

Mercy Hospital of Buffalo and Communications Workers of America, AFL-CIO. Case 3-CA-16544

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On a charge filed August 20, 1991, by Communications Workers of America, AFL-CIO, the General Counsel for the National Labor Relations Board issued a complaint September 27, 1991, against Mercy Hospital of Buffalo, the Respondent, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating cafeteria service on weekends between the hours of 2 and 4 a.m., and thereafter unilaterally eliminating these same hours of cafeteria service during the week. The Respondent filed a timely answer and an amended answer admitting in part and denying in part the allegations in the complaint and raising affirmative defenses.

On December 30, 1991, the General Counsel, the Respondent, and the Charging Party filed with the Board a stipulation and motion to transfer the case to the Board. The parties stated that the stipulation and attached exhibits constituted the entire record in this proceeding, and that they waived a hearing and decision by an administrative law judge. On April 3, 1992, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. Thereafter, the General Counsel and the Respondent filed briefs.

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

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York not-for-profit corporation, is engaged as a health care institution in the operation of an acute care hospital in Buffalo, New York, where it provides inpatient and outpatient medical and professional care services. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received at its Buffalo facility goods and services valued in excess of \$50,000 from outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 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. *Facts*

On March 11, 1991,¹ the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit:

All full-time and regular part-time registered nurses employed by the Respondent at its Abbott Road, Buffalo, and South Western Boulevard, Orchard Park, New York facilities, including the registered nurses employed at the Respondent's Skilled Care Nursing Facility.

Excluding: All other professional employees, office clerical employees, technical employees, service and maintenance employees, guards and supervisors as defined in the Act.

Thereafter, the Union and the Respondent commenced negotiations for a collective-bargaining agreement. On May 15, the Union submitted the following proposal: "Cafeteria services shall be available to all employees from 6:30 a.m.-8:00 p.m. and 2:00 a.m.-4:00 a.m." The Union's proposal reflected the present practice, which had existed for 10 years, regarding the 2 to 4 a.m. hours. The Respondent rejected the proposal on May 16.

At that time, the Respondent's cafeteria, which is part of the dietary department, was open from 6:30 a.m. to 7 p.m. and from 2 to 4 a.m., 7 days per week. The cafeteria staff consisted of approximately 38 full-time and part-time employees, including 7 supervisors. The 2 to 4 a.m. shift was staffed by two cafeteria employees, each of whom worked an average of 4 hours per night and earned an average of \$7.50 per hour. These employees provided salads, sandwiches, desserts, soups, coffee, and other hot and cold beverages and snack foods. There were also, at that time, food and beverage vending machines which provided sandwiches, some desserts, coffee, and other hot and cold beverages and snack foods. Also available to employees were a microwave oven and a moneychanging machine. The Respondent employed approximately 174 employees during the 2 to 4 a.m. cafeteria shift, including 30-40 unit employees and 3 maintenance employees represented by the International Union of Operating Engineers.²

¹ All dates are in 1991 unless otherwise indicated.

² The Respondent employed a total of about 2117 employees, including supervisory and administrative staff. This included, approximately, 340 unit employees, 35 maintenance employees represented by the International Union of Operating Engineers, and 1742 unrepresented employees.

On May 19, the Respondent, without prior notice to the Union and without affording the Union an opportunity to bargain, eliminated the 2 to 4 a.m. cafeteria hours on weekends, thereby eliminating the salad bar and grill area. At the same time, the Respondent installed an additional food vending machine which provided soups and salads, as well as food and beverage items and hot entrees that were not previously available through vending equipment. The Respondent also provided a bread toaster for the employees' use. The cafeteria premises remained open and accessible to the employees. The Respondent's decision to discontinue the cafeteria hours was based upon economic considerations only. In this regard, the volume of sales on the discontinued shift averaged \$65 to \$110 per night, with a minimum loss of approximately \$500 per month. During the approximately 10 years that the cafeteria had been in operation, the Respondent had either broken even on or sustained losses from the operation of the cafeteria during the nighttime hours. The Respondent concluded, without discussing the matter with the Union, that the Union could not offer labor cost concessions with respect to the unit that could affect its decision and, therefore, that the matter of cafeteria hours did not appear to be amenable to collective bargaining.

