Kay Fries, Inc. ***and*** **International Chemical Workers Union, Local 677, AFL-CIO.** Case 2-CA-17565

December 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 9, 1982, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed partial exceptions and a supporting brief.

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, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified below, and to adopt his recommended Order as modified herein.

We disagree with the Administrative Law Judge's finding that the Respondent's unilateral institution of a proof requirement for funeral leave did not violate Section 8(a)(5) by virtue of the Union's failure to timely request bargaining over such rule. Here the record reveals that the Respondent instituted and began enforcing the proof rule prior to any notification to the Union and thus the Union was faced, not with a mere proposed change, but rather a *fait accompli*.[3] Nor did the Union acquiesce in the unilateral change. For, upon learning of the change, Union President Paul, Grievance Chairman Maurice, and International Representative Meade each protested the rule, and Maurice processed grievances regarding denials of funeral pay for lack of sufficient proof. Finally, the record reveals that, when protesting the rule to Wasilewski, the Respondent's personnel director, Union President Paul agreed to discuss alternatives to the rule at an upcoming grievance meeting on September 29. We find that such action constituted a timely protest and request to bargain over the proof requirement and that, therefore, the Respondent's unilateral imposition of such violated Section 8(a)(5).[4]

Additional Conclusion of Law

By unilaterally instituting a rule requiring the submission of proof to obtain funeral leave, the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Kay Fries, Inc., Stony Point, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Insert the following as paragraphs 1(g) and (h):

"(g) Refusing to bargain in good faith with International Chemical Workers Union, Local 677, AFL-CIO, by unilaterally instituting changes in terms and conditions of employment.

"(h) In any other manner interfering with, restraining, or coercing its employees in the exercise and enjoyment of rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its personnel files any reference to the discharge of Donald Maurice and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Respondent 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.

[2] While we agree with the Administrative Law Judge's finding that the Respondent's asserted reasons for discharging Maurice were a pretext, we disavow his statement that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is not applicable to the facts herein. Rather, the Board has held that, where a pretext discharge is found, "[n]o substantive objective is served by our reiterating and recasting an administrative law judge's finding and conclusions in order to achieve a formalistic consistency with *Wright Line* . . ." *Limestone Apparel Corp.*, 255 NLRB 722 (1981). This is so because a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied on, and therefore establishes that the employer has failed to rebut the General Counsel's *prima facie* case.

Member Jenkins would affirm the Administrative Law Judge in this regard.

[3] *The City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978), and *Clarkwood Corporation*, 233 NLRB 1172 (1977), relied on by the Administrative Law Judge, are therefore inapposite; in both lack of diligence by the Union was shown.

[4] Since the record shows that the Respondent subsequently entered into a written agreement with the Union by which it abandoned the rule, we shall not order that the Respondent bargain over the change.

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.

WE WILL NOT restrain or coerce our employees in the exercise of their protected rights by:

(a) Telling employees we will turn over their grievances to a company physician for him to institute legal action against employees because employees file grievances against the Company for questioned sanitary practices of the physician.

(b) Refusing a discharged Union's designated grievance chairman (agent) access to our facility to process grievances.

(c) Conditioning reinstatement of a discharged union agent upon his relinguishing his position as grievance chairman (agent) for the Union.

(d) Telling employees to bring their problems to management and if management cannot resolve them it will refer them to the Union.

WE WILL NOT discourage employees' membership in, or support of, International Chemical Workers Union, Local 677, AFL-CIO, or any other labor organization by violating our contract with such labor organization, or by discharging employees because they support or carry on activities on behalf of the Union, or because they threaten to go to and/or file charges with the Board, or file complaints with other Government administrative agencies, or otherwise discriminate against them in any manner with respect to their tenure of employment, or any term or condition of employment.

WE WILL NOT refuse to bargain in good faith with International Chemical Workers Union, Local 667, AFL-CIO, by unilaterally changing terms and conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise and enjoyment of rights guaranteed them by Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL offer Donald Maurice immediate reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our personnel files any reference to the discharge of Donald Maurice and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

WE WILL retract and expunge from the personnel records of employee Darryl Thaler, the written warning which we issued to him for filing a grievance about health and safety practices during physical examinations of employees.

All our employees are free to become, remain, or refuse to become or remain, members of International Chemical Workers Union, Local 677, AFL-CIO, or any other labor organization.

KAY FRIES, INC.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon a charge and an amended charge of unfair labor practices filed on October 1 and November 21, 1980, respectively, by Donald Maurice, on behalf of International Chemical Workers Union, Local 677, AFL-CIO,[1] herein called Maurice or Charging Party, against Kay Fries, Inc., herein called Respondent, an original and an amended complaint and notice of hearing were issued by the Regional Director for Region 2, on behalf of the General Counsel on November 20, 1980, and June 17, 1981, respectively.

[1] An examination of the charges (G.C. Exhs. 1(a) and 1(b)) herein shows that both charges were filed by Donald Maurice. Under item 5 on each charge, which is to be completed at the time of filing, appears the name of the International of which Maurice's Local 677, AFL-CIO, is an affiliate. The record herein shows that Donald Maurice was an elected grievance chairman for the Union and represented the Union in dealings with Respondent, which considered him and treated him as such over the past 3 or 4 years. Robert Meade, International representative and David Paul, president of Local 677, both testified herein on behalf of the Union and Maurice. I therefore conclude that both charges were filed on behalf of the Union since the Union by its conduct appears to have approved, ratified, and/or acquiesced in the charges and the hearing herein. *Pastoor Bros. Company*, 223 NLRB 451, 453 (1976). Sec. 102.9 of the Board's Rules and Regulations and Statements of Procedures provide: *Who May File*: Charge may be filed by any person or labor organization. Does not have to be an "aggrieved" person. *Brophy Engraving Company*, 94 NLRB 719 (1951); *McComb Manufacturing Company*, 95 NLRB 596 (1951); *Kansas Milling Co.* v. *N.L.R.B.*, 185 F.2d 413 (10th Cir. 1950).

The amended complaint in substance alleges that Respondent warned and advised its employees to refrain from filing grievances with the Union until they sought its permission to do so, in violation of Section 8(a)(1) of the Act; that Respondent threatened an employee union agent (responsible for processing grievances) with a lawsuit or with discharging him if he continued to file grievances, in violation of Section 8(a)(1), or file a charge with the Board in violation of Section 8(a)(1) and (4) of the Act; that Respondent unilaterally changed working conditions by changing its bereavement policy, in violation of Section 8(a)(1) of the Act; that by changing such bereavement policy without giving notice to or affording the Union an opportunity to negotiate and bargain with it on the change, Respondent violated Section 8(a)(5) of the Act; that by discharging, and since thereafter failing and refusing to reinstate, the union agent employee it discharged, Respondent violated Section 8(a)(3) and (1) of the Act; and by refusing the discharged union agent access to its facility for the purpose of processing and adjusting employee grievances, Respondent violated its union contract and Section 8(a)(1) of the Act.

Respondent timely filed an answer and an amended answer denying that it has engaged in any unfair labor practices as alleged in the amended complaint, and alleged five affirmative defenses set forth as follows:

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred by Section 10(b) of the Act.

THIRD AFFIRMATIVE DEFENSE

The Complaint's allegations extend beyond matters encompassed by the underlying charge.

FOURTH AFFIRMATIVE DEFENSE

The charging party, an individual (Donald Maurice), is without capacity to allege a violation of Section 8(a)(5) of the Act.

FIFTH AFFIRMATIVE DEFENSE

Donald Maurice was discharged for cause.

SIXTH AFFIRMATIVE DEFENSE

The matters complained of in the Complaint are within the scope of the grievance and arbitration provisions of the current collective bargaining agreement between Respondent and Union; the General Counsel and the Board should defer to those contract procedures.

A hearing in the above matter was held before me in New York, New York, on July 27, 28, and 29, August 31, and September 1 and 2, 1981. Briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, which have been carefully considered.

Upon the entire record in the case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, a New York corporation, with an office and place of business in Stony Point, New York, herein called its facility, where it has been engaged in the manufacture and nonretail sale of organic chemicals.

In the course and conduct of its business operations, Respondent annually sells and ships from its facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of New York.

The complaint alleges, the answer admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Chemical Workers Union, Local 677, AFL-CIO, herein called the Union, is now and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Kay Fries, Inc., the Respondent herein, is engaged in the manufacture and nonretail sale of organic chemicals at its Stony Point, New York, facility. At the hearing, the parties stipulated that at all times material herein the following named persons occupied the positions following their respective names, and are now, and have been at all times material herein, supervisors within the meaning of Section 2(11) of the Act, and are agents of Respondent, acting on its behalf: Joseph Wasilewski, personnel director since August 11, 1980; Jeff Beattie, former personnel director until August 11, 1980; Robert Gaines, supervisor; William Bicknell, supervisor; Richard M. Brooks, supervisor; Don Schickle, supervisor; Dave Colvin, plant manager; Peter Dapas, production manager; Steve Bierman, supervisor; Robert O'Neil, supervisor.

It is undisputed that Respondent had very poor labor management relations in 1980 and that it hired Personnel Director Wasilewski for the purpose of improving such relations. The record undisputedly shows that Rosalie Barbera was personnel assistant under the supervision of Wasilewski.

The following personnel constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All analytical laboratory technicians, maintenance, shipping, receiving, and production employees employed at Respondent's Stony Point, New York, facility, excluding executives, superintendents, assistant superintendents, supervisors, assistant supervisors, foremen, chemist, engineers, technical apprentices, research assistant, plant stenographers and typist, office employees, and timekeepers, and supervisors as defined in Section 2(11) of the Act.

At all times material herein, the Union has been the designated and exclusive collective-bargaining representative of Respondent's employees in the above-described unit, and during that time it has been recognized as such by Respondent. Moreover, Respondent and the Union have executed successive collective-bargaining agreements, the most recent of which is effective by its terms for the period December 17, 1979, to December 17, 1982.[2]

B. *Respondent's Labor Relations and the Union Activity of Donald (Don) Maurice*

The record contains considerable undisputed and credited testimony that Respondent and the Union have had turbulent labor relations, with numerous (three to four hundred, plus) grievances having been filed between October 1977 and September 1980. Respondent's approximately 140 employees are represented by Local 677, and the entire unit struck and maintained an around-the-clock picket line at the plant from June through December 1979. About 20 employees were arrested on various days, including Donald (Don) Maurice, union grievance chairman, who was arrested twice for disorderly conduct. The parties (Respondent and the Union) nevertheless entered into an amnesty agreement on December 17, 1979, with respect to the strikers, and executed a collective-bargaining agreement, effective December 17, 1979, through December 17, 1982.

The record shows that on October 8, 1979, the following union persons were elected to the offices following their respective names, until November 1981: David (Dave) Paul, president; James Bosico, vice president; K. Rodney, recording secretary; Frank Curtain, financial secretary; James Lovell, guide; George Reeves, sergeant-at-arms; and L. P. Picarello, Richard Seminatra, and L. Edwards, trustees.

