

**Hoffman Air & Filtration Systems, Division of
Clarkson Industries, Inc. and Local Union
4496, United Steelworkers of America, AFL-
CIO-CLC. Case 3-CA-15369**

September 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The principal issues presented in this case are whether certain unfair labor practice complaint allegations should be deferred to the parties' contractual grievance-arbitration procedure pursuant to the principles of *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971), and whether the Respondent unlawfully refused to furnish information requested by the Union in connection with certain grievances.¹

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by giving a discriminatory warning to a union steward and violated Section 8(a)(1) by threatening to hold that steward to a higher standard of conduct than that demanded of other employees. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of unit employees, by refusing to furnish information to the Union, and by refusing to abide by a grievance settlement. The Respondent denied having violated the Act and argued before the judge that the entire case should be deferred to arbitration under *United Technologies Corp.*

The judge found that deferral to arbitration was inappropriate with respect to all the allegations, and decided the issues on their merits. The judge found that the Respondent had violated the Act by issuing a discriminatory warning to the steward and by threatening the union steward. He also found that the Respondent had violated the Act by making unlawful unilateral changes in the plant rules, in the calculation of overtime pay, in the amount of time allotted for conducting union business on worktime, and in the subcontracting out of maintenance work. The judge further found that the Respondent had violated Section 8(a)(5) by refusing to furnish information to the Union. The judge dismissed the other allegations of unilateral change and

the allegation that the Respondent reneged on a grievance settlement.²

The Respondent excepted to the judge's findings that it violated the Act, and to his failure to defer these issues to arbitration. For the reasons set forth below, we agree with the Respondent that the unilateral change allegations, to which exceptions were filed, should be deferred to arbitration. We find deferral inappropriate, however, for the reasons set forth below, with respect to the alleged threat and discriminatory discipline. Further, for the reasons set forth by the judge, we find deferral inappropriate with respect to the alleged failure to provide information. We agree with the judge, again for the reasons set forth in his decision, that the Respondent violated the Act as alleged with respect to these allegations.

The Respondent is a New York corporation engaged in the manufacture of centrifugal blowers, liquid filtration systems, and industrial vacuum cleaning services. The Respondent's production and maintenance employees have been represented by the Union for many years. At the time of the events in question, the parties were bound to a collective-bargaining agreement effective by its terms for 3 years from January 1, 1989.

The contract contained a management-rights clause which stated in part that the Respondent "shall not discriminate against any employee because of his membership in or lawful activity in [sic] behalf of the Union." The contract also contained a grievance procedure. At step four, the grievance procedure stated in part that "[i]f no satisfactory solution has been reached . . . and if the grievance involves the interpretation of application of the provisions of the Contract, the issue may then be presented to an impartial arbitrator to be agreed upon by the Company and the Union." This provision further stated that "[t]he arbitrator shall not have the right or authority to subtract from or alter any provision of this Contract, nor may the arbitrator make any recommendations for future action by the Company or the Union."

I. THE ALLEGED THREAT AND DISCRIMINATION

On November 8, 1989,³ Union Steward Eli Snyder left his work area between 10:30 and 11 a.m. On his way to the men's room he walked through the cafeteria, got a can of soup, opened it, and put it back in the cafeteria. The time spent in the cafeteria was about 15-30 seconds. A foreman observed Snyder's conduct, and reported it to upper management.

On November 13, Snyder received a letter from the manufacturing manager, Richard Shutz, stating that he

¹On August 19, 1991, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent and General Counsel filed exceptions, supporting briefs, and answering briefs.

²No exceptions were filed to these findings, and no party contends that the dismissed allegations still should be deferred to the grievance-arbitration process. Consequently, we adopt pro forma the judge's dismissal of these allegations.

³All dates are in 1989 unless otherwise noted.

had violated the plant rule against leaving his work area without permission and inefficient use of time. The letter further stated that it was a formal warning letter that would be placed in Snyder's file. Snyder attended a meeting that day with several members of management and the union vice president. At the meeting, Snyder admitted the conduct and apologized for it. At one point during the meeting, Shutz told Snyder that "being the steward, grievance man, that [he] should—[he] had to represent an example to the other men, that [he] shouldn't have done this."

Snyder testified that he had never received any verbal or written warnings for such conduct in the past, even though the warning letter stated that he had been warned twice before for such action. The parties stipulated that his personnel file contained no record of any prior warnings for such misconduct. Union Vice President Williams testified that he had seen as many as 10 employees, half of whom were unit employees, enter the cafeteria on worktime, and that despite their being observed by supervisors, none of them received a reprimand.

II. THE ALLEGED UNILATERAL CHANGES

A. *Changes in the Plant Rules*

On October 2, the Respondent issued a revised set of work rules to its employees. The rules addressed issues such as alcohol and drug abuse, insubordination, stealing, fighting, sleeping, immorality, job performance, and timeliness. The rules were never reviewed or discussed with the Union prior to their publication. On October 23, the rules were modified by the Respondent during a grievance meeting. About the same time, the Respondent issued a two-page document entitled "Attendance and Tardiness Policy." These rules were put into effect without prior notification to or bargaining with the Union.

B. *Calculation of Overtime Pay*

On October 9, the Respondent instructed its payroll office that the method of calculating overtime pay would involve counting only the hours an employee worked on a specific calendar day for which overtime was claimed and not the hours worked on the prior day. This method was a change from the past practice, which on some occasions involved consideration of the hours worked in the 24 hours prior to the end of a shift for which overtime was claimed. Again, the change was implemented without notice to or bargaining with the Union.

C. *The Restriction on Conducting Union Business*

On September 28,⁴ the Respondent issued a memorandum addressing the subject of conducting union business during working hours. The parties' contract limited employees and stewards to "a reasonable time" for conferences during working hours. The September 28 memorandum, however, states that no such meeting should take more than one-half hour. The memorandum further states that if a meeting will take longer than this, it must be done in conjunction with a break, lunchtime, or before or after working hours. This memorandum was issued without notice to or bargaining with the Union, and the Union filed a grievance over the change.

D. *Subcontracting Out of Maintenance Work*

On August 18, the Respondent sent a letter to the Union notifying it of the Respondent's intent to have an outside service maintain the lawn care and snow removal of Respondent's premises, and inviting the Union to contact the Respondent if it wished to discuss the matter. This work previously had been performed by unit employees on an overtime basis, and the work was included in the job descriptions for the "truck driver crane operator" and the "sweeper trucker." The parties discussed the matter without reaching an agreement, and the Respondent subcontracted out that work in the fall. The Respondent claims to have subcontracted out similar work in the past. The Union promptly filed a grievance.

III. DISCUSSION AND CONCLUSIONS

A. *The Board's Prearbitral Deferral Policy*

The Board's policy regarding prearbitral deferral has undergone several changes in the last 20 years. In *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board first set forth the standards that it would apply in determining whether, prior to arbitration, the Board would defer a case to the parties' contractual grievance-arbitration process. The complaint in *Collyer* alleged that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes in certain wages and working conditions. The Board found that the circumstances there weighed heavily in favor of deferral.

In so deciding, the Board considered that the dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer enmity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitra-

⁴This date is also in 1989. The judge inadvertently identified it as in 1987.

tion to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration, in that the contract and its meaning lay at the center of the dispute.⁵ Accordingly, the Board dismissed the complaint.⁶

Shortly after *Collyer* issued, the Board extended this prearbitral deferral policy to cases involving 8(a)(3) and (1) allegations. In *National Radio Co.*, 198 NLRB 527 (1972), the Board deferred to arbitration allegations that the respondent had discriminatorily suspended and discharged a union representative. The Board held that the issues presented were essentially the same as those presented in *Collyer*, in that the underlying dispute was over the meaning of certain contract provisions. The Board recognized, however, that the 8(a)(3) allegation added a new dimension—that of union animus—and that unlike *Collyer*, the resolution of the contract dispute might not supply the decision in the unfair labor practice controversy.⁷ Despite the Board’s “grave concerns,” that a contractually sound arbitrator’s decision might fail to dispose of all issues arising under the Act, the Board determined that the proper course was to “adjur[e] the parties to seek resolution of their dispute under the provisions of their own contract.”⁸

In 1977, a Board plurality in *General American Transportation Corp.*, 228 NLRB 808 (1977), rejected the holding of *National Radio* and determined that the Board would only defer in cases involving alleged violations of Section 8(a)(5) and (b)(3). The plurality reasoned that the protection afforded employees by the Act is an individual right, not a group or union right, and that in these circumstances, the Board should not force arbitration on an alleged discriminatee.⁹

Seven years later, in *United Technologies Corp.*, supra, a Board majority overruled *General American Transportation*, reaffirmed the principles of deferral in *Collyer*, and returned to the policy set forth in *National Radio* of deferring to arbitration in cases alleging violations of Section 8(a)(3) and (1). *United Technologies* involved, inter alia, an allegation that the Respondent violated Section 8(a)(1) when a foreman advised an employee and a shop steward during the course of a first-step grievance meeting that adverse consequences might flow if the employee decided to

process her grievance to the next step. The Board found that the statement was cognizable under the broad grievance-arbitration provision in the parties’ collective-bargaining agreement and that it was well suited for deferral.¹⁰ The Board further noted that, although the alleged remark was made during the processing of another grievance, the alleged misconduct did not appear to be of the type that would render resort to the grievance-arbitration process futile.

