

Bath Iron Works Corporation and Local 7, International Union of Marine and Shipbuilding Workers of America, AFL-CIO and Local 6, International Union of Marine and Shipbuilding Workers of America, AFL-CIO. Cases 1-CA-23792-1 and 1-CA-23792-2

May 13, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On April 19, 1989, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief and a brief in support of the judge's decision, the Charging Parties filed a brief in reply to the Respondent's exceptions, and the Respondent subsequently filed a brief responding to the General Counsel's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs² and has decided to affirm the judge's rulings, findings, and conclusions only as modified herein and to adopt the recommended Order as modified and set out in full below.

The Respondent and the Charging Party Unions in this case submitted to arbitration pursuant to their collective-bargaining agreements the issue of the Respondent's unilateral implementation in 1986 of its Substance Abuse Policy and Procedures (SAPP).³ The SAPP included provisions for drug and alcohol testing. Arbitrator Eric Schmertz' decision issued on June 30, 1986. There he found the Respondent's conduct valid under both the National Labor Relations Act and the parties' contracts.⁴ An unfair labor practice complaint issued subsequently, and the question of the Respond-

ent's unilateral implementation of the SAPP was put before the judge. As a threshold matter, the judge declined to defer to the arbitrator's decision, concluding that it was "repugnant to the purposes and policies of the Act." In her analysis of the substantive issues, she concluded that the Respondent's institution of the SAPP violated Section 8(a)(5) and (1) and she recommended remedial action pursuant to that conclusion and the evidence of the Respondent's disciplinary action against various employees in applying the SAPP.⁵ We disagree, for the most part, with the judge's determination concerning deferral and, except for certain matters fully explained below, we will defer to the arbitrator's decision pursuant to the Board's *Spielberg/Olin* policy.⁶

I. BACKGROUND AND ARBITRATOR'S DECISION

Central to the issues in this case are the Respondent's plant rules 18 and 19, which state:

18. Use, possession, distribution, sale or offering for sale, of narcotics, dangerous drugs including marijuana or alcoholic beverages on Company premises at any time.

First offense: DISCHARGE

19. Being on Company premises under the influence of alcohol, narcotics, or dangerous drugs including marijuana, or refusing to submit to a test administered by the Medical Department to determine if under such influence.

First offense: 5 DAYS OFF

Second offense: DISCHARGE

These rules, last revised in 1978, had been implemented without any objection from the Unions. In fact, in both the arbitration and the unfair labor practice proceedings, the legitimacy of the Respondent's unilateral establishment of these rules and the validity of the rules in themselves was undisputed.

The record makes clear a pattern of consistent enforcement of both rules between 1978 and 1986, when the SAPP was implemented. With respect to the "testing" provision of rule 19, the Respondent, without objection from the Unions, had made use of a breathalyzer test to determine whether employees were "under the influence" of alcohol. The Respondent did not engage in testing for "under the influence" of drugs within the meaning of rule 19 until the SAPP was instituted. The drug-testing aspect of the SAPP was the flash-point of the current dispute between the Unions and the Respondent. Also significant is the management-rights clause contained in article III of both collective-bargaining agreements:

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

²The General Counsel's motion to strike from the record three documents attached to the Respondent's exceptions brief is denied as untimely because the same three documents were attached to the Respondent's posthearing brief and considered by the judge, and the General Counsel did not object at that time.

³There is no dispute in this case that the Respondent implemented the SAPP without prior notice to and bargaining with the Unions concerning its content. Also, the Respondent in fact issued two substance abuse policies of concern here, the first on February 24, and a revised policy on April 28, 1986. Because there is no significant difference between the two policies for purposes of our decision, we will refer to both as "the SAPP."

⁴The arbitrator made modifications in the SAPP which are not relevant here. On March 31, 1989, the U.S. District Court for the District of Maine denied the Unions' motion to vacate the arbitration award. *Local 6 and Local 7, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO v. Bath Iron Works Corp.*, Civil No. 86-0308-P.

⁵See *Johnson-Bateman Co.*, 295 NLRB 180 (1989), for the Board's view of drug and alcohol testing of bargaining unit employees as a mandatory subject of bargaining under the Act.

⁶*Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).

ARTICLE

Management Functions

The management of the BIW and the direction of the working forces, including the right to hire, classify, assign, transfer, promote, discipline or discharge for [just] cause, decrease the force, require employees to observe the BIW's rules and regulations, and to regulate the use of equipment and other property of the BIW, are the prerogatives of BIW. It is agreed that all management functions not specifically limited by the expressed provisions of this Agreement are reserved to BIW. [The Company agrees that it will not exercise its management functions in a manner which violates its obligation under this Agreement.]⁷

The SAPP, as represented in the Respondent's document dated April 28, 1986, set forth in seven sections, with various subsections, the following: a philosophy statement for the policy; an explanation of the need for the policy; its purpose; the Respondent's definition of "substance abuse"; the Respondent's definitions of "under the influence," as determined by testing with respect to both alcohol and illegal drugs; the relationship between the policy and the Respondent's procedures for hiring⁸ and recall from layoff; and detection and enforcement procedures, including disciplinary sanctions and various "reasonable bases" for testing. Rules 18 and 19 were set forth verbatim in this final section.

In his written decision, the arbitrator made an overall finding that the SAPP was not a "substantial or significant departure from Rules 18 and 19." Rather, he concluded, it was a "particularization and methodological implementation" of the Respondent's authority under the two rules, and a delineation of the "means, methods, procedures and standards" that the Respondent would follow in the administration and enforcement of the rules. He demonstrated this finding in a section-by-section analysis of the SAPP, locating the various parts of the program within the logical structure of rules 18 and 19. He noted, for example, that the SAPP's disciplinary penalties were the same as those set forth in the two rules. Also, he pointed out that although the SAPP's establishment of a drug and alcohol counseling service was not within the specific scope of rules 18 and 19, it was a "therapeutic ben-

efit" and not a substantial variation from the rules that would require bargaining with the Unions.

There were, however, several provisions of the SAPP which the arbitrator did not specifically address, but simply identified generally as "procedures, methods, and implementations of the substantive provisions of Rules 18 and 19." Among these were provisions for the following: consecutive 5-day suspensions on a finding that an employee was "under the influence" of alcohol or drugs, until testing disclosed levels below those proscribed; periodic testing for 1 year on returning from such a suspension, with discharge the sanction for a positive test; inclusion of possession of "drug paraphernalia" as a ground for discharge under rule 18; and provisions for discipline, including discharge, if an employee should be convicted of a drug- or alcohol-related crime.

The arbitrator concluded that the SAPP, as a "methodological implementation" of rules 18 and 19 that did not vary significantly from them, violated neither Section 8(a)(5) of the Act nor the Respondent's contractual obligations to the Unions. With respect to the validity of rules 18 and 19 in themselves, he concluded that they were legitimately grounded in the Respondent's authority to legislate rules and regulations implicit in article III, the management-rights clause of the contracts. Accordingly, as a policy that simply provided for enforcement of the two rules, the SAPP shared the rules' validity.

II. THE JUDGE'S DECISION

The judge strongly disagreed with the arbitrator's analysis, finding deferral to his decision inappropriate on her conclusion that it was "wholly inconsistent with Board precedent." She focused initially on the arbitrator's broad interpretation of the contractual management-rights clause, and his implicit finding of the Unions' general waiver of bargaining rights therein. The judge viewed this as conflicting with the Board's "clear and unmistakable waiver" doctrine concerning statutory bargaining rights. In the judge's view, Board precedent dictated a finding that the general language of the management-rights clause granting the Respondent the right unilaterally to "require employees to observe the [Respondent's] rules and regulations" did not waive the Unions' right to bargain about the SAPP.

Further, she found that under Board law the Unions' previous assent to rules 18 and 19 did not establish a waiver of bargaining rights with respect to subsequent matters, like the SAPP, which related to rules 18 and 19. Thus, in the judge's view, Board precedent established that the SAPP was a "material, substantial and significant" change from previous employment conditions, even accepting that rules 18 and 19 were previously in force. She perceived the SAPP's drug-test-

⁷The material in brackets appears only in the Respondent's contract with Local 6. The Respondent's agreement with Local 6 was effective from October 8, 1985, to August 14, 1988, and its agreement with Local 7 from September 23, 1985, until August 14, 1988.

⁸The SAPP's application to job applicants is not at issue in this case. See *Star Tribune*, 295 NLRB 543 (1989), in which the Board concluded that drug and alcohol testing of applicants does not come within the statutory duty to bargain. Also, in consideration of the judge's reliance in the instant case on the judge's decision in *Star Tribune*, we note that there the Board adopted the *Star Tribune* judge's findings regarding drug and alcohol testing of current unit employees in the absence of exceptions. *Id.*

ing provision as an establishment of new conditions of employment because the Respondent had not previously *engaged in* drug testing of employees.⁹ Relatedly, she found that the SAPP imposed new disciplinary measures on employees because they had not previously been disciplined pursuant to positive drug tests. She also noted that the SAPP provided for an increasing number of penalties related to testing—for instance, the potential for discharge pursuant to periodic testing with respect to employees returning from suspension pursuant to a positive test. She also pointed out that the SAPP provided entirely new grounds for discipline with respect to the addition of “drug paraphernalia” to the substance of rule 18, and regarding discipline for drug-related criminal convictions.¹⁰ Concerning the drug and alcohol counseling program covered in the SAPP, she agreed with the arbitrator that this was outside the scope of the two rules, but disagreed regarding its impact, finding it to be a significant change in employment conditions.

III. ANALYSIS

The Board will decline to decide the merits of unfair labor practice allegations and will, instead, defer to an arbitration decision, when the arbitral proceedings appear to have been fair and regular, all parties have agreed to be bound, the arbitrator has considered the unfair labor practice issues, and the arbitrator’s decision is not clearly repugnant to the policies and purposes of the Act. *Olin*, supra, 268 NLRB at 573–574; *Spielberg*, supra, 112 NLRB at 1082. With respect to the arbitrator’s consideration of the unfair labor practice, we will find it adequately considered if: (1) the contractual issue before the arbitrator is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, supra

⁹She also implied that by its practice of not enforcing the drug-testing aspect of rule 19 prior to the SAPP, the Respondent itself had waived its right to initiate such enforcement without bargaining.

¹⁰The text of the “drug paraphernalia” and “criminal convictions” provisions are as follows:

Possession

Alcohol or illegal drugs, including drug paraphernalia as defined by Maine State law (17-AM.R.S.A. § 1111-A) are prohibited on company property. If an employee is found having such substances or paraphernalia in his/her possession, the following procedures will apply:

Procedures:

- a. Supervisors will document the incident, notify the Security Department, and escort the employee out of the shipyard.
- b. The employee will be *disciplined under Rule 18*.

CONVICTED OF CRIME

If an employee of BIW is convicted of a drug related crime (other than use) under Maine State law [Title 17-AM.R.S.A. Sections 1101–1116 (sale, theft, etc. of drugs)] or similar crimes in other jurisdictions, the employee will be discharged. An employee who is convicted of a crime for use of illegal drugs or alcohol related crimes will be subjected to periodic testing for one year following the date of conviction. The employee may be subject to discipline, based upon a consideration of the facts and circumstances involved, including the effect of the event and conviction on the conduct of company business.

at 574. Deferral will be found inappropriate under the clearly-repugnant standard only when the arbitration award is “‘palpably wrong,’ i.e., the decision is not susceptible to an interpretation consistent with the Act.” *Ibid*.

In the instant case, it is undisputed that the arbitration proceeding satisfied the *Spielberg/Olin* criteria with the exception of the “repugnancy” standard. Regarding that standard, the judge agreed with the General Counsel and the Unions that the decision was entirely inconsistent with Board precedent. We disagree in substantial part because, in our view, there is nothing repugnant to the Act in the arbitrator’s conclusion that, to the extent that the SAPP represented merely reiterations of, or means of implementing, rules 18 and 19, the Respondent had no obligation to bargain with the Union prior to implementing it. Two provisions of the SAPP, however, cannot reasonably be viewed as mere means of implementing those rules, and we agree with the judge that the arbitrator’s decision is “‘palpably wrong” insofar as it found the Respondent’s unilateral action on the subjects of those provisions to be proper. With respect to those two provisions, therefore, we do not defer to the arbitrator.

