Merrill & Ring, Inc. *and* **International Woodworkers of America Local Union No. 3-90, affiliated with International Woodworkers of America, AFL-CIO, CLC.** Case 19-CA-12762

June 23, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On October 27, 1981, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party, hereafter the Union, filed exceptions and supporting briefs, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel and the Union have excepted to the Administrative Law Judge's dismissal of the complaint allegations that Respondent violated Section 8(a)(5) and (1) of the Act on August 27, 1980,[3] by unilaterally instituting a policy of having day-shift employes report for work before jury duty without affording the Union a reasonable opportunity to bargain. We find merit to these exceptions.[4]

As set forth more fully in the Administrative Law Judge's Decision, the Union has represented approximately 250 production and maintenance employees at Respondent's Port Angeles, Washington, facility since 1955. Respondent and the Union have been party to a number of collective-bargaining agreements, and they have had a generally amicable relationship. In the last two collective-bargaining agreements (the current collective-bargaining agreement effective from June 1, 1980, through May 30, 1983, and the collective-bargaining agreement covering the preceding 3 years), the clause dealing with jury duty has remained unchanged and reads as follows:

ARTICLE XX

JURY DUTY

A. Any regular employee who is required to perform jury duty, including Grand Jury duty, will be entitled to reimbursement at the straight time hourly rate of his regular job, including shift differential if assigned to swing or graveyard shift for the hours necessarily lost as a result of serving on the jury; provided, however that such reimbursement shall not exceed eight (8) hours per day or forty (40) hours per week, less pay received for jury duty. The employee will be required to furnish a signed statement from a responsible officer of the court as proof of jury service and jury duty pay received.

B. Day shift mill employees will be required to report for work if their jury service ends on any day in time to permit at least four (4) hours work in the balance of their regular shift. Other shift employees will not be required to report for work on any day they have performed jury service for more than one-half day. Woods crew employees will receive jury pay for any day served in whole or in part.

C. Hours paid for jury duty will be counted as hours worked for the purpose of computing vacation pay, health and welfare and pension contributions and overtime.

D. The above provisions apply to employees on days they are required to report for jury duty, even though not selected to serve as jury members.

There are two courts in Port Angeles, the county superior court and the more recently created county district court. Neither court required

[1] At one point during the hearing, the Administrative Law Judge asked Don Taylor, the Union's financial secretary-business agent, a series of questions. When the Administrative Law Judge asked Taylor what he had told the Union's attorney about the unfair labor practice charge, the Union's attorney objected claiming that the Administrative Law Judge's question breached the attorney-client privilege. The Administrative Law Judge overruled the objections stating that the attorney-client privilege did not apply "at this point" and that if counsel persisted in her objection he would draw an adverse inference.

We find merit to the Union's exception that in overruling its objection the Administrative Law Judge abused his judicial authority and abrogated a clear application of the attorney-client privilege. In view of our resolution of the case, however, the error was not prejudicial.

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

[3] Unless otherwise indicated, all dates refer to 1980.

[4] In finding merit to these exceptions, we find it unnecessary to consider the General Counsel's and Union's alternative theory that Respondent further violated Sec. 8(a)(5) and (1) of the Act because its requirement that day-shift employees report to work prior to reporting for jury duty was a unilateral modification of the parties' collective-bargaining agreement. Since our Order restores the *status quo ante*, we find that the purpose of the Act will be better served by permitting the parties themselves to determine the meaning of their contract. Accordingly, we have expressly refused to consider or pass upon an interpretation of the parties' collective-bargaining agreement.

subpoenaed individuals to report for jury duty each day. Instead, the courts utilized an "on call" status, which requires the individual to report for service on specified days. The reporting time for superior court jurors is normally 9:15 a.m., and the reporting time for district court jurors is normally 10:15 a.m. Until July 1980, none of Respondent's employees had ever received a subpoena for jury duty from the district court. However, first-shift employees have been subpoenaed for jury duty at superior courts where they were expected at 9:15 a.m.

Due to the nature of their work, Respondent's production and maintenance employees soil their clothing. Since the first shift works from 7 a.m. to 3:30 p.m.,[5] it would be necessary for a subpoenaed employee to go home and change clothing prior to reporting for jury duty. Accordingly, Respondent has never required its first-shift employees to report to work prior to reporting for jury duty.

In July 1980, first-shift employees Rondeau and Blore received subpoenas from the district court requiring them to serve as jurors during the upcoming session of that court. On August 7, Rondeau and Blore reported for jury duty as instructed at 10:15 a.m., and they were excused at approximately 11:30 a.m. In accordance with past practice, neither employee worked prior to reporting for jury duty, and pursuant to article XX(B) neither employee reported for work following jury duty. When Respondent discovered that the two first-shift employees had served a little more than 1 hour of jury duty but were paid for a full 8 hours, it sent the Union a letter on August 13, requesting that article XX(B) of the contract be modified. Respondent noted that the language of article XX(B) had been written when the first shift worked an 8 a.m. to 4:30 p.m. schedule and that the change to a 7 a.m. to 3:30 p.m. schedule justified modifying paragraph (B) of article XX. Respondent requested that paragraph (B) be revised to read: "Day Shift Mill employees will be required to report for work if their jury service ends on any day in time to permit at least two (2) hours work on the balance of their regular shift."