On June 19, the Union demanded that the Respondent restore the cafeteria hours that had been discontinued, and that the matter be subject to negotiations. Although the Respondent indicated a willingness to negotiate with respect to the general subject of cafeteria services, including hours, the Respondent asserted its right to implement the changes complained of and has continued to refuse to restore the previous hours of operation.

At a negotiation session on August 15, the Respondent advised the Union that it further intended to discontinue cafeteria hours between 2 and 4 a.m. on Mondays through Fridays, effective September 2, for economic reasons. The Union advised the Respondent that no change in cafeteria hours could be made until the matter was negotiated, and demanded bargaining. The Respondent indicated that it was willing to discuss the decision it had made, but refused to delay implementation of its decision. No proposals with respect to cafeteria service were made at that time or at any time from August 15 until the hours were discontinued on September 2. The Respondent made the September 2 changes concerning the weekday hours based on the same reasons and considerations as the May 19 changes concerning the weekend hours. Since September 2, the Union has made repeated demands that the Respondent reinstate the discontinued hours of cafeteria service. The Respondent has refused the Union's demands.

The parties stipulated that the changes in the hours of operation of the cafeteria service related to wages, hours, and other terms and conditions of employment of the unit employees.

B. Issues

The issue before the Board is whether, as alleged in the complaint, the Respondent violated the Act by unilaterally eliminating cafeteria service between 2 and 4 a.m. on weekends and on weekdays. Additionally, the Respondent's answer raises the following defenses: (1) that it has not failed or refused to bargain collectively or in good faith; and (2) that the Union waived the right to bargain about the hours of cafeteria service.

C. Contentions of the Parties

The General Counsel, citing *Central Mack Sales*, 273 NLRB 1268, 1279 (1984); *Chemtronics, Inc.*, 236 NLRB 178, 190 (1978); and *Abingdon Nursing Center*, 197 NLRB 781, 788 (1972), contends that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the 2 to 4 a.m. hours of cafeteria service on the weekends and on weekdays without first bargaining with the Union. The General Counsel maintains that the Respondent's conduct was not de minimis because a substantial number of unit employees, 30–40 nurses, are affected by the reduction in cafeteria hours. Also significant, according to the General Counsel, is the fact that the Union considered the subject to be important enough to warrant the submission of a proposal on May 15 regarding the cafeteria's hours of operation. The General Counsel further contends that because the Respondent operated the cafeteria from 2 to 4 a.m. for 10 years at a financial loss or, at best, breaking even, these losses do not constitute the sort of extreme and precipitous economic disaster that would justify an employer's unilateral action before offering the union an opportunity to bargain. Expressing disagreement with the Respondent's position that the issue was not amenable to collective bargaining, the General Counsel contends that the Respondent could have bargained with the Union about eliminating the vending machines or reducing the daytime hours of cafeteria service in order to cut costs. Additionally, the General Counsel distinguishes cases such as *E. I. du Pont & Co.*, 269 NLRB 24 (1984), in which the Board, relying on the unpredictable nature of the restaurant business, found that the employer did not violate the Act by unilaterally implementing price increases with respect to cafeteria and vending machine food. In this regard, the General Counsel contends that a decision about cafeteria operating hours, unlike food price considerations, is not driven by constantly fluctuating outside conditions. Finally, citing *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), the General Counsel requested as part of the remedy that the

certification year be extended because the Respondent's conduct, occurring after the Union had submitted a cafeteria services proposal in negotiations, undermined the Union's bargaining strength.