Essential to our nonrepugnancy finding is the fact that the legitimacy of rules 18 and 19 as unilaterally promulgated in 1978 and enforced prior to the implementation of the SAPP is not now and never has been in dispute. The Unions never objected to the language and content of the rules, even though rule 19 plainly provided for drug testing as well as alcohol testing to determine whether an employee is “under the influence.”¹¹ Neither did they object to the Respondent’s initial methods of enforcing the rules which, under rule 19, included the use of an alcohol breathalyzer test. Accordingly, by failing to request bargaining at an appropriate time concerning rules 18 and 19, the Unions acquiesced in the Respondent’s promulgation and enforcement of these rules prior to the SAPP. See, e.g., *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). Because of the Unions’ acquiescence, the arbitrator’s acceptance of the validity of the rules themselves at the time the SAPP was issued is, in the terms of *Olin*, supra at 574, “susceptible to an interpretation consistent with the Act”; and we therefore need not consider his additional reasoning that the management-rights clause authorized the Respondent to act unilaterally in creating and implementing those rules.

The mere fact that a union has previously acquiesced in an employer’s unilateral implementation of plant rules does not, however, mean that the employer is free thereafter to implement different plant rules or significant and material changes in existing plant rules

¹¹Cf. *Johnson-Bateman Co.*, supra at 185 fn. 27, in which the Board noted, inter alia, the absence of “testing” provisions in the parties’ collective-bargaining agreement and the employer’s plant rules in concluding that the union did not waive the right to bargain about drug/alcohol testing of employees.

without giving the union notice and an opportunity to bargain. “A union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.” *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). See also, e.g., *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983); *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), *enfd.* 454 F.2d 303 (7th Cir. 1971). When changes in existing plant rules, however, constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a “material, substantial, and significant” change. Only changes of this magnitude trigger a duty to bargain under the Act. In *Rust Craft Broadcasting*, 225 NLRB 327 (1976), for example, the Board found that the employer did not have a duty to bargain about its installation of a timeclock in place of a card system involving the manual transcription of employees’ time-in and time-out. The Board pointed out that the rule itself, concerning recordation of employees’ time, “remained intact,” and that the employer’s choice of a more dependable, efficient method for enforcing its rule was not a “radical change,” and thus not “material, substantial, and significant.” *Id.* at 327. See also *Trading Port*, 224 NLRB 980 (1976), in which the Board concluded that the employer’s installation of a timing device to measure more accurately employees’ productivity against previously established productivity/efficiency standards, and its related tightening of the application of existing disciplinary sanctions, did not require bargaining with the union. The standards themselves and the sanctions remained the same as before; thus the employer had made no significant, substantive change in the status quo and had no obligation to bargain over the matter. *Id.* at 983–984. See also, e.g., *UNC Nuclear Industries*, 268 NLRB 841, 847–848 (1984) (unilateral implementation of an oral test as part of an established training program not a bargainable change in the circumstances); *Bureau of National Affairs*, 235 NLRB 8, 9–10 (1978) (installation of timeclock without prior bargaining not a violation because not a significant change in the circumstances).

Taking account of the principles and precedent described above, we find that the arbitrator’s decision in the present case, with the exception of the two specific matters addressed below, is “susceptible to an interpretation consistent with the Act.” *Olin*, *supra* at 574. Thus, the arbitrator was not “palpably wrong” in concluding that the SAPP was no more than an implementation of methods and procedures for enforcing rules 18 and 19, and that it did not expand their substantive scope. In effect, the arbitrator concluded that the SAPP did not represent a “material, substantial, and significant” change from the two established rules and the

disciplinary sanctions supporting them, and thus did not require bargaining. We cannot say that this view is manifestly incorrect.

Keeping in mind that in deciding whether to defer to an arbitral decision, we must avoid *de novo* consideration of the issues, we do not share the judge’s view that the implementation of drug testing for the first time under the SAPP necessarily must be deemed a material change in the enforcement of rule 19. The rule’s language, unchallenged by the Unions, clearly sets forth the Respondent’s authority to test employees for the influence of drugs as well as alcohol, and the Respondent previously engaged, unchallenged, in breathalyzer testing as a method to determine “under the influence” of alcohol under rule 19. We reach a similar conclusion as to the Respondent’s institution of testing to determine whether employees are “under the influence” of drugs and its application of the disciplinary sanctions set forth in the rule. The arbitrator was not “palpably wrong” in concluding that this was logically encompassed in the rule and did not require advance bargaining.¹²

We also do not agree with the judge that the arbitration decision was palpably wrong because, in the judge’s view, the SAPP established a significant increase in the number of penalties pursuant to a positive test. The SAPP’s requirement of 1-year of periodic testing on the return of an employee suspended under rule 19, with discharge the sanction for a positive test, is not necessarily outside the scope of the rule. It may reasonably be interpreted as a delineation of the enforcement procedure which follows an original finding of “under the influence” pursuant to the rule. The followup testing is not itself necessarily punitive in nature and the discharge sanction for a subsequent positive test is not new. In addition, the SAPP’s institution of consecutive 5-day suspensions on a finding of “under the influence” of drugs or alcohol until subsequent testing discloses sufficient diminishment of the presence of the substance is not necessarily a significant change in rule 19’s disciplinary structure. Rather, it can be interpreted reasonably as a discretionary continuation of the “First Offense” sanction under the

¹² Compare, *Medicenter, Mid-South Hospital*, 221 NLRB 670, 675–676 (1975), in which the Board found the unilateral implementation of polygraph testing violated Sec. 8(a)(5) and (1) where there had been no prior technological method employed for such testing and where no existing rule made any reference to such testing.

Concerning an issue not addressed by the arbitrator, we do not agree with the judge’s implication that the Respondent itself waived its authority under rule 19 concerning drug testing by failing to engage in it prior to the SAPP. In light of the plain language of rule 19 concerning drug testing and the Respondent’s conduct of alcohol testing pursuant to the same rule, it would be inappropriate to conclude that the Respondent had abandoned its right under the rule merely by not exercising it from the beginning. See *Rust Craft*, *supra* at 327 (employer’s previous lax enforcement of its rule did not make the rule’s procedure a matter for required bargaining).

rule in lieu of an immediate progression to the harsher discharge sanction for a "Second Offense."¹³

Therefore, we will defer to the arbitrator's decision concerning the implementation of the SAPP to the extent it is not clearly repugnant to the Act, and we do not affirm the judge's decision to the extent it is not consistent with our deferral.¹⁴

There are two matters contained in the SAPP, however, that quite clearly do not fit within the substantive scope of rules 18 and 19, and thus are clearly not the mere procedural and "methodological" implementations of those rules that the arbitrator considered them to be. The SAPP effectively added to the "use, possession, distribution" provisions of rule 18 a prohibition against possession of "drug paraphernalia," with discharge the penalty for violation. The SAPP also established provisions for discipline, including discharge, if an employee should be convicted of a drug- or alcohol-related crime. As the judge pointed out, these two matters created entirely new grounds for discipline, neither within the language nor the reasonable scope of rules 18 and 19, and represented "material, substantial, and significant" unilateral changes from the status quo of employment conditions. The existing rules were limited to an employee's conduct or condition when "on Company premises"; the adoption of disciplinary provisions for being convicted of a drug- or alcohol-related crime, however, introduced potential sanctions that could logically apply to conduct having no manifestation at all on the Respondent's premises, e.g., a drunk driving conviction arising from an incident during vacation. Similarly, although the possession of drug paraphernalia relates generally to conduct that was prohibited by the rules, the fact remains that an employee could be guilty of this new prohibition without violating either rule 18 or rule 19. Thus, we agree with the judge that the arbitrator was palpably wrong in concluding that the Respondent had no duty to bargain with the Unions about these two matters, and we will not defer to his decision in this regard. See, e.g., *Ciba-Geigy*, supra at 1016.¹⁵

¹³We note that consecutive suspensions were permitted under the SAPP only for a maximum of 30 days, with subsequent positive test results subjecting the employee to discharge. This practice was apparently an accommodation based on the fact that a series of positive test results could occur following an individual's last incident of ingestion of certain drugs. See fn. 10 of the judge's recommended decision.

¹⁴With respect to the drug and alcohol counseling service referred to in the SAPP, we do not specifically agree with the arbitrator, who found that it was established by the SAPP but not a significant change, or with the judge, who found it to be a significant change. The record before us establishes without dispute that this service predated the SAPP by over a year and that it was instituted without objection from the Union. The SAPP merely incorporated the preexisting counseling service without material change. Because it is apparent that the Unions acquiesced in the implementation of the service, we view the arbitrator's determination that this was not a bargainable matter as one susceptible to a construction consistent with the Act and therefore entitled to deference.

¹⁵We note that the arbitrator did not attempt to justify the SAPP as itself an exercise of authority under the management-functions clause; he found that the Respondent was free to implement all parts of the SAPP because he found

With respect to the merits of the 8(a)(5) allegation, we consider the SAPP's provisions concerning drug paraphernalia and criminal convictions to be mandatory subjects of bargaining. Thus, pursuant to the Supreme Court's views in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), these two matters, both establishing disciplinary measures including discharge for their violation, are germane to the unit employees' working environment, especially with respect to their potential impact on job security, and there is no showing that either was within the scope of managerial decisions relating to the core of entrepreneurial control. *Id.* at 498. See also, e.g., *Johnson-Bateman Co.*, supra; *Medi-center*, supra at 675-678.

Further, we find that the Unions did not waive their right to bargain concerning these two matters pursuant to the language of the management-rights clause in article III of the contracts. The Board does not infer a waiver of the statutory right to bargain from general contractual provisions; rather, such a waiver must be established clearly and unmistakably. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Johnson-Bateman*, supra. The article III language lists in summary form various prerogatives of the Respondent, including the right to "discipline and discharge for cause" and the right to "require employees to observe the BIW's rules and regulations," and generally reserves unspecified management functions to the Respondent. There is nothing in this language or in the record evidence of bargaining history that clearly and unmistakably authorizes the Respondent to promulgate unilaterally the two specific changes in employment conditions at issue here, i.e., that establishes that the Unions relinquished their right to negotiate over these matters. Even the Respondent does not contend that the language granting it the right to "discipline or discharge for cause" embodies the right unilaterally to create new grounds for discipline; and we cannot conclude that the right to "require" employees to "observe" the Respondent's regulations clearly and unmistakably encompasses the right unilaterally to make rules such as these in the first instance.¹⁶

it a permissible extension of rules 18 and 19. Hence, for purposes of deciding whether to defer, the only basis for consideration is whether the arbitrator was palpably wrong in concluding that the new disciplinary sanctions for paraphernalia possession and conviction of certain crimes were nonsubstantive elaborations of the existing rules.

¹⁶See *Johnson-Bateman*, supra; *Ciba-Geigy*, supra, 264 NLRB at 1017. Compare *United Technologies Corp.*, 287 NLRB 198 (1987), affd. 884 F.2d 1569 (2d Cir. 1989) (finding union waiver of right to bargain over material changes in disciplinary rules through the union's agreement to management-functions clause that expressly authorized employer to "make and apply rules and regulations for . . . discipline").