Upon receipt of the letter, the Union phoned Respondent Administrative Manager Remedios and discussed Respondent's proposed contract change. Respondent, however, did not mention changing its past practice of not requiring first-shift employees to report for work prior to reporting for jury duty, and the parties did not discuss this issue. Thereafter, on August 15, the Union responded by letter to Respondent and indicated that the short duration of jury duty on August 7 was a fluke and was unlikely to happen again. In addition, the Union indicated that it would not agree to Respondent's proposed midterm modification of the contract. At no point did either of the parties mention the possibility of Respondent changing its past practice of not requiring first-shift employees to report for work prior to reporting for jury service.

As found by the Administrative Law Judge, however, sometime between August 15 and 27, Respondent unilaterally changed its past practice and decided that first-shift employees who were subpoenaed for jury duty would be expected to work for a reasonable period of time before reporting for jury duty, provided that this would allow them sufficient time to return home from work to clean up before going to court. Shortly before August 27, Remedios spoke with Rondeau and Blore, in the presence of a union steward, about the feasibility of them working before reporting to jury duty. After determining to his own satisfaction that they could report for work and still have time to clean up before reporting for jury duty, Remedios informed Rondeau and Blore that effective immediately they would be expected to work from 7 to 9 a.m. on days that they were not expected to report for jury duty until 10:15 a.m. As found by the Administrative Law Judge, Respondent did not discuss its new jury duty policy with the Union prior to implementing it.[6]

August 27, and on a number of occasions in September, Rondeau and Blore reported to the district court for jury duty at 10:15 a.m. Pursuant to Respondent's instructions, they worked from 7 to 9 a.m., prior to reporting for jury duty. On August 27, Rondeau and Blore filed grievances with the Union contending that Respondent had abrogated the collective-bargaining agreement by changing its past practice and requiring them to work prior to jury duty.[7] On September 3, Respondent and the Union discussed the grievance but were unable to reach accord. The Union contended that Respondent's actions were prohibited by the collective-bargaining agreement, and Respondent contended that the contract did not restrict the imposition of its new policy. The Union informed Respondent that, if it did not retract its unilaterally imposed jury duty policy, the Union would file unfair labor

[5] In May 1978, Respondent changed its work schedule for first-shift employees from 8 a.m. to 4:30 p.m. to 7 a.m. to 3:30 p.m.

[6] We agree with the Administrative Law Judge that Remedios' casual mention to the union shop committee on August 12 that Respondent might have problems with individuals not reporting to work prior to jury duty does not bear the indicia of definiteness, clarity, and specificity sufficient to support a finding of notice to the Union. See cases cited in fn. 9 of the Administrative Law Judge's Decision.

[7] The collective-bargaining agreement contains a grievance procedure which does not end in binding arbitration. Instead, its permits the Union to take economic actions if the parties are unable to settle the grievance.

practice charges with the Board. In response, Respondent indicated that the matter would be turned over to its attorney and the Union would be notified the next day about management's decision. On the next day, Respondent informed the Union that there would be no change in its position.

On September 9, after consulting with its attorney, the Union filed an unfair labor practice charge alleging that Respondent's unilateral change requiring employees to work before jury duty violated Section 8(a)(5) and (1) of the Act. Subsequently, at a grievance meeting on September 16, Respondent informed the Union that it objected to the filing of the charge by the Union and that it would like to handle the matter through the grievance process. The Union responded that it did not intend to withdraw the charge and that, since the matter had been referred to the Board, it was not inclined to discuss the issue any further.

Section 8(d) of the Act requires that the parties bargain "in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." As noted by the Supreme Court:

> A refusal to negotiate *in fact* as to any subject which is within § 8(d) and which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.[8]

Since jury duty rights are mandatory subjects of bargaining and comprise terms and conditions of employment covered by Section 8(d) of the Act,[9] Respondent's "refusal to negotiate *in fact*" regarding changes in its jury duty policy constitutes a clear violation of Section 8(a)(5) of the Act. The Administrative Law Judge, however, found that Respondent's unilateral conduct did not violate Section 8(a)(5) and (1) of the Act because the parties have an amicable collective-bargaining relationship, Respondent was not trying to undermine the Union, Respondent was not motivated by union animus, and the unilateral change was in fact based on economic considerations. Although these factors may have a bearing on Respondent's motivation and would be relevant in a bad-faith bargaining context, they are irrelevant to the determination in the instant case as to whether Respondent acted unilaterally in modifying the employees' terms and conditions of employment without affording the Union an opportunity to bargain about such changes. As pointed out by the Surpreme Court:

> The duty "to bargain collectively" enjoined by § 8(a)(5) is defined by § 8(d) as the duty "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party had refused even to negotiate *in fact*—"to meet . . . and confer"—about any of the mandatory subjects.[10]

The Administrative Law Judge also based his dismissal of the complaint allegations on the finding that the Union's bargaining position as expressed in its September 3 and 16 meetings with Respondent indicated that it would have been futile for Respondent to have given the Union an opportunity to bargain before it acted unilaterally. The Administrative Law Judge further found that there was no evidence that Respondent's unilateral conduct was irreversible, nor that the unilateral conduct had a substantial impact on unit employees. Finally, he concluded that it was the Union on September 3 and 16 that had refused to bargain. We disagree.