The Respondent contends that the change in cafeteria hours was not material. Although it eliminated two cafeteria personnel and the salad bar and grill area, the Respondent maintains that the only changes, from the perspective of the employees, were that salads became available only through vending machines rather than from a salad bar, and that hot sandwiches were available through vending machines, a microwave oven, and a toaster rather than through cafeteria personnel. The Respondent further contends that, in fact, more hot entrees were available through vending machines after the alleged unlawful changes than had previously been offered through the cafeteria, and that the cafeteria premises remained open and accessible to employees. According to the Respondent, the change in cafeteria hours was not material for the further reason that it would affect only the small—and possibly even nonexistent—number of unit employees who utilized the food services provided by the cafeteria personnel rather than the vending machines. Noting that the discontinuance of the cafeteria hours was based exclusively on economic considerations, the Respondent further contends that the matter was not amenable to collective bargaining because the Union does not represent the cafeteria personnel or the large majority of the night-shift employees and, therefore, could not offer significant labor cost concessions. Regarding its waiver defense, the Respondent contends that because its rejection of the Union's May 15 proposal made clear that the Respondent was not agreeable to continuing the 2 to 4 a.m. cafeteria service, the conclusion is warranted that the parties did bargain about the hours of service. Under the circumstances, the Respondent maintains that it was not necessary to notify the Union before implementing the May 19 change. Regarding the further change in the hours of cafeteria service that was implemented in September, the Respondent, citing *Haddon Craftsmen*, 300 NLRB 789 (1990), and *Kenton Transfer Co.*, 298 NLRB 487 (1990), contends that although it advised the Union of a change "that it was 'intending' to make effective September 2," the Union waived its right to bargain because it never initiated bargaining or made proposals other than to demand the restoration of the status quo. Finally, the Respondent maintains that *Abingdon Nursing Center* and *Central Mack Sales*, supra, are distinguishable because they involved respectively, the elimination of employer-provided and free coffee rather than, as in the instant case, the provision of the same food products but through vending machines rather than through cafeteria personnel.

D. Discussion

For the following reasons, we find that the Respondent's elimination of cafeteria service from 2 to 4 a.m. on weekends and on weekdays constitutes unlawful unilateral changes. As an initial matter, we find, consistent with the parties' stipulation, that the operating hours of the Respondent's cafeteria is a matter relating to wages, hours, and terms and conditions of employment of the unit employees. In this regard, the Court in *Ford Motor Co. v. NLRB*, 441 U.S. 448 (1979), in upholding the Board's finding that in-plant food prices and services are terms and conditions of employment that are mandatory subjects of bargaining, held:

[T]he availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those "conditions" of employment that should be subject to the mutual duty to bargain. By the same token, where the employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain. The terms and conditions under which food is available on the job are plainly germane to the "working environment". . . . [Footnotes omitted. *Id.* at 498.]

In so finding, the Court rejected the employer's argument that in-plant food prices and service are too trivial to qualify as mandatory subjects, noting that the fact that the bargaining unit employees pressed an unsuccessful boycott to secure a voice in setting food prices indicated that the unit employees considered the matter "far from trivial."

The Board has found unlawful unilateral conduct where employers have made changes regarding the availability of food on company premises, including the method by which the food is provided. For example, in *Central Mack Sales*, supra, the Board adopted the administrative law judge's finding that the respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing its practice of providing coffee at no required cost,³ and installing a vending machine that provided coffee at 25 cents per cup. In finding a violation, the judge observed that even if, once the vending machine was installed, the respondent by reason of its contract with the machine supplier could not control the price per cup, "it very much was within the respondent's discretion to determine, in the first instance,

³The respondent had encouraged 10-cent contributions, but the judge found that such donations were rarely made by the employees.

whether the machine was to be installed.” 273 NLRB at 1279.

In *Chemtronics*, supra, the Board adopted the administrative law judge’s finding that the respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing its practice of providing employees with coffee and rolls.⁴ Similarly, in *Abingdon Nursing Home*, supra, the Board adopted the administrative law judge’s finding that the respondent violated Section 8(a)(5) by unilaterally discontinuing its practice of providing company food for pay, and requiring instead that employees provide their own food for meals and coffeekes. In so finding, the judge noted that “from the very beginning, the question of what type of food was to be made available to the employees for their lunch while at work was an important consideration in their employment.” 197 NLRB at 788.⁵