B. Deferral of the Alleged Threat and Discriminatory Discipline in the Instant Case

This case presents a close question of whether to defer the 8(a)(1) and (3) allegations presented. The complaint alleges, and the judge concluded, that the Respondent violated Section 8(a)(3) by warning Snyder. The judge found the company policy that Snyder violated was unevenly enforced against Snyder on the basis of his position as a union steward. The 8(a)(1) violation was based on the fact that Snyder was told during his disciplinary interview that he was expected to set an example for the other employees because of his position as steward.

The Respondent excepts to these findings, arguing that it did not violate the Act as alleged, and that in any event, these issues should be deferred to arbitration.

We first address the deferral argument. The threat to Snyder is arguably covered by the language in the contract prohibiting discrimination on the basis of union membership or activity. However, the arbitration provision further states that “[t]he arbitrator shall not have the right or authority to subtract from or alter any provision of this Contract, nor may the arbitrator make any recommendations for future action by the Company or the Union.” (Emphasis added.) The contract language would prevent an arbitrator from imposing the functional equivalent of a “cease and desist” remedy by the Board, for such a remedy is directed at future actions. Deprived of the authority to impose the equivalent of a “cease and desist” remedy, an arbitrator consequently would be unable to fashion any appropriate remedy for the alleged threat. Accordingly, we find that deferral is not warranted.¹¹

⁵ 192 NLRB at 842.

⁶ In dismissing the complaint, the Board retained jurisdiction for the limited purpose of “entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.” Id. at 843 (footnote omitted).

⁷ 198 NLRB at 530.

⁸ Id. at 531.

⁹ 228 NLRB at 808–809.

¹⁰ Art. IV of the parties’ contract stated in part that the “employees covered by this agreement may not be discriminated against in violation of the provisions of the Labor Management Relations Act, 1947, as amended” Id. at 560 fn. 20.

¹¹ For this reason, the present case is distinguishable from the alleged threats which the Board deferred in *United Technologies* and *United Aircraft Corp.*, 204 NLRB 879 (1972). Concededly, the grievance-arbitration clause in this case, like the clauses in the cited cases, arguably covers the dispute, and hence an arbitrator would arguably have jurisdiction. However, unlike the two cited cases, the instant case involves a provision which limits the arbitrator’s remedial authority with respect to the alleged threat.

With respect to the alleged 8(a)(3) warning, there is the same limitation on remedial relief. That is, the arbitrator cannot enter “cease and desist” relief. However, unlike the 8(a)(1) allegation discussed above, the arbitrator can enter substantial remedial relief. For example, the arbitrator can order the rescission of the warning and can thus render it a nullity. Thus, there is no remedial reason to decline deferral. Nonetheless, we shall decline deferral of this 8(a)(3) allegation because it is closely related to the 8(a)(1) allegation which we are not deferring. The Board has consistently held that it will not defer one issue if it is closely related to another issue that is not deferrable.¹² If the Board must hear and resolve one issue, it makes no economic sense to refrain from deciding a closely related issue. In addition, it would not be prudent to require litigation of related issues in more than one forum.¹³

For all of the foregoing reasons, we will not defer the 8(a)(1) and (3) allegations. With respect to the merits of the allegations, we adopt the judge’s findings, for the reasons stated in his decision, that the Respondent violated the Act as alleged.¹⁴

C. Deferral of the Alleged Unilateral Changes

The judge declined to defer on the alleged unilateral changes, stating that the parties’ grievance-arbitration procedure severely limited the scope of the disputes which may be resolved under it, and that it provided for arbitration in only a narrow range of disputes. Further, the judge declined to defer on the issues involving unilateral change because he found that they were interrelated with other nondeferrable allegations. He also expressed the view that the restrictive arbitration clause may inhibit an arbitrator from granting an award which would be in the interest of the bargaining relationship or that is in accord with the policies of the Act. Finally, the judge found that some aspects of the Respondent’s alleged misconduct raised questions as to the sincerity of the Respondent’s adherence to the grievance procedure.

We disagree with the judge. In the present case, we find that the allegations of unilateral changes concerning plant rules, overtime pay and restrictions on the conduct of union business are well-suited for deferral under the standards of *Collyer* and *United Technologies*. The parties have had a long and productive bargaining relationship. Their collective-bargaining agreement provides for arbitration in a wide range of

disputes, and the arbitration clause clearly encompasses the issues presented by the alleged unilateral changes.¹⁵ The Respondent has stated that it is willing to utilize the grievance-arbitration procedure to resolve these disputes and that it will waive any potential timeliness and/or procedural defenses to arbitrating these issues.

With respect to whether the employer has demonstrated animosity toward the employees’ exercise of protected rights, we find that here, the single 8(a)(1) allegation of a threat to hold the union steward to a higher standard and the single 8(a)(3) allegation of a discriminatory warning, are not, by themselves, so egregious as to render the use of the arbitration machinery unpromising or futile. In a case involving similar alleged misconduct, the Board deferred.¹⁶

We also find that the Respondent’s alleged renegeing on a grievance settlement is not an impediment to deferral. As we have noted, the judge dismissed that allegation on the merits, and no party has excepted to this decision in that regard, or argues that the issue should be deferred to the grievance-arbitration process. Thus, we find no persuasive evidence that the Respondent is not sincere in seeking to have the unilateral change allegations decided through the parties’ private dispute resolution processes.¹⁷

¹⁵ Contrary to the judge, we find that the arbitration provision in the parties’ collective-bargaining agreement, stating that arbitration is appropriate where the “grievance involves the interpretation of application of the provisions of this Contract,” does not limit arbitration to a narrow range of disputes. Under that provision, the conduct involved herein is at least arguably arbitrable. Further, although an arbitrator cannot enter “cease and desist” relief, he/she can enter substantial relief for unilateral changes. That is, an arbitrator can order restoration of the status quo ante and can order make-whole relief. See the discussion, supra, concerning the 8(a)(3) allegation.

¹⁶ *United Aircraft Corp.*, 204 NLRB 879 (1973), affd. 525 F.2d 237 (2d Cir. 1975). *Kenosha Auto Transport Corp.*, 302 NLRB 888 (1991), does not require a different result. There, unlike here, the respondent refused to deal with the union’s chosen representatives, which the Board found to be a rejection of the principles of collective bargaining. The Board noted as further evidence of employer animosity that there were allegations that the respondent had violated Sec. 8(a)(3) and (1) by discriminatorily granting a pay raise and laying off an employee, to discourage union activities. We find that the much less serious 8(a)(3) and (1) allegations in this case, without further evidence that the Respondent has rejected certain basic principles of collective bargaining, do not present sufficient reason for us to decline to defer.

¹⁷ We do not suggest that it was inappropriate for the judge, in determining whether to defer the other issues in this case, to consider the allegation that the Respondent had renegeed on a grievance settlement. However, having declined to defer any of the issues in the complaint, the judge proceeded to decide those issues on their merits and found that the alleged renegeing did not happen. As no party has excepted to the judge’s finding, the alleged renegeing is not before us. The result in that this case comes to the Board in a different posture from that in which it was presented to the judge, that is, no one now contends on this basis that the Respondent is insincere about seeking deferral.

