

Union Child Day Care Center, Inc. and District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO. Case 2-CA-23841

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On December 11, 1990, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Union Child Day Care Center, Inc., White Plains, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with District Council 1707, Community and Social Agency Employ-

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²With regard to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain over changes in the net pay of employees, we note that the judge, at one point in her decision, finds that the Respondent was obligated to bargain over the effects of its decision to computerize its payroll system. We understand the judge to mean that the Respondent was not under an obligation to bargain about the decision to switch from Controller Roher's manual preparation of the payroll to use of an outside, computerized service, ADP. Rather, we understand the judge to be finding that the computerized service's changes in the methods by which deductions were computed resulted in less net pay. Thus, as found by the judge, Roher, among other things, deducted the employee pension contribution *after* figuring the withholding and other taxes while ADP deducted the pension contributions *before* making the other calculations. This was a change not just in the procedure for doing the payroll but in the substance of the deductions. In the absence of any evidence that changes of this sort were mandated by law or regulation, we find that, as alleged in the complaint, the Respondent's unilateral change in net pay violated Sec. 8(a)(5), and that the Respondent, on the Union's request, is obligated to bargain about such changes.

The General Counsel has excepted to the judge's failure to order the Respondent, on request, to rescind the changes in employees' net pay and the decision not to permit employees to use its vehicles to obtain lunch for employees. In declining to order rescission of the unilateral change in net pay, the judge reasoned that "such a change would be disruptive to unit employees." After examining the record, we find that restoration of the status quo ante would not be unduly disruptive. We agree with the General Counsel's exceptions and shall amend the Order and notice accordingly. See *San Antonio Portland Cement Co.*, 277 NLRB 309, 314 (1985).

ees Union, AFSCME, AFL-CIO concerning the effects on unit employees of its decision to computerize its payroll procedures.

(b) Making unilateral changes in employees' terms and conditions of employment without notifying and affording an opportunity to bargain to the Union.

(c) Disparately enforcing any rule prohibiting employees from meeting with Union agents in the staff room, and threatening the arrest of Union agents who are meeting with employees.

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

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

(a) Rescind the unilateral change in its practice of permitting use of its vehicles to obtain lunch for its employees and bargain with the Union over the decision.

(b) On request, rescind the changes in the net pay of employees and bargain with the Union over any such future changes in net pay for unit employees.

(c) Notify the Union that it will grant access to Union agents to meet with employees in the staff room.

(d) Post at its facility in White Plains, New York, copies of the attached notice marked "Appendix"³ Copies of the notice, on forms provided by the Regional Director for Region 2, 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.

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

³If 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."

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 fail and refuse to bargain with District Council 1707, Community and Social Agency

Employees Union, AFSCME, AFL-CIO concerning the effects on unit employees of our decision to computerize payroll procedures.

WE WILL NOT make unilateral changes in employees' terms and conditions of employment without notifying and affording an opportunity to bargain to the Union.

WE WILL NOT disparately enforce any rule prohibiting employees from meeting with Union agents in the staff room or threaten the arrest of Union agents who are meeting with employees.

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

WE WILL rescind our unilateral change in our practice of permitting use of our vehicles to obtain lunch for our employees and bargain with the Union over that decision.

WE WILL, on request, rescind the changes in net pay of employees and bargain with the Union over any such future changes in net pay for unit employees.

WE WILL notify the Union that we will grant access to union agents to meet with employees in the staff room. The unit is:

INCLUDED: All full-time and regular part-time teachers, assistant teachers, teachers' aides, assistant social workers, business office assistant, assistant building superintendent, food service aide, nurse, bus driver, receptionist, cook, transportation coordinator, building and grounds coordinator, and food service coordinator employed by the Respondent.

EXCLUDED: The Executive Director, Comptroller, Assistant to Executive Director, Executive Secretary, Social Service Coordinator, Health and Infant Coordinator, Therapeutic Nursery Coordinator, Educational Coordinator, and guards, professional employees and supervisors as defined in the Act.

UNION CHILD DAY CARE CENTER, INC.

Randy M. Girer, Esq., for the General Counsel.

Marc L. Silverman, Esq. and *Meredith H. Savitt, Esq.* (Milgrim Thomaian & Lee P.C.), of New York, New York, for the Respondent.

Stephen E. Appell, Esq. (*Sipser, Weinstock, Harper & Dorn*), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on May 21 and 22, 1990. The complaint alleges that Respondent, in violation of Section 8(a)(1), (3), and (5) of the Act, changed the amounts of net pay received by its employees, changed the established

practice that permitted Respondent's drivers to use its vehicles for nonbusiness purposes, threatened to have union representatives arrested while they were on Respondent's premises meeting with employees, and disparately prohibited union-related solicitations and distributions. Respondent denies that its actions violated the Act, and asserts that if any unfair labor practices were committed they were isolated and de minimis.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent on July 17, 1990, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent a New York not-for-profit corporation with an office in White Plains, New York, is engaged in the operation of a day care center. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

In March 1988, the Union, District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO, was certified as the bargaining representative of Respondent's employees in the following unit:

Included: All full-time and regular part-time teachers, assistant teachers, teachers' aides, assistant social workers, business office assistant, assistant building superintendent, food service aide, nurse, bus driver, receptionist, cook, transportation coordinator, building and grounds coordinator, and food service coordinator employed by Respondent.