Relying on the above precedent, we find, contrary to the Respondent’s contentions, that the changes in the hours of cafeteria service, effective on May 19 and September 2, were material, substantial, and significant. The Respondent maintains that the changes were not material because, in essence, the same categories of food continued to be available after the nighttime cafeteria hours were discontinued, but the food was provided through vending machines rather than through cafeteria personnel. The Respondent’s change would, however, affect other aspects of the in-plant food service, a subject which the Court in *Ford Motor Co.*, supra, found to be of importance to employees. For example, after the changes, cafeteria personnel would no longer be available to maintain the cafeteria premises. Also of concern to the employees would be differences in quality and convenience between food provided by cafeteria personnel and food coming from vending machines. It, therefore, follows that even though the same categories of food continued to be available, it was not inconsequential to the unit employees whether they purchased their food from cafeteria personnel or from vending machines. Thus, the Respondent’s discontinuance of cafeteria service during the night shift was a matter that was “germane to the working environment” under *Ford Motor Co.*, supra, not unlike the discontinuance of employer-provided food in *Abingdon Nursing Center*, supra, and the discontinuance of free coffee in *Central Mack Sales*, supra.⁶

The Respondent also contends that its change was not material because, at most, only a small percentage

⁴ The respondent’s conduct in *Chemtronics* was also found to violate Sec. 8(a)(3).

⁵ Cf. *E. I. du Pont & Co.*, 189 NLRB 753 (1971) (respondent did not violate Sec. 8(a)(5) by, inter alia, closing the cafeteria on weekends, holidays, and nights where it bargained to impasse with the union with respect to the changes made).

⁶ We therefore disagree with the Respondent’s efforts to distinguish this case from the precedent cited by the General Counsel.

of the night-shift unit employees would be affected by the discontinuance of cafeteria service. The parties stipulated that there are 30–40 unit employees on the night shift; there is nothing in the stipulated facts that would support the Respondent’s contention that only a few of those unit employees ate food provided by the cafeteria personnel rather than from the vending machines.⁷ Additionally, as the General Counsel contends, the fact that the Union presented a bargaining proposal regarding the hours of service is evidence that the bargaining unit employees considered the issue to be significant. See *Ford Motor Co.*, 441 U.S. at 501.

Additionally, the Respondent maintains that its conduct was not unlawful because the discontinuance of cafeteria service was based exclusively upon economic considerations, and that the issue was not amenable to collective bargaining because the Union could not offer significant labor cost concessions.⁸ In rejecting the Respondent’s argument, we note initially that the Court in *Ford Motor Co.*, supra at 498, relying on Justice Stewart’s concurring opinion in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (1964), stated that where an employer is not in the business of selling food to its employees, the establishment of in-plant food prices is not among those “managerial decisions, which lie at the core of entrepreneurial control.” The Court, therefore, concluded that in finding in-plant food prices and services to be a mandatory subject of bargaining, “[t]he Board is in no sense attempting to permit the Union to usurp managerial decision-making.”⁹ It, therefore, follows that where the Respondent here is not in the business of selling food, the provision of cafeteria services is not a managerial decision relating to the core of entrepreneurial control which is exempt from a bargaining obligation. Further, an employer’s obligation to bargain with a union about mandatory subjects is not excused by economic expediency, even in good faith. *Master Slack*, 230 NLRB 1054 (1977), enf. 618 F.2d 6 (6th Cir. 1980).

Regarding the Respondent’s related contention that the Union could not offer labor cost concessions, we find that although the Union does not represent either the majority of the night-shift employees or the cafeteria employees, the definition of a mandatory collective-bargaining subject does not depend on the number

⁷ Cf. *Abingdon Nursing Center*, supra at fn. 22.

⁸ The Respondent does not contend that compelling economic circumstances justified its unilateral action. Cf. *Aquaslide ‘N’ Dive Corp.*, 281 NLRB 219 (1986). Additionally, the Respondent has not relied on precedent involving an employer’s more limited bargaining obligation with respect to a change in food prices. In this regard, we note that the Respondent stated in its brief that the employees were not subjected to a change in cafeteria food prices.

⁹ In view of the Court’s finding in *Ford Motor Co.*, supra, that in-plant food services are a mandatory subject of bargaining, we find that the Respondent’s citation to *Dubuque Packing Co.*, 303 NLRB 386 (1991), which involves an employer’s relocation decision, is inapposite.

of unions within the bargaining unit. *Ford Motor Co.*, supra at 502 fn. 13. Moreover, as the General Counsel contends, the Respondent could have bargained with the Union about cost cutting measures such as the reduction in daytime cafeteria hours or eliminating vending service.