Donald Maurice, who had previously served as grievance chairman, was elected to a second term for the period October 1979 through November 1981. From July through December 1979, Maurice also served on the negotiating committee. He also served as strike captain during the strike, at which time he was present on the picket line daily.

The record further shows that during the period of January through March 1980, four grievances were filed by Richard Seminatra, mostly relating to safety factors. Grievance Chairman Donald Maurice testified with *gross uncertainty* (as is largely shown on the record) as to the date on which he met with former Personnel Director Jeff Beattie, Union President Dave Paul, and Union Vice President James Bosico. During the meeting, which Maurice finally said, after considerable questions by respective counsel and the bench, occurred in March or April 1980, and that Beattie warned himself, Paul, and Bosico, "*that if Mr. Seminatra didn't stop putting these grievances in, there was no room in the company for him and they would have to let him go*, and we should talk to Mr. Seminatra about his processing grievances."[3]

Since the credited evidence fails to establish that the above alleged 8(a)(1) statement was made by former Director Beattie on a date subsequent to April 1, 1980, or that such statement and attitude continued well beyond April 1, into the 10(b) period (the charges herein having been filed on October 1, 1980, and November 21, 1980, respectively), the allegation clearly appears to be barred by Section 10(b) of the Act. *Marvex Processing & Finishing Corp.*, 229 NLRB 188 (1977). Consequently, I find that the allegation set forth in paragraph 11 of the amended complaint is barred by Section 10(b) of the Act, and the same hereby is dismissed.

In May 1980, Respondent arranged for all of its employees to undergo a required physical examination by a physician at the expense of the Company. The examinations were conducted in a medical trailer on or near the premises of Respondent. On May 21, employees, including employee Darryl Thaler, reported for examination. During the course of the examinations, Thaler observed that the doctor dipped his fingers in alcohol after examining each employee without washing his hands. Thaler left the trailer and filed a grievance (G.C. Exh. 9) which stated:

> In undergoing required physical examination by company doctor, that said doctor in examining gentilia for hernia, passed from person to person (4–5 prior) without washing his hands before examining me. Common sense & good medical practice should have been exercised by doctor, who must be aware of possible germ transmittal from his carelessness. Such activity by a doctor can only be used as a point that company physicals are being used to dehumanize those examined under the guise of benevolent caring for health.

Two days later, on May 23, Thaler met Union President Dave Paul outside one of the plants. Paul told Thaler (not admitted for the truth) that he was returning from a meeting with former Personnel Director Beattie and former Safety Administrator Joseph Bick, and "Respondent was considering suing him [Thaler] for slander" regarding the contents of his recently filed grievance.

On Monday, May 26, Supervisor William Bicknell directed Thaler to go to the office of Director Beattie. When Thaler arrived, Paul was present and Beattie told Thaler his "grievance was uncalled for, it was a vicious attack against our company doctor and they were slanderous remarks." Thaler tried to discuss the matter but *Beattie told him Respondent was going to turn the written grievance over to the company doctor for his legal action.*

[2] The facts set forth above are undisputed and are not in conflict in the record.

[3] Although Beattie is no longer in Respondent's employ and did not appear and testify or deny the above statement, neither is the unspecific date (March or April 1980) on which Maurice said the statement was made, corroborated by the testimony of Paul, who was present during the conversation, or Bosico, who was also present but did not appear and testify herein. Hence, I do not credit Maurice's testimonial date of the conversation not only because I was persuaded by his gross uncertainty in stating possibly December 1979, January 1980, and finally March or April 1980, but also because his testimony is uncorroborated and a more accurate date on which the conversation occurred is crucial to Respondent's affirmative defense (Sec. 10(b) of the Act). Moreover, this resolution is particularly supported, when it is noted that Maurice is the sole alleged discriminatee herein. His testimonial uncertainty in this regard is self-serving.

Subsequently, in June, Thaler received a written warning as follows:

> You are being issued this written warning because you directed false, vicious and slanderous accusations toward our company doctor. The grievance procedure will not be allowed to be used in a pretentious manner that attacks people instead of problems. (G.C. Exh. 8.)[4]

In reference to the above-cited evidence, paragraph 10 of the amended complaint herein alleges that "on or about June 2, 1980, Respondent, acting through Jeff Beattie, at its facility, threatened its employees with lawsuits if they filed a grievance with the Union." An examination of employee Thaler's grievance described above clearly reveals that the essence of his complaint was concern for sanitary practices of the Company's examining physician, more specifically, the cleanliness of his hands while employees undergo mandatory physical examination.

Although Thaler's grievance may be considered drafted in "hard language," so to speak, I do not believe that fact can be said to diminish its genuineness, or that the language is so far off color as to have been maliciously motivated. The latter conclusion is particularly true when it is kept in mind that the history of the relations between the parties (Respondent and the Union) in the plant has been unequivocally negative. Under these circumstances, I find that the substance of Thaler's grievance was related to sanitation and safe health procedures, which affect all employees. The evidence does not show that other employees did not share the same concerns. Such concerns certainly and clearly fall within the net of protected concerted activity. *Wolverine World Wide, Inc.*, 243 NLRB 425, 431–432 (1979), and *Razco, Inc., d/b/a Hit'N Run Food Store*, 231 NLRB 660, 675 (1977).

A literal reading of the language of Thaler's grievance demonstrates that it was initiated on behalf of Thaler and fellow employees, and not solely on his individual behalf, since all employees stood to benefit from procedures which would enhance sanitation and safe health. This is so, notwithstanding the validity or invalidity of Thaler's conclusions. *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

I therefore conclude and find that by suggesting or advising employee Thaler in the meeting of May 26, and thereafter issuing a written warning to him on or about June 2, that his grievance was uncalled for and Respondent was giving it to its physician to institute legal action against Thaler for filing such grievance, Respondent threatened, coerced, and restrained its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act. *Wolverine World Wide, Inc.*, and *Razco, Inc., supra.*

The contract between the parties provides as follows:

> ARTICLE VIII—SETTLEMENT OF GRIEVANCES
>
> A. Should any difference arise between the Company and the Union or between the Company and an employee, the matter will be settled in the following manner.
>
> Subdivisions under the above article provide for procedural steps in processing a grievance. However, the above quoted language clearly provides that the subject of a grievance may be any difference which arise between the Company and the Union, or between the Company and an employee. Consequently, the contract between the parties does not specify or limit the subjects of a grievance. Under these circumstances, I find the above general language broad enough to include the subject matter of Thaler's grievance, and that said grievance is not restricted or excluded from the grievance process by construction of the contract.

C. *Respondent's Bereavement Policy and its Change in the Procedure for Qualifying for Benefits Thereunder*

The following provision of the current contract (effective December 17, 1979—December 17, 1982) between the parties was discussed during negotiation sessions held May through December 1979:

> ARTICLE XIX—DEATH IN FAMILY
>
> In the event of death of a member of his immediate family, an employee will receive time off with pay within a seven (7) day period following the death for a period of three (3) days.
>
> * * * * *
>
> Immediate family is defined as grandfather, grandmother, father, mother, brother, sister, stepfather, stepmother, stepsister, husband, wife, child, father-in-law and mother-in-law.
>
> An employee will receive time off with pay for one (1) day to attend the funeral of a brother-in-law, sister-in-law, aunt and uncle.

During negotiations for the current contract, the parties did not discuss or agree upon a procedure to be followed by employees in qualifying for bereavement pay under the above provision. Nevertheless, prior to August 22, 1980, the practice or procedure used by employees and accepted by Respondent in applying for bereavement leave, was the employee simply notifying his immediate supervisor of the number of days he would be absent from work, or his leaving a message to that effect on the answering service. The supervisor would certify his approval to the payroll department and the employee would be paid. Submission of proof of death and relationship was not required.

However, as early as 1974, employee McMillan was discharged by Respondent for submitting false information to verify death and relationship to receive bereavement payment. In March 1980, employee Cavezzi was suspended for 3 days for falsifying evidence of death (of

[4] Although Paul did not corroborate Thaler's testimony with respect to the Beattie-Thaler conversation on May 26, 1980, the above warning (G.C. Exh. 8) supports Thaler's testimony. I therefore credit Thaler's account of the conversation because I was also persuaded by his demeanor that he was testifying truthfully.

his grandmother, when in fact it was his wife's grandmother) and accepting payment for bereavement leave under the death and family provision. Several months later (early August 1980) the Singh Brothers individually, and on different dates, applied for death leave to attend the same uncle's funeral on different dates, a week apart. When Production Manager Dapas demanded proof of death, proof was submitted confirming only the death of the uncle which occurred on a date different from the dates alleged by each of the brothers.

On August 11, 1980, Joseph Wasilewski commenced his employment as personnel director with Respondent. He was immediately advised by Production Manager Peter Dapas that he would have to tighten up on the procedure for employees qualifying for the contract death-leave benefit as a result to several abuses thereof by employees. In mid-September Wasilewski told Union President Dave Paul about the employees abusing the death leave provision and Paul, who was aware of some of the abuses, agreed to discuss the matter with Wasilewski at a convenient time. Notwithstanding, without any further discussion, Personal Director Wasilewski commenced enforcing the proof rule in early September 1980 and continued to do so until November 1980; as follows:

> Effective immediately all requests for "Death in Family" payments must be approved by Personnel prior to submission to payroll.
>
> In order to receive such approval the affected employee must provide acceptable evidence that a death in family had indeed occurred, and evidence of the employees' relationship with the deceased. (G.C. Exh. 7.)

Wasilewski promulgated the above requirement for proof but did not specify what kinds of proof would be acceptable to Respondent. A copy of the above provision was transmitted to all supervisors but not to employees. Wasilewski contended he forwarded an informal copy to the Union, which Union President Paul denied the Union received. Wasilewski delegated the responsibility of formulating the kinds of proof and processing claims for death-leave benefit to his personnel assistant, Rosalie Barbera. Within a period of a week or two, requests for death-leave benefits were made by employees McGilvary, John Sleight, John Lovell, and Judson, all of whose requests were substantiated by obituaries which were either in the local or foreign newspapers. Payments were made thereupon 1 or 2 weeks or more subsequent to their request. However, McGilvary filed a grievance on September 5, 1980, because of the delay in payment pending verification of proof. On September 6, 1980, Sleight filed a grievance claiming that Respondent's proof requirement inferred that he was lying about the need for such death leave. Grievance Chairman Maurice processed both grievances in mid-September 1980, and I therefore find that Maurice knew about the proof requirement as of that time, even though the record does not show that he demanded Respondent to bargain with the Union thereon.

The foregoing undisputed and hereunder credited evidence of record established the following facts:

(a) In a memorandum (G.C. Exh. 7) dated August 22, 1980, Respondent (Wasilewski) unilaterally changed its policy for employees qualifying for bereavement leave pay. A copy of the memorandum was distributed to all supervisors but not to the employees.

(b) The former policy for bereavement leave simply required employees to notify their immediate supervisor of the death and the days they would be absent, or to call the company's answering service and leave a message to that effect.