Good-faith bargaining requires that the parties meet and negotiate *prior* to any modification of working conditions. In the instant case, Respondent's unilateral change, on August 27, of its employees' working conditions presented the Union with a *fait accompli*, rather than a good-faith invitation to begin collective-bargaining negotiations. When the parties met on September 3 to discuss the Union's grievance, Respondent refused to restore the *status quo ante* and on September 4 Respondent reiterated that there would be no change in its position. Similarly, at the meeting on September 16, Respondent indicated that it had no intention of retracting its unlawfully imposed change in working conditions. Instead of unequivocably informing the Union that it would cease its unfair labor practices, restore the *status quo ante*, and enter into good-faith bargaining on changes in the jury duty policy, Respondent on September 16 indicated that it was unhappy that the Union had filed unfair labor practice charges and that it preferred to treat the dispute as a grievance. We fail to see how such conduct evidenced a stated intent to bargain in good faith. On the contrary, we find that it was Respondent's refusal to cease its unlawful unilateral conduct and restore the *status quo ante* that indicated bargaining would be futile, not the Union's insistence that Respondent cease its unlawful conduct.

[8] *N.L.R.B.* v. *Benne Katz, etc. d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743 (1962).

[9] *Newspaper Printing Corporation*, 232 NLRB 291 (1977).

[10] *N.L.R.B.* v. *Katz, supra* at 742-743.

We further find that Respondent's refusal to cease its unlawful conduct provided evidence that its unilateral change in working conditions was irrevocable.[11] Finally, we disagree with the Administrative Law Judge's finding that the impact of Respondent's unfair labor practices was not material, substantial, or significant. As we have stated elsewhere:

> Respondent's unilateral changes in working conditions without consultation with the bargaining agent are violations which strike at the heart of the Union's ability to effectively represent the unit employees. There is no clearer or more effective way to erode the ability of the Union to bargain for the employees than for Respondent to make such changes without consultation with the Union.[12]

Accordingly, we find that Respondent's unilateral change in its employees' jury duty rights, a mandatory subject of bargaining, was not immaterial, insubstantial, or insignificant[13] and that Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Thus, we shall order Respondent to restore the *status quo ante* by rescinding its unlawful unilaterally imposed requirement that certain first-shift employees must work a reasonable period of time before reporting for jury duty. We shall further order that Respondent bargain in good faith with the Union before making any change with respect to employee wages, hours, and other terms and conditions of employment.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Merrill & Ring, Inc., Port Angeles, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning its past practice of not requiring first-shift employees to work prior to reporting for jury duty.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Rescind its unlawful unilaterally imposed requirement that certain first-shift employees must report for work before reporting for jury duty and bargain in good faith with the Union before making any change with respect to employee wages, hours, and other terms and conditions of employment.

(b) Post at its Port Angeles facility copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

[11] Respondent's statement that it preferred to treat the dispute as a grievance rather than as an unfair labor practice hardly qualifies as an unequivocable statement that it would cease its unfair labor practices or that its unlawful change in working conditions was not irrevocable.

[12] *The Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967), enfd. 414 F.2d 1084 (8th Cir. 1969).

[13] Compare *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), where an employer's unilateral replacement of a manual attendance recording system with a mechanical timeclock system was found to be an immaterial, insubstantial, and insignificant change from prior practice.

[14] In the event that 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 National Labor Relations Board."

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively concerning our past practice of not requiring certain first-shift employees to work prior to reporting for jury duty.

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

WE WILL rescind our unlawful unilaterally imposed requirement that first-shift employees must report for work before reporting for jury duty.

WE WILL bargain in good faith with the Union before making any change with respect to employee wages, hours, and other terms and conditions of employment.

MERRILL & RING, INC.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case held on May 20, 1981, is based on an unfair labor practice charge filed by International Woodworkers of America Local Union No. 3-90, affiliated with International Woodworkers of America, AFL-CIO, CLC, herein called the Union, on September 9, 1980, and a complaint issued on October 22, 1980, amended at the hearing herein, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 19, alleging that Merrill & Ring, Inc., herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, herein called the Act. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it instituted a rule requiring day-shift employees who perform jury duty to work 2 hours before reporting for jury duty because said rule modified article XX of the Union's contract with Respondent without the consent of the Union. In the alternative the complaint as amended alleges Respondent violated Section 8(a)(5) and (1) because it instituted the rule unilaterally without affording the Union a reasonable oportunity to bargain. Respondent filed an answer, amended at the hearing, denying the commission of the alleged unfair labor practices.[1]

