

Klein Tools, Inc. and Local Lodge No. 1255 of the International Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers, AFL-CIO.
Case 13-CA-32502

November 14, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On July 24, 1995, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs.

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

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

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

²We agree with the judge that there was no impasse when the Respondent unilaterally implemented its no-smoking policy. In doing so, we find it unnecessary to rely on the judge's discussion in sec. III.S.2, of her decision, which suggests that the Respondent did not truly believe that the Union's January 20, 1994 proposal "widened the gap" between the parties, or on the judge's characterization of the Respondent's bargaining proposal that day as "regressive."

We also agree with the judge that the Respondent has failed to show that the management-rights clause or the waiver provision, or both, clearly and unmistakably waived the Union's statutory right to bargain about this issue. Even under the "contract coverage" standard applied by the courts of appeals for the Seventh and District of Columbia Circuits, we would reach the same result. In this regard, we note that the contract is silent on the no-smoking issue. Cf. *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). In *Chicago Tribune*, supra, the management-rights clause gave the company the right to impose reasonable rules relating to employee conduct. The court found that the alcohol and drug standards adopted by the employer were reasonable rules relating to employee conduct within the express terms of the management-rights clause. In this case, by contrast, the management-rights clause permits the Respondent to "adopt and enforce such policies, plant rules and regulations as it may believe are necessary for efficient control and direction of its employees . . ." On this record, we find that the Respondent has failed to demonstrate a belief that its no-smoking policy, as proposed, was necessary for the efficient control and regulation of its employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Klein Tools, Inc., Skokie, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard S. Andrews, Esq., for the General Counsel.

R. Clay Bennett, Esq. (Keck, Mahin & Cate), of Chicago, Illinois, for the Respondent.

James R. Waers, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, between February 27 and March 1, 1995, pursuant to a charge filed against Respondent Klein Tools, Inc. on May 13, 1994, by Local Lodge No. 1255 of the International Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers, AFL-CIO (the Union), and a complaint issued on July 18, 1994. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, by unilaterally implementing a nonsmoking policy without bargaining in good faith with the Union.

On the entire record in the case, including the demeanor of the witnesses,¹ and after due consideration of the briefs filed by counsel for the General Counsel, Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation that manufactures tools. Respondent has an office and place of business in Skokie, Illinois (sometimes referred to in the record as Respondent's Chicago facility; Skokie is a Chicago suburb). During the calendar year 1993, a representative period, Respondent, in conducting such operations, purchased and received at its Skokie, Illinois facility products, goods, and materials valued in excess of \$50,000 directly from points outside Illinois. I find that, as Respondent admits, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

II. THE UNION'S STATUS

At all material times the Union has been a labor organization within the meaning of the Act.

¹My factual findings are based partly on memoranda written by Respondent's vice president of human relations, Bruce Beebe, to his superiors and "For the Record," with respect to events that occurred in his presence. These memoranda were received into evidence without objection or limitation and, moreover, as to some of them Beebe testified that when he wrote them, he tried to make them factually accurate. I regard them as probative (although not necessarily credible) evidence of the truth of their contents.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent manufactures tools in seven facilities in the continental United States.² Of these seven facilities, three have been unionized at all times material, namely, the Skokie plant and a plant at Moran, Kansas, at both of which the employees are represented by a Boilermakers local; and a plant at Jonesville, Michigan, whose employees are represented by a Teamsters local. In addition, on an undisclosed date between February 21, 1994, and February 27, 1995, a Teamsters local was certified by the Board as the representative of Respondent's employees in Cedar Rapids, Iowa. Respondent's nonunion facilities are located in Roselle, Illinois, in Fort Smith, Arkansas, and in San Luis, Arizona.

Since at least February 10, 1992, the Union has been the bargaining representative of Respondent's Skokie employees, in an admittedly appropriate unit that consists essentially of production and maintenance employees and is described in detail in Conclusion of Law 3, *infra*. The most recent contract between the parties was effective on February 10, 1992, and expires by its terms no earlier than February 9, 1996. For the Union, the signatories on this contract included then-Union President and Bargaining-Committee Chairman Ernest Garza and employees Robert Aryee, Wendell Hickey, and Oscar Orellana;³ each of the negotiating sessions involved in the instant case was attended by at least one of these employees as a member of the employee bargaining committee. For Respondent, the signatories included Vic Palazzolo, who at all material times has been the personnel manager of the Skokie plant and who attended all of the negotiations here at issue, and Mathias A. Klein III (Mat Klein III), who at all material times has been Respondent's executive vice president of operations. The unit covered by this contract consists of about 230 employees.

Respondent's principal spokesman during the March 1993–January 1994 negotiations was Bruce Beebe, who since March 1992 (after the effective date but before the execution of the 1992–1996 bargaining agreement) has been Respondent's vice president of human resources. Beebe is attached to Respondent's corporate headquarters, which are located in the same building as the Skokie plant. Beebe's immediate superior is Mat Klein III, whose immediate superior is Respondent's president and chief operating officer, Richard T. Klein Jr. (Rick Klein); Rick Klein and Mat Klein III, who are part owners of the business, are sometimes referred to herein as the Kleins.⁴ Beebe testified that if Rick Klein sent him a memo, he considered it an important piece of information, and that if Rick Klein wants him to do something, he

²In addition, at least two such facilities outside the United States are partly owned by a corporate facility of Respondent.

³So spelled in the printing under his signature on the bargaining agreement. The transcript and exhibits spell his name in various ways. As to Hickey's first name, I likewise follow the printed portions of the bargaining agreement rather than the handwritten bargaining notes of International Representative Casper Green.

⁴Respondent's owners and officers also include Michael S. Klein, who is chairman of the board and is Respondent's chief executive officer, and Thomas R. Klein, who is Respondent's vice president of materials and logistics. Although it appears likely that all four of the Kleins are related to each other, their kinship is not shown by the record.

is going to give it his attention. Beebe's job duties include "broad-ranging advisement to the executive staff; oversight of all the compensation and benefit programs, training, employment, health, and welfare," and negotiating with the Union regarding contracts and policies and changes to contracts. As to Respondent's relationship with the Union, Beebe testified in February 1995, "We have a long standing relationship with the [Union] in Skokie. It has been a supportive relationship. We have had our differences but they have not been very many in number and we have done many good things together."

Casper Green, who until the end of 1993 was an International representative for the Union's parent International and who serviced Respondent's Skokie facility between about early 1992 and about the end of 1993, testified that before the events which gave rise to this proceeding, almost all of his dealings as to the Skokie facility had been with Skokie Personnel Manager Palazzolo, and that Green considered the bargaining relationship during this period to be "very good" because "I was always open and straightforward and truthful with him, and he was the same with me."

B. Events Preceding Respondent's Initial Broaching of Its Desire To Make the Skokie Plant Smoke Free

Until April 1994, Respondent's employees were free to smoke within the plant buildings, except for some of the lunchrooms, some of the restrooms, and certain areas that contained inflammable materials or where processes were performed that created a danger of fire or explosion. Respondent annually develops, for the ensuing year, action plans for things Respondent would like to undertake for the business on a year-by-year basis. About late 1992, after the execution of the bargaining agreement at Skokie, Respondent decided that it wanted to begin some process that would eventually render free of tobacco smoke all the plant buildings in all of the plants owned by Respondent. A memorandum dated August 7, 1992, to Beebe from Rick Klein, states:

I would like to proceed with the Smoking Cessation Program [a program to assist individual employees to stop smoking completely]. However, in light of our long-range strategic planning committee discussions, I would suggest that we fold this into the action plan process.

On undisclosed dates before October 7, 1992, Respondent's management conducted discussions among themselves with respect to employee health and how to protect employees on the worksite from harmful elements. These discussions included discussions of potential regulation, by the Occupational Health and Safety Administration, which would find employers responsible for diseases caused by smoking, or nonsmokers' exposure to tobacco smoke, in the workplace.

On October 7, 1992, Beebe sent to Rick Klein, with a courtesy copy to Mat Klein III, a memorandum on the subject of "Smoking," which stated, in part:

we would be best served by developing a longer term strategy in this area for the Corporation . . . I firmly believe that the end-point of this whole process will be our desire, reinforced in all likelihood by Municipal,

State or Federal Regulation, that our facilities be "smoke-free." I have not heard any disagreement inside Klein Inc. on this point . . . it would be in the best interest of the company and all of [its] employees to put together a managed process by which we will come to that end-point. I am concerned that any number of seemingly unrelated and perhaps unilateral actions which would restrict or prohibit smoking in this area or that are not going to be nearly as effective as if they were discussed and seen as part of a larger program to which the Corporation is committed.

I would like to propose that we take the following steps.

Take no single point unilateral actions without the benefit of a communicated Corporate objective.

Define and communicate the Corporate Objective as well as the time frame for attainment.

Beebe's memorandum went on to propose a conference on the matter between him and the Kleins on October 8, 1992. There is no further evidence regarding this proposed conference.

C. Respondent First Advises the Union of a Desire To Establish a No-Smoking Policy (Late-February, Early-March 1993)

At all times relevant here, the Union's representatives included a bargaining committee, of about five employees, whose membership remained essentially the same, although on July 1, 1993, committee member Markos Kalamaris succeeded committee member Garza as committee chairman and president. In 1993, the Union's representatives also included International Representative Green.

On a day in late February or early March 1993, when Green was visiting the Skokie plant on grievance meetings, Palazzolo and Beebe told Green and the bargaining committee (which then included Garza, Aryee, Hickey, and Orellana) that Respondent was considering the establishment of a no-smoking policy at the Skokie plant. During a telephone conversation a few days later, on March 9, Beebe told Green that Respondent wanted the Skokie plant to be a "smoke-free facility." Green, who does not smoke, said that on a personal level he was supportive of these types of initiatives, that he was not a legal expert on whose responsibilities were what, and that the Union had no objection to establishing a no-smoking policy, if Respondent would be reasonable in its approach. Green went on to say, repeatedly, that Respondent should establish a couple of "smoking-permitted areas." In addition, he suggested certain tactics that he and Respondent could use to obtain the union bargaining committee's support and to "find a common ground" on the issue. Green suggested that Respondent "[S]hould proceed not along the lines of this is what [Respondent] would like to do but this is what [Respondent is] going to do and we want [the Union's] help and support in doing it." Beebe's March 9, 1993 memorandum to the Kleins about this conversation (see *supra*, fn. 1) attributes to Green, without amplification, the statement, "Not much doubt, but that you have the right to do this." This memorandum further stated that overall, the tenor of the Green-Beebe conversation had been "very positive."

During this conversation, Green offered to try to obtain some "no-smoking policies" from International headquarters. Pursuant to his request, Green received from the International about March 12 copies of several documents described by a covering letter, over the signature of the International's "Research & Collective Bargaining Service Assistant," as "sample smoking policies that were published by the Bureau of National Affairs. These samples should give you a few ideas on drafting a smoking policy for Klein Tools. If you need additional information, please contact me." All of these "samples" contemplated permitting employees to smoke in some enclosed areas. On March 12, Green forwarded these samples, and the covering letter to Beebe with a note stating that Green had not read the material yet but felt confident the Union could support Respondent's efforts in establishing a "no smoking" policy. Green reiterated the suggestion, which he had made during his March 9 telephone conversation with Beebe, that the parties could spend "some time on this" on March 26, a date set for a grievance meeting.

D. Respondent's Internal Discussions and Plans, Prior to Late March 1993, About Its No-Smoking Policy

Meanwhile, by a memorandum to the Kleins dated Monday, March 8, as to "Smoke Free Initiative/Union Issues," Beebe stated that on Friday, March 5, Company Counsel Michael Cavanaugh had advised him, *inter alia*, "Go first to the local business agents via informal telephone call Don't give them a policy to pick apart and fight Do share with them that we are looking to press ahead on this as soon as possible."⁵ Beebe stated that he had told a representative of the Teamsters, which represents Respondent's Jonesville factory employees, that "this was a company-wide initiative."

Beebe testified that as to the Skokie negotiations about smoking, his "game plan" was "to explain to them that . . . we wanted their input, we wanted their support . . . to commence on an informal basis with the business agent. Then to move on to an informal and informative basis with the business agent and the committee, to see what their concerns were, to identify what issues there might be that we might have to overcome and to end up with a negotiated agreement on how to go ahead." He went on to testify that he wanted to do it this way, as opposed to giving a pretty hard and fast detailed written proposal early in the discussions, because he thought the "way to go" would be something that was jointly crafted and put together.