¹² *Everlock Fastening Systems*, 308 NLRB 1018 fn. 8 (1992); *15th Avenue Iron Works*, 301 NLRB 878, 879 (1991).

¹³ *S.O.I. Roofing*, 271 NLRB 1 fn. 3 (1984); *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168 (1972), enf. mem. 85 LRRM 2548 (1st Cir. 1973).

¹⁴ The judge did not provide a separate remedy in the Order for the independent 8(a)(1) violation. This omission is corrected in our modified Order.

D. Deferral of the Subcontracting Issue

With respect to the subcontracting dispute, we conclude that this issue also meets our deferral policy, but for somewhat different reasons. The contract provides for arbitration “if the grievance involves the interpretation of application of the provisions of the Contract,” but there is no provision in the contract specifically addressing subcontracting. The Union, however, did file a grievance on October 4 over the subcontracting out of unit work.

In *E. I. du Pont & Co.*, 293 NLRB 896 (1989), the Board addressed a similar situation. There, the employer was alleged to have unilaterally altered employees’ work assignments. Despite the absence of specific contractual language addressing the issue, the Board decided to defer the case to arbitration. The Board pointed to the fact that the union had filed a grievance over an earlier, but similar, dispute, and had processed the grievance to the point of requesting arbitration, thereby indicating that the union and the employer both considered the work assignments to be subject to the grievance-arbitration process, notwithstanding the absence of specific contract language. *Id.* at 897.

The Board also noted that past practice can be found by arbitrators to be the “law of the shop,” and thus enforceable through arbitration. Further, the Board relied on the Supreme Court’s holding that, where Section 301 suits to compel arbitration are concerned, arbitration should be ordered “unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.”¹⁸

In the present case, we also find that the fact that the Union filed a grievance over the subcontracting issue and the Respondent’s assertion that, *inter alia*, this matter should be deferred to the grievance-arbitration process, indicates that both the Union and the Respondent consider the issue to be covered by the parties’ grievance-arbitration procedure. Further, there is no contractual language or other evidence that would permit us to say “with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.” We find, contrary to the judge, that deferral is appropriate.

Finally, with respect to both the alleged unilateral changes discussed in section III,C, and the subcontracting issue discussed in section III,D, we find that these deferrable issues are not in any way factually or legally interrelated with the issues presented by the alleged threat or alleged discriminatory discipline. We therefore see no reason that we should decline to defer that part of the case which is eminently well-suited to resolution through the parties’ agreed-on machinery for

such disputes.¹⁹ Accordingly, we reverse the judge and find that the issues concerning the alleged unilateral changes shall be deferred to the parties’ grievance-arbitration procedures.²⁰

E. Deferral of Information Issue

We agree with the judge that the 8(a)(5) information request allegations are not deferrable to arbitration.²¹ On the merits, we agree with the judge’s finding of a violation.

ORDER²²

The National Labor Relations Board orders that the Respondent, Hoffman Air & Filtration Systems, Division of Clarkson Industries, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they will be held to a higher standard of conduct because of their union activities.

(b) Issuing warnings or otherwise discriminating against employees because of their union activity.

(c) Refusing to furnish the Union with information relevant and reasonably necessary to its performance of

¹⁹ See *Transport Service Co.*, 282 NLRB 111 (1986). Cf., e.g., *American Commercial Lines*, 291 NLRB 1066, 1069 (1988) (“[W]hen . . . an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party’s request for deferral must be denied.”); *S.O.I. Roofing*, 271 NLRB 1 fn. 3 (1984) (no partial deferral where the arguably deferrable allegations cannot be deferred). Although there is dictum in *Sheet Metal Workers Local 17 (George Koch Sons)*, supra, 199 NLRB at 168, suggesting that the Board is reluctant to defer issues under *Collyer* if it is declining to defer other issues in the same proceeding, the disposition of the case is entirely consistent with the principles we have applied here in deciding to resolve some of the issues and defer others. In *George Koch* the potentially deferrable issue (the strike) and the nondeferrable issue (the union fine) were intertwined, in that both turned on whether the individual who was fined was a representative of the employer within the meaning of Sec. 8(b)(1)(B) of the Act.

²⁰ Because we are deferring the unilateral change allegations, we need not address the General Counsel’s exceptions, which concern only the appropriate remedy for two of those alleged violations.

²¹ *Postal Service*, 307 NLRB 429 (1992); *Postal Service*, 280 NLRB 685 fn. 2 (1986); *United Technologies Corp.*, 274 NLRB 504, 505 (1985).

Because the information refusal allegations in this case are not closely related to any of the unilateral change allegations, the failure to defer the former does not affect the deferrability of the latter. Cf. *Postal Service*, 302 NLRB 918 (1991) (alleged unilateral change not deferred to arbitration process because “intimately connected” to the nondeferrable refusal to grant information allegation).

²² Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted to arbitration, or (b) the grievance of arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

¹⁸ *Steelworkers v. Gulf Navigation*, 363 U.S. 574, 582–583 (1960).

its obligations as bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees employed by Respondent at its Syracuse, New York facility, including all plant clerical employees, shipping and receiving clerks, truck drivers and inspectors; but excluding all office clerical employees, production control employees, timekeepers, research building employees, stores records employees, guards, professional employees, and all supervisors as defined in the Act.

(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 its discriminatory action against Eli Snyder and remove the disciplinary warning and any reference to it from the personnel files and notify the employee in writing that this has been done and that it will not be used against him in any way.

(b) Post at its facilities in Syracuse, New York, copies of the attached notice marked "Appendix."²³ 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 on 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.

²³If 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 tell employees that they will be held to a higher standard of conduct because of their union activities.

WE WILL NOT issue warnings or otherwise discriminate against employees because of their union activity.

WE WILL NOT refuse to furnish the Union with information relevant and reasonably necessary to its performance of its obligations as bargaining representative of employees in the following appropriate unit:

All production and maintenance employees employed by us at our Syracuse, New York facility, including all plant clerical employees, shipping and receiving clerks, truck drivers and inspectors; but excluding all office clerical employees, production control employees, timekeepers, research building employees, stores records employees, guards, professional employees, and all 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 rescind our discriminatory action against Eli Snyder and remove the disciplinary warning and any reference to it from the personnel files and notify him in writing that this has been done and that it will not be used against him in any way.

HOFFMAN AIR & FILTRATION SYSTEMS, DIVISION
OF CLARKSON INDUSTRIES, INC.

Ronald Scott, Esq., for the General Counsel.

Norman A. Quandt, Esq. (Clark, Paul, Hoove & Mailards),
of Atlanta, Georgia, for the Employer.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Syracuse, New York, April 30 and May 1-3, 1990. The charges were filed by the Union on December 28, 1989 (amended February 7, 1990), and the complaint issued on February 13, 1990. The issues are, in substance (a) whether the General Counsel should have deferred the unfair labor practice charges to the arbitration provision of the collective-bargaining agreement, (b) whether the Respondent should be found to have violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) for disciplining an employee because of his capacity as a union official, and (c) whether the Respondent should be found to have violated Section 8(a)(5) and (1) and/or Section 8(d) of the Act because of its unilateral changes and implementations of policies, for its failure to abide by a grievance settlement, and for refusing to furnish the Union with certain information.

On the entire record, including my observation of the witnesses, and after consideration of the brief filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Hoffman Air & Filtration Systems, Division of Clarkson Industries, Inc., is a New York corporation

located in Syracuse, New York, where it is engaged in the manufacture of centrifugal blowers, liquid filtration systems, and industrial vacuum cleaning systems. With sales and shipments from its Syracuse, New York facility of products in excess of \$50,000 directly to points outside the State, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, Local Union 4496, United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

Facts

The Respondent, Hoffman Air & Filtration Systems, is a division of Clarkson Industries which is a subsidiary of British Tire and Rubber Co. The corporate hierarchy includes George Bagnall as the president of Hoffman Air, Richard Shutz, manager of manufacturing, Richard Gozigian, manager of production and field service, and Linda Becker, personnel manager. The Company's production and maintenance employees are, and for many years have been, represented by Local Union 4496 of the Steelworkers. Their collective-bargaining agreement is effective for 3 years, beginning January 1, 1989. The president of Local Union, James Gray, has been in the position since May 1988. Hubert M. Berger, the staff representative of International Union since 1980, participated in the collective-bargaining negotiations.

