

**Ohio Power Company and Local Union No. 478,
Utility Workers Union of America, AFL-CIO.
Case 8-CA-25882**

April 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On November 29, 1994, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception and an answering brief, and the Respondent filed an answering and reply brief.

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

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

1. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, and without affording the Union notice or an opportunity to bargain, ending the longstanding practice of allowing union workmen's compensation (WC) officers to take time off work without pay to attend WC hearings at which employees of the Respondent were presenting claims. In arriving at that conclusion, the judge found that the Respondent had not bargained in good faith to impasse over ending the practice during the parties' 1993 contract negotiations, and that the Union had not waived its statutory right to bargain over that issue by agreeing to the management-rights and zipper clauses

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

No exceptions were filed to the judge's findings that (a) the practice of allowing union officers to take time off without pay to assist employees with their claims at workmen's compensation hearings was a mandatory subject for bargaining, (b) the issue in this case is not appropriate for deferral to arbitration, and (c) the case is not barred by Sec. 10(b). In the latter regard, we wish to correct the judge's erroneous implication that Sec. 10(b) bars consideration of conduct occurring more than 6 months before the issuance of the complaint; in fact, Sec. 10(b) bars consideration of acts committed more than 6 months before the filing and service of the charge.

In affirming the judge's finding that the parties did not bargain to impasse over the elimination of the practice in question, we do not rely on his finding that the parties left the May 26 bargaining session with the understanding that the Union would investigate the issue. That was the situation at the end of the session on May 4, not on May 26. Nor do we rely on his finding that the parties left the May 26 meeting disagreeing over whether they were at impasse.

contained in the resulting collective-bargaining agreement. The Respondent has excepted to both of the latter findings, as well as to the judge's finding that it violated the Act. We find no merit to the exceptions.

In affirming the judge's ultimate findings and conclusions, we rely on his finding that, although the parties discussed the practice during their 1993 contract negotiations and the Respondent's negotiator, Hendon, indicated dissatisfaction with it, the Respondent nevertheless did not advise the Union that it intended or had decided to terminate the practice. The judge based that finding on the demeanor of the witnesses who testified concerning the negotiations and on the absence of any mention of terminating the practice in the Respondent's best and final offer, which it communicated to the Union at the final bargaining session on May 26. The judge found, in fact, that the Respondent never made termination of the practice a clear proposal, as opposed to merely an item for discussion, at any of the negotiating sessions. Accordingly, we find it unnecessary to rely on the judge's alternative finding that, even if Hendon told the Union he was not going to permit WC officers to attend WC hearings, that statement was not a proposal but an ultimatum made to the Union without any time specified for the action to take place.

Turning to the Respondent's waiver arguments, we find, in agreement with the judge, that neither the management-rights clause nor the zipper clause of the 1993 contract constitutes a waiver of the Union's right to bargain over termination of the practice in question. The management-rights clause provided, in pertinent part, that "the company . . . shall have the right to . . . determine the hours of work and schedules[.]"² The zipper clause provided that

The parties agree that this contract incorporates their full and complete understanding and that any prior written or oral agreements or practices are superseded by the terms of this Agreement. The parties further agree that no such written or oral understandings or practices will be recognized in the future unless committed to writing and signed by the parties as a Supplement to this Agreement.

This Agreement shall govern the parties' entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.

The parties for the life of this Agreement hereby waive any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in this Agreement except as specifically noted otherwise herein.

² Art. 5, sec. 5.1.2, of the agreement also provided that "[t]he scheduling of employees' daily and weekly working hours . . . shall be determined solely by the company[.]"

The language in those clauses was identical to the language in the 1990 and 1987 contracts.

As the judge noted, the Board will not infer a waiver of a statutory right unless the waiver is “clear and unmistakable.”³ Generally worded management-rights clauses and zipper clauses will not be construed as waivers of statutory bargaining rights.⁴ Waiver of such rights may be evidenced by bargaining history, but only if the matter at issue has been fully discussed and consciously explored during negotiations and the union has consciously yielded or clearly and unmistakably waived its interest in the matter.⁵

We concur in the judge’s finding that the Respondent has failed to demonstrate that the Union waived its right to bargain over the termination of the practice of allowing WC officers time off without pay to attend WC hearings by agreeing to the cited contract clauses. We agree with the judge that, as the contract does not mention the practice in question, the general language of the management-rights clause referring to the Respondent’s right to determine hours of work and schedules is not a clear and unmistakable indication that the Union intended to waive its right to bargain over the elimination of that practice.⁶ That finding is reinforced by the fact that the Union not only did not “consciously yield” its position with regard to the practice, but stoutly maintained that position at the last negotiating session.⁷ As the judge also found, the fact that the practice continued under the two previous contracts, both of which contained identical management-rights provisions, is further evidence that the management rights clause in the 1993 contract was not intended to change the practice.

Nor do we agree with the Respondent that the Union waived its bargaining rights by agreeing to the zipper clause in the 1993 contract. Although that clause states that the contract supersedes all prior agreements and practices and is to be the parties’ complete understanding and sole source of all rights or claims arising out of the parties’ relationship, we think the judge was correct in finding that, under these circumstances, the parties did not mutually intend the zipper clause to

abolish the practice of allowing WC officers unpaid time off to attend WC hearings.⁸ The contract does not address the practice, and, as we have noted, the Union maintained its position concerning the practice instead of consciously yielding it. And the practice was continued under the prior contracts even though the 1990 and 1987 agreements contained the same zipper clause as the one in the 1993 agreement.

In *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), enf. 646 F.2d 1173 (6th Cir. 1981), the Board found that the union had not waived its right to bargain over the elimination of an annual bonus that was not mentioned in the collective-bargaining agreement, even though the agreement contained a zipper clause similar to the one in this case.⁹ There, as here, the practice had continued despite the zipper clause stating that prior agreements and benefits were superseded by the contract. Nothing was said during contract negotiations that would have caused the union to believe that its failure to include the bonus practice in the contract would preclude it from further bargaining on the subject; indeed, the employer indicated that it intended to continue the practice. On those facts, which are strikingly similar to those presented here, the Board found the absence of a clear and unmistakable waiver of the union’s right to bargain over the elimination of the bonus.

In reaching the same result in this case, we recognize that the Respondent did not affirmatively indicate, as did the employer in *Pepsi-Cola*, supra, that it would continue the practice in question, but rather, expressed displeasure with it. However, we do not find the distinction dispositive, because the subject was discussed in negotiations and the Union indicated its intention that the practice continue. Given the Union’s adherence to its position, and the Respondent’s mere indication of displeasure about the practice, we are unwilling to find that the Union waived its right to bargain merely because the Respondent did not state its intention to continue the practice.

In support of its waiver argument, the Respondent cites *Radioear Corp.*, 214 NLRB 362 (1974), and *Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986), affg. *Columbus Electric Co.*, 270 NLRB 686 (1984). In both of those decisions, the Board found that unions had waived their rights to

³ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

⁴ *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).

⁵ Id. at 185.

⁶ The same finding holds for the general language in sec. 5.1.2, quoted at fn. 2, supra.

⁷ We find *United Technologies Corp.*, 287 NLRB 198 (1987), affd. 884 F.2d 1569 (2d Cir. 1989), a case relied on by the Respondent, distinguishable from this case. In *United Technologies*, supra, the management-rights clause specifically allowed the employer to make and apply rules concerning discipline. The Board found that that language covered changes in disciplinary rules, and that the union, by agreeing to the language, had waived its right to bargain over such rule changes. By contrast, the contract language here, which covers the determination of hours and schedules, neither explicitly nor implicitly covers the practice of allowing WC officers to take time off to attend WC hearings.

⁸ The zipper clause also states that the parties waive their bargaining rights concerning matters contained in the agreement. As the practice in question was not among the matters contained in the agreement, a waiver of the Union’s bargaining rights with regard to the practice cannot be inferred from that contractual provision. See *Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150, 155 (D.C. Cir. 1986).

⁹ The zipper clause provided that the parties waived their rights to bargain with respect to any subject, whether or not referred to in the contract. It also stated that the agreement constituted the parties’ complete understanding and superseded all written agreements or benefits previously made or given.

bargain over the elimination of extracontractual benefits. Both cases, however, are materially distinguishable from this one. In *Radioear*, supra, the parties were bargaining for a first contract, and the union asked for a clause preserving all existing benefits, but the employer rejected that request. Instead, the parties agreed to include a zipper clause in which they stated that the union had had the opportunity to bargain over all proper bargaining subjects and that the employer would not be obligated to bargain over any matter not referred to or covered in the contract. Unlike this case, then, there was no history in *Radioear*, supra, of the benefit's having been granted repeatedly notwithstanding apparently conflicting language in the zipper clause, and the employer, unlike the Respondent, had refused the union's explicit request to maintain all existing benefits. In *Columbus Electric*, supra, the parties agreed on a zipper clause much like the one in this case. During negotiations, the union requested a list of all agreements that would be terminated pursuant to the (apparently newly proposed) zipper clause; the employer refused to provide such a list on the ground that none was maintained, but stressed to the union that "all" in the clause meant just that—all agreements. The Board and the court found that the union understood the import of the contract language, and that by agreeing to it, the union had waived its right to bargain over the elimination of the established bonus. Here, there was no discussion of the zipper clause as it related to the practice of allowing WC officers to take time off work without pay to attend WC hearings and, in contrast with *Columbus Electric*, supra, the practice had continued despite identical language in the zipper clause in the two prior contracts.¹⁰ Thus, there is no indication that the Union understood, or should have understood, that the zipper clause was meant to end the practice.¹¹

¹⁰ Similarly, we find *TCI of New York, Inc.*, 301 NLRB 822 (1991), to be distinguishable from this case. In *TCI*, supra, the Board found that the union had waived its right to bargain over the elimination of an established bonus plan. There, however, the union had first opposed but later agreed to a change in the language of the zipper clause which added a provision that the contract superseded all prior agreements and past practices. It was the parties' course of bargaining that persuaded the Board that (in contrast with *Pepsi-Cola*, supra), the union was on notice that the employer contemplated a change in the bargaining relationship. As we have noted, no such change in the zipper clause was negotiated in this case.

¹¹ In affirming the judge's finding that agreement to the zipper clause did not constitute a waiver of the Union's right to bargain over the practice here, we do not rely solely on the fact that the language of the zipper clause was unchanged from the prior contract(s). Instead, we consider that factor and others, discussed in text above, in finding that the Union did not clearly and unmistakably waive its right to bargain in this regard. The Respondent's reliance on the D.C. Circuit's decision in *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198 (1993), therefore is misplaced. In *Gannett*, supra, the court was troubled by language in the Board's decision stating that a zipper clause carried over without modification from a prior contract cannot be used to eliminate a past practice, and therefore cannot establish a waiver of bargaining rights. The court read that lan-

2. The General Counsel has excepted to the judge's failure to order the Respondent to make employees whole for any losses they may have incurred because of its unlawful termination of the practice of affording WC officers time off without pay to attend WC hearings. The General Counsel claims that because of the Respondent's unlawful action, employees who formerly would have been represented by WC officers have found it difficult or impossible to obtain such representation and at times have been forced to retain attorneys to represent them instead.¹²

We find no merit to the General Counsel's exception. Although the Respondent ceased to allow WC officers to take time off work without pay to attend WC hearings, either WC officers or other union representatives are free to attend such hearings on their days off or on vacation days. Also, according to the unrebutted assertions in the Respondent's answering brief, attorneys are able to provide a much wider range of representation than union officers can offer. Thus, if we were to order the Respondent to pay the expenses of legal counsel, we would be forcing the Respondent to pay for services that union representatives could not have provided in any case. In sum, we find insufficient foundation for the General Counsel's claim for make-whole relief.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

guage as indicating that the Board would not find a waiver based on a zipper clause unless the clause was renegotiated and reaffirmed each time it was incorporated into a new contract. The court found this "reaffirmation" theory erroneous. *Id.* at 204. We rely on no such blanket reaffirmation theory here; our finding that the Union did not waive its bargaining rights is based on all the factors discussed above, one of which is the unchanged language of the zipper clause.

We note that certain courts of appeals have faulted the Board in similar cases for applying waiver analysis when, in the courts' view, the precise issue was not whether the union waived its bargaining rights concerning a subject but whether, in agreeing to contract terms, the union had exercised its bargaining rights in such a way as to foreclose further bargaining on the subject. See, e.g., *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). The record evidence does not establish that the Union here exercised its bargaining rights concerning the practice at issue in such a fashion as to preclude further bargaining on the subject. That practice is not covered by or even alluded to in the contract, either directly or by implication; and as it has never been included in any previous contract, its absence from the current agreement does not bespeak a negotiated change in contract terms. Accordingly, we find that, even under the courts' analysis, the Union did not lose its right to bargain over the termination of the practice.

¹² The General Counsel states that no such remedy was requested from the judge because there was no evidence at the time of the hearing that any employee had sustained monetary losses as a result of the unilateral change. He further avers that, since the hearing, he has been apprised that several employees have incurred such losses.

orders that the Respondent, Ohio Power Company, Brilliant, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Allen Binstock, Esq., for the General Counsel.
James R. Blake, Esq. (Day, Ketterer, Wright & Rybolt), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSEN, Administrative Law Judge. A charge of unfair labor practices was filed on October 25, 1993, by Utility Workers of America, Local 478 (the Union or the Charging Party) against Ohio Power Company (the Respondent).

On December 9, 1993, the Regional Director for Region 8 issued a complaint on behalf of the General Counsel. The complaint in essence alleges that Respondent unilaterally terminated its past practice of permitting the Union's workmen's compensation officer or other union officers to take leave, without pay, to attend workmen's compensation hearings involving claims of unit employees. Respondent terminated the practice without giving prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent about its termination of the practice and the effects of its action, in violation of Section 8(a)(1) and (5) of the Act.

The Respondent filed an answer to the complaint on December 20, 1993, denying that it has violated the Act as alleged, and affirmatively asserting that: (1) it had engaged in good-faith bargaining with the Union prior to abolishing the subject practice; (2) the Union waived the right to bargain over the termination of union officers being permitted to represent unit employees at workmen's compensation hearings on company time; (3) the collective-bargaining agreement between the parties provided a procedure for grievance filing and binding arbitration, and this matter should be deferred to that procedure; and (4) the Union's claim is barred by the statute of limitations and therefore, the complaint should be dismissed.

The hearing in the above matter was held before me April 19, 1994, in Steubenville, Ohio. Briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, which have been carefully considered along with the entire record.

On the entire record in this case, including my observation of the demeanor of the witnesses and my consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent an Ohio corporation, with an office and place of business in Brilliant, Ohio (Respondent's facility), has been engaged as a public utility in the generation, transmission, and distribution of electrical energy.

In conducting its business operations, Respondent annually purchases and receives at its Brilliant, Ohio facility goods

valued in excess of \$50,000 directly from points outside the State of Ohio.

The complaint alleges, Respondent's answer admits, and I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent's answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

On May 25, 1971, the Union was certified the exclusive collective-bargaining representative of Respondent's production and maintenance employees at its Brilliant, Ohio power plant. Respondent and the Union has had a longstanding collective-bargaining relationship and their current contract is effective from June 1, 1993, through May 31, 1996. Sections 6 and 7 of the current agreement, grants members of the Union's bargaining committee and other employees paid time off from work to participate in contract negotiations and meetings concerning the adjustment of grievances. The contract does not provide for paid time off for any other union officers to conduct union business.

The below-named employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, including performance employees, at Cardinal Plant, located in Brilliant, Ohio; excluding office clerical employees and guards, professional employees, supervisors as defined in the Act, as amended, and all other employees.

Since its certification on May 25, 1971, the Union has been the exclusive collective-bargaining representative of Respondent's unit employees.

At all times material, the following individuals held the positions set forth opposite their respective names, and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Mahlon Rice	Director of Human Resources
Gene Hendon	Labor Relations Manager
Wayne Grimm	Human Resources Supervisor
Everett Townley	Plant Manager
Ron Weisenborn	Department Manager

Prior to August 12, 1993, Respondent had an established practice of allowing union workmen's compensation officers or other union officers to leave their work shifts, without pay, to attend or represent unit employees in workmen's compensation hearings.¹

¹ The facts set forth above are not in conflict in the record.

B. Respondent's Unwritten Policy of Permitting Union Workmen's Compensation Officers to Attend Workmen's Compensation Hearings with Unit Employees Claiming Benefits

Article 10, sections 6 and 7 of the current collective-bargaining agreement between the parties contain provisions which grant certain union member employees paid time off from work to participate exclusively in contract negotiations and meetings to adjust grievances.

The uncontroverted evidence of record shows that for more than 10 and as much as 25 years Respondent has followed an established practice of allowing union officers unpaid time off from work to attend national conventions, educational or training conferences, to process complaints or charges filed before various governmental agencies, and to attend and assist or represent unit employees in workmen's compensation hearings. The latter well-established practices remain essentially in effect to the present time in four of five of Respondent's plants, except with respect to union officers attending workmen's compensation hearings.

The 1993 negotiations for a contract

The long-established practice of WC officers being allowed time off without pay to attend WC hearings did not become a subject of consideration by the parties until the parties commenced negotiations for a new collective-bargaining agreement on April 8, 1993. At that time Respondent presented the Union with a set of proposals. On Respondent's list of proposals was item 5 which Respondent calls a "proposal" but the Union calls "item for discussion," which reads: "Discuss work hours and lunch periods."

Respondent contends the language in item 5 included its intention to discuss "Union Officers taking time off to attend WC hearings." The Union contends that, under past bargaining procedures, items such as item 5 was not a "proposal" but only a "subject for discussion."

When the parties met in bargaining session on May 4, 1993, Respondent (Labor Relations Manager Gene Hendon) explained that the Company was looking at down sizing and determining how many people had to be laid off. In an effort to prevent losing worktime as a result of employees not performing work because of taking off for one purpose or another, including returning late from lunch or breaktime, Hendon testified he specifically informed the Union that WC officers would not be permitted to attend WC hearings and classify such attendance as union business and he said that included union officers discussing union business on company time.

Hendon (Respondent), in reference to item 5, explained that the Company's concern was productivity and loss of worktime by employees returning late from lunch and breaktime, as well as union WC officers taking unpaid time off to attend WC hearings. Hendon also advised the Union that based upon his research, he did not believe the Union had any responsibility for representing employees at WC hearings, and that WC officers were losing too much time from work attending such hearings. Union Representative James Kelly informed Respondent it would have to look into the accuracy of Hendon's contention that WC officers were taking too much time off from work. Assuming that Hendon is correct, if the practice is a mandatory subject of bargain-

ing, Respondent was nevertheless obligated to bargain on the longtime practice, irrespective of the responsibility of the Union in WC hearings.

At the May 13 bargaining session, Union Representative Keller informed the Company that the Union understood the Company's concern about union WC officers and that he would relay those concerns to each Local so that they may address the matter.

During the last bargaining session on May 26, 1993, Keller informed the Company that from his research it did not appear that the amount of time WC officers were away from work was excessive or an abuse of the practice. Respondent (Hendon) told the Union there was an abuse; and that the Company would not grant anyone time off for union business to attend WC hearings.

Union Representatives James Keller and Randy Blue, however, denied Hendon or the Company ever proposed or said it was terminating or going to terminate WC officers from attending WC hearing. In support of their testimony, they cite Respondent's written best and final offer dated May 26, 1993 (G.C. Exh. 2), in which there is no written expression of intent to change, or any statement changing the longstanding practice of WC officers attending WC hearings.

Based upon my observation of the demeanor of witnesses Hendon, Keller, and Blue, as well as a copy of Respondent's best and final offer (G.C. Exh. 2), I am persuaded that during the bargaining sessions Respondent did not advise the Union that it had intended, or had in fact decided to terminate the practice of WC officers attending WC hearings during workhours. The record also fails to show that Respondent ever made termination of such practice a clear "proposal" rather than an item for "discussion" during any of the negotiation sessions held April 8, and May 4, 13, 14, or 26, 1993. The record clearly shows, however, that the parties discussed the subject in the May 4 and 26 sessions without a definite and formal proposal, or an agreement on the matter. Moreover, if Hendon simply told the Union he was not going to permit the WC officers to attend WC hearings, I find his statement was not a proposal but more of an ultimatum to the Union without any time specified for such action.

Hendon testified he informed the Union he was not denying employees representation at WC hearings by union officers. He said union officers could still attend WC hearings on their personal day off or their vacation or other time off, but not on company time. At that juncture, Union Representative Keller told Hendon "[Y]ou do what you have got to do and we have got to do what we have to do." As Keller later reviewed Respondent's proposals (G.C. Exh. 3), he said in reference to item 5, "[T]hat's been discussed."

Keller has been the union representative servicing the Local since July 1991 on grievances and arbitration, and he helped to negotiate the current collective-bargaining agreement between the parties. He testified without dispute that Respondent has permitted union officers to take time off to attend union national conventions, educational conferences for educational purposes, NLRB proceedings, to file NLRB, OSHA, and EEO complaints, as well as to attend WC hearings.

At the May 26 meeting Keller told the Company WC officers were not abusing the time off because at the Cardinal plant, WC officer, Saunders, was off from work on WC hearings about 45 hours a year. In response, Hendon said in

the judgement of the Company, any hours off was an abuse because the Company needs WC officers on the job. Union Representative Blue told the Company he believed the Union had a responsibility to represent unit employee claimants at WC hearings. Hendon said he researched the matter and he did not believe such representation was the responsibility of the Union; that the claimant is often represented by an attorney; that the Company was looking at productivity and it was not granting any employee time off to conduct union business (attend WC hearings); and that the Union had full-time employees who could attend such hearings. Keller then told Hendon you have to do what you have to do.

Keller further testified that the parties had no discussion during the negotiation sessions on changing article 13 of the contract (dealing with the terms and completeness of the contract); that the subject company practice on WC hearings is not included in the contract, and nor are other subjects such as 3 months of overtime, staffing, vacation staffing, holiday vacation for 24 hours, or 7 days a week been included in the contract since 1969. During the discussions the Union never indicated it was waiving its right to bargain over these or any of the Company's past practices. Keller further stated that the Union pays a WC officer only for time lost—time for which the officer was not paid by the Company, and not for an officer attending a hearing on his own vacation or personal day off for which the Company pays him.

*C. Respondent Terminated the Practice of Allowing
Union WC Officers to Attend WC Hearings
During Worktime*

Jeffrey Saunders has been serving as the Union's workmen's compensation (WC) officer. In the latter capacity, Saunders informs employees of their rights under the WC Act, and until August 12, 1993, he accompanied unit employee-claimants at WC hearings. He has also talked at unorganized plants, including Respondent's Galvin plant, about the employees' need to have a WC officer.

For the past 10 years, whenever Saunders had an employee who wanted him to accompany the employee to a WC hearing, Saunders would simply notify his supervisor of the time he needed to be off from work and he was always granted permission to be off without pay. The Union would in turn pay Saunders for his time off from work. This practice has been in effect for many years until August 12, 1993, when Saunders was called to the office and advised by department Head Ron Weisenborn, in the presence of Chief Union Steward Bill Duncan, that Weisenborn had been informed by his superior that Saunders was not allowed to attend any WC hearings, unless he did so on his vacation or personal day off.

Saunders said he asked Weisenborn why was he no longer allowed to attend the hearings; that he believed he was no longer allowed to do so because he was so successful in representing employees; and that the prohibition against his going to the hearing was a retaliation by the Company against him because he attended and attempted to organize Respondent's nonunion Galvin plant. The latter testimony of what Saunders said to Weisenborn is essentially corroborated by Union Chief Stewart William Duncan and I credit their account not only because I was persuaded by their demeanor that they were testifying truthfully, but also because their accounts are supported by the record evidence as a whole.

Saunders further testified, without dispute, that whenever he interrupted work to attend WC hearings he would make up the work the next day, or the other senior technician would fill in for him and do the job. Saunders has not attended or represented any unit employees at a WC hearing since August 12, 1993, because he was prohibited from doing so by management. Prior thereto, he said he was involved in approximately 8 hearings a year, some of which involved more than 1 hearing, which resulted in about 12 hearings a year. He said favorable results were obtained at those hearings on 75 percent of the claims, which consumed from about 2 to 8 hours away from work, for a total of approximately 40 to 50 hours a year.

The day after Saunders was told he could not attend WC hearings, Union Officer Blue testified without dispute that he was called by human resources supervisor, Wayne Grimm, who told him that Everett Towne, plant manager, told Grimm to make it clear that no union officer was allowed to attend WC hearings and that included all officers, not simply Saunders, and he wanted that understood. Blue said Respondent had not given him or the Local prior notice of this change in the longstanding practice. Nor had Respondent offered to bargain with the Union on the change in practice. He said some long-term practices were changed after mid-term discussions, but "WC officers attending hearings" was not one of the subjects of past discussions for change.

When the subject of WC officers attending WC hearings was discussed during negotiations, Blue testified that he believed Respondent (Hendon) may have referred to Jeffrey Saunders, when he stated that Saunders' attendance at educational conferences did not present a problem. Other locals did not present any research on the length of time WC officers spend away from the job. It was not until August 13, 1993, when Respondent clarified its prohibition by stating that no WC officers (in any of its plants) will be allowed to go to WC hearings.

Curtis Koshena, employed 6 years by Respondent and now works as mechanic welder, was vice president and is now president of the Union. He testified he was involved in negotiations for three contracts including the current one; and that the parties have engaged in midterm negotiations on procedural matters in the past but did not address the contract on past practices of union officers attending WC hearings. His testimony is consistent with the testimony of union witness Blue.

Gene E. Hendon, manager for Respondent testified that Respondent has five plants, seven divisions, and one general office. It has 11 collective-bargaining agreements with unions involving two International Unions. He said he negotiated the contracts with the Unions, including the current one with the Cardinal plant near Steubenville, Ohio. He said he determined that workmen's compensation officers representing employees in WC hearings was not necessary. Although union officers do not receive pay by the Company for doing union business (WC hearings) their benefits of \$7 an hour are not tolled when they are off on union business.

Hendon said he further stated that WC officers do not represent the claimant in these hearings and they have little to do with the decision that is made by the hearing officer upon an established formula. The Company is not contesting the claim in the hearing but it only evaluated the claim for the percentage owed. The Company's decision to terminate the

practice of WC hearing officers was not directed at Saunders, and the decision was made prior to implementing it in other locals. He acknowledged termination of the officers attending WC hearings was not discussed during the May 13 or 14 meeting because the Union stated it was not prepared to discuss the matter on those occasions.

Manager Hendon acknowledged that the Company's best and final offer did not contain any language about attending workmen's compensation hearings. He said the Company did not believe anything needed to be discussed about terminating the practice of union officers attending WC hearings, because it never has been any language in the contract on the subject. The Company implemented the change on WC officers attending hearings on June 1, 1993, the date the contract was ratified with the Cardinal plant. It was implemented on July 1 for the other six plants. Local Union 478 nor any of the other plants employees filed a grievance against the change in policy.

Finally, Hendon testified, and Respondent's counsel argues, that the Company changed its policy of WC officers attending WC hearings pursuant to the management-rights clause of the current collective-bargaining agreement, which provides in pertinent parts as follows:

Article 3

Rights of Management

3.1 Except as otherwise provided in this agreement, the company, in the exercise of its functions of management, shall have the right to decide the policy, methods, safety rules, direction of employees, assignment of work, equipment to be used in the operation of the company's business, and to determine the hours of work and schedules, the right to hire, discharge, suspend, discipline, promote, demote, and transfer employees, and to release employees because of lack of work or for proper or legitimate reasons, subject, however, to employee's privilege of bringing a grievance as provided in this agreement. The enumeration of the above management prerogatives shall not be deemed to exclude other prerogatives not enumerated.

. . . .

Article 5

Working Conditions

5.1 Work week and work day

5.1.1 The work week shall consist of seven consecutive calendar days beginning and ending with Friday night (midnight between Friday and Saturday) or the starting time of a shift that overlaps Friday midnight. The work day shall be a period of 24 hours beginning and ending at midnight or the starting time of the shift that overlaps midnight.

5.1.2 The scheduling of employees' daily and weekly working hours, including the scheduling of employees to work more or less than eight (8) hours in a work day or forty (40) hours in a work week, shall be determined solely by the company. To the extent practicable, however, work schedules shall include work days between eight (8) and twelve (12) consecutive hours (exclusive of an unpaid lunch period where provided by the com-

pany) and work weeks of between thirty-six (36) and forty-eight (48) hours. This section 5.1.2 shall not be construed as a guarantee of hours of work or pay.

. . . .

Article 13

Conclusion

The parties agreed that this contract incorporates their full and complete understanding and that any prior written or oral agreements or practices are superseded by the terms of this agreement. The parties further agreed that no such written or oral understandings or practices will be recognized in the future unless committed to writing and signed by the parties as a supplement to this agreement.

This agreement shall govern the parties' entire relationship and shall be the sole source of any and all rights or claims which maybe asserted in arbitration hereunder or otherwise.

The parties for the life of this agreement hereby waive any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in this Agreement except as specifically noted otherwise herein.

Manager Hendon explained that witness Koshena's testimony about midterm discussions involved a provision in the contract on overtime procedures. It was on language that was in the contract. There was no signed agreement on the matter. He said the same thing is true with respect to the discussion about vacation and shift scheduling. There was no signed agreement and the problem was resolved. The Union never made a proposal on WC officers attending WC hearings. The Company changed a practice for which it did not have to go to the contract in order to change it. Hendon acknowledges there was no discussion on the zipper clause during their discussions with the Union about WC hearings.

Analysis and conclusions

It is well established by the uncontroverted evidence of record that Respondent's longstanding practice of permitting union officers to take off from work without pay, to attend and participate in workmen's compensation (WC) hearings on behalf of a unit employee claimant. On August 12, 1993, the Respondent terminated its practice of permitting union officers to attend workmen's compensation hearings during worktime, except on the union officer's vacation or personal day off.

The General Counsel contends that the longtime practice of permitting union officers unpaid time off from work to attend WC hearings is a mandatory subject of bargaining; and that the Respondent could not unilaterally terminate the practice without first notifying the Union it was going to do so, and affording the Union an opportunity to bargain on the termination of the practice. In support of his contention, the General Counsel cites *BASF Wyandotte Corp.*, 278 NLRB 173 (1986); and *Axelson, Inc.*, 234 NLRB 414 (1978).

It is particularly noted that in *Axelson*, supra, the Board stated at 415:

We have defined mandatory subjects of bargaining as:

Those comprised in the phrase “wages, hours and other terms and conditions of employment” as set forth in Section 8(d) of the Act. While this language is broad, parameters have been established, although not qualified. The touchstone is *whether or not the proposed clause sets a term or condition of employment or regulates relation between the employer and employees.* [*International Union of Operating Engineers, Local Union No. 12*, 187 NLRB 430, 432 (1970).] [Emphasis added.]

In reference to terminating the payment of wages or time spent in negotiations as a mandatory subject of bargaining, the Board further stated that: “a matter that concerns the relations between an employer and his employees . . .” or as the Supreme stated in *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 178–180 (1971):

a matter that “vitality affects” the relations between an employer and employees is a mandatory subject of bargaining, whereas a matter that bears a “speculative and insubstantial” impact on the relations between an employer and employees is a permissive subject of bargaining.

In concluding, the Board said, as it had previously found,

wages paid to employees during presentation of grievances constitute a mandatory subject of bargaining and that the unilateral abrogation of such a contractual term or past practice, [*Hilton-Davis Chemical Co.*, 185 NLRB 241, 242–243 (1970)], violates Section 8(a) (5) and (1) of the Act. . . . [and so does] union-related matters inure to the benefit of all the members in the bargaining unit by contributing to more effective collective-bargaining representation and thus, “vitality affect” the relations between an employer and employees.

Although the practice of allowing union officers to attend WC hearings during worktime was without pay, it is noted that the services of Union Officer Saunders nonetheless inured to the benefit of individual unit employee claimants. This is so even though Saunders was not paid by Respondent for time off from work; and even though Saunders may not have been representing employees as an advocate or in an adversarial role as an attorney at law. Saunders nevertheless assisted unit employees by explaining their rights to them under the law, helping them complete WC forms, impliedly giving them moral or emotional support before and during WC hearings, as well as by helping to maintain health and safety conditions in Respondent’s plant.

It was on August 12, 1993, when Union Officer Saunders was first precluded by Respondent from attending a WC hearing. This was the first time the Union learned that Respondent was implementing termination of the practice of allowing union officers to attend WC hearings. Since Respondent had not given the Union prior notice that it was going to implement or change the longstanding practice, the change was not only unilateral but Respondent also failed to afford the Union a reasonable opportunity to bargain on the change of this longstanding practice.

Respondent’s unilateral termination of the practice also “vitality affected” the benefits which inured to Union Officer

Saunders because it restricted him from attending and participating in WC hearings, only to times when Saunders is on vacation or on a personal day off. The Union, however, does not pay union officers when they attend WC hearings on their own vacation time or personal days off, because the officers are being compensated for such days by the employer. Consequently, I find that Respondent’s unilateral termination of the longstanding practice affected unit employees, as well as union WC officers in their relationship with the Respondent, concerning safety and wages. As such, the longstanding practice constituted a mandatory subject of bargaining. *BASF Wyandotte Corp.*, supra; *Axelson, Inc.*, supra.

Although Respondent contends it notified the Union of its intent to change the practice of allowing union officers to attend WC hearings during work hours, it is particularly noted that during the last negotiation session on May 26, Manager Hendon simply exclaimed on one or two occasions that he was not going to permit WC union officers to attend WC hearings on company time; that union WC officers could attend such hearings on their vacation or personal days off; and that Respondent was not denying union WC officers an opportunity to attend WC hearings on their vacation or personal day off. The parties did not agree on any resolution of “the time off practice” discussed in the May 26 bargaining session. Consequently, I find that Respondent’s mere exclamation that it was not going to permit union officers to attend WC hearings on company time did not definitely announce that it was terminating the practice at a specific time, and its exclamation alone did not constitute notice to the Union that Respondent was actually terminating the practice at that time.

In fact Respondent contends it implemented termination of the practice on June 1, 1993, when the negotiated contract with the Union at its Cardinal plant became effective and that it implemented termination of the practice at its five other plants when the contract at those plants became effective July 1, 1993. Respondent, however, neglected to establish and the record evidence fails to show that Respondent ever communicated notice to the Union that it was implementing the longstanding practice of allowing union officers unpaid time off to attend WC hearings. In fact, if Respondent’s simple exclamation that it was going to terminate the practice amounted to an ultimatum, or fait accompli. *Id. SGC Control Services, Inc.*, 275 NLRB 984 (1985).

Did the parties bargain to impasse?

Respondent alleges and argues that it engaged in good-faith bargaining with the Union; and that it bargained to impasse with the Union on the subject of time off of WC officers, prior to terminating the practice.

With respect to bargaining to impasse, in *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board stated:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is agreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant

factors to be considered deciding whether an impasse in bargaining existed.

In the instant case, the parties met in bargaining sessions on April 8 and May 4, 13, and 26, 1993. The record shows, however, that the Respondent mentioned the subject of the union officers attending WC hearings in the May 4 meeting. Respondent raised the same subject in the May 13 meeting when the Union said it was not prepared to discuss the subject.

The only real discussion of the subject of union officers attending WC hearings occurred in the May 26 meeting, when the Union did not agree with Respondent that too much time was being spent by union officers attending WC hearings; or that unpaid time off allowed union officers to attend WC hearings was not being abused by union officers and such time off should not be terminated. The parties left the meeting disagreeing that they were at impasse in their discussion, and the Union promising to get back with Respondent after it investigated the matter with the membership in 10 days. Although the Union did not get back to Respondent until 5 weeks later, I find that the parties had not bargained to impasse for the following reasons:

1. The discussion or bargaining history of the parties on the subject of union officers attending WC hearings was brief, in one session, and of short duration.

2. The importance of the issue of union officers attending WC hearings was not explicitly listed in item 5 of Respondent's proposals, while all other items in Respondent's proposals were explicitly stated therein as proposals.

3. The contemporaneous understanding of the parties on May 26 was one of disagreement that union officers were spending too much time at WC hearings, and that Respondent did not submit any written estimated or statistical proof that they were. The parties left the meeting without an agreement and with the understanding that the Union would get back to the Company after hearing from the Locals on the matter. *Taft Broadcasting Co.*, supra, and *Television Artists*, supra.

In any event the employment condition which Respondent sought to change (allowing union officers to attend WC hearings on work time) was not in the contract between the parties, and the bargaining obligation of the Respondent remained the general one of bargaining in good faith to impasse before instituting change. *Michigan Bell Telephone Co.*, 306 NLRB 281 (1982).

Respondent (Manager Hendon) admitted that its best and final offer to the Union did not contain any language about union officers attending WC hearings, because Respondent did not believe the latter subject needed to be discussed, since the language of the practice was never in the contract between the parties. If Respondent really believed this, it may be reasonably inferred from this impression that the parties were not at impasse in bargaining and Respondent was not bargaining in good faith.

I therefore conclude and find upon the above uncontroverted and credited testimonial and documentary evidence, that Respondent did not bargain in good faith to impasse because Respondent not only did not believe it had an obligation to bargain on this longstanding practice, since language on the practice was not a part of the contract; and that the parties only engaged in minimal dialogue on changing the

practice of union officers attending WC hearings in the negotiation session on May 26, 1993. The bargaining history on the subject in the latter session was of extremely short duration. The evidence also fails to show that the parties ever reached a contemporaneous understanding that they were at impasse on the subject. In fact the evidence shows the issue of impasse was disputed by the parties. Finally, the evidence fails to show, and I find that the parties did not in fact bargain to impasse on the longstanding practice. *Michigan Bell Telephone Co.*, supra.

Did the Union waive its right to bargain on the subject pursuant to the management-rights clause of the contract?

Finally, Manager Hendon testified that the Company changed its policy on union officers attending WC hearings pursuant to the management-rights clause of the current collective-bargaining agreement. As discussed above, however, Respondent's unilateral change of the longstanding practice of allowing union officers to attend WC hearings is a mandatory subject of bargaining by statute.

Whether or not the Union waived its right to bargain on this mandatory subject of bargaining is not limited to a construction of the language in the management-rights clause of the contract between the parties. As the Supreme Court has stated in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983):

We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the understanding is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

While the management-rights clause of the current contract, as well as the last two contracts between the parties provided that the Company shall determine "hours of work and schedules"; "that the contract incorporated the full and complete understanding of the parties and no oral understanding or practice will be recognized unless in a signed writing"; "that the agreement shall be the sole source of any and all rights and claims"; and "that the parties waived any rights to request to negotiate or bargain on any matter contained in the contract." Clearly, the latter waiver clause applies to terms or matters in the contract.

Conspicuously absent in the language of the clause, however, is any mention of the longstanding (25 years) practice of the Company allowing union officers unpaid time off to attend WC hearings, or that the Union has waived its right to bargain on the Company's termination of that longstanding practice, which by statute, is a mandatory subject of bargaining.

Consequently, I cannot infer from the language in the above management-rights clause that the Company's right to determine "hours of work and schedules," that the Union intended to waive its right to bargain on the Company's termination of the unwritten practice of allowing union officers time off to attend WC hearings with unit employees. Since such comparable language was not used in the clause, the clause does not contain the required clear and unmistakable language that the Union has waived its right to bargain on Respondent's termination decision. *Metropolitan Edison Co.*

v. *NLRB*, supra; *Dearborn Country Club*, 298 NLRB 915 (1990).

Since the language in the management-rights clause cited by the Respondent was a part of the two previous contracts while the Respondent acquiesced in continuation of the practice, it may be reasonably concluded that the management-rights clause was not intended to address the Company's practice on WC hearings. At no time during the bargaining sessions between the parties did the Union willingly concede to Respondent's desire to change the practice. In fact the Union (Blue and Keller) made it clear that the Union intended to adhere to the longstanding practice on WC hearings. Nor does the phrase in the clause "oral understanding or practices" excuse the Respondent for its action, since this language alone is ambiguous, and is not clear and unmistakable that the Union waived its right to bargain on a change of the practice. Such ambiguous language may not be used to justify Respondent's unilateral changes.

More specifically, article 13 of the contract appears to indicate that prior practices which the parties intended to abolish were superseded by provisions recited in the contract. The contract in the instant case does not mention the practice of union officers attending WC hearings, which practice continued long after the effective dates of the management-rights clause in the current and two past contracts. *Associated Services for the Blind*, 299 NLRB 1150, 1151-1152 (1990); *Murphy Oil U.S.A., Inc.*, 286 NLRB 1039 (1987). As the Board stated there:

As the Board has recognized, the normal function of such clause is to maintain the status quo, not to facilitate unilateral changes. *GTE Automatic Electric*, 261 NLRB 1491, 1492 (1992).

The Board also stated in *Southwestern Portland Cement Co.*, 303 NLRB 473, 479 (1991):

Where an employer is relying on zipper clauses, such as those herein, to enable it to make unilateral changes, or to institute new terms and conditions of employment not contained in the agreement the record must disclose that the particular matter in issue was fully discussed or consciously explored in negotiations, and that the Union consciously yielded, or clearly and unmistakably waived its interest in the matter. *Angelus Block Co.*, 250 NLRB 868 (1980); *Rockwell International Corp.*, 260 NLRB 1346 (1982).

The evidence of record clearly shows that during the negotiations the parties did not fully discuss or consciously explore Respondent's complaint that union officers were spending too much time at WC hearings, or whether the long time practice of attending such hearings would continue or be terminated. Respondent did not present any evidence in support of its complaint that the WC officers were spending too much time at WC hearings. More significantly, Respondent did not contradict or present evidence to refute Saunders' testimony or the Union's report that Saunders was spending approximately 40 or 45 hours a year at WC hearings. Respondent did not offer any proposals on this subject and it did not state that it had intended to terminate the practice at any specific time before it precluded Saunders from attending a WC hearing on April 12, 1993.

Are issues in the instant matter barred by Section 10(b) of the Act?

Respondent argues that the charge and complaint in the instant case is barred by Section 10(b) of the Act. As counsel for the General Counsel argued, however, presumably Respondent is contending that the practice on attending WC hearings was terminated by the effective dates of the current contracts (June 1 and July 1, 1993). The evidence fails to show, however, that the Union had any knowledge that the practice on WC officers had been terminated by Respondent until August 12, 1993, when officer Saunders was forbidden to attend a WC hearing. Under these circumstances the time frame for limitations did not begin to run until August 12, 1993, and the complaint was issued December 9, 1993, well within the period of 10(b) limitations.

Should the issues in the instant matter be deferred to arbitration?

Finally, Respondent argues that the matter in issue is one for deferral to the grievance arbitration procedure under the current contract. Respondent, however, does not cite any provision of the contract pursuant to which the current issue should be deferred. The contract does specify what controversies arising under the contract should be deferred to grievance arbitration, but the matter of attending WC hearings is not a subject in the contract. In fact, the contract is silent on the practice of union officers attending WC hearings. Under these circumstances, deferral for grievance arbitration of this matter is not appropriate.

I therefore conclude and find upon the foregoing credited evidence and cited legal authority that Respondent unilaterally terminated its longstanding practice of allowing union officers unpaid time off to attend WC hearings on claims of unit employees; that the said practice was a mandatory subject of bargaining; that Respondent terminated the practice without giving the Union prior notice of the termination, and without affording the Union an opportunity to bargain with Respondent about termination of the practice, and the effects of its action; that Respondent failed to bargain to impasse with the Union before it terminated the practice; and that Respondent's action in unilaterally terminating the practice constituted an interference with, restraint upon, and coercion against employees in the exercise of rights guaranteed them in Section 7, in violation of Section 8(a)(1) of the Act, and its action also constituted failure and refusal to bargain in good faith with the exclusive collective-bargaining representative (the Union) of its employees, in violation of Section 8(a)(1) and (5) of the Act.

THE REMEDY

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

Having found that Respondent failed and refused to bargain with the Union, the designated collective-bargaining representative of its unit employees, by unilaterally terminating its longstanding practice of allowing union officers unpaid time off to attend workmen's compensation (WC) hearings, without notifying the Union and affording it an oppor-

tunity to bargain on the termination, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7, in violation of Section 8(a)(1) of the Act; and that the same conduct of Respondent also constituted failure and refusal to bargain with the Union in good faith, in violation of Section 8(a)(1) and (5) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct, and that it take certain affirmative action to effectuate the policies of the Act.

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

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

CONCLUSIONS OF LAW

1. Respondent Ohio Power Company is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Local Union No. 478, Utility Workers of America, AFL-CIO, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including performance employees, at the Cardinal plant, located in Brilliant, Ohio; excluding office clerical employees and guards, professional employees, supervisors as defined in the Act, and all other employees, constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the designated and exclusive collective-bargaining representative of employees described in the above unit for purposes of collective-bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

5. At all times material, the Respondent and the Union have been parties to successive collective-bargaining agreements for more than 10 years, the last of which was effective by its terms from June 1, 1990, through June 1, 1993.

6. By unilaterally deciding and implementing termination of its longstanding practice (of allowing union officers unpaid time off to attend WC hearings on behalf of a unit employee), without the consent of the Union and without affording the Union an opportunity to bargain on the proposed change, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by the Act, in violation of Section 8(a)(1) of the Act, and by failing and refusing to bargain with the Union in good faith, in violation of Section 8(a)(1) and (5) of the Act.

7. By unilaterally deciding and implementing the termination of the longstanding practice of allowing union officers unpaid time off to attend WC hearings on behalf of claimant employees, without the consent of the Union and without bargaining with the Union to impasse, Respondent has violated Section 8(a)(5) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Ohio Power Company, Brilliant, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the Union by implementing the termination of its longstanding practice without prior notice to the Union and not allowing the Union an opportunity to bargain on the change.

(b) Failing and refusing to bargain collectively with the Union to impasse on Respondent's decision to terminate the practice of allowing union officers unpaid time off to attend WC hearings with unit employee claimants.

(c) Unilaterally terminating its longstanding policy of allowing union officers unpaid time off to attend WC hearings with unit employee claimants, without notifying the Union and without bargaining with the Union in good faith to impasse.

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

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

(a) Rescind the termination of the policy of allowing union officers unpaid time off to attend WC hearings of unit employee claimants.

(b) Reconstitute the longstanding policy of allowing union officers unpaid time off to attend WC hearings of unit employee claimants from August 12, 1993, until such policy is changed pursuant to agreement with the Union or by valid good-faith bargaining to impasse, on behalf of employees in the below appropriate bargaining unit:

All production and maintenance employees, including performance employees, at Cardinal Plant, located in Brilliant, Ohio; excluding office clerical employees and guards, professional employees, supervisors as defined in the Act, as amended, and all other employees.

(c) On request, bargain in good faith with the Union on Respondent's practice of allowing union officers unpaid time off to attend WC hearings on behalf of unit employees.

(d) Post at Respondent's Brilliant, Ohio and other plants with which it has collective-bargaining agreements with the Union, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, 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

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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 interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by the Act, by unilaterally deciding and implementing termination of our longstanding practice of allowing union officers unpaid time off to attend WC hearings with unit employee claimants, without first notifying the Union and affording it an opportunity to bargain on the proposed termination of the policy.

WE WILL NOT unilaterally terminate our longstanding policy of allowing union officers unpaid time off to attend WC hearings with unit employee claimants, without notifying the Union and without bargaining with the Union in good faith to impasse.

WE WILL rescind the termination of our practice of allowing union officers unpaid time off to attend WC hearings with unit employee claimants.

WE WILL NOT fail and refuse to bargain with the Union as the duly designated collective-bargaining representative of our employees in the below described appropriate unit:

All production and maintenance employees, including performance employees, at Cardinal Plant, located in Brilliant, Ohio; excluding office clerical employees and guards, professional employees, supervisors as defined in the Act, as amended, and all other employees.

WE WILL, on request, bargain in good faith with Local Union No. 478, Utility Workers of America, AFL-CIO on our practice of allowing union officers unpaid time off to attend WC hearings with unit employee claimants.

WE WILL apply and honor the terms of the collective-bargaining agreements, effective June 1, 1993, and July 1, 1993, or any added or successor agreement thereto, at our Brilliant, Ohio, and our other plants, until such policy or practice is changed pursuant to agreement with the Union or after valid bargaining with the Union to impasse.

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

OHIO POWER COMPANY