

Triangle Electric Company and General Motors Corporation and Lucinda Darrah. Cases 7-CA-39041 and 7-CA-40075

August 27, 2001

DECISION AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE**

On May 11, 1999, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondents filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this decision, and to substitute a new Order for that of the judge.

The complaint alleges, *inter alia*, that Respondent General Motors Corporation requested Respondent Triangle Electric Company and contractor Superior Electric to remove Charging Party Lucinda Darrah from a jobsite because of her exercise of protected concerted activities, and that Respondent Triangle Electric Company terminated Darrah pursuant to such a request, in violation of Section 8(a)(1) of the Act.² The judge found no merit to these allegations and dismissed these portions of the complaint.³ For the reasons below, we reverse and find the violations, as alleged.

Facts

Charging Party Linda Darrah is a journeyman electrician and member of International Brotherhood of Electrical Workers, Local 58. From April 1 to May 31, 1996, Darrah was employed by Respondent Triangle Electric Company (Triangle). Triangle was a construction contractor at a plant in Hamtramck, Michigan, operated by Respondent General Motors Corporation (GM), known

as the Poletown site. Darrah was assigned to work at the Poletown site.

Between November 1995 and February 1997, Darrah distributed, sold, and solicited subscriptions at various locations for a "strike newspaper" known as the Detroit Sunday Journal (Sunday Journal), a newspaper written and published by employees on strike against two major Detroit daily newspapers—the Detroit News and the Detroit Free Press. In April and May 1996, while she was employed at the Poletown site, Darrah also distributed, sold, and solicited subscriptions for the Sunday Journal at that site in nonwork areas during nonworking time. Darrah distributed the strike newspaper as a volunteer and for the purpose of supporting the cause of the striking newspaper employees.

Darrah testified that, when distributing, she would typically tell prospective recipients that the Sunday Journal,

was normally 75 cents. Whatever you want to donate, I give the money to the strike. I'm not a striker. In other words, I don't need the money. I've got a regular job . . . let's say it was a non-construction worker either at the Poletown plant, or out on the street, I'd let people know that their money was going to go help the strike.

On April 22, 1996, Respondent GM's security personnel issued a "Security Incident Report" to Darrah because she solicited and distributed the Sunday Journal at the Poletown site. In pertinent part, the Report states:

Ms. Darrah was soliciting the strikers newspapers to GM employees and other contractors entering plant . . . I informed her that contractors or any other outside company is not allowed to sell, distribute or solicit on GM property.

On May 20, 1996, Respondent GM security personnel again issued to Darrah a security report because of her solicitation and distribution of the Sunday Journal. This report states, in pertinent part:

Details of Incident. At above date and location, Ms. Darrah was in west entrance corridor soliciting strike papers. This contractor employee has been repeatedly instructed not to sell or distribute or solicit names for home delivery.

The next day, May 21, 1996, Respondent GM ordered Respondent Triangle to remove Darrah from the Poletown site because she distributed the Sunday Journal in the plant.⁴ Darrah received her termination paycheck and departed.

¹ The Charging Party 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.

² The complaint also alleges that Superior Electric terminated Darrah pursuant to Respondent General Motors' request. However, Superior Electric is not a party to this proceeding.

³ No exceptions were filed to the judge's finding that Respondent General Motors violated Sec. 8(a)(1) by maintaining unlawfully broad no-solicitation and no-distribution rules.

⁴ As noted, Respondent GM maintained unlawfully broad no-solicitation and no-distribution rules. Respondent GM considered

Thereafter, on February 3, 1997, Darrah was again referred to work at the Poletown site for contractor Superior Electric. However, she was ejected by Respondent GM security personnel because of her previous distributions of the Sunday Journal, again resulting in the loss of her employment.

Discussion

The judge found that Darrah was not engaged in activity protected under the Act when she distributed the Sunday Journal, and that the Respondents therefore did not violate the Act with respect to her ejections from the Poletown site. For the reasons below, we find that she was engaged in protected activity, and that the Respondents violated Section 8(a)(1) by removing Darrah from the work site.

The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e. activity engaged in with or on the authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984).⁵

Here, Darrah's distribution activities with respect to the Sunday Journal were clearly concerted in character. Thus, Darrah was not acting as a single individual solely on her own behalf. Rather, she was engaged in a group action pertaining to an ongoing strike by the Detroit newspaper employees.⁶

Contrary to the judge, we also find that Darrah's activities were protected in character. The purpose of Darrah's distribution activities was to support the strike of the Detroit newspaper employees. As noted, Darrah testified without contradiction that any money she received from her distributions went to support the strike, that she informed prospective recipients of the Sunday Journal that "I give the money to the strike," and that "I'd let people know that their money was going to go help the strike."

Darrah to be distributing and soliciting in violation of these rules, thereby causing her ejection from the jobsite.

⁵ Remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaff'd. 281 NLRB 882 (1986), enf'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

⁶ As the Board held in *Meyers Industries*, supra, "to find an employee's activity to be concerted, we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." (Fn. omitted.) 268 NLRB at 497. Accordingly, an activity will be deemed concerted in character when it sufficiently pertains to group activity, as opposed to involving purely individual activity.

Although Darrah was not herself a Detroit Newspaper employee or striker, this does not render her conduct unprotected. As the Supreme Court stated in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-565 (1978):

The "employees" who may engage in concerted activities for "mutual aid or protection" are defined by 2(3) of the Act . . . to "include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . ." This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees and employers other than their own.⁷

In nevertheless finding that Darrah's distribution activities were unprotected, the judge relied principally on the nature and content of the Sunday Journal itself. The judge distinguished between whether the Sunday Journal could be viewed as a "propaganda strike tool" (which included some nonstrike-related material), or whether it was "essentially an alternative product produced by striking employees" (with minimal prostrike news coverage). In finding that it was the latter, the judge noted that the contents of the Sunday Journal included predominantly nonstrike articles and that it was a "facially professional" news product that was insufficiently related to mutual aid or protection.

Contrary to the judge, we find that the manner in which striking employees may exercise protected forms of "mutual aid or protection" is not limited merely to overt "propaganda" messages. It may, additionally, encompass other forms of activity, as here, when the pur-

⁷ In arguing that Darrah's conduct was unprotected, Respondent GM cites the Court's subsequent statement in *Eastex* that "at some point the relationship [between the concerted activity and employees' interests as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause. 437 U.S. at 567-568. GM argues that Darrah's distribution of the Sunday Journal was too attenuated because "neither she nor GM nor her employer bore any relationship whatsoever to the striking newswriters." We disagree. Although the underlying labor dispute does not involve GM, Triangle, or Superior Electric, nonetheless the object and purpose of the distribution here was to garner support, both financial and moral, for striking employees in the Detroit community. Such activities are not "attenuated," for purposes of mutual aid or protection, when undertaken in support of the interests of other employees. See *Office Depot, Inc.*, 330 NLRB 640, 642 (2000) (employee's use of the term "scab" in support of striking employees of another employer protected); and *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974) (employee's distribution of handbills supporting other employers' employees protected). See also *Eastex*, supra at fn. 18, where the Court stated, "The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing," quoting from Professor Getman at 115 U. Pa. L. Rev. 1195, 1221 (1967).

pose of the activity is to advance the strike itself.⁸ Put another way, concerted activity engaged in for the purpose of mutual aid or protection, as here, is not rendered unprotected simply because some feature of those activities suggests that, in other circumstances, the activities could have been pursued for purposes that would not be protected.⁹

Here, striking newspaper employees produced an alternative newspaper clearly labeled under its masthead as “A Publication By Striking Detroit Newspaper Workers.” Although the contents certainly could be viewed as that of a professional and serious news publication,¹⁰ the purpose of the Sunday Journal is related and linked to the strike itself, whether the newspaper is to be viewed as “propaganda,” or as “professional” in character, content, and quality. Thus, the Sunday Journal was produced by striking employees—who were in fact professional newspaper writers; one of its purposes was to boost the morale of the strikers, and thereby to promote strike solidarity; it provided an alternative for Detroit newspaper customers in support of a union boycott of the struck newspapers; it provided a forum to disseminate the strikers’ viewpoint about strike issues; and, the term of its continued existence, according to its articles of incorporation, was intended only to track the pendency of the strike itself.¹¹ In view of these strike related purposes, we find that the Sunday Journal was a means to promote the ultimate success of the strike notwithstanding the professional overall quality of its presentation.¹² As dis-

cussed above, Darrah’s purpose in distributing the Sunday Journal was also clearly to support the strike.