Excluded: The Executive Director, Comptroller, Assistant to Executive Director, Executive Secretary, Social Service Coordinator, Health and Infant Coordinator, Therapeutic Nursery Coordinator, Educational Coordinator, and guards, professional employees and supervisors as defined in the Act.

Since 1988, Respondent and the Union have negotiated for a collective-bargaining agreement but no contract has been reached. The last negotiating session between the parties took place on September 26, 1989.

2. Change in the net pay of employees

The undisputed evidence establishes that in the spring of 1989, the board of directors of Respondent discussed with its Controller the desirability and feasibility of converting from

¹I note that at p. 28 of Respondent's brief, the first footnote refers to a document and purported facts that were ruled inadmissible at the hearing. Respondent does not argue in its brief that the ruling rejecting the proffered evidence should be reconsidered. This attempted reliance on evidence not admitted at the hearing is improper. I shall disregard the first footnote on p. 28 of Respondent's brief.

a manual method of preparing the biweekly payroll to the use of an outside computerized service. The Controller, Florence Roher, testified that it was burdensome for her to write manually the payroll and the 60 to 65 checks. After a study of available services, the board of directors decided to engage the services of ADP. It is clear that the decision to change the method of preparing the payroll was not due to any failing or deficiency on Roher's part: in the many years during which she kept Respondent's records and prepared the payroll, no complaint had been made that her work was not accurate. The last manually prepared payroll was dated May 25, 1989. The first payroll prepared by ADP was dated June 9, 1989. Although the gross pay received biweekly by the employees did not change, the net pay of the employees was either increased or decreased on the ADP checks because the methods used by ADP were different from those used by Roher. Roher testified that both her method and the ADP method were consonant with generally accepted accounting principles. The differences in the methods and the resultant figures obtained for net pay arose from the fact that Roher used tables with ranges as the basis for computing withholding, while ADP used a computer that was accurate to the penny; further Roher deducted the employee pension contribution after figuring the withholding and other taxes while ADP deducted the pension contribution before making the other calculations. Finally, according to Roher, ADP corrected some minor errors she may have made. Roher emphasized that the changes in net pay would not result in a greater tax being owed by employees.

On June 6, 1989, a staff meeting was held at which the unit employees were informed that Respondent was changing to a computerized payroll system and that there were likely to be changes in their net pay. Roher attended the meeting and she invited any employees with questions to come see her. The evidence shows that Shop Steward Robert Plenty was present at the meeting. Not all unit employees could attend the staff meeting because some had to remain with the children in their classes. Respondent also distributed minutes of the meeting the next day. According to Roher, three employees came to her subsequent to the distribution of the next pay checks and asked about changes in their net pay.²

It is undisputed that Respondent did not inform the Union that it had decided to institute a different payroll system under which the net pay of employees would change. The Union first heard of the change when Shop Steward Robert Plenty called it to say that staff members were concerned about the changes in their paychecks.³ Some employees were afraid that they would owe more money at tax time and others thought they might be entitled to more money than they were receiving. Plenty asked the Union to look into the problem. On September 6, 1989, the Union wrote to Hulkower protesting any change in terms and conditions of employment made without consulting the certified collective-bargaining agent. The letter requested meetings to clarify the

²She named these employees as Burwell, Hilliard, and Buckner. Employee Olivia Howcott testified that she asked Roher why her paycheck had decreased. According to Howcott, whom I credit, Roher told her that she did not know where ADP got its figures but that Howcott should not worry because she would recoup the amount at tax time.

³The changes in the net wages received biweekly by employees ranged from an increase of \$21.44 to a decrease of \$8.81. For the majority of employees, the changes amounted to well over \$2.

changes in the payroll checks. The Union suggested that each employee concerned as well as a shop steward and a union representative would be present at the suggested meetings and stated that it would call soon to schedule the meetings.

On September 15, 1989, Respondent's attorney, Marc L. Silverman, wrote to counsel for the Union stating that Respondent would discuss the changes at a projected meeting of September 26. When this meeting was held, the Union repeated its request that any employee who had a question about the change in his or her net pay be granted a meeting with a representative of Respondent together with union representatives. Silverman said such individual employee meetings were not necessary as he was prepared to go over each employee's status at that time. But the Union said Silverman's proposal was not acceptable: it maintained that the individual employees had the right to be present at the meeting where their net pay was explained.