Upon the entire record,[2] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Respondent operates a facility in Port Angeles, Washington, where it manufactures timber products. It is a member of the Timber Operator's Council, Inc., herein called TOC, an association of employers in the wood products industry, which negotiates collective-bargaining agreements on its members' behalf with the Union. These contracts are negotiated in the manner which collective-bargaining agreements are usually negotiated in the Pacific Northwest's Wood Products Industry: The so-called "broad issues" such as wages and fringe benefits are first negotiated between the Union's parent organization, the Western States Regional Council No. III, herein called the Regional Council, and the large lumber manufacturers. These agreements are used as patterns for negotiations between the several local unions affiliated with the Regional Council and the smaller lumber manufacturing companies, including those smaller companies such as Respondent who designate the TOC as their representative for purposes of collective bargaining. In addition, certain "local issues" which are unique to the several employers are separately negotiated between the local unions and the individual employers.

The Union has represented Respondent's production and maintenance employees since approximately 1955. The current contract between Respondent and the Union is effective from June 1, 1980, through May 30, 1983. The predecessor contract was effective from June 1, 1977, through May 30, 1980. Each of these contracts contains an identical clause, article XX, dealing with jury duty, which reads as follows:

ARTICLE XX

JURY DUTY

A. Any regular employee who is required to perform jury duty, including Grand Jury duty, will be entitled to reimbursement at the straight time hourly rate of his regular job, including shift differential if assigned to swing or graveyard shift for the hours necessarily lost as a result of serving on the jury; provided, however that such reimbursement shall not exceed eight (8) hours per day or forty (40) hours per week, less pay received for jury duty. The employee will be required to furnish a signed statement from a responsible officer of the court as proof of jury service and jury duty pay received.

B. Day shift mill employees will be required to report for work if their jury service ends on any

[1] Respondent admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and that Respondent meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

[2] The Charging Party's motion to correct transcript is granted.

day in time so permit at least four (4) hours work in the balance of their regular shift. Other shift employees will not be required to report for work on any day they have performed jury service for more than one-half day. Wood crew employees will receive jury pay for any day served in whole or in part.

C. Hours paid for jury duty will be counted as hours worked for the purpose of computing vacation pay, health and welfare and pension contributions and overtime.

D. The above provisions apply to employees on days they are required to report for jury duty, even though not selected to serve as jury members.

The aforesaid jury duty clause is standard throughout the Pacific Northwest Timber Products Industry and is apparently one of the so-called "broad issue" clauses which Respondent and the Union have incorporated into their collective-bargaining contract as the result of the bargaining between the larger employers in the industry and the Union's parent organization. The sole evidence in the record pertaining to the negotiation of this provision is that when the Union in 1980 notified Respondent of its intent to reopen the 1977-80 contract for revision and amendment, the Union set out 25 proposed revisions and amendments, 1 of which included the jury duty provision. This proposed amendment, as proposed by the Union in its reopening letter to Respondent, read as follows: "Jury Duty—To include in all contracts; eliminate exceptions; broaden article . . . ." No evidence was introduced about what, if anything, was said about this proposal during contract negotiations. As noted *supra*, the Union and Respondent in entering into their current contract carried over the identical jury duty provision from the preceding contract.

There are two courts in Port Angeles, Washington, where Respondent's place of business is located. The county superior court and the more recently created county district court. The State of Washington does not require that persons subpoenaed for jury duty report each date for possible service, but instead places those subpoenaed "on call" to report on specific days during the court's term. The reporting time for the superior court's jurors is normally 9:15 a.m. whereas the district court does not require jurors to report until 10:15 a.m. and sometimes later.

Since May 8, 1978, the work schedule for Respondent's day shift has been 7 a.m. to 3:30 p.m. Prior to the events of August 1980 Respondent's day-shift employees subpoenaed for jury duty were apparently subpoenaed for superior court juries and were normally expected to report to the court at 9:15 a.m. Respondent had never required them to report for work before jury duty.

In July 1980[3] day-shift employees Charles Rondeau and Jim Blore received subpoenas from the district court to serve as jurors during the upcoming 3-month session of that court. Rondeau reported for jury duty on July 10 at 1:15 p.m. He worked from 7 to 11 that morning, not because anyone from management told him he was supposed to work a 4-hour shift in the morning if he were not scheduled to report for jury duty until the afternoon. On July 24 both Rondeau and Blore reported for jury duty at approximately 9:15 a.m. and were both excused approximately a half hour later. Neither of them worked that day prior to reporting for jury duty, but reported to work after they were excused and worked for the remainder of the shift. On August 7 both Rondeau and Blore reported for jury duty at approximately 10:15 a.m. and were excused at approximately 11:30 a.m. Neither one worked that day either prior to the start of or following their jury duty.