In dismissing the complaint, the judge also relied on his finding the Respondents only had notice that Darrah was distributing “an apparent general circulation newspaper” produced by striking employees, and were not aware of any strike-related content therein or the subjective motivations of its publishers or Darrah herself. However, the record does not show that the Respondents had any basis to conclude that the Sunday Journal was purportedly a “general circulation” newspaper. Indeed, according to Respondent GM’s brief, any assertion that Respondent GM had knowledge of the Sunday Journal’s content is “unfounded.”

Further, as discussed above, the record *does* clearly show that the Respondent was aware of the concerted nature of Darrah’s activity. As indicated above, the GM security reports themselves referred to Darrah’s conduct as “distribut[ing]” and “soliciting” “strikers newspapers” or “strike papers.” Soliciting and distributing to other employees are quintessential group activities under the Act; as, of course, are strikes. Contrary to our dissenting colleague, we think this description alone would therefore reasonably tend to put the Respondents on notice that there was, or could be, a correlation between Darrah’s activities and “mutual aid or protection” activities associated with the “strike,” notwithstanding the Respondent’s lack of knowledge concerning the precise contents of the strike newspaper or Darrah’s motivation in distributing it. Cf. *Kysor Industrial Corp.*, 309 NLRB 237 (1992) (employer violated Sec. 8(a)(1) by disciplining employees who assembled at supervisor’s desk to ask about their work assignments, notwithstanding employer’s lack of knowledge about why the employees were confused or were seeking specific directions about their assignments).

We recognize, as our colleague points out, that a newspaper typically is, in part, a commercial product that can be sold for personal remuneration by a vendor who may, or may not have any personal interest in “supporting” the newspaper itself. In the present case, however, Darrah engaged in solicitation/distribution activities directed at other employees, in nonwork areas during nonwork time and at her site of employment, of a specialized “strike” periodical. Although the strike newspaper had a listed price on its cover and Darrah raised money for the strikers, this does not render Darrah akin to a “newsboy or newsgirl on the street,” as the dissent suggests. Rather, Darrah’s activities are essentially no different

⁸ “Purpose” is, of course, critical to our inquiry. Sec. 7 expressly refers to concerted activities undertaken for the “purpose” of collective bargaining or other mutual aid or protection.

⁹ *Wilkes-Barre Publishing Co.*, 266 NLRB 438 (1983), cited by the judge, is clearly distinguishable. In *Wilkes-Barre* a strike replacement, who crossed a union picket line every day for the 2-1/2 year duration of her employment with a daily newspaper, placed an advertisement in a newspaper established by striking newspaper employees. The strike replacement placed the advertisement solely for the purpose of promoting her individual private business interests, and she had no purpose of aiding the striking employees. In finding that the strike replacement’s advertisement was not protected concerted activity, the Board noted that the employee had no purpose of aiding the strikers, but instead acted for personal interests. In the present case, Darrah acted for precisely the opposite purpose as that presented in *Wilkes-Barre*—to support the strikers.

¹⁰ As the judge found, while the Sunday Journal included strike-related coverage and advertisements predominantly for labor organizations and various law firms, the vast preponderance of its contents relate to news and sports coverage unrelated to the Detroit newspaper strike, as well as including some advertisements placed by local businesses and classified ads by individuals.

¹¹ The Respondent presented no witnesses at the hearing. The purpose of the Sunday Journal was described, in part, by striking Teamsters Local 372 Secretary-Treasurer Al Derey.

¹² Cf. *Detroit Newspapers*, 330 NLRB 505 (2000), enf. denied on other grounds by unopposed summary disposition No. 00-1327 (D.C. Cir. 2000) (Unions’ publication of Detroit Sunday Journal did not con-

stitute a clear and present danger of a conflict of interest interfering with collective bargaining process.)

than the protected activities of any employee who, in a group effort, concertedly distributes or solicits leaflets, circulars, or other group material, and/or raises money for the group, at his or her place of employment during nonwork time and in nonwork areas. In these circumstances, we cannot agree with our colleague that the Respondents were unaware of the group nature of Darrah's activities.

In sum, Darrah was engaged in protected concerted activity (the distribution and solicitation of the Sunday Journal in support of the strike), the Respondents were aware of the concerted nature of the activity, and there is no dispute that her discharge was, in fact, attributable to that activity. Accordingly, under the standards set forth in *Meyers Industries*, supra, we find that the Respondents violated Section 8(a)(1) by causing the termination, and terminating Darrah because of her exercise of protected concerted activities.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent GM has violated the Act by maintaining a facially invalid no-solicitation/no-distribution rule, we shall order it to rescind or modify that rule so that non-GM employees working at its Hamtramck, Michigan plant, are not prohibited from solicitation or distribution for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of the Respondent's GM's Hamtramck, Michigan plant.

Having found that Respondent GM requested contractor Superior Electric to remove Lucinda Darrah from its Hamtramck jobsite because she engaged in lawful distribution and solicitation activities and that this action resulted in Darrah's discharge, we shall order Respondent GM to inform Superior Electric that it has no objection to Darrah's employment at the Hamtramck jobsite and to request that Superior Electric reinstate her to her former position. We shall also order that Respondent GM make whole Darrah for any loss of earnings and other benefits that she may have suffered by reason of her loss of employment on February 3, 1997, with Superior Electric, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹³

¹³ The General Counsel seeks in the complaint a monetary remedy imposed on Respondent GM, on behalf of Charging Party Darrah, only with respect to her loss of employment with Superior Electric on February 3, 1997, and not with regard to her earlier loss of employment with Respondent Triangle in May 1996.

Having found that Respondent Triangle Electric Company unlawfully discharged Darrah because of her exercise of protected concerted activities, we shall order it to reinstate her to her former position, or if that job no longer exists, to a substantially equivalent position, and make her whole for any loss of earnings and other benefits she may have suffered as the result of her discharge, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.¹⁴

ORDER

A. The National Labor Relations Board orders that the Respondent, General Motors Corporation, Hamtramck, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting contractors to remove an employee from its Hamtramck, Michigan plant, because that employee has engaged in lawful distribution and solicitation activities protected under the National Labor Relations Act.

(b) Maintaining a no-solicitation/no-distribution rule at its Hamtramck, Michigan plant, that forbids solicitations and distributions of material for purposes protected by Section 7 of the Act anywhere in that plant during nonworking time by employees working there but who are not directly employed by it.

(c) 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) Rescind or modify the no-solicitation/no-distribution rule at its Hamtramck, Michigan plant, which forbids solicitations and distribution of materials for purposes protected by Section 7 of the Act during nonworking times by employees working there but who are not directly employed by it.

(b) Within 14 days from the date of this Order, inform Superior Electric, with copies to Lucinda Darrah, that General Motors Corporation has no objection to Superior Electric employing Darrah at its jobsite and request that they reinstate her to her former position.