3. Use of Respondent's vehicles

Robert Plenty is Respondent's transportation coordinator. He has been employed by Respondent since 1973. Plenty is responsible for planning all routes and all trips involving the pickup and delivery of the children to the Day Care Center. He sees to it that vehicles are inspected and maintains all records necessary to this purpose. Plenty testified that Respondent operates two vehicles, a minibus and a 20-passenger van. The two vehicles are used for many purposes: those listed by Plenty include picking up children at home or at local schools, taking children home, running errands for the Center, taking employees to the bank, taking people to pick up lunch, taking people to church, taking Center deposits to the bank, taking the executive director's personal deposits to the bank, transporting employee Rose Einstein when it snows and she is unable to drive, transporting the executive director when her own car is unavailable, picking up furniture donated to the Center and occasionally transporting the furniture to the home of an employee, and picking up soda for the sunshine club.⁴ Plenty testified that no one had ever instructed him as to the permissible and nonpermissible uses of the vehicles nor was he aware of any rules or regulations relating to the use of the vehicles for specific purposes. In addition to planning transportation matters for Respondent, Plenty drives a vehicle daily to pick up and deliver children and for some of the purposes described above. Respondent employs another driver, Geneva Benton; also, the building superintendent drives the vehicles when necessary.

Plenty is a member of the bargaining unit. He distributed authorization cards for the Union and acted as an observer for the Union at the election. Plenty is the shop steward and attends all bargaining sessions as a member of the employee negotiating committee.

Plenty testified that on September 6, 1989, he took his lunch break at 1 p.m. During this time, Geneva Benton was to be on duty at the Center. He drove the van to the Burger Deli a short distance from the Center, taking with him em-

⁴The sunshine club is a staff supported fund which raises money so that it may give flowers or presents to employees on occasions such as births, weddings, birthdays, and the like. The club is run by the staff and not by managers of Respondent, although the executive director may give the club advice when requested to do so.

ployees Lilly Ellison and Laura Oliva.⁵ There, the employees met union organizers Tom Murray and Ben Meskin and discussed union business. When Plenty, Ellison, and Oliva returned to the Center 45 minutes later, Executive Director Rita Hulkower was standing outside.⁶ As Plenty got out of the van Hulkower asked him where he had gone with the van. According to Plenty, he told Hulkower that he had been to lunch and to a meeting with the Union. Hulkower said he should not use the van for personal business; Plenty replied that they had been doing that since the beginning and that if Hulkower was changing the rules she should do so in writing. Plenty's affidavit given to a Board agent does not relate that he told Hulkower that the employees were returning from a union meeting; instead, the affidavit states that he came back from the meeting with union papers in his hands and that when Hulkower saw the papers she said they were not to use the van for that business.

Ellison has worked at the Center for 18 years. She testified that she has observed drivers using the vehicles to pick up and deliver children, take children and staff on trips, take employees to cash their paychecks at the bank and take employees to pick up their lunches. Ellison stated that employees often pick up lunch on the way back from the bank on payday, but that occasionally the drivers take someone to get lunch on other days or pick up lunch for the staff on nonpaydays.⁷

Hulkower's testimony is contrary to that of Plenty in several significant respects. Hulkower testified that the vehicles were used to transport children, staff members and parents on outings and to and from the Center. She stated that the vehicles were used to make the Center's deposits at the bank and to purchase items for the sunshine club. The vehicles take employees to the bank to cash their paychecks, but only on payday. Hulkower acknowledged that the bus had been used to transport donated furniture to an employee's home. Hulkower stated that the sunshine club is not considered personal business. She denied any knowledge that Center vehicles were used to pick up employee lunches or to take employees to church. Hulkower works at least 10 hours per day at the Center and she sees Plenty almost everyday.

Hulkower testified that when Plenty and the two employees got off the bus on September 6 and she asked Plenty where he had gone, Plenty replied that he took two people to lunch; he did not say that he had taken them to a union meeting and she did not see any papers in Plenty's hand. Hulkower stated that she did not know that Plenty had been to lunch with union representatives until the first day of the instant hearing. According to Hulkower, when Plenty told her he had gone to lunch, she said that is not what the bus was to be used for.

⁵ Ellison and Oliva are both assistant shop stewards and members of the negotiating committee.

⁶ The record shows that Hulkower was standing outside because she wanted Plenty to drive her around to look for one of the Center's pupils who had been permitted to leave a local school district bus when she should have been transported to the Center for an after school program. It has not been explained why Benton was not available for this purpose although she was supposed to be on duty during Plenty's lunch hour. At any rate, there is no suggestion in the record that Plenty should not have been absent from the Center during his lunch hour and no discipline was issued to him by Respondent as a result of the events of September 6, 1989.

⁷ Ellison did not hear the conversation between Plenty and Hulkower on September 6. Oliva did not testify.

Respondent introduced into evidence a document entitled Personnel Practices which prohibits "unauthorized use of Center equipment." There is much controversy over when and if this document was distributed to employees. It is not necessary for me to make any finding on that subject. The document does not define what constitutes unauthorized use, and the phrase begs the question posed in the instant case because the parties disagree over what was the practice as to authorized use of the Center's vehicles.

4. Events of September 15, 1989

a. Background

In order to understand the dispute surrounding the events of September 15, 1989, when General Counsel asserts that Respondent disparately denied access to the union and threatened to have union representatives arrested, it is necessary to explore the issue of access to the Center generally as well as to determine exactly what happened on that day. Respondent contends, in substance, that access to the facility is monitored and controlled by the receptionist while General Counsel urges that few, if any, restrictions are placed on public access to the Center.