As I have indicated, *supra*, prior to August 7 employees subpoenaed for jury service were usually expected by the court to report for jury service no later than 9:15 a.m. Respondent's administrative manager, Edward Remedios, testified that during this period Respondent did not require these employees to report for work on the day shift prior to going to court because Respondent did not feel this would give the employees, whose shift began at 7 a.m., sufficient time to return home and clean up so as to arrive at court by 9:15 a.m. But when Respondent in August 1980 learned that Rondeau and Blore, as well as other employees who would be subpoenaed as jurors by the district court, would not normally be expected to be at court until 10:15 a.m., Remedios testified, Respondent changed its policy and decided that day-shift employees who were subpoenaed for jury duty would be expected to report for work and work for a reasonable period of time before going to court, provided this would allow them sufficient time to return home from work to clean up before going to court.[4] As described *infra*, this policy was implemented for the first time sometime between August 15 and 27 when Remedios informed employees Rondeau and Blore that they would be expected to work from 7 to 9 a.m. on the days they were not expected to report for jury duty until 10:15 a.m.

On August 12 at a regular meeting of the Company's representatives and the Union's shop committee, the Company's administrative manager, Remedios, mentioned to the Union's shop committee that the Company "may have a problem with individuals not coming in to work prior to jury duty, and not reporting for work after jury duty." The Union's chief steward indicated he would bring up this subject at the next general membership meeting. It is plain that Remedios, at this meeting, only casually mentioned the subject of jury duty, as described above, inasmuch as nothing else was said about it. As a matter of fact, Remedios' prehearing affidavit which was submitted to the Board in this case, failed to include the above-described August 12 statement because, in the light of the casual nature of the statement, Remedios had apparently forgotten about it.[5]

[3] All dates hereinafter, unless otherwise specified, will refer to the year 1980.

[4] The record establishes that Respondent's employees dirty their clothes due to the nature of their work, thus it is necessary for them to go home and change clothes prior to going to court.

[5] In the affidavit he submitted to the Board Remedios stated "[w]e did not discuss this requirement [referring the requirement of day-shift employees working prior to jury duty] with the Union before we told the employee to come to work at 7 a.m." Remedios testified that the reason he failed to mention his August 12 statement was he had forgotten about it.

On August 13 Remedios sent the following letter to Union Representative Taylor:

> A situation has arisen whereby we feel justified in requesting a revision of Article XX of our current contract.
>
> Paragraph B states that "mill employees will be required to report to work if their jury service ends on any day in time to permit at least four (4) hours work in the balance of the regular shift." My understanding is that this language was written when the plant was on an 8:00 A.M. to 4:30 P.M. schedule.
>
> Since our day shift runs from 7:00 A.M. to 3:30 P.M. the following has occurred. Two individuals at the Planing Mill are presently on Jury Duty. On August 7th, both reported for duty at 10:15 A.M. and were subsequently dismissed at 11:25 A.M. Under the terms of our contract neither individual was required to return to work. Therefore, the company was required to pay both individuals for a full eight (8) hours for doing nothing more than serving on Jury Duty for one hour and ten minutes (see attached). Further, the company incurs additional costs minutes (see attached). Further, the company incurs additional costs by having to replace employees on Jury Duty.
>
> We request that Paragraph B be revised to read: "Day Shift mill ends on any day in time to permit at least two (2) hours work on the balance of their regular shift."
>
> Please let me know if you have any questions.

Upon receipt of the letter, Taylor phoned Remedios and discussed Remedios' proposal that day-shift employees be required to report for work if their jury service ended in time to permit them to work at least 2 hours. There was no mention by Remedios during this conversation about day-shift employees reporting for work prior to reporting for jury service. Thereafter, on August 15 Taylor sent Remedios the following letter:

> In regard to your letter on the subject of Jury Duty, Article XX of our contract, I did bring this up to the membership of M & R on their August 14th sub-local meeting.
>
> It is their thinking that what has taken place with two employees now on Jury duty will never happen again and feel it would not be wise to penalize the balance of the employees for this fluke situation.
>
> As I stated to you in person, this has never happened to any operations of this Local, to the best of my knowledge, and they also have early starting times.
>
> Therefore, I was told by the membership to respond to you in letter form that they did not wish to discuss any change at this time.

Sometime between August 15 and 27, employee Blore heard a rumor that on the days he and Rondeau were scheduled to report for jury duty Respondent intended to require them to come to work before they went to the courthouse. Blore immediately informed Union Representative Taylor about the rumor. Taylor told Blore that such a requirement would be a "direct violation of the contract," but that Blore and Rondeau should obey such an instruction, if given, and file a contractual grievance against Respondent.

Shortly before August 27, Remedios, in the presence of a union steward, met with employees Blore and Rondeau. He told them that Respondent's collective-bargaining contract with the Union did not say employees did not have to report to work before jury duty. After questioning Blore and Rondeau to determine whether it was feasible for them to come to work before their jury duty and work a reasonable period of time before reporting to the court, Remedios told them that effective immediately they would be required to work from 7 to 9 a.m. on the days they were scheduled to report for jury duty. Blore stated he had been informed by the Union that this was a violation of the collective-bargaining agreement.

On August 27 Rondeau and Blore reported to the court for jury duty at or about 10:15 a.m., but, pursuant to Remedios' instruction, worked from 7 to 9 a.m. before reporting for jury duty. In September, on three occasions, Rondeau reported for jury duty at approximately 10:15 a.m., he was required to work on each of these occasions from 7 to 9 a.m. and once, when he did not report for jury duty until 1:15 p.m., worked from 7 to 11 a.m. Likewise, Blore, in September twice reported for jury duty at approximately 10:15 a.m. and on each of these occasions was required to work from 7 to 9 a.m. prior to reporting for jury duty.