(c) Make Lucinda Darrah whole for any loss of earnings and other benefits suffered as a result of her loss of employment with Superior Electric in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to Darrah's distributions and

¹⁴ The Respondents may litigate appropriate remedial issues at the compliance stage of this proceeding.

her removal from the Hamtramck jobsite and, within 3 days thereafter, notify Darrah in writing that this has been done and the distributions and removal from the jobsite will not be used against her in any way.

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

(f) Within 14 days after service by the Region, post at its facility in Hamtramck, Michigan, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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 February 3, 1997.

(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.

B. The National Labor Relations Board orders that the Respondent, Triangle Electric Company, Madison Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have engaged in lawful distribution and solicitation activities protected under the National Labor Relations Act.

(b) 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 from the date of this Order, offer Lucinda Darrah full reinstatement to her former job, or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Lucinda Darrah whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge in the manner set forth in the remedy section of this decision.

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

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

(e) Within 14 days after service by the Region, post at its facility in Madison Heights, Michigan, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondents authorized representative, shall be posted by the Respondent immediately on 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 May 21, 1996.

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

¹⁵ 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."

¹⁶ See fn. 15, *supra*.

CHAIRMAN HURTGEN, dissenting in part.

The issue here is whether Respondent General Motors (GM) violated Section 8(a)(1) of the Act by causing the removal of Lucinda Darrah, the Charging Party, from the GM jobsite where she was performing work for her employer, Triangle Electric (Triangle), and whether Triangle violated Section 8(a)(1) by subsequently discharging Darrah. The judge found no violation as to Darrah and dismissed the related complaint allegations. My colleagues reverse. For the following reasons, I agree with the judge that these allegations should be dismissed.

The facts, in brief, are as follows. Darrah is a journeyman electrician who was employed by Triangle from April 1 to May 21, 1996,¹ to perform work for Triangle at GM's Hamtramck, Michigan, plant, known as the Poletown plant. During the period that she worked at the Poletown site, Darrah distributed, sold, and solicited subscriptions for the Detroit Sunday Journal (Sunday Journal), a newspaper written and published by employees on strike against the Detroit News and the Detroit Free Press.

On April 22, a Pinkerton security guard, an admitted agent of GM, filed a "Security Incident Report" with his superior officer which recorded an incident involving Darrah on the same date. The report stated:

At above date & location this writer received call stating, Ms. Darrah was soliciting the strikers newspapers to GM employees & other contractors entering plant. When this writer informed her she could not distribute papers she asked why? I informed her that contractors or any other outside company is not allowed to sell, distribute or solicit on G.M. property. She continued to asked [sic] why? but returned papers to her bag and proceeded toward her job site.

Despite having been warned not to sell the Sunday Journal, Darrah again attempted to sell and distribute copies of the newspaper on May 20. A Pinkerton guard prepared a security report of the same date which recorded a second confrontation with Darrah:

Details of incident: At above date and location, Ms. Darrah was in west entr[ance] corridor soliciting strike papers. This contractor emp[loyee] has been repeatedly instructed not to sell or distribute or solicit names for home delivery. . . . When this writer spoke with Ms. Darrah, she refuse[d] to give her name and just pack[ed] up [the] papers and return[ed] them to her car.

Later the same day, Darrah's supervisor informed her that GM personnel were disturbed by her Sunday Journal sales efforts in the plant. The next day, May 21, Darrah

was informed that GM had ordered that Respondent Triangle remove her from the plant. Darrah received her termination paycheck at 2:30 p.m. and departed.

Finding that Respondent GM did not know of the concerted nature of Darrah's sales activities when it ordered Darrah's removal from the Poletown plant, the judge found that Respondent GM did not violate Section 8(a)(1) by requiring Triangle to remove Darrah from the plant. In this regard, the judge concluded "that Respondent GM and its Pinkerton agents only had notice that Darrah was distributing in conjunction with and promotion of a solicitation of sales of issues of and subscriptions for home delivery of an apparent general circulation newspaper produced by striking newspaper workers."²

My colleagues reverse the judge to find, in effect, that the Respondents knew that Darrah was engaged in concerted activity when she sold and distributed the Sunday Journal. My colleagues assert that since the Respondents were aware that Darrah was selling a "strike newspaper," they should have known "that there was, or could be," a connection between Darrah's activity and the striking employees' protected activities of publishing and distributing the Sunday Journal. I disagree.

As explained in *KNTV, Inc.*, 319 NLRB 447, 459 (1995), "Section 8(a)(1) is violated if the Respondent knows of its employees' concerted activity, if the activity is protected by the Act, and if the adverse employment action is motivated by the employees' protected concerted activities."³ Further, "[t]he burden of establishing every element of a violation under the Act is on the General Counsel." *Iron Workers Local 386 (Warsawsky & Co.)*, 325 NLRB 748, 756 (1998), enf. denied 182 F.3d 948 (D.C. Cir. 1999), cert. denied sub nom. *Ironworkers Local 386 v. Warsawsky & Co.*, 529 U.S. 1003 (2000). The issue here is whether the use of the adjective "strike" to

² Finding that the Sunday Journal was a commercial enterprise and an alternate product to the Detroit News and the Detroit Free Press, the judge dismissed this allegation on the additional ground that Darrah's sale and distribution of the Sunday Journal were not protected under the Act. For the purposes of this case, I will assume arguing that Darrah's activities were protected.

³ As the Board explained in *Meyers Industries*, 268 NLRB 493, 497 fn. 23 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand sub nom. *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988):

Under this standard, an employee "may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

¹ All dates hereafter refer to 1996.

describe what is essentially a commercial newspaper sufficed to put Respondent GM on notice that Darrah's sale and distribution of the Sunday Journal was concerted activity. I find, in agreement with the judge, that it did not.

The Respondents knew only that Darrah was selling copies of a commercial newspaper, the strike newspaper, at the Poletown plant. As my colleagues admit, they had no knowledge of Darrah's motive in selling the newspaper. My colleagues assert that since the Respondents knew that Darrah was selling and distributing the "strikers newspapers" or "strike papers," it was unnecessary to show "that the Respondents were also aware of Darrah's subjective motivations" in order to find that the Respondents knew of the concerted nature of Darrah's activities.

In support of their view, my colleagues rely on *Kysor Industrial Corp.*, 309 NLRB 237 (1992). However, that case is readily distinguishable from the present case. In *Kysor*, employees assembled together at a supervisor's desk to ask about their work assignments. The action of assembling together by itself established that the employees' activity was concerted, and the employer knew of that action. It was therefore not necessary for the respondent to know *why* the employees had come together to ask about their work assignments.

In the present case, by contrast, Darrah acted alone. Her conduct consisted of selling and distributing a commercial newspaper. She sold and distributed the newspaper to employees of employers who were not directly involved in the Detroit newspaper strike. In these circumstances, I find, in agreement with the judge, that the General Counsel has not met his burden of showing that the Respondents knew, or should have known, that Darrah was engaged in concerted activity. That burden is not met merely by showing that the Respondents knew that Darrah was selling and distributing the "strikers newspapers" or "strike papers." The use of the word "strike," standing alone, was not sufficient to signal to Respondents, in the circumstances present here, that Darrah's activity was concerted in nature. Compare *Office Depot*, 330 NLRB 640, 642 (2000) (where employee of one employer said to employee of another employer "Oh, you work for the scab newspaper," Board found that the use of the term "scab" was an expression of support for striking employees and "amounted to making common cause with the protected concerted activity of the employees of another employer."). Finally, since Respondent GM was unaware of the concerted nature of Darrah's conduct, it was free to order her removal from the Poletown plant.⁴

⁴ As explained above, absent special circumstances like those in *NLRB v. Burnup & Sims*, supra, there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an

I recognize that Respondent knew that Darrah was selling a strike newspaper. However, the fact that an employer knows that someone is selling a strike newspaper does not establish that the employer knows that the seller is making common cause with the strikers. A newsboy or newsgirl on the street can sell a strike newspaper without making common cause with the strikers. The same is true even if the seller is an employee of a nonstruck employer.