The evidence shows that when one enters the front door of the Day Care Center, there is a main hallway opposite the entrance and another hallway to the right. The first office on the main hallway is the reception office. A sign posted over the door to the reception office reads, "All persons must stop at reception desk." Past the reception office down the main hallway are the classrooms. The reception office is the outer area of a suite of offices which contain, inter alia, Hulkower's office and the controller's office.

b. The meetings

Plenty testified that on September 15, 1989, he called a union meeting so that a group could gather in order to present an agenda to Hulkower.⁸ At 1 p.m. on that day, Plenty together with union staff organizers Thomas Murray and Ben Meskin and with unit employees Olivia Howcott, Mildred Blackwell, and Bernice Wilson, proceeded to Hulkower's office. According to Plenty, he spoke to the receptionist in the office outside Hulkower's private office and told her he was going in to see Hulkower. Plenty stated that he and the others did not wait outside and ask for permission to enter because he normally does not wait in that fashion before entering Hulkower's office. When the group entered Hulkower's office, they handed her the agenda they had prepared and asked to meet with her. Hulkower said that she was engaged in speaking on the telephone and asked the group to wait. According to Plenty, the group then left Hulkower's office and waited just outside until they saw that she was no longer on the telephone. Then they walked back into Hulkower's office and asked about the items on their agenda. Hulkower said the Union should speak to her lawyer. Meskin said the Union had already asked Respondent's attorney about the items on the agenda but had not received an answer. He asked whether the Union would have to wait

⁸ The agenda for discussion with Hulkower read:

1. Scheduling meetings for payroll problems
2. Understaffing
3. Escrow account for salary enhancement money.

until Christmas. At that point, Hulkower stood up and said she did not have to listen this. She said she could deal with Murray but that she was not going to deal with Meskin. Then Hulkower left her office: as she did so, she said to Plenty, "this is the kind of guy that you want to represent you."

According to Plenty, the union group left Hulkower's office and went to the staff room to discuss union matters. After about 10 minutes, Hulkower entered with education coordinator Irma Green. She told the union representatives that they would have to leave the building or she would call the police. Then Hulkower and Green left and the union representatives and unit members continued their meeting in the staff room. Other staff members were present during the time they met and when Hulkower came in and made her threat to summon the police.

Union staff organizer Thomas Murray testified about the Union's attempt to discuss its agenda with Hulkower on September 15, 1989.⁹ His testimony is to the same effect as Plenty's except that he supplied more details about the events of the day. Murray stated that when Hulkower told the union agents and employees that she could not talk to them because she was speaking on the telephone they left her office and waited outside. Hulkower's door remained open while she completed her telephone conversation. After Hulkower finished her conversation and the group reentered her office, she refused to discuss the agenda items saying that her lawyer would discuss them. Murray said she did not need the lawyer because the items concerned individual problems. At this point, there was a heated exchange of words between Hulkower and organizer Ben Meskin.¹⁰ Murray stated that Meskin talks a lot and it can be hard to follow what he says because he talks fast and loud. Murray maintained that Meskin did not shout at Hulkower but that he normally speaks in a loud voice. Then Hulkower left her office and the group followed her out. When Murray told her in parting that they had to discuss certain subjects, Hulkower said she could talk to him but that, indicating Meskin, "I'll never talk to this."

Murray testified that after the union group left the offices, they went to the staff room down the hall and met to discuss what had just happened and what could be done to achieve a collective bargaining agreement. The time was about 1:15 p.m. and several employees were in the staff room taking their lunch breaks; these employees were sitting on a sofa 4 or 5 feet from the table where the union group was seated. About 5 or 10 minutes after the meeting began, Hulkower entered the staff room with educational coordinator Irma Green. She told the union representatives that they must leave the premises right away and said she would call the police and have them arrested if they did not. According to Murray, Hulkower appeared angry and upset. Murray said, "fine," and then Hulkower left. The group continued talking for about 45 minutes. Before Murray and Meskin left the facility, they went to Hulkower's office and gave her their business cards in case the police wanted to reach them.

Unit employee Olivia Howcott testified about the Union's attempt to meet with Hulkower on September 15.¹¹ Although

Howcott could not see or hear everything that went on in Hulkower's office because Howcott was at the back of the group, her testimony is consistent with that of Plenty and Murray; she stated that Hulkower's door was open while the group waited for her to complete her phone call. Later, in the staff room meeting, Howcott heard Hulkower tell the union representatives that if they did not leave now she would call the police.

Hulkower testified at length about the events of September 15, 1989. I note that Hulkower was patently hostile to the Union. Her testimony was replete with adjectives such as "astounded" and "shocked" when she described the union group's attempt to visit her on September 15. In describing the action of Murray in handing her the agenda, she at first testified that Murray put the paper on her desk and then changed it to say that he threw a paper on her desk. Hulkower sounded as though she felt threatened by the presence of the two union agents and the employees in her office although she did not describe any threatening actions.¹² During her testimony, Hulkower gave unresponsive answers to questions posed by counsel in an effort to interject evidence that she believed would make the Union look bad. She was uncooperative on cross examination by counsel for the Union. For these reasons as well as for the reasons discussed in connection with Hulkower's testimony below I shall not rely on Hulkower's testimony where it is contradicted by other, more reliable evidence.