(c) The new proof requirement instituted on August 22, 1980, required the employees to provide proof (mostly documentary copy of obituary) of death and the employee's relationship to the deceased, prior to being paid for such leave.

(d) Although Respondent (Wasilewski) contends it sent an informal copy of its memorandum (G.C. Exh. 7) to the Union, the Union (President Dave Paul) denied having received a copy thereof. Since Respondent was unable to substantiate that it transmitted, or that the Union received, a copy of its memorandum, I credit the Union's denial and find, that Respondent did not notify the Union of its changed policy (G.C. Exh. 7) requiring proof of death and relationship for death leave benefits.

(e) Under the credited facts, the Union (Donald Maurice) first acquired actual and unequivocal knowledge of Respondent's unilaterally instituted proof of death rule on September 16, 1980, when John Sleight's grievance was filed and Grievance Chairman Donald Maurice processed both Roland Singh's and Sleight's grievances with Respondent's Personnel Director Joseph Wasilewski. This meeting occurred only six working days prior to the discharge of Maurice on September 24, 1980, *infra.*

(f) According to the undisputed and credited testimony of Wasilewski, Wasilewski mentioned the problem of employee abuses of death leave during an informal conversation with Union President Dave Paul in early September and again, on September 19, 1980. When Wasilewski told Paul that Respondent was requiring proof of death and relationship, Paul said it was unfair to group the good employees with the "bad apples" (employees who abused death leave). Wasilewski offered to discuss alternative procedures with Paul and Paul suggested that they do so at the next third level grievance meeting scheduled for September 29, 1980.

(g) At the time Maurice (the Union) first learned on September 16, 1980, that Respondent was enforcing a unilaterally promulgated proof of death rule of which neither the Union nor the employees had been notified, Wasilewski told Maurice the new proof procedure was designed to deter fraud and centralize approval of death leave authority in the Personnel Director. Maurice did not request Respondent to bargain on the rule at any time prior or subsequent to his discharge on September 24, 1980.

(h) Two days later, September 18, Maurice advised his supervisor, Dave Colvin, that he would be attending the funeral of an uncle on the following day, September 19, and he did not know whether or not he would furnish proof of death. He said, maybe they could straighten out this proof of death matter. Supervisor Colvin said Maurice warned him that "he didn't want to hear any shit about bringing in proof." I credit Colvin's testimony in this regard because it is consistent with other credited statements by Maurice. Maurice was in fact absent on Friday, September 19, and when he returned to work on Monday, September 22, he gave Supervisor Richie Brooks a funeral prayer card (G.C. Exh. 12) but was later notified by personnel (Rosalie Barbera) that the prayer card was insufficient as proof of death; and that a copy of the obituary was needed to establish his relation to the deceased.

(i) Union Executive Board Member John Lovell testified he believed he saw a copy of Respondent's proof of death memorandum (G.C. Exh. 7) on the bulletin board on or after August 22, 1980, but he was *not sure*. I do not credit Lovell's testimony as to the date he saw the memo because, not only was he not sure where and when he saw the memorandum, if in fact he saw it at all, but he also said he did not mention the memo's existence nor its contents to any union member or agent. Consequently, I find that Lovell (the Union) had knowledge of Respondent's unilaterally instituted proof of death rule at the time Maurice acquired knowledge thereof on September 16, 1980.

(j) International Representative Robert Meade testified, and I credit his essentially undisputed account, that he called Wasilewski on September 24 or 25 and told him that Respondent could not change the funeral leave policy without negotiating with the Union. Wasilewski said he did not think the Company was changing anything and refused to discuss it further. On September 29, when he said he would have to grieve the matter, Wasilewski said, "do what you've got to do." He told Wasilewski there will be many grievances filed with the attitude of the Company. Thereafter he grieved the funeral leave policy. The record does not show that Meade ever unequivocally requested or demanded Respondent to bargain on the proof rule, even as late as the September 29 grievance meeting.

(k) Union President Dave Paul did not request Respondent to bargain on the required proof rule prior to his meeting with Wasilewski on September 29. Wasilewski had already suggested discussing alternatives for his proof rule and the evidence clearly indicates that Paul had reasonable grounds for knowing that the proof rule was in effect. In any event, the evidence does not show that Paul in any way indicated that the Union requested bargaining on the rule.

(l). Employee Darryl Thaler testified that he took one day's death leave in October 1980. When he returned to work his supervisor asked him for proof of death. Several days later, he presented his supervisor with a newspaper clipping regarding the death and the supervisor told him it was not necessary. About 30 days later, employee Walter Luther took 1 day's death leave. Luther testified that when he returned to work he was not asked for proof but he voluntarily submitted an obituary to his supervisor, Bicknell, who asked, "what's that for?"

I credit the testimonial accounts of Thaler and Luther, not only because I was persuaded by their demeanor that they were testifying truthfully, but particularly, because Thaler's version is essentially undenied and Luther's is essentially consistent with Thaler's with respect to uniform enforcement, even though Luther had some problem recalling the precise time of the conversation.

(m) The change instituted in Respondent's policy (G.C. Exh. 7) is a significant change which affects the terms and conditions of employment of the employees, as is more fully explained, *infra*.

(n) Neither the management-rights clause, nor the zipper clause of the contract, contains language which may be reasonably construed as the Union having expressly waived its right to bargain on unilaterally promulgated work rules, which affects terms and conditions of employment.

(o) Maurice did not formally protest Respondent's unilateral action during the grievance meeting on September 16, but he did take issue with the equity of Respondent's proof rule. However, the record does not contain any evidence that Maurice or the Union ever advised or suggested that the Union waived its right to bargain on the proof rule, or that it in fact requested Respondent to bargain on the newly instituted proof of death rule.

(p) On November 16, 1980, Respondent's August 22 proof requirement was superceded by a written agreement between Respondent and the Union, which in part, provided as follows: "It is not necessary for employees suffering a death in family to routinely provide evidence of such deaths."

(q) By unilaterally instituting its "proof of death and relation" policy, without notifying or consulting with the Union, Respondent did fail to bargain collectively with the Union. *Schrafft's Candy Company*, 244 NLRB 581, 583-584 (1979); *Interstate Transport Security/Division of PJR Enterprises, Inc.*, 240 NLRB 274, 279 (1979); *Womack Industries, Inc.*, 238 NLRB 43 (1978).

In *Schrafft's Candy, supra*, the employer had a longstanding practice of posting prospective work rules on the bulletin board for employee feedback before implementing the rules. Employees dissatisfied with the rules would bring their dissatisfaction to the attention of management and there would be a give-and-take spirit of collective bargaining. Suddenly, the employer unilaterally posted and implemented what it labeled "New Company Rules and Regulations," which changed and altered longstanding practices affecting wages, hours, and working conditions. The employer contended it made the changes pursuant to the management-rights clause in the contract. The Board affirmed the Administrative Law

Judge's decision, which held such changes were bargainable, and, having been implemented without notification or consultation with the union, were in violation of Section 8(a)(1) and (5) of the Act. He held the union did not waive its right to bargain in the management-rights clause of the contract.

In *Interstate Transport Security, supra*, the employer had a loose sick leave reporting system wherein employees simply reported illness-related absences to their supervisor. After the election, the employer informed employees "that it was now company policy to require a doctor's certificate for even 1 day of sick leave," and that there would be "no more free time off" for "illness-related absences." The Board affirmed the Administrative Law Judge's decision that the sick leave policy change of employer violated Section 8(a)(5) and (1) of the Act.

Perhaps even more like here, the employer in *Womack Industries, supra*, unilaterally instituted a requirement that employees furnish a doctor's excuse for absences from work due to illness. The Administrative Law Judge found that the change fell within the exercise of general supervisory function necessary for the day-to-day maintenance of discipline, thereby removing it from the category of mandatory subjects of collective bargaining. Accordingly, he dismissed the allegation as set forth in the complaint. In reversing the dismissal of the Administrative Law Judge, the Board said:

> Mandatory subjects of bargaining are those which set a term or condition of employment or regulate the relation between the employer and employee. Plant rules clearly affect conditions of employment and are mandatory subjects of collective bargaining. Thus, we have held that the initiation of new and more stringent rules with respect to absenteeism which represent a significant change from prior practice without consulting or bargaining with the union violates Section 8(a)(5) and (1) of the Act. Here, the record shows that the Respondent's absentee policy was initiated in May and *represented a significant change from its prior practice of not requiring written documentation from a physician for all absences* due to illness. By implementing this change without consulting or bargaining with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act. [Emphasis supplied.]

Based upon the foregoing credited facts, reasons, and legal authority cited herein, I conclude and find that Respondent unilaterally changed its policy for employees qualifying for bereavement leave pay, without notifying or consulting with the Union. By doing so, Respondent did fail and refuse to bargain collectively with the Union, the duly authorized representative of its employees.

Counsel for Respondent argues that Respondent (Wasilewski) unilaterally instituted its new proof requirement rule (G.C. Exh. 7) pursuant to article IIC and article IIID of the collective-bargaining agreement (G.C. Exh. 6) between the parties.

Specifically, the above-cited articles provide as relevant herein, as follows:

> IIC. The Union recognizes the rights to manage are vested exclusively in the Company. This includes the right to promulgate work rules and regulations.
>
> . . . .
>
> IIID. It is the intent of the parties hereto that the provisions of this agreement, which supercedes all prior agreements and understandings, oral or written, expressed or implied, between such parties, *shall govern their entire relationship and shall be the sole source of any and all rights or claims which either party may assert* against the other in arbitration hereunder, or otherwise. *The provisions of this Agreement can be amended, supplemented, rescinded, or otherwise altered only by mutual agreement in writing hereafter signed by the parties hereto.* [Emphasis supplied.]

Counsel for Respondent further argues that Respondent's new proof rule does not in any way alter the language or the substance of its bereavement policy set forth in article XIX of the contract, and that since the contract contains the above-described management-rights clause (art. IIC) which, when read with the zipper clause in article IIID of the contract, shows that the Union expressly waived its right to bargain on "work rules" and the subject proof rule herein. In support of its argument, Respondent cites *Leroy Machine Co., Inc.*, 147 NLRB 1431 (1964), where an employer unilaterally instituted a rule requiring employees with records of excessive absenteeism to submit to physical examination by a physician of their choice, at the expense of the employer. Refusal to submit to such examination was grounds for discipline. The Board held that since the management agreement between the parties conferred on the employer the right to determine the "qualifications of employees," the plain meaning of such language did encompass physical examinations. Consequently, such language removed the subject physical examinations from the scope of collective-bargaining during the term of the contract.

Here, as distinguished from the contract in *Leroy Machine, supra*, the language of the management-rights clause does not specifically address the subject of required proof for entitlement to family death leave benefits. Nor was the subject of such proof discussed during contract negotiations when the family death provision was adopted by the parties. The contract does not discuss employee-proof in relation to "personal and sickness" days under article XXIII. There, in fact, the contract specifically provides that contractual absences such as holidays, vacation, personal days, *bereavement time*, etc., are not subject to disciplinary action.