Concededly, it may well be the case that Darrah sold the paper because she was in sympathy with the strikers. Indeed, as noted above, I shall assume *arguendo* that this is so and that her actions were protected. However, the General Counsel has not established that Respondents knew that she was acting in sympathy with the strikers. And, as discussed above, the fact that they knew that she was selling a strike newspaper does not show that they knew that she was acting in sympathy with the strike. Indeed, the reason for taking action against Darrah was that she was selling papers and soliciting subscriptions for home delivery, not that she was acting in sympathy with strikers.

My colleagues say that soliciting and distributing to other employees are quintessential group activities under the Act. Similarly, my colleagues say that soliciting to raise money for a group is protected activity. The statements are overly broad, and lead to my colleagues' error in this case. Soliciting other employees to buy Girl Scout cookies, in order to raise money for that group, is not protected by Section 7. Neither is selling a newspaper. And, the fact that the selling occurs at the place of employment does not render the sale protected.

In the instant case, Darrah's motive in selling the newspaper may have been to aid the employees at the Detroit Newspapers. But, there is no showing that the Respondents knew that. Nor could the Respondents infer it merely from the fact that the security incident reports referred to it as a strike newspaper. That is what it was. But that does not show that the Respondents knew that Darrah's motive was to aid the strikers.

employee engaged in unprotected activity. The only issue remaining, then, is whether the *Burnup & Sims* exception applies here. As stated in *Kysor Industrial Corp.*, supra (emphasis added):

I think not. Whatever the final sentence of footnote 23 [see above, n. 20] may mean, it seems clear that before the *Burnup & Sims* gloss on the statute comes into play, the employer *must be aware that the context* in which the alleged misconduct occurred was activity which was both concerted and protected, qualifications which were present in *Burnup & Sims*.

In the present case, the Respondents were not aware that Darrah's activities were concerted. Therefore, the *Burnup & Sims* "gloss" does not apply.

The issue here is what did the Respondents know about Darrah's activities. The Respondents knew that the Sunday Journal, as a newspaper, was a commercial enterprise. The Respondents also knew that Darrah, as a vendor of the newspaper, was, participating in that commercial enterprise. The Respondents did not know, however, what Darrah did with the money she earned selling the newspaper. Nor, as explained above, could the Respondents have known from the words "strikers newspapers" or "strike papers" that Darrah's sale of the newspaper was other than an aspect of the commercial enterprise. Thus, as far as the Respondents knew, Darrah's sale and distribution of the Sunday Journal was indeed "akin" to that of a newsboy or newsgirl on the street, because there would be no reason for the Respondents to know that the sale of the newspaper was concerted activity rather than commercial activity.

For all these reasons, I would adopt the judge's finding that Respondent GM did not violate Section 8(a)(1) by causing Darrah's removal from the GM Poletown plant and that Respondent Triangle Electric did not violate Section 8(a)(1) by subsequently discharging Darrah.

APPENDIX A

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 request our contractors to remove employees from our Hamtramck, Michigan jobsite, because those employees have engaged in lawful distribution and solicitation activities protected under the National Labor Relations Act, which results in the discharge of such employees.

WE WILL NOT maintain a no-solicitation/no distribution rule at our Hamtramck, Michigan plant that forbids solicitations and distributions of material for purposes protected by Section 7 of the Act anywhere in that plant during nonworking time by employees working there but who are not directly employed by us.

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 or modify the no-solicitation/no-distribution rule at our Hamtramck, Michigan plant, which forbids solicitations and distribution of materials for purposes protected by Section 7 of the Act during nonworking times by employees working there but who are not directly employed by us.

WE WILL, within 14 days from the date of the Board's Order, inform Superior Electric, with copies to Lucinda Darrah, that we have no objection to Superior Electric employing her on our jobsites and WE WILL request that Superior Electric reinstate her to her former position.

WE WILL make Lucinda Darrah whole for any loss of earnings and other benefits suffered as a result of her loss of employment with Superior Electric, with interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files and reference to Lucinda Darrah's distributions and her removal from the Hamtramck jobsite, and WE WILL within 3 days thereafter, notify Darrah in writing that this has been done and that the distributing and removals from the jobsite will not be used against her in any way.

APPENDIX B

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 discharge employees because they have engaged in lawful distribution and solicitation activities protected under the National Labor Relations 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, within 14 days of the Board's Order, offer Lucinda Darrah full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent

position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Lucinda Darrah for any loss of earnings and other benefits suffered as a result of her unlawful discharge, with interest.

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

TRIANGLE ELECTRIC COMPANY

Linda Rabin Hammell, Esq., for the Acting General Counsel.

Stewart J. Katz, Esq. (Keller, Thoma, Schwarze, Dubay, & Katz), of Detroit, Michigan, for Respondent, Triangle Electric Company.

Mark Pieroni, Esq., of Detroit, Michigan, for Respondent, General Motors Corporation.

Ellis Boal, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This case was tried before me at Detroit, Michigan, on August 12, 1998, pursuant to unfair labor practice charges filed by Lucinda Darrah, an individual, against Triangle Electric Company, herein called Respondent Triangle, on October 1, 1996, and against General Motors Corporation, here called Respondent GM, on July 27, 1997, and pursuant to a consolidated complaint and notice of hearing, here called the complaint, issued by the Board's Regional Director on February 27, 1998. The Respondents filed timely answers which denied the commission of unfair labor practices, and motions to dismiss the complaint, which were denied by Order of the Board, issued on August 3, 1998.

The issue raised by the pleadings is whether Respondent Triangle, an electrical contractor, while performing work at a Respondent GM plant, acquiesced in Respondent GM's request to remove Triangle employee Darrah from work she had been performing at that plant and thereby caused her loss of employment because she had attempted to distribute and solicit sales in that plant of the Detroit Sunday Journal, a publication by six striking Detroit newspaper unions, in violation of an overly broad no-solicitation/no distribution rule addressed to non-GM employees working in the plant. The Acting General Counsel alleged that the Charging Party, by aligning herself with third party striking employees, engaged in concerted protected activity by distributing and selling a community-wide "mass handbill;" i.e., a newspaper published by striking unions which contained news accounts sympathetic to the strikers' position in a dispute with their employers and which provided economic support for the strikers.

The Respondents argue that the striking unions' newspaper was a commercial venture which provided an alternate newspaper to the general public which, by virtue of its preponderance

of nonnewspaper strike general news and editorial content and its limited reference to a labor dispute which involved neither the Respondent nor its employees, exceeded the protection of the Act accorded under its "mutual aid or protection" clause. The Respondents conclude that Darrah was not engaged in activities protected by the Act when she was ordered by Respondent GM to be removed from its plant.

The parties were given full opportunity at the trial to adduce relevant testimonial and documentary evidence and to argue orally. They were also afforded opportunity to submit post-trial briefs, which were received on October 19, 1998.

Based on the entire record, oral arguments, the briefs, and my observation and evaluations of the witnesses' demeanor, I make the following findings.

I. JURISDICTION

At all material times, Respondent GM, a corporation with offices and places of business in Detroit and Hamtramck, Michigan, has been engaged in the manufacture and nonretail sale of automobiles. During the calendar year 1997, in the course and conduct of its business operations, Respondent GM sold and shipped from its Hamtramck, Michigan facility, goods and materials valued in excess of \$50,000 directly to points outside the State of Michigan.