Finally, we reject the Respondent's contention that the Union waived the right to bargain about the changes in cafeteria hours. Regarding the May 19 discontinuance of the 2 to 4 a.m. weekend hours, we find no merit in the Respondent's contention that its rejection of the Union's May 15 proposal constituted bargaining. The parties stipulated that the Respondent instituted the May 19 changes without prior notice to the Union and without affording the Union an opportunity to bargain. In the absence of clear notice of the intended change, there is no basis on which to find that the Union waived its right to bargain. See *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990).

We further find, contrary to the dissent, that the Union did not waive the right to bargain about the September 2 discontinuance of the 2 to 4 a.m. hours during the week. The Board does not find a waiver when the change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the employer will not bargain. *Michigan Ladder Co.*, 286 NLRB 21 (1987); *Glass & Pottery Workers (Owens-Corning)*, 282 NLRB 609 fn. 1 (1987). The Board looks for objective evidence in determining whether an employer has unlawfully presented a union with a "fait accompli." Further, an employer's use of positive language in presenting its proposal does not constitute an indication that a request for bargaining would be futile. In applying these standards, the Board in *Haddon Craftsmen*, 300 NLRB at 790 fn. 8, observed:

Board law requires an employer, after reaching a decision concerning a mandatory subject, to delay implementation of the decision until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making process itself. *Lange Co.*, 222 NLRB 558, 563 (1976).

Although the Respondent in its brief contends that it presented the Union with a change "that it was 'intending' to make," we find, based on the facts as stipulated by the parties, that the Respondent did more than present its proposed change in positive language or as a fully developed plan. As stipulated:

The Union advised Respondent that no change in cafeteria hours could be made by Respondent until the matter was negotiated, and demanded bargaining on the matter. Respondent indicated that it was willing to discuss the decision it had

made, but refused to delay implementation of its decision.

In view of the Respondent's obligation to delay implementation of its decision, we find that the Respondent's express statement refusing to delay such implementation, made in response to the Union's demand for bargaining and considered in the context of the May 15 unlawful changes, constitutes objective evidence that bargaining would be futile.¹⁰ See *Owens-Corning*, supra at fn. 1.¹¹ Following this statement, the Union was, therefore, relieved of any further obligation to request or pursue bargaining concerning the change.¹² Under the circumstances, we reject the Re-

¹⁰ It is true, as the dissent contends, that the parties stipulated that the Respondent advised the Union on August 15, 1991, of the change in cafeteria hours that it intended to make, and that the Respondent indicated it was willing to discuss the decision. However, both the Respondent in its brief and our colleague in his dissenting opinion fail to address a critical additional statement that appears in the stipulation. The stipulation states, "Respondent indicated that it was willing to discuss the decision it had made, *but refused to delay implementation of its decision* [emphasis added]." The stipulation, read as a whole, indicates that the Respondent's expressed willingness to "discuss" was not a willingness to bargain, because the Respondent was effectively putting the Union on notice that it was going to implement the decision as planned regardless of what the Union might counterpropose before the scheduled implementation date. Cf. *Emhart Industries*, 297 NLRB 215, 216 (1989) (no violation where employer announced a procedure for reinstating employees on a certain date without indicating that it would not "change its mind," and union failed to request bargaining). Under the circumstances, we disagree with the dissent's assertion that no one could reasonably contend that the Respondent suggested the futility of bargaining.

¹¹ In *Owens-Corning*, supra, the Board, in affirming the judge's finding that the respondent violated Sec. 8(a)(5) by unilaterally changing its employee purchase plan, found that the respondent's proposal was presented as a fait accompli because the management representatives who announced the plan to union representatives also made statements indicating that nothing could be done about the plan. We agree with the dissent's assertion that in this case the Respondent did not precisely state that "nothing could be done." However, we find that the Respondent's statement that it would not delay implementation, considered in the context of its prior unlawful unilateral change, similarly conveyed the message that bargaining would be futile.