The Respondent contends that, in a formal complaint filed in the U.S. District Court for the District of Maine seeking injunctive relief prior to the arbitration hearing in this case, the Unions stated that the art. III management-rights clause gives the Respondent the right to "promulgate Rules and Regulations and enforce the same." Although a copy of the complaint itself is part of the record in this proceeding, we have no other information concerning the status of the complaint or the significance of that statement. Even viewing the statement as an admission by the Unions, we cannot know, for example,

Accordingly, because we find that both the drug paraphernalia prohibition and the criminal conviction provisions were mandatory bargaining subjects and matters on which the Unions did not waive their right to bargain, the Respondent's implementation of these changes in employment conditions without giving the Unions' prior notice and an opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

ORDER¹⁷

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Bath Iron Works Corporation, Bath, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith by implementing changes in unit employees' terms and conditions of employment, without prior notification to and bargaining with the Unions, concerning disciplinary measures for the possession of drug paraphernalia and for employees convicted of drug or alcohol-related crimes. Local 6, International Union of Marine and Shipbuilding Workers of America, AFL-CIO is the exclusive bargaining representative of employees in the following appropriate unit:

All production and maintenance employees of the Respondent at its plants at Bath, Brunswick and Portland, Maine, including apprentices, truck drivers, janitors, janitresses, store keepers, toolmakers, toolkeepers and those working in stores for the purpose of supplying the men with tools, supplies or other equipment or things; but excluding executives, office and clerical employees, timekeepers, counters, ship calendar men, ship-checkers, ship expeditors and ship technicians, draftsmen, technical engineers, salaried employees, First Aid employees, and any individual employed as a guard, watchman, or security patrol-

whether it concedes that the Respondent has authority to *create* rules unilaterally or merely authority to promulgate rules, the substance of which has been previously agreed to by the parties. It therefore does not change our view that the management-rights clause fails to establish a clear and unmistakable waiver of the Unions' right to bargain about the two matters at issue here. See *Johnson-Bateman*, supra, in which we found management-rights contractual language authorizing the employer "to issue, enforce and change Company rules" insufficient to establish the union's clear and unmistakable waiver of bargaining concerning particular subject areas, specifically drug and alcohol testing.

¹⁷We find it unnecessary to consider the Respondent's exceptions and the General Counsel's cross-exceptions addressing the judge's make-whole remedy for employees suspended or discharged pursuant to the SAPP's testing provisions. In view of our deferral to the arbitrator's decision in relevant part, the judge's make-whole order, which was based on her consideration of all employees alleged to be entitled to relief, is no longer appropriate. In this regard, we note that all those employees who, the evidence indicates, were disciplined under the provisions of the SAPP were charged with transgressions of provisions which, in the part of the arbitrator's award to which we defer, were found legitimately implemented by the Respondent.

man to enforce rules against employees and other persons to protect the safety of persons on the BIW's premises, and professional employees and supervisors as defined in the Act.

Local 7, International Union of Marine and Shipbuilding Workers of America, AFL-CIO is the exclusive bargaining representative of employees in the following appropriate unit:

All full-time hourly clerical and technical employees including those classifications in Attachment "A" on pp. 39-41 of the Local 7 1985-8 contract employed by the Employer at its Bath, Brunswick, Maine facilities, and all additional plants and/or sites in the State of Maine but excluding all other employees, confidential secretaries, administrative secretaries, nurses, charge nurses, ratesetters, accounting clerk/courier assistant supervisor-piecework administrator, senior counter cost control technicians in Department 2-30, senior clerk in Department 41, financial analysts in Department 1-20, all Industrial Relations employees (except employees of Department 60, clerk in the Employee Store, medical technicians and records clerk in Department 28), guards and supervisors as defined in the Act.

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

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

(a) On the Unions' request, rescind the above unlawfully implemented changes in terms and conditions of employment, and bargain with the Unions as the exclusive representatives of the employees in the units set forth above concerning disciplinary measures for the possession of drug paraphernalia and for employees convicted of drug- or alcohol-related crimes.

(b) Post at all its facilities in Maine where employees represented by Locals 6 and 7 are employed, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹⁸If 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."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

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

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

WE WILL NOT refuse to bargain in good faith by implementing changes in unit employees' terms and conditions of employment, without prior notification to and bargaining with the Unions, concerning disciplinary measures for the possession of drug paraphernalia and for employees convicted of drug- or alcohol-related crimes. Local 6, International Union of Marine and Shipbuilding Workers of America, AFL-CIO is the exclusive bargaining representative of employees in the following appropriate unit:

All production and maintenance employees of the Respondent at its plants at Bath, Brunswick and Portland, Maine, including apprentices, truck drivers, janitors, janitresses, store keepers, toolmakers, toolkeepers and those working in stores for the purpose of supplying the men with tools, supplies or other equipment or things; but excluding executives, office and clerical employees, timekeepers, counters, ship calendar men, shipcheckers, ship expeditors and ship technicians, draftsmen, technical engineers, salaried employees, First Aid employees, and any individual employed as a guard, watchman, or security patrolman to enforce rules against employees and other persons to protect the safety of persons on the BIW's premises, and professional employees and supervisors as defined in the Act.

Local 7, International Union of Marine and Shipbuilding Workers of America, AFL-CIO is the exclusive bargaining representative of employees in the following appropriate unit:

All full-time hourly clerical and technical employees including those classifications in Attachment "A" on pp. 39-41 of the Local 7 1985-8 contract employed by the Employer at its Bath, Brunswick, Maine facilities, and all additional plants and/or sites in the State of Maine but excluding all other employees, confidential secretaries, administrative secretaries, nurses, charge nurses, ratesetters, accounting clerk/courier assistant supervisor-piecework administrator, senior

counter cost control technicians in Department 2-30, senior clerk in Department 41, financial analysts in Department 1-20, all Industrial Relations employees (except employees of Department 60, clerk in the Employee Store, medical technicians and records clerk in Department 28), guards and supervisors as defined in the Act.

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

WE WILL, on the Unions' request, rescind the above-unlawfully implemented changes in terms and conditions of employment, and bargain with the Unions as the exclusive representatives of the employees in the units set forth above concerning disciplinary measures for the possession of drug paraphernalia and for employees convicted of drug- or alcohol-related crimes.

BATH IRON WORKS CORPORATION

Avrom J. Herbster, Esq., for the General Counsel.
Mark L. Haley, Esq. (Constance P. O'Neil, Esq. (Conley, Haley & O'Neil), of Bath, Maine, for the Respondent.
Jonathan W. Reitman, Esq. (McTeague, Higbee, Libner, Reitman, Macadam & Case), of Topsham, Maine, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. The Charging Parties, Locals 6 and 7, International Unions of Marine and Shipbuilding Workers of America, AFL-CIO (the Unions) filed the original charges on April 28, 1986,¹ which were amended on June 16 and 23, 1987. The initial complaint consolidating these charges and adding another charge issued on August 26, 1987, superseded by a second amended consolidated complaint dated June 29, 1988. The complaint alleges in substance, that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally implementing an initial and revised Substance Abuse Policy and Procedures on or about March 1 and April 28. The Respondent, Bath Iron Works Corporation (BIW) filed timely answers denying that it had committed unfair labor practices.

By agreement, BIW and the Unions submitted their dispute regarding the unilateral implementation of the Substance Abuse Policy to an arbitrator, Dean Eric Schmertz, who took testimony on various dates in May 1986.² The arbitral award which issued on June 30, as clarified on October 6, held that BIW had a contractual and statutory right to institute the revised Substance Abuse Policy.³

¹ All dates refer to 1986 unless otherwise specified.

² Professor Schmertz was Dean of the Hofstra University Law School.

³ The transcript of the arbitration hearing and exhibits admitted into evidence by the arbitrator, together with the parties' briefs to the arbitrator, his award and clarification, were submitted into evidence in the proceeding as joint exhibits 1 through 9. Thus, the arbitration transcript is cited as JX 1, vol. __, p. __; exhibits are marked as JX 1 - CX __ (company exhibits) or UX (union exhibits). Exhibits introduced into evidence in the instant case are

The case came to trial before me at Bath, Maine, on October 31 and November 1, 1988, at which time the parties had full opportunity to examine and cross-examine witnesses, to introduce documentary evidence and present oral argument.⁴

The parties subsequently submitted briefs which addressed the following relevant issues:

1. is deferral to the arbitrator's award appropriate under the standards of *Spielberg* and *Olin*?
2. if not, did the Respondent violate the Act by implementing a substance abuse policy without bargaining, and
3. if so, what remedial relief is due to employees disciplined under that policy?

After carefully considering the posttrial briefs, from my observation of the witnesses and their demeanor and upon the entire record, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS

Respondent, a corporation with an office and place of business in Bath, Maine, has been and is engaged in building and repairing ships. Annually, in the course and conduct of its business operations, Respondent sells and ships from its Bath plant, products, goods, and materials valued in excess of \$50,000 and purchases and receives at its Bath plant, products, goods, and materials valued in excess of \$50,000 directly to and from points outside the State of Maine. Accordingly, the complaint alleges, Respondent admits, and I find that BIW is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

Locals 6 and 7 are now and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Drug Policy from 1978 to 1985

Respondent, a shipbuilder whose principal client is the United States Navy, maintains its primary facilities at Bath, Portland, and Brunswick, Maine. Since the mid-1940s, Local 6 has represented the production and maintenance employees at these three locations. Local 7 has represented a unit of clerical and technical employees at the same sites since 1982. At the time the Substance Abuse Policy was announced and implemented in early 1986 Respondent's current collective-bargaining agreement with Local 6 covered a period from October 8, 1985, to August 14, 1988, and with Local 7, from

marked GCX, CPX, and RX for the General Counsel, Charging Party, and Respondent, respectively.

⁴At the outset of the hearing, the Respondent and the Unions entered into a non-Board adjustment of the matters alleged in Cases 1-CA-24000 and 1-CA-25515. Accordingly, I granted a motion offered by counsel for the General Counsel (General Counsel), to dismiss those matters and to delete correlative paragraphs in the complaint. I also granted the General Counsel's motion to amend the complaint to reflect the fact that the Government was seeking restoration of the status quo ante for employees who were disciplined or discharged pursuant to the original and revised Substance Abuse Policy.

September 23, 1985, to August 14, 1988. Article III in both contracts contained the following management-rights clause which is central to the present dispute:

The management of the BIW and the direction of the working forces, including the right to hire, classify, assign, transfer, promote, discipline or discharge for cause, decrease the force, require employees to observe the BIW's Rules and regulations . . . are the prerogatives of BIW. It is agreed that all management functions not specifically limited by the expressed provisions of the Agreement are reserved to BIW.

During the negotiations for the 1985 agreement, Local 6 proposed adding the following language to article III: "The Company agrees that it will not exercise its functions in a manner which violates its obligations under this agreement or is otherwise inconsistent with its obligations under law." Recognizing that it was obliged to observe the law in any case, Respondent opposed this final sentence and it did not appear in the executed agreement.

Also in effect at Respondent's facilities prior to and during the relevant time period, but not contained in the collective-bargaining agreements, was a set of plant Rules, two of which, Rules 18 and 19, have special bearing on this dispute. These Rules, last revised by the Respondent in 1978, and implemented without objection from the Unions, forbid:

18. Use, possession, distribution, sale or offering for sale, of narcotics, dangerous drugs including marijuana or alcoholic beverages on Company premises at any time.

First offense: DISCHARGE

19. Being on Company premises under the influence of alcohol, narcotics, or dangerous drugs including marijuana, or refusing to submit to a test administered by the Medical Department to determine if under such influence.

First offense: 5 days off

Second offense: DISCHARGE

A total of 36 employees were disciplined for violating these Rules from 1978 through 1985, 23 of whom were penalized for alcohol offenses arising under both Rules 18 and 19. The balance, that is 13 employees, either were discharged or suspended for use, possession, or sale of drugs under Rule 18. The only employees to be disciplined under Rule 19 were those who failed or refused to take a company-administered breathalyzer test to determine alcohol impairment. In other words, as the record shows, no employee was charged with violating or penalized for being under the influence of drugs under Rule 19.⁵ In fact, prior to the introduction of the

⁵See JX 1, CX 23, and JX 1, vol. 4 at 60. Relying on JX 1, UX 1, an uncorrected version of Respondent's exhibit, JX 1, CX 23, the General Counsel and Charging Parties erred in stating in their briefs that an employee (No. 5) had been disciplined for drug abuse under Rule 19. Respondent also was mistaken in asserting in its brief that several employees were disciplined prior to 1986 for "being under the influence" of drugs based upon medical examinations. In making this assertion, Respondent incorrectly relied on testimony offered by a witness at the arbitration hearing who, in fact, referred to discipline imposed under Rule 18 when responding to a leading (and misleading) question. (JX 1, Vol. 5 at 415-416.)