At all material times, Respondent Triangle, a corporation with an office and facility at 29787 Stephenson Highway, Madison Heights, Michigan, herein called the Madison Heights facility, has been engaged in the electrical construction and maintenance business at various jobsites in the State of Michigan. During the calendar year 1996, in conducting its business operations, Respondent Triangle had gross revenues in excess of \$500,000 and purchased goods valued in excess of \$50,000 from points located outside the State of Michigan and had said goods shipped directly to its Madison Heights facility.

It is admitted, and I find, that Respondents Triangle and GM are now, and have been at all times material here, employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Events leading to plant ejection

Lucinda Darrah, here called the Charging Party, is a journeyman electrician. She is a member of Local 58, International Brotherhood of Electrical Workers (IBEW).

Darrah began working for Respondent Triangle at Respondent GM's Poletown construction site in Hamtramck, Michigan, via referral under the hiring hall procedure contained in the collective-bargaining agreement between Respondent Triangle and Local 58.¹ She was employed at the Poletown site by Respondent Triangle from April 1 through May 21, 1996, in the installation of replacement lighting fixtures in a renovated production area, along with various other skilled trades' construction workers employed by subcontractors.

¹ Poletown is a colloquial reference to a section of Hamtramck, which, in turn, is a municipal enclave completely surrounded by the City of Detroit.

On July 13, 1995, six unions commenced a strike against the two major Detroit daily newspapers; i.e., the Detroit News and the Detroit Free Press and their joint creation under the Federal Newspaper Preservation Act, the Detroit News Agency (DNA).² The strike was ongoing during Darrah's Poletown employment. Neither of the Respondents was involved in the newspaper labor dispute. Although never employed by the newspapers, Darrah had been an ardent and active supporter of the striking newspaper employees prior to and during her Poletown employment. She attended support meetings, fundraisers, strike rallies, and she distributed strike support fliers at various public places and institutions. She also distributed and sold individual copies of and subscriptions to the Detroit Sunday Journal that she characterized as a strike newspaper published by the six striking newspaper unions. She distributed some copies free of charge and solicited sales and subscriptions from a variety of unidentified employees at unidentified, nonnewspaper employers commencing with the first issue in November 1995. She obtained bundles of the papers each Saturday morning. Each bundle contained 100 papers. She paid \$55 for each bundle. The initial printed price of the paper was 60 cents but it was raised later to 75 cents. Darrah testified that some purchasers freely paid more than the requested price, particularly construction workers who usually paid a dollar for each copy. Darrah testified that she returned all of her profits to the publisher.

Darrah testified that during the period from November 1995 to February 1997, she solicited sales by telling the prospective purchasers, i.e., employees or "people on the street," that they could give what they wanted for the paper but that she herself was not a striker and did not need the money but would donate it to support the newspaper strike. She testified that she also asked the prospective purchasers to boycott businesses which continued to advertise in the struck newspapers and that she, in general, "educated people" regarding the newspaper strike issues. There is no evidence that any of these foregoing activities away from Poletown were known to the Respondents, nor were they aware of what she told prospective purchasers away from or at Poletown.

Darrah testified that on a Monday in mid-April 1996, she first attempted to sell copies of the Journal to GM employees inside the Poletown plant in the main aisle of the production area used by hi-lo vehicles driven by GM employees. She did this at 6:15 a.m. prior to her 7 a.m. shift. Ten persons, one of whom was a uniformed guard employed by the Pinkerton Security Agency, told her not to "sell this paper here." She therefore desisted and retreated to her assigned work area. At 9:30 a.m., during her break at the nonwork picnic tables area in the plant, she solicited other construction trade employees, i.e., subcontractor employees, to purchase copies and home delivery subscriptions. She also distributed strike rally notice fliers to them. There is no evidence that any agent of the Respondent was aware of this activity. The Pinkerton guards are admitted agents of Respondent GM.

Thereafter, Darrah continued her distribution and sales/subscription solicitation inside the Poletown plant in a

west entrance, L-shaped corridor at a location 15 feet from a double door entry to the inner plant and the GM employees' timeclock. This solicitation was directed to GM production workers from 6:30 a.m. to 7 a.m. prior to their clocking in or after the prior shift clocked out. She also solicited sales from non-GM construction workers on their way to the construction renovation site. The solicitation area was free of any production or construction work. Darrah testified that she engaged in this solicitation activity on subsequent Mondays for 5 weeks, in the hallway and at the picnic tables, and was not told to desist. However, she failed to testify whether a Pinkerton guard or any other agent of GM observed her. She estimated that during this period she distributed about 5 to 10 copies at the picnic tables and 15 to 30 copies in the hallway each Monday. She estimated that she distributed about 60 to 70 percent of the Journal issues to construction workers, i.e., those who wore "hardhats," and the remainder to those she assumed were GM personnel because they wore no hardhats.

A Pinkerton guard filed a "Security Incident Report," dated April 22, 1996, with his superior officer referencing an incident of that date involving Darrah in the "A22 Aisleway." The report stated:

At above date & location this writer received call stating, Ms. Darrah was soliciting the strikers newspapers to GM employees & other contractors entering plant. When this writer informed her she could not distribute papers she asked why? I informed her that contractors or any other outside company is not allowed to sell, distribute or solicit on G.M. property. She continued to asked [sic] why? but returned papers to her bag and proceeded toward her job site.³

It is admitted that since on or about March 30, 1996, Respondent GM has maintained at its Poletown facility a no-distribution/no solicitation rule that prohibits "visitors," including employees working at the facility but not directly employed by Respondent GM, from selling, distributing, or soliciting on Respondent GM's property without GM authority. It is further admitted that the Pinkerton Security Agency has since the same date maintained enforcement of that rule.

It was further stipulated that Respondent GM maintained a much narrower rule with respect to its own employees that restricted distributions to nonworking time and distribution to nonworking areas.

Darrah testified that on Monday morning, May 20, 1996, she again commenced her distribution, sale, and subscription solicitation of the Journal at the usual time and in the same manner to the same type of persons in the same corridor when a Pinkerton guard confronted her. The guard loudly stated, "I told you, you can't distribute this paper." Darrah did not reply and refused to disclose her name when asked. The guard then stated, "well you can't sell this paper anywhere on this property." Darrah picked up her bundle of 100 Journals and carried them to the outside cross gate, vehicular entrance 100 yards from the plant

² See *Detroit Newspapers*, 326 NLRB 700 (1998).

³ No Pinkerton security guard testified. Neither of the Respondents adduced any testimonial evidence except that derived from cross-examination.

door, but still on GM property, and distributed for about 20 minutes when another Pinkerton guard confronted her stating, "you can't sell this paper here; [you] can't sell it anywhere on our property." Darrah asked where she could sell it and was directed to the public sidewalk 200–300 yards away. Since it was 6:50 a.m., she abandoned the effort and reported for work.

Later in the same day, her supervisor reported to her that GM labor relations persons were disturbed by her Journal sales efforts in the plant. On Tuesday, the next day, she was informed that GM had ordered Respondent Triangle to remove her from the plant, and she received her termination paycheck at 2:30 p.m. and departed. It is stipulated that but for Respondent GM's demand, Triangle would not have removed Darrah from employment at the Poletown plant on May 21, 1996.

A Pinkerton security guard (an admitted GM agent) prepared a security report dated May 20, in reference to Darrah's activity in the west entrance corridor on that date. It states:

Details of Incident: At above date and location, Ms. Darrah was in west entr corridor soliciting strike papers. This contractor emp. Has been repeatedly instructed not to sell, or distribute or solicit names for home delivery. And yet she still stands at west entr desk, distributes papers on A-22 aisle, at job site & today (5-20-96) inside west entr desk (near men's room). When this writer, spoke with Ms. Darrah, she refuse to give her name and just pack up papers and return them to her car.