Although withholding pay for bereavement leave may not constitute disciplinary action, it certainly does affect the compensation rights of employees and therefore affects the terms and conditions of employment. Consequently, in the absence of such specificity in the contract, I find that neither the management-rights clause nor the zipper clause of the contract herein, constituted an expressed or an implied waiver by the Union of its

statutory right to bargain on the subject "proof rule." *Pepsi-Cola Distributing Company of Knoxville Tennessee, Inc.*, 241 NLRB 869, 870 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981).

Although the employer in *Pepsi-Cola Distributing* was a successor employer, it nevertheless unilaterally discontinued its predecessor's practice of annually paying its route salesmen a bonus of 1 percent per case of Pepsi-Cola, upon its asserted right to do so pursuant to the management-rights clause of the contract. In holding that the Union's right to bargain on the subject was not waived by the language in the management-rights clause of the contract, the Board said:

> The law is settled that the right to be consulted concerning unilateral changes in terms of employment is a right given by statute and not one obtained by contract and that, in order to establish a waiver of a statutory right, there must be a showing of a clear relinquishment of the right. Whether there has been a clear relinquishment of the right is to be decided on the facts and circumstances surrounding the making of the contract. Having considered all the circumstances herein, we conclude that there has been no showing that the Union relinquished its statutory right to bargain over the year end bonus.
>
> * * * * *
>
> On the basis of the foregoing, we find that the Union has not clearly and unmistakably waived its right to be consulted with regard to any change in this condition of employment. Inasmuch as a waiver is not lightly inferred, we conclude that, in the circumstances herein, there was no waiver by the Union, and Respondent should have bargained with the Union prior to discontinuing its predecessor's established practice of paying the year end bonus to its route salesmen.

Respondent further argues that in the past (1977), Respondent unilaterally promulgated and instituted shop rules, which included a prohibition against falsifying work records or failing to furnish required record information; that in 1980 Respondent unilaterally promulgated additional rules and regulations including a prohibition against falsifying work records; that in February 1980 Respondent unilaterally promulgated a rule requiring employees to provide it with their home telephone number, so as to enable Respondent to have immediate access to them should such necessity occur; and that in neither event did Respondent bargain with the Union. Nor were any of the prior unilaterally promulgated rules subsequently rescinded by Respondent.

Respondent's argument seems to suggest that the Union's silence or ultimate acquiescence in Respondent's past enumerated unilateral actions established a precedent wherein the Union, for all times and purposes, waived its right to protest and bargain on all unilateral actions. Such a proposition is untenable, however, since the courts and the Board have repeatedly held to the contrary. Specifically, in *N.L.R.B.* v. *Miller Brewing Company*, 408 F.2d 12, 15 (9th Cir. 1969), the court held, as pertinent herein, as follows:

> Each time the bargainable incident occurs—each time new rules are issued—Union has the election of requesting negotiations or not. An opportunity once rejected does not result in permanent "close-out"; as in contract law, an offer once declined but then remade can be subsequently accepted.

Additionally, in *Boland Marine and Manufacturing Company, Inc.*, 225 NLRB 824, 829 (1976), the Board, citing *N.L.R.B.* v. *Miller Brewing Company, supra*, said:

> [A] union does not waive its right to bargain over rules by its conduct in acquiescencing in the employer's promulgation of rules in the past.

Counsel for Respondent also argues that Respondent's new proof of death rule is a rule of procedure, as opposed to a rule of substance to which no disciplinary action was tied. While it is true no disciplinary sanction was appended to Respondent's new proof rule, enforcement of the rule for failure to comply therewith would nonetheless result in nonpayment of the death leave benefit provided for under the substantive provision of article XIX of the collective-bargaining agreement. Under these circumstances, it cannot be rationally argued that, in operation, Respondent's new proof rule, *which is also vague as to kinds of proof required*, does not impose a more onerous burden upon employees to prove death and relationship to the deceased, especially at a time when the employee is in a state of bereavement. As such, the rule has a character of substance because it affects the terms and conditions of employment (proof of death and relationship, or pay is withheld), and is therefore a proper subject for bargaining. *Schrafft's Candy Company, supra*, and *Womac Industries, supra.*

Moreover, as counsel for the General Counsel points out in *Murphy Diesel Company*, 184 NLRB 757 (1970), there, very much like here, the employer had an informal procedure for employees to report when they would be absent. Without notifying or consulting with the Union, the employer unilaterally posted a notice requiring employees to present proof or information concerning their absence to their foreman upon their return for his consideration. The Board affirmed the trial examiner's findings, who said:

> Plant rules, particularly where penalties are prescribed for their violation, clearly affect conditions of employment and are mandatory subjects of collective bargaining. When, therefore, Respondent on August 15, 1969, posted work rules governing employees absenteeism and tardiness, admittedly without prior notice and bargaining with the Union, it violated the Act unless the posting was a mere statement of existing rules or unless the Union had waived its right to bargain about the subject. . . . *Id.* at 762.

Finally, Respondent argues that even if its new proof requirement is a rule of substance, the Union neverthe-

less knew about the rule and failed to either protest or request bargaining on the matter. By neglecting to do so, Respondent argues, the Union waived its right to protest and bargain on the subject.

In this regard, the evidence shows that Director Wasilewski mentioned the new proof requirement to Union President Paul in early September, and again on September 19. Precisely what Wasilewski said to Paul on both occasions is not clear from the record. However, it is clear that on September 19, Paul did understand that Respondent was either contemplating instituting, or had in fact unilaterally instituted its proof rule. It was at that time that Paul said "It is unfair to group the good employees with the bad apples," and Wasilewski offered to discuss alternatives. Paul said "yes," and suggested September 29. Wasilewski agreed to discuss the proof policy on September 29. However, at no time did Paul express a formal protest or requested Respondent to bargain on the subject.

It is clear from the record evidence that Maurice had actual knowledge of Respondent's proof policy on September 16, when he asked Wasilewski why was he treating grievant Sleight like a second class citizen when Sleight had such a good work record. The record shows that union executive Board Member Lovell knew about Respondent's proof rule on or shortly before September 16, the precise time is not clear. However, Lovell did not mention the existence nor the contents of the rule to the Union or to management. Thus, at most, Paul's above-described statement, and Maurice's above-described question to Wasilewski might have suggested they did not agree with the proof policy, and possibly constituted a subtle protest. The record shows it was no more than that, and neither Lovell, Paul, Maurice, nor Meade at any time requested Respondent to bargain on the new proof rule.

Under the above circumstances, I find that, although the Union (Paul, Lovell, and Maurice) knew about Respondent's unilaterally instituted proof policy on and shortly before September 16, it did not timely protest and/or request Respondent to bargain on the subject. This includes the times during which Maurice held the heated conversations with Wasilewski about the rule on September 22, 1980. By failing to timely protest and request Respondent to bargain, the Union thereby waived its right to bargain on the proof rule. *The City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978). See *Clarkwood Corporation*, 233 NLRB 1172 (1977), where the employer unilaterally removed two pay telephones and closed some restrooms and locker facilities. The union had advance notice of these changes and only registered a delayed protest. The Board, in reaffirming its position in *American Buslines, Inc.*, 164 NLRB 1055 (1967), said:

> [T]hat a union which receives timely notice of a change in conditions of employment must take advantage of that notice if it is to preserve its bargaining rights and not be content in merely protesting an employer's contemplated action. Such lack of diligence by a union amounts to a waiver of its right to bargain and that is precisely what occurred here with respect to both the pay phone and restroom changes.

Also, in *Cessna Aircraft Company*, 172 NLRB 696, 707 (1968), the Board said:

> . . . the union must do more [than merely object]; it must "enforce its bargaining rights diligently by attempting to persuade the Respondent to alter its decision if it found the decision unacceptable." While it is true that the Respondent indicated that its decision was not bargainable, this did not reflect, in the context of all the facts and surrounding circumstances, an uncompromising attitude which foreclosed bargaining . . . . Additionally, the Respondent offered to discuss any problems or adverse effects that the Union foresaw would be created by these changes.

I credit Meade's testimony that he talked to Wasilewski on September 22 and 25 about his policy but I do not credit his testimony that he at any time requested Respondent to bargain on the subject.

Consequently, I find that Respondent's violation of Section 8(a)(5) and (1) of the Act was waived by the Union and therefore paragraphs 17, 18, and 22 of the complaint are hereby dismissed.

D. *Respondent's Discharge of Donald (Don) Maurice*

As herein before established, Maurice was a very active union adherent and grievance chairman. Since first serving as grievance chairman in 1977, he has processed 300 or 400 grievances with Respondent. Neither the Union's constitution nor the contract between it and Respondent contained a written provision for a grievance chairman as an officer of the Union. Nevertheless, the Union has elected a grievance chairman since 1961, and such chairman has adjusted grievances with Respondent ever since. *Highway and Local Motor Freight Employees Local Union No. 667, et al. (Owens-Corning Fiberglass Corporation)*, 228 NLRB 398 (1977), and *Glaziers & Glassworkers Local No. 513 (Linclay Corporation of America)*, 191 NLRB 461 (1971).

Director of Production David Colvin testified that on or about September 17, he had a very brief conversation with Maurice about the funeral leave policy. During their conversation Maurice told him he did not want to "hear any shit" about bringing in proof because he was going on funeral leave on Friday, September 19, 1980, which leave he did in fact take to attend the funeral of an uncle.

A composite of the undisputed and credited testimony shows that when Maurice returned to work on Monday, September 22, Supervisor Richie Brooks approached him in the shop and asked him for proof of death in the family. Maurice handed Brooks a prayer card (G.C. Exh. 12) about 11:15 a.m. On that same morning, Supervisor Brooks gave Maurice a letter (G.C. Exh. 13) from Director of Personnel Joseph Wasilewski, advising as follows: ". . . The enclosed proof of death in family is not acceptable. A copy of the obituary is needed where it establishes your relation to the deceased."

On September 22, Wasilewski's secretary, Rosalie Barbera, showed Wasilewski Maurice's prayer card as proof of death and told him she did not think it was sufficient. Wasilewski agreed and advised her to return it to Maurice, which she did. Wasilewski testified that about 11:15 a.m., he received a telephone call from Maurice, and their conversation was as follows:

> He called me on the phone and said, I got this note that says that the prayer card wasn't good enough as proof, and I said that's right; it's not. That's not sufficient proof.
>
> And he kind of said, well, what kind of proof do I have to bring in?
>
> I said, well, you could bring in an obituary.
>
> And—actually, he said something much stronger that that. He said, *what the fuck must I do*, and, what kind of proof must I bring in, *what kind of fucking proof do you want.*
>
> And I said, well, you could bring in an obituary; that would be helpful.
>
> And he said—well, I don't know which preceded which, but, in any event, *he said that as far as he was concerned the prayer card was proof enough and that he wasn't going to bring in any additional proof.*
>
> And I said, well, if you don't bring any additional proof in, you're not going to get paid. *And he said, what the fuck you mean, I'm not going to get paid. He said, if I don't get paid there's going to be fucking trouble in this plant.*
>
> I said, wait a minute, wait a minute, calm down, calm down, take it easy. I said, don't get excited about this. I said, I don't see any real problem about your bringing in proof. I said, people have brought in proof left and right here for the last month or two. I said, what's the big deal with you. I said, why don't you take it easy, see if you can bring in your proof, and that will be the end of it. And he said, we'll see. And at that the phone conversation ended.