E. The March 26, 1993 Discussions About the Proposed No-Smoking Policy

On March 26, 1993,⁶ Green and the entire bargaining committee (including Garza, Aryee, Hickey, and Orellana), by prearrangement, met with Skokie Plant Manager Jeff Butdorf, Skokie Plant Personnel Manager Palazzolo, and Skokie Assistant Personnel Manager Bill Eggert with respect

⁵Cavanaugh is the primary partner (in the law firm of Keck, Mahin & Cate) in charge of Respondent's business. His specialty, however, is tax law rather than labor law.

⁶The parties are in dispute as to whether this meeting occurred on March 26 or 29. For convenience, I have used the date contained in Green's contemporaneous notes. The exact date is immaterial.

to certain grievances. At the conclusion of the grievance discussion, the parties began to discuss the smoking issue, at which point they were joined by Beebe. Beebe stated that Respondent was concerned about the effect on employees' health of smoking and "second hand side stream smoke"; and that Respondent wanted to see what it could do about it by eliminating smoking in the workplace at Skokie. Beebe said that he did not have a formal proposal ready for the Union at that time, but that Respondent wanted to initiate a no-smoking policy "of designating certain areas in the plant as smoking areas." Green said that Respondent probably had the right to take a smoking action in the building, but such action had to be fair and equitable. Green further said that the Union would be willing to work with Beebe as long as Respondent took a reasonable approach; and that probably a no-smoking policy could be negotiated, but from the Union's point of view, a "piece of that has to be that there are reasonable smoking areas where smoking is permitted." The Union asked how Respondent would enforce the no-smoking policy; remarked that supervisors presently had problems in enforcing existing limitations on smoking, and sometimes themselves smoked in no-smoking areas; stated that a policy on smoking would have to be administered against supervisors as well as against employees; and stated that supervision (rather than employees willing to "rat" on each other) would have to take the lead on the "no-smoking" policy. In addition, the parties discussed the fact that all of the sample policies that Green had forward to Beebe called for "smoking permitted areas"; Green stated that the new policy at the Skokie plant would have to provide for such areas. Local secretary-treasurer/bargaining-committee member Orellana, himself a smoker, said that he supported the concept of a no-smoking policy, that he tried to be considerate of fellow employees who were nonsmokers, and that he was more than willing to work out a reasonable settlement with respect to smoking. Beebe said that Respondent wanted to support those employees who wanted to stop smoking, and that Respondent's owners were willing to expend funds to promote "no smoking." Beebe stated that Respondent wanted to have another meeting on the subject as soon as possible, and that Respondent would try to have its policy put together by that time. The smoking discussion that day lasted 30 or 40 minutes.⁷

By memorandum to the Kleins dated March 29, 1993 (with courtesy copies to Cavanaugh, Palazzolo, Butdorf, and Eggert), Beebe stated, in part:

The purpose of this meeting was to introduce to [the union representatives] our intent to commence an action with respect to "tobacco smoke" in the workplace and to gain their input. My tactic for the meeting was to make general statements about smoking and then to seek their input, as well as to ask them specific questions to make every effort possible to draw them out on the issue.

. . . .

⁷This finding is based on the testimony of Green, who impressed me as a wholly honest witness. Moreover, in view of the record evidence as to the substance of the discussion, his testimony seems somewhat more likely than Beebe's statement, in a March 29 memorandum to the Kleins, that the discussion lasted about 90 minutes.

The bottom line of the above discussion is that it appears [Green] is going to insist that we have "smoking permitted" areas and I am not certain he will be happy to find that our attitude about "smoking permitted" includes the other concept that it would be "outside" the building. We will see . . . All in all, the meeting was fairly positive with the exception that there is a very great concern that we will have significant difficulty enforcing the program . . . Our side of the table made it clear that we were absolutely committed to not only abiding by, but enforcing whatever program we ended up with.

F. The Jonesville Agreement; Beebe's May 10, 1993 Comments to Other Members of Management

On an undisclosed date between April 1 and 29, 1993, Respondent drafted and submitted to the Teamsters local that represents the employees at Respondent's Jonesville plant (located in Michigan, about due east of Respondent's Skokie plant), a document captioned "Smoke Free Workplace Proposal," which was identical to a document that Respondent submitted to the Union at Skokie on May 18 (see *infra*, part III,G). On April 29, 1993, Respondent and the Teamsters local agreed to this document, with certain additions and changes. The additions included an agreement that the cost of smoking-cessation programs would be evenly divided between Respondent (with a \$100 "cap") and the individual employee; the changes included an agreement by Respondent that such programs might include the nicotine patch.

By memorandum to the Kleins and Cavanaugh dated May 10, 1993, as to "Smoke Free Update Re: Unions," Beebe stated that "hopefully" the parties at Skokie would be able to come to the same conclusion, or something very close to the same conclusion, that had been negotiated in Jonesville. The memorandum further stated:

To the extent that we want to kick this program off as a single, corporate-wide, initiative, I once again surface for your consideration some fall-back position, the letters which we have put together⁸ and particularly our targeted implementation Company-wide on September 1, 1993. If we are to maintain the September 1st date, and at the same time hold off on any Company-wide kick-off, we are squeezing down significantly on the implementation interval. While this could be alleviated in all other plants by slipping the implementation date, in the Jonesville facility . . . we have *negotiated* a reduction in smoking opportunity to specific areas and on breaks and lunch only *effective June 1st* and the initiation of the smoke free facility concept *effective August 1st*. The clock is running there and they are on a fixed and definite interval. At a minimum, we need to consider allowing the Jonesville Plant to proceed with local program implementation, just as had been done in San Luis, more recently on a partial basis in Cedar Rapids, and of course at Roselle [*supra*, part III,A].

⁸The record is silent as to what letters Beebe was referring to. Cf. *infra*, part III,M,P.

G. The Skokie Bargaining Session on May 18, 1993

During the next meeting about smoking at Skokie, which was held on May 18, 1993, Respondent was represented by Beebe, Butdorf, Palazzolo, and Eggert; and the Union was represented by Green and the entire bargaining committee (consisting of Garza, Aryee, Orellana, Hickey, and Edward Wilson). Respondent brought out a two-page typewritten document captioned, "Smoke Free Workplace Proposal." At the union representatives' request, Respondent gave a copy to Green and to each member of the bargaining committee. The Union stated that it felt very strongly that this was something Respondent could not unilaterally implement, and that it would be necessary to have a number of "smoking permitted" areas within the building at Skokie. Later that day, the Union gave Respondent a typewritten response to Respondent's proposal.⁹

Point 1 of Respondent's proposal read in part as follows:

in many of our workplaces, we have created "smoking prohibited" areas, as well as "smoking permitted" areas. Our experience is that these restrictions have not been satisfactory to many people, in that the smoke from the "smoking permitted" areas tends to permeate other areas Our position on this issue is that *all* areas of the workplace shall be free from tobacco smoke.

During the May 18 discussion of this proposed point 1, Beebe said that Respondent wanted to make the entire plant smoke free, and that smoking would be done outside the building; he did not state what types of structures the employees would go to in order to smoke. Bargaining committee member Orellana said that he had heard of at least two Skokie employees who would challenge the rules. Green said that because smoking had not been restricted in the plant when the incumbent employees were hired, to change the policy to a "total no smoking anywhere in the plant is probably an unreasonable rule." Beebe said that "he had a right under management's rights, he had wide latitude in a lot of areas under management's rights." The Union replied that "management's rights will only go so far. [The Company] can't always just change wages, hours and working conditions—of which smoking, for some, was a working condition—unilaterally."¹⁰ Also, the Union complained that the employees who used a lunchroom where Respondent's rules already prohibited smoking were nonetheless being subjected to tobacco smoke, and that some supervisors winked at or even themselves committed violations of the existing restrictions against smoking. Respondent said that restrictions against smoking applied to everyone who worked in the plant, including Plant Manager Butdorf (one of Respondent's representatives at that meeting, and whom Beebe testimonially described as a "major league smoker"), and the parties agreed that as to compliance with smoking restrictions, the

⁹The response had been typewritten for the Union by Palazzolo's secretary, whom Green mistakenly identified at the hearing as Beebe's secretary. Beebe credibly testified that he was pleased to have her perform this service.

¹⁰The quotations in the last two sentences are from Green's bargaining notes and/or honest testimony.

supervisors should set an example. The Union's written reply to point 1 stated:

There is no question but that smoking is a health issue. Statistics prove that it is. However, the company must realize that all the current employees working for the company were hired with the understanding that smoking or not smoking in the plant was an individual option. For the company to suddenly implement a "no-smoking-anywhere-in-the-plant-policy" would seem to violate, or change, the labor/management rule of one party not being able to unilaterally change the wages, hours, or working conditions of the employees. It would appear that the company would be in violation of the National Labor Relations Act should the "working condition" of being able to smoke in the plant be unilaterally changed by the Company.

However, you are advised that it is our opinion that if the company will establish "smoking areas" in strategically located areas of the plant, the company would not be in violation. It is also our opinion that the union and the company will be able to reach agreement on the number of "smoking areas" and their location(s) in the plant.

The second point in Respondent's four-point proposal stated, *inter alia*, that regarding programs that were designed to help employees who voluntarily chose to stop smoking, Respondent would financially assist them on a cost-sharing basis. The proposal did not specify the proportion of the cost, or the maximum amount, which Respondent would undertake to pay. When the Union asked about the cost-sharing matter, Respondent said that cost-sharing on a 50-50 level would give the employees an incentive to follow through on smoking cessation programs. The second point also stated, and Respondent reiterated to the Union, that for safety reasons, Respondent would not encourage or fund nicotine patches. The Union said that it had no argument with this. As to point 2, the Union's written reply commended Respondent for its "moral and financial support toward those employees who want to quit smoking," and said that the Union would encourage the employees to take advantage of Respondent's offers; but contained no specific reference to a cost-sharing ratio for smoking cessation programs, and contained no reference to a cost "cap."

The third point in Respondent's proposal stated that the no-smoking policy would be implemented on a phased basis, with an established date after which the program would become effective in full force. Although Beebe's May 10, 1993 memorandum to other members of management had referred to "our targeted implementation Company-wide on September 1, 1993," Respondent's May 18 proposal gave no dates at all with respect to the proposed "phase-in."¹¹ As to this third point, Green credibly testified that the parties discussed a "time frame" at the meeting. He credibly testified that although he did not remember the length of the "time frame," before November 23 the parties had held "discussions that

¹¹As previously noted, the Jonesville agreement, which had been reached on April 29, 1993, called for "designated smoking" as of June 1, 1993, and "total smoke free" as of August 1, 1993.

they would take about six months to phase this thing in.”¹² The Union’s written reply commended Respondent for the phased approach, and stated that it would encourage employees to comply with smoking policies established by Respondent, and agreed to by the Union; the Union’s reply failed to propose any specific “phase-in” dates or periods.

The fourth point of Respondent’s proposal stated that Respondent would “view willful violations of this process as being serious and reprimands will commence at an advanced point is the existing reprimand/disciplinary process.”¹³ During this meeting and in its written reply, the Union stated that after the Union and Respondent “agree upon a smoking policy,” i.e., establish certain smoking areas, the Union would treat discipline for any perceived violation as the Union would treat any other discipline meted out to employees. Respondent at least tentatively agreed to this approach.

H. *The May 21, 1993 Bargaining Session*

The next meeting with respect to smoking at Skokie was held on May 21, 1993, and was attended by the same persons as the May 18 meeting. At the outset of this meeting, the Union read aloud that portion of its May 18 letter (in response to Respondent’s four-point proposal that day) which stated, “For the company to suddenly implement a ‘no-smoking-anywhere-in-the-plant-policy’ would seem to violate, or change, the labor/management rule of one party not being able to unilaterally change the wages, hours, or working conditions of the employees. It would appear that the company would be in violation of the National Labor Relations Act should the ‘working condition’ of being able to smoke in the plant be unilaterally changed by the Company.” The Union agreed to points 2, 3, and 4 of Respondent’s May 18 proposal, and expressed the hope that the Union would be able to reach an agreement with Respondent. The Union further stated that there should be at least two smoking areas within the plant buildings, and probably more. Respondent proposed a smoking area outside the west main entrance (called the canopy area) and, perhaps, one to three other areas, also outside the plant buildings. Green said that to establish such an area or areas outside the plant buildings only was unreasonable, because in winter the wind chill factor in Skokie frequently drops to 40 or 50 degrees below zero Fahrenheit. Beebe said that Respondent would enclose the three open sides of the proposed canopy smoking area by canvas and plastic. The Union proposed that employees be permitted to step outside any of the plant doors in order to smoke. Respondent said that for security reasons, exterior doors had to be kept closed. The Union proposed various other smoking areas, both inside and outside the plant build-

¹²I do not accept Beebe’s testimony that at least by the end of the January 13, 1994 meeting the Union understood Respondent’s position to be 3 or 4 months, for demeanor reasons; because of his reliance on the Union’s January 13 acquisition of the Moran agreement (infra, part III.I and fn. 34) and the Jonesville agreement, both of which called for 2 months; and because during the January 20 meeting, Respondent gave the Union a proposal that called for 1 month.