On August 27 Rondeau and Blore filed grievances with the Union against Respondent pursuant to the contractual grievance procedure[6] alleging in substance that by requiring them to work prior to jury duty Respondent was violating the jury duty provision of the collective-bargaining agreements.

On September 3 the grievances of Rondeau and Blore were discussed by representatives of Respondent and the Union. Respondent's rpresentatives stated that there was no language in the jury duty provision of the collective-bargaining contract which stated that employees did not have to report to work before reporting for jury duty, that as long as employees had sufficient time to prepare themselves for jury duty and get to court on time that the employees should report to work prior to reporting for jury duty, and that 1 hour and 15 minutes was sufficient time for Rondeau and Blore to get cleaned up and transport themselves to court. The Union's representatives stated that the jury duty provision contained in the contract prohibited Respondent from requiring the employees to report for work prior to reporting for jury duty, that Respondent's action in this respect was unilateral conduct in violation of the contract, and that if the Company did not reverse its position the Union would file unfair labor practice charges with the NLRB. Respondent's representatives informed the Union's representatives that since the parties disagreed about the interpretation of the jury duty provision of the contract that

[6] The parties' collective-bargaining contract contains a grievance procedure which does not end in binding impartial arbitration, but instead provides that if the parties deadlock over a greivance the Union has a right to take economic action, including a work stoppage or strike.

the matter would be turned over to Respondent's lawyer and the Union would be notified the next day about management's decision.

The next day, September 4, Production Manager Gil Oldenkamp informed Union Representative Taylor that "the Company remains firm on their stand. There is to be no change." Union Representative Taylor reacted by consulting the Union's attorney about the matter and, on September 9, the Union, through its attorney, filed the charge herein alleging that Respondent in violation of the Act "has unilaterally modified Article XX of its collective-bargaining agreement with the [Union]."

On September 16 at a grievance meeting between representatives of Respondent and Union, Company President Dale Woodside objected to the Union having filed an unfair labor practice charge against Respondent for having instituted the policy of day-shift employees on jury duty working prior to reporting for jury duty. Woodside told the union representatives that the Company would like to continue to treat this matter as a grievance under the contractual grievance procedure inasmuch as it involved an interpretation of the parties' contract. Union Representative Taylor acknowledged that the Union had referred the matter to the NLRB by filing an unfair labor practice charge. He stated that the Union did not intend to withdraw that charge and advised Woodside that since the grievance had been referred to the NLRB union was not inclined to discuss it any further with Respondent. Woodside replied that he felt that the Union's grievance should be handled locally through the grievance machinery and that by refusing to do so the Union was not bargaining in good faith.[7]

B. *Discussion and Analysis*

The law is settled that an employer acts in derogation of its bargaining obligation under Section 8(d) of the Act, and thereby violates Section 8(a)(5) and (1) of the Act, when, during the effective period of a contract and without the content of the Union which represents employees, it modifies contractually determined benefits or other employment conditions which are mandatory subjects of bargaining. *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157, 183–188 (1971); *N.L.R.B.* v. *C & C Plywood Corporation, 385 U.S. 421, 425 (1967).*

Article XX of the governing collective-bargaining contract provides in pertinent part that employees shall be reimbursed by the Company for the hours of work lost as a result of having to report for jury duty even though they were not selected for jury duty and further states that "day shift mill employees will be required to report for work if their jury service ends on any day in time to permit at least four (4) hours work in the balance of their regular shift." The General Counsel and the Charging Party argue that, when Respondent, in August 1980, changed its policy and decided that day-shift employees subpoenaed for jury before going to court, this constituted a modification of the aforesaid contractual jury duty provision.[8] In support of this contention they rely on the terms of the contractual jury duty provision and Respondent's past practice. I am not persuaded by these arguments.

Article XX, the jury duty provision, is silent about the obligation of day-shift employees to report for work prior to their having to report for jury duty, if there is sufficient time to permit them to work. Article XX only addresses the subject of the employees' obligation to report for work after having been excused from jury duty before the end of the workday. This circumstance, plus the fact that the purpose of article XX as set forth by its terms is to compensate employees for the hours of work lost due to having been subpoenaed for jury duty, persuades me that article XX, on its face, does not preclude Respondent from requiring the day-shift employees to report for work prior to reporting for jury duty. In so concluding I have considered the Board's decision in *C & S Industries, Inc.*, 158 NLRB 454, 459 (1966), where the Board found an 8(a)(5) violation in the employer's unilateral implementation of a wage incentive program, although "wage incentives" were not contained in the contract. That case is distinguishable in significant respects from the instant situation. Essential to the Board's decision in *C & S Industries, Inc.*, was its finding that, "[a]lthough the contract makes no specific mention of wage incentives, such incentives are inseparably bound up with and are thus plainly an aspect of the payment of wages, a subject expressly covered by the Contract," and its further finding that the governing contract also contained a provision "which expressly prohibits any change in the method of payment without the written consent of the parties." In the instant case the requirement that the day-shift employees report for work for a reasonable period of time before reporting for jury duty was not inseparably bound up or plainly an aspect of the contractual provision which restricts Respondent's ability to require the employees to report for work after having been excused from jury duty for the day. Nor is there any other provision in the contract which reveals that it was the intent of the parties in negotiating the contract to preclude the Employer from requiring employees to report for work for a reasonable period before serving on jury duty.