About an half hour later, Wasilewski testified Maurice called him again and accused him of taking $80 out of his pay. Before he could reply, Maurice said "well, you know what, he said, *fuck the $80; shove the $80 up your fucking ass.*" *He also said he did not want the $80, that he would get it back one way or the other, and that if he [Wasilewski] wanted cooperation, he was not going to get if from him or the Union from then on.* He told Maurice he was abusing his position as grievance chairman and advised him to utilize the grievance procedure. Maurice became very angry and started raising his voice and using *profane language*, warning him that he was going to win this thing; that *he was not going to take "this fucking shit,"* advising that "I was going to be sorry I ever did that to him" *and that "I was going to see trouble and grievances at the plant like I had never seen before."*

Maurice's testimonial version of the telephone conversations is as follows:

> I said if the company is willing to give me the time off and pay my expenses I'll gladly go down and get the birth certificate.
>
> It was either the first or second meeting, I said to him, what the fuck are you doing to people, Joe. *I said you're fucking with the employees. I said when they have a death benefit, a death in the family, you're asking them for proof.*
>
> I said John Sleight you held back two days pay. I says, what do you expect from people. I says, we have—*I says, you're unilaterally changing the contract. The contract doesn't call for proof and all of this.*

Maurice further testified that his second telephone conversation with Wasilewski was as follows:

> And I says, Joe, just *what the fuck do you think you're doing.* I said, you're going to hold back a day's pay on me. I says, you held back money on John Sleight.
>
> I says when I get my paycheck, I better have my money in my paycheck. *I says I'm going to the Labor Board on it.*
>
> *And he says don't be such a big fucking baby to me.* I blew my stack. And after that, I can't bring to memory just what I said but I did blow my stack.[5]

According to the testimony of Managers William Bicknell, Alfred Pellegrino, and Richard Brooks, they overheard parts of Maurice's telephone conversations with Wasilewski. *Bicknell* said he heard Maurice say "don't fuck me around," "you want cooperation, you've seen the last of cooperation." *Pellegrino* said he heard Maurice say "Joe, I think you're fucking me around." *Brooks* said he heard Maurice say "come on Joe, don't fuck me around." *Bicknell* further testified that he has never heard an employee tell a member of management anything like "take the $80 and shove it up your ass." He acknowledged that he used obscene language towards

[5] I credit the above testimonial account of Wasilewski, except for his denial that he told Maurice "don't be such a big fucking baby," because Maurice acknowledged he uttered most of the profanity and obscenities attributed to him by Wasilewski. I was so persuaded by Maurice's candid admission or failure to deny he uttered such language, that I believed him when he said Wasilewski made the "big baby" statement. However, while Maurice did not acknowledge making the "shove it" statement, he nevertheless did not emphatically and convincingly deny making that statement and uttering other obscenities attributed to him by Wasilewski, Bicknell, Pellegrino, and Brooks. Maurice simply said, "*I can't bring to memory just what I said but I did blow my stack.*" I interpret Maurice's latter statement to mean he probably did make the "shove it" statement. Moreover, from my having observed the ease with which Maurice articulated the foul and profane language while testifying herein, I was easily persuaded that the "shove it" statement and the other obscene and profane language attributed to him, came from his smoking stack, since the undeniable record evidence shows he was extremely angry during the telephone conversations on September 20. I also credit Maurice's testimony and discredit Wasilewski's denial, that Maurice told him during the telephone conversation that "he [Wasilewski] was unilaterally changing the contract; that the contract does not call for proof and all of this." I credit Maurice's version not only because I was persuaded by his demeanor that he was testifying truthfully in this regard, but also because his statement about the contract is consistent with his experience as a grievance chairman, and his participation on the negotiating committee where he must have known that the proof requirement was not discussed. Finally, the substance of the obscenities and profanity uttered by Maurice during the telephone conversations with Wasilewski on September 22 is corroborated in small part by Supervisors Bicknell, Pellegrino, and Brooks, as hereafter shown.

Maurice and was called on the carpet by management for doing so, *but admitted he was not suspended, reprimanded or had such warnings placed in his personnel file.* Bicknell told Wasilewski that he, Brooks, and Pellegrino had overheard parts of Maurice's conversation as above described. I find that Maurice did not tell Supervisor Pellegrino or any other member of management that "all supervisors suck." The latter statement, if made at all by Maurice, was made in a private conversation with fellow employees with Maurice not knowing that anyone from management was present, as Pellegrino finally admitted.

After Bicknell informed Wasilewski that he, Brooks, and Pellegrino had overheard Maurice's telephone conversation with him, Wasilewski called Manager Dave Colvin and asked him to investigate the incident. He also pulled Maurice's personnel file and found that it contained two prior warnings, one for calling a member of management (Joe Bick) a "Jew bastard"; and a second warning for leaving the plant without authorization. That is, his car was illegally parked on the plant's premises and he was directed by management to move it. Instead of moving it and returning to the shop, Maurice drove out of the plant abandoning his job. Maurice's files did not contain any other warnings which were not agreed to be expunged from his file. Consequently, based upon his examination of Maurice's personnel file and learning what other managerial personnel overheard as described-above, Wasilewski said he decided to discharge Maurice for *using foul and abusive language towards him; and threatening Respondent by telling Manager Gaines, if he did not get his money on Thursday, he was going to get evil*, which Maurice denied, and *for telling himself (Wasilewski) he was going to withhold cooperation of the Union from the Company and make trouble in the plant.* Maurice was in fact discharged after the 4 o'clock meeting on September 24.

Wasilewski acknowledged that he did not warn Maurice about his telephone conversations on September 22, nor on September 23 or 24. However, he noticed that on September 22 Maurice filed approximately 20 more grievances, which were more grievances than the Company ordinarily would have received the entire year.

It is nevertheless observed that the evidence does not establish that any of the 20 grievances filed on September 22 were frivolous or personally filed on behalf of Maurice. In the absence of such proof, it can be reasonably assumed that they were not filed on Maurice's behalf and were not frivolous.

Based upon the foregoing credited testimony, I conclude and find that as a result of Wasilewski's rejection of Maurice's evidence of proof (prayer card) of death and relation, submitted pursuant to Respondent's unilaterally instituted "proof" rule, Maurice, in anger, initiated the above-described September 22 telephone conversations. It is quite apparent from the conversations that Maurice was primarily concerned with the impact of enforcement of the proof rule upon himself on that occasion. However, it is also apparent from his questions and statements, "what the fuck are you doing to people, Joe," "you are fucking with the employees," "you are unilaterally changing the contract," and "you withheld two days pay from John Sleight," that Maurice was concerned with the effect of enforcement of the proof rule on fellow employees as well. It is therefore clear that since Maurice was grievance chairman and was expressing concern about the proof rule on behalf of himself and fellow employees, he was in fact concertedly protesting the practicality, wisdom, and equity of the proof rule. This is so even though Maurice's protest might have been loud, discourteous, and uttered in some profane and foul language.

The question raised by the above circumstances is whether Maurice's telephone protest constituted protected concerted activity under the Act.

In this regard, it has been long settled by the Board and the courts that concerted activity for the objectives stated in Section 7 of the Act can be unprotected if it is unlawful, violent, in breach of contract, or indefensible because they demonstrate a lack of loyalty to the employer and deemed unnecessary to carry on the workers' legitimate concerted activities. *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9, 17 (1962). In such situations the test seems to suggest that an accommodation must be sought between the "undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline . . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793, 797–798 (1945).

The evidence is undisputed that Donald Maurice has been a very active and diligent grievance chairman, having processed some 300 to 400 grievances with Respondent over the past 3-1/2 years. Maurice had processed two grievances under the proof rule on behalf of two employees only 3 working days earlier. While he had not filed a grievance or requested Respondent to bargain on the matter, he was nevertheless protesting the required proof, and, as such, was engaged in protected concerted activity (the right to complain about the ambiguity, equity, and onerous effects of the rule).

Having found that Maurice was engaged in protected concerted activity during his telephone conversations with Wasilewski on September 22, *the question remains as to whether such activity became unprotected by Maurice's use of any threatening, profane and obscene language while talking with Director Wasilewski.* Before analyzing this question it is perhaps appropriate to point out here that Board law has long recognized the fact that the use of profane, obscene, and vulgar language is not uncommon in the industrial sphere. *Passaic Crushed Stone Company, Inc.*, 206 NLRB 81, 85 (1973). There is no dispute herein that Respondent is an industrial enterprise (factory) engaged in the manufacture of organic chemicals. Moreover, the undisputed and credited testimony of Dave Paul established that such profane and obscene language, as used by Maurice, is heard daily in the plant. Employee Walter Luther undeniably heard employee Frank Curtin state in a grievance meeting, in the presence of Wasilewski and Manager Kay, that "we have to discuss this goddamn contract and I am not going to take any of your fucking bull shit"; and "that he was marrying this Pollock bitch so he could beat her fucking ass."

In a department meeting with Manager Steve Bierman, Manager Frank Kay, and Director Joe Wasilewski, Thaler undeniably heard Manager Maggio say, "I could take this before any fucking lawyer and you guys would lose and I would win"; and employee Bob Cronk said upper management's opinion of them was that they were a "bunch of fucking assholes." In a meeting with Manager Frank Kay, John Lovell undeniably told Kay, "his fucking head was in the air"; and Kay undeniably asked him, "what the fuck he wanted him to do." During the past 9 years only one employee was ever given a written warning for telling Supervisor Brooks "to take his overtime and shove it up his ass." *No employee has been suspended or discharged for using such foul language, prior to the discharge of Maurice.* I credit the account of Paul, Luther, Thaler, and Lovell because their accounts are consistent and I was persuaded by their demeanor that they were testifying truthfully.

1. Discussion

With the above undisputed background in mind, it is clear that the use of profane and foul language by and among employees and members of management was common in Respondent's plant. Nonetheless, it is particularly observed that most of the foul words used by Maurice were used as expletives and did not have an ethnic or personal connotation, such as the employee calling a supervisor a "mexican m— f—"; "taco vender"; and "beaner," in *Coors Container Company*, 238 NLRB 1312 (1978); or as, when a supervisor asked an employee why was he not at his machine, and the employee responded, "why don't you kiss my damn ass," in *Jeffrey Manufacturing Division, Dresser Industries, Inc.*, 248 NLRB 33 (1980). In *Coors*, the employee was engaged in protected activity and such language was considered to be a part of the industrial work sphere. Consequently, discharge of the employee was held unlawful. The discharge of the employee in *Jeffrey Manufacturing* was held unlawful because the remarks were not delivered in a threatening or insubordinate manner.