By contrast, in *W-I Forest Products Co.*, 304 NLRB 957, 961 (1991), the Board refused to rely on similar statements made by management as evidence of futility where, unlike in the instant case where the Respondent announced that it would not delay implementation of its decision, the respondent had offered in writing to bargain about its plan when it was first announced to the union. The Board in *W-I Forest Products* found the statements insufficient to overcome the respondent's earlier express invitation to bargain.

¹² The presence of objective evidence that bargaining would be futile distinguishes the instant case from *Haddon Craftsmen*, supra, cited by the Respondent, in which the Board found that the union representative's subjective impression of the respondent's state of mind and the respondent's use of positive language in the notice announcing its change did not constitute objective evidence of futility that would excuse the union from its obligation to demand bargaining.

spendent's contention that the Union did not act with due diligence, and therefore waived the right to bargain about the hours of cafeteria service.¹³

Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the hours of cafeteria service on May 15 and September 2, 1991.

CONCLUSION OF LAW

By unilaterally eliminating cafeteria service between 2 and 4 a.m. on weekends and on weekdays without giving the Union notice and an opportunity to bargain, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action to effectuate the policies of the Act. We shall order the Respondent, on request, to restore the hours of cafeteria service as they existed prior to the May 19 discontinuance of the 2 to 4 a.m. hours on weekends and the September 2 discontinuance of those same hours on weekdays. We shall also order the Respondent to bargain with the Union before making such unilateral changes.¹⁴

ORDER

The National Labor Relations Board orders that the Respondent, Mercy Hospital of Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally eliminating cafeteria service between 2 and 4 a.m. on weekends and on weekdays without first giving notice and an opportunity to bargain to the

Also distinguishable is *Kenton Transfer*, 298 NLRB 487, in which the Board dismissed the 8(a)(5) complaint allegation where, unlike here, the respondent remained ready and willing to discuss contract terms and urged the union to respond to its proposals, but the union protested the respondent's action and gave no indication that it would be amenable to further bargaining.

Finally, we find that *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988), cited by the dissent, is not applicable to the facts here because that case did not involve a proposal presented by the employer to the union as a *fait accompli*. See fn. 6 of that decision, which cites and distinguishes precedent we have relied on here.

¹³We have not, as the dissent maintains, refashioned the rules governing the collective-bargaining process. Rather, we emphasize our reliance on precedent that holds that when, as here, an employer presents its proposal as a *fait accompli*, a union is thereafter relieved of any further obligation to pursue bargaining concerning the change.

¹⁴Contrary to the General Counsel's request, we find that an extension of the certification year under *Mar-Jac Poultry Co.*, 136 NLRB 785, is not warranted to remedy the Respondent's unlawful unilateral changes. See *American Rubber & Plastics Corp.*, 200 NLRB 867, 876-877 (1972). See also *Bay Diner*, 279 NLRB 538 (1986).

Communications Workers of America, AFL-CIO as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time registered nurses employed by the Respondent at its Abbott Road, Buffalo, and South Western Boulevard, Orchard Park, New York facilities, including the registered nurses employed at the Respondent's Skilled Care Nursing Facility.

Excluding: All other professional employees, office clerical employees, technical employees, service and maintenance employees, 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) Restore, on request, the hours of cafeteria service as they existed prior to the changes made on May 19, 1991, and September 2, 1991, and bargain collectively with the Union as the exclusive bargaining representative of the employees in the above appropriate unit with respect to cafeteria hours and other terms and conditions of employment.

(b) Post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, 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.

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

MEMBER OVIATT, concurring and dissenting.

I concur with my colleagues in finding that the Respondent violated Section 8(a)(5) by unilaterally eliminating certain cafeteria service on May 19, 1991.

I cannot agree, however, with their conclusion that the Respondent also violated the Act by discontinuing other cafeteria service on September 2, 1991. To properly assess this situation, I believe it is necessary to consider the factual background. Respondent Hospital operated a cafeteria which was open from 6:30 a.m. to

¹⁵If 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."

