



WORKER RIGHTS CONSORTIUM

To: Primary contacts/WRC affiliate colleges and universities
From: Scott Nova, Executive Director
Date: February 21, 2002
Re: New Era document, dated February 14

As you know, on February 14, 2002, New Era mailed a document to a number of colleges and universities entitled "New Era Cap Co. Inc. Response to WRC Report." The WRC received this document on February 19. Several administrators have asked us to provide an initial assessment of this document and that assessment follows. I should note that this is a brief and preliminary assessment, based on a review of the New Era document by two members of the WRC's New Era investigative team: myself and our health and safety specialist. Our lead investigator on freedom of association issues is presently in Indonesia and will not be able to review the document until next week. Nonetheless, the following is based on a careful review, by the two individuals noted, of the arguments and information contained in the New Era submission; I hope you will find it useful.

We looked at the document with two key questions foremost in mind:

- 1) To what extent does the New Era document satisfy the requests that the WRC and universities have made to the company for substantive information about company practices with respect to freedom of association and occupational health and safety?
- 2) To what extent does the information contained in the document call into question the preliminary findings expressed in the WRC's report on New Era of August 2001?

First, it is positive that New Era has made an effort to provide some additional information to concerned colleges and universities. While the tone of the report could be more constructive (the company continues to make light of universities' concerns and to insist that the WRC's preliminary findings are "baseless allegations," even though, as New Era is aware, they are based in significant part on the findings of US government law enforcement agencies), the report itself – and indeed any substantive, ongoing communication with the company – is welcome.

FREEDOM OF ASSOCIATION

To what extent does the New Era document satisfy the informational needs outlined by the WRC and some universities with respect to freedom of association?

In this area, the New Era document contains little new, substantive information. The only documentary material supplied by the company are three letters from the National Labor Relations Board (NLRB) which New Era considers favorable to its claim to be in compliance with Code of Conduct provisions concerning freedom of association. These three documents (two of which are already in the WRC case file) simply convey previously known information – specifically, that the NLRB has declined to pursue some Unfair Labor Practice charges brought by the Communications Workers of America (CWA) against the company. The WRC has previously reported these NLRB decisions to affiliate schools (with the exception of a decision by the NLRB General Counsel, just announced, to uphold the previously reported decision of the NLRB Regional Director to decline to pursue Unfair Labor Practice charges made in mid-2001).

The only other document supplied is an outline of the new-engineered standards the company is using to determine piece-rate pay levels in the Derby plant. It is not clear from the report why this document is included. It does not speak to any substantive concern in this case.

In addition to these four documents, New Era also supplies a narrative of some events over the last several years involving disputes and negotiations between the union and the company. It is understandable that New Era's narrative emphasizes events that it believes reflect positively on the company while omitting those that reflect negatively. However, to the extent that the company seeks to address concerns raised in the WRC's August report about New Era's practices with respect to freedom of association, it would have made sense for the authors of the Feb. 14 document to discuss the major incidents and evidence of Code violations cited in the WRC's assessment. New Era's narrative does not do this. It omits any mention of, or gives short shrift to, all of following:

- The NLRB's finding of illegal anti-union activity and "intense" anti-union animus on the part of New Era's owners and managers.¹
- New Era's earlier acknowledgment that in the aftermath of the 1997 union affiliation election at the Derby plant, the company unlawfully destroyed union literature.
- New Era's decision to terminate and then, after legal challenge, reinstate a number of workers who, the CWA alleged, were illegally fired by the company for their lawful union activities.

¹ United States of America Before the National Labor Relations Board Division of Judges; Cases 3-CA-21227 and 3-CA-21274; July, 1999. The full ruling is available on the WRC website: <http://www.workersrights.org/NLRB.pdf>

- New Era's statement to city government officials in Buffalo that the company's unexpected decision to open plants in Alabama rather than expand in the Buffalo area was based on "concerns over relations with union workers" – an apparent admission of an illegal motivation for relocating production.
- Extensive testimony by Derby workers that company managers threatened to close the Derby plant and/or shift production to Alabama specifically to punish workers for their decision to affiliate with the CWA.
- Extensive testimony by Derby workers alleging numerous other specific incidents, statements and acts of intimidation (outlined in detail in the WRC report) that, if they truly occurred, would constitute proof of anti-union action and animus on the part of the company.