Hulkower testified that on September 15, 1989, Murray, Meskin and four to six of her staff members entered her office.¹³ She was speaking on the telephone and told Murray, "excuse me, I'm on the phone."¹⁴ Nevertheless, according to Hulkower, Murray put his briefcase on her desk and also placed a piece of paper on her desk. Murray said they would wait and Hulkower replied, "please wait outside." The group then left her office, and, according to Hulkower, she ended her conversation, closed the door to her office and called Respondent's attorney, Silverman. She read Silverman the paper given to her by Murray and told him that she was shocked. According to Hulkower, Silverman said if the group did not leave she could tell them to go and if they refused she could call the police. After finishing the conversation with Silverman, Hulkower stated that she got up and opened the door to her office. When she did so the union group came back in. They stood around her desk.¹⁵ Murray stated that he wanted to discuss the agenda items with Hulkower but she said that her lawyer's response should be at the union office momentarily. Then Meskin shouted that the people have waited long enough and, "It's about time you stopped treating them this way; come up with some answers and come to some agreement." Hulkower then told Murray that she had nothing further to say to him. Meskin kept shouting, according to Hulkower. She told him, "If you

¹²My observation of the employee witnesses leads me to conclude that these were all mild mannered, genteel individuals used to working with children in a professional environment. I also observed that Murray was a careful, gentlemanly individual.

¹³Hulkower testified that the group "burst" into her office, but there is no evidence to show why this word would be accurate. All the witnesses agree that Hulkower's door was open and no one suggested that they arrived screaming or making a commotion in any other way.

¹⁴Although Hulkower purported to recall the events of September 15 in great detail, she could not recall to whom she was speaking when the union group entered her office.

¹⁵The testimony shows that Hulkower's office is quite small and would be filled by the presence of a group such as that which called on her that day.

⁹Murray had been at the Center about 15 times before September 15, 1989.

¹⁰Meskin did not testify herein.

¹¹Howcott is the head teacher for the 4-year olds.

don't leave, I will call the police." As the group left her office, Meskin shouted that she was treating the staff like garbage and that she was a miser and was mismanaging funds. Hulkower denied that she shouted at Meskin.

According to Hulkower, she called Silverman again and he told her to call the police if the union representatives were still in the building. Hulkower telephoned the local police and she was informed that if anyone was disturbing the peace, she could file a complaint.

Someone told Hulkower that Meskin was in the staff room. She went to the staff room and told Meskin and Murray that if they did not leave she would summon the police. Then Hulkower left the staff room and called Silverman again. She told him she had decided not to call the police because she did not want to cause any disruption. Sometime after this, Murray and Meskin came to her office and gave her their business cards so that the police would know where to find them.

When asked by counsel for Respondent why she threatened to have Meskin and Murray arrested, Hulkower replied that they were being abusive to her, that they were causing a disturbance in the office that could easily be observed by parents and children, that they were disrupting nap time, and that the proper procedure when people want to see her is to talk to the receptionist. On cross-examination, Hulkower added that she was advised by counsel to call the police and she felt threatened by the encounter in her office. She stated that the union officials were not doing anything disruptive in the staff room.

Hulkower testified that Meskin is rather short and fat. He told her that he was brought in to "make trouble" at the negotiating table. Hulkower stated that Meskin took threatening actions: he picketed the Center, he called the Center's board of directors to appeal for support for the Union, he called the United Way, the town supervisor and the State Department of Social Services. Respondent filed charges concerning this activity but they were dismissed. Hulkower acknowledged that Meskin never threatened her with violence, but he was militant and abrasive. Hulkower stated that she has always been opposed to the Union representing the employees and that since the organizing started in 1987 she has not wanted this Union.

Controller Florence Roher also testified about the events of September 15, 1989. Roher's office opens directly into Hulkower's office and Roher was able to observe and hear what went on that day in Hulkower's office. Roher's testimony generally confirmed that given by Hulkower. Roher said that there was shouting and that Hulkower was shouting along with the others, but she heard no threats of violence. She said Hulkower was "not in control of her emotions" and that she told the group that if they did not leave she would call the police. Roher stated that Hulkower does not like dealing with the Union; Hulkower expressed annoyance about having to do certain things for the Union long before she ever met Meskin. During the union campaign, Hulkower told Roher that she did not want to see the Union win. Both Roher and Hulkower felt harassed when they had to prepare the report on the payroll changes for the Union, and they feel that work done as a result of Board processes is a waste of time.

c. Visitor access

Plenty testified that many visitors come to the Day Care Center and are admitted without question. Employees such as the food service manager have visitors almost everyday, including her husband, friends, and fellow church members. Parents enter the Center freely for various purposes including the setting up of private boutiques in the hallways for the sale of merchandise. Plenty often sits at the reception desk when the receptionist is absent; he does not require that all people entering the Center stop at the desk to state their business.

Ellison, who has been employed by Respondent for 18 years, testified that the sign requiring that all visitors stop at the reception desk is not enforced strictly. She is not aware of any rule that visitors must seek permission to come to the Center. She has often seen visitors wandering the halls at the Center. There are occasions when no one is sitting at the reception desk and visitors walk past the reception area. Among the visitors Ellison has seen at the Center are John Bell a jewelry and leather goods salesman who used to come to the staff room once a week to sell his merchandise to the staff, and Julian Bond, a jewelry salesman who used to come to the staff room. Ellison's girl friend used to come visit her at lunchtime. Parents may set up boutiques in the halls or staff room to sell their merchandise several times a year.