7 p.m. and from 2 to 4 a.m., 7 days per week. The 2 to 4 a.m. shift was staffed with two individuals who provided salads, sandwiches, desserts, soups, coffee, other hot and cold beverages, and snack foods. In addition, there were food and beverage vending machines which also provided sandwiches, desserts, coffee, other hot and cold beverages, and snack foods. On May 19, when the Respondent discontinued the staffing for the 2 to 4 a.m. cafeteria service for weekends, it installed an additional food vending machine which provided soups and salads, and expanded the selection of previously provided food and beverage items, as well as hot entrees that had not previously been available through the vending equipment, and a bread toaster was added to the microwave oven, available for employee use. The cafeteria premises remained open and accessible to employees.

At a negotiation session between the parties on Thursday, August 15, 1991, the Respondent advised the Union that it "intended to discontinue cafeteria hours between 2 AM and 4 AM on Mondays through Fridays, effective September 2, 1991, for economic reasons." The Union responded that no change in cafeteria hours could be made until the matter was negotiated. The Respondent indicated it was willing to discuss the decision. The Union made no proposals then, or at any time from August 15 until the Respondent implemented the discontinuance. The parties agree that the Respondent discontinued the 2 to 4 a.m. hours based only on economic considerations, that it was losing a minimum of approximately \$500 per month on that shift, it had either broken even or sustained losses for some 10 years for those hours, and that it had concluded that the Union could not offer labor cost concessions that could have affected its decision, and, therefore, that the matter did not appear to the Respondent to be amenable to the collective-bargaining process.

In my view it is clear from the above that there is no violation with regard to the September 2 partial discontinuance of the 2 to 4 a.m. cafeteria shift. Indeed, I believe finding a violation of the Act in this regard is inconsistent with the cases cited by my colleagues, as well as other Board precedent.

My colleagues begin their analysis of this question with the observation that "the Board does not find a waiver when the change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the Employer will not bargain," citing *Michigan Ladder Co.*, 286 NLRB 21 (1987), and *Glass & Pottery Workers (Owens-Corning)*, 282 NLRB 609 (1987). I have no quarrel with the general proposition stated. But I am at a loss to understand what those cases have in common with this one. In *Michigan Ladder Co.*, supra, in discussing the respondent's failure to bargain over subcontracting, the

majority noted the following in support of finding that the respondent presented nothing more than a "fait accompli":

Members Stephens and Johansen note that, in agreeing that the Respondent did not afford the Union a reasonable opportunity for bargaining, they are not faulting the Respondent simply for having worked out a detailed plan for the subcontracting in advance. See *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987). However, where, as here an employer conceals and misrepresents details of an arrangement already worked out with the subcontractor when it presents the plan to the bargaining representative and when the employer agrees with the subcontractor to put the arrangement into effect at a time when the bargaining representative is still in the dark about what is happening, they cannot find that the employer has afforded the bargaining representative the opportunity for negotiations that is due under the Act. [Id. at fn. 4.]

In affirming the judge's conclusion that the respondent in *Owens-Corning* violated Section 8(a)(5) in failing to bargain about changes in the employee purchase plan, the majority (Members Johansen and Stephens) stated: "The gravamen of the Respondent's offense here was that, according to testimony credited by the judge, the management representatives who announced the plan to union representatives on August 6 also made statements indicating that nothing could be done about the plan." Id. at fn. 1.

But there is no suggestion in this case that the Respondent has "concealed" or "misrepresented" details of an arrangement worked out with someone else, nor agreed with a subcontractor to put an arrangement into effect when the bargaining representative is "still in the dark." Nor is there credited testimony showing that management representatives made statements indicating that "nothing could be done." Rather, the Respondent here simply worked out its proposal in advance and notified the Union about what it intended to do. My colleagues concede that an employer's use of positive language in presenting a proposal does not constitute an indication that a request for bargaining would be futile. Nor could one reasonably contend that the Respondent in this case had in any way suggested that bargaining would be futile. My colleagues state that "the Respondent in its brief contends that it presented the Union with a change that it was 'intending' to make," but they find that the Respondent did more, i.e., that it made clear that bargaining would be futile.