Subsequently on February 3, 1997, Darrah was referred to work for another electrical contractor at the Poletown plant but was ejected by Pinkerton guards even though she made no attempts to distribute or solicit sales for the Journal on that occasion.

2. Evidence of Poletown plant distribution practice

Respondent GM's Poletown production and maintenance employees are represented by the UAW. That Union maintains in-plant employee representatives called plant committee persons. Certain in-plant space is reserved for their exclusive UAW representation duties. It is called the committee room. Darrah testified that she observed that copies of the Journal had been placed in the committee room. She did not testify how or when they were placed there, nor whether any Respondent GM agent was aware of it.

Martin Andrew was called as a witness for the Acting General Counsel. At the time of his testimony, he was retired from his GM Poletown employment, the last 2-1/2 years of which he had served as a UAW plant chairperson. Although he testified that he entered on duty for GM at Poletown in 1985, he did not testify as to the date of his retirement. Darrah testified that after her first confrontation with the security guard in mid-April and before she renewed her Poletown Journal solicitation efforts, she spoke to several persons about her right to do so, one of whom was Andrew who she testified was a plant chairman. The implication is that he held the position at that time, but the record is not clear. How long Andrew remained in GM Poletown employment after that is unknown, assuming he was employed on that date.

Andrew testified in very general terms as to the sale of the Journal in the Poletown plant in production areas, at the gates, before shift commencement, at lunch, and "all day long" to GM employees. He testified as to the placement for sale of the Journal in the UAW committee room and admitted that GM agents do not visit the UAW committee room. He identified one such seller, i.e., a GM employee and identified himself also as a Journal sales solicitor at the plant gate or in the committee room. He identified no other sellers by name or by employment status. He testified that he observed Journal sales solicitations and distributions to unnamed "foremen" and persons "in management" by unidentified solicitors in unspecified areas of the plant. He testified that he also had solicited Journal sales at undisclosed areas in the plant in the presence of an unnamed person whom he characterized as a "GM manager." He testified that he had never been disciplined for this solicitation.

Andrew also testified that he observed the sales solicitation by unidentified GM employees of other unidentified GM employees at undisclosed times and places in the plant for a variety of personal commercial products; e.g., Avon products.⁴ He identified one such solicitor, GM employee Betty Johnson, as a longtime in-plant production area purveyor of china glassware products to unnamed "bosses" and office personnel.

In cross-examination, Andrew testified that UAW newsletters are available to GM employees in the plant and that UAW insignia and internal UAW political literature distributions are widely tolerated in the plant. Confusingly, he also testified that he personally only sold the Journal at the gate and nowhere else. His inconsistent testimony on this point was not explained.

In addition to the generalized nature of Andrew's testimony already noted and its context-free nature, he also failed to specify on what dates these solicitations occurred. Thus, as the Respondents argue, it is not clear as to whether Journal sales and other solicitations occurred before, during, or after Darrah's termination. His retirement date is unknown.

3. The Journal

Al Derey, secretary-treasurer of Teamsters Local 372—one of the six striking Detroit newspaper unions—testified for the Acting General Counsel as to the nature of the Detroit Sunday Journal. Derey is also the chairman of the six-union council. Initially, he characterized the Journal as a "mass type handbill." He identified the articles of incorporation of the Journal, which reveal it to be a nonprofit corporation created for the publication of an interim weekly Sunday newspaper that is to terminate on cessation of the labor dispute. The Journal's board of directors is composed of officers from the six striking unions, and Derey is the vice president.

With respect to the purpose of the Journal, Derey testified that its formation had several objectives. One objective was to convey to the public the striking unions' "side of the strike." Another was to give the strikers "something to do; i.e., professional, editorial, production, maintenance, and transportation striking employees were utilized in the writing, composition,

⁴ There is no evidence of the sale of newspapers or magazines of any nature in the Poletown facility or on the exterior GM premises.

and production of the Journal at a suburban independent printing facility and distribution thereafter. Another stated purpose was to assist the unions' effort to effectuate a public boycott of the struck newspapers. He testified that the Journal would serve as an alternative newspaper and an alternative advertising source for advertisers who boycotted the struck newspapers.

Derey also characterized the Journal as a "strike tool" and a "morale booster" for strikers.

Derey testified the initial press run of the Journal was 300,000 weekly copies of which the unspecified "vast" preponderance were distributed free, and 30,000 were sold "on the street." He testified that costs became abhorrent and production was reduced to 150,000 copies at an undisclosed subsequent date. Thus, the Journal became a commercially viable newspaper. Derey failed to testify what portions of subsequent issues were distributed free and what portions were sold. He testified that the receipts of sold editions were used to offset the costs of production. He did not testify as to whether these costs included any compensation to the striking employees who produced the Journal. There is no evidence that any monies were used to defray the six unions' negotiation and strike-related litigation costs. Derey testified that the Journal was also funded by unspecified donations to it by the International Unions of the striking unions. He testified that the Journal's distributors, which included strikers and activist supporters, "sometimes" returned all receipts to the Journal but that they "sometimes" returned only the difference between the wholesale and retail price.

The Acting General Counsel introduced into evidence nine successive weekly issues of the Detroit Sunday Journal starting with the March 24-30, 1996 issue and ending with the May 19-25, 1996 issue. Under the masthead of each Journal is printed, "A Publication By Striking Detroit Newspaper Workers." However, to characterize this publication as mere handout fliers or leaflets is an insult to the professionalism of those persons responsible for the product and its contents. Each issue consists of 40 pages, the vast preponderance of which relates to international, state, and city news concerning business, economic, racial, political, cultural, entertainment, and sports interests unrelated to the Detroit Newspaper strike. The Journal easily compares in content, size, and quality to the best of metropolitan suburban newspapers. Indeed, many small city and even some large metropolitan publications suffer badly in comparison. Included in the Journal's content is a national and local sports section, television and motion picture listings, and entertainment reviews by national syndicated columnists. There are included restaurant listings and reviews, articles of general interest, and articles supplied by national wire services that appear across the country. There are advertisements predominantly for labor organizations and various law firms. But there are also advertisements placed by a variety of many automobile dealerships, transportation service companies, home improvement contractors, personal hygiene specialists, the Shrine Circus, charitable raffles, loan companies, political candidates, retail appliance stores, automotive service centers, a sports complex, a sport supply store, a snowmobile outlet, a talk radio station, a new book publication, an optical retailer, religious organizations, a private college, a recorded music retail outlet,

realtors, a job fair, a national bookstore chain promotion for recorded musical compact discs, video rental stores, a theatrical performance, a jewelry store, a recall notice by the Ford Motor Company, and a national drugstore chain. The Journal also includes several pages of classified ads paid for by individuals.

The Detroit Sunday Journal however, quality of editorial content aside, does not compare favorably in extensiveness and depth of news coverage and more so in the variety and extensiveness of advertisers enjoyed by the two large metropolitan newspapers.

The opinion page and various news articles can be interpreted to be sympathetic to organized labor in general, but articles relating to the newspaper strike and the point of view of the striking unions is not as extensive as what might be expected from its description as a "strike tool." They are in fact sparse, overwhelmed by coverage of unrelated matters, and buried within interior pages.