Howcott, who has been employed by Respondent for 18 years, has never been told that there is any rule requiring visitors to check in at the receptionist's desk. Howcott's son often visits her at work without checking in with the receptionist. Howcott has seen visitors enter the Center through the front door and proceed to visit staff members without stopping at the receptionist's desk. If Howcott sees a person wandering the halls near the classrooms she will direct him or her to the office, but she would not do so with respect to a person whom she saw in the staff room. Howcott has seen various visitors in the Center; these include salesmen, parents of children, friends of the staff, and people donating items to the Center.

B. Discussion and Conclusions

1. Change in the net pay of employees

Wages are a mandatory subject of collective bargaining and it is manifest that Respondent could make no change in the wages of its unit employees without negotiating with the Union. Respondent urges that a change in the net pay of employees, without any change in the gross pay, is not a change in wages; alternatively, Respondent urges that if it is considered to be a change, it is *de minimis*. I find that a change in net pay received biweekly is indeed a change in wages. When employees have less or more money in a paycheck, those employees have less or more money to dispose of as they see fit for the pay period in question. There is no basis for holding that the Act forbids a unilateral change in the annual gross wages of employees but that it permits unilateral changes in the amount of the paycheck received by the employees and available to them for their use. Nor can I find that the changes in the net pay were *de minimis*. These changes amounted to several dollars for most employees and to over \$20 for at least one. The Center employees are not

affluent, highly paid workers.¹⁶ Experience teaches that even small amounts in a paycheck are significant to most employees. It would be adopting a cavalier attitude to find, without any evidence, that a few dollars here or there are unimportant to Respondent's employees. Finally, Respondent informed the employees of the projected change before it occurred; there was no reason, except Hulkower's and Roher's disinclination to deal with the Union, for Respondent's failure to notify the collective-bargaining representative of its employees that it was planning to change its payroll methods and that this would cause certain changes in the net pay of employees.¹⁷ Thus, I conclude that Respondent had a duty to bargain over the effects of its change to a computerized payroll system.

The facts show that Shop Steward Plenty was present at the staff meeting where Roher announced that due to a change to ADP payroll services there might be changes in employees' paychecks. This does not constitute notice to the collective-bargaining representative of the employees. Respondent was well aware who were the negotiators on behalf of the Union and it did not satisfy its duty to bargain by holding a meeting with its employees and there making certain vague statements about changes that might be taking place in a few days. Plenty testified that he called the Union about the changes after they had taken place and employees were asking about them. Respondent did not seek to have Plenty inform the certified representative of the substance of the staff meeting so that the Union would have prior notice of the changes and an opportunity to bargain. Moreover, the staff meeting was held on June 6 and the change was effective on June 9; thus there was no adequate interval for bargaining even if Plenty had called the Union immediately.

Rust Craft Broadcasting, 225 NLRB 327 (1976), is not apposite. In that case, management decided that its employees would punch a time clock instead of manually writing in the hours they worked and the times they reported and left each day. The Board found that there was no change in working conditions or wages; the rule that employees must record their total working time as well as time in and time out on a daily basis had been in force for a long time. The Board relied on *Wabash Transformer Corp.*, 215 NLRB 546 (1974), where it had found that it was not a violation for the employer to make explicit the penalty for failure to adhere to certain rules where the penalty had been implicit in the existence of the rules and standards before the Union came on the scene. Further, *GSM, Inc.*, 284 NLRB 174 (1987), and *Broyhill Co.*, 260 NLRB 1366 (1982), relied on by Respondent, do not support a finding that Respondent "cured" its refusal to bargain with the Union by offering the Union information about the changes in net pay several months after the changes had been instituted by Respondent. In *GSM* and *Broyhill*, the employers had unlawfully threatened their employees but had later disavowed the threats and taken corrective action. Thus, although the conclusions of law in the decisions find violations of the Act, no remedial orders were issued as to those violations. In contrast to the employers' actions in the cases relied on by Respondent, the Respondent

has issued no notice to its employees disavowing its unlawful unilateral changes and it has not restored the status quo ante.

On August 23, 1990, the Board issued its decision in *WPIX, Inc.*, 299 NLRB 525. In that case, the union business representative had "received actual notice of the [unilateral] change more than a week prior to the implementation," but the Union failed to request bargaining prior to implementation of the change. In that case, there was no *fait accompli*, because the Union had an opportunity to request bargaining before the change was instituted. In the instant case, no notice to a union representative was given prior to Respondent's implementation of the changes in the net pay of its employees. Thus, Respondent's reliance on *WPIX* is misplaced.