Concurrent with the relatively recent personnel changes at the Company—the appointments of Bagnall in July 1989 and Shutz in April 1989—and during Gray's 2-year tenure with the Union, numerous grievances were filed giving rise to some of the allegations in the complaint.

The allegations, consisting of one discriminatory warning to a union official, several unilateral changes, a reneged grievance settlement, and a refusal to furnish information, are initially subject to a determination whether they should be resolved through the arbitration process of the collective-bargaining agreement.

Deferral to Arbitration. In its answer to the complaint and on the record prior to the taking of testimony, the Respondent moved to have all pending allegations deferred for resolution to the grievance procedure, including arbitration, contained in the collective-bargaining agreement (G.C. Exh. 1(g), Tr. 11). The Respondent renewed its motion at the conclusion of the General Counsel's case and at the conclusion of the hearing (Tr. 604, 834). The matter was taken under advisement. The Respondent argues in its brief that its motion should be granted and that all 8(a)(1), (3), and (5) allegations in the complaint be deferred to arbitration.

The General Counsel opposed the Respondent's motion and argues that this case falls into several exceptions to the Board's "policy favoring prearbitral deferral" in unfair labor practice cases. Recognized exceptions may be found in instances of information requests, unilateral changes in working conditions, acts of discrimination, and repeated misconduct.

Both sides agree that the leading case governing the issue of deferral is *Collyer Insulated Wire*, 192 NLRB 837 (1971). There, and in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), the Board stated its intentions to defer to the contractual arbitration procedure under the following circumstances:

The dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration.

In *United Technologies Corp.*, the Board decided that deferral is not only appropriate under these guidelines in matters of contractual disputes but also in instances of 8(a)(1) and (3) allegations. The Board recently held that deferral under *Collyer* was appropriate in a case involving unilateral implementation of substance abuse and drug-testing programs. *Inland Container Corp.*, 298 NLRB 715 (1990). There the Board cited *E. I. du Pont & Co.*, 275 NLRB 693 (1985), in support of its holding that a company's unilateral actions or changes in the condition of employment are subject to deferral even though no specific contract provisions were in dispute. On the other hand, if unilateral changes, such as a wholesale repudiation of wage rates, amount to "a basic repudiation of the bargaining relationship," deferral becomes inappropriate. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enf. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

In the present case, the allegations are numerous and complex, ranging from one allegation of discriminatory conduct to allegations of unilateral changes in the employees' working conditions and a request for information. The Respondent has repeatedly declared its willingness to utilize arbitration to resolve the disputed issues. It is also clear that the issues involving the dispute arose within the confines of a long and productive collective-bargaining relationship. The record shows that this relationship has existed for many years and that in contrast to almost 100 grievances filed between April 1989 and April 1990, 15 were filed during the same monthly period from 1980 to 1989 and only 12 from 1987 to 1988 (Tr. 616, 162-163). The instant dispute, consisting of 8(a)(1) and (3) misconduct, as well as 8(a)(5) unilateral changes in conditions of employment may, to that extent, be properly deferrable to arbitration. However, the allegations of Section 8(a)(5) and (1) also include the Respondent's alleged refusal to furnish information to the Union relevant to its ability to function as collective-bargaining agent and the Respondent's refusal to abide by the settlement of a grievance. The Board has not deferred cases involving requests for information. *Postal Service*, 276 NLRB 1282, 1285 (1985). Moreover, a respondent's refusal to abide by the settlement of a grievance goes to the very substance of the bargaining relationship. Significantly, the collective-bargaining agreement contains the following provision (G.C. Exh. 2, p. 39):

Step Four: If no satisfactory solution has been reached in accordance with Step 3 within fifteen (15) working days after the receipt of the Company's answer under Step 3, and if the grievance involves the interpretation of application of the provisions of this Contract, the issue may then be presented to an impartial arbitrator to be agreed upon by the Company and the Union. Within ten (10) days after electing to arbitrate,

the Company and the Union will meet for the purpose of agreeing upon an arbitrator. If no arbitrator is selected by this process, the Company and Union, within five (5) days thereafter, will attempt to select an arbitrator from a list furnished by the Federal Mediation and Conciliation Service. If the parties are not mutually able to agree upon an arbitrator from this list, a second list shall be requested. If no arbitrator can be mutually selected from said second list, which shall consist of seven (7) names, then the parties shall select an arbitrator by alternately striking the proposed names from the list until one is left.

The arbitrator shall *not have the right or authority* to subtract from or alter any provision of this Contract, nor may the arbitrator *make any recommendations for future action by the Company or the Union*. The decision of the arbitrator, within the scope of his authority, shall be final and binding upon the Company, the Union, and the employee or employees concerned. The compensation and expenses of the Company and Union counsel, witnesses, and others who act for them in the presentation of the case will be paid by the respective parties. The compensation and expenses of the arbitrator and the rental of a hearing room shall be paid equally by the Company and the Union. [Emphasis added.]

The *underlined* portion of the proviso severely limits the scope of the disputes which may be resolved under the grievance procedure. Only “if the grievance involves the interpretation of application of the provisions of this contract” may the issue be presented to arbitration. Moreover, the arbitrator does not have the right to “make any recommendation for future action by the Company or the Union.” By these terms, the parties have agreed to provide for arbitration in only a narrow range of disputes. Because the contract fails to provide for arbitration in a very broad range of disputes, as contemplated by the Board in *Collyer* or *United Technologies*, supra, I find that the entire case is not deferrable. Moreover, the deferrable issues are interrelated with the other allegations and the restrictive arbitration clause limiting the authority of the arbitrator from making “any recommendations for future action” may inhibit an arbitrator from granting an award which would be in the interest of the bargaining relationship or one which is in accord with the policies of the Act. Finally, some of the allegations question the sincerity of Respondent’s adherence to the grievance procedure. I accordingly find that deferral in this case is inappropriate. The motion by the Respondent is therefore denied.

Discriminatory and Other Misconduct. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Eli Snyder. The Respondent does not dispute that Snyder was reprimanded but argues that he violated company policy and that a supervisor’s remark referring to Snyder’s union activity should be regarded as an innocuous comment. The General Counsel submits that Snyder was singled out for discipline because he was a union steward and that the supervisor’s remark supports that conclusion. The facts are not seriously in dispute. On November 13, 1989, Snyder received the following letter from Richard Shutz, manufacturing manager (G.C. Exh. 3):

Subject: Violation of Plant Rules #19g&h (dated 10/2/89)

On Wednesday, November 8, 1989 at 11:30PM, you were observed entering the lunchroom with a can of food in your hand. You did not have permission to be away from your work station and were not performing a task relative to your assigned job. You have been warned of this same violation on two previous occasions, once prior to the issuance of the new Plant Rules and Regulations, and once since the current Plant Rules and Regulations were put into effect on October 2, 1989.

This letter is a formal warning letter which will be placed in your personnel file. Any future violation will be dealt with according to the next disciplinary action step.

Snyder, who has been in the Respondent’s employ for 16 years, testified that on November 8, 1989, between 10:30 and 11 a.m. he left his work area. On his way to the men’s room he walked through the cafeteria, “got a can of soup and . . . opened it up and . . . put it back in the cafeteria” (Tr. 405). The time spent in the cafeteria lasted, in Snyder’s estimation, no more than 15 to 30 seconds. Foreman Steve Moses observed his conduct and informed upper management. On November 13, 1989, Snyder attended a meeting with several members of management, including Vice President Andrew Williams, Production Manager Richard Gozigian, as well as Shutz and Moses. Gozigian handed him the written reprimand and asked him to read it. Snyder responded to the letter admitting the accusation and apologizing for his conduct (Tr. 411). At one point during the course of the meeting, Shutz made the comment that Snyder “being the steward, grievance man, that [he] should—[he] had to represent an example to the other men, that [he] shouldn’t have done this” (Tr. 409). According to Snyder, other employees who committed the same violation and left their work station to go to the cafeteria were not reprimanded. From October 1989 to May 1990, Snyder knew of 8 to 10 other employees who entered the cafeteria on worktime. Snyder did not know whether any foremen had observed these employees. Snyder also testified that he had never received any written or verbal warnings (and later reduced to writing) for such conduct before, even though the written warning states that he had been warned twice before (Tr. 406–407, 411–412). Indeed the parties stipulated that Snyder’s personnel file did not contain any written evidence for similar misconduct (Tr. 412).