Substance Abuse Policy in 1986, Respondent had not defined "being under the influence of . . . narcotics or dangerous drugs" and made no effort to introduce any test which might detect the presence of drugs in the body.

In July 1985, Clifford Bolster, Respondent's director of human resources, formed a task force composed of management and supervisors, which was charged with developing an expanded written substance abuse policy. Union representatives were not invited to participate in this effort and apparently were unaware that such work was taking place. The task force met frequently throughout the summer and fall and by December, had completed its work.

Thereafter, the Respondent met several times with union representatives to advise them of the new policy. On January 20, Ray Ladd, president of Local 6, wrote to Bolster seeking detailed information about Respondent's drug-testing plans and requesting that the parties bargain about the proposed changes to Rules 18 and 19.

On January 21, Respondent sent a copy of the Substance Abuse Policy to each employee with a cover letter announcing that it would take effect on February 10. Shortly before the effective date, the Unions requested an extension of time, offering to try to formulate an acceptable alternative policy. The Respondent agreed to delay implementation for several weeks. Although indicating it would receive the Unions' proposal, Respondent made it clear that it would not bargain about or delete any portion of its policy.

Believing that efforts to revise the policy would be futile, and that a 2-week reprieve was insufficient, the Unions did not present an alternative proposal. Instead, on February 18, they submitted a lengthy letter in which they outlined objections to the policy and suggested again that the parties "meet . . . and negotiate that which is negotiable, arbitrate before a neutral on an expedited basis the issues that are not, and attempt . . . to institute a fair and rational substance abuse policy . . ." (JX 1, CX 44 at p. 8.)

The Respondent implemented its original Substance Abuse Policy on February 24, 1986, which it supplanted with a revised policy issued to the work force on April 28.

B. *The Substance Abuse Policy*

The original Substance Abuse Policy, was a comprehensive multipage statement going far beyond the uncomplicated pronouncements of Rules 18 and 19.⁶ The initial sections of the Policy set forth in expository terms, Respondent's commitment to a drug-free work environment, and the need for aggressive action to combat drug use. In section IV, substance abuse was defined to mean any use of illegal drugs on company premises or off company premises to the extent that it interfered with the "individual's performance or social adjustment at work." (JX.1, CX 13.) The policy then defined "being under the influence" as "Presence in the body and disclosed by a valid test procedure of any amount of illegal drugs." Section V prescribed drug testing for all employment applicants,⁷ and for recalled employees if probable cause indicated that testing was warranted. If the recalled employee tested positive, he would be suspended and on returning to

work, would be subject to random testing for 1 year. If any test during that year was positive, the sanction was discharge.

In section VI, plant Rules 18 and 19 were republished verbatim, followed by a provision allowing random testing. The policy next set forth the grounds which could support a decision to test including excessive absenteeism, accidents or injuries, and direct or indirect reports of drug use; a pre-existing, informal Employee Assistance Program was upgraded and expanded to provide drug abuse counseling for employees. Respondent reserved the right to inspect company or personal property on its premises if the possessor was suspected of substance abuse, a procedure which it had utilized in the past.

This policy remained in effect and was invoked in eight disciplinary incidents prior to April 28 at which time, Respondent supplanted it with an amended version which it labelled "Revised Substance Abuse Policy." The revised policy differed from the original in three principal ways: first, Respondent abandoned random testing; second, "under the influence" was redefined to make it clear that in testing for illegal drugs, threshold levels were established to eliminate questionable test results,⁸ and third, supervisors, rather than in-house medical personnel, were authorized to determine whether grounds for testing existed.

A review of the extent to which the substance abuse policies went beyond the scope of Rules 18 and 19 is a necessary prelude to evaluating the arbitrator's opinion in light of the *Spielberg-Olin* decisions.

Clearly, drug testing was the major innovation under the Substance Abuse Policy. The entire technological procedure, including the setting of threshold levels and submitting positive test specimens to an outside laboratory to confirm initial test results was new. By assuming that positive test results could be equated with "being under the influence," Respondent positioned itself to enforce Rule 19 in the substance abuse context for the first time.⁹

Prior to 1986, Respondent had not established what "under the influence" meant with regard to illegal drugs, had not identified any grounds which might justify drug testing, and, therefore, had not enforced Rule 19 with respect to drugs. With the advent of drug testing, an employee who tested positively was suspended for 5 days which could be repeated for a maximum of 30 days if the employee's tests continued to show positive results.¹⁰ Although Respondent renounced random testing for the general employee population, it retained a form of random testing for a 1-year period in three categories: for applicants who initially tested positively but were subsequently hired; for employees who were recalled after being suspended for positive test results and for employees convicted of drug use. A positive test re-

⁸Specifically, the onsite urinalysis test (referred to by its acronym, EMIT) was conducted by a BIW medical technician using special equipment calibrated to detect the presence of a positive threshold level of Delta 9-THC acid metabolites in marijuana of 100 nanograms per millimeter of urine. If the test proved positive, the specimen was shipped to an independent laboratory where a more sensitive GC/MS test was performed to determine if the initial results were valid. The initial test results were deemed confirmed if a threshold level of 20 nanograms was obtained on the GC/MS test.

⁹The experts who testified in the arbitration proceeding agreed that it is difficult to determine the extent to which an individual may be impaired after inhaling any given quantity of marijuana.

¹⁰Unlike cocaine which passes quickly through the body, measurable quantities of marijuana may remain in the body for as much as 36 to 42 days or longer.

⁶Because the complaint focuses solely on Respondent's Substance Abuse Policy as it affects illegal drugs, in particular, marijuana, I do not address those portions of the policy which concern the excessive use of alcohol.

⁷Drug testing of applicants is not an issue in this proceeding.

sult during this period would result in discharge. Possession of drug paraphernalia and conviction of a crime relating to the sale of drugs were added as new and independent grounds for suspension or discharge.

C. The Arbitrator's Award

In submitting this matter to arbitration, the parties agreed that the arbitrator should decide whether BIW had the right to unilaterally implement its original and revised Substance Abuse Policy, both under the terms of the collective-bargaining agreement and the National Labor Relations Act. As mentioned above, Arbitrator Schertz found that BIW was entitled to act without bargaining with the Unions.

His conclusion stems from construing the management functions clauses in the labor contracts in the broadest possible terms. The essence of his decision is set forth in the following passage (JX 2 at 12):

The Management Functions clauses in both Union contracts (Article III) expressly "require Employees to observe the BIW's Rules and regulations." Impliedly, a requirement that Company Rules and regulations be observed, authorizes the Company to legislate those Rules and regulations. I do not find that this traditional management function is limited by any express provisions in the contract. . . . As Rules 18 and 19 were consistent with management rights under Article III of both contracts, the unilateral, methodological, implementation of those Rules under the Revised Policy is neither violative of the contract nor management's obligations thereunder.

Further, although he did not literally use the word "waiver," to describe the Unions failure to challenge Rules 18 and 19, he implied as much when he observed that: "The Unions have not and do not in this proceeding challenge the propriety, effectiveness or validity of those Rules. Indeed, there is no question that those two Rules have been accepted by the Unions." *Id.* at 6.

After deciding that Rules 18 and 19 were promulgated as a valid exercise of Respondent's prerogative, the Arbitrator found that none of the terms of the Substance Abuse Policy departed significantly from those Rules. Rather, he held that the policy was a "particularization and methodological implementation of managerial authority, implicit in [the] Rules" *Id.* As such, BIW had no duty to engage in bilateral bargaining before implementing them.

Arbitrator Schertz then explained how, in his view, the major provisions of the Substance Abuse Policy merely "fleshed out" what was implicit in Rules 18 and 19. For example, he stated that the Respondent had the implied right to utilize methods, including medical tests, to determine if and when an employee did the acts proscribed by the Rules. *Id.* In this same vein, he found that the discipline imposed for violations of the Policy did not differ from the penalties allowed by Rules 18 and 19. *Id.* at 7. He further decided that since the Respondent lawfully implemented Rule 19 prohibiting "being under the influence," it was entitled to define that phrase in the revised policy without bargaining. *Id.* at 9.

Unlike many provisions of the Policy which he characterized as methodological extensions of Rules 18 and 19, the Arbitrator acknowledged that the newly established employee

counseling program (EAP) was not within the scope of those Rules. Nevertheless, he reasoned that since the EAP was intended to be a therapeutic benefit for employees, it cannot "be construed as the kind of major variation from Rules 18 and 19 that requires bilateral bargaining." *Id.* at 8.

The Arbitrator also acknowledged that the policy defined substance abuse in a manner which affected private conduct away from the plant's premises. However, he pointed out that since the new standard proscribed only that drug usage which affected the employee's job performance, it was a logical and reasonable extension of work Rules 18 and 19. *Id.* at 8-9.

Discussion and Concluding Findings

1. The arbitrator's award is repugnant to the Act

The *Spielberg-Olin* standards

Pursuant to the mandate expressed in Section 203(d) of the Act,¹¹ the Board has long regarded arbitration as an effective forum for the peaceful resolution of labor disputes. At the same time, Section 10(a) of the Act provides in pertinent part that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment . . . that has been established . . . by agreement, law or otherwise." While the Supreme Court encourages adherence to arbitration,¹² it has admonished the Board that it may not abdicate its statutory responsibilities in favor of awards which are inconsistent with the purposes of the Act. Thus, the Court recognized in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964):

There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award . . . the Board has considerable discretion to respect an arbitration award . . . if to do so will serve fundamental aims of the Act.

The Court further observed that "[t]he superior authority of the Board may be invoked at any time" and, should the Board disagree with an arbitrator, "the Board's ruling would of course take precedence." *Id.* at 272.

In resolving the tension between Section 10(a) and 203(d), the Board held in its seminal decision, *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), that it will defer to an arbitration award where (1) the arbitration proceedings appeared to be fair and regular, (2) all parties to the arbitration had agreed to be bound, and (3) the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act.

More recently, in *Olin Corp.*, 268 NLRB 573 (1984), the Board redefined its deferral standards, announcing that deferral is owed to arbitral awards as long as (1) the contractual issue is factually parallel to the unfair labor practice issue; (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and (3) the award

¹¹ Sec. 203(d) states, "Final adjustment by a method agreed upon by the parties is declared to be a desirable method for settlement of a grievance or disputes arising from the application or interpretation of an existing collective bargaining agreement."

¹² See, e.g., *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 581 (1960).

is not “palpably wrong,” that is, the decision is “susceptible to an interpretation consistent with the Act.”

Although the Board stated in *Olin*, supra at 574, that it would “not require an arbitrator’s award to be totally consistent with Board precedent” it subsequently ruled that it would not defer where the arbitrator’s decision was totally inconsistent with case law. See *Federated Answering Service*, 288 NLRB 341 (1988) (arbitrator’s opinion that union waived right to financial data held repugnant to Act where Board found no clear and unmistakable waiver). See also *MIS, Inc.*, 289 NLRB 491 (1988) (arbitrator relied on law which was overruled after his award issued).

The General Counsel and the Unions submit that Arbitrator Schmertz’ award is not entitled to deference because it is palpably wrong.¹³ In evaluating the parties’ conflicting contentions, I start by recognizing that under most circumstances, deferral to arbitration is a legally sound and eminently efficient way to resolve labor disputes. As the Board has observed:

Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray

United Technologies Corp., 268 NLRB 557, 559 (1984). Here, the parties elected to submit their dispute to binding arbitration, agreed upon the arbitrator, and submitted both the contractual and unfair labor practice issues to him. Arbitrator Schmertz presided over an 8-day hearing and promptly issued an award which reflects an effort to deliver what he believed was an equitable result. Given these circumstances, it is with considerable reluctance that I conclude that his opinion is wholly inconsistent with Board precedent. His expansive reading of the management functions clause, his silent conclusion that the union waived its right to bargain about major portions of the Substance Abuse Policy, and his finding that most of the policy’s new Rules were not significant departures from Rules 18 and 19 are totally at odds with well-settled Board precedent.

