting her from engaging in protected concerted activities while on probationary status, because she had spoken at a group meeting called by the Respondent, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To the extent that it has not already done so, the Respondent will be required to rescind the unlawful solicitation/distribution rule and notify employees that it has done so. In order to remedy the unlawful conduct toward Baldessari, I shall recommend that the Respondent make her whole for any wages and benefits lost as a result of her suspension, with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). I shall also recommend that the Respondent be ordered to remove from its records any references to the suspension and the probationary status that she was subjected to from September 8, 1998, through August 31, 1999.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Caval Tool Division, Chromalloy Gas Turbine Corp., Newington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule that requires employees to obtain company authorization to engage in protected activity in nonwork areas on the employees' own time.

(b) Suspending, placing on probation, or otherwise retaliating against any employee for making statements at group meetings to enlist support from employees or to protest terms and conditions of employment.

(c) Imposing conditions on any employees' continued employment that would prohibit him or her from engaging in concerted activities that are protected by Section 7 of the Act.

[16] *HCA/Portsmouth Regional Hospital,* 316 NLRB 919 (1995), cited by the Respondent, is clearly distinguishable. There the Board found that the employee had knowingly and recklessly spread false rumors in a malicious attempt to resolve a personal threat posed by a supervisor's continued supervision of her. The Board characterized the employee's conduct there as "rumormongering."

[17] *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[18] If no exceptions are filed as provided by Se. 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.

(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) To the extent that it has not already done so, notify its employees in writing, by memo or letter separate from the notice to employees, that the solicitation/distribution rule that existed until September 17, 1999, is no longer in effect.

(b) To the extent it has not already done so, insert a written notice in any employee handbook or plant rules where the solicitation/distribution rule appears, advising the reader that the rule, as written, has been rescinded, or substitute a valid rule for the one now appearing there.

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

(d) Make Diane Baldessari whole for any loss of earnings or other benefits she suffered as a result of her August 14, 1998 suspension, plus interest.

(e) 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 necessary to analyze the amount of backpay due under the terms of this order.

(f) Within 14 days after service by the Region, post at its facilities in Newington, Connecticut, of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 at any time since September 1, 1998.

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

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT maintain any rule that requires you to obtain our authorization to engaged in protected activity in nonwork areas on your own time.

WE WILL NOT suspend you, place you on probation, or otherwise retaliate against you for asking questions or making statements at group meetings to enlist support from other employees or to protest terms and conditions of employment.

WE WILL NOT impose conditions on your continued employment that would prohibit you from engaging in concerted activities that are 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 HAVE rescinded the rule that prohibited you from posting, distributing, or selling unauthorized material on company property without proper authorization from human resources.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and probation of Diane Baldessari, and WE WILL within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL make Diane Baldessari whole for any loss of earnings and other benefits resulting from her August 14, 1998 suspension, plus interest.

CAVAL TOOL DIVISION, CHROMALLOY GAS TURBINE CORP.