Shutz’ recollection of the meeting did not materially differ with that of Snyder, except that, according to Shutz, he did not refer to Snyder’s status as union steward and his membership on the grievance committee until the end of the meeting. He said the following (Tr. 698):

As an aside, as we prepared to dismiss or as the meeting broke up, I indicated to Mr. Snyder that I was disappointed in his performance; that he was a member of the grievance committee, he not only had been present during the presentation of the rules on October 2nd, but he had been present in the meeting on October 10th, present again on October 23rd and had ample knowledge of the rules; plus the fact he had been warned prior to the rules that he had been in the lunch-

room on unauthorized time, he was given one verbal warning after the rules of October 2nd were put into place. And I told him that I was disappointed in him; that as a member of the committee, that he was looked upon by other people as an example and if he did things that were against these policies, that that would be a bad example for other people.

Foreman Moses remembered the episode as follows (Tr. 788–789):

He read the letter and asked if there was any comments from Eli or explanations, and Eli said no. And Dick said something about as being a steward, that you should be well aware of the plant rules and regulations and that, you know, you should try to set an example for other union members.

The union representative similarly recalled that Shutz' "exact words were, being in the position that you were in, being a union steward, you should set an example" (Tr. 364).

Whether Shutz' reference to Snyder's union activity was made halfway through the disciplinary meeting or at the conclusion did not change the impact or the significance of the remark. Clearly, it was not merely an "offhanded expression of disappointment" as concluded by the Respondent. Shutz' remark was an expression that Snyder was held to a higher standard, and that he was expected to set an example for the rest of the employees. Moreover, the record shows that Snyder was indeed treated differently in this instance. The unequivocal testimony of Williams, a credible witness, showed that he had observed as many as 10 employees, half of whom were unit employees, enter the cafeteria on worktime—the same violation for which Snyder was reprimanded—without receiving any warning, even though their conduct was observed by supervisors (Tr. 371–372). Williams also explained that verbal warnings are generally reduced to a written document as are written warnings and made a part of the employee's personnel record (Tr. 367, G.C. Exh. 38). Because the parties stipulated that Snyder's personnel file contained no written documents reflecting any prior reprimands, it is clear that the written warning received by Snyder incorrectly reflected that he had received prior verbal warnings.

Respondent's suggestion that the reprimands given to two employees, Matthew Wojtalewski and Isaiah Williams, are identical to the one at issue, is not persuasive (R. Exhs. 2, 14). In one reprimand the employee was accused of eating at his work station during working time, arriving too early for work, and loitering in the bathroom, and the other reprimand related to an employee's failure to punch the time-clock in accordance with company policy.

On balance, the record there shows that the company policy that Snyder violated was not even enforced. Indeed, he was the only one who received a written reprimand even though the Employer must have been aware that other employees had engaged in the same misconduct. The facts that Snyder was a union steward and was told during his disciplinary conference attended by representatives of management and the Union that he was expected to set an example to the other employees because he was a union steward leads to the

inference that he was singled out because of his union activities. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

In addition it is clear that Shutz' remark during that conference has a coercive effect and tended to interfere with the employee's union activity, in violation of Section 8(a)(1) of the Act.

Unilateral Changes. The complaint next alleges that the Respondent made numerous changes in the employees' working conditions without bargaining with the Union. The first such changes were plant rules. The evidence is undisputed that effective October 2, 1989, the Respondent issued a revised set of work rules to the employees (Tr. 685, G.C. Exh. 7). Shutz testified that he and Linda Becker, personnel manager, "basically put the rules and regulations together" and then obtained the approval of the president, George Bagnall (Tr. 685). When asked whether the rules were reviewed or discussed with the Union prior to their publication, Shutz unequivocally answered "no" (Tr. 685). Shutz explained his failure to discuss the issuance of the revised rules with the Union as follows (Tr. 685):

I felt that the company has the right to publish work rules, policies as business requires. I believe the contract gives us the authority to establish policies and procedures, and it is an understood management's right to initiate and to change, as may be required, company rules and policies.

This explanation accords with the Respondent's argument that the Company had the right, particularly under its management-rights clause, to publish such work rules without prior notice or offer to bargain with the Union and that the Union's only recourse was to challenge them through the grievance procedure on the grounds that they violate the collective-bargaining agreement or that they are arbitrary, capricious, or discriminatory. The General Counsel, on the other hand, argues that the revised rules are a mandatory subject of bargaining which affect the employees' working conditions and that the Respondent violated his duty to bargain with the Union.

The new rules, entitled "Company Rules and Regulations" consist of 19 paragraphs and numerous subparagraphs on 3 printed pages and cover a series of definitions of misconduct, such as alcohol and drug abuse, insubordination, stealing, fighting, sleeping, immorality, job performance, timeliness, etc. (G.C. Exh. 7). These rules were obviously designed to govern the employees' conduct at work and clearly were conditions of employment. On October 2, 1989, management informed the employees during several meetings that these rules were in effect (Tr. 688). The Respondent ultimately revised the rules on October 23, 1989, during a grievance meeting (Tr. 688–689, Tr. 55, G.C. Exh. 11). These revised rules differed slightly, notably in the area of alcohol and drug abuse, and were communicated to the employees in April 1990 (Tr. 692). About the same time, the Respondent issued its "Attendance and Tardiness Policy" which in a two-page document carefully and explicitly details the Company's rules and sanctions governing absenteeism (G.C. Exh. 12, Tr. 693). These rules were put into effect without prior notification to the Union and without making an attempt to bargain about them (Tr. 37, 55).

The Respondent argues in its brief that the plant rules simply modified the rules last issued on May 1, 1979 (G.C. Exh. 5), which had been effectuated on the same unilateral basis and without union opposition (R. Br. p. 19–20). However, an analysis of the newly issued rules, compared with the old ones, shows that significant changes were made. The General Counsel in his brief properly points to several material changes (G.C. Br. p. 18–19). For example, the new rules governing employees' conduct relating to immorality, to gambling and solicitation, the use of company telephones, the posting of notices in work areas or bulletin boards, are completely new (G.C. Exhs. 7, 11, pars. 9, 16–18). Furthermore, the new plant rules define insolence as a new incident of misconduct (par. 2(b)). And an employee's tardiness and presence at his work area or work station have received new definitions with the specificity of seven paragraphs of explanation (G.C. Exh. 11, par. 19). Finally the Company's "Disciplinary Action" chart has also been revised so as to increase the discipline in several areas and to justify discharge for numerous first offenses (G.C. Exhs. 5, 11).

Here the Union had not waived its right to bargain with the Company and the new rules certainly govern the employees' working conditions in every respect. Not only was the Union deprived of its opportunity to bargain about the new and changed definitions of misconduct but also about the general tightening of the discipline imposed for violations of all rules, new and old.

The Respondent contends that the "management" provision in the collective-bargaining agreement operates as a waiver of the duty to bargain. That provision is contained in article IV of the bargaining agreement (G.C. Exh. 2):

The entire management of the Company and the determination and control of its policies are vested exclusively in the Company, provided, however, that in the exercise of such functions the Company shall comply with the provisions of this contract and shall not discriminate against any employee because of his membership in or lawful activity in behalf of the Union.

This proviso is not a "clear and unmistakable" waiver of bargaining rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Bath Iron Works Corp.*, 302 NLRB 898 (1991). A general management-rights clause does not operate as a waiver over the specific conditions of employment. *Litton Systems*, 283 NLRB 973 (1987); *Proctor Mfg. Corp.*, 131 NLRB 1166 (1961). Moreover, the mere fact that the Union may not have bargained over the plant rules in 1979 does not constitute a waiver of its right in 1989. It is well settled that plant rules are considered mandatory subjects of bargaining and that the Company's unilateral change of plant rules violates Section 8(a)(5) and (1) of the Act. *Murphy Diesel Co. v. NLRB*, 454 F.2d 303 (7th Cir. 1971); *Production Plated Plastics*, 254 NLRB 560 (1981); *Our Way, Inc.*, 268 NLRB 394 (1983); Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act.