2. The arbitrator’s construction of the management rights clause conflicts with Board precedent

As detailed above, the arbitrator read the management functions clause to mean that because employees were required to observe BIW’s Rules, the Respondent was impliedly authorized to legislate those Rules, absent limitations in the contract. Starting with this unqualified view of Respondent’s prerogatives, he then reasoned that BIW imposed Rules 18 and 19 unilaterally as a proper exercise of its managerial functions. As the final step in his analysis, the Arbitrator concluded that the Substance Abuse Policy was merely a methodological implementation of Rules 18 and 19, and as such, was not subject to collective bargaining.

A union may of course consent to a broad management-rights clause and thereby relinquish its right to bargain over terms and conditions of employment. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). Absent such consent, however, “an employer violates Section 8(a)(5) of

the Act if, during the term of a collective-bargaining agreement, it changes its employees’ work Rules without first having bargained with its employees’ collective bargaining representative over the matter.” *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 567 (1979). See also *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1983), enf’d. 722 NLRB 1120 (3d Cir. 1983); *Alfred Lewis, Inc.*, 229 NLRB 757 (1977). In order to find that a union has waived its right to bargain over terms and conditions of employment, “clear and unmistakable” proof is required that the union consciously yielded that right. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Park-Ohio Industries, Inc. v. NLRB*, 702 F. 2d 624 (6th Cir. 1983). Since “national policy disfavors waivers of statutory rights by unions,” a waiver will not be lightly inferred from the contract’s silence or a generally worded management-rights clause. *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982); *Ciba-Geigy*, supra at 1017. Thus, while the express provisions of a collective-bargaining agreement or the conduct of the parties, including past practice, bargaining history, or inaction, may establish waiver, the evidence that the union intended to waive its rights must be clear and unmistakable and encompass the program in issue. See *Continental Telephone Co.*, 274 NLRB 1452, 1456–1457 (1985), and cases cited therein.

In the arbitration opinion at issue here, Dean Schmertz read the management functions clause as giving the Respondent carte blanche to enact any work rule, whether or not such rule governed terms and conditions of employment, as long as there was no limitation in the contract. Thus, for example, he suggested that the Respondent agreed to negotiate with the Unions over the meaning of “habitual absenteeism,” not because BIW was compelled to bargain about this mandatory term of employment, but rather, because it volunteered to do so. (JX 2 at 11.) What the Arbitrator did not state, but what he apparently assumed, was that by consenting to the management-rights clause which gave Respondent the “implied” power to legislate rules and regulations, the Unions relinquished any right to bargain about the Substance Abuse Program. To reach such a conclusion, the Arbitrator had to ignore the Board’s unambiguous waiver doctrine, for the management functions clause on which he relied is the antithesis of clear and unmistakable language required by the authorities cited above. This clause is silent about virtually all of the matters contained in the Substance Abuse Policy; it does not begin to qualify as an express waiver of the Unions’ bargaining rights.¹⁴ See, e.g., *Murphy Diesel Co.*, 457 F.2d 303 (7th Cir. 1971), enf’g. 184 NLRB 757, 762 (1970) (employer could not unilaterally revise and implement attendance rules where the management-rights clause made no reference to that topic); *Kay Fries, Inc.*, 265 NLRB 1077, 1084 (1982) (where management-rights clause did not specifically address subject of proof required for entitlement to death leave benefits, employer violated Act by unilaterally implementing Rule requiring such proof). See

¹³The parties agree that the arbitration proceeding and the award comports with the other *Spielberg-Olin* criteria.

¹⁴The management functions clauses in both collective-bargaining agreements explicitly grant to BIW control over hiring. (JX 10 a and b.) I conclude, therefore, that Respondent was entitled to require that job applicants take pre-employment physicals which included a drug test, to reject those applicants who tested positively, and to condition any subsequent offer of employment on the right to demand that new hires submit to periodic testing for 1 year. Accordingly, drug testing for applicants will not be treated as an issue in this decision.

also *Ciba-Geigy Pharmaceuticals Division*, supra; *Merillat Industries, Inc.*, 252 NLRB 784 (1980).

Reichhold, Chemicals, 275 NLRB 1414 (1985), and *LeRoy Machine Co.*, 147 NLRB 1431 (1964), cases on which the Respondent relies, do not provide contrary authority. In *Reichhold*, the management-rights clause vested “the direction of the working forces” exclusively in the employer. In an underlying arbitration case, the arbitrator found that pursuant to this language, the employer had an unrestricted right to promote a few bargaining unit employees to supervisory positions. Although the Board indicated that it might not have reached the same result were it reviewing the matter ab initio, it nevertheless deferred to the arbitrator’s award, finding that his construction of the management-rights clause was susceptible to an interpretation consistent with the Act. While the clause relied on in *Reichhold* is quite broad and generalized, it nevertheless provides some authority for the employer’s unilateral action. In the instant case, the management functions clause is wholly devoid of any language which even remotely grants to BIW sole control in the substance abuse area.

Respondent’s reliance on *Leroy Machine Co.*, supra, also is misplaced. There, the Board found that a management-rights clause giving the employer the express right to determine the “qualifications of employees” encompassed a unilaterally imposed rule requiring employees with excessive absenteeism to take physical examinations, thereby removing that topic from collective bargaining. See also *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988) (management-rights clause which explicitly reserved right to make and enforce rules of conduct included right to promulgate attendance policies); *United Technologies Corp.*, 287 NLRB 198 (1987) (management-rights clause giving employer right to issue disciplinary Rules, permitted unilateral changes to system of progressive discipline for absenteeism).

In each of the above-cited cases, a provision in the labor agreement itself contained enabling language sufficiently tailored to authorize the employer to take some action consistent with the authority conferred. In contrast to these cases, the management rights clause in the instant matter does not even remotely grant to BIW power to single-handedly mandate a far-reaching Substance Abuse Policy. Arbitrator Schmertz did not, and indeed, could not point to anything more than an implied and uncrystallized power to legislate in the management functions clause of the parties’ labor agreement as a purported source of Respondent’s power. The contractual language upon which he relied contains nothing to suggest that the Unions clearly, unmistakably and consciously yielded their right to bargain about the Substance Abuse Policy.

The Arbitrator also seemed to imply that by accepting Rules 18 and 19 after they were unilaterally implemented in 1978, the Unions waived their right in perpetuity to demand bargaining about any matter related to those Rules. This conclusion also runs counter to well-established Board precedent.

A union may have any number of valid reasons for declining to bargain regarding a particular requirement. Here, witnesses for the Unions explained that they saw no need to request bargaining over rules which, as originally implemented, were acceptable in that they had an appropriate purpose. They further explained that the Unions did not object to the

breathalyzer test, introduced from the outset to enforce Rule 19, since its standards were consistent with state law.

Although the word “test” is positioned in the text of Rule 19 so that it appears to apply to both alcohol and drugs, Respondent’s practice and the Union’s understanding belie such an inference. From 1978 when Rule 19 was amended, through 1985, the Respondent did not administer drug tests; its medical department did not possess the technology to do so. Since urinalysis was an established technique during this period, Respondent could have initiated such a procedure if that had been its intent. The fact that Respondent did not engage in drug testing throughout this period and did not enforce Rule 19 with respect to being under the influence of illegal drugs by any other means, the Unions reasonably could conclude and rely on the fact that the word “test” in Rule 19 applied only to breathalyzer exams given to detect excessive use of alcohol.

Even if the Unions did not demand bargaining about Rules 18 and 19 in the past, their inaction does not establish a clear and unequivocal intent to waive bargaining about all prospective Rules related to them.¹⁵ The Board and the courts have held repeatedly that “a union’s acceptance of unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.” *Owens-Corning Fiberglass Corp.*, 282 NLRB 609 (1987); *Kay Fries*, supra at 1085; *Boland Marine & Mfg. Co.*, 225 NLRB 824, 829 (1976), citing *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969), where the court stated:

[I]t is not true that a right once waived under the Act is lost forever Each time the bargainable incident occurs—each time new Rules are issued—the Union has the election of requesting negotiations or not.

3. The arbitrator erred in finding that the Substance Abuse Policy did not significantly depart from Rules 18 and 19

As mentioned above, the arbitrator found that the Substance Abuse Policy was a “particularization and methodological implementation of managerial authority” and not “a substantial or significant departure from Rules 18 and 19.” He reasoned that since Respondent had a contractual right to implement Rules 18 and 19, it followed that it also had the right to introduce a policy which implemented those Rules. In other words, since Rules 18 and 19 were promulgated unilaterally under the authority of the management-rights clause, the Policies, which were not “significant variations from those Rules” also were legitimately implemented without collective bargaining.

The Board has not insisted that every unilateral change in the terms and conditions of employment constitutes a breach of a bargaining obligation; rather, bargaining is required only when the change is a “material, substantial, significant one.” *Peerless Food Products*, 236 NLRB 1612 (1978).

Board case law offers clear guidance in distinguishing major changes from those which are de minimus. Thus, relevant precedent clearly shows that the Board does not readily allow an employer to avoid bargaining unless the change is

¹⁵The Unions do not challenge the propriety of Rules 18 and 19 in this proceeding; their charges focus solely on the unilateral promulgation and imposition of the Substance Abuse Policies.

relatively minor, does not create totally new practices or carry significant penalties. For example, in *Murphy Diesel Co.*, supra, the company maintained a plant rule which required employees to give notice of prospective absences and warned that excessive absenteeism or tardiness would not be condoned. Subsequently, the employer posted more stringent attendance rules requiring, inter alia, that employees present proof of the reason for an absence with discipline imposed for a limited number of unexcused absences. The court of appeals agreed with the Board that the expanded absentee rules did not merely particularize the employer's previous policy; instead, the revised rules were regarded as a substantial change in the company's practices affecting conditions of employment. 484 F.2d 303. Similarly, in *Womac Industries*, 238 NLRB 243 (1978), the Board reaffirmed that "the initiation of new and more stringent Rules with respect to absenteeism which represents a significant change from prior practice without bargaining with the Union violates Section 8(a)(5) and (1) of the Act." See also *Ciba-Geigy Pharmaceutical*, supra; *NLRB v. Miller Brewing Co.*, supra, 408 F.2d at 15.

Medicenter, Mid-South Hospital, 221 NLRB 670, 675 (1975), is another case very much in point. There, the Board adopted the administrative law judge's conclusion that an employer's change in the method of investigating employee misconduct, from personal interrogation to the use of a mechanical polygraph test, was a change "substantially varying both the mode of investigation and the character of proof on which an employee's continued job security might hinge." As such, "the test itself substantially altered the existing terms and conditions of employment . . ." Id. In *Star Tribune* [295 NLRB 543 (1988)], a case posing issues similar to those litigated here, the administrative law judge found that a new policy including drug testing was not an extension of former office rules proscribing the use of drugs. In both of these cases, the fact that a penalty was attached provided an additional reason for characterizing the changed procedure as a significant and material term or condition of employment requiring bargaining. See *Medicenter, Mid-South Hospital*, supra at 677-678 and cases cited therein.

The foregoing decisions contrast sharply with cases such as *Peerless Food Products*, supra, and *Rust Craft Broadcasting*, 225 NLRB 327 (1976). In *Peerless*, the Board ruled that the employer's decision to confine the union agent's access to nonproduction areas of the shop (except when necessary to process grievances), whereas access previously had been unlimited, was not a significant change requiring bargaining. Similarly, in *Rust Craft*, the Board found that bargaining was not necessary where an employer substituted a timeclock for employees' handwritten entries of their arrival and departure times. See also *Bureau of National Affairs, Inc.*, 225 NLRB 8 (1978). Accord: *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 11-12 (8th Cir. 1967), where the court, reversing the Board, ruled that the employer could unilaterally promulgate a rule prohibiting employees from removing company-owned tool boxes from the plant since this was a particularization of an existing rule prohibiting removal of employer-owned property from the premises.

Where a changed practice was unaccompanied by a new or increased penalty, the Board also has refused to find that the change was material, substantial or significant. Thus, in *UNC Nuclear Industries*, 268 NLRB 841 (1984), the em-

ployer instituted an oral test to assess the effectiveness of an established mandatory training program for its operators. If an operator's knowledge was deemed insufficient, additional training was required without loss of salary or downgrading in job classification. On these facts, the administrative law judge, with Board approval, found that any threat to existing working conditions or to job tenure was virtually nonexistent; therefore, the test did not constitute a radical departure from prior practice requiring bargaining.