Respondent urges that it offered the Union an explanation of each and every change in the net pay of the employees at the bargaining session of September 26, 1989, but the Union declined to discuss the matter unless the employees were also present. Respondent argues that it cured any violation of law but that the Union refused to bargain over the changes in the net pay of employees. Respondent misapprehends the nature of its unlawful acts. It presented the Union with a *fait accompli* in that the Union did not have a reasonable opportunity to bargain over the changes before they took effect. Its later offer to explain the changes may be very well, but it is no substitute for notice to the Union prior to the effectuation of the changes; only by having prior notice and an opportunity to bargain about the effects of the change in payroll methods on the net pay of employees could the Union have negotiated in any real manner on the effects of the change. Respondent's offer to explain the changes on September 26 was not an offer to negotiate; it was an offer to tell the Union what it had already done but it provided the Union no opportunity to bargain. By way of example, I note that it is entirely possible that the Union could have told Respondent that despite its use of ADP it preferred that no changes take place in the net pay of employees, and it is entirely possible that ADP could have accommodated this request if it had been made in a timely manner. Certainly, there is nothing in the record to negate this possibility. I find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the net pay of its employees. Cf. *Orange County Machine Works*, 147 NLRB 1004, 1006 (1964).

2. Use of Respondent's vehicles

I credit Plenty's testimony as to the practice with respect to use of Respondent's vehicles during the time he has been transportation coordinator. Plenty has primary responsibility for scheduling and overseeing the use of the vehicles and he has the most direct knowledge of the actual uses to which the vehicles have been put. From my observation of Plenty during the trial I am convinced that he testified truthfully concerning this matter. Further, his testimony was supported by that of Ellison. Although Hulkower denied any knowledge that Respondent's vehicles were used to pick up employee lunches her denials strain credulity. As the executive director it is clear from the record that she worked long hours and was involved in all aspects of the Center's operation. However, Hulkower's knowledge or lack thereof is not determinative of the issue. Based on the evidence, I find that Respondent's vehicles had been used regularly for all the purposes

¹⁶ Respondent's exhibit shows that of 43 employees, 29 have net pay under \$400 on a biweekly basis.

¹⁷ Respondent's own witnesses established that Hulkower and Roher were opposed to the Union even before the election was held and that they did not want to have to deal with the Union as the representative of their employees.

testified to by Plenty including transporting employees to the bank on payday and other days, transporting employees to pick up lunch on payday and other days, transporting employees when their usual means of transportation were not available and making purchases for the sunshine club.

Hulkower and Plenty disagree whether Plenty informed Hulkower that he had been to a union meeting on September 6, 1989, when he got off the bus with Ellison and Oliva. Hulkower denied that Plenty either mentioned the Union or that she noticed some union papers in his possession. Plenty's affidavit states that he had union papers in his hands and that Hulkower saw them; however, Plenty testified that he told her that he had been to a union meeting. I shall credit Plenty's affidavit that he only mentioned lunch to Hulkower, because the affidavit was given at a time closer to the occurrence it describes. I shall credit Hulkower's testimony that she did not see any union papers and that she did not know that Plenty had been to a union meeting. Contrary to Plenty's affidavit, he could not know if Hulkower had indeed looked at the papers he held in his hand. I find that Plenty told Hulkower that he had used the bus to drive to lunch and that Hulkower told him he could not use the bus for that purpose because it was personal business. I find that the vehicles had been used for many purposes, including those related to providing employees with lunch, and I find that when Hulkower told Plenty that he could not use the bus for lunch she was changing a long established condition of employment. Respondent did not negotiate with the Union concerning this change and Respondent thus violated Section 8(a)(5) and (1) of the Act by changing a long standing past practice that "affected all employees and constituted a substantial modification of a privilege which had been an existing condition of employment." *Brown & Connolly, Inc.*, 237 NLRB 271, 281 (1978).

General Counsel urges that Hulkower's anti union animus and the fact that Plenty, Ellison and Oliva were shop stewards and sat with the negotiating committee would be a sufficient basis for finding that Hulkower changed the rule relating to vehicle use for a discriminatory reason in retaliation against the employees' union activities. I do not believe that all the assumptions required by General Counsel's argument may fairly be made: Hulkower did not know that the employees had been to a union meeting and nothing in the evidence shows that she harbored resentments against particular employees who supported the Union. Based on the record before me, I can only find that when Hulkower could not locate Plenty she became annoyed and that she decided to change the practice that permitted him to use the vehicles for the employees' convenience in obtaining lunch.

3. September 15, 1989 denial of access and threat to arrest

I find that on September 15, 1989, Meskin, Murray, and several employees met in order to present an agenda to Hulkower. The group walked into Hulkower's office, presented her with the agenda, and at Hulkower's request left her office to wait outside until she could complete a telephone call. After the phone call, the group reentered Hulkower's office. The General Counsel's witnesses claim that Hulkower's door remained open while she spoke on the telephone. Hulkower claims that she closed the door and then opened it again to admit the union group when she was fin-

ished speaking on the phone. According to Hulkower's version of the occurrence, the group asked her about the agenda and she referred them to her attorney. A heated discussion ensued during which Meskin shouted at Hulkower and, according to Roher, Hulkower shouted back and lost control. Both Roher and Hulkower claim that Hulkower told the union agents to leave or she would call the police but General Counsel's witnesses deny this. All the witnesses agree that the group of union agents and employees then left Hulkower's office. Taking the facts as presented by Respondent, it is clear that the union group complied with Hulkower's request that they permit her to finish her telephone call and that they only reentered Hulkower's office when she invited them back by opening her door. Hulkower does not claim that when she reopened her door she immediately told the union group that they should leave the premises on pain of arrest, or that they should not reenter her office or that she wished to have no conversation with them at all. I find that Respondent's witnesses showed that Hulkower voluntarily continued talking with the Union group until she became upset with Meskin's demands and assertions. Then, she told them to leave and they left.¹⁸ It is not necessary to make any credibility resolution as to whether Hulkower did indeed mention the police when the group was in her office since General Counsel does not argue that this threat to call the police was unlawful.