The Board has repeatedly held that strong profane and foul language, or what is normally considered discourteous conduct while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity. *Max Factor & Co.*, 239 NLRB 804, 818 (1978), and *United States Postal Service*, 250 NLRB 4 (1980).

Here, Maurice, in a loud and angry voice, certainly made considerable use of obscene language (various forms of the word f—), and Wasilewski used the same obscene word (f—ing) on one occasion during their September 22 discourse. However, it is particularly noted that such obscene language was used by Maurice and Wasilewski as impersonal expletives. The only other obscene language used by Maurice which could possibly be interpreted as having carried a discourteous and personal connotation to Director Wasilewski was Maurice's heated response to Wasilewski's admonition that he would not be paid for death leave without submitting sufficient proof of death. Maurice replied: "F— the $80; shove the $80 up your f—ing ass." While the latter statement is certainly foul and discourteous, especially when it was overheard in part by fellow employees and several members of management, suffice it to say that it is a statement commonly understood as a vulgar way of telling someone to "keep it." Finally, it is further noted that Maurice did not at any time address Wasilewski by a foul or vulgar name as "mexican m— f—," "kiss my damn ass," as the employee addressed a member of management in the *Coors* and *Jeffrey* cases, *supra*, where discipline of the employee was held unlawful.

Since Maurice's use of four expletives, including the "shove it" statement, were made during a heated telephone protest of Respondent's unilaterally instituted proof of death rule, I find that such language was uttered while Maurice was engaged in protected activity. Here, Maurice was acting in his capacity as grievance chairman on behalf of himself and other employees. I do not find that Maurice's obscene and foul language at anytime became unlawful, violent, in breach of contract, indefensible, or otherwise egregious, so as to have stripped his protesting activity of Section 7 protection. In fact, as the evidence has established, the use of such language was a part of the industrial sphere at Respondent's plant between employees and management.

2. Maurice's allegedly threatening remarks

The second question raised by Maurice's conversations with Wasilewski on September 22 is whether Maurice actually threatened management. In this regard, the evidence shows that Maurice said, "if I don't get paid there's going to be fucking trouble in this plant"; "that if you want cooperation, you are not going to get it from me or the Union from now on"; "that he was not going to take this fucking shit, and Wasilewski was going to be sorry he ever did that to him"; that Wasilewski "was going to see trouble and grievances like he had never seen before"; and told Supervisor Gaines that "if he did not get his money on Thursday he was going to get evil."[6]

On that afternoon, or between September 22 and 25, Maurice filed or processed the filing of 20 grievances, which were more than the Company would have normally received within a year. However, the evidence does not show that any of the 20 grievances, nor any of the 300–400 previously filed grievances were frivolous, or that any of them were personally filed on Maurice's behalf.

In determining if and in what manner Maurice threatened Wasilewski and other supervisors as above described, it is first observed that the credited testimony of Supervisors Bicknell, Colvin, Gaines, Brooks, and Pellegrino indicated they overheard only some parts of the telephone conversations between Maurice and Wasilewski. Their accounts mostly described expletives (f—) by Maurice and essentially no threats to do wrongful harm to Wasilewski. Thus, the question of threatening remarks to Wasilewski during the telephone conversa-

[6] I credit Gaines' testimony in this respect because I was persuaded by his demeanor that he was telling the truth; and also because his account is consistent with other credited testimony of Maurice's admissions of statements he made while in a state of anger on September 22.

tions is one involving largely the credibility of Wasilewski and Maurice alone.

Comparing Wasilewski's own above-described testimonial account with his memorandum of September 24 (G.C. Exh. 15), it is noted he indicated, as Maurice credibly testified, that Maurice said he was going to the Labor Board if he did not receive his death-leave pay. In the same memorandum Wasilewski characterized Maurice's remarks as threatening him. Interestingly, in another memorandum dated October 7, 1980 (G.C. Exh. 3), Wasilewski clearly indicated that he considered "threatening": Resort to outside agencies (NLRB, OSHA, etc). Consistent with this understanding of Maurice's allegedly threatening remarks is Wasilewski's undenied statements to International Representative Robert Meade during the September 29 grievance meeting on Maurice's discharge. There, Representative Meade asked Wasilewski what was the Union defending. Wasilewski replied: "*Well, he used vile and obscene language, he threatened a number of our supervisors, and this is why we discharged him.*" *The supervisors had given Wasilewski prepared statements of the alleged threats of Maurice.*

After considerable efforts by Meade to persuade Wasilewski during the September 29 grievance meeting to permit him to see the statements and interview the respective supervisors, the interview with the supervisors revealed the following *undisputed* information elicited by Meade: Meade asked Supervisor Colvin what constituted the threats, Dave Colvin said he threatened me. When Meade asked how, Colvin said Don came up to him and told him *if he didn't get paid for the death holiday that he was going to file a grievance with the Labor Board.* When Meade asked what kind of a threat was that, *Colvin said it was a threat against his position if he did not do what Maurice wanted.* When asked what did Maurice want, Colvin said *he threatened to go to the Labor Board or he was going to the health department*, and where does it end. Finally, Colvin acknowledged that Maurice did not make any personal threat against himself but he (Colvin) considered it a threat against the Company. At that point, Meade said he asked Wasilewski if that was the best he had, and the latter said he had other statements.

When Meade asked Bicknell if he felt personally threatened by Maurice, Bicknell said there was no way that he was scared of Maurice in any fashion, but that Maurice was using his position to try to intimidate somebody. Meade continued to testify as follows:

> A. And I said, "Well, how's that?" and he said, "*Well, you can see by the number of grievances he's put in.* It's everything. It's the grievances. That's all we hear from him. He's going here, he's going to do this. He's trying to intimidate somebody." And I said, "Well, do you feel personally intimidated? Are you scared? Are you afraid he's going to hit you with a stick or something?" and he said, "No way." But he felt that he was trying to intimidate the company unless they did what he wanted.

Meade then questioned Bicknell about Maurice using the word "fuck" and asked him was that not a part of shop talk, and had he not also used the word towards Maurice. Bicknell acknowledged that it was shop talk and that he had used the same language towards Maurice. Subsequently, Company Supervisors Brooks and Gaines entered the room. Meade said he asked both gentlemen how did they feel threatened by Maurice, and they responded *that he constantly threatened the Company that he was going to file grievances; and that he was going to OSHA or some other public agency*, which they said was wrong action on his part.

It is therefore clear from the foregoing undisputed and credited evidence that Maurice's remarks: "There's going to be f—ing trouble in this plant"; "That if you want cooperation you aren't going to get it from me or the Union from now on"; "That you are going to be sorry for what you did to me"; "You are going to see grievances like you had never seen before"; and that "If I don't get my money I am going to get evil," were not interpreted by either Wasilewski or Supervisors Bicknell, Colvin, Brooks, and Gaines, as threatening them with physical harm, or to do physical injury or other unlawful harm to the Company.

On the contrary, Wasilewksi and the aforenamed supervisors all equated Maurice's remarks with filing grievances with the Company or filing charges with the Board or other public agencies. When Maurice's above-quoted language is considered in the context of the heated protected protest about Respondent's unilaterally instituted proof of death rule, it is quite evident that Maurice was warning Wasilewski that the company-union's already turbulent relations were not going to improve but worsen (trouble). The many grievances previously filed, and the 20 additional grievances filed September 22–25, tended to further substantiate what Maurice meant by trouble and grievances.

Perhaps more importantly it is also clear that Maurice's language indicated, and Wasilewski and the aforenamed supervisors understood him to mean, that he (Maurice) and the Union would no longer make efforts to informally resolve employee grievances with management. Instead, they would resort to the contractual grievance procedure and to the Board and other governmental administrative procedures, since Respondent was so unrelenting in enforcing its unilaterally adopted proof of death rule. In order to conclude otherwise, I would have to ignore and discredit all of the undisputed testimony and documentary evidence, some of which is Respondent's own witnesses and documents. Certainly threats or warnings by an employee to exercise the right to resort to such contractual and legal procedures fall within the protection of Section 7 of the Act. *Austell Box Board Corporation*, 249 NLRB 345 (1980).

Maurice's remarks to withhold cooperation of himself and the Union from Wasilewski are distinguishable from, and certainly not as vague as, employee Green's remarks in *Southwestern Bell Telephone Company*, 190 NLRB 427 (1971), where one supervisor would not disclose which management person refused to change Green's work assignment. Green interrupted and said, "well, I don't care whose decision it is, whether its your's, Rawlin's, Mellina's . . . whosever's decision it is I'm going to say he is

a chicken s—s.o.b. I will f—"[7] him *24 hours a day some way*. When asked did he mean what he said, Green said "well, I sure do, and you can expect no cooperation from me in anyway." When asked what he meant by that, Green said "you will find out." The Board approved the Administrative Law Judge's finding that the employer's 1-day suspension of Green for threatening to do some harm to, or make things difficult for, the employer was not unlawful. However, it is particularly noted that Green, unlike Maurice herein, was not shown to have been engaged in protected activity at the time of his utterance. Maurice did not address Wasilewski by a foul name as Green addressed (chicken s—s.o.b.) management. Moreover, Green's remarks left clear reasons for speculative apprehension by the employer as to what Green was going to do (physically or otherwise) to a member of management. Maurice's remarks left no room for such speculation, and the proof of that fact was borne out in the final analysis by Wasilewski and the other supervisors admitting no apprehension of harm, but only additional grievances and complaints filed with government agencies by Maurice and the Union. The entire conversation of September 22 (Wasilewski and Maurice) was carried on by telephone and the evidence does not establish as a fact, who, or that any identified employees, were in his immediate presence. I do not know if they were identified it would make a difference. It is noted that International Representative Meade told Wasilewski to expect many grievances during their conversations on September 22 or 25.

Finally, it has been found herein that Respondent has failed to establish that Maurice threatened Personnel Director Wasilewski or any of Respondent's supervisors with personal harm. Nor was Respondent able to demonstrate that Maurice threatened to cause injury to the Company or unlawful difficulty for it. At most, Respondent established that Maurice warned or threatened to file grievances, and did in fact file grievances pursuant to the grievance procedure of the contract, and threatened to file charges with governmental agencies, including the Board. However, the evidence failed to show that any grievances or charges filed, were instigated by Maurice, or that those processed by Maurice were frivolous and designed to harass Respondent. In the absence of such proof, it may reasonably be inferred from the established facts that the number of grievances filed or processed by Maurice represents what has been clearly established by the evidence: the gravity of the discord between the Union and Respondent.

While it has been found herein that Maurice did utter considerable obscene words as expletives during the September 22 conversations, it has also been found that Wasilewski used the same expletive once during the conversation; and that such profane, obscene, and vulgar language is a part of the industrial sphere at Respondent's plant. Only the obscene "shove it" statement by Maurice was addressed to Wasilewski. However, even though that statement is vulgar and was discourteously addressed to Wasilewski, such statement was nevertheless uttered during a heated and protected protest (activity) by Maurice. While Maurice's loud and foul protest is not worthy of commendation, at least the evidence shows such language was not uncommon between employees and management. However, the question is whether such conduct was so excessive as to deprive his protest of protected activity.