New Era does not acknowledge these incidents and actions and does not outline any remedial steps it has taken. Nor, conversely, does the company offer proof that the above allegations are false. It simply ignores them or makes only passing reference. Thus, with respect to much of the evidence of violations of associational rights cited by the WRC, New Era's Feb. 14 submission is silent.

New Era does refer to some alleged incidents and related legal proceedings cited in the WRC report, for example the NLRB's decision to file charges against the company for unilaterally changing the pay system in one department of the Derby plant. In this case, the authors of the Feb. 14 document question the validity of the NLRB's decision, but offer no evidence to back up this claim, other than expressing the opinion that the decision was contradictory. New Era then states that the only reason the company settled the NLRB charges was because few employees were affected and there would be no cost to the company. New Era also refers to one of the cases involving the firing or disciplining of union leaders and states that a trial was never held and that there was not a finding of anti-union animus. However, in this case, as the company notes, there was no trial because New Era chose to *settle* the union's Unfair Labor Practice charges. A company's decision to settle Unfair Labor Practice charges involving the firing of union leaders would be interpreted by most observers as at least a tacit acknowledgment of wrongdoing. New Era, oddly, seeks to offer the incident as evidence that the company is not anti-union. In this case, as in the case of the abovementioned NLRB charge, New Era's Feb. 14 narrative does not offer significant new evidence.

Indeed, virtually all of the substantive information contained in the company's narrative is already a matter of public record – having been reported, for example, in the New Era chronology posted on the WRC website in September and/or in the local press. Beyond this review of facts already generally known, the remainder of the narrative consists of assertions to the effect that New Era is not anti-union and that its actions and decisions have all been legal and justified. These assertions do not appear to constitute any significant amplification of the company's previous public statements and are not accompanied by significant supporting evidence.

New Era's most significant claim is that the Derby plant is unproductive and that this lack of productivity explains layoffs at the plant, proposed pay reductions and other adverse economic decisions by the company. However, the narrative, here and in other areas, does not contain substantive data or documentary evidence in support of this or related claims – with the exception of a small amount of summary data concerning absenteeism. In our preliminary report on New Era's Derby facility, the WRC outlined (appendix II of the report) the information that would be necessary to substantiate the company's claim that the economic decisions it has made over the last five years, which have adversely affected the Derby plant and the members of the CWA local union, were motivated solely by economic concerns, not by anti-union animus. Most importantly, we sought information documenting the company's assertion, with which the union and individual workers vehemently disagree, that the Derby facility is less productive than New Era's other U.S. plants. The February 14, 2002, New Era document contains none of the data we have been seeking and includes no other evidence that supports the company's claims concerning alleged low productivity at the Derby plant. The Feb. 14 report is also non-responsive to other specific information requests contained in the WRC report, concerning some of the alleged incidents of anti-union activity cited above.

Overall, New Era's narrative is of interest in that it is the most detailed statement available to date of management's impressions of important events, but it does not contain significant evidence that can help the WRC or affiliate universities understand the actual level of Code compliance at New Era. The February 14 document does not, in the WRC's view, satisfy to a significant degree the need for substantive information from New Era concerning the company's practices with respect to freedom of association.

To what extent does the information contained in the document call into question the preliminary findings concerning freedom of association expressed in the WRC's report on New Era of August 2001?

With respect to the NLRB documents:

As noted above, the February 14 New Era document does not contain any significant new documentary evidence bearing on the issue of freedom of association. The document does contain information, previously reviewed by the WRC, concerning decisions by the NLRB not to pursue certain Unfair Labor Practice charges brought against the company by the CWA. As we noted when informing schools of these developments, while these NLRB decisions certainly militate in the company's favor, they must be weighed against other, negative findings and/or settlements that indicate non-compliance with US law and college and university Codes of Conduct. (They also must be considered in light of the widely recognized limitations of the NLRB process, particularly in cases where a corporation's actions are facially legal and a finding of illegal behavior can only be based on an assessment of the corporation's intent.)