Although Hulkower testified that she felt threatened and abused in her office, she did not describe any abusive or threatening conduct on the part of any individual member of the union group. It is clear that she disliked Meskin because he was vigorous in pressing the employees' demands. But the Act sanctions the methods used by Meskin; it was entirely proper for him to picket and to contact governmental agencies and charitable organizations. Indeed, in setting up an adversarial system which tests relative economic and other strengths, the Act contemplates that union agents will "make trouble" for management. Meskin, an unathletic individual, talked loud and fast, but Hulkower also shouted during her encounter with him.

Although Hulkower testified that the union group should have checked with the receptionist prior to entering her office, she did not testify that on seeing the group she immediately told them to go back out and make a proper appointment with her. Nor was the receptionist called by Respondent to testify that she strictly monitored those entering Hulkower's office, a significant omission in view of Plenty's testimony that he often walked into Hulkower's office without obtaining permission from the receptionist. Based on this state of the record, the only convincing evidence before me shows that the receptionist did not enforce any rule respecting access to Hulkower's office. Indeed, there is no credible evidence that the receptionist enforced any rule regarding access to the rest of the building.

Hulkower also testified that the union group was causing a disturbance that was visible to children and parents; as I have found above, there was no disturbance and there is no

¹⁸There is no evidence that Hulkower was specific that the Union organizers must leave the building; indeed, I am convinced that Hulkower's request that they leave could reasonably be interpreted to mean that she wanted to stop the conversation in her office and that she would call the police if the group did not leave her office.

evidence that any parents or children were anywhere near Hulkower's office.

Turning to the incident in the staff room, Hulkower testified that she went to the staff room and told Meskin and Murray that she would have them arrested if they did not leave. Hulkower stated that the union officials were not doing anything disruptive in the staff room. But Hulkower also testified that she threatened to call the police because Meskin and Murray were disrupting nap time. I note that there is no evidence that any children were near the staff room nor was it shown how nap time could have been disrupted. The facts recited above at great length show that parents, salesmen, and relatives of employees have free access to the staff room for both social and business purposes. I find that for many years Respondent has not limited access to the staff room to employees only. Further, as discussed above, there is no evidence that the receptionist controlled access to the staff room; relatives, parents and other visitors are permitted to enter the Day Care Center and proceed to the staff room without checking with the receptionist.

It is clear from the testimony of Respondent's own witnesses that Hulkower has opposed this Union since 1987, that she does not like to deal with and does not want to deal with this Union, and that she can lose control when confronted with the legal representative of Respondent's employees. I find that when Hulkower told Meskin and Murray that they were prohibited from remaining in the staff room to meet with the employees she was enforcing the prohibition in a disparate manner and I find that Respondent was restraining and coercing its employees in the exercise of their Section 7 rights. Respondent thereby violated Section 8(a)(1) of the Act. *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989). Finally, Hulkower's threat to have Murray and Meskin arrested while they were meeting with employees was made for the purpose of inducing employees to refrain from supporting the Union; Respondent thereby violated Section 8(a)(1) of the Act. See *Harvey's Resort Hotel*, 236 NLRB 1670, 1677-1681 (1978), *enfd.* 106 LRRM 2547 (9th Cir. 1978).

CONCLUSIONS OF LAW

1. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time teachers, assistant teachers, teachers' aides, assistant social workers, business office assistant, assistant building superintendent, food service aide, nurse, bus driver, receptionist, cook, transportation coordinator, building and grounds coordinator, and food service coordinator employed by Respondent.

Excluded: The Executive Director, Comptroller, Assistant to Executive Director, Executive Secretary, Social Service Coordinator, Health and Infant Coordinator, Therapeutic Nursery Coordinator, Educational Coordinator, and guards, professional employees and supervisors as defined in the Act.

2. At all times material herein, District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO has been the exclusive representative of all employees within the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. By unilaterally changing the net pay of its employees and by unilaterally changing the practice of permitting use of its vehicles to obtain lunch for its employees without notice to the Union and without affording the Union an opportunity to bargain concerning the changes, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By disparately prohibiting union agents from meeting with its employees in the staff room, Respondent violated Section 8(a)(1) of the Act.

5. By threatening to cause the arrest of union agents while they were meeting with its employees, Respondent violated Section 8(a)(1) of the Act.

6. Respondent did not engage in unfair labor practices other than those found herein.

REMEDY

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

I shall not order that Respondent rescind the changes it made in its employees' net pay as, after the passage of time, such a change would be disruptive to the unit employees.

[Recommended Order omitted from publication.]