Nor does Respondent's past practice of not requiring day-shift employees to report for work before reporting for jury duty warrant an inference that the intent of the parties in negotiating the language of Article XX was to preclude Respondent from requiring employees to report for work before reporting for jury duty. This past practice, as Administrative Manager Remedios testified, was not based on a contractual obligation which Respondent felt it owed the employees, but on the fact that employees were usually required to report for jury duty no later than 9:15 a.m. which meant if they reported to work for a reasonable period of time before reporting to the court-

[7] Insofar as Taylor's testimony can be construed as denying that he informed Woodside at this meeting that the Union was not inclined to discuss its jury duty grievance any further with the Company, I credit Remedios' testimony to the contrary. In terms of demeanor Remedios impressed me as the more credible and reliable witness.

[8] The jury duty provision included in the contract herein is a mandatory subject of bargaining. *Newspaper Printing Corporation*, 232 NLRB 291 (1977).

house that they would not have sufficient time to return home to clean up and change their clothes. Respondent changed its policy of not requiring employees to report for work prior to reporting for jury duty only after it learned that employees who were subpoenaed for jury duty by the District Court were not usually required to report for jury service until 10:15 a.m., rather than 9:15 a.m. In other words, Respondent's past practice of not requiring day-shift employees to report for work prior to the time they were scheduled to report for jury duty was not based on the terms of the contract but was based on Respondent's belief that, under the circumstances which existed at the time, the employees would not have ample time to clean up before going to the courthouse.

Based on the foregoing, I find that the evidence is insufficient to establish that Respondent, by requiring day-shift employees to report for work prior to reporting for jury duty, modified its current contract with the Union.

The complaint, as amended at the hearing, alleges that even if Respondent's requirement that day shift employees on jury duty must work a reasonable period of time before reporting for jury duty does not constitute an impermissible modification of the governing collective-bargaining contract in violation of Section 8(a)(5) of the Act. Respondent still violated Section 8(a)(5) by unilaterally instituting this requirement without affording the Union a reasonable opportunity to bargain about it.

As described in detail *supra*, it is undisputed that Respondent for at least 3 years did not require day-shift employees to report for work prior to reporting for jury duty. This practice was changed in August 1980 when Respondent, without notifying the Union, instituted a policy whereby the day-shift employees subpoenaed for jury duty were required to report for work and work a reasonable period of time before reporting for jury duty.[9]

This new policy was instituted for the first time on August 27, when day-shift employees Rondeau and Blore were required to report for work and work from 7 to 9 a.m. before reporting to the courthouse at 10:15 a.m. for jury duty. The employees suffered no loss of pay and there is no evidence or contention that they did not have ample time to return to their homes to clean up before going to court.

Upon the advice of Union Representative Taylor, on August 28 employees Rondeau and Blore filed identical contractual grievances with the Union alleging in substance that Respondent had violated article XX of the contract, the jury duty provision, by requiring them to work prior to reporting for jury duty. On September 3 representatives of Respondent and the Union discussed these grievances. Respondent's representatives stated there was no language in article XX which dealt with the matter of whether or not employees were required to report for work before reporting for jury duty, if the time permitted, and that Respondent, due to the necessities of business, was requiring the day-shift employees to report for work prior to reporting for jury duty as long as they had ample time to clean up and get to the courthouse and that Respondent felt that 1 hour and 15 minutes was ample time for Rondeau and Blore to do this. The representatives of the Union replied that article XX precluded Respondent from requiring day-shift employees from reporting to work prior to reporting for jury duty, and that Respondent's conduct in this respect violated that provision and warned that if Respondent did not rescind its action the Union would file unfair labor practice charges with the NLRB. When Respondent, the next day, informed the Union it refused to accede to the Union's request, the Union filed the instant unfair labor practice charge alleging that Respondent, by its actions, had violated the Act by unilaterally modifying article XX of the collective-bargaining contract. Shortly thereafter Respondent's president, Woodside, informed Union Representative Taylor that Respondent objected to the Union having filed the unfair labor practice charge and that Respondent should rather discuss the disputed matter as a grievance since it involved a dispute over the interpretation of the parties' contract and indicated that Respondent was prepared to discuss the matter with the Union. Taylor answered that the Union had referred its grievance to the NLRB and was not inclined to discuss the matter with Respondent, but instead would let the NLRB handle the matter. Woodside replied that the Union, by this conduct, was not bargaining in good faith.