On applying the lessons derived from the above cases to the circumstances attending Respondent's implementation of the Substance Abuse Policy, it is impossible to conclude, as did Arbitrator Schmertz, that the changes were insignificant variations which imposed no new conditions of employment or additional penalties. Drug testing did not exist at the facility prior to implementation of the Substance Abuse Policy. The introduction of testing where no such test had been utilized heretofore certainly was a change "substantially varying both the mode of investigation and the character of proof on which an employee's job security might hinge." *Medicenter*, supra at 675. The situation here bears no comparison to the introduction of a timeclock in *Rust Craft*, where a mechanical device replaced an existing manual process.

Contrary to the Arbitrator's contention that no new discipline was imposed by the Substance Abuse Policy, a number of its provisions did subject employees to "a jeopardy which had not prevailed under the pre-existing Rules." *Medicenter, Mid-South Hospital*, supra at 677. I refer to the discipline imposed upon those who tested positively or who refused to submit to the test. Since such tests were not required prior to 1986, it is obvious that any penalty imposed in connection with drug testing was a new sanction. The introduction of testing carried additional sweeping implications significantly affecting the employees' job security. For the first time, "under the influence" was defined and applied to those suspected of using illegal substances; absenteeism or work-related injuries could provide probable cause for testing; an employee who was visibly under the influence of alcohol could be tested for the presence of drugs. Upon returning to work, an employee suspended because of positive test results was subject to periodic testing for 1 year (without probable cause). Surely, this requirement is a form of random testing, even if the grounds for the original testing were based on the Respondent's definition of probable cause. The reinstated employee could be discharged if he tested positively again during that period. It would be a gross and mistaken simplification to equate Respondent's Policy, which imposed numerous new conditions and subjected employees to an increasing number of penalties, to the nonpunitive oral test introduced in *UNC Nuclear Industries*, supra.

Rules 18 and 19 said nothing about possession of drug paraphernalia, the inspection of property,¹⁶ discharge for conviction of a drug-related crime or discipline and random testing if an employee was convicted of using illegal drugs. They made no mention of an employee assistance program. The fact that such a program may benefit employees, as the arbitrator pointed out, does not alter Respondent's duty to

¹⁶Testimony was undisputed that BIW had an established practice of conducting searches of company and personal property. The Union's acquiescence constitutes a waiver of its right to demand bargaining over the clause in the Substance Abuse Policy formalizing this practice.

bargain with the Union about it.¹⁷ Although these sweeping changes lie far beyond the compass of Rules 18 and 19, the Arbitrator euphemistically labelled them as nothing more than “procedures, methods and implementations of the substantive provisions of Rules 18 and 19 consistent with the Company’s implied managerial rights” JX 2 at 11. His treatment of these significant, far-reaching and novel Rules, which permit the Respondent for the first time to invade the employees’ privacy both at and away from the workplace, cannot be reconciled with Board and court precedent.

While deferral to arbitration serves an important national labor law principle, that principle is ill-served if deference is paid to an award which offends the purposes of the Act. Indeed, honoring awards which are repugnant to the Act may be self-defeating for by doing so, parties may be deterred from submitting future disputes to arbitration. It is necessary to bear in mind that in addition to the desire to foster arbitration, another equally if not more important statutory objective is at stake here: that is, reducing industrial strife by requiring employers to bargain in good faith over terms and conditions of employment with their employees’ designated representatives. Only where a union has clearly, unmistakably and consciously yielded its statutory right to bargain should waiver be found. Here, the language upon which the Arbitrator relied does not meet the Board’s criteria for finding a bona fide waiver. Moreover, the Arbitrator’s conclusion that the Substance Abuse Policy merely extends and implements Respondent’s preexisting Rules which were accepted by the Unions, fails to comport with well-established Board precedent. If any past practice is relevant here, it is the Respondent’s practice of not enforcing Rule 19 by resort to drug testing. For the foregoing reasons, his award is repugnant to the purposes and policies of the Act.¹⁸

4. The merits

Having concluded that deference is not owed to the arbitration award, the next question to be resolved is whether the Respondent was required to bargain with the Unions before implementing both the original and revised Substance Abuse Policy. The answer to this question will depend on whether the provisions of that policy are considered terms or conditions of employment. Although the Board has not yet

¹⁷ Respondent’s obligations with respect to mandatory subjects of bargaining is discussed below.

¹⁸ By letter dated April 6, 1989, Respondent forwarded a copy of a U.S. District Court’s *Memorandum Opinion and Order on Motion to Vacate or Modify Arbitral Award* (D.ME. Mar. 31, 1989). In ruling upon the Unions’ motion to vacate or modify the same arbitration award at issue in this proceeding, the District Court applied a standard of judicial review that was “strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made” *Id.* at 6. (Citations omitted.) In addition, the Court stated that a federal court may vacate an arbitrator’s award only on the grounds specified in 9 U.S.C. § 10 including “[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made” *Id.* Under these circumscribed standards, the Court denied the motion to vacate, concluding that the arbitral award was “reasonable, consistent with the collective bargaining agreements and well within the scope of the stipulated submission.” In so ruling, the Court did not take into account the governing Federal labor law precedents which are discussed above. I am bound, of course, by Board case law, which has dictated a conclusion in this matter at odds with the result reached by the District Court. Therefore, I respectfully decline to rely on the Court’s Memorandum Opinion as persuasive or preemptive authority.

ruled on this precise issue, the overwhelming weight of authority leads to only one conclusion: drug testing policies are mandatory subjects of bargaining within the meaning of Section 8(d) of the Act.

5. The Substance Abuse Policy is a mandatory subject of bargaining

Section 8(d) of the Act, which defines the employer’s duty to bargain imposed by Section 8(a)(5), requires the employer “to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.” Bargaining about any subject encompassed within the statutory definition of “wages, hours and other terms and conditions of employment” is mandatory. *NLRB v. Borg Warner Corp.*, 356 U.S. 342, 348–349 (1958). Consequently, a refusal to bargain on request or unilateral action by an employer with regard to such a matter violates Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736, 741–743 (1962).

No precise standards exist which define the scope of terms and conditions of employment. However, as a general rule, matters which “settle an aspect of the relationship between the employer and employees,” *Pittsburgh Plate Glass*, 404 U.S. at 178, or are “plainly germane to the working environment” of the employees and do not significantly abridge an employer’s freedom to manage its business, fall within the bargaining framework. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting *Fiberboard Paper Products Corp.*, 379 U.S. 203, 222–223 (1964) (Stewart, J., concurring).

In accordance with these guidelines, the Board and the courts have consistently taken the position that in the absence of waiver, plant Rules regarding attendance, safety Rules, physical examinations and polygraph testing all constitute mandatory subjects.

For example, in *Fiberboard*, *supra* at 322, Justice Stewart stated that “what one’s hours are to be, what amount of work is expected during those hours . . . what safety practices are observed, would all seem conditions of one’s employment.” Indeed, safety considerations are such an important condition of employment that an employer may not modify safety Rules without first bargaining with the union even where the employer is obligated by laws to conform its conduct to specific minimum safety standards. See, e.g., *NLRB v. Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967).

The Board also has held that various testing requirements constitute terms and conditions of employment. Thus, an employer may not unilaterally insist on physical examinations for its employees as part of attendance control procedures, either as a condition of continued employment or where the results of the exams could be grounds for discharge. See *Ciby-Geigy*, *supra*. Similarly, in *Medicenter*, *supra*, 221 NLRB at 675, the Board, adopted the administrative law judge’s conclusion that replacing personal interrogation of employees suspected of misconduct with polygraph testing “substantially altered the existing terms and conditions of employment and constituted a mandatory subject of bargaining.”

Moreover, the Board has extended the bargaining obligation not only to the test requirement itself, but to the attendant features of such tests as well. Thus, bargaining is required over the contents of the exam, the purpose for which the exam is to be used, the results of tests and the refusal to submit to a test if continued employment is affected.

Lockheed Shipbuilding, supra, 273 NLRB at 171, 177; *LeRoy Machine Co.*, supra, 147 NLRB at 1432, 1438–1439. With respect to the analogous circumstances of polygraph testing, the administrative law judge ruled that “[t]he required bargaining . . . does not comprehend merely the magnitude or propriety of the penalty, but . . . the content and incidents of the Rule giving rise to the penalty.” *Medicenter*, supra at 677–678. By implementing its Substance Abuse Policy, particularly the provisions relating to drug testing, as a means of determining whether employees were using or “under the influence” of drugs pursuant to Rules 18 and 19, Respondent instituted changes in existing terms and conditions of employment as significant as those which led the Board to hold in *Medicenter* that polygraph testing was a mandatory subject of bargaining. Judge Wallace’s analysis in *Star Tribune*, supra, is equally apt to the circumstances of this case:

At no previous time in the parties bargaining history had the Respondent utilized a drug . . . test to ascertain impairment on a unit employee’s performance, to determine whether an employee was “under the influence” or to investigate the cause of a workplace accident. The introduction of this new method to confirm impairment and to investigate employee misconduct constitutes the very same substantial alteration of employment terms that compelled the *Medicenter* Board to find a bargaining obligation in relation to polygraph tests. [id., 295 at 560.]

In sum, I conclude that the Respondent’s new drug testing policy vitally affects the employment status of the BIW workers and therefore is a term and condition of employment subject to collective bargaining pursuant to Section 8(d) of the Act.

The Respondent actually does not contest the status of the substance abuse program as a mandatory condition of employment. Rather, Respondent’s major argument is that the Unions clearly and unmistakably waived their right to bargain. However, as I found above, the waiver defense is without merit. The Unions did not forego their statutory right to bargain by contractual waiver or by their failure to request bargaining with respect to Rules 18 and 19. Suffice to say that no evidence was presented during the arbitration hearing or in this forum which revealed that the Unions consciously and intentionally relinquished the statutory right to bargain about the various aspects of Respondent’s drug testing policy. The Unions’ acceptance of Rules 18 and 19 does not preclude them from demanding bargaining over Respondent’s implementation of new policies which substantially alter established Rules. This is particularly true in this case where Respondent never enforced Rule 19 with respect to being under the influence of drugs from 1978 through 1985. A Rule which, as implemented here, called solely for submission to a breathalyzer test to determine whether an employee was under the influence of alcohol, differs vastly from a Rule which requires submission to a urinalysis test to detect whether an employee may be under the influence of or using an unlawful drug such as marijuana. When this latter test is enforced in a manner which reaches beyond the plant gate and is joined with discipline which may result in multiple suspensions or discharge and under certain circumstances, involve periodic testing for a year without prob-

able cause, it is abundantly clear that employees are confronting a new and entirely different condition of employment.

6. Respondent violated Section 8(a)(5) by unilaterally imposing its Substance Abuse Policy

It is well settled that Section 8(d) of the Act imposes on employers an obligation to provide its employees’ bargaining agent timely notice and a meaningful opportunity to bargain before instituting changes in terms and conditions of employment. As the Board stated in *Ciba-Geigy*, supra, 264 NLRB at 1017:

To be timely, the [employer’s] notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain [I]f the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli. [Footnotes omitted.]

Of course, when timely notice is received, the union must request bargaining promptly. *Id.*

In the present case, the Respondent acknowledged that it never offered or intended to bargain about the Substance Abuse Policy, believing it had no duty to do so. Although Respondent’s officials held several meetings with union leaders before the policy took effect, the discussions were wholly advisory in nature. An offer to confer is not an offer to bargain. A union is entitled to an opportunity to bargain when that bargaining could be productive—that is, when the issue is under consideration, not when an employer, like BIW, is on the verge of implementation. See *ABC Trans-National Transport*, 247 NLRB 240, 242 (1980), modified on other grounds 642 F. 2d 675 (3d Cir. 1981).

The Respondent halted implementation for several weeks at the Unions’ request, but it had no intent to alter the terms of the Policy or to engage in negotiations in response to the Unions’ initial request set forth in a letter of January 20, 1986. Given the fact that Respondent’s Substance Abuse task force took many months to develop the Policy, it is hardly likely that the Unions could prepare fully developed counter-proposals in 2 weeks.