It is worth reviewing New Era's overall record with respect to NLRB enforcement: As we reported in December, the NLRB (the national board itself) upheld the findings of an NLRB judge that the company violated federal law by illegally interfering in the union affiliation election at the company's Buffalo plant and that New Era and its senior managers exhibited illegal and "intense" anti-union animus. In addition, in some other cases where the CWA has filed Unfair Labor Practice charges, New Era has responded by settling the cases (for example by reinstating workers whom the CWA alleged were fired illegally). In some of these cases, New Era settled prior to any issuance of complaints by the NLRB Regional Director; in others, the company settled after complaints were issued. The overall record, and especially the NLRB ruling concerning the Buffalo plant, constitutes significant, independent evidence of failure by the company to respect the right of its employees to freedom of association. In light of this record, the fact that NLRB did not pursue other Unfair Labor Practice charges does not constitute a clean bill of health, as New Era appears to argue. Even if one interprets these NLRB decisions as proof of compliance by the company in these specific instances, the fact remains that New Era is obligated to respect the law and comply with college and university Codes of Conduct all of the time, not just occasionally. Indeed, it seems disingenuous of New Era to insist that the decision of the NLRB Regional Director to decline to pursue some charges be viewed as important evidence that the company respects worker rights – while at the same time dismissing the relevance of NLRB findings and charges that were not in the company's favor. Either the NLRB is a credible finder of fact or it is not. If it is, then New Era needs, at a minimum, to address in full the implications of the NLRB ruling in the Buffalo case.

New Era's refusal to acknowledge the legitimacy of the NLRB decision in the Buffalo case is of particular concern. The company (page 5), in its only reference to the NLRB decision, describes one element of this decision as "astonishing." Otherwise, New Era makes no mention whatsoever of the NLRB decision and does not offer any evidence that the illegal practices and positions cited by the NLRB have been discontinued. To the extent that New Era is offering the February 14 document as a means to assuage the concerns raised in the WRC's August report, it is difficult to understand why the company has failed to address, save in passing, the single most significant government decision bearing on this case.

It must be noted here that an acknowledgement by New Era of the NLRB's finding of anti-union animus does not necessarily lead to the conclusion that New Era does not or cannot respect college and university Codes of Conduct. As a practical matter, neither universities nor monitoring organizations expect perfect Code compliance; everyone acknowledges significant problems can occur at any plant. What is crucial is that when violations do occur, companies acknowledge the problems and make a sincere effort to correct them. In this case, this would require, at a minimum, that New Era acknowledge the NLRB's finding in the Buffalo case and outline the steps it has taken/is taking to ensure that such violations do not occur in the future. Or, if the company truly believes the NLRB ruling is unjust, New Era should offer detailed, substantive evidence that the NLRB was wrong. The company does neither. The Feb. 14 report does not acknowledge the overall NLRB ruling at all, citing only one element of the ruling and then only for the

purpose of attacking it. Moreover, New Era does not back up its challenge to this element of the NLRB ruling with a substantive offering of evidence, but rather offers only one out-of-context excerpt from the trial transcript.

For the reasons cited above, our preliminary assessment leads us to conclude that the NLRB documents included in the New Era report (for the most part documents the WRC has already reviewed) are not cause for the WRC to alter the preliminary findings contained in our August report.

With respect to New Era's narrative of company-union relations:

There are two kinds of information that would necessitate a reconsideration of the WRC's preliminary conclusions concerning freedom of association:

1) New information, or new explanations, concerning specific alleged and/or documented instances of anti-union activity tending to demonstrate that New Era did not in fact commit the alleged infractions, was somehow justified in doing so or has remedied past violations.

2) Data and documentation proving New Era's assertion that the Derby facility is unproductive and that this lack of productivity, not anti-union animus, is behind the decisions, over several years, that adversely affected the Derby plant.

With respect to point #1: The narrative does not contain any such new information. New Era fails to mention or address in any detail a number of the instances in question. Instead, New Era mainly discusses those instances where the NLRB decided not to pursue charges against the company. As noted above, where New Era does acknowledge charges against it, New Era does not offer evidence that justifies or provides an adequate explanation for its actions.