I cannot agree. In my view, to make such finding would require going at least beyond, if not behind, the parties' stipulation. First, contrary to my colleagues, the Respondent's "intention" is not simply a 'contention' in the brief; it is part of the parties' own stipula-

tion submitted to the Board which states that, on August 15, the Respondent “advised the Union that it intended to discontinue cafeteria hours . . . effective September 2, 1991, for economic reasons.” To disregard the parties’ own stipulation of facts and treat it as merely a contention in a brief requires an adverse credibility finding that the parties expressly waived, and that we are not in a proper position to make.

The Respondent announced its intention at a bargaining session on August 15. The Union protested the action and demanded bargaining. The Respondent agreed, but declined to cancel its proposed date of implementation which was then still 18 days hence. That does not amount to presenting the Union with a “fait accompli.” Nor does it objectively demonstrate that bargaining would be futile. As the Board observed in *Haddon Craftsmen*, 300 NLRB 789 (1990), an employer after reaching a decision concerning a mandatory subject “must delay implementation of the decision until after it has consulted with the bargaining representative.” That is what happened here. Indeed, even the 18-day proposed delay in implementation is not shown here to have been set in stone. We do not know what would have happened if the Union had exercised diligence in enforcing its representational rights. Here, the Respondent provided the Union with some 18 days’ notice of the proposed change. “The Board has on occasion found as little as 2 days’ notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient.” (*Jim Walter Resources*, 289 NLRB 1441, 1442 (1988).) At that point, it behooved the Union to do more than merely protest the Respondent’s proposal (or file an unfair labor practice charge). Rather, it “became incumbent upon the Union to enforce its bargaining rights diligently by attempting to persuade the Respondent to alter its decision if it found the decision unacceptable.”¹ But the Union did not do so. It did not make any proposal on August 15. Indeed, it did not make any proposal the next day, or the next, or at all, until after the implementation on September 2—at which point it demanded that the Respondent rescind its action.

What my colleagues’ conclusion amounts to here, is a finding that after one party makes a proposal in good faith, with adequate notice before the intended implementation, and the other party objects and says “you can’t do that,” the party making the initial proposal must then rescind it or alter it to the satisfaction of the receiving party or the Board. Indeed, I believe that is precisely the effect of my colleagues’ assertion that the Respondent’s stipulated willingness to discuss the matter here was “not a willingness to bargain.” They say this, absent any determinations on credibility, and notwithstanding the fact that there was absolutely no attempt by the Union thereafter to bargain or otherwise

test the situation by putting forth any proposal at all. With all due respect, I submit that that is neither how collective bargaining actually works, nor how it is supposed to work.

To require one of the parties in collective bargaining to rescind or recast a proposal presented in good faith and with clearly adequate notice based on a mere objection by the other party, and particularly in the absence of that other party “diligently attempting to persuade” the first party to alter the decision, in my view represents an unwarranted and inappropriate intrusion by the Board into the *substance*, as opposed to the *process*, of collective bargaining. I believe that is contrary to the longstanding proposition that the Board does not “either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.”²

Accordingly, I would dismiss the allegation concerning the partial discontinuance of cafeteria shift hours on September 2, 1991.

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 unilaterally eliminate cafeteria service on weekends and on weekdays without first giving notice and an opportunity to bargain to the Communications Workers of America, AFL–CIO as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time registered nurses employed by the Respondent at its Abbott Road, Buffalo, and South Western Boulevard, Orchard Park, New York facilities, including the registered nurses employed at the Respondent’s Skilled Care Nursing Facility.

Excluding: All other professional employees, office clerical employees, technical employees, service and maintenance employees, guards and supervisors as defined in the Act.

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, on request, restore the hours of cafeteria service as they existed prior to the changes made on

¹*American Bus Lines*, 164 NLRB 1055 (1967).

²*Chevron Chemical Co.*, 261 NLRB 44, 46 (1982), quoting from *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) (footnote omitted).

June 19, 1991, and September 2, 1991, and bargain collectively with the Union as the exclusive bargaining representative of the employees in the above appro-

priate unit with respect to cafeteria hours and other terms and conditions of employment.

MERCY HOSPITAL OF BUFFALO