

**Mitchellace, Inc. and Chicago & Central States
Joint Board, Amalgamated Clothing & Textile
Workers Union, AFL-CIO-CLC.** Cases 9-CA-
32394 and 9-CA-32619

May 16, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issue presented here is whether the judge correctly found the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its policy with regard to employee use of freight elevators, and by unilaterally changing its shift schedule.¹ The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified and set forth in full below.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Mitchellace, Inc., Portsmouth, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(c) and (d).

“(c) Within 14 days after service by the Region, post at its facility in Portsmouth, Ohio, copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

¹On January 26, 1996, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

²The 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³There are no exceptions to the judge's statement that the issuance of the Respondent's September 1994 elevator use policy memorandum would not have violated Sec. 8(a)(5) absent the time limitations stated in a November 1992 newsletter statement about elevator use.

⁴We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 28, 1994.

“(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

David L. Ness, Esq., for the General Counsel.

Fred Pressley, Esq. and *Nancy Falk, Esq.*, of Columbus, Ohio, for the Respondent.

Cheryl Stiffler, of Jackson, Ohio, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, Mitchellace, Inc., operates out of a facility in Portsmouth, Ohio, where it manufactures shoelaces and industrial braid. Mitchellace does not dispute that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). The Charging Party, Chicago & Central States Joint Board, Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC (the Union) represents Mitchellace's bargaining unit employees.¹ There are roughly 300 employees in the unit. Mitchellace admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.²

The General Counsel alleges that in the period between May 31, 1994, and January 16, 1995, Mitchellace violated Section 8(a)(1), (3), and (5) of the Act in various respects.

I. THE ALLEGED VIOLATIONS OF SECTION 8(A)(5)

A. *Breaktime Rules*

The General Counsel alleges that in May 1994 Mitchellace unilaterally changed its policies specifying when employees had to be back at their work stations after their breaks and

¹The bargaining unit:

All production and maintenance employees, including receiving, shipping and print shop employees, employed by Mitchellace at its Portsmouth, Ohio, facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined in the Act.

A company named “Mat World” operates out of the basement of Mitchellace's facility. It manufactures floor mats for automobiles. While the record is unclear about the nature of the relationship between Mitchellace and Mat World, all parties agree that the bargaining unit includes Mat World's employees and that, accordingly, the Union represents such employees of Mat World.

²Mitchellace has been the subject of two Board decisions: 314 NLRB 536 (1994) (certifying the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit); and 315 NLRB No. 68 (Nov. 7, 1994) (not reported in bound volumes). The latter decision resulted from Mitchellace's attack on the validity of the Board's certification of the Union. Mitchellace has appealed from that decision, which appeal was pending at the time of the hearing in this proceeding.

after their lunch periods, thereby violating Section 8(a)(5) and (1) of the Act.³ For the reasons discussed below, I conclude that Mitchellace did not violate the Act in this respect.

Each Mitchellace employee gets one unpaid half-hour lunchbreak. Each employee also gets two paid breaks per day, one before lunch and one after. These paid breaks are either 10 or 15 minutes long (depending on whether the employee is working an 8-hour, 9-hour, or 10-hour day).⁴ For all employees, the paid breaks always start on the hour.

I have no doubt that, as far as senior Mitchellace management is concerned, at all times Mitchellace's policy concerning employee breaks has been that employees are to remain at their work stations until the break starts and are to be back at their work stations at the time the break ends. And the record indicates that from time to time in the past, at least some first-level supervisors so informed the employees in their crews. Thus, for instance, employee Dana French testified that she remembered her supervisor warning her crew, "four or five years ago," that employees had to be at their work stations as the break ended. And employee Brenda Dyer testified that that was Mitchellace's policy back "when they were really trying to enforce the rules."

But as these quotations indicate, it is more probable than not that for at least a couple years prior to May 1994 supervisors allowed employees to wait until the end of their break periods to leave the employee break areas. (Mitchellace occupies a six-floor factory—seven floors including the basement, where Mat World is located.⁵ The employee lunchroom, which is one of the few places in the building where cigarette smoking is allowed, is on the first floor. Additionally, there are smaller break areas on each floor.) Some employees nonetheless made it their business to be back at their work stations by the end of their 10- or 15-minute break periods. But many others did not. Thus, for example, many employees whose breaks ended at 9:10 a.m. would wait until 9:10 a.m. before leaving the areas in which they were taking their breaks. As a result, some employees in this latter group would not in fact resume work until 2 or 3 minutes after the break ended. (The record does not permit a determination of how many of the employees got back to their work stations by the end of the 10- or 15-minute break period and how many waited until that period ended before starting their return to their work stations.)

As for the employees' state of mind about the breaktime rule, there is some indication in the record that, generally speaking, all of the employees knew that the intent of the rule was that employees were to be back at work as the break ended (10 or 15 minutes after it began). But the record is insufficient for me to make a finding to that effect. In any event, the record is clear that employees knew that their supervisors allowed them to wait until the 10- or 15-minute period was over before they made their way back to their work stations.

³ The complaint originally alleged that Mitchellace made this policy change in July 1994. But at the outset of the hearing the General Counsel moved to amend the complaint, which motion I granted.

⁴ See R. Exh. 5. Mitchellace's employee handbook provides that all employees get two 10-minute breaks. But all parties agree that the handbook is incorrect in respect to the breaktime of employees working 9- or 10-hour days.

⁵ See fn. 1, *supra*.

In September 1993, the Board conducted an election among Mitchellace's bargaining unit employees. A majority of those voting cast their ballots in favor of the Union. In July 1994, the Board certified the Union as the exclusive representative of the bargaining unit employees.

Beth Haney is Mitchellace's director of personnel. On May 31, 1994 (that is, between the date of the election and the certification date), Haney notified Mitchellace's employees, by memorandum, that—

A bell system has been recently installed that sounds every hour and half-hour as well as three minutes before the hour and half-hour. Bells also sound at 9:10, 9:15, 2:10, and 2:15 signaling the end of break periods.

Employees are to have returned to their work area/station when the bell sounds, signaling the end of lunch times and break times. When the bell sounds announcing the break's end, employees are to be back to work—NOT ON THE WAY BACK TO WORK.

Employees who do not comply with this policy will be subject to disciplinary action.

A bell system has always been in place at Mitchellace (or, at least, has been in place at all relevant times). As far as the bell system was concerned, the only change that occurred about the time that the above memorandum issued was that Mitchellace improved the bell mechanism to ensure that the bells sounded exactly when they were supposed to. Thus, for those Mitchellace employees who waited until the end of their break periods (at 10 or 15 minutes after) to return to their work stations, the main thrust of the memorandum was to threaten them with discipline if they continued that practice.

Since the issuance of the memorandum no Mitchellace employee has been disciplined for remaining too long on break. In fact it appears that Mitchellace has never disciplined any employee for returning late from a break.

Mitchellace did not provide the Union with an advance copy of Haney's memorandum or otherwise notify the Union that it intended to make any change in its rules or practices concerning employee breaks. Mitchellace has never offered to bargain with the Union about the matter. Rather, Mitchellace's position is that the memorandum made no change in Mitchellace's rules; the memorandum merely restated what Mitchellace's breaktime rule was and always had been.

As noted above, the General Counsel contends that the issuance of the memorandum amounted to a violation of Section 8(a)(5). The General Counsel does not claim that Mitchellace took such action for antiunion reasons. Thus, there is no allegation that such action violated Section 8(a)(3).

It would be a remarkable supervisor who at all times enforced all work rules with equal rigor. Plainly supervisors inevitably will relax their enforcement of at least some rules at least some of the time. See, e.g., *Phillips Fibers Corp.*, 307 NLRB 145, 146 (1992). I will assume that, where that happens over relatively brief cycles, management does not have to bargain with the union every time a tightening up occurs.

But here employees had for years been allowed to wait until the end of the break period before starting back to their work stations. In this circumstance, the May 31 memorandum amounted to a unilateral change in the employees' terms and conditions of employment. See, e.g., *Lovejoy Industries*, 309 NLRB 1085, 1104 (1992), enfd. in pertinent part sub nom. *Acme Die Casting v. NLRB*, 26 F.3d 162 (D.C. Cir. 1994); *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. in pertinent part 823 F.2d 1086 (7th Cir. 1987); *Celotex Corp.*, 259 NLRB 1186 (1982); and cf. *Hyatt Regency Memphis*, 296 NLRB 259 (1989), enfd. in pertinent part 939 F.2d 361 (6th Cir. 1991). As for the fact that the Union had not yet been certified, that is irrelevant since it is the date of the election that determines when the duty to bargain arises—where, as here, the Union is subsequently certified. E.g., *Lovejoy Industries*, supra; and *Adair Standish Corp.*, 290 NLRB 317, 337 (1988), enfd. in pertinent part 912 F.2d 854 (6th Cir. 1990).

The question that remains is whether this unilateral change in breaktime rules amounted to a “material, substantial and significant change” in the terms or conditions of employment at Mitchellace. If it was not, then, notwithstanding the unilateral action, Mitchellace did not violate the Act. E.g., *Peerless Food Products*, 236 NLRB 161 (1978).

A fair number of Board cases deal explicitly with the issue of whether a given unilateral act by an employer resulted in a material, substantial, and significant change in the employees' terms or conditions of employment.⁶ As a reading of

⁶For examples of cases holding that the employer action in question did have material, substantial, and significant effects, see *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993) (employer discontinued cafeteria service between 2 and 4 a.m., instead providing vending machines and other snack facilities); *Rangaire Co.*, 309 NLRB 1043 (1992) (employer discontinued past practice of providing an extra 15 minutes of paid lunchbreak once per year, on Thanksgiving); *Murphy Oil USA*, 286 NLRB 1039, 1041–1042 (1987) (employer prohibited employees from putting up posters, pictures and calendars at their work stations); *Angelica Healthcare Services*, 284 NLRB 844, 853 (1987) (transfer of three employees from the day shift in one department to the night shift in another); *Atlas Microfilming*, 267 NLRB 682, 695–696 (1983), enfd. 753 F.2d 313 (3d Cir. 1985) (employer added 15 minutes to the employees' lunch period); and *Nathan Littauer Hospital Assn.*, 229 NLRB 1122 (1977) (nurses required to clock in). For examples of employer action held not to have material, substantial, and significant effects, see *Litton Systems*, 300 NLRB 324, 331–332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991) (installation of a new buzzer system for regulating breaktime led, in some cases, to a 20-percent reduction in the time employees spent on their breaks); *J. W. Fergusson & Sons*, 299 NLRB 882, 892 (1990) (employer increased the lunchbreak by 5 minutes while decreasing the employees' afternoon break by 5 minutes); *Murphy Oil USA*, supra (employer required employees to: (1) play cards only in the lunchroom, not in work areas; (2) wait at their work stations prior to quitting time, instead of allowing employees to “roam around”; (3) provide more detailed paperwork in order to borrow tools; and (4) remove bumper stickers from their hats); *Angelica Healthcare Services*, supra (transferring one employee to a new work station 10 feet from her old where the transfer made no difference in terms of the department to which the employee was assigned, the shift on which she worked or the pay she received); *St. John's Hospital*, 281 NLRB 1163, 1168 (1986), enfd., 825 F.2d 740 (3d Cir. 1987) (reimposition of restrictions on smoking and drinking during the 15-minute employee report time); *Advertiser's Mfg. Co.*, supra (employees prohibited from parking in the first row of the plant parking lot); *Alamo Cement Co.*, 277 NLRB 1031 (1985) (change

them will indicate, there is no way to categorize them so that every unilateral action by an employer can be pegged with any assurance as having material, substantial, and significant effects or as not having such effects. Indeed, given the nature of the issue, that would seem unavoidable. There is a continuum of employer actions, after all, ranging from those that obviously have material, substantial, and significant effects on terms and conditions of employment to those that obviously do not. “[A]nd in the middle of the continuum, any classification is bound to be somewhat arbitrary.” *Illinois Power Co. v. Commissioner of Internal Revenue*, 792 F.2d 683, 685 (7th Cir. 1986).⁷

I have no doubt, that, from the viewpoint of many Mitchellace employees, the effect of Mitchellace's action was indeed material, substantial, and significant. For those employees who had waited until the bell rang before returning to work, after all, in some cases the Company's action reduced their breaktime by more than 20 percent. Nonetheless, my conclusion is that, as the Board defines “material, substantial, and significant,” for two reasons Mitchellace's breaktime action did not have a material, substantial, and significant impact on the employees' terms and conditions of employment. First, that result is suggested by what appear to be the closest precedents: *Litton Systems*, supra, and *La Mousse*, supra. And second, from the point of view of at least some Mitchellace employees, the Company's action made no change whatever. See, in this connection, *Postal Service*, 275 NLRB 360 (1985).

As for the lunchbreak, Mitchellace's bell system has always been set to have a bell ring 3 minutes before the end of each lunch period. Concomitantly employees have always understood that means they are to head back to their work stations so as to arrive there as the lunch period ends. See,

in one employee's classification from “mix chemist” to “assistant chief chemist” resulting in “a slight increase in his hourly wage,” “sporadic substitution” for a supervisor, and his assisting in the preparation of a monthly report); *UNC Nuclear Industries*, 268 NLRB 841 (1984) (changes in test requirements for nuclear reactor operators); *La Mousse, Inc.*, 259 NLRB 37 (1981), enfd. mem. 703 F.2d 576 (9th Cir. 1983) (employer unilaterally increased the morning and afternoon breaks by 5 minutes each); *Weather Tec Corp.*, 238 NLRB 1535 (1978) (employer unilaterally ended its practice of paying for the coffee supplies that the employees used to make the coffee for their morning and afternoon breaks); *Peerless Food Products*, supra (limiting a union business agent's previously unlimited access to the plant); and *Bureau of National Affairs*, 235 NLRB 8 (1978) (use of timeclock instead of cards filled in by the employees themselves).

⁷*Illinois Power*, supra, deals with the question of whether, for purposes of Federal income tax regulations, a utility “acquired” or, instead, “constructed” certain property. Comparable line-drawing issues arise elsewhere under the National Labor Relations Act (see, e.g., *Central Transport*, 299 NLRB 4 fn. 2 (1990) (concerning the “employee” versus “independent contractor” distinction) and, indeed, in virtually every area of the law. In all, where the facts fall toward the middle of the continuum, “the ultimate choice will be somewhat arbitrary.” L. Maisel, *Submarkets in Merger and Monopolization Cases*, 72 *George L. J.* 39, 49 (1983). The problem, of course, is that while the law tends to call for binary classifications (e.g., yes, it is material, substantial and significant, or no, it is not), life obstinately refuses to categorize itself that way. See generally P. Schuck, *Multi-Culturalism Redux: Science, Law, and Politics*, 11 *Yale Law & Policy Review* 1 (1993).

for example, the testimony of General Counsel witness (and Mitchellace employee) Rickey Broughton that—

Three minutes before lunch was over, you know, you have a bell that rings, let's you know to go back to work, and you'd see probably ten or twelve, maybe fifteen people piled on the elevator [in order to return to their work stations].⁸

I accordingly conclude that the May 31 memorandum made no change in the length of employee lunch periods.

B. *Employee use of the Plant's Elevators*

The Mitchellace factory has three elevators. Each has a sign posted in it stating that the elevators are for freight only. But the factory has six floors. Bargaining unit employees work on floors two through five (and in the basement). The elevators, obviously enough, are an attraction to employees who work on the upper floors.

Supervisors tend not to enforce the freight-only rule and, indeed, not infrequently ride the elevators themselves to save themselves a climb. But sooner or later the use of the elevators for passenger transportation results in delays in the movement of freight. At that point Mitchellace cracks down on the employees' use of the elevators. Then, over time, enforcement once again gradually relaxes and the cycle continues.

One of these crackdowns on elevator use occurred in November 1992. At that time management included the following in the Company's monthly newsletter:

Due to the fact that the elevators must be utilized so heavily for materials handling, we must limit employee use. Unless a doctor's statement is held in your personnel file stating that you must use the elevator, stairways must be used. This will be effective between the hours of 7 a.m. and 3 p.m. daily.⁹

I used the term "crackdown." From one point of view, that is accurate. But, from another point of view, the newsletter piece could be considered to be an easing of the Company's elevator rules. The point is that the newsletter item prohibited employees from using the elevators only from 7 a.m. until 3 p.m. That amounted to a declaration by management that employees were permitted to use the elevators at all other times (for example, on arriving at work for the day shift). It also amounted to a declaration by management that the notices in the elevators did not mean what they said.

For about 22 months thereafter nothing was said to employees about elevator use (apart from the notices posted in the elevators). The result was that by September 1994 employees were routinely and openly using the elevators not only before 7 a.m. and after 3 p.m., but also when going to and from the first floor lunchroom (as the above quotation from employee Broughton's testimony indicates¹⁰). Then, on September 9, 1994, Mitchellace distributed a memorandum to each employee that read:

The elevators allow us to move raw materials and finished goods. However, due to the excessive use of the elevators we must eliminate usage to only those hauling freight. If you have a medical problem you may use the elevators only if you have a statement from your doctor. Please submit your excuse to the personnel office at which time you will be issued a sticker showing permission to use the elevators. This has always been a company rule but will be strictly enforced after September 30th to allow you time to acquire verification from your doctor¹¹

Note that the memorandum appears to prohibit employees from using the elevators at all times, not just between 7 a.m. and 3 p.m..

Mitchellace issued the memorandum without notifying the Union or offering to bargain about employee use of the elevators.

No employee has ever been disciplined for riding the elevator—either before or after the September 1994 memorandum.

The General Counsel alleges that issuance of the September 1994 memorandum violated Section 8(a)(5) and (1) of the Act.¹² I conclude that the record supports the General Counsel in this respect.

I know of no prior Board decision dealing with the question of whether the availability of elevators constitutes a term or condition of employment within the meaning of Section 8(d) of the Act. But an elevator-versus-stairs issue is one that is "plainly germane to the 'working environment.'" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979).¹³ And, particularly for employees assigned to the upper floors of the Mitchellace factory, it is hard to argue that the difference between, on the one hand, having to walk up all those flights every working day and, on the other, being permitted to ride an elevator, is not material, substantial, and significant.

Nonetheless, absent the time limitations stated in the November 1992 newsletter, I would be constrained to conclude that the issuance of the September 1994 did not violate the Act. See *Postal Service*, supra.

But the November 1992 newsletter did contain time limitations, so that its effect was to permit employees to use the elevators during the 16 hours from 3 p.m. until 7 a.m. The impact of the 1994 memorandum, therefore, was not to republish what had always been a rule. Rather, the 1994 memorandum expanded an 8-hour prohibition on employee use of the elevators to a 24-hour prohibition. I conclude that that amounted to a material, substantial, and significant change in the employees' terms and conditions of employment. Since Mitchellace undertook that change without bargaining with the Union, the Company violated Section 8(a)(5) and (1) of the Act.

As a last matter, no witness referred to the time limitations stated in the 1992 newsletter item or testified that the effect of the 1994 memorandum was to prevent employees from using the elevators before 7 a.m. or after 3 p.m. But a deter-

⁸Tr. 187.

⁹R. Exh. 1.

¹⁰See the text at fn. 8, supra.

¹¹G.C. Exh. 2.

¹²Again, the General Counsel does not allege a violation of Sec. 8(a)(3).

¹³The Court's quotation is from Justice Stewart's concurrence in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1974).

mination of whether Section 8(a)(5) has been violated does not hinge on how the affected employees happened to respond to the employer action in question. Rather, it is up to the Board to determine whether a given change in terms and conditions of employment was such as to have required bargaining.¹⁴

C. Schedule Changes

For many years Mitchellace has frequently changed its employees' work schedules to take account of output needs. Mitchellace, for example, routinely switched employees from five 8-hour days per week to four 10-hour days and then back again. Workday length often varied department by department within Mitchellace and sometimes group by group within a department. Shift starting and ending times sometimes changed even when there was no change in workday length.

On October 3, 1994, Mitchellace once again changed the shift hours and shift length for a number of employees. As it happens, in this case the Company ordered that all first-shift employees begin working 8-hour days—from 6 a.m. to 2:30 p.m., Monday through Friday; and all second-shift employees begin working 10-hour days, from 2:30 p.m. to 1 a.m., Monday through Thursday.¹⁵ Mitchellace made the change without notifying or offering to bargain with the Union.

A nontrivial change in shift starting or ending times or shift length plainly amounts to a material, substantial, and significant change in terms and conditions of employment. E.g., *Virginia Concrete Co.*, 316 NLRB 261, 268 (1995); *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 896, 901 (1994); and *Indiana Hospital*, 315 NLRB 647, 657 (1994). The question here is whether the fact that Mitchellace routinely had effectuated that kind of change in the past, before the employees chose to be represented by the Union, made it permissible for management to unilaterally order the change even after the Union arrived at Mitchellace.

There is authority to the effect that where an employer frequently changed individual employees' working schedules preunion, the employer may lawfully continue to make employee-by-employee changes unilaterally after the arrival of the union. *KDEN Broadcasting Co.*, 225 NLRB 25, 34–35 (1976); accord: *Carbonex Coal Co.*, 262 NLRB 1306, 1313 (1982). There is also authority to the effect that an employer need not bargain before making "routine production scheduling and adjustments relating to diminishing hours of work," so long as such action did not vary from the employer's past practice. *Kal-Die Casting Corp.*, 221 NLRB 1068 fn. 1 (1975).¹⁶

But here Mitchellace issued a plantwide schedule. There was no showing that the new schedule stemmed from "diminishing hours of work" or anything akin to that. And decisions about the time of day that work starts and whether the workweek should consist of five 8-hour days or four 10-hour days are classically matters in which unions, at the behest of employees, want to be involved. I accordingly con-

clude that the *KDEN* and *Kal-Die* exceptions to the usual rule concerning the duty to bargain about schedule changes do not here govern. I accordingly further conclude that by Mitchellace's unilateral action, on October 3, 1994, establishing plantwide schedules, the Company violated Section 8(a)(5) and (1) of the Act.

D. No Smoking Rules

At all relevant times Mitchellace prohibited smoking in its facility except in the employee lunchroom and in the employee breakroom on the third floor of the factory. According to the employee handbook, employees who smoke or carry a lighted cigarette in any nonsmoking area of the plant will receive a "written warning (with or without suspension, depending on company assessment as to the need for more/less discipline)."¹⁷

Naomi Souders is the immediate supervisor of Mat World employee John Welty. In August 1994, employee Ruthanne Carter told Souders that she saw Welty smoking in a nonsmoking area. Souders passed on the information to Mitchellace's director of personnel, Beth Haney. When Haney questioned Welty, he admitted that he had been smoking in a nonsmoking area. Haney thereupon ordered a 3-day suspension for Welty. Welty had not previously been disciplined for smoking in a nonsmoking area.

In December 1994, Tim Duncan, who is the immediate supervisor of employee Jerry Blair, warned Blair about smoking in a nonsmoking area. (Blair testified that Duncan saw him with a lighted cigarette. Duncan testified that he saw Blair alone in a smoke-filled restroom but did not actually see Blair holding a lighted cigarette. Blair and Duncan were equally credible on this point. In any event, no purpose would be served in attempting to resolve this credibility issue.) Blair—in what presumably must have seemed to him to be a good idea at the time—then complained about the warning to Mitchellace's chief operating officer, Steve Keating. In the process of doing so, Blair admitted to having smoked a cigarette in a nonsmoking area. Keating suspended Blair for 3 days. Like Welty, Blair had not previously been disciplined for that kind of violation of the Company's rules.

The General Counsel contends that the suspensions of Welty and Blair represented a rule change in that, after the Union's arrival, Mitchellace "began imposing more serious disciplinary penalties on its employees for violations of its no smoking policy," doing so without notice to the Union.

But the facts do not bear out that contention. Probably as far back as 1990, and certainly since 1992, Mitchellace has advised its employees that any employee caught smoking in a nonsmoking area would be suspended for 3 days if that was the employee's first such offense and would be fired if it was the employee's second offense. As put into practice, Mitchellace suspends or fires an employee for smoking only if a supervisor actually saw the employee with a lighted cigarette in a nonsmoking area or if the employee admitted to smoking in a nonsmoking area. Thus if, say, a supervisor found an employee alone in a restroom (all of which are nonsmoking areas) with the room filled with cigarette smoke, but the supervisor saw no cigarette, the supervisor would, at most, issue a "verbal" (that is, nonwritten) warning—unless

¹⁴ See, e.g., the cases cited at fn. 6, supra; cf. *American Freightways*, 124 NLRB 146, 147 (1959).

¹⁵ See G.C. Exh. 16.

¹⁶ An additional criterion is that the union "did not broach these issues" with the employer." *Id.*

¹⁷ G.C. Exh. 11. Mitchellace does not allow any pipe smoking or cigar smoking at all.

the employee admitted that he or she had been smoking there.

It is true that there is evidence that on numerous occasions employees got away with smoking in nonsmoking areas without being disciplined. It also appears that some supervisors sometimes smoked cigarettes in nonsmoking areas. But absent evidence that, as a matter of practice, management permitted employees to smoke in nonsmoking areas, such behavior means nothing in terms of proving a violation of Section 8(a)(5). And there is no evidence of any such practice by management.

I accordingly shall recommend that the complaint be dismissed insofar as it alleges that Mitchellace's no-smoking rule violated Section 8(a)(5) and (1) of the Act.¹⁸

II. THE ALLEGED VIOLATIONS OF SECTION 8(A)(3)

A. Mitchellace's Discipline of Blair and Welty

As just discussed, the General Counsel contends that Mitchellace's action suspending Welty and Blair for smoking amounted to a unilateral change in the Company's disciplinary rules, which contention I found to be incorrect. But the General Counsel also contends that the suspensions of Welty and Blair were discriminatorily motivated. The reason that Welty and Blair received disciplinary suspensions, the General Counsel argues, was because of their prounion stance. And the record does show that Blair and Welty both supported the Union, as Mitchellace's management surely knew. Further, the record here proves animus on Mitchellace's part. See part III of this decision, sections A, B, and D, *infra*.

But the record shows that Mitchellace would have suspended both Welty and Blair even in the absence of their union activity. Both smoked cigarettes in nonsmoking areas and both then admitted to supervisors that they had done so. As discussed above, Mitchellace's rules call for 3-day suspensions in these circumstances. Additionally, both Haney and Souders (regarding Welty) and Keating (regarding Blair) were entirely credible about having responded in what they considered to be the only appropriate way given the circumstances presented to them.

I accordingly shall recommend that the complaint here be dismissed insofar as it alleges that the Company's suspensions of Blair and Welty violated Section 8(a)(3) and (1) of the Act. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

B. Dianna Harrell's Potato Chips

Both Dianna Harrell and her husband are employed by Mitchellace and both actively supported the Union's campaign at Mitchellace. Harrell testified on behalf of the Union in the course of a previous Board hearing concerning alleged unfair labor practices by Mitchellace. The General Counsel alleges that in July 1994 Mitchellace discriminatorily disciplined Harrell because of these prounion activities. To un-

derstand the allegation and Mitchellace's defense, it is necessary to briefly touch on Mitchellace's use of "situation memos" and Mitchellace's rules about employees having food at their work stations.

Mitchellace provides supervisors with "situation memo" forms. A supervisor uses the form when confronted with circumstances that, in the supervisor's judgment, ought to be recorded in writing. Often such circumstances involve a supervisor's problem with an employee. For example, a costly production error by an employee might well become the subject of a situation memo. Situation memos are not considered to be part of the disciplinary process. On the other hand, in the event of employee behavior that is on the borderline of being discipline worthy, the existence of one or more situation memos in an employee's file could result in the employee receiving a disciplinary warning where, but for the situation memos, the employee would not be disciplined. Mitchellace employees accordingly much prefer to avoid having unfavorable situation memos in their files.

As for Mitchellace's rules about food at employee work stations, the employee handbook provides:

Food may not be consumed on the production floor.

Water, pop, coffee and other beverages as well as gum and candy (that can be contained as a whole within the mouth) are allowed at individual workstations.

Notwithstanding this rule, employees routinely keep open bags of snack items like cookies or potato chips at their work stations. And Mitchellace has never disciplined any employee for doing so. In particular, employee Diana Craycraft, who is prominently antiunion and who is supervised by the same supervisor as Harrell, often keeps open food containers at her work station and has not been disciplined in any way for doing so.

Sometime in July 1994 Haney (Mitchellace's director of personnel) chanced by Harrell's work station in the course of giving a tour of the plant to a new employee. At the time Harrell had an open bag of potato chips at her worktable. Haney did not say anything to Harrell. But a half-hour later, Harrell was told to meet with her supervisor, Vicki Scott.

According to Harrell's credible testimony, Scott told Harrell that Haney wanted Harrell disciplined for having the open bag of chips at her work station. But, said Scott (again, according to Harrell's credible testimony), she was not going to discipline Harrell for this violation of the food rules "because everybody else does it too."

At that point, testified Harrell, Scott wrote a situation report "confined to the open bag of potato chips." Scott, however, testified that she did not write any situation report concerning Harrell's potato chips. And her testimony was as credible as Harrell's. (Additionally, Scott's testimony is supported by evidence that no situation report concerning Harrell having food at her work station exists in any of the files where one would expect such a report to be kept.)

The General Counsel contends that a situation report about an employee amounts to discipline, that the most likely explanation for Harrell being disciplined for having food at her work station is Mitchellace's animus toward Harrell because of support for the Union, and that Mitchellace thereby violated Section 8(a)(3) and (1) of the Act. Mitchellace argues

¹⁸Not long before the hearing Mitchellace added a fifth-floor breakroom to the areas in the plant in which smoking was allowed. While it does not appear that management notified the Union of the Company's plans in this respect, the General Counsel does not contend that this action violated Sec. 8(a)(5).

that being the subject of a situation report does not constitute discipline and, in any case, no situation report was written.

Neither Scott nor Haney testified about the incident except to deny that any situation report was written about Harrell having food at her work station.

As just discussed, I find that the General Counsel failed to carry his burden of proving that the alleged situation report was in fact written. But it is undisputed that a supervisor did tell Harrell that the Company's director of personnel wanted Harrell disciplined because Harrell had an open bag of potato chips at her work station. This constitutes a threat notwithstanding Scott's statement that she was not going to abide by Haney's directive. See *Oklahoma Fixture Co.*, 314 NLRB 958 (1994).

We thus have a situation in which: (1) Harrell was threatened for behavior that, while technically violative of the Company's rules, was commonplace among employees; (2) Harrell was a union activist, as Mitchellace's management had to have known; and (3) management was hostile to the Union. Under these circumstances, "[t]he Respondent cannot simply present a legitimate reason for its action; it must persuade by a preponderance of the evidence" that the same threat would have been made even absent Harrell's union activity. *Wisconsin Steel Industries*, 318 NLRB 212 (1995), citing *Wright Line*, supra. This Mitchellace has failed to do.

The evidence shows that Haney walked past Harrell's open bag of chips when Haney had a new employee in tow. Given Mitchellace's food rules, that is the one situation most likely to generate a response by the Company regarding Harrell's chips notwithstanding the frequency with which employees ignore the food rules. And it is clear that throughout this episode no one said anything to Harrell about her union activity. But these circumstances do not add up to a showing by a preponderance of the evidence that Harrell would have received the threat of discipline even absent her union activity. I accordingly conclude that while the evidence fails to add up to a violation of Section 8(a)(3), the Company, by threatening Harrell, violated Section 8(a)(1) of the Act.

III. OTHER ALLEGED VIOLATIONS OF THE ACT

A. Bulletin Board Issues

There is a bulletin board in Mitchellace's lunchroom intended for use by employees. Management does not object to employees posting union-related materials on that bulletin board, and employees routinely do so.

There are also bulletin boards in Mitchellace's work areas. On several occasions employee Jerry Adkins sought to post a union notice on one of these bulletin boards. In each case a supervisor removed the notice from the bulletin boards. The General Counsel contends that Mitchellace thereby violated Section 8(a)(1) of the Act.

Mitchellace has a rule governing the use of the bulletin boards in work areas. It reads:

The bulletin boards located in the plant must be restricted to company business, and consequently, employees will not be permitted to post information on them. Any material posted on any plant bulletin board on company property, by any employee other than su-

perisors, management, or the payroll/personnel staff will be removed when discovered.¹⁹

The General Counsel agrees that the rule is "facially valid."²⁰

As a matter of practice, almost all of the materials posted on the work area bulletin boards are what might be termed "official" business: safety notices, materials related to production techniques, and the like. Additionally, as indicated in the rule, only supervisors post materials on the work area bulletin boards or, occasionally, designate an employee to post a given document.

But, also as a matter of practice, on the request of an employee a supervisor will post, or have posted, on a work area bulletin board, personal materials that relate to the employees, as a group, in the supervisor's department. Examples of such materials are thank you notes (where, for instance, an employee had a received, while out sick, flowers or a get well card from his or her fellow employees) or an invitation to a baby shower for an employee in the department. These personal materials are generally restricted to one corner of any given work area bulletin board.

Adkins works in the braiding department on the third floor of Mitchellace's factory. Adkins is supervised by Leon Smith. On October 18, 1994, Adkins posted a union notice on the bulletin board in his department. (The notice was 5.5 by 8.5 inches in size, colored chartreuse, with large black print. It advised of a union meeting on October 19.²¹) Shortly after Adkins posted the notice he returned to the area of the bulletin board and discovered that the notice was gone. Adkins posted another one. That too disappeared after a few minutes. Adkins posted a third. Again the notice was removed. But this time Smith (Adkins' supervisor) made it clear that it was he who had removed the notice. In fact Smith handed the notice back to Adkins. Adkins, in Smith's presence, yet again posted the notice on the bulletin board. Smith did not say anything about the reposting. But 10 or 15 minutes later, the notice once again had disappeared. While there is no direct evidence that it was a supervisor who removed the union notice this last time, the only implication to be drawn from the record is that an agent of the Company was responsible for the removal.

In sum, Mitchellace prevented Adkins from posting union notices on a work area bulletin board while permitting personal messages to be posted on that same bulletin board. I conclude that the Company thereby violated Section 8(a)(1) of the Act. See *R. H. Macy & Co.*, 267 NLRB 177, 181 (1983).

Mitchellace points out that all of the nonwork items posted on each bulletin board in the Company's work areas related specifically to employees in the department where the bulletin board was located. But the notice that Adkins wanted posted also was addressed specifically to Mitchellace's employees (albeit not to employees in any one department). And the notice certainly was as work related as any thank you note.

¹⁹ Additionally, Mitchellace has a no-solicitation rule that prohibits employees from distributing "literature or other materials": (a) during working time; and (b) "in working areas at any time." R. Exh. 18.

²⁰ Br. 9.

²¹ An identical notice is in the record as G.C. Exh. 4.

Mitchellace's bulletin board rule forbids anyone but a supervisor from posting materials on work area bulletin boards. And the record shows that, in keeping with the rule, employees who wanted personal messages posted on work area bulletin boards always brought such messages to their supervisors and that it was the supervisors who personally, or through a delegate, posted the message. Adkins, however, did not proceed that way.

Had Adkins' failure to do so been the reason that Mitchellace removed the union notice, I would recommend dismissal of those allegations of the complaint associated with this action by the Company. See generally *Airstream, Inc.*, 304 NLRB 151 (1991), enf. mem. 963 F.2d 373 (6th Cir. 1992). To begin with, the General Counsel has not attacked the facial validity of the bulletin board rule. Second, there is no claim that Mitchellace had antiunion reasons in mind when it adopted the requirement that only supervisors post materials. Third, I would have no basis for finding that Mitchellace lacked a legitimate business reason for the requirement that only supervisors post materials on the work area bulletin boards. Compare *Peck, Inc.*, 269 NLRB 451, 458 (1984).

But the evidence is clear that Mitchellace would not have allowed the union notice to be posted on a work area bulletin board even had Adkins brought the notice to his supervisor. Mitchellace's problem with the notice, clearly, was the nature of the document, not the procedure that Adkins followed.

B. Haney's Threat; Prohibiting Union Notices from Being Posted on Company Property

Dee Tackett is a supervisor one rung up from Smith. Not long after Adkins' last effort to post a union notice on his department's bulletin board, Tackett spoke to him about it. Adkins explained that, as he understood the law, he was entitled to post union literature on the department's bulletin board. Tackett said that she would check into it. Adkins agreed not to post another union notice until he heard further from her.

About 15 minutes later Tackett returned to Adkins and told him that Haney (Mitchellace's director of personnel) had contacted the Company's lawyers about the matter and that the lawyers had advised that employees "were not allowed to post anything on Company property about the Union."²²

That still was not the end of the matter for Adkins. The following day (October 19) Haney called Adkins to her office. Haney told Adkins that she had been "irate" when she had first heard about Adkins' posting of a union notice on a work area bulletin board. But, Haney told Adkins, because of "your good record, I'm not going to do anything about it this time."²³ Haney went on to tell Adkins that he could not post any union notice anywhere on company property, not even on his locker.²⁴

²² The quotation is from Adkins' testimony. The record is clear that Tackett did not mean to include in that prohibition the bulletin board in the lunchroom.

²³ The quotation is from Adkins' testimony. Although Haney did testify, she did not testify about this conversation.

²⁴ Again, it is clear that Haney did not intend to keep employees from posting union materials on the lunchroom bulletin board.

Mitchellace could lawfully prohibit employees from posting anything on their lockers. But Mitchellace maintains no such nondiscriminatory prohibition. Rather, the Company allows employees to post at least some kinds of communications on their lockers. Under these circumstances, the broad prohibitions that Tackett and Haney uttered regarding posting union materials on company property violated Section 8(a)(1) of the Act. Additionally, Haney's conversation with Adkins amounted to a threat of discipline if, in the future, Adkins were to attempt again to post union literature on a work area bulletin board. That is a further violation of Section 8(a)(1).²⁵

C. Scott's Removal of Union Literature from a Break Area

Mitchellace's tipping and inspection department (T&I) is on the second floor of the factory. T&I has its own break area adjoining the department's machines. There are two tables and eight chairs in the break area. Management grades each of Mitchellace's departments, including T&I, on the cleanliness of its break area.

Vicki Scott supervises both the first and second shifts of that department. (Scott was the subject of discussion in part II,B of this decision, *supra*, concerning her response to Harrell's open bag of potato chips.) While designated Mitchellace employees have the job of keeping T&I's break area clean, Scott routinely helps out by throwing away trash that the employees have left in the break area.

At the start of the morning shift on August 12, 1994, T&I employee Steve Thompson placed eight union notices on each of the two T&I break tables. The notices referred to the Board's ruling in favor of representation of the Mitchellace employees by the Union, made claims about the benefits that union representation was going to offer to Mitchellace's employees, and advised of upcoming meetings between representatives of the Union and the employees. Each notice was printed on a single sheet of florescent yellow, 8.5-by-11-inch paper.

The notices remained in the break area throughout the 10-hour first shift. According to Thompson's credible testimony, as the shift ended (and with the second-shift employees about to arrive), Scott collected all of the union notices and placed them in a trash container. A newspaper was on one of the tables. Scott left it there. (Scott testified, also credibly, that she did not remember the incident.)²⁶

The mere fact of a supervisor removing union literature from a break area does not constitute a violation of the Act—or rather, does not where the supervisor routinely helps keep the break area clean. E.g., *Steelcase, Inc.*, 316 NLRB 1140, 1143–1144 (1995); compare *Gearhart-Owen Industries*, 226 NLRB 246, 260 (1976). The General Counsel, however, argues that Scott discarded the union notices be-

²⁵ The only allegation in the complaint addressed specifically to "company property" is that Haney threatened an employee with discipline for posting union literature on company property. But the question of whether Haney uttered an overly broad prohibition (one that included employee lockers) was specifically addressed at the hearing.

²⁶ Also at the end of the first shift, Scott ordered Thompson to remove union literature from the desk he used for his work. The General Counsel does not contend that this violated the Act in any respect.

cause she wanted to preclude the second-shift employees from reading them. But that argument is without substantial basis in the record. Scott certainly did not say that that was her purpose, and no one claims that Scott discarded the papers in a manner that he could be considered a nonverbal communication of union animus on Scott's part. Compare *Jennie-O Foods*, 301 NLRB 305, 337 (1991). Further, if Scott had been motivated by a desire to keep second-shift employees from reading the literature, she presumably would have had a similar interest in keeping first-shift employees from doing so. Yet she left the notices on the break area tables for more than 10 hours, including through two break periods and the lunch period. As for Scott letting a newspaper remain on one of the tables, that is not inconsistent with Scott discarding as unacceptably messy florescent-yellow sheets of paper that had been on the breaktables throughout the entire shift.

I accordingly shall recommend that these allegations of the complaint be dismissed. See generally *Page Avjet*, 278 NLRB 444, 450 (1986).²⁷

D. Did a Supervisor Threaten an Employee for Talking About the Union

Employee Rickey Broughton actively supported the Union during the election campaign and thereafter. Sometime in September 1994 Broughton had an 8- or 10-minute conversation with employee Dave Horner, during worktime, about several subjects, including union matters. Broughton was about 20 feet from Supervisor Farrell Crabtree when he had that conversation. Crabtree does not supervise either Broughton or Horner.

Broughton was, and is, supervised by Jean Fraley.²⁸ According to Broughton's testimony, later during the day of Broughton's conversation with Horner, Fraley told Broughton that Crabtree had talked to her about Broughton. Crabtree had said to Fraley (again, this is per Broughton's testimony about his conversation with Fraley) that she should tell Broughton that the next time Crabtree saw Broughton "talking about union stuff on the job, he was going to write [Broughton] up." Broughton testified that Fraley went on to say that she was telling Broughton about Crabtree's remark for Broughton's "own good," that Fraley "didn't want to see" Broughton "get in trouble."

There was nothing about Broughton's demeanor that causes me to question his credibility.

Crabtree denied ever talking to Fraley about Broughton talking to other employees during worktime and denied ever telling Fraley that he was going to write up Broughton. Crabtree's testimony was equally as credible as Broughton's.

Neither Fraley nor Horner testified.

The fact that Horner did not testify seems to me to be without significance. But that is not the case with the absence of testimony from Fraley. Rather, given the failure of

²⁷ Employee Rickey Broughton testified that union literature that he left in a break area at the end of the day disappeared by the time he returned the next day while nonunion materials did not. But there is no evidence that any supervisor played a role in this, and the General Counsel does not contend that Mitchellace violated the Act in this respect.

²⁸ While there is no evidence that specifically addresses the question of whether Fraley was still a Mitchellace supervisor as of the hearing, Mitchellace does not appear to dispute that Fraley remains a supervisor of the Company. See Mitchellace's Br. 16.

Fraley to testify, I consider Broughton's testimony, about Fraley's remarks to him, to be undisputed. See, e.g., *Yukon Mfg. Co.*, 310 NLRB 324, 331 (1993). That is, even assuming that Crabtree did not in fact say anything about writing up Broughton for "talking about union stuff on the job," I find that Fraley, for reasons about which I need not speculate, nonetheless warned Broughton that Crabtree had said that he would discipline Broughton the next time Crabtree caught Broughton talking about union matters during worktime.

The record shows that Mitchellace permits employees to hold reasonably brief conversations with their fellow employees during worktime about nonwork matters. That being the case, and because Fraley specifically warned Broughton against talking about "union stuff" during worktime, I conclude that Fraley's remarks to Broughton violated Section 8(a)(1) of the Act. See *Kroger Co.*, 311 NLRB 1187, 1193 (1993), *enfd.* 50 F.3d 1037 (11th Cir. 1995); and *Emergency One, Inc.*, 306 NLRB 800, 806 (1992).

E. Haney's January 16 Meeting with Jamie Rewakowsky

At issue is whether Director of Personnel Haney threatened to fire employee Jamie Rewakowsky because of a remark by Rewakowsky at a meeting called by management and whether, if Haney did so, Mitchellace thereby violated Section 8(a)(1) of the Act.

In the fall of 1994 Mitchellace asked employees to respond to a questionnaire—an "employee morale assessment survey." On January 12, 1995, a consultant retained by Mitchellace held a series of meetings with employees to discuss issues raised by the survey. No supervisors attended any of these meetings.

At one such meeting employee Jamie Rewakowsky spoke up. Rewakowsky had only recently become a Mitchellace employee. Rewakowsky's concern was that, in his view, he had not received adequate training. "The guy who trained me," Rewakowsky complained, had only been at Mitchellace for a couple of weeks. No one contends that there was anything inappropriate about Rewakowsky's remarks or about the manner in which he made