One piece of evidence that New Era does cite (in support of its claim that it has bargained in good faith with the Derby union) is the recent vote at the Buffalo plant ratifying a contract offer similar to New Era's last offer to the Derby workers. The decision of the Buffalo workers is not, in the WRC's view, evidence of good faith or respect for associational rights on New Era's part and may in fact suggest the opposite. There are allegations, of which New Era is aware, that workers at the Buffalo plant only ratified the contract proposal (having previously rejected it), after officials of the allegedly pro-company Buffalo union told workers that 1) a decision not to ratify would automatically mean a strike, 2) in this event union leaders would immediately cross the picket line, and 3) workers would receive nothing in the way of strike benefits. Until these allegations are resolved, it is unclear whether recent events at the Buffalo plant are evidence of good faith on New Era's part or the opposite.

With respect to point #2: As noted above, the February 14 document contains assertions to the effect that the Derby plant is unproductive, but does not include any of the production data that could serve to substantiate these assertions. The WRC continues to

hope that New Era will supply this data (described in detail in Appendix II of the WRC report), either directly to the WRC or to affiliate schools.

OCCUPATIONAL SAFETY AND HEALTH

Before discussing the value of the information contained in New Era's Feb. 14 submission, there is one matter that bears mention: the inclusion in the New Era document of a series of demonstrably false statements about health and safety issues.

The Feb. 14 document's discussion of health and safety begins with the statement that the Occupational Safety and Health Administration (OSHA) does "not agree with" the WRC's finding of substantial credible evidence that New Era has not maintained a safe and healthy workplace. The discussion is followed by what New Era offers as a summary of its experience with OSHA enforcement. New Era states (page 20) that "In the last twelve years, New Era has been cited three times for OSHA violations" and that "New Era was investigated by OSHA for several days in July of 2001 [NB: the inspection actually began in June] and did not issue any violations." Elsewhere (page 9), the document states that OSHA investigated New Era's safety procedures concerning "bloodborne pathogens" and "did not issue any violations."

All of these statements are false. They raise additional, serious questions about the commitment of New Era management to a candid dialogue about Code compliance. Over the last twelve years, New Era has been cited for OSHA violations not three times but nineteen times (nine of these at the Derby plant).² There were eleven additional citations over the previous three years. OSHA's June 2001 investigation resulted not in a clean bill of health, as New Era claims, but in the issuance of citations for four violations, two of them serious. One of these violations, contrary to New Era's assertion, was for the company's failure to protect 124 workers from exposure to bloodborne pathogens.³ It is unclear why New Era would make false statements that are easily disprovable based on publicly available documents.

To what extent does the information contained in the document call into question the preliminary findings concerning occupational safety and health expressed in the WRC's report on New Era of August 2001?

The Feb. 14 document contains four sections dealing with health and safety issues:

Section B – OSHA

Section C – Ergonomics Programs

Section D – Workers Compensation

Section E – Needle Punctures

² OSHA Establishment Database (see: <http://155.103.6.10/cgi-bin/est/est1sr?est=new+era+cap&sort=D&limitd=100&limitp=2500&state=ZZ&fed=B&office=0000000&fdate=1972-07-01&tdate=2010-12-31&vio=V&str1=&str2=&xtr1=&xtr2=>)

³ OSHA Establishment database (see: <http://155.103.6.10/cgi-bin/est/est1vd?30379299803001>)

Section B contains two documents that contain new and useful information (and a number of documents from OSHA that are already part of the WRC case file and public record as well as memos from an ergonomics consultant (Martin Helander) hired at OSHA's direction after OSHA cited New Era for serious ergonomics violations affecting 500 workers in 1989/1990 – the WRC had previously obtained this document from OSHA through a Freedom of Information Act request and cited it in our August report). The first useful document is the record of a brief review of safety conditions at the Derby plant, based on a “walk-thru” by the New York State Department of Labor's OSHA Consultation Service (NYDoL). The review did not address health issues (i.e. ergonomic issues). During its walk-through, NYDoL found twelve serious safety violations, including four involving machine guarding. Missing from the copy of the NYDoL report supplied by New Era is Section E, the assessment worksheet, in which DoL provides numerical ratings of a company's performance.

The second useful document, dated August 17, 2001 (one week after the release of the WRC report) is a statement to employees in the embroidery department announcing a new policy to protect against puncture wounds resulting from uncommanded activation of embroidery machines (“embroidery key lock policy”). The WRC report noted serious concerns about the lack of such protection and the implementation of this policy is a positive step for which the company should be commended.