Change in the Workweek. The complaint next charges that the Respondent unilaterally changed the workweek starting time for its unit employees. The Respondent states flatly that there "is no evidence in this case to support this allegation" and that "Hoffman's work week starting time (7:30 a.m. Monday morning) has not changed" (R. Br. p. 25). The Gen-

eral Counsel submits that the evidence in this issue, consisting of Gray's testimony and a letter of agreement, are insufficient to prove that the Respondent actually made the change (Tr. 67–74, G.C. Exh. 12). Accordingly, the General Counsel candidly concedes that this allegation "has not been proven by the preponderance of the evidence" (G.C. Br. p. 24). I, accordingly, dismiss this allegation of the complaint.

Overtime Pay. The Respondent unilaterally changed the policy of paying for overtime according to the complaint. The record shows that the Company took action on October 9, 1989, when Shutz instructed the payroll office by an inter-office memorandum concerning "Payment of Overtime" as follows (G.C. Exh. 18):

All daily overtime pay will be calculated as follows beginning immediately:

Time worked over 8.0 Hrs. in a shift will be paid at the time and one half rate. The time will start at the time that the employee punches in, and end when he punches out regardless of the hours worked the previous day. This is for Tues. thru Fri. only.

Time worked on Monday will be paid the same way, except that if an employee worked 40.0 straight-time (not including daily overtime or Sat. & Sun. overtime) hrs. the previous week, they will get paid at the time and one half rate for any time worked prior to 7:00 AM regardless of how many hours that they work in total that Monday.

All other rules regarding the payment of overtime remain unchanged. If you have any questions regarding this matter, please call.

The Respondent concedes that "prior to October 9, 1989, the Company had followed an inconsistent method of determining" an employee's daily overtime rate but argues that its memorandum was not a new policy directive but rather a clarification of existing policy (R. Br. p. 28). "Not so," argues the General Counsel, because the Respondent had used inconsistent and "different ways before settling on one consistent policy" (G.C. Br. p. 22). In this regard, the record shows that prior to the interoffice directive, employees received paid overtime for the time worked prior to the 7:30 a.m. shift even if the employee worked less than 8 hours on that day, so long as the employee had completed an 8-hour shift on the prior day. The Union had filed a grievance on that basis on September 19, 1989, because employee James Gray was not paid for overtime on September 6, 1989 (G.C. Exh. 13). The grievance was initially denied because the employee had not worked a full 8 hours on the prior day (Tr. 710). The grievance was ultimately settled on October 9, 1989, in favor of the employee and reflected the new policy (G.C. Exh. 14, Tr. 711). One of the main distinctions between the policies is that the determination on overtime pay under the old but inconsistent policy took into account the hours worked on the prior day while the new policy required consideration of the hours worked on the particular day for which overtime was claimed (Tr. 77–78, 710–711). The parties are in agreement that prior to the October 9 directive, the Respondent's policy "was not done on a consistent basis" (Tr. 77, 710). And the purpose of the change in policy was, in the words of Shutz who initiated the change, "to make it a consistent basis" (Tr. 710). The record clearly

shows and the Respondent cannot dispute that the new policy was a "change" and that it was accomplished without an attempt to bargain with the Union. Under these circumstances, I find that the Respondent's change of past practice of paying for overtime without affording the Union the right to bargain violated Section 8(a)(5) and (1) of the Act. *Liberty Cleaners*, 227 NLRB 1296 (1977).

Hoffman Time. The complaint next alleges a violation of the Act as a result of the Company's change of "Hoffman time." By "Inter office Memo," dated September 12, 1989, management advised its various departments and the bargaining unit personnel as follows (G.C. Exh. 19):

Effective Monday, September 18, 1989, at 12:01 a.m., "Hoffman Time" will be eliminated. The Plant will change to Eastern Standard/Eastern Daylight Savings Time as appropriate.

For all Bargaining Unit and Shop Supervisory Personnel the official starting time will remain at 7:30 a.m. and the official quitting time will remain at 4:00 p.m.

Please take whatever actions may be appropriate to make sure that you arrive on time on Monday, September 18, 1989, and each day thereafter.

According to the testimony of Richard Shutz, "It's a notification that at 12:01 AM on Monday, September 18, 1989, that Hoffman time will be eliminated, the plant will change to Eastern Standard and Daylight Savings Time as appropriate. So, it was changing from Hoffman time to real time" (Tr. 700). Hoffman time was defined by James Gray as follows (Tr. 102):

Hoffman time was time—five minutes fast is what it was. Time was five minutes fast. We started at 7:30, but the time actually was 7:25. By the clocks was 7:30 at Hoffman.

The purpose was to alleviate the traffic on Thompson Road which was lined with other plants with similar working hours (Tr. 103). Gray testified that the longstanding practice of permitting the employees to come in 5 minutes early and leave 5 minutes earlier actually saved them 10 to 15 minutes in travel time. The Union filed its grievance on September 12, 1989. The Company denied the grievance stating that the "Contract clearly states that the Company has the right to starting times . . ." (G.C. Exh. 20.) Shutz unequivocally testified that the Company did not discuss the elimination of Hoffman time in advance with the Union (Tr. 701). He also explained that the reason for the Company's action was to avoid the inherent confusion when the administrative offices were moved to the location adjoining the manufacturing plant and the times differed in these facilities by 5 minutes (Tr. 701). The unilateral change was discussed in the context of the grievance but without a recognition by the Company that the Union had a right to bargain over the issue.

The collective-bargaining agreement provides as follows (G.C. Exh. 2, p. 7):

Determination of the starting time in the changes of the daily and weekly work schedules will be made by the Company and such schedules may be changed by the Company from time to time to suit varying conditions of the business; provided, however, that indis-

criminate changes shall not be made in such schedules and provided further that changes deemed necessary by the Company shall be made known to the Grievance Committeeman or Committeemen of the Union as far in advance of such changes as is possible.

The Company failed to notify the Union of the changes in working time. Nevertheless, this proviso gave the Company the right to determine the starting time and the work schedules "to suit varying conditions of the business." The Union had the right to file a grievance over the Company's failure to give notice to the grievance committeeman or other committeemen of the Union, but the Union had clearly and unmistakably waived its right to bargain over the change in working time by the express provision in the contract. Accordingly, I dismiss this allegation in the complaint.

Overtime Assignment for Sundry Clerks. It is alleged that the Respondent's change of the overtime assignment policy for sundry clerks violated the Act. The parties are in agreement that the challenged practice of assigning overtime to its sundry clerks complied with the collective-bargaining agreement and that it did not comply with a prior negotiated "side agreement." The question is which is controlling the issue, the side agreement or the collective-bargaining agreement. The Company employed two or three sundry clerks who were sometimes called after hours to work. The "round robin" procedure of calling employees by seniority was changed in 1988 by an agreement following a grievance filed by sundry clerk Leonard Mitchell. As the less senior of the sundry clerks, he wanted the assignments rotated. The agreement, dated January 8, 1988, established the rotation assignments (G.C. Exh. 10).

Article V, paragraph 9, of the collective-bargaining agreement is entitled "overtime distribution procedure" and provides for a "round robin distribution" which "means that each employee's name will be posted according to seniority and each employee will be asked to work in sequence of his posting." (G.C. Exh. 2, p. 2.) Employee Larry Lauber filed a grievance on November 11, 1989, because the other sundry clerk, Leonard Mitchell, had been called in twice in a row for overtime work, contrary to the 1988 side agreement which would have required assignments on a rotation basis (G.C. Exh. 40). The Respondent denied the grievance on the basis that its practice complied with the new contract. The General Counsel does not dispute that this practice "might have been consistent with the current contract" but argues that the Company had reaffirmed its side agreement by a notice entitled "Emergency Procedure for After Hours Problems" (G.C. Exh. 41). The procedure outlined is identical to the 1988 side agreement requiring rotation between the two sundry clerks. The record is not clear whether the notice (G.C. Exh. 41) constitutes a reaffirmation of the side agreement as urged by the General Counsel. The grievant had not seen the document until it was shown to him by the union steward after the filing of the grievance. And Lauber was unsure whether it was distributed to the employees or posted in the plant (Tr. 491). Shutz testified that he had issued the notice to the guards on May 9, 1989, and that he made a mistake in doing so, because he "failed to take into consideration the hours of the new contract and the opportunity system" (Tr. 722). Shutz issued a memorandum on September 13, 1989, whose purpose was to make it clear to the

foremen that the terms of the collective-bargaining agreement applied to the overtime for sundry clerks (R. Exh. 11, Tr. 722).