Since the protected activity (foul and obscene telephonically protesting enforcement of a unilaterally adopted proof requirement against employees) in which Maurice was engaged was not unlawful, violent, in breach of contract, or indefensible because it demonstrated a lack of loyalty to Respondent, I do not find that such "shove it" statement nor any of the other remarks uttered by Maurice were so unreasonable and egregious that they were sufficient to strip his protest activity of Section 7 protection.

Finally, it is especially noted, according to the credited testimony, that Wasilewski was apparently provoked by Maurice's threat to go to the Labor Board, when he retorted, "don't be such a big f—ing baby." The record shows Maurice was further provoked by Wasilewski's latter statement and he responded with multiple expletives including the "shove it" statement. As I observe both witnesses (Wasilewski and Maurice), I did not detect any expressions of animosity for one against the other. On the one hand, I received the distinct impression that Wasilewski was the cool and reasonable personnel director trying to improve relations between the Company and the Union. On the other hand, I saw Maurice as a zealous grievance chairman and union adherent whose active daily vocabulary included profane and obscene language, and whose aggressive union activities could very well be a thorn in the side of an employer acting in good faith.

On September 22, Maurice and Wasilewski were caught in a verbal cross-fire while discussing enforcement of the Company's unilaterally adopted proof rule. Maurice overreacted, only short of exceeding the limits of Section 7 protection. Wasilewski was probably willing to overlook the matter but either, later (2 days) realized or was persuaded that Maurice might have provided him the opportunity to remove the Maurice thorn from his side by discharging him. But for the protected conduct of Section 7, I think Wasilewski might have had ample grounds for discharge. However, in the context of the poor company-union relations reflected throughout the record (before and after the discharge of Maurice), the evidence is clear that Respondent's discharge of Maurice was motivated by Maurice's grievance filing, his threat to file more grievances and his actually filing more grievances, and his threat to go to the Labor Board because he thought informal resolution of problems with Respondent was futile. While such conduct by a union agent can be annoying, in the absence of *evidence* of frivolous complaints and a manifested intent to harass Respondent, for which evidence I examined the record here without success, I am persuaded by all of the credited evidence that Maurice's conduct was still within the scope of Section 7, as the above-cited legal authorities indicate. Union member-employee Walter Luther further

[7] The word used is obscene and may be literally translated to "foul up" or "screw up."

testified that on March 11 and 12, 1981, he accompanied Managers David Colvin and Peter Dapas to a Chemical Manufacturer's Association convention in Philadelphia, Pennsylvania. While there, Luther said, *Mr. Colvin said* "Don Maurice was not fired for what he did, that incident, but was fired because he was no longer working for the Company, he was working for the Union." Colvin denied he made such a statement.[8]

Consequently, I conclude and find upon the foregoing evidence reasons, and cited legal authority, that Respondent's discharge of Donald Maurice was substantially motivated by his aggressive union grievance filing (processing), his angered protest of Respondent's enforcement of the proof of death rule, and because Maurice threatened to go to the Labor Board if he did not receive pay for death leave. This conclusion is further supported by Wasilewski's responses to the Union's effort to have Respondent reinstate Maurice discussed, *infra*. Additionally, I conclude and find that Respondent's contended reasons (foul, obscene, abusive, and threatening language to management) for discharging Maurice were not the real reasons for discharging him. Rather, such contended reasons were of a pretextual nature, perhaps exaggerated, to conceal the unlawfulness of Respondent's real reason for discharging him. Under these circumstances, Respondent's discharge of Donald Maurice was discriminatory and in violation of Section 8(a)(1), (3), and (4) of the Act.

Counsel for the General Counsel has established that Maurice's protected activity was the substantial motivating cause for his discharge. Since Respondent has failed to demonstrate that Maurice would have been discharged in the absence of his threats to go to the Labor Board and his zealous grievance filing activity, *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is not applicable to the facts as found herein.

E. *The September 29 Grievance Meeting of Respondent and the Union on the Discharge of Donald Maurice*

Robert Meade has served as International representative of the Union since 1979. In this capacity he serves 13 locals and 25 different plants, including Local 677 of Respondent's plant. On September 24, 1980, the day Maurice was discharged, Meade received a telephone call from Dave Paul, president of Local 677, who told him that Donald (Don) Maurice had been suspended by Respondent for foul and abusive language, like calling a foreman an "Ass Hole." Meade said he told Paul he would call Joe Wasilewski and see how serious the charges were. Meade called Wasilewski on September 25 and they agreed to discuss Maurice's discharge at the next scheduled grievance meeting on Monday, September 29, 1980.

On the following Monday, September 29, Meade approached the plant and saw Don Maurice who advised him that Respondent would not allow him on the premises. Meade contacted Wasilewski and told him Maurice was not permitted to enter the plant. Wasilewski told him Maurice could enter the premises if he were escorted by someone. Thereupon Meade and Dave Paul went out of the plant and brought Maurice into the plant. They entered the third step of the grievance and present for the Company were: Joe Wasilewski, personnel director, Dave Colvin, production manager, and another gentleman. Present for the Union were: Meade, Dave Paul, Don Maurice, Frank Curtin, George Reeves, John Lovell, and probably one or two others. After an argument about the presence of Don Maurice, Meade testified that the meeting proceeded in part as pertinent herein as follows:

> He asked Wasilewski, "what did he do?" He said, "Well, he used vile and obscene language, he threatened a number of our Supervisors, and this is why we discharged him." I said, "Well, who did he threaten?" He said, "Well, we're not going to tell you that now. We don't want any reaction." I said, "How the hell can I defend that if you're not going to tell us who?"

After considerable reluctance to tell who the supervisors were, to show Meade their statements, and, finally, to allow him to interview them, the supervisors (Bicknell, Colvin, Brooks, and Gaines) all said Maurice did not threaten them or the Company with harm; but that he threatened to file more grievances and to file a charge with the Board or other agencies, as previously found herein. Supervisor Brooks admitted profane and obscene language was common shop talk but Supervisor Gaines denied that it was shop talk. I nevertheless do not credit Gaines' denial because I was not persuaded by his demeanor that it was truthful, and because it is contrary to the abundance of credited testimony herein.

Wasilewski then told Meade that Maurice was calling him about his own funeral leave and not someone else's, and he did not have to talk with him. Meade tried to explain that as shop steward, even representing his own complaints, Maurice was engaged in protected activity. Wasilewski did not agree with any distinction between the Company recognizing Maurice as chief shop steward, as distinguished from an individual employee. Wasilewski then told him, Maurice had to leave the room and Meade tried to explain that, since Maurice was the shop steward, they could not go forward or present the grievances without Maurice; that that would be holding up the grievance machinery. Wasilewski said "Well they would have to be held up because he's fired and he can't be the chief shop steward." Meade tried to explain that Maurice need not be an employee so long as he was a shop steward, he was still entitled to represent the employees for the purpose of processing grievances. Since they could not go forward with Maurice, Meade said they agreed to set up another meeting at a later time. The Respondent made its employment status decision that Don Maurice was discharged. The meeting ended

[8] I credit Luther's testimony because it is consistent with the prior credited evidence and findings herein. I was also persuaded by Luther's demeanor that he was testifying truthfully and I discredit Colvin's mere denial. Based upon this credited testimony, which is consistent with the foregoing credited evidence regarding the reasons for Maurice's discharge, I find this to be additional evidence of Respondent's discriminatory motive for the discharge of Maurice.

and, as he was driving on the Garden State Parkway, he stopped and went to a public telephone and called Wasilewski and their conversation was as follows:

> A. "I talked to you last week and we were talking about an apology and maybe a two day suspension and now you come up and you want to hang the guy. What is it?" He said, "*Well, you know they want him. You know they want his ass.*" I said, "Christ sakes, get it some other way. You know and I know if you wanted Maurice you can follow him around there for a month and fire him for ten different reasons, but not phony bullshit like this." And he said, "Well, what chance? Are we going to hang Maurice to get a chance for that place to operate?" He said, "*Let me work on it a little while. You know how these people are here*" *because at the meeting they had brought up a hit list.*

Their conversation ended with them arguing about a suspension of 2 days to 2 weeks, an apology by Maurice, and *Maurice returning upon the condition of relinquishing his chief shop steward (grievance chairman) position*, which Meade said he would not buy.

In a letter dated October 3, 1980 (G.C. Exh. 2), Respondent advised the Union (Meade), after a long recitation of its position and the Union's position, that the Company had proper cause to discharge Donald Maurice for using foul and abusive language towards the personnel director and maintenance supervisor; threatening the maintenance manager, director of production, and personnel director; failure to fulfill his responsibility, and obligation to settle labor-management disputes peacefully, utilizing contractual grievance machinery; and failure to act responsibly after receiving a disciplinary suspension for the use of foul, abusive, and threatening language to company officials. More specifically, the Company said Maurice violated company rules 1 and 13, category II, of the posted and distributed "Work Rules and Regulations," dated 2-80, and article II, section D and E, of the union contract. The letter was signed by Joseph Wasilewski.

About 10 days after the receipt of the Company's decision upholding the discharge of Maurice, Meade said they proceeded to the Company again for a grievance on the discharge. Again they met with company opposition to admit Maurice on the premises and after some discussion with Wasilewski in an effort to obtain his permission to allow them to escort Maurice on the premises, they left the premises since the Company denied such permission. The Company had also denied their request to meet at a church in a grievance meeting.

Sometime after the first of the year, while at the plant on other business, Meade said he asked Wasilewski about the Maurice case and the latter said maybe they can settle the case. He said, "great, let's do it," and Wasilewski said they will have to talk suspension. He said, "Christ, how much suspension, the guy has been gone forever," and *Wasilewski said Maurice cannot come back as chief steward (grievance chairman)*. Meade said he told him that was the heart of the controversy, he has to return as chief steward. Wasilewski then said, "why can't he settle for part money" and Meade said, "why don't you talk to Maurice it's your offer," and Wasilewski said he would.

Meade said that a few weeks later, while at the plant for another meeting, Wasilewski told him Maurice said there was no way he would come back without being chief steward. When he was asked what did he offer Maurice, Wasilewski reluctantly said, "25," he said "dollars or thousands," and Wasilewski said, "you, know, thousands."

It is particularly noted that Respondent (Wasilewski) did not introduce any testimony to refute or controvert the extensive testimonial account of his conversations with International Representative Meade on September 24 and 29.[9]

F. *Respondent's Refusal to Permit Grievance Chairman Access to Premises to Attend Grievance Meeting*

Article IV, B, of the current contract between the parties provides as follows:

> B. A business agent of the Union shall have access to the plant for the purpose of adjusting grievances, negotiating the settlement of disputes, and generally for the purpose of carrying into effect the provisions and aims of this agreement. Whenever possible he shall make an appointment in advance for such visits. In any event, the agent of the Union shall on arrival at the Plant clear through the regular channels of the Company for receiving visitors.