Assessment: As noted above, Section B contains a series of false statements and is essentially an argument, without evidence, that New Era has demonstrated a high level of compliance with OSHA regulations and college and university Codes of Conduct. The statements in this section are of no value and do not provide any explanation or justification for the company's documented history of health and safety problems. However, as noted above, two useful documents are included in the exhibits portions of this section, which do help provide a fuller picture of New Era's safety policies and practices.

Section C contains two documents: 1) A statement by a paid New Era consultant that is, in essence, an endorsement of the company's approach to ergonomics, with some review of activities over the last ten years, and 2) A report from an ergonomics consultant including recommendations for measures to reduce repetitive-stress injuries in the Taping Department of the Derby plant. New Era offers no documentation that these recommendations were implemented, in this or any other department.

Section C also includes a series of statements by New Era, some of which include reference to specific actions the company claims to have taken to address ergonomic problems.

Assessment: Coupled with the Martin Helander report, the consultant's report on the Derby Taping Department provides useful information on New Era's approach to ergonomics (the Helander report was referenced in the WRC's August report as evidence that New Era had taken some steps with respect to ergonomics after being cited by OSHA for violations in 1990). In addition, the statements by the report's authors in

Section C contain some additional information about specific ergonomics practices employed at one time or another in the plant. However, the WRC has sought from New Era a far more detailed and comprehensive accounting of the company's ergonomics programs, past and present, as well as information on the history of musculo-skeletal disorders (MSDs) at Derby and at New Era's other production facilities and on the company's response to, and management of, such injuries. The information sought is outlined in detail in Appendix II of the WRC's August report. Neither in Section C nor in any other part of the Feb. 14 document does the company provide a comprehensive outline of its ergonomics programs, past or present, or provide data on, or explanation of, the incidence of MSDs among its workforce. Indeed, the Feb. 14 document ignores altogether the most significant preliminary finding with respect to workplace health in the WRC August report – the disturbingly high rate of MSDs and MSD-related surgeries at the Derby plant, as reflected in New Era's OSHA 200 Logs and in the WRC's comprehensive injury survey, conducted in July of 2001. Nor does New Era address the specific concerns raised in the WRC report, based substantially on worker testimony, about apparent major inadequacies and flaws in the company's ergonomics practices prior to 1999. Overall, with respect to the central issue of ergonomics, the Feb. 14 report does not provide sufficient information to allow a full analysis of the New Era's policies, practices and performance.

Section D: This section contains rhetorical statements to the effect that no "reasonable person" could share the WRC's concerns about New Era's practices with respect to the compensation of injured workers. These statements do not contain any substantive information. The section also contains a number of documents, including an undated document that is apparently New Era's policy with respect to the handling of reported injuries, various statements of policies and employer obligations from New Era's workers compensation claims administrator, and background on the company's transitional work program.

Assessment: These documents are of only limited use in evaluating New Era's actual workers' compensation practices. The company's legal obligations are well understood; the question is whether these obligations have been fulfilled, in light of the claim of some workers to the contrary. In order to answer this question, the WRC asked New Era for information on the claims actually filed. New Era has not provided this information. The outline of the company's policies is helpful, but absent information on the claims themselves, it is impossible to determine whether New Era has followed its stated policies.

Section E: This section contains some statistics concerning cut, puncture and laceration injuries (presumably at the Derby plant, though the report does not specify). The number of injuries cited is actually higher than the number cited in the WRC report. New Era offers the assertion that the injury rate implied by these statistics is "consistent with or below comparable sewing industries according to BLS statistics." The document cites no actual BLS statistic and does not offer any other data to substantiate this claim. The section also contains an outline of what New Era says is its bloodborne pathogen program.

Assessment: The data on the cut and puncture injury rate is itself helpful, but as noted, New Era fails to substantiate its claim that this is a normal or low rate. The outline of bloodborne pathogen procedures is useful, and partly responsive to the WRC's information request. However, the company does not explain when the program was implemented, who is responsible for ensuring that it is used in practice, and the level of detail supplied about the program is inadequate for proper evaluation.

To what extent does the information contained in the document call into question the preliminary findings concerning workplace safety and health expressed in the WRC's report on New Era of August 2001?