The Respondent's explanation that the reissued side agreement was a mistake and that the Company intended to comply with the specific and detailed terms of the contract is credible and plausible. Moreover, the Respondent's strict adherence to the unmistakable and clear terms of the contract can hardly be construed as a refusal to bargain or a unilateral change of its overtime policy. At most, the Respondent was faced with two inconsistent agreements and decided to comply with the subsequently negotiated collective-bargaining agreement. Under these circumstances, I find that the Respondent did not, as alleged, violate this allegation of the complaint.

The Insurance Waiver. The General Counsel agreed to "respectfully bite the bullet" and agrees with the Respondent that there is "no basis for an 8(a)(5) finding regarding this allegation" which challenged the Company's instructions to its employees not to accept the collision damage waiver insurance as a result of an agreement with Hertz, Inc. (G.C. Br. p. 28, R. Br. p. 33-34). In agreement with the parties, I find that this allegation should be dismissed.

The Time Restriction Concerning Union Business. Alleged as a violation of Sections 8(a)(5) and (1) and 8(d) of the Act is a portion of the Company's interoffice memorandum of September 28, 1987, entitled "Union Business." The purpose of the memorandum was to "serve as a reminder of the rules regarding the conducting of Union business during working hours" (G.C. Exh. 22). The memorandum is primarily based on the provisions in the collective-bargaining agreement, except for the contractual language limiting conferences between employees and stewards to "a reasonable time" during working hours (G.C. Exh. 2, art. XV, sec. 12). This provision was limited by the interoffice memorandum as follows (G.C. Exh. 22, par. 6):

All meetings will be kept to a minimum in duration. No meeting should take more than 1/2 hour. If it will take longer than this, it must be done in conjunction with a break, lunch time, or prior to/after normal working hours. The time which these meetings may take before or after normal working hours will not be paid for by the Company.

Shutz admitted that the Company issued this memorandum without bargaining with the Union and explained that it was prompted by a dramatic increase in the number of grievances and the time expended by the union committee in preparation of the second- and third-step grievances (Tr. 723-726). Shutz testified that the time limit was intended and used as a guideline (Tr. 726). Nevertheless, the Union filed a grievance, suggesting that some grievances take a longer time to write up than others and that it had resisted the 10-minute time limit during contract negotiations in favor of a flexible standard (Tr. 121-122, G.C. Exh. 23).

Although the Company may well have intended to fashion a reasonable guide, an examination of the language in the memorandum does not support such an interpretation. Should a meeting for a reasonable time on a complicated matter last longer than 30 minutes "it must be done in conjunction with a break lunch time" or on the employee's own time before

or after working hours. According to the clear language in the memorandum which by its own terms describes the various paragraphs as "rules regarding the conducting of union business," the parties would not have the option to meet for a "reasonable time" as agreed on in the contract. To that extent, the memorandum is an abrogation of the agreement. Accordingly, I agree with the General Counsel that the Respondent attempted to accomplish unilaterally to change the terms of the bargaining agreement in violation of Sections 8(a)(5) and (1) and 8(d) of the Act.

The Subcontracting of Maintenance Work. The next paragraph in the complaint alleges that the Company's action of subcontracting lawn care and snow removal work without bargaining with the Union violated Sections 8(a)(5) and (1) and 8(d) of the Act. The record shows that on August 18, 1989, the Respondent notified the Union by letter as follows (G.C. Exh. 25):

This letter will notify you of the Company's intent to have an outside service firm maintain the lawn care and snow removal on Company premises.

Should you wish to discuss this matter, please advise.

Following discussions between the parties and without reaching any agreement, the Company subcontracted the work effective in the fall of 1989 (Tr. 128, 728). The Union promptly filed a grievance, dated October 4, 1989 (G.C. Exh. 27). The record further shows that the work had always been performed by unit employees on an overtime basis and that the work was part of the job descriptions of the "truck driver crane operator" and the "sweeper trucker" (G.C. Exh. 26, Tr. 126, 729).

The Respondent relies on the criteria in *Westinghouse Electric Corp.*, 153 NLRB 443 (1965), that the Respondent had subcontracted certain work in the past, the decision was made solely for economic reasons, the subcontracting had no detrimental result on the employees, and the Union had the opportunity to bargain. To be sure, the Company had in the past subcontracted work like moving heavy equipment, painting, and roofing, but usually only after agreement with the Union. Furthermore, loss of overtime pay, if substantial, is usually not regarded as *de minimis*. *Cities Service Oil Co.*, 158 NLRB 1204 (1966). Moreover, here the contract specifically provided as follows (G.C. Exh. 2, art. 1):

No excluded employee shall do work in job classifications for which rates of pay are established as hereinafter provided, except for purposes of instruction, in case of emergency, or experimental research and development with bargaining unit assistance.

The contract establishes rates of pay for sweeper truckers and truckdriver crane operators whose job description specifically includes "clears snow" and "[r]esponsible for snow removal and lawn and garden care as directed," respectively (G.C. Exh. 2, p. 44; 26). To be sure this work did not constitute their principal assignment but it clearly fell within the scope of their work. *ACF Industries*, 234 NLRB 1063 (1978).

The record does not show, however, that the Respondent was primarily motivated in its decision to subcontract by focusing on labor costs. Gray testified that one of the reasons

was (Tr. 128): “They told us that they did not want us spreading chemicals and, by New York State, that certain professional people had to do that.” Gray also stated that the Company expressed concern about the bad working conditions of the snowplow and other equipment (Tr. 127). Shutz testified that he told the union representatives that the Company “had a problem with the equipment, that the vehicles . . . were old, needed repair and that the recent DEC regulations regarding the application of pesticides, fertilizers, that type of thing, required a licensed applicator” (Tr. 729.) Shutz also explained that the Company found it difficult to manage the work load that it “was able to find people to do it but not always at the right time. Any time the lawn got too high, we couldn’t pull people out of the shop during the week, we had people working overtime during the normal work week in the evenings, we’d have to wait until a Saturday.” (Tr. 279.)

An employer’s failure to bargain over its decision to subcontract maintenance work normally done by bargaining unit employees violates Section 8(a)(5) of the Act. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). This is so because the loss of overtime work is considered a mandatory subject of bargaining. In a related case, involving relocation of unit work *Dubuque Packing Co.*, 303 NLRB 386 (1991), the Board overruled *Otis Elevator Co.*, 269 NLRB 891 (1984), and devised a test for determining whether the employer’s decision is a mandatory subject of bargaining. One of the important aspects of the tests is an employer’s ability to show that labor costs were not a factor in the decision. In this case, the record shows, on the one hand, that the subcontracted work was not the principal assignments of the affected unit employees, the decision was made for a number of reasons the least of which was to reduce labor costs, and the employer has subcontracted in the past, albeit with the consent of the Union. On the other hand, the unit employees would lose a certain amount of overtime, the work was expressly recognized as a part of the unit, and the Respondent did not make a change in the scope and direction of the enterprise. In short, the issue boils down to the Respondent’s replacement of work by unit employees with the same work performed by an independent contractor. Under these circumstances, I find the Employer should have bargained with the Union. Its failure to do so violated Sections 8(a)(5) and (1) and 8(d) of the Act.

The Grievance Settlement. A decision on the issue whether the Company violated Section 8(a)(5) and (1) of the Act involving the grievance of Wes Osborne, an employee, is a close question. On September 25, 1989, the Union filed a grievance, stating “Brother Osborne was not asked to work overtime on 9-23-89” (R. Exh. 3). The grievance was denied at the third step because the work, consisting of moving a machine out of a paint booth, was properly performed by Joe Sgroi, a painter’s helper. The Union’s position was that Osborne, a sweeper, had always performed that work and should have been called on this occasion.

During two grievance meetings in October 1989 in the presence of Richard Shutz, Richard Gozgian, Linda Becker, and the union committee, the parties discussed a settlement of the grievance. The parties reached a binding agreement, according to James Gray, during the meeting on October 23, 1989, amid contentions that Osborne should have been called because he had always done the moving work on the one

hand and, on the other, that Sgroi’s job description as a painter’s helper included that work and that he had done so in the past. Gray testified as follows (Tr. 142-143):

Because I made a proposal to the company that, look it, let’s settle the grievance. I think Joe Sgroi can say he’s never, never moved one of them. If he comes in and says he never moved one of them, why don’t you just pay Wes Osborne, get the grievance out of the way. If he says it the other way, we’ll drop it, no problem whatsoever. It was okayed.