Since the undisputed evidence demonstrates that Respondent refused Grievance Chairman (steward) Donald Maurice access to its plant to attend grievance meetings on or about September 29 and October 7, respectively, because he was discharged by Respondent on September 24, counsel for the General Counsel contends Respondent has violated the above-cited section of the contract and Section 8(a)(1) of the Act. Respondent does not offer any defense to this allegation and the evidence is uncontroverted that Respondent refused Maurice access on September 29, but relented and permitted him to enter escorted by Representatives Meade and Paul. On the second occasion, Respondent refused Maurice access to the premises, even if he were escorted by Meade and Paul. Respondent maintained its refusal even after Meade explained to Wasilewski that Maurice was to enter the plant in his official union capacity and as grievant. Under these circumstances, I conclude and find that Respondent's refusal constituted coercion against and restraint upon the exercise of employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

The evidence does not establish that Maurice would be a dangerous risk if he had been admitted to the plant, but even if he would have been, Respondent could have

[9] I find Meade's account essentially uncontroverted by Wasilewski. However, to the extent that Wasilewski *may have denied* any part of Meade's account, I discredit his denial because I was not persuaded by the denial, or any frail explanation, that it was sufficient to refute the credited account of Meade. Meade's account is consistent with all of the credited evidence of record.

had Maurice escorted into and out of the plant by one of its guards or other designees. Since no justification has been advanced for Respondent's refusal, I find that Respondent's refusal in this regard violated article IV, B, of the contract and Section 8(a)(1) of the Act. *Pioneer Inn Associates*, 228 NLRB 1263, 1264 (1977); *Southern Florida Hotel & Motel Association*, 245 NLRB 561 (1979); and *General Electric Company*, 160 NLRB 1308 (1966).

G. *Respondent Allegedly Advised Employees To Refrain From Filing Grievances But To Bring its Problems to It*

The complaint herein also alleges that on or about October 6, 1980, Maintenance Supervisor Donald Schickle warned and advised employees to refrain from filing grievances with the Union, unless and until they sought Respondent's permission to do so.

The evidence shows that Supervisor Schickle held a meeting with all maintenance pipefitters, the yard laborer, and Shop Steward Walter Luther on or about October 1, 1980. During the meeting, Schickle discussed rules and procedures to be followed at the Company. Luther testified that Schickle also told the employees "if they had any problems with the Union, he wanted them to come see him, and if he could not help them with the problems, even if they were personal problems, then he would direct them to the proper union official." Luther said that Schickle told other employees and himself the same thing on the next day. Schickle denies Luther's uncorroborated account.

Schickle's account of what he said is as follows:

> Q. Would you tell me essentially what you said with respect to how employees should handle problems?
>
> A. I stated that all—any problems that the employees had *I wanted them to come to me with the problem, and that I would try and handle that problem and do what had to be done for them, and if I couldn't I would direct them to the department or to the Union or whatever was needed to expedite the problems.*

Schickle said he specifically said payroll problems or personal problems. Subsequent to the meeting, he said a shop steward came to him and told him he (Schickle) had been misinterpreted by some employees that they should not go to the Union. Schickle denied the assertion and held a meeting the next day with the pipefitters and other persons, during which he said the following:

> A. I explained to those present at that meeting that the statement I made about coming to me with problems had been misinterpreted by a few individuals at the first meeting and what I would like to clarify it at this meeting so that there wasn't—so that I didn't make the same mistake twice.
>
> Q. And what clarification did you give?
>
> A. The same, that I did not tell the employees not to go to the Union, that I simply told them that I would prefer they come to me with every problem so that I have a chance to handle it first.[10]

The above testimonial statements of Schickle to the pipefitters are, as the General Counsel argues, very much similar to the statement of the supervisor in *Berbiglia, Inc.*, 237 NLRB 102 (1978), who told the employees, "if you have a problem come to me. That's what I'm here for." Except here, Schickle's statements are even clearer in telling the employees to come to him first, and if he could not resolve the problem, he would refer them first to management and then to the Union. Moreover, here, Schickle testified he attempted to clarify his statements on the next day, but when he was asked how he clarified them, he said he said the "same." He only denied that he told the employees not to go to the Union. I can hardly discern a clarification which refutes Luther's version. If anything, Schickle's attempted clarification is more of an affirmation of what Luther testified he said on both days.

While I understand what Respondent (Schickle) was trying to accomplish in good faith, regretfully Schickle did not express himself within the context of his objective and the best interest of Respondent. Consequently, I conclude and find upon his explicit testimony that he solicited employee grievances within the context of *Berbiglia, supra*, and *Communication Systems Construction, Inc.*, 209 NLRB 652, 655 (1974). In doing so, Respondent coerced and restrained its employees, in violation of Section 8(a)(1) of the Act.

Conclusions

Although the record contains an abundance of testimony, I have nevertheless found such testimony, in substantial part, truthful and free of conflict. While the testimony of Maurice and Wasilewski, in particular, is crucial to several of the issues presented for determination, I have found their affirmative testimony for the most part to be truthful, and to a greater extent, their denials, untruthful. Although Director Wasilewski denied certain members of management used foul and obscene language in exchange with employees on several occasions, I did not credit Wasilewski's denial in this regard, not only because he *merely* denied it, but because several employees had so testified specifically. Also, several supervisors admitted such language was shop talk. None of the managers who were accused of using such language (Maggio and Kay) testified herein to the contrary. Hence, it is well established by the credited testimony that such obscene exchanges between employees and management were not uncommon.

Additionally, since Maurice unequivocally learned on September 16 that Respondent was enforcing its unilaterally adopted proof rule, he was engaged in lawful protest of the rule only 3 or 4 working days later, on September

[10] Although Schickle denied Luther's testimonial version of what he told the pipefitters during the October meeting, a reading of his own above-testimonial version shows that it is essentially consistent with Luther's version. I therefore credit Luther's because I was persuaded by Luther's demeanor, as opposed to Schickle's demeanor, that he was testifying truthfully. Moreover, it is also noted that Luther's account is consistent with the record evidence of Respondent's apparently good-faith efforts to minimize the number of grievances being filed by the Union.

22. When the Union failed to request bargaining on the matter after Maurice was discharged (not before September 29), the Union waived its right to request bargaining.

Director Wasilewski also merely denied that he conditioned reinstatement of Maurice upon his relinquishing his union position of grievance chairman. Again, I was not persuaded by Wasilewski's testimony nor his demeanor that his weak denial was truthful. In this regard, I noted that Wasilewski did not deny that he offered Maurice a money settlement and made other statements about his efforts to settle the Maurice grievance with management, as Meade testified. Meanwhile, I was persuaded by Meade's uncontroverted testimony and his demeanor that he was testifying truthfully in describing his postdischarge conversations with Wasilewski. The record shows that Respondent was making some reasonable efforts to improve relations between itself and the Union herein. Unfortunately, some of the measures taken by Respondent to achieve those ends fell short of being lawful. Thus, after viewing the evidence of record from every dimension most favorable to Respondent, I find that it supports the findings herein made.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent threatened an employee by telling him it will turn over his grievances to the company physician to institute legal action against the employee, and issuing a written warning to him for filing a grievance against it for questionable sanitary examining practices of the physician, in violation of Section 8(a)(1) of the Act; that by discharging, and since thereafter failing and refusing to reinstate a union grievance chairman (steward) employee because he filed numerous grievances, Respondent violated Section 8(a)(1) and (3) of the Act; that by discharging said union grievance chairman employee because he threatened to go to or file a charge with the Board and other governmental administrative agencies, Respondent violated Section 8(a)(1) and (4) of the Act; that by refusing the discharged union grievance chairman access to its facility to attend grievance meetings and process grievances, Respondent violated its contract with the Union, as well as Section 8(a)(1) of the Act; that by telling employees to bring their problems to management and if management could not resolve them it would refer them to the Union, Respondent violated Section 8(a)(1) of the Act; and that by conditioning the reinstatement of said union grievance chairman upon the condition that he relinquish his grievance chairman's (steward) position, Respondent violated Section 8(a)(1) of the Act, the recommended Order will provide that Respondent make the discharged union grievance chairman whole for any loss of earnings he may have suffered within the meaning and in accord with the Board's decision in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[11] except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Upon the basis of the above findings of fact and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW

1. Kay Fries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Chemical Workers Union, Local 677, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees by telling them it will turn over their grievances to the company physician for him to institute legal action against employees for filing a grievance against the Company for questionable sanitary examining practices of company physician, and issuing a written warning to them for filing such grievance, Respondent has violated Section 8(a)(1) of the Act.

4. By refusing the discharged union grievance chairman (steward) access to its facility to process grievances, Respondent has violated its contract with the Union and has violated Section 8(a)(1) of the Act.

5. By conditioning the reinstatement of the discharged union grievance chairman (steward) upon his relinquishing his union position as grievance chairman (steward), Respondent has violated Section 8(a)(1) of the Act.

6. By telling employees to bring their problems to management and if management cannot resolve them, management will refer them to the Union, Respondent violated Section 8(a)(1) of the Act.

7. By discriminatorily discharging Donald (Don) Maurice and thereafter failing and refusing to reinstate him, because he continued to file grievances on behalf of the employees, Respondent has violated Section 8(a)(1) and (3) of the Act.

8. By discriminatorily discharging Donald (Don) Maurice because he threatened to go to and/or file charges or complaints with the Board and/or other governmental administrative agencies, Respondent has violated Section 8(a)(1) and (4) of the Act.

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[11] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[12]

The Respondent, Kay Fries, Inc., Stony Point, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees by telling them Respondent will turn over their grievances to the company physician for him to institute legal action against them for filing grievances against Respondent for questionable sanitary examining practices of the Company's physician, and issuing and including in the personnel files of employees, a written warning for doing so.

(b) Refusing discharged grievance chairman (steward) access to its facility for the purpose of processing grievances.

(c) Conditioning reinstatement of unlawfully discharged grievance chairman (steward) upon his relinquishing his union position as grievance chairman (steward).

(d) Telling employees to bring their problems to management and, if management cannot resolve them, it will refer them to the Union.

(e) Discouraging membership in, or activities on behalf of, International Chemical Workers Union, Local 677, AFL-CIO, or any other labor organization, by discharging employees who support such organizations or carry on its activities.

(f) Discriminatorily discharging employees because they threatened to go to or file charges with the Board or complaints with other governmental administrative agencies.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Donald Maurice immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered by reason of the discrimination against him, with interest, in the manner described in the section of this Decision entitled "The Remedy."

(b) Retract and expunge from the personnel records of Darryl Thaler, the written warning (G.C. Exh. 8) issued to him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its plant and place of business copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent 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.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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

[12] 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.

[13] 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 United States Court of Appeals Enforcing an Order of the National Labor Relations Board."