The WRC's main preliminary findings concerning workplace safety and health were as follows:

We found substantial, credible evidence that:

1. There has been an extraordinarily high rate of MSD injuries at the Derby plant
2. There has been an extraordinarily high rate of cut and puncture injuries at the Derby plant
3. New Era did not have in place an adequate program to prevent MSD injuries before 1999
4. New Era did not have in place, at the time of the WRC report, an adequate program to protect workers from exposure to bloodborne pathogens
5. New Era was failing to timely compensate some injured workers as required by law

With respect to finding #1: New Era's Feb. 14 submission offers no data or other evidence to contradict this finding.

With respect to finding #2: New Era offers data that suggests a higher injury rate than that identified by the WRC. New Era claims that this rate is actually normal or low, but does not offer any data to substantiate this claim. Therefore, there is no basis for questioning the WRC's conclusion, based on BLS data cited in the August report, that the rate for this type of injury at the Derby plant is extraordinarily high. However, New Era's new key lock policy for the Embroidery Department, assuming it is fully implemented, should serve to reduce the number of puncture injuries and is a positive step by the company that will impact the WRC's findings concerning the company's safety practices and policies.

With respect to finding #3: New Era has supplied some additional documentation and information concerning ergonomics-related activities prior to 1999. However, a number of the actions cited are not elements of a legitimate ergonomics program. For example, the main emphasis of the action plan recommended to New Era for the Taping Department in 1993 appears to have been an exercise program. This is not a recognized

ergonomics program – and, according to worker testimony, was discontinued after a brief duration. New Era also refers (1994) to a doctor who offered workers chiropractic treatment; this is also not an ergonomics program. In other cases, the information supplied by New Era is simply not relevant to ergonomic issues – for example, a structural engineering review that found the floors in the embroidery department to be adequately stable. In other cases, the information is incomplete: New Era says it purchased new peak stitching equipment to reduce repetitive stress, but does not say in which plant(s) the machines were installed or provide any information on the impact of their installation on worker injuries. Overall, the new information supplied concerning pre-1999 ergonomics policies, when weighed against OSHA findings, worker testimony, and other data, does not constitute a basis for altering the WRC’s preliminary finding that New Era did not have an adequate ergonomics program in place prior to 1999.

As noted in the WRC’s August report, New Era appears to have improved its ergonomics performance substantially beginning in 1999, but the new information supplied in the Feb. 14 document falls short of providing a full picture of those programs now in place. New Era also cites as evidence of adequate programs that OSHA did not cite the company for ergonomics violations pursuant to its 2001 investigation. However, it is the WRC’s understanding that OSHA was unable to complete this portion of its investigation due to the work stoppage at the Derby plant. Therefore, the absence of a citation in this area cannot be taken as evidence of compliance by New Era.

With respect to finding #4: New Era’s claim that it was not cited for an OSHA violation in 2001 on bloodborne pathogen exposure is false; the company was cited. There is nothing in the Feb. 14 document that calls into question the WRC’s finding that New Era did not have an adequate protection program in place at the time of the WRC report. The brief outline of a protection program contained in the Feb. 14 report, and New Era’s pledge to abate the violations cited by OSHA, suggest that the company may have resolved, or may be in the process of resolving, this problem. Follow-up research will be required to make a determination.

With respect to finding #5: While it is useful to have an outline of New Era’s workers compensation policies, the information and rhetorical statements supplied are not sufficient to warrant a re-evaluation of the WRC’s preliminary finding that some workers have been denied timely compensation.

One additional note: New Era claims that “the [CWA] union apparently does not have any outstanding issues regarding plant safety or working conditionCWA informs us that this statement is not correct and that the union has deep concerns about New Era’s health and safety practices.

In summary, New Era has supplied some new and useful information on health and safety issues that partially, but by no means fully, satisfies the need for additional data and documentation identified by the WRC and some universities. Some of this data indicates positive steps by the company to correct health and safety problems (for example, the key lock policy for the embroidery department). Overall, however, the information supplied

is not sufficient, is in some cases knowingly false, and does not reflect a willingness on the part of the company to address the concerns that the WRC and affiliate schools have raised. With the limited exceptions noted above, the Feb. 14 report does not constitute a basis for the re-evaluation of the WRC's preliminary findings in the area of health and safety.