Reference to the Detroit newspaper strike for each 40-page issue was as follows:

March 24-30, 1996 pages 3, 10, 11
 March 31-April 6, 1996 pages 1, 14
 April 7-13, 1996 pages 10, 11
 April 14-20, 1996 pages 3, 9, 10, 15
 April 21-27, 1996 page 9
 April 28-May 5, 1996 pages 3, 9, 15
 May 5-11, 1996 pages 3, 8
 May 12-18, 1996 page 6
 May 19-25, 1996 pages, 3-8

Of these articles, most consisted of much less than one page. Some were found on the "Opinion" page, which more often related to nonstrike-related issues. Some articles purported to be a factual account of an ongoing unfair labor practice proceeding involving the struck newspapers and the DNA. Others consisted of a human interest account of a strike-related matter. One page, i.e., page 9 of the May 5-11, 1996 issue, consisted of a whole page advertisement soliciting support of a boycott of U.S.A. Today, a publication of Gannett Corporation, the owner of the struck Detroit News. There were also sparsely spaced various unions' advertisements in support of the Journal itself, but not explicitly strike referenced.

The security reports related to the distribution of the April 21-27 and May 19-25 issues. The only reference to the strike in the April 21-27 issue on page 9 was a supposedly factual account of what transpired at the opening session of an unfair labor practice proceeding involving the newspaper dispute and a smaller account of several newspaper picket line confrontations. The May 19-25 issue on pages 3 and 8 contained articles sympathetic to the strikers. Neither of these issues referenced these articles on the first page section which listed noteworthy articles within the paper. Nothing in these articles can be construed as a clarion call to some kind of supportive action. The same can be said of the vast preponderance of strike commentary. Of course, the implied objective clearly was to arouse the sympathy of the reader for the plight of the striker and animosity toward the newspapers' negotiators. The first page of each issue, except for the identification as a striking Detroit News-

paper Worker publication, was formatted as a commercial, general circulation, general news publication.

The March 24–30 issue headlined a federal witness protection effort for a “Detroit Mafia” prosecution. A side reference alluded to an interior story regarding, *inter alia*, the unfair labor practice proceeding and a brief account of staff restructuring at the struck newspapers related to a strike-related drop in readership. The March 31–April 6 issue headlined a newspaper strike rally but referred to no interior strike-related news. All issues thereafter, up to the May 19–25 issue had no front-page reference to any newspaper strike-related matter. Their headlines were as follows:

March 24: “In harm’s way—Witnesses against mob get U.S. protection”

April 7: “Medicine on the move—Mobile health clinic serves Macomb County’s needy”

April 14: “On the record: Wings want Cup”/“Chemo overdoes blamed in death at Beaumont”

April 21: “The bomb’s echo—Oklahoma City haunts Michigan town”

April 28: “Lives at Risk—Breakdowns plague city ambulances”

May 5: “Hardball—U.S. cracks down on ex-Tiger McLain”

May 12: “Breaking the silence—Cop who reported sergeant sues, claiming retaliation”

If the objective of the Detroit Sunday Journal’s creators was to construct a product that offered some value for money as a serious purveyor of news and human interest features rather than a mere propaganda blurb seeking gratuities, I find that they were totally successful.

B. Analysis

The Acting General Counsel’s theory of violation was set forth in oral argument and supplementary brief. It is a very simple and straightforward argument. The Acting General Counsel’s argument is as follows: The striking Detroit newspaper employees were engaged in concerted activities for the “purpose of collective bargaining or other mutual aid or protection . . .” and thus, were protected by the Act. Employees of another employer not involved in the primary dispute may make common cause with the employees of the primary employer and, thus, by such alliance, gain the protection of the Act. *NLRB v. Eastex, Inc.*, 437 U.S. 556 (1978); *Boise Cascade Corp.*, 300 NLRB 80, 81–82 (1990). In *Eastex*, *id.* 563–566, the Supreme Court rejected arguments that the protection of the Act does not extend to a situation where the secondary employer and secondary employees have no dispute. The Court held that the “mutual aid and protection” clause of the Act extends to employees who act in support of another employer’s employees; the Court cited well settled Board law on that point, including, *inter alia*, *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974) (right to distribute literature in support of another employer’s employees). In *Boise*, *supra*, the Board held that the wearing of union insignia, which is normally protected when worn by a primary employee in support of a union at the primary employer unless disruptive, is also protected when

worn by an employee of an employer not related to the dispute at that employer’s premises in support of other employees in a dispute with another employer.

The Acting General Counsel further reasoned that Darrah had been protected in her attendance at strike rallies, an action in sympathy of the newspaper strike, and similarly she was protected by “. . . the distribution of a strike organ essentially; a newspaper put out by the striking newspaper workers for the purpose of advancing their cause.” Counsel further argued that Darrah’s purpose in distributing, in conjunction with selling copies of and home delivery subscriptions to the Journal “was to educate the public about the Detroit newspaper strike, to garner subscriptions for the Journal, which would be to the benefit of the striking workers, and to alert people generally to the ongoing activities on behalf of the striking newspaper workers by rallies and so forth.” Counsel for the Acting General Counsel argued that the Journal “wasn’t just a newspaper [but] it was sort of a glorified union newsletter,” and thus concerted protected activity.

The Acting General Counsel conceded that to be culpable, GM would have to have had “reasonable notice of the concertedness of the activity.”⁵ She cited as evidence of GM knowledge the Pinkerton security guards’ reports which referred to “strike papers” and “strikers newspapers.” Counsel argues that coupled with evidence of extensive distribution of the Journal within the plant to foremen and managers, Respondent GM had the requisite knowledge.

The Acting General Counsel next argues that because the distribution and sale of the Sunday Journal allied Darrah with the newspaper striking employees, she was therefore engaged in concerted activity for mutual aid and protection. As such, her conduct was the cause of her job loss pursuant to an unlawfully broad no-solicitation/no-distribution rule; *i.e.*, the more restrictive rule applied to non-GM employees working at the Poletown site. An employer may not lawfully restrict the distribution rights of employees of other employers lawfully and regularly present on its property, while simultaneously permitting its own employees the right of distribution on its property in nonworking areas in the absence of some serious impairment of its managerial prerogatives. *Gayfers Department Store*, 324 NLRB 1246 (1997); *Southern Services*, 300 NLRB 1154 (1990), *enfd.* 954 F.2d 700 (11th Cir. 1992); see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Accordingly, it is argued that Darrah was unlawfully terminated from her employment. The General Counsel further and alternatively argues that the Respondents applied its no-distribution rule discriminatorily against Darrah wherein it tolerated a variety of solicitations in the Poletown plant, including the Journal itself.

As to the nature of the Detroit Sunday Journal, the Acting General Counsel stresses the fact that it was produced and distributed by striking employees and supporters; was a striker morale booster; provided to the public the striking unions’ viewpoint; provided an alternative paper for those who desired to support the striking unions’ boycott of the struck papers; had advertisements by sympathetic unions and law firms (*i.e.*, pre-

⁵ See *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*).

sumably sympathetic); was funded (in undisclosed part) by the six striking unions' International Union; was of interim duration; and was nonprofit in nature. The Acting General Counsel concluded: "In these many ways the Journal is not an ordinary commercial enterprise. It is to the contrary, a protected extension of the striking newspaper employees' labor dispute." The Acting General Counsel finally cited Darrah's Journal sales solicitation as the "logical outgrowth" of her various other activities in support of the strikers, of which there is no evidence of Respondent GM's knowledge.