I do not believe, as alleged in the complaint as amended at the hearing, that Respondent violated Section 8(a)(5) and (1) of the Act by unilateraly instituting a requirement that the day-shift employees report for work prior to reporting for jury duty, without affording the Union a reasonable opportunity to bargain. This conclusion is predicated on the following considerations.

The dispute arises in the confined of an established and what appears to be an amicable collective-bargaining relationship, nor is there evidence that work before reporting for jury duty it was motivated by union animus. To the contrary, it is undisputed that Respondent was motivated by legitimate economic considerations.

When the representatives of the Union and Respondent met on September 3 to discuss Respondent's new policy of having day-shift workers report for work before jury duty, the Union's representatives, in effect, informed Respondent's representatives that the subject

[9] Administrative Manager Remedios' August 12 statement to the Union's shop committee that the Company "may have a problem with individuals coming into work prior to jury duty" does not bear the indicia of definiteness, clarity, and specificity sufficient to support a finding of notice to the Union. This is especially true because Remedios' August 13 letter to Union Representative Taylor which specifically discussed the problems Respondent was having with the employees' jury duty significantly failed to mention the problem of employees on the day-shift failing to come to work prior to reporting for jury duty. In addition, when Taylor spoke to Remedios about this letter, Remedios failed to mention the problem of the day-shift employees not reporting for work prior to jury duty. Nor does the fact that there was a rumor among the employees that Respondent intended to require them to report for work before jury duty constitute notice to the Union. This rumor was insufficient to relieve Respondent of its obligation to notify the Union, because without some clear, definite, and specific further indication of Respondent's intention to require employees to report for work before jury duty, the employees' concerns remain speculative. The failure of the Union to act in the face of such speculation does not wave a union's statutory right to bargain. See, *International Ladies' Garment Workers Union, AFL-CIO [McLoughlin Manufacturing Corporation]* v. *N.L.R.B.*, 463 F.2d 907, 918 (D.C. Cir. 1972); *N.L.R.B.* v. *Royal Plating and Polishing Co., Inc.*, 350 F.2d 191, 194–195 (3d Cir. 1965); *N.L.R.B.* v. *Rapid Bindery, Inc., and Frontier Bindery Corporation*, 293 F.2d 170, 176 (2d Cir. 1961).

was not one for discussion because the jury duty provision of the parties' contract prohibited the Employer from instituting such a requirement. The Union, at all times thereafter, maintained this position and, on September 16, expressly refused Respondent's invitation to sit down and discuss the disputed subject. But instead Union Representative Taylor, in effect, informed Respondent's president, Woodside, that the Union was not obliged to even discuss the question of day-shift employees working before jury duty because any requirement that they do so violated the National Labor Relations Act.

The Union refused Respondent's invitation to sit down at the bargaining table to discuss Respondent's newly instituted policy of having day-shift employees report for work before jury duty, even though there was no evidence that Respondent's decision was of an irrevocable nature. Since no third party interest had intervened, Respondent at any time could have rescinded this new policy in its entirety or reached a compromise with the Union acceptable to both parties.[10]

When the Union refused to sit down with Respondent and discuss Respondent's newly instituted policy of day-shift workers reporting for work prior to jury duty, the impact of the policy upon the unit employees was neither material, substantial, nor significant. Quite the opposite, the effect upon the unit employees was insubstantial. Only 2 employees out of a unit of approximately 250 had been affected. Together, the two employees had been required to work a total of 8 hours before reporting for jury duty. They had not suffered a loss of pay or other financial detriment other than the *de minimis* amount of money spent for gas to drive from the plant back to their homes to clean up for jury duty. Nor is there evidence that they were inconvenienced in reporting for jury duty by having to work 2 hours prior to reporting. I realize that the Company's new policy inconvenienced the employees insofar as it prevented them from sleeping later or engaging in personal business at the Company's expense prior to reporting for jury duty. However, as indicated by the express terms of the jury duty provision of the parties' contract, it was not the intent of the parties to permit employees to be reimbursed for sleeping or for engaging in personal business, rather it was their intent that the employees only be paid for the time lost from work because of their jury duty.

The aforesaid circumstances, particularly the evidence which indicates that it would have been futile for Respondent to have given the Union an opportunity to bargain before implementing its decision to have day-shift employees report for work prior to jury duty and the Union's refusal to bargain about this matter when invited to do so by Respondent even though the decision was not irreversible and its impact upon the unit employees was insubstantial, persuade me that Respondent's decision to have the day-shift employees report for work prior to jury duty did not constitute a refusal to bargain within the meaning of Section 8(a)(5) of the Act, even though Respondent failed to afford the Union an opportunlty to bargain prior to the implementation of the decision.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The complaint is dismissed in its entirety.

[10] Respondent's September 16 invitation to the Union to sit down and discuss the recently instituted policy of day-shift employees reporting for work prior to reporting for jury duty was calculated to alert the Union to the fact that Respondent's decision to institute this policy was a bargainable matter. The fact that Respondent previously refused the Union's request to rescind the policy does not detract from this conclusion because Respondent's refusal was expressed in the context of the Union's incorrect demand that Respondent was obligated to rescind its policy because it violated the parties' collective-bargaining contract.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.