In support of his testimony, the General Counsel points to Gray’s written notes (G.C. Exh. 30). They reflect the following statement, “if Joey says yes, Wes would not be paid, if no he will Ok.”

Andrew Williams similarly recalls that Shutz accepted Gray’s proposal that “if Joe would come in and say that he never moved a 791 unit out of the lab, they would pay.” (Tr. 375.)

The testimony of the management officials does not reveal that an agreement had been reached, although they testified that the Union had made a proposal to which they agreed. Shutz testified: “My response in particular, my own personal response was that we’ll bring him in, but that’s how it was left. We’ll bring him in and we’ll go from there” (Tr. 734). Gozgian testified that: “We agreed to let him come in and asked the questions we wanted to ask of him” (Tr. 769). According to Becker, Shutz responded to the Union’s request to ask Sgroi the question as follows: “He said okay, we’d bring him in, you know, we’d let them ask the questions if they wanted to” (Tr. 816-817).

Sgroi was brought in and promptly supported the Union’s position that he had never moved the equipment. However, his statement did not resolve the issue. According to the Company, his response was considered but it did not convince management that the grievance had merit.

I agree with the Respondent that the incident was an honest misunderstanding. It was plausible for the Union to assume that the Company had accepted both of the Union’s proposals, that is the suggestion to have Sgroi appear at the next meeting and also the idea that the parties would be bound by his response. The Company’s version is equally convincing that it merely agreed to the Union’s offer to hear and consider Sgroi’s response. In expressing their assent to the Union’s proposal, the management representatives may simply have overlooked the impact of the suggestion. In any case, the record does not show that there was a meeting of the minds between the parties and an agreement to be bound by statement at the meeting. I therefore dismiss this allegation of the complaint.

The Information Request. The final change in the complaint alleges that the Respondent has unlawfully delayed and refused to furnish the Union with the timecards of certain employees.

The Union made several requests for certain timecards. In connection with a grievance filed to protest the suspension or discharge of Harold Starring, a unit employee, the Union made a written request, dated August 23, 1989, requesting among other items the timecards of the employee (Tr. 147-148, G.C. Exh. 32). According to Gray’s testimony, the Company failed to produce the requested material (Tr. 150-

151). By memorandum of September 7, 1989, the Union requested also the timecards for two coworkers (G.C. Exh. 35). By memorandum of September 21, 1989, the Union referred to the request for information and asked for an extension of time, *inter alia* (G.C. Exh. 33):

As we have asked for 6 or 7 pieces of evidence and were refused all of them we feel we are not qualified to make a final disposition of said evidence. We would also like to ask for an extension on our right to either arbitrate or accept said grievances.

On September 26, 1989, the Company replied as follows (G.C. Exh. 34):

The Contract allows for 15 working days to respond to the Company's third step grievance final answer. I believe that this should be sufficient time for you to make your decision. The Company's final decision was given to you on September 20, 1989. This would give you until October 11, 1989 to advise the Company of your decision.

If you wish to make any specific requests for further information, I will consider them. These requests must be specific in nature and must include an explanation of why the information requested is pertinent to the grievance.

The Respondent did not produce the timecards by October 11, 1989. The controversy ended with a settlement of the grievance and the Respondent's decision to reduce the employee's discharge to a warning (Tr. 299).

The second information controversy arose as a result of the Union's grievance dated August 28, 1989, about the refusal of the Company to grant leave to several union officials to attend a meeting (G.C. Exh. 36). The Union made a written request for the timecards for all welders the week of August 21-25 (Tr. 158, 300). The purpose was to probe the Company's explanation for refusing to grant the leave of absence, namely, that the employees were too busy with their work assignments. The Union wanted to show with the aid of the timecards that the employees "were doing next month's work" (Tr. 159, 301). The Respondent refused the request by memorandum of August 28, 1989 (G.C. Exh. 37):

On Monday, August 28, 1989, you requested the welder's timecards for August 21-25, 1989. These are company records and I don't consider them pertinent to Jim Gray's grievance for discrimination of union officers by the Company. All of the union employees are treated equally under the terms of the contract and the plant rules and regulations. As you are aware, the whole shop worked a great deal of overtime last week (Monday, August 21 thru Thursday, August 24) to meet the required shipments for August. Also, all of the employees are required to be here on a daily basis to do their jobs except as allowed by the contract. This type of a meeting is not specifically allowed under the contract.

I therefore must deny your request to see the requested timecards.

Another request for timecards was made in November 1989. The Union requested all timecards for all unit employees as of January 1, 1988, in order to examine the Company's overtime practice involving several grievances (Tr. 160, 303). The Union conceded that this request would have entailed thousands of timecards. Gray testified that initially he received a verbal response denying the request (Tr. 160-161). However, by letter of January 26, 1990, the Company informed the Union that its request for all timecards from January 1, 1988, to November 30, 1989, is granted because it "has determined that the Union is entitled to this information" (G.C. Exh. 18).

The General Counsel argues that the Union had made several requests for relevant information which the Respondent denied. The "Respondent's belated compliance with the requests does not preclude a finding" of violation (G.C. Br. p. 36). The Respondent argues that the Union made these requests as a ploy to harass the Company, and that the Company has offered since January 26, 1990, to make these timecards available to the Union subject to reasonable administrative considerations (R. Br. p. 49).

The record is clear that the Union's request for timecards was initially denied. It also cannot be gainsaid that the timecards were relevant in all three instances, including the Union's grievance challenging the Company's decision to discipline an employee, for willfully abusing "company property by wasting production hours" and other misconduct (G.C. Exh. 31). The Union wanted to probe the Company's claim that it took a long time for two other employees to rectify the mistakes made by Starring. It therefore requested the timecards of the three employees showing the work performed on the particular assignment (Tr. 148). The request to see the timecards for the welders was obviously relevant to test the Company's claim that they could not be given leave to attend a union meeting. The relevancy of all timecards was not contested by the Company.

It is well settled that as "part of the section 8(a)(5) duty to bargain, an employer has a duty to furnish all information requested by a union that is necessary to the union in order for it to fulfill its obligation as representative of bargaining unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967)" *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377 (7th Cir. 1991), *enfg.* 296 NLRB 715 (1989). The relevancy is a "discovery-type" standard which is sufficiently broad to encompass the timecard request by the Union. Although part of the request became moot and the other aspect of the request was finally granted, it is clear that the Respondent initially denied the requests in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the collective-bargaining representative of Respondent's employees in the following unit:

All production and maintenance employees employed by Respondent at its Syracuse, New York facility, including all plant clerical employees, shipping and receiving clerks, truck drivers and inspectors; but exclud-

ing all office clerical employees, production control employees, timekeepers, research building employees, stores records employees, guards, professional employees, and all supervisors as defined in the Act.

4. By issuing a written warning to Eli Snyder because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By unilaterally, without prior notice to or in consultation with the Union, implementing new work rules and regulations for unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By unilaterally, without affording the Union the right to bargain, changing its policy of paying unit employees for certain overtime, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. By unilaterally, and without consultation with the Union, restricting the time allotted to union officials for union business, the Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act.

8. By unilaterally, and without prior consultation with the Union, subcontracting snow removal and yard maintenance work, the Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act.

9. By failing and refusing to furnish the Union with certain timecards or information relevant to the Union's performance of its function as the exclusive bargaining representative of the unit, the Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

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

Having found that the Respondent unlawfully discriminated against its employee Eli Snyder by issuing a written warning, the Respondent will be ordered to rescind its action by removing the warning from the personnel files of the employee and to notify him to that effect in writing. Having found that the Respondent has unilaterally and without bargaining with the Union issued plant rules to its employees, changed its policy on overtime, restricted the time for union officials to transact union business, and subcontracted maintenance work, the Respondent will be ordered to rescind its unilateral actions and to bargain with the Union as the collective-bargaining representative of the employees in the unit described above. Having further found that the Respondent violated the Act by refusing to furnish certain information to the Union relevant to its function as the exclusive collective-bargaining representative, the Respondent will be ordered to cease and desist from any future violations in this regard. An order requiring the Respondent to furnish the information is not necessary because the Respondent has belatedly agreed to make the necessary disclosures.

[Recommended Order omitted from publication.]