The Charging Party's argument tracks that of the Acting General Counsel. The Charging Party, however, argues further that because GM's no-distribution rule was unlawfully broad, any enforcement of it is unlawful. Under this theory, even distribution activity not engaged in for mutual aid or protection would be protected; e.g., solicitations for the New York Times. I find this suggestion unsupported by Board precedent. Clearly, it is necessary to determine whether or not Darrah's distribution of the Journal at the Poletown plant consisted of activity that can be defined as protected because of its alliance with and support of the striking newspaper employees and its concerted nature was known to GM. The Respondents argue that her activity does not fall within the mutual aid and protection clause of the Act because it amounted to sales activity on behalf of a product which, although authored and published by strikers, essentially constituted a commercial venture at least for all purposes apparent to Respondent GM which was not proven to be aware of anything more than what its masthead banner proclaimed. The Respondents argue correctly, and I find in agreement, that Andrew's testimony as to the sale and distribution of the Journal at and in the Poletown plant lacks probative value for the reasons found above. Accordingly, there is no probative evidence that Respondent GM's agents, including Pinkerton security guards, were aware that the Detroit Sunday Journal was anything more than the product of striking employees as an alternative or a supplement to the product of their struck employer.⁶

There is no evidence that GM or its agents were aware of Darrah's collateral activities on behalf of the striking workers, nor of the subjective motivation of its publishers and supporters and Darrah herself. It is a matter of surmise whether any GM agent, including the Pinkerton security guards, delved into the inner pages of the Journal and read that disproportionately small segment related to the strike or to the unfair labor practice proceeding related to it. The mere act of supporting or doing business with a newspaper published by strikers does not *per se* constitute concerted protected activity. In *Wilkes-Barre Publishing Co.*,

⁶ The issue in this case does not involve an evaluation of whether the Sunday Journal constituted a serious economic threat to the struck newspapers. That issue was evaluated by Judge Karl H. Buschmann in a decision issued by him on March 10, 1999, JD-21-99, Case 7-CA-40012. One of the issues resolved by Judge Buschmann was whether the striking unions' publication of the Detroit Sunday Journal constituted a conflict of interest which impaired their representational capacity. He found that it did not. The Charging Party's reliance upon Judge Buschmann's decision in its letter of March 10, 1999, is misplaced.

266 NLRB 438, 440 (1983),⁷ Administrative Law Judge Joel Harmatz, whose decision was adopted by the Board, stated:

The question presented is whether "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ought to be extended to favor one business competitor over another simply because the former was organized and maintained by aggrieved employees of the latter. To ask the question is to answer it.

The issue before Judge Harmatz was whether the struck employer-newspaper unlawfully terminated an employee who had placed an advertisement in a newspaper published by striking employees. Judge Harmatz found:

In short, Respondent was free to meet the competitive challenge presented by the latter without limitation or constraint from the National Labor Relations Act. The newspaper founded and maintained by the strikers is not, for purposes of Section 7 of the Act, the analogue of strike action, and hence, contrary to the General Counsel, Martin's placement of the ad did not have inherent characteristics of statutorily protected conduct.

In that case, unlike here, the employee had no intention of aiding the strike effort but intended it as a simple personal business matter. The General Counsel there had argued that the mere contribution to the strikers' paper was protected regardless of employee intent. Judge Harmatz observed that "it is the nature of the employee's activity, as distinguished from intent, which determines protected status," citing *Smithfield Packing Co.*, 258 NLRB 261 (1981); *Brown & Root, Inc.*, 246 NLRB 33, 36-37 (1979); and *Ohio Valley Graphic Arts, Inc.*, 234 NLRB 493 (1978).

In evaluating the employee's objective conduct of doing business with the strikers' newspaper, he considered the nature of the strikers' newspaper which he found to have constituted a serious, viable competitor to the struck newspaper. As I stated, the issue of the Detroit Sunday Journal's status as a serious economic competitor to the struck newspapers is not before me. However, I believe the nature of the publication is relevant to a determination of whether it was propaganda strike tool to which was appended nonstrike-related material, or whether it was essentially an alternative product produced by striking employees with minimal pro-strike news coverage. If it had been the former, there hardly would be an issue. Because it is the latter, a serious question arises, even if publication of such organ can be considered to be activity engaged in for mutual aid and protection. The Respondents argue that the sale and distribution of such publication by an employee not involved in the dispute, and which does not relate to their employment relationship, exceeds the limits of the Act's protection. The Respondents quote the Supreme Court's language in *Eastex Corp.*, supra at 567-568:

It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly

⁷ Cited by Judge Buschmann.

be deemed to come within the "mutual aid or protection" clause.

The Acting General Counsel and Charging Party counsel argue that the limited content of the Journal's factual and editorial reference to the striking employees position is sufficient to render the entire product protected by the mutual aid and protection clause. The Charging Party counsel points to the Board's rationale in its underlying decision in *Eastex* holding that extraneous inclusions do not detract from a leaflet's protected status. *Eastex, Inc.*, 215 NLRB 271, 274 (1974). It also alludes to *Veeder-Root*, 237 NLRB 1175 (1978), which involved a notice for a May Day rally partially concerning working conditions and partially attacking economic corporation. The Charging Party counsel cites the language of the Fifth Circuit Court of Appeals in *Reef Industries v. NLRB*, 952 F.2d 839 (5th Cir. 1992), wherein a sarcastic letter and T-shirt was held to be protected:

. . . the tee shift incident . . . was intimately connected . . . with union activity.

Neither the Acting General Counsel nor Charging Party cite any precedent where sale of a 40-page, ostensible general circulation newspaper comes within the purview of the Act's mutual aid and protection clause because certain references therein related to employees' mutual aid and protection and a great proportion of which were purportedly factual reports. If a general circulation newspaper prints articles relating to the minimum wage law or to presidential vetoes favorable to working employees, does sale of that newspaper in Poletown become protected for that issue? Is it not protected for all issues?

I conclude that Respondent GM and its Pinkerton agents only had notice that Darrah was distributing in conjunction with and promotion of a solicitation of sales of issues of and subscriptions for home delivery of an apparent general circulation newspaper produced by striking newspaper workers and was not proven to be sufficiently aware of limited aspects of its content related to employees' mutual aid and protection and therefore did not violate the Act by enforcing its distribution rule against its sale and distribution. I further find that the striking newspaper employees and their unions produced and distributed a facially professional, commercial, wide circulation

news product which, as a whole, was not so intimately and objectively related to employees' mutual aid and protection that the mere selling of it constituted, *per se*, protected activity under the Act. Accordingly, I find that Darrah was not engaged in activity protected under the Act and the Respondents did not violate the Act with respect to her ejection from and loss of employment at Poletown.

I further find that the Acting General Counsel has proven that Respondent GM did maintain an overly broad no-solicitation/no-distribution rule which prohibited employees working at its Hamtrack, Michigan plant not directly employed by the Respondent from soliciting or distributing in that plant. Inasmuch as that rule can reasonably be interpreted to prohibit the protected concerted activities of those employees, i.e., protected solicitation at nonworking times or protected distributions in nonworking areas, it is on its face unlawful and violative of Section 8(a)(1) of the Act as alleged in the complaint. *MBI Acquisition Corp.*, supra. *Southern Services*, supra; *Republic Aviation Corp. v. NLRB*, supra.

CONCLUSIONS OF LAW

1. By maintaining a rule at its Hamtramck, Michigan plant, which prohibits non-GM employees from engaging in the concerted activity of solicitation protected by the Act during nonworking times and distribution protected by the Act in nonworking areas, Respondent GM violated Section 8(a)(1) of the Act.

2. In no other manner did Respondent GM violate the Act, and in no manner did Respondent Triangle violate the Act.

THE REMEDY

Having found that Respondent GM has violated Section 8(a)(1) of the Act by maintaining a facially invalid no-solicitation/no-distribution rule, I shall recommend that it be ordered to rescind or modify that rule so that non-GM employees working at its Hamtramck, Michigan plant are not prohibited from solicitation or distribution for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of the Respondent's Hamtramck, Michigan plant.

[Recommended Order omitted from publication.]