When the policy took effect on February 24, it was unchanged from the version originally presented to the Unions the month before, although in the interim, the Unions had submitted to management a fairly detailed letter outlining their concerns. Respondent not only failed to address these concerns, it also refused to entertain the Unions’ second request to bargain contained in the February 20 letter. As the General Counsel correctly contends, Respondent presented the Unions with a classic “fait accompli” and never indicated to the Union that it was receptive to negotiations. In these circumstances, Respondent’s refusal to bargain violates Section 8(a)(5) and (1) of the Act. Moreover, Respondent compounded its error by failing to bargain with the Unions prior to implementing the revised Policy in April 1986. The complaint alleges and I find that this action constitutes a separate violation of the Act.

7. Respondent's defenses

Respondent raised several new defenses in its posttrial brief which warrant brief discussion. First, Respondent pointed out that after implementing the revised Policy in April 1986, it introduced two additional Substance Abuse Policies, one in August and the other in November 1986. Although the Unions filed charges alleging that the later policies, like their predecessors, were implemented unlawfully, these charges were dismissed by the Board's Regional Director. Respondent argues that because the November 1986 Policy currently is in effect, allegations in the complaint concerning the initial and revised versions of the Policy are moot. Respondent's argument is without merit.

The August and November editions of the Substance Abuse Policy were amended to reflect rulings of the Arbitrator. These few modifications did not significantly alter the terms of the predecessor policies. Having concluded above that the arbitration award is repugnant to the Act, it follows that deference is not owed to that decision or to amendments to the Policy which conformed to the Arbitrator's rulings. Consequently, as the complaint alleges, it is Respondent's pre-arbitral policies which were litigated appropriately here.

The Respondent next contends that as a contractor with the U.S. Navy, it must comply with Federal laws and regulations which mandate drug testing. Respondent submits, therefore, that if the Board requires bargaining with the Unions over its Substance Abuse Policy, it would be put into an untenable position of having to disobey the dictates of one Federal agency in order to comply with those of another. An examination of the pertinent statute and Department of Defense regulations reveals that the Respondent's concern is groundless: there is no inconsistency between bargaining over terms and conditions of employment under the Act and observing other lawful requirements.

Specifically, Respondent states that it is governed by the Drug-Free Work Place Act of 1988 (P.L. No. 100-690) and the Department of Defense (DOD) Interim Rule entitled "Drug Free Workforce" (48 CFR, Parts 223.75 and 252.223-7500).

The Drug Free Work Place Act, effective on March 18, 1989, provides in substance, that a Federal contractor must advise employees that the manufacture, possession, distribution or use of a controlled substance is prohibited in the workplace; establish a drug free awareness program informing employees of the dangers of workplace drug abuse, the availability of employee assistance and drug counseling programs and potential penalties for drug abuse violations; require each employee to agree to abide by the terms of the contractor's program, and notify the employer of any drug conviction resulting from a violation at the workplace. Respondent's fears of noncompliance are exaggerated for plant Rules 18 and 19 already satisfy most of the requirements of the Drug-Free Work Place Act.¹⁹

As for the DOD regulations, Respondent has failed to provide any real proof that the interim Rule applies to each of its contracts with the Navy or to all the members of its workforce. sec. 223.7504 expressly states that the Rule shall apply only to those contracts with the DOD which the contracting

¹⁹Rules 18 and 19 did not address the statutory requirement that each employee agree to notify the employer of any drug conviction, but this was not required by the Substance Abuse Policy either.

officer has determined either affect national security interests or are necessary to protect "the health or safety of those using or affected by the product" Further, the Rule covers only those employees in sensitive positions, a term of art applicable to employees granted access to classified information or "employees in other positions that the contractor determines involve national security, health or safety" 252.223-7500(a). The record in this proceeding is barren of any evidence that such determinations have been made as to each contract between BIW and the Navy.²⁰

Even assuming arguendo that these basic determinations were made, another subsection of the Rule provides that an employer is exempted from complying with the DOD drug-testing requirements until bargaining takes place. Thus, 252.223-7500(e) states that:

The provisions of this clause pertaining to drug testing programs shall not apply to the extent they are inconsistent with state or local law, or with an existing collective bargaining agreement; provided that with respect to the latter, the Contractor agrees that those issues that are in conflict will be a subject of negotiation at the next collective bargaining session.

This section expresses the intent of DOD to avoid conflict between its regulation and an employer's obligations under law or with an extant bargaining agreement. Accordingly, the Rule grants an exception for contractors who have a duty to bargain. Moreover, since compliance with the Rule is suspended where a conflict may exist with state or local law, then surely the same exception exists where immediate compliance with the Rule would be contrary to the employer's obligations under federal labor law. Having found here as a matter of law, that Respondent's drug testing policy is a mandatory condition of employment, its duty to include that policy as "a subject of negotiation at the next collective bargaining session" is totally consistent with the DOD Interim Rule.²¹

8. Remedial relief for employees disciplined under the Substance Abuse Policy

The complaint's prayer for relief requests a make-whole order for any employee who was disciplined either for refusing to take a drug test or who tested positively under the Substance Abuse Policy. As a general Rule, a make-whole order restoring the status quo ante, which may include back-pay and reinstatement, is appropriate where an employee is discharged or disciplined solely for engaging in union or other protected, concerted activities. Conversely, where an employee is discharged for cause within the meaning of Section 10(c), the Board is precluded from imposing a make-whole remedy. *Taracorp, Inc.*, 273 NLRB 221, 222 (1984).

²⁰Local 6 unit members are production and maintenance employees; Unit 7 is composed of clerical and technical employees. It hardly seems likely that all of these employees perform work which would bring them within the Interim Rule's definition of "Employee in a sensitive position."

²¹While the word "random" is not used in the Interim Rule, random testing appears to be required by 252.223-7500 (c)(4)(i). Since Respondent abandoned the random testing requirement contained in its original Substance Abuse Policy, that was not an issue in this proceeding. However, while expressing no opinion as to the constitutionality of this issue I note that the reasoning which led to the conclusion that Respondent is required to bargain about its substance abuse policy applies with equal force to any new proposal for random testing.

The Board has recognized another category of cases where an employee's right to relief may appear uncertain. Thus, the Board observed that in certain circumstances, an employee may have been disciplined for what appeared to be cause, when closer examination reveals that the discipline actually stemmed from an employer's unfair labor practice. For example, in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 217 (1964), the Supreme Court affirmed a make-whole remedy for employees whose discharge stemmed from the employer's failure to bargain with the Union before subcontracting their work. The principle nicely stated in *Fibreboard* is that a make-whole remedy is appropriate where the "loss of employment stems directly from an unfair labor practice." *Taracorp*, supra.

On applying *Fibreboard* to the instant case, it is evident that employees who were disciplined for refusing to take a drug test, or who tested positively were disciplined as a direct consequence of Respondent's unlawful implementation of its Substance Abuse Policy. Therefore, in the ordinary course, such employees should be entitled to backpay and rescission of any discipline imposed.

Notwithstanding the general propriety of the foregoing approach, the Board has denied conventional remedies when an employer can show that an unlawfully discharged employee is unfit for employment. (See, e.g., *North Star Refrigerator Co.*, 207 NLRB 500 (1973) (reinstatement proper for employee who was insubordinate and disobeyed safety Rules, but not for employee who stole from employer and committed perjury at Board hearing). In the instant case, the employer presented evidence showing that some employees tested positively for marijuana. However, this fact alone does not demonstrate that the employee was unfit to perform the specific tasks required by his job or had committed some intolerable offense. As the arbitrator acknowledged after hearing extensive and conflicting expert testimony, it is unreasonable to conclude that

a level of 100 ng . . . (of marijuana metabolites) in the urine, if confirmed, produces impairment, mental or physical changes or other symptoms associated with being under the influence [T]he experts are in wide disagreement over what quantity of marijuana produces impairment, how quickly and for what period of time. [JX 2 at 15-16.]

Based on my own review of the expert testimony in this record, I concur with the Arbitrator's finding that the only sound conclusion that can be drawn is that "such a level (100 ng.) may cause impairment" (Emphasis added. JX 2 at 17.) What is more, expert evidence in the arbitration proceeding established that the effects of marijuana on mental and physical acuity typically dissipate within 6 hours after the drug is ingested, although other documentary evidence suggested that the effects may linger for 24 hours.

In the absence of evidence demonstrating actual job impairment, the only remaining reason which might justify withholding a make-whole remedy in this case would be to accommodate a public interest in discouraging the use of illegal drugs because of their potentially injurious effects. Drug abuse is unquestionably an exceedingly serious problem of national proportions. In the industrial setting, the use of illegal substances could threaten the health and safety of em-

ployees, even those who do not use drugs, and compromise the soundness of the product. Thus, an employer may have a legitimate interest in guarding against drug use by members of its work force. This interest does not mean that the Board will sanction the unilateral imposition of a new and intrusive drug testing policy or deny relief to employees who submitted positive test results pursuant to that policy. As the General Counsel observed in his brief, "While there may be a public policy against criminal drug use, there is no clear public policy against employment of drug users."

Moreover, the record evidence does not suggest that drug abuse was or is a widespread problem at BIW. From 1978 through 1985, only 13 employees were disciplined for violating Rule 18. Even under Respondent's unilaterally implemented new Rules, only 17 employees have been disciplined; and some of those incidents involved only a refusal to take the test. Further, in all but one situation, the drug implicated was marijuana which, by all accounts, is nonaddictive. Indeed, the State of Vermont has decriminalized its use. In other words, Respondent was not confronting a situation which required precipitous action. It could have and should have engaged in collective bargaining as the most effective means of obtaining a Substance Abuse Policy which had the support and understanding of those who would be subject to it.

With these considerations in mind, I conclude, with certain exceptions to be discussed below, that restoration of the status quo ante requires that each employee who was disciplined for refusing to take a drug test or who tested positively, be returned to the position he or she occupied before Respondent unilaterally implemented its Substance Abuse Policy. See *Southwest Forest Industries*, 278 NLRB 228 (1986); *Star Tribune*, supra. Specifically, this means that all reference to drug tests and to discipline imposed for testing positively or for refusing to take such tests should be expunged from the employees' files as if such actions had not been taken and they should be made whole by payment of backpay and, where appropriate, be reinstated. To do otherwise would be to sanction Respondent's unfair labor practices and discourage collective bargaining.²²

A separate question raised in the remedial portion of this case concerned the proper allocation of the burdens of proof. Respondent correctly points out in its brief that the General Counsel bears the initial burden of demonstrating that the employees would not have been disciplined in the absence of the unfair labor practice. See *Taracorp Industries*, 273 NLRB 221 (1984). Because the General Counsel presented no evidence on this issue, relying instead on proof introduced by BIW, Respondent claims that the government has failed to meet its burden.

The record indicates, however, that counsel for the General Counsel, met at least a few times with counsel for the Respondent for the express purpose of identifying the employees who had been disciplined under the drug testing provisions of the Substance Abuse Policy for whom relief would

²²In *Wong Sun v. U.S.*, 371 U.S. 471 (1963), the Supreme Court held that under the Fourth Amendment, unlawfully seized heroin had to be excluded from evidence and could not be used to convict the defendant. (See *Mapp v. Ohio*, 367 U.S. 643 (1961), applying *Wong Sun*'s poisoned fruit Rule to illegal search and seizures by state agents under the Fourteenth Amendment.) By analogy, evidence "seized" from BIW employees as a result of Respondent's unlawful implementation of the Substance Abuse Policy, also should be excluded as a ground for taking any adverse employment action against them.

be requested. (See Tr. 103–104.113.) Respondent presented evidence bearing on the remedial aspects of this case only after these consultations took place, and after the General Counsel had presented a prima facie case that Respondent unlawfully implemented its drug abuse policy.²³ Based on the totality of the record, I find no reason to conclude that the General Counsel should be faulted for allegedly failing to meet its initial burden, nor do I find that the Respondent was prejudiced or suffered any injustice in presenting its case.

a. Suspended employees entitled to make-whole relief

I turn now to the circumstances attending the discipline meted out to those employees who were suspended for either refusing to take drug tests or who took tests which produced positive results. In accordance with the approach discussed above, I find that employees G.D., L.L., M.P., and J.P., are entitled to make whole relief for the periods they were suspended.

G.D. (Badge No. 25-9845)²⁴ was one of three employees whom a supervisor suspected of smoking marijuana on November 23, 1987. However, when confronted, G.D. denied having engaged in any wrongdoing and subsequently refused to take a drug test. No one testified that G.D. actually was seen smoking marijuana and no evidence was presented that he was unable to perform his job properly.

L.L. (Badge No. 11117) a grinder, was suspended for 5 days after testing positively on a drug test. The suspensions were continued for two additional 5-day periods when followup tests also were positive.

M.P. (Badge No. 52558-8) was a laborer whose duties involved general cleaning work on ships. A medical evaluation by a BIW doctor indicated that M.P. was referred for testing because she manifested some symptoms consistent with alcohol use. However, she was not given nor did she refuse to take a breathalyzer test. Instead, she was suspended when consecutive drug tests on August 29 and September 6 proved positive.

J.P. (Badge No. 15-4692) a pipefitter, was allegedly behaving in a bizarre manner because he attempted to work in his stocking feet after his supervisor chastised him for wearing sneakers rather than safety shoes. He refused to be tested on August 12 and received a 5-day suspension. When he was tested on three subsequent occasions, that is, on August 22 and 29 and September 6, 1988, the confirmed values declined from 164. to 118.31 to 31.2 ngs.

b. Employees entitled to reinstatement

D.K. (Badge No. 39-578) was tested for both alcohol and drug testing on June 18, 1987. Although his breathalyzer test was negative, the urine bioassay was positive and he was suspended. Retesting a week later produced negative results.

²³ At the outset of the hearing, Respondent submitted a Motion In Limine, requesting, inter alia, that I determine how the burdens of proof should be allocated with respect to the remedial portion of the case. With little time for research or reflection, I failed to give clear or sound guidance on this matter. Initially, I suggested that the Respondent bore the burden of proof but subsequently indicated that the ultimate burden of persuasion lay with the General Counsel, and that regardless of where the burdens lay, I would base my findings on the totality of the evidence. (See Tr. at 45–48.)

²⁴ Employees will be identified by initials and badge numbers for reasons of privacy.

On October 15, 1987, D.K. again was tested pursuant to the periodic testing provisions of the Substance Abuse Policy. He was discharged based on positive findings of 21.38 ngs.

Similarly, C.B. (Badge No. 50.90) was suspended on October 1, 1988, and discharged in April 1988 after a followup test also showed a positive result. T.B. (Badge No. 15-5362) was discharged after first refusing to be tested on October 31, 1986, and then testing positively on a spotcheck conducted almost a year later. R.L. (Badge No. 394108) was discharged after eight consecutive tests between April 3 and May 16, 1986, revealed high ng. concentrations.

If the parties had bargained over the Substance Abuse Policy, it is possible that Respondent might have abandoned the requirement for periodic testing for a year without probable cause, or perhaps agreed that an employee need not be discharged after a second positive test. Although it is not possible now to state with certainty what bargain the parties might have struck had they negotiated a substance abuse policy in good faith, it is clear that the individuals discussed here were tested and discharged because Respondent insisted on unilaterally implementing its own drug code. Accordingly, make-whole remedies including reinstatement and backpay are appropriate for D.K., C.B., T.B., and R.L. since their “loss of employment stems directly from an unfair labor practice.” *Taracorp Inc.*, supra at 222.

M.E. (Badge No. 39-479), also was discharged after several tests showed unacceptable levels of marijuana metabolites. He was reinstated pursuant to a special probationary agreement on February 5, 1988, and then terminated again when a periodic test administered on August 25 proved positive. Although M.E. agreed to submit to random testing as a condition of his reinstatement, he did so only after discharge as a way of regaining employment. Since his original dismissal came about as a consequence of Respondent’s unlawful implementation of the Substance Abuse Policy, it follows that the probationary agreement and the subsequent random test are poisoned fruits. See *Wong Sun*, supra.²⁵ Therefore, I find that the evidence bearing on his initial and subsequent discharge is tainted and may not be used to justify the discipline imposed. In sum, I conclude that M.E. is entitled to backpay and reinstatement.

c. Compliance hearings warranted

Two employees, whose situations are described below, resigned after taking drug tests which revealed positive results. In each case, it seems likely that the resignation was tendered either in lieu of discharge or because the employee believed he would be fired. Because the evidence gives rise to strong inferences that the employees did not resign voluntarily, their resignations should be accorded no more significance than their test results. However, such matters should not be left to inference. Therefore, I shall recommend that reinstatement and backpay be offered to these two employees, unless it is established at the compliance stage of this proceeding that they would not have resigned but for a well-grounded belief that discharge pursuant to the Substance Abuse Policy was imminent.

²⁵ In the agreement which M.E. signed with BIW, expressly reserves his rights as they may be affected by the case then pending before the Board. See RX 20.

M.L. (Badge No. 39.10102) was discharged in April 1986 after positive test results revealed cocaine and marijuana metabolites. After reinstatement pursuant to a probationary agreement, a periodic test on August 11 reflected an ng. level well above the positive threshold. M.L. resigned on September 12. Although his resignation statement attributes his termination to personal reasons, it also notes that "This resignation resolves the (M.L.) grievances on his discharge." (RX 19.)

C.H. (Badge No. 43-13812), a probationary employee, was referred for drug and alcohol testing on March 13, 1987, after his supervisor smelled alcohol on his breath and noted that his speech was slurred when he returned from an extended break. He admitted that he had been drinking but refused to take the tests and was suspended. Since he could have received the same 5-day suspension for refusing to take the breathalyzer test, I find that this suspension was valid.

The same can not be said for his subsequent resignation. On returning to work following the March 13 suspension, a followup test indicated positive results. Without waiting for confirmation of those results by an independent laboratory, C.H. resigned the same day. However, the independent evaluation, which Respondent received a week later, established that the March 13 test result was negative. Thus, C.H. apparently resigned prematurely, believing that he would be discharged because of a false reading on his second drug test.

d. *Employees not entitled to relief*

Although the following employees also were disciplined after the Substance Abuse Policy was implemented, I find that special circumstances justify their suspensions:

L.A. (Badge No. 08-51-67) refused both the alcohol and drug test allegedly for being "under the influence," a condition which Respondent initially applied in the context of alcohol, rather than drug use. Under Rule 19, Respondent could have imposed a 5-day suspension for being under the influence of alcohol or refusing a breathalyzer test alone. Consequently, even without reference to the Substance Abuse Policy, Respondent had cause for suspending Ms. A. Therefore, I find that she was not disciplined improperly.

R.B. (Badge No. 09-11124) also was suspended for refusing to take both an alcohol and drug test on October 9, 1986, after his supervisor was advised that he was seen staggering. On observing him, the supervisor testified that R.B. looked glassy-eyed and had the odor of alcohol on his breath. As in L.A.'s case, R.B.'s suspension was warranted under Rule 19 for refusing to take the breathalyzer test. Accordingly, because his suspension did not come solely as a result of the unlawfully implemented Substance Abuse Policy, a remedy is not warranted in his case.

C.S.H. (Badge No. 10003) RX 12 indicates that this employee was suspended solely for refusing to take a test to determine if he was under the influence of alcohol. Thus, his discipline did not stem from the drug testing policies but from the legitimate application of Rule 19. As with the two employees discussed above, his suspension was valid.

I.P. was one of the three employees described above whom a supervisor believed was implicated in smoking marijuana on the job. He refused to take a drug test, but admitted that he had smoked marijuana on company premises, as al-

leged. Thus, his suspension was lawful under Rule 18 which proscribes the use of marijuana.

W.H. (Badge No. 6691-5), a tinsmith responsible for installing ventilation parts, was observed on May 12, 1987, by an assistant foreman walking far more slowly than customary as he approached the vessel on which he was working. Soon thereafter, noticing that W.H. seemed dazed and had not begun his assignment, the foreman referred him for testing. W.H. received a 5-day suspension after refusing the test and then, resigned on June 1. Because his suspension came about as a result of Respondent's drug testing code, backpay for the period he was suspended is appropriate. However, the General Counsel did not establish that W.H.'s resignation, which came 2 weeks after his suspension had ended, was related to Respondent's unfair labor practice. In the absence of contrary evidence, it is fair to infer that W.H.'s resignation was voluntary. Accordingly, he is not entitled to reinstatement. See *NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978).

T.D. (Badge No. 39-4017) tested positively on June 30 after previously refusing to be tested. When he failed to appear for a retest scheduled for July 7, a medical technician noted that T.D. was involved in "rehab," presumably referring to drug rehabilitation. T.D. resigned ostensibly for personal reasons on July 8.

The General Counsel contends that an inference should be drawn that T.D. resigned for fear that he would test positive. Counsel's contention rests more on speculation than on sound evidence, for T.D. would have been suspended again, not discharged, if he continued to show positive test results. As previously stated, it was the General Counsel's duty to present evidence which might show that T.D.'s resignation was directly related to the Respondent's drug abuse policy. I find that she has failed to meet this burden by demonstrating the real reason for T.D.'s resignation.

CONCLUSIONS OF LAW

1. Respondent, Bath Iron Works Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 6 and Local 7, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material to this proceeding, the Respondent has recognized Local 6 as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees of the Respondent at its plants at Bath, Brunswick and Portland, Maine, including apprentices, truck drivers, janitors, janitresses, store keepers, toolmakers, toolkeepers and those working in stores for the purpose of supplying the men with tools, supplies or other equipment or things; but excluding executives, office and clerical employees, timekeepers, counters, ship calendar men, shipcheckers, ship expeditors and ship technicians, draftsmen, technical engineers, salaried employees, First Aid employees, and any individual employed as a guard, watchman, or security patrolman to enforce Rules against employees and other persons to protect the safety of per-

sons on the BIW's premises, and professional employees and supervisors as defined in the Act.

4. At all times material to this proceeding, the Respondent recognized Local 7 as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time hourly clerical and technical employees including those classifications in Attachment "A" on pp. 39-41 of the Local 7 1985-8 contract employed by the Employer at its Bath, Brunswick, Maine facilities, and all additional plants and/or sites in the State of Maine but excluding all other employees, confidential secretaries, administrative secretaries, nurses, charge nurses, ratesetters, accounting clerk/courier assistant supervisor-piecework administrator, senior counter cost control technicians in Department 2-30, senior clerk in Department 41, financial analysts in Department 1-20, all Industrial Relations employees (except employees of Department 60, clerk in the Employee Store, medical technicians and records clerk in Department 28), guards and supervisors as defined in the Act.

5. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by unilaterally implementing its Substance Abuse Policy on or about February 24, 1986, and a Revised Substance Abuse Policy on or about April 28, 1986, without bargaining with the Unions as requested.

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act.

Specifically, it is recommended that Respondent be ordered to rescind its Substance Abuse Policy as implemented on or about February 24, 1986, and as revised on April 28, 1986, to the extent it pertains to employees who are represented by Locals 6 and 7,²⁶ In addition, Respondent shall be ordered, upon request, to bargain with the Unions in good faith concerning its proposal for a substance abuse program, with the exception of alcohol testing.

Further, Respondent shall be ordered to restore the status quo ante which existed at the time of its unlawful actions by (1) rescinding all disciplinary actions taken against those employees who were wrongfully suspended or discharged, as identified in the section of this decision entitled, "Remedial Relief for Employees Disciplined Under the Substance Abuse Policy," and make them whole by offering those who were discharged, full and immediate reinstatement to their former positions, or if they no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges. Discharged and suspended employees who are entitled to relief, shall be paid for any losses they may have sustained, with interest, as a consequence of Respondent's unilateral action.²⁷

[Recommended Order omitted from publication.]

²⁶In restoring the status quo ante, Plant Rules 18 and 19, which were incorporated verbatim into the Substance Abuse Policy, survive intact.

²⁷See generally, *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971).