¹³The current bargaining agreement set forth a reprimand procedure that began with three warnings and ended with suspension pending possible dismissal. However, “The Employer reserves the right to discipline an employee at any step including discharge based upon the seriousness of the offense.”

ings and including one of two plant bathrooms; but Respondent rejected each of these proposals, some on the ground that the proposed area was an ear/eye protector area and/or already presented an industrial-smoke problem.¹⁴

A memorandum from Beebe to the Kleins and Cavanaugh, dated May 24, 1993, attached Green’s May 18 reply to Respondent’s four-point proposal. The memorandum stated that on May 18, the Union had strongly expressed the view that the four-point proposal “was something [Respondent] could not unilaterally implement and that it would be necessary to have a number of ‘smoking permitted’ areas within the building here in Skokie.” The memorandum further stated that Green had “commenced the [May 21] meeting with a reading of his letter to me of May 18th, wherein he gave specific emphasis to paragraph #1 and the area of ‘suddenly implement . . . seem to violate . . . unilaterally . . . etc.’ This of course caught the attention of all those attending.”

I. *The Moran Agreement*

For reasons mostly unexplained in the record, the Skokie parties did not meet again until August 27, 1993.¹⁵ Meanwhile, on an undisclosed date before August 23, a sister local of the Union reached an agreement with respect to a “Tobacco Free Environment Policy” at Respondent’s plant in Moran, Kansas, about 300 miles south of Skokie. This agreement provided, in part:

Effective November 1, 1993, the facility will be entirely tobacco free. Use of tobacco will be permitted only in outside areas designated as such, during break and lunch periods. The Company will provide one area outside the Forge Shop and one area outside the Die Shop which will be enclosed to shield users from inclement weather. Costs of erecting the enclosure to be paid by the Company.¹⁶

The Moran agreement states on its face that it had been “Revised at Union request to include the use of all tobacco products.” During the Moran negotiations, Respondent had submitted prior to May 7, 1993, the same proposal that the Respondent submitted to the Union at Skokie on May 18.

J. *The August 27, 1993 Negotiating Session*

At the August 27 negotiating session, Respondent was represented by Beebe, Palazzolo, and Eggert; and the Union by Green and bargaining committee members who included Kalamaris (Garza’s recent replacement as union president

¹⁴The exact number and location of these proposed areas, and the dates on which they were respectively discussed, are unclear in the record. The record suggests that on May 21 an area proposed by Palazzolo was rejected by Beebe.

¹⁵During this 3-month interval, the Skokie plant shut down for 2 weeks. The bargaining agreement suggests that this may have been a regularly observed annual shutdown.

¹⁶Green credibly testified that on a date that he was not asked to give, the negotiations at Skokie discussed Respondent’s having provided four smoking areas at a much smaller plant than the Skokie plant. The Moran agreement suggests that he was in error in believing this was the Moran plant. The record fails to show the number of smoking areas (or their amenities) provided at Respondent’s Jonesville (Michigan), Cedar Rapids (Iowa), Roselle (Illinois), Fort Smith (Arkansas), or San Luis (Arizona) facilities.

and committee chairman), Garza, and Wilson. The Union said that there should be at least two smoking areas, and that really there should be more than two. The Union suggested a place near an outside wall; Respondent rejected this on the ground that this would necessitate keeping open a door that Respondent wanted to keep closed for security reasons. Other areas proposed by the Union (perhaps previously) may have been discussed at this meeting, but Respondent rejected all of them (see *supra*, fn. 14). Bargaining committee member Wilson suggested that Respondent put a roof on what is referred to in the record as the "atrium," an area surrounded on all sides by the outside walls of plant buildings, and use this "atrium" as a smoking area. Respondent stated that in the canopy area, at least two sides of which consist of the outside walls of plant buildings, it would erect what Green's testimony and notes refer to as a "lean-to" with curtains.¹⁷ The Union suggested that there should be heat in the area. Beebe said that for the few minutes needed to smoke, heat was unnecessary.

At this point, the parties caucused. During the caucus, the union committee stated that the "lean-to" proposed by Respondent should be closed in, that curtains were not good enough. Also, the committee stated that if there was to be only one smoking area, there should be a 5-minute extension of paid breaks, which were contractually specified as 10 minutes in the morning and 7 minutes in the afternoon (see *infra*, fn. 19).

At the end of the caucus break, Respondent said that the atrium area could be fixed to make it a smoking area; although vague as to the location of the atrium area, the evidence indicates that it was closer than the canopy area to the portions of the plant farthest from the canopy area. When the Union asked how the atrium area would be fixed up, Respondent replied that it would install a partial roof, install a receptacle for cigarette butts, and put gravel on the ground "to provide proper drainage so people wouldn't be standing in water when it rained."¹⁸ The Union said that Respondent would have to make the two smoking areas "somewhat comfortable," that an open-sided lean-to, even with a curtain promised by Beebe, was not acceptable because of the extreme winter temperatures, and that the Union was doubtful about the reasonableness of the atrium area as Respondent proposed to modify it. Respondent reminded the committee that Respondent was willing to spend money to help the employees quit smoking altogether. The Union said that it would have to represent all the unit employees, and would have to insist that Respondent at least give reasonable accommodations to smokers. The Union said that if the canopy area was the only smoking area, breaks should be extended by 5 minutes in order to give employees time to walk to and from the area and smoke a cigarette.¹⁹ Respondent refused,

¹⁷Beebe, the only witness who testified about the area in question after actually seeing it, testified that it is about 10 feet by 20 feet, is sheltered on "three plus sides," and is partly sheltered by a roof. He further testified that the south side of this area is "the entry way into the building." I am unable to reconcile his testimony with the plant map received in evidence. Such differences, however, appear immaterial to the issues in this case.

¹⁸The quotation is from Beebe's testimony.

¹⁹The portion of Respondent's property that is covered by buildings is about 840-feet long at its longest point, and about 420-feet wide at its widest point. Unit employees work throughout the plant.

saying that this was out of the question, and that the contract specified the length of breaks. Neither during this meeting nor during any later meeting did the Union ever tell Respondent that the Union agreed there would not be any additional expanded breacktime. During this meeting, Respondent proposed that as to smoking-cessation programs voluntarily entered by individual employees, Respondent would pay 75 percent and the individual employees would pay 25 percent.²⁰

Respondent stated that it could, and might, implement a no-smoking policy. The Union said that its reaction to the implementation would depend on its members. Respondent said that the unions that represented the employees at Respondent's Moran and Jonesville plants had agreed to their smoke-free implementation, that all the nonunion facilities were moving in that direction, and that Skokie was the last facility to come to grips with how to implement the smoke-free policy. Laying to one side the evidence summarized in this paragraph, Respondent did not specify to the Union any proposed dates for implementation.

At the end of the meeting, Respondent asked the Union to have a meeting with the employees, and see what they thought about the three-sided enclosure for smokers. The Union did in fact conduct such a meeting on an undisclosed date between the August 27 negotiating session and the next session, on September 13.

K. Events During the Grievance Meeting on September 13, 1993

At about 7 a.m. on September 13, 1993, Green came to the plant and met with members of the grievance committee who included Kalamaris, Hickey, and Garza. After this conference, they discussed about seven grievances with management representatives who did not include Beebe.

At about 9:30 a.m., at the conclusion of these discussions, which did not address the no-smoking issue, Beebe came into the room and joined management representatives Butdorf, Palazzolo, Eggert, and someone identified in the record as "Jim." Green said that the Union had conducted a membership meeting, that some of the members were "dead set against" the no-smoking policy, but that if Respondent would make reasonable accommodations for the smokers—"i.e., a closed-in place not an open-sided lean-to," Respondent's no-smoking policy would be supported by a majority of the membership and by the Union. Beebe said, "I am sorry you feel that way," abruptly closed his books, and stomped out of the room. This conversation with Beebe lasted 4 or 5 minutes. The Union continued to discuss grievances with the members of management who remained in the room, but there was no further discussion of the no-smoking issue.

As the crow flies, the smoking area initially proposed by Respondent is about 570 feet from the point in the plant most distant therefrom. Because of such intervening barriers as walls, machinery, working areas, and parking areas, the walking distance would appreciably exceed 570 feet.

²⁰This finding is based on Green's testimony. I do not credit Beebe's testimony that this proposal emanated from the Union, and that Respondent proposed that it would pay half and the employees would pay half, for demeanor reasons and the additional considerations summarized *infra*, fn. 54.

L. Rick Klein's October 6, 1993 Inquiry to Beebe About the Status of the No-Smoking "Initiative"

A memorandum from Rick Klein to Beebe dated October 6, 1993, states "Where do we stand with regard to the no-smoking initiative in the corporation, and particularly in the Skokie facility? I would appreciate your response by tomorrow." The record fails to show Beebe's response, if any.

M. The November 23, 1993 Bargaining Session

On November 23, 1993, Green, and bargaining committee members who included Kalamaris, Hickey, and Garza, again met with Beebe, Palazzolo, and Eggert. Beebe said that as to smoking, his proposal was the same as last time. He stated that there would be two smoking areas, and that Respondent would finance smoking-cessation seminars on a cost-share basis. Beebe said that Respondent had already implemented the no-smoking policy at its other facilities, and wanted to move forward in Skokie with respect to its Respondent's no-smoking policy. Beebe stated that the canopy smoking area would consist of a three-sided lean-to, on the outside, with a roof; that the atrium area would have a roof but would still be somewhat exposed to the elements; that both these areas would have dirt floors; and that after smoking, the smokers would have to "police" these areas themselves. The Union said that the Respondent's proposal concerning the quality of these areas was "totally unreasonable," and said that Respondent "should just come through with something that was comfortable for the people so that they wouldn't catch pneumonia." Respondent stated that it did not intend to do any better. Green credibly testified that during this or an earlier meeting, the Union had said that "they would be able to get by with two [smoking areas], but we also mentioned to them we felt there should be more." At the November 23 meeting, the Union again said that there was not enough breaktime to allow smokers to walk to the tentatively agreed-on smoking areas and back, again stated that there should be more places to smoke, and stated that some people did not want to quit smoking. Respondent stated that it intended to phase in the no-smoking policy (without giving dates or periods) and would back up its promises with money. Beebe stated that he was concerned that the parties had not made any progress, that they seemed not to be making any progress on "this reasonableness thing," and that "sooner or later . . . we may have to implement this." This statement aside, Respondent did not say during this meeting that it had made its final offer, or say "take it or leave it, this was it." As to this meeting, the contemporaneous notes of Assistant Skokie Personnel Manager Eggert, who did not testify, state, "Union-not sure of both parties [sic] legal rights concerning implementing non-smoking"; Beebe's contemporaneous notes state, "Don't know who's rights or what—Don't know where you would go." These notations are unexplained in the record.

During this November 23, 1993 meeting, Green said that he was going to retire at the end of the year, would be taking his accumulated vacation time during most of January 1994, and, in the capacity of a union representative, probably would not again see those present. He stated that he was going to tell his successor, James Pressley, to get in touch with Respondent, and would let Pressley schedule his own meetings with Respondent because Green did not want to set

up a schedule for someone else who might not be able to meet it. Green told Respondent that it would have to set up further meetings with Pressley; and gave Respondent Pressley's office telephone number in Des Plaines, Illinois (about 7 miles from Skokie), and also the Des Plaines office telephone number of Respondent's International vice president, which (Green said) Respondent should call if it could not get in touch with Pressley. During December 1993, Green's responsibilities (at least as to Respondent's Skokie plant) were assigned to International Representative Ron Lyons. So far as the record shows, neither Respondent nor the Union made any attempt to contact the other before arrangements were made for a meeting on January 13, 1994.

N. Rick Klein's January 3, 1994 Statement to Beebe About Bringing the No-Smoking Issue to a Closure by the End of the Month

By memorandum dated January 3, 1994, to Beebe with a courtesy copy to Mat Klein III, "Re: No-Smoking Policy," Rick Klein stated:

Please advise where we stand with regard to the [no-smoking] policy. Please commit to a date when I will be able to send out the notice to all employees. I would like this to happen no later than the end of this month. Please meet with our attorneys and do whatever else is necessary to bring this issue to a closure.

O. Pressley Succeeds Green as International Representative; the January 13, 1994 Bargaining Session

About January 3, 1994, Green drove to Pressley's office, in Des Plaines, Illinois, with Green's 15 years of files, including his Skokie files, with respect to the 15 to 18 collective-bargaining relationships for which responsibility was being transferred from him to Pressley. The two men unloaded from Green's car about seven or eight large boxes that held these files. The two men then visited a couple of these facilities in Des Plaines and, later that day, in Milwaukee, Wisconsin. As to Respondent's Skokie facility, Green told Pressley that there were ongoing negotiations in regard to Respondent's desire to install a smoking area. Green told Pressley to be sure to read Green's bargaining notes because they would tell him everything he needed to know. Also, Green talked about having a new president of the Skokie local and some new members of the Skokie bargaining committee (inferentially, Kalamaris and Jorge Reyes), and gave Pressley the name of Skokie Personnel Manager Palazzolo, whom Green described as a "real gentleman" who was "easy to do business with." In addition, on a date or dates not clear in the record, Green met with Pressley to tell him what was going on at all the local lodges that Green was servicing, and wrote a four- or five-page document describing the status of the issues that were on the table at the various companies, including the no-smoking policies at Respondent's Skokie plant. Green told Pressley to get in touch with Respondent and see when it was going to meet with the Union some more on that subject.

Pressley assumed Green's title of International representative on January 1, 1994. Before becoming International representative, Pressley had been president of one of the Union's sister locals for 5 years; in this capacity, he had

been the solo spokesman in negotiating policies that became part of a current collective-bargaining agreement, and a chief spokesman in a lot of the discussions during grievance sessions. He had also been a cospokesman (never a solo chief spokesman) in contract negotiations, but such contract negotiations were primarily handled by the International representative. Before taking over at Skokie, he had never come into the middle of union negotiations. Like Green, in filling the job of International representative, Pressley traveled a great deal and worked long hours.

Pressley first met with Respondent on January 13, 1994.²¹ That day, before beginning negotiations, he spent an hour or an hour and half going through Green's notes about grievances and no-smoking discussions at Respondent's Skokie plant. Also, Pressley and the employee-bargaining committee (which included Kalamaris, Garza, and Hickey) met for about half an hour, the major subject of discussion being "a lot of" grievances to be discussed later that day.

After these grievances had been discussed with Palazzolo and Eggert, the parties moved into another room to discuss the no-smoking issue. Beebe thereupon joined the group, and gave what Pressley testimonially described as a "brief history of the negotiations." Beebe said that on March 29, 1993, Respondent had advised the Union that Respondent had expressed to the Union a growing concern about the medical problems associated with tobacco smoke. He further stated that during a meeting held on April 9, Respondent had discussed with the Union what Respondent would do in the way of support for its no-smoking program.²² Beebe went on to say that Respondent had given a proposal to the Union on May 18, that the parties had met on May 21 to discuss this proposal, and that "thru all this the un. resp. was Co. did not have the right."²³

The Union stated that the smoking-area accommodations that Respondent had undertaken to provide were not reasonable accommodations because they would be very rude and cold. Beebe said that Respondent would not spend large sums of money to help people support a habit that was dangerous to their health. The Union said that the number of smoking areas that Respondent had undertaken to provide were not enough for the size of the building.²⁴

Beebe said that as to smoking, Respondent had reached an agreement with one of the Union's sister locals at Respondent's Moran, Kansas plant and with a Teamsters local at Re-

spondent's Jonesville, Michigan plant; and that Respondent also had a smoke-free policy at Respondent's Roselle, Illinois facility, which is not union represented. Pressley asked for copies of Respondent's "smoke-free policies" in Moran, Jonesville, and Roselle.²⁵ Respondent gave Pressley copies of the Moran and Jonesville agreements, but nothing in connection with Roselle.²⁶ Pressley also asked for a copy of Respondent's no-smoking proposal. Respondent said that the Union already had a copy, and gave him a clean copy of the proposal document that Respondent had given the Union on May 18. Then, Respondent asked Pressley whether he had had the benefit of all of Green's notes. Pressley said yes, but apparently told Respondent (as was in fact the case) that Green had not given him a copy of the May 18 proposal.²⁷

Then, Respondent said that as to individual employees who wanted to quit smoking, Respondent would fund preapproved programs on a 50-50 cost-sharing basis up to a company funding maximum of \$100 per employee. When the Union suggested that Respondent should pay the entire cost, Respondent replied that employees were more likely to quit smoking if they had to pay part of the cost. Respondent further stated that programs that it would help fund would not include nicotine patches, because they did not work very well and had caused some deaths.²⁸ Beebe went on to say that as to the smoking issue, the Union had given no support in August or during the September 13 and November 23 meetings.²⁹ Beebe said that Respondent had not agreed to change anything since the August meeting, and that the Union had not changed its proposal (cf. supra, part III,K,M).

After a caucus, Pressley asked for an opportunity to review before the next meeting the material that Respondent had given him at that meeting. Beebe said that the parties had already had a number of meetings over a considerable period of time, that no progress had been made during the present meeting, that the parties could meet "until Hell freezes over," but that unless the parties started making some progress it was silly to meet, and meet, and meet.

²⁵ This finding is based on Pressley's testimony and contemporaneous notes, and on Beebe's testimony when called by the General Counsel as an adverse witness. On direct examination as a witness for Respondent, and in a January 14 "For the Record" memorandum, which for reasons discussed infra (part II,S,2) Beebe may not have intended to be wholly accurate, Beebe stated that Pressley asked for the Moran, Jonesville, and Roselle "agreements."

²⁶ Pressley testified that Beebe replied the Union was not entitled to any Roselle material, because Roselle was not organized. Beebe testified that when asked for the Roselle "agreement," he replied that Roselle was a nonunion facility; his January 14 "For the Record" memorandum states that Pressley was told that there was no formal written policy at Roselle. I find it unnecessary to resolve this issue. The complaint does not allege an unlawful failure or refusal to provide information.

²⁷ On May 18, employees then on the bargaining committee, as well as Green, had each received a copy of this document. The record fails to show what they had done with their copies. Garza, Wilson, and Hickey attended both the May 18 and the January 13 meetings as members of the bargaining committee.

²⁸ The Jonesville and Moran agreements called for co-funding of programs that included nicotine patches.

²⁹ As previously noted, on August 27 the Union proposed, and Respondent agreed to, a smoking area in the atrium (supra, part III,J). On September 13, the Union had told Beebe that it would support a no-smoking policy if Respondent would provide a closed-in place for smoking, whereupon Beebe walked out (supra, part III, K).

²¹ Although there is some evidence that this meeting occurred on January 14, for convenience this meeting will be referred to as the January 13 meeting. The exact date is immaterial.

²² Neither Green's bargaining notes, Green's testimony, nor the bargaining notes of Respondent's representatives before the January 13 meeting contain any reference to a meeting on or about April 9. Beebe testified that there was one meeting with Green as to which Respondent had no notes, and that as to whether this was an April 9 meeting with the Union about the smoking issue, "I don't recall for certain. There may have been."

²³ The quotation is from Pressley's bargaining notes about what Beebe said at the January 13 bargaining session. Cf. infra, part III,S,1.

²⁴ My findings in this paragraph are based on Pressley's contemporaneous notes and on Beebe's January 14 "For the Record" memorandum. Although this memorandum is not wholly trustworthy (see infra, part III,S,2), as to the matters summarized in this paragraph the memorandum is indirectly corroborated by Pressley's contemporaneous notes.

Pressley said that he thought he could give Respondent a proposal at the next meeting, and that he would like to meet again. Beebe said that this would be fine if the meeting were held the following week. The parties agreed to meet again on January 20.

Pressley testified that at the time of the January 13 meeting, he was not familiar enough with what had gone before to really do anything else other than listen and get up to speed, and believed that the amount of previous discussion about the no-smoking matter was less than was in fact the case. During this meeting, Respondent did not state, in words or substance, that its May 18 proposal, a copy of which Respondent gave Pressley during the January 13 meeting, was Respondent's final offer.³⁰

P. The January 20, 1994 Bargaining Session

At the next bargaining session, on January 20, 1994, the Union was represented by Pressley and the bargaining committee (including employees Kalamaris, Hickey, and Garza), and Respondent was represented by Beebe, Palazzolo, and Eggert. Respondent asked Pressley whether he had received and digested the material Respondent had sent him; he said yes. Pressley said that the Skokie plant was quite large in area, that the employees had only a limited breacktime to reach any smoking areas, that Skokie became very cold in the winter,³¹ and that employees who had been working for Respondent for a long time without much limitation on where they could smoke would find it difficult to adjust to such limits. Then, Pressley orally gave, on the basis of his written notes, a proposal that included the following: "smoking areas strategically, agreed to locations in the plant";³² programs to assist individual employees to quit smoking "similar to Moran," with Respondent to pay 80 percent of the costs and the employee to pay 20 percent;³³ a phased in program "similar to Moran" with the date of the first phase to be mutually agreed to and the second phase to begin 12 months after the date established in the first phase;³⁴ smok-

³⁰ My findings as to the January 13 meeting are based on credible parts of Beebe's and Pressley's testimony, on Pressley's contemporaneous notes, and on inferences therefrom. As to the sequence of events, my findings are based on Pressley's contemporaneous notes. As discussed *infra*, Beebe subsequently prepared as to this meeting a document that is captioned "For the Record," and which he forwarded a few days later to Mat Klein III. For reasons explained *infra*, this memorandum is not particularly reliable as to its factual assertions.

³¹ The temperature that day was well below zero Fahrenheit, and the plant parking lot had a lot of ice on it.

³² Pressley credibly testified that the Union wanted inside smoking areas.

³³ The Jonesville and Moran agreements provided that Respondent would pay half, and the individual employee half, the cost of various specified programs which might include, *inter alia*, the nicotine patch. Pressley had taken his proposed copayment ratio from the copayment ratio specified in Respondent's hospitalization plan.

³⁴ The Moran program called for a first phase during which "use of tobacco products" inside the plant would be restricted to two areas and only during breaks and lunchtime; and a second phase, to begin 2 months later, when "the facility will be entirely tobacco free" and "Use of tobacco will be permitted only in outside areas designated as such, during break and lunch periods." Disciplinary measures for smoking violations were to become effective 1 month after the effective date of the second phase.

ing areas, if outside the production facility, would be "made comfortable and kept clean and orderly same as non-smokers";³⁵ smokers were to be given "ample time to travel" to and from smoking areas in addition to normal breacktimes and lunchtimes; and discipline for breach of no-smoking rules was to be the same as the current progressive discipline system "commencing 6 months after phase 2 date" and subject to the contractual grievance procedures.

As previously noted, Green credibly testified that prior to November 23, 1993 (in effect, on or before August 27), the parties had had "discussions that they would take about six months to phase [the smoking policy] in." Such discussions are not reflected in his bargaining notes and, laying to one side Respondent's January 13 action in giving the Union a copy of the Moran and Jonesville agreements,³⁶ this union proposal constituted the first proposal by either party that specified the length of the phase-in. The Union's proposal did not address any "cap" on company expenses in paying for smoking cessation programs for individual employees;³⁷ as to this "cap" matter, Green credibly testified that as of November 23, 1993, no agreement had been reached as to Respondent's \$100 proposal, but he believed it was not a major issue. Respondent did not ask the Union to reduce its January 20 proposal to writing, and the Union did not do so.

After hearing this proposal, Beebe said that he saw no progress over prior discussions, and that "We have talked about this for 10 months and now you want a year to put this into place. We are not going to [give] smokers a longer break than we do non-smokers." Pressley said that he did not know about progress, that he had not been in all the discussions, but that nothing in the Union's proposal was unreasonable. Beebe then requested a caucus.

After a caucus of about an hour and a half, Respondent gave each member of the union bargaining committee a type-written document captioned "Smoke-Free Facility Proposal." The document stated, in part, that since August 27, 1993, and continuing on until the January 20 meeting then in progress, there had been no progress made with respect to this issue. The document went on to state that during the current meeting:

³⁵ Pressley credibly testified that he recognized that Respondent could not do a lot of things exactly the same for smokers as for non-smokers taking breaks, but that the thrust of the Union's proposal was that the Union wanted the smoking areas to be kept clean and to protect the smokers from inclement weather conditions. The Moran agreement provided that Respondent would place waste receptacles in the smoking areas, but that employees using the areas would be responsible for maintaining them, and they would be eliminated if not properly maintained.

³⁶ The Jonesville agreement called for "designated smoking" as of about a month after the program was agreed to, and for "total smoke-free" effective 2 months after the effective date of "designated smoking." As to the Moran agreement, see *supra*, fn. 34.

³⁷ This finding is based on Pressley's testimony, which for demeanor reasons I credit over Beebe's testimony that the Union proposed that "there be no cap on the company funding of the programs." Beebe's notes as to this meeting include, "EE [employee] support programs @ 80/20 No limit on patches \$ max \$." Pressley was not asked about the nicotine-patches matter. I note, however, that the Jonesville and Moran agreements did include nicotine patches as part of smoking-cessation programs to be partly paid for by Respondent.

the union presented additional demands with respect to a phase-in program exceeding 12 months and with respect to the construction of a smoking-permitted area, which in their words must be “. . . made as comfortable and clean and orderly as the non-smokers have.” This imposition of additional demands . . . puts us in a regressive position and not one of making progress. The company’s position continues to be as follows.

Then, the document stated, *inter alia*, that all interior areas of the facility were to be free of tobacco smoke; that Respondent would co-fund on a 50/50 basis preapproved smoking cessation programs for smokers who desired to quit, with a cap of \$100 per smoker; and that smoking-permitted areas would be created in the canopy and atrium areas, both to be equipped with a canopy and wind screening. The document also specified that effective February 1, 1994, smoking would be permitted only in designated interior areas on breaks and lunch, and that the entire interior of the facility was to be free of tobacco smoke effective March 1, 1994—that is, 1 month later. This was the first proposal from either side that specified a date for the beginning of the phase-in. Also, this was the first proposal from Respondent that in terms specified the length of the first phase; moreover, the Moran and Jonesville agreements that Respondent had given the Union called for 2 months. Finally, the document stated that discipline for failure to comply was to be in accordance with the current bargaining agreement. This proposal as to discipline had been agreed to by both parties on May 21, 1993. It differed from the proposal that Respondent had initially given to the Union on May 18, 1993, however, and a clean copy of which Respondent had given to Pressley on January 13. So far as the record shows, nothing in the material that Green had given to Pressley reflected this agreement. Pressley credibly testified to the belief on January 20 that Respondent’s discipline proposal that day narrowed the differences between the parties.

On reading this proposal, one of the committee members remarked that it only said “smoke free,” and asked whether the Skokie employees would be permitted to use chewing tobacco “in house”; prior to this meeting, the subject of chewing tobacco had not come up. Beebe said no, that the proposal meant “tobacco free,” and that Respondent was not going to allow chewing tobacco as a substitute for smoking.³⁸ Personnel Manager Palazzolo credibly testified that before this discussion began, “there was no prohibition against [chewing tobacco] in the past. I don’t know of anybody that chewed tobacco in the plant.” Beebe testified that as of February 28, 1995 (about a year after Respondent’s unilateral imposition of restrictions on smoking), there was no prohibition against smokeless tobacco at the Skokie plant; and that neither Respondent’s January 20, 1994 proposal, nor the smoking-restriction communication to the Skokie local president (see *infra*, part III,Q) or to Respondent’s other plants, dealt one way or the other with smokeless tobacco. As pre-

³⁸ My findings as to the chewing-tobacco discussion are based on a composite of credible parts of the testimony of General Counsel’s witness Pressley and Respondent’s witness Palazzolo. Beebe testified that as to this meeting he did not “recall anything about chewing tobacco. If there was any comment—the proposal we made was in writing and it was the same as we had on the table.”

viously noted, the copy of the Moran agreement given to Pressley on January 13 attributes to the Moran union’s request the prohibition against the use of “all” tobacco products.

Beebe said that Respondent’s proposal was a reasonable one, and asked the Union to consider it. Pressley said that the Union would consider the proposal if Beebe liked, but that Pressley did not agree it was reasonable. Then, Beebe asked when the parties could meet again (see *infra*, fn. 40). Pressley—who lives in Akron, Ohio, about 350 miles from Skokie—said that he had been called for 3 weeks of jury duty (that is, for a period that would not end until about February 11); that efforts were being made to effect his being excused from jury duty, but he did not know whether they would be successful; and that as soon as that matter had been cleared up, he would get in touch with Respondent to set up future meeting dates regarding the no-smoking policy. Respondent agreed that the parties would have a future meeting, and that it was Pressley’s responsibility to get in touch with Palazzolo to set the meeting up. During this meeting, Respondent did not say that its proposal that day was Respondent’s final proposal, or that the Union could take it or leave it, or words to that effect.³⁹

Pressley credibly testified that he did not recall that during this meeting, Respondent told him anything about whether there had been an agreement on the number of nonsmoking areas during previous discussions; the credible evidence shows that there had been no such agreement. Further, he credibly testified that he did not recall any discussion, during this meeting, about whether a cap on the payment by Respondent of the cost of the no-smoking cessation program had been agreed to; the credible evidence shows that there had been no such agreement. Also, he credibly testified that during this meeting, there were no discussions about whether the Union had previously dropped its request for an increase in the amount of time permitted to the employees to travel between their work stations and the smoking areas; the credible evidence shows that this request had not been dropped. In addition, he credibly testified that he had no recollection of any discussion, during this meeting, about whether there had been an agreement during previous negotiations about the division of costs of the smoking cessation program; further, there is no evidence that such a claim was there made by anyone (cf. *supra*, fn. 20; *infra*, fn. 54).

Q. The Union’s Unsuccessful Efforts to Arrange an Additional Meeting; Respondent’s February 8, 1994 Announcement of the Unilateral Implementation of a Nonsmoking Policy Effective in April 1994

Late in the evening of Friday, January 21, Pressley was advised by the court that he had been excused from jury duty. On the following Monday or Tuesday, January 24 or 25, he telephoned Palazzolo. The two men tentatively agreed that the next meeting would be on February 8, but Palazzolo said that he would have to confirm this date with Beebe, that

³⁹ My findings as to the discussions on January 20 are based on credible parts of the testimony of Palazzolo, Pressley, and Beebe; and on Pressley’s and Beebe’s contemporaneous notes. When considered without regard to other evidence, including Beebe’s testimony on cross-examination, his direct testimony about the January 20 meeting is misleading (see *infra*, part III,S,2).

Beebe was at that time in negotiations at some of the other facilities, and that after checking with him, Palazzolo would call Pressley back.

In the morning of January 27, Mat Klein III telephoned Beebe that Rick Klein wanted a followup on the "Skokie Smoke-free circumstance," inferentially referring to Rick Klein's January 3 memorandum (supra, part III,N). That same day, Beebe advised Rick Klein's secretary that Beebe would be ready to meet with Rick Klein at his convenience. Later that same day, Beebe sent Mat Klein III a memorandum that was captioned "Smoking Follow-up with Rick" and included a purported description of the January 20 meeting.

Beebe's January 27 memorandum to Mat Klein III stated that Pressley "opened the [January 20] meeting by giving us a proposal that included a phase-in program exceeding 12 months (we had proposed 3 months)"; as previously noted, before Pressley gave Respondent this proposal Respondent had not submitted any proposal that specified the length of the phase-in period (see supra, fn. 12 and attached text). In addition, Beebe's January 27 memorandum stated that during the January 20 meeting Pressley had said that "cost sharing should be on an 80/20 basis with no limit on the company's cost"; Pressley's credible and otherwise uncontradicted testimony shows that the Union's January 20 proposal did not address the "cap." Beebe's January 27 memorandum went on to say that Beebe's position as stated to the Union on January 20 had been provided on January 25 to Cavanaugh's partner, Labor Counsel R. Clay Bennett, who had agreed to discuss Beebe's position with Cavanaugh; that Beebe had had a brief conversation with Cavanaugh on January 26; that Cavanaugh wanted to discuss the matter with Bennett; and that Cavanaugh would call Beebe on Thursday or Friday (January 27 or 28) with Cavanaugh's "thoughts." Beebe's January 27 memorandum further stated:

It was my thought [on January 20 or 25], and continues to be, that we are in as good a position as we will ever be in implementing, as a result of impasse, this proposal. It is my fullest expectation that should we sit with the union and negotiate with them again, they will in February reduce their 12-month demand to 11, and in March reduce their 10-month demand for implementation to 9, etc. etc. The bottom line on this scenario is that we *may* be able to implement in 1995.

The other side of the coin on this is that if we do implement as the result of an impasse we believe we have reached, we run the liability of an unfair labor practice charge being filed against us by the union which, in all likelihood, would have very little impact even if we were to have been found to have perpetrated an unfair labor practice.

Beebe's memorandum went on to say that the discharge of an employee for failure to comply with a unilaterally implemented no-smoking rule could result in liability for back wages in consequence of an adverse arbitration award or unfair labor practice determination. Beebe testified on cross-examination that he was thereby advising the recipients of this memorandum of the "worse case scenario;" that he had previously done this in discussion (on a date or dates he was not asked to give); and that "I believe" he had previously

so advised Mat Klein III in writing (Beebe was not asked to produce this document, and was not asked its date).

Beebe's memorandum to Mat Klein III did not refer to the fact that on January 20, Beebe had asked Pressley when they could meet again.⁴⁰ Beebe testified that as of the time of this memorandum, Respondent was still in the process of deciding legally whether there was an impasse or not; "It was an issue of discussion."

Beebe enclosed with his January 27 memorandum to Mat Klein III a copy of a memorandum "For the Record," which Beebe had prepared about the January 13 meeting. This "For the Record" memorandum stated, in part, that at this meeting Beebe had

reiterated, at Mike Cavanaugh's suggestion, the past 10 months of meetings on this smoking issue, written proposals and responses and further the fact that [Respondent had] had no showing of support ever from the union on this issue and that there had been no progress made in the 4 meetings we have held since August 27, 1993. [Beebe] stated to [Pressley] that we have had 8 meetings over the course of 10 months, with no progress in the last 3 meetings; and that, frankly, [Beebe] thought it was silly to continue scheduling meetings where we basically were making absolutely no progress.

The record shows that after August 27 and as of January 13, the parties had had a total of three meetings, including the September 13 meeting where Beebe walked out (supra, part III,J) and the January 13 meeting itself. The record further shows that as to the smoking issue, as of January 13 the parties had met (at most) on nine occasions, including the January 13 and September 13 meetings, the at least alleged meeting about April 9 (as to which none of the parties had any records; see supra, fn. 22), and the occasion in late February or early March when Palazzolo and Beebe told Green, who was present at the plant on grievance meetings, that Respondent was considering the establishment of a no-smoking policy, with no further details. As to whether there had been "no showing of support ever from the union" on the smoking issue, see supra, part III,C,E,G,H, and K.

Beebe's "For the Record" memorandum about the January 13 meeting concludes with the following paragraph:

⁴⁰ Pressley's contemporaneous notes and his credible testimony state in terms that Beebe had made this inquiry. When called by the General Counsel as an adverse witness, Beebe testified that he could not remember who asked for another meeting. When called as Respondent's witness, he was asked on cross-examination. "When you wrote the January 27, 1994 memo to Mat Klein III, you neglected to mention that you had requested an additional meeting with the Union at the January 20th meeting, correct?" Beebe replied, "My testimony would not include your characterization of neglect I see a large difference between a conscious act of omission or neglect and simply reporting what I did. I reported what I did because I felt those were the important aspects of the meeting. You will note that my report of the meeting in one paragraph, and certainly there were many other things that happened in the meeting than could be reported in one paragraph." Later, when asked, "[Y]ou didn't think it was important to tell Mat Klein III that you had asked for another meeting at the January 20th meeting, correct?" Beebe replied, "I don't believe you can construct the opposite to my comment."

In the discussion it seemed to me that Mr. Pressley was angling toward the use of his newness in the role for the lack of progress in today's meeting. Given the thought that we may end up implementing an impasse in the final offer, it was my judgment that taking away this excuse prior to implementation was an appropriate action.

Neither Palazzolo nor Beebe got in touch with Pressley about his tentative arrangements with Palazzolo for a negotiating session on February 8. On undisclosed dates between about Tuesday, January 25, and Thursday, February 3, Pressley called Beebe's office in an effort to schedule further negotiation sessions. Palazzolo advised Beebe that Pressley had tried to reach him by telephone, and Beebe knew the purpose of these calls (see *infra*, fn. 41), but he did not get in touch with Pressley. On a date between January 24 and 29, Beebe began to draft a letter, for the signature of Michael S. Klein (Respondent's board chairman and chief executive officer) and Rick Klein to all of Respondent's employees, announcing that "all Klein facilities will be smoke free not later than April 30, 1994"; Beebe provided this draft on January 31 to Rick Klein, who forwarded it to Attorney Cavanaugh on an undisclosed date prior to February 3. By memorandum to Rick Klein dated February 3, 1994, captioned "Smoking Initiative," Beebe stated, in part:

With respect to the implementation of our smoking initiative in Skokie . . . we have a couple of issues that are sensitive to timing.

In [Skokie] the International Business Representative, Jim Pressley has made 2 calls to me in my absence this week in an attempt to schedule further negotiation sessions⁴¹ I have reviewed my notice of impasse and implementation to the union with Clay Bennett and on that issue I am ready to go.

The memorandum went on to say that Beebe had arranged for a mailing label batch for the purpose of mailing the "all Klein facilities will be smoke free" letters to all employees; that the letter to employees which had been forwarded to Cavanaugh should perhaps be mailed on Friday, February 4; and, "with that," the nonsmoking policies could be posted in the various plants. As to the purpose of the actions referred to in this memorandum, Beebe testified, "The issue of across the whole company was the point of finality. It was an issue of attainment."

Beebe testified that so far as he knew, between the end of the January 20 negotiating session and the date that Respondent decided to implement the nonsmoking policy, Respondent had no correspondence or contact with any union representative concerning this policy. Beebe further testified that Respondent did not tell the union negotiators on January 20 that Respondent was going to implement this policy, and that so far as he knew, between January 20 through February 7, Respondent did not give the Union any notice concerning the implementation of this policy. The "smoke free" letter drafted by Beebe was mailed to all of Respondent's employ-

ees shortly after February 4, 1994 (the date it bore), over the signatures of Michael S. and Rick Klein. By letter dated February 8, 1994, to Skokie employee Markos Kalamaris in his capacity as union president, and addressed to him at Respondent's Skokie plant, Beebe stated: "Pursuant to the impasse in our negotiations with respect to the proposed non-smoking policy, the company is implementing the enclosed policy effective immediately, which will totally prohibit smoking of tobacco within the facility, effective April 30, 1994." The enclosure set forth a policy identical to that set forth in Respondent's January 20 proposal, except that the phase-in period was to begin on April 1, 1994 (rather than February 1, 1994), and the entire interior of the facility was to be free of tobacco smoke effective April 30, 1994 (rather than March 1, 1994). On the evening of February 8, Kalamaris advised Pressley by telephone that Respondent had just informed him that it would be implementing its last proposal. Kalamaris showed Pressley Beebe's February 8 letter a few days later.

R. *The February 22, 1994 Grievance Regarding the No-Smoking Policy*

On February 22, 1994, the Union filed a grievance that was signed by all the members of the bargaining committee (Kalamaris, Garza, Hickey, Wilson, and Reyes) and that protested "the unilateral implementation of the non-smoking policy [at Skokie]."

The Union contends that this policy violates a long and well established past practice and further [contends] that this policy is unjustified, unreasonable and unfair to the employees.

We request that this non-smoking policy be canceled and any disciplinary action taken against any employee be removed from their record.

The contractual grievance procedure defines the term "grievance" as "any dispute or difference . . . with respect to the meaning, interpretation or application of the terms and provision [sic] of the Agreement." The grievance filed by the Union did not in terms specify any bargaining-agreement provisions relied on. In denying this grievance on February 25, 1994, Respondent stated that the grievance did not cite or in any way relate to any term or provision of the agreement; that the policy was properly and legally implemented; and that the Union's position made "absolutely no sense" unless the Union felt that employees "should not be protected from cancer and other health problems caused by tobacco smoke inhalation, including passive smoke inhalation. Grievance denied. No contract violation." On May 10, 1994, Palazzolo told the Union that he would look at the designated smoking areas "in terms of improvement." At this time, or perhaps at another meeting about April 1994, Pressley, Palazzolo, and Eggert agreed that the Union's grievance would be held in abeyance pending resolution of the charge (filed on May 13, 1994), which gave rise to the case at bar. None of the parties has contended before me that the instant case should be deferred to the contractual grievance/arbitration procedure. Accordingly, whether such deferral would be warranted is not before me. *Maine Yankee Atomic Power Co.*, 258 NLRB 832 (1981); see also *Wheel-*

⁴¹This statement in Beebe's February 3, 1994 memorandum underlies my finding that Beebe knew why Pressley had been trying to reach him by telephone, and my discrediting of Beebe's February 1995 testimony to the contrary.

ing-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1015–1016 (3d Cir. 1980), cert. denied 449 U.S. 1078 (1981).

S. Analysis and Conclusions

1. Whether the contractual “management rights” and “waiver” clauses constitute a defense to Respondent’s unilateral imposition of its smoking policy

As Respondent’s September 1994 answer admits, Respondent’s proposed policy with respect to smoking on company premises constituted a mandatory subject of collective bargaining within the meaning of Sections 8(a)(5) and 8(d) of the Act. *W-I Forest Products Co.*, 304 NLRB 957 (1991). Moreover, the sole affirmative defense raised by Company Counsel Bennett in this answer was the allegation that “Respondent unilaterally implemented the non-smoking policy only after bargaining in good faith with the Union regarding the policy and reaching impasse.” On the second day of the hearing, however, and about 23 months after Respondent broached to the Union Respondent’s desire for a new plant rule with respect to smoking, he raised on Respondent’s behalf the contention that Respondent’s unilateral action was lawful because the current bargaining agreement waived the Union’s statutory right to compel bargaining about the matter. Counsel relies on the following language in article I, section 2, and in article XIX, of the 1992–1996 bargaining agreement:

Management Rights

The right to control and direct its business and operation is and shall continue to be vested solely in Employer. Therefore, the rights of Employers [sic] shall include, but not be limited to, the following:

Employer may, in its discretion, determine the type, quality and quantity of materials and products to be purchased and manufactured, install and remove machinery, equipment, facilities and determine whether employees or the employees of other employers shall perform such work, contract for necessary services, introduce new or improved production methods, processes and procedures, and determine the size and composition of the work forces. Employer may also adopt and enforce such policies, plant rules and regulations as it may believe are necessary for efficient control and direction of its employees, but no such policy, rule or regulation shall be adopted or enforced which is contrary to a specific provision of this Agreement. Employer also reserves the right to relieve employees from duty because of lack of work, to assign, direct, employ, re-employ and transfer employees, and to demote, discharge or otherwise discipline employees for cause, but none of such rights shall be exercised by Employer in violation of specific provisions of this Agreement.

. . . .

WAIVER

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective

bargaining and that all such subjects have been discussed and negotiated upon, and the agreement contained in this contract was arrived at after the free exercise of such rights and opportunities. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

In connection with Respondent’s waiver argument, Respondent has not adverted to the provision in the collective-bargaining agreement (art. X, sec. 2) that states that the rules and regulations “shall not be so devised as to abridge the rights of the employees provided in this Agreement.” As previously noted (*supra*, part III.J), during negotiations the Union claimed that the break periods specified in the bargaining agreement were too short to enable some employees to travel to and from their work areas in order to smoke in the smoking areas agreed to (and eventually established) by Respondent, but Respondent relied on the bargaining agreement’s specification as to length of breaks.

Even if the contractual language relied on by Respondent were the only record evidence relevant to Respondent’s waiver defense, the Board might well reject that defense, particularly because the contract language on which Respondent relies does not in terms mention the no-smoking issue.⁴² On the other hand, were the relevant evidence limited to the relied-on contractual language, a different result might well be reached by the court of appeals for the Seventh Circuit, within which circuit the instant case arose.⁴³ “The Board takes the view that an Administrative Law Judge’s duty is to apply established Board precedent which the Supreme Court of the United States or the Board itself has not reversed, despite reversals of Board precedent by courts of appeals.” *Ford Motor Co. v. NLRB*, 571 F.2d 993, 996–997 (7th Cir. 1978), *affd.* 441 U.S. 488 (1979). “Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.” *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), modified 331 F.2d 176 (8th Cir. 1964).⁴⁴ In determining whether such a contractual waiver has been effected, however, both the Board and the courts look to evidence regarding the parties’ own interpretation of

⁴² See *Johnson-Bateman Co.*, 295 NLRB 180, 184–188 (1989); *Ohio Power Corp.*, 317 NLRB 135 (1995).

⁴³ See *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992); cf. *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995).

⁴⁴ Such an approach would appear particularly appropriate in the instant case, where the respondent does business in four different circuits (the Sixth, Seventh, Eighth, and Ninth); see Sec. 10(e) and (f) of the Act. I note that in recommending dismissal of the *Ford* complaint, the administrative law judge heavily relied on a Seventh Circuit decision that the Seventh Circuit distinguished in approving the Board’s reversal of the administrative law judge. See *Ford Motor Co.*, 230 NLRB 716, 717, 724 (1977); *Ford Motor Co.*, *supra*, 571 F.2d at 999.

the contract.⁴⁵ Moreover, as to whether such a waiver was effected, the burden of proof is on Respondent. *NLRB v. New York Telephone Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991). After taking into account the parties' own conduct in connection with Respondent's proposed smoking restrictions, I conclude that Respondent has failed to sustain that burden.

As to Respondent, the record persuasively shows that the contract was not deemed to effect a waiver of the Union's statutory right to compel bargaining about the no-smoking policy. Thus, Respondent's September 1994 answer (signed by Attorney Bennett) admitted that the no-smoking policy is a mandatory subject of collective bargaining, and advanced as Respondent's sole affirmative defense the contention that "Respondent unilaterally implemented the nonsmoking policy only after bargaining in good faith with the Union regarding the policy and reaching impasse," a defense that at least normally would be relevant only if the Union had a statutory right to compel Respondent to bargain about that subject. Similarly, on February 8, 1994, Respondent advised the Union that it was unilaterally implementing Respondent's no-smoking proposal "Pursuant to the impasse in our negotiations," an "impasse" assertion that at least normally would have been irrelevant if the Union had contractually waived its right to compel bargaining about the matter. Again, on February 3, 1994, Beebe advised Rick Klein that as to the no-smoking policy, Beebe was "ready to go" after having reviewed his "notice of impasse" with Company Attorney Bennett. Also, in a memorandum dated January 27, 1994, Beebe advised Mat Klein III that "we are in as good a position as we will ever be in implementing [Respondent's no-smoking proposal] as a result of impasse . . . if we do implement as the result of an impasse we believe we have reached, we run the liability of an unfair labor practice charge." Although Mat Klein III had executed on Respondent's behalf the bargaining agreement that (Respondent now claims) permitted Respondent unilaterally to implement its no-smoking proposal without bargaining with the Union at all, there is no evidence that he ever expressed this opinion to Beebe or anyone else. Similarly, although Skokie Personnel Manager Palazzolo attended all of the 1993-1994 negotiations with respect to the no-smoking matter, and (in International Representative Green's opinion) had always been "straightforward and truthful" with him, there is no evidence that Palazzolo ever expressed the opinion, either to union representatives or to fellow members of management, that Respondent's duty to bargain about this matter was excused by the 1992-1996 bargaining agreement that Palazzolo had signed on Respondent's behalf. Further, Respondent's February 1994 response to the Union's grievance regarding the unilateral implementation of the no-smoking policy did

not claim that the management rights and "zipper" clauses in the bargaining agreement afforded Respondent the right to engage in the action being grieved about, but, instead, claimed that the grievance did not relate to any term or provision of the contract and that there was "no contract violation." Moreover, when the Union advised Respondent in writing on May 18 that it would likely violate the Act by unilaterally changing the "working condition of being able to smoke in the plant," and read this aloud at the May 21 bargaining session, this assertion was not challenged (so far as the record shows) at either meeting by any of Respondent's representatives (including Palazzolo, who had signed the current bargaining agreement), even though this assertion "of course caught [their] attention" on May 21, at least. Moreover, when Beebe forwarded to the Kleins on May 24 the Union's May 18 written assertion of statutory rights, together with a memorandum that summarized the Union's claims in this respect, no question as to the propriety of this claim was expressed either in Beebe's memorandum or (so far as the record shows) by Mat Klein III, who had signed on Respondent's behalf the bargaining agreement in which (according to Respondent's present position) the Union effectively waived its right to compel bargaining on the matter. Instead, until January 20, 1994, Beebe continued to participate in bargaining sessions about this proposal, notwithstanding pressure exerted by the Kleins (beginning in early October 1993) to bring the issue to a "closure." It is true that early in the May 18 meeting, after the Union orally claimed that Respondent could not unilaterally implement its proposed nonsmoking policy and that the existing tolerance of in-plant smoking probably rendered a total ban unreasonable, Beebe said that "he had a right under management's rights." So far the record shows, however, Beebe never claimed that he was relying on the bargaining agreement; nor is there any evidence that he or any other member of management ever even mentioned "management rights" after receiving the Union's written May 18 response. Taken as a whole, Respondent's conduct shows that at no material time did Respondent truly believe that the Union had contractually waived its right to compel bargaining about Respondent's no-smoking proposal.

Moreover, although the Union's expressed views as to the precise scope of its bargaining rights may have varied somewhat over the 10-month period of the negotiations, the record as a whole clearly shows that the Union at all times believed that it had retained at least some bargaining rights with respect to Respondent's no-smoking proposal. Thus, International Representative Green's written May 18 response to Respondent's May 18 proposal stated, in part, "It would appear that the company would be in violation of the National Labor Relations Act should the 'working condition' of being able to smoke in the plant be unilaterally changed by the Company." Further, earlier that same day, when Beebe claimed that as to certain portions (that he did not specify) of Respondent's May 18 nonsmoking proposal Respondent "had a right under management's rights, he had wide latitude in a lot of areas under management's rights," the Union replied that "management's rights will go only so far. [The Company] can't always just change . . . working conditions—of which smoking, for some, was a working condition—unilaterally." Furthermore, when on March 26 the parties discussed the smoking issue in advance of any formal

⁴⁵ *American Oil Co. v. NLRB*, 602 F.2d 184, 189 (8th Cir. 1979); *Electrical Workers IBEW Local 1395 (Indianapolis Power & Light) v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986); *Chemical Workers Local 1-547 (Chevron U.S.A.) v. NLRB*, 842 F.2d 1141, 1144 (9th Cir. 1988); *Electrical Workers IUE Local 387 (Arizona Public Service) v. NLRB*, 788 F.2d 1412, 1414 (9th Cir. 1986); *Pepsi-Cola Distributing Co. of Knoxville*, 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981); *Georgia Pacific Corp.*, 275 NLRB 67 (1985). See also, *Continental Telephone Co. of California*, 274 NLRB 1452 (1985); *Allied-Signal, Inc.*, 307 NLRB 752 (1992); *California Portland Cement Co.*, 101 NLRB 1436, 1437-1438 (1952), reconsideration denied 103 NLRB 1375 (1953).

company proposals on the subject, Green said that although Respondent probably had the right to take a smoking action in the building, such action had to be fair and equitable, and that a “piece” of a negotiated no-smoking policy would have to be “reasonable smoking areas.” Moreover, although the contract that included the alleged waiver had been executed, on the Union’s behalf, by four employees who served on the bargaining committee during part or all of the 1993–1994 smoking negotiations, there is no evidence that the Union’s right to bargain about Respondent’s nonsmoking proposal was ever questioned, by any of them, to Respondent or even within the committee itself.⁴⁶ Perhaps most telling, between May 1993 and January 1994, the Union unreservedly engaged in normal negotiations, with respect to an unchallenged subject of mandatory collective bargaining, to which the Union committed the services of paid and busy representatives and of the employees on the grievance committee, and internally tried to procure at least the acquiescence of the membership to the prospect of limitations on smoking. Although on March 9, 1993, Beebe told the Kleins that Green had said, “[N]ot much doubt, but you have this right to do this,” on January 13, 1994, Beebe told Pressley that at least since May 18, 1993, the Union had responded that “Co. did not have the right.”

On the basis of the record as a whole, and particularly because the contractual management-rights and “zipper” clauses did not specify the no-smoking issue and the parties’ conduct during the 1993–1994 bargaining negotiations shows that they did not believe this issue to be covered by these clauses, I conclude that Respondent has failed to show that the 1992–1996 contract effectively waived the Union’s statutory right to compel bargaining about Respondent’s no-smoking proposal.

Furthermore, even assuming that the contract language would have justified Respondent if it had chosen to implement its smoking ban in April or May 1993 without giving the Union prior notice and an opportunity to bargain, I conclude that Respondent’s delay in advancing its waiver contention precludes Respondent from relying on it before me. Because the terms and conditions contained in the contract itself do not include any provisions with respect to smoking, in the absence of a waiver Sections 8(a)(5) and 8(d) would require Respondent to bargain about the matter during the life of that contract. *Johnson-Bateman*, supra, 295 NLRB 180. Respondent did not advance, however, its waiver contention until about 2 years after broaching Respondent’s smoking concerns to the Union, until about 23 months after beginning negotiations with the Union on that subject, until about 20 months after submitting to the Union Respondent’s initial proposal on this subject, and until about 11 months after unilaterally effectuating its proposed smoking ban on

⁴⁶ Indeed, the credible evidence indicates that Green was unsure whether Respondent had the right to compel the Union to bargain about the matter during the life of the contract. Green’s contemporaneous notes about the August 27 negotiating session include the language, “Mid contract implementation??? Union feels this may not be legal.” As to this entry, Green credibly testified that this was a question he asked of himself; “My thoughts were could the Company do this, were we obliged, because I am not an attorney and were we obliged to even negotiate this with the Company during mid contract.” He did not remember whether he so stated at the bargaining table, and there is no evidence that he did so.

the ground that the parties had reached an impasse as to this matter. Meanwhile, negotiations on the smoking issue had required the services of two out-of-town International representatives (Green and then Pressley) who were very busy servicing a number of plants in addition to the Skokie plant and who received pay and (inferentially) travel expenses from the International; and the attendance of four or five rank-and-file Skokie employees at a number of negotiating sessions.⁴⁷ Also, partly at Respondent’s request, the Union had shouldered the institutional strain of attempting to reconcile the unit members who smoked to the possible outcome of the negotiations. Moreover, the Union had filed charges with the Board, and had litigated (through counsel) for a day and a half the Union’s claim that Respondent had taken unlawful action with respect to a subject about which the Union had a statutory right to bargain, before Respondent advanced its contention that the Union had contractually waived that right. Further, Respondent did not raise its waiver contention in its September 1994 answer to the complaint, although the complaint might have been subject to dismissal on the pleadings if Respondent had been warranted in contending that dismissal is required by the contract language alone. Instead, Respondent permitted the General Counsel and the Union to process this case, and me to hear it, to the second day of litigation (February 28, 1995) before raising the waiver issue. In consequence of this delay, Respondent received the benefit of the Union’s proposal that the smoking areas include the atrium (which Beebe’s testimony indicates was a welcome suggestion as to an area that had not even occurred to Respondent previously)⁴⁸ and the benefit of the Union’s efforts to procure employee acquiescence in smoking limitations.⁴⁹ Indeed, if at all material times Respondent really did believe (which I have found it did not) that the Union had contractually waived its right to compel bargaining about the smoking issue, by failing to make this claim during negotiations Respondent was purposefully trying to put itself into a position where it could receive (as it did) the benefits of the Union’s suggestions (in the instant case, the atrium as a smoking area) and the Union’s efforts to appease the unit members, and could eventually impose any smoking restrictions Respondent chose to impose, while attributing to the Union any restrictions that the Union may

⁴⁷ The bargaining agreement requires Respondent to pay the union committee members “lost wages for all hours lost from their regular shift at base rate as a result of [grievance] meetings.” Grievances were discussed at several of the meetings which also discussed Respondent’s no-smoking proposal. The record is otherwise silent as to whether the employee members of the bargaining committee were paid for the time which they devoted to such discussions, or (if they were so paid) by whom.

⁴⁸ Beebe testified that Respondent “commended” bargaining-committee member Wilson on this “creative” proposal. The record fails to show whether this commendation was given him at or away from the bargaining table.

⁴⁹ As Beebe said in his memorandum to Rick Klein on October 7, 1992, “unilateral actions which would restrict or prohibit smoking in this area or that are not going to be nearly as effective as if they were discussed and seen as part of a larger program to which the Corporation is committed.” Rather similarly, Beebe testified before me that he wanted to withhold a detailed written proposal to the Union until after discussing the smoking issue with the Union, because he thought the “way to go” would be a negotiated agreement that was jointly crafted and put together.

have at least tentatively agreed to in reliance on seeming concessionary offers made by Respondent but which Respondent was free to ignore. I conclude that Respondent's course of conduct in connection with its waiver contention precludes it from relying thereon. Compare *R.P.C., Inc.*, 311 NLRB 232 (1993); *Albertson's, Inc.*, 310 NLRB 1176, 1187 (1993); *Industrial Workers Local 770 (Hutco Equipment Co.)*, 285 NLRB 651 (1987); *Arco Electric Co. v. NLRB*, 618 F.2d 698 (10th Cir. 1980); *American Diamond Tool*, 306 NLRB 570 (1992); *Auciello Iron Works*, 317 NLRB 364 (1995); *Dreis & Krump Mfg. Co. v. Machinists District 8*, 802 F.2d 247, 251-252 (7th Cir. 1986).

Much of the basis for my finding that Respondent can no longer rely on any contractual waiver is not addressed by Respondent's brief, which states (p. 17, fn. 2) that Respondent "did not waive its right to unilaterally implement the [smoking] policy simply because it chose to bargain with the Union even though it did not have to. A contrary interpretation would be counter to the policy supporting cohesive labor-management relations because it would inhibit management from ever negotiating over any rule or policy which is even arguably covered by contract language for fear of losing rights provided by that language." This argument ignores Respondent's opportunity to advise the Union at a reasonably early date that Respondent did not think it was obligated to bargain with the Union about the matter, but that Respondent would nevertheless welcome the Union's input and would like to obtain an agreement before imposing restrictions on smoking.

2. Whether Respondent's unilateral implementation of its smoking proposal was justified by a legally cognizable impasse

As all parties appear to agree, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally putting into effect his own proposal as to a mandatory bargaining subject that is under negotiation, unless the parties have reached a legally cognizable impasse. *P.R.C. Recording Co. v. NLRB*, 836 F.2d 289, 292-293 (7th Cir. 1987); *Harding Glass Co.*, 316 NLRB 985 (1995); see also *Litton Financial Printing Division v. NLRB*, 111 S.Ct. 2215, 2221 (1991). Such an impasse exists when good-faith negotiations have exhausted the prospects of concluding an agreement, the parties are in fact in deadlock, and there is no realistic possibility that continuation of the discussions as of that time would have been fruitful. *P.R.C. Recording Co.*, 280 NLRB 615, 634-635 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987); see also *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994). When (as here), however, the employer claims impasse as a defense to his unilateral conduct, the burden of proof as to the existence of such an impasse lies with the employer. *P.R.C. Recording Co.*, *supra* at 635. I agree with the General Counsel and the Union that Respondent has failed to discharge that burden.

As the Board said in its oft-quoted decision in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *affd.* 395 F.2d 622 (D.C. Cir. 1968):

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 disagreement, the contemporaneous understanding of

the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse existed.

As to "the contemporaneous understanding of the parties as to the state of negotiations," the record shows that neither party believed that the negotiations had reached an impasse by the end of the January 20 session, which turned out to be the last negotiating session between the parties. Thus, during that meeting Pressley undertook to give consideration to the proposal that Respondent had given the Union that day, and promised that when the status of his jury-duty obligation was clarified, he would get in touch with Respondent to set up future meeting dates with Respondent; moreover, 4 or 5 days later (and the first or second weekday after he learned that he had been excused from jury duty), he did telephone Palazzolo and agree to meet again on February 8. Furthermore, as evinced to the Union, Beebe's conduct on January 20, and Palazzolo's conduct during his January 24 or 25 conversation with Pressley, unequivocally show that Beebe and Palazzolo, too, believed that parties were not at impasse; it was Beebe who on January 20 asked when the parties could meet again, and on January 24 or 25 Palazzolo tentatively agreed with Pressley that the parties would meet again on February 8. I note, moreover, that at no time did Respondent ever advise the Union that it had received Respondent's last offer.

Further, the evidence shows that Beebe's February 8 declaration of impasse was not motivated by his own honest judgment as to the status of bargaining negotiations, but, instead, was motivated by his desire to please his superiors. The Union and Respondent did not exchange any views about the smoking subject after the January 20 meeting, at whose conclusion Beebe asked when the parties could meet again. On January 27, however, Beebe received a telephone call from his immediate superior (Mat Klein III) that Mat Klein III's immediate superior (Rick Klein) wanted a follow-up on his January 3 memorandum, which stated that Rick Klein would like to be able to send, no later than the end of January, a notice to all employees setting forth Respondent's nonsmoking policy. Thus prodded by two higher levels of management to whose desires Beebe necessarily gives great weight, later that same day Beebe sent Mat Klein III a memorandum "Smoking Follow-up with Rick" which, in effect, recommended immediate implementation of Respondent's nonsmoking proposal on claim of impasse, and which supported this recommendation by inaccurate and misleading assertions regarding (inter alia) the status of negotiations regarding the phase-in period. Moreover, this "Smoking Follow-up with Rick" memorandum to Mat Klein III attached a "For the Record" memorandum by Beebe, with respect to the January 13 meeting, which included the language, "Given the thought that we may end up implementing an impasse in the final offer." I infer that this language, and Beebe's statement to Pressley at the January 13 meeting that another meeting "would be fine if it was next week," were at least partly spurred by Rick Klein's January 3 memorandum. Further, because Beebe's even arguable ability to lawfully meet the Kleins' deadline would have been substantially diminished by a negotiating session which produced progress toward an agreement but failed to produce a final and complete agreement, or even by the pendency of an agreed-on

date for further negotiations, and because Respondent's January 20 agreement to another meeting would predictably have put Beebe under some pressure to thereafter explain to Pressley why his tentative agreement with Palazzolo for a February 8 meeting was unacceptable, Beebe's failure to return Pressley's telephone calls about the arrangements for a February 8 meeting, and Beebe's untruthfulness in his testimony as to why Pressley's calls were not returned, further evidence that Beebe did not really think the parties were at an impasse.

That Beebe did not truly believe the parties had reached impasse is further shown by the internal inconsistencies in his testimony about the status of negotiations and about related matters. On direct examination as a witness for Respondent, he testified that as of the close of the last negotiating session (on January 20, 1994) with respect to smoking, he believed that the Union's conduct on that day had widened the gap between the parties that had existed as of the close of the last meeting (on November 23, 1993) where the Union was represented by Green. For example, on direct examination Beebe initially testified that the gap between the parties was widened by the Union's January 20 proposal with respect to discipline for breach of the smoking rule; but the evidence (including Beebe's testimony) shows that the Union's January 20 proposal as to discipline was the same as the agreement that had already been reached on May 18.⁵⁰ On direct examination, Beebe further testified that the gap between the parties was widened by the Union's January 20 proposal as to the length of the phase-in period. On cross-examination, however, he admitted that prior to January 20, Respondent had not given any specific number of months for the phase in other than the phase-in periods specified in the Jonesville and Moran agreements given to Pressley on January 13, which periods were longer than those proposed by management on January 20 as to the Skokie plant; further, Pressley credibly testified that to the best of his knowledge, the Union had never before proposed specific dates or time periods regarding the phase in, and there is no evidence otherwise.⁵¹ In addition, Beebe testified that the gap between the parties was widened by the Union's January 20 proposal that "the smoking cessation program which had been offered by the company be funded at the rate of 80 percent paid by the company and 20 percent by the employees. That they include patches with no limit on the patches. And that there be no cap on the company funding of the programs." On cross-examination, however, he testified that before January 20 the Union had not agreed to a 50-50 cost share and there was still talk about 75-25 (cf. supra, fn. 20, infra, fn. 53); moreover, the Union's January 20 proposal did not in terms address either patches or the cap and (as previously found) Pressley credibly testified that the January 20 discussion did not address the cap.⁵² Finally, Beebe testified that the gap

between the parties had been widened by the Union's January 20 proposal that smoking areas, if outside the production area, would be made "comfortable and kept clean and orderly same as non-smokers." Immediately after so testifying, however, Beebe "admit[ted] freely that we had not [previously] concluded on the amenities for the two outside smoking permitted areas." Moreover, he elsewhere admitted that before January 20, the parties had not reached an agreement concerning the "comfortable and clean or construction of" these areas.⁵³ These admitted exaggerations by Beebe as to the effect of the Union's January 20 proposal indicate that he did not believe that truthful and accurate testimony by him as to the status of the bargaining on that date would show the existence of an impasse. I note, moreover, that there is no evidence at all that on January 20 anyone suggested to Pressley that his proposals that day as to the smoking cessation program or as to discipline were regressive in any respect.⁵⁴

Moreover, the record supports the parties' real views that impasse had not been reached. Thus, what turned out to be the final meeting between the parties was the first meeting where either of them had made any specific proposal as to the length of the phase-in period; and the Union had said that it would consider Respondent's counterproposal as to this issue among others. Furthermore, at this same meeting the subject of chewing tobacco was raised for the first time. Respondent's reply at that point that it would not allow chewing tobacco as a substitute for smoking tobacco evinced recognition that the Union was seeking to explore the possibility that the heavily addicted smokers who were likely the strongest opponents of Respondent's proposed restrictions on smoking might regard them as more acceptable if employees were assured that they could chew tobacco at their work stations at any time if it did not interfere with their duties. That discussion of this matter might have furthered ultimate agreement as to the remaining issues between the parties is strongly suggested by management's testimony before me that Respondent had never forbidden the use of chewing tobacco. I do not agree that in foreclosing such exploration by at least implying (falsely) to the Union that chewing tobacco was likewise forbidden,⁵⁵ Respondent was giving short shrift to

patch. The patch was not mentioned in Respondent's January 20 proposal or in its February 8 notice of implementation.

⁵³ Indeed, Respondent's January 20 proposal was regressive not only as to the cost division of the smoking cessation program (see supra, fn. 20 and attached text), but also as to the amenities of the atrium, for which Respondent had proposed on August 27 to provide a graveled floor to keep smokers from having to stand in water, but on and after November 23 to leave the area as dirt. I note, moreover, that although Respondent's January 20 proposal had called for a 1-month phase-in, Respondent's discussion with Green had revolved around a 6-month period, Beebe testified that the Union had previously understood that Respondent wanted 3 or 4 months (supra, fn. 12), and the Jonesville and Moran agreements given to Pressley on January 13 had called for 2 months.

⁵⁴ Respondent's failure to make such a claim on January 20 in response to Pressley's January 20 proposal of an 80 percent-20 percent allocation is one reason for my action in discrediting Beebe's testimony that in 1993 it was the Union which proposed a 75 percent-25 percent allocation.

⁵⁵ Beebe testified in February 1995 that a particular employee's use of smokeless tobacco would not be a "disciplinary cir-

⁵⁰ As noted supra, part III.P, Pressley had made this January 20 proposal as to discipline because he was unaware that Respondent had already agreed to a similar proposal by Green.

⁵¹ As to the status of the phase-in issue as of the beginning of the January 20 meeting, see supra, fn. 12 and attached text.

⁵² Although the May 18 proposal of which Respondent gave Pressley a copy on January 13 specifically excluded use of the patch on grounds of health, and Green had acquiesced thereto on May 18, the Jonesville agreement reached on April 29, 1993, and the Moran agreement reached in or before August 1993, had both included the

a “trivial and meaningless issue” (see pp. 27–28 of R. Br.), in view of that brief’s heavy reliance, in asserting the existence of an impasse, on the parties’ continued disagreement as to the amenities to be provided (particularly heat) in the smoking areas. The significance of such an issue (as well as the traveling issue) would have been diminished to employees who were willing to chew instead of smoke. I note, moreover, that Palazzolo (at least) was not certain that the amenities that Respondent provided in the smoking areas on unilateral implementation in April 1994 were the best that Respondent could or would furnish; rather, in May 1994 he told the Union that he would look at these areas in terms of improvement. A preliminary similar undertaking during continuing negotiations might well have furthered an agreement as to the amenities to be provided.

In sum, Respondent has failed to discharge its burden of showing the absence of any realistic prospect that continuation of discussion would have been fruitful. Accordingly, I find that Respondent has failed to show that the parties had reached a legally cognizable impasse before Respondent unilaterally imposed its smoking policy and, therefore, that by taking such action, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. 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 following employees of Respondent at its Skokie, Illinois facility constitute a unit appropriate for collective bargaining within the meaning of the Act:

All production and maintenance employees, but excluding office clerical employees, die shop employees, professional employees, supervisors and guards as defined in the National Labor Relations Act.

4. At all material times, pursuant to Section 9(c) of the Act, the Union has been the exclusive representative of all the employees in the above unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a nonsmoking policy, with respect to the employees in the above unit, about February 8, 1994.

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

cumstance” unless such use “posed some sort of a health or sanitation hazard [to] other people”; and that Beebe was thereby referring to situations when mere expectoration of saliva into the oil wells on a machine had been found to create a major dermatitis problem in the coolant. A somewhat similar attitude toward employees who choose to use tobacco is reflected in Respondent’s February 4, 1994 letter to all employees announcing that all Klein facilities would shortly become smoke free (supra, part III,Q). The letter stated, in effect, that Respondent was taking such action to protect nonsmokers and to help employees who were attempting to lessen or quit smoking, but that Respondent otherwise recognized smokers’ right to choose to smoke.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required, on the Union’s request, to rescind as to the unit employees Respondent’s unilaterally imposed nonsmoking policy. Further, although there is no evidence that anyone has been discharged or disciplined in consequence of that policy, as a precautionary matter Respondent will be required to offer, to any unit employees who may have been discharged in consequence of the nonsmoking policy, reinstatement to their old jobs or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed; to make any unit employees discharged or disciplined in consequence of that policy whole, with interest, for any loss of pay they may have suffered by reason of such discharge or discipline; to remove from its files any reference to such discharge or discipline; to provide such employees with written notice of such removal; and to inform them in writing that such discharge or discipline will not be used as a basis for further personnel action against them. All payments required hereunder are to be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay in consequence of any separation from employment shall be calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁶

ORDER

The Respondent, Klein Tools, Inc., Skokie, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) In the absence of a legally cognizable impasse, unilaterally putting into effect rules which limit the right of employees in the following Skokie, Illinois unit to smoke on company premises:

All production and maintenance employees, but excluding office and clerical employees, die shop employees, professional employees, supervisors, and guards as defined in the National Labor Relations Act.

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

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

(a) On request by Local Lodge No. 1255 of the International Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers, AFL–CIO rescind as to employees in the afore-

⁵⁶If 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.

said unit the nonsmoking policy that was effective at Respondent's Skokie, Illinois facility in April 1994.

(b) Offer to any employees in that unit who may have been discharged in consequence of the nonsmoking policy, reinstatement to their old jobs or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed.

(c) Make such employees, and any employees in that unit who may have been disciplined in consequence of the nonsmoking policy, whole for any loss of pay they may have suffered by reason of such discharge or discipline, in the manner set forth in the remedy section of this decision.

(d) Remove from its files any reference to such discharge or discipline, provide such employees with written notice of such removal, and inform them in writing that such discharge or discipline will not be used as a basis for any further personnel action against them.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Skokie, Illinois facility copies of the attached notice marked "Appendix."⁵⁷ Copies of the notice on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that these notices are not altered, defaced, or covered by any other material.

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

⁵⁷If 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, in the absence of a legally cognizable impasse, unilaterally put into effect rules which limit the right of employees in the following Skokie, Illinois unit to smoke on company premises:

All production and maintenance employees, but excluding office and clerical employees, die shop employees, professional employees, supervisors, and guards as defined in the Act.

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

WE WILL, on request by Local Lodge No. 1255 of the International Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers, AFL-CIO, rescind as to employees in the above unit the nonsmoking policy that was effective in April 1994.

WE WILL offer to any employees in that unit who may have been discharged in consequence of the nonsmoking policy, reinstatement to their old jobs or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make such employees, and any employees in that unit who may have been disciplined in consequence of the non-smoking policy, whole, with interest, for any loss of pay they may have suffered by reason of such discharge or discipline.

WE WILL remove from our files any reference to such discharge or discipline, provide such employees with written notice of such expunction, and inform them in writing that such discharge or discipline will not be used as a basis for any further personnel action against them.

KLEIN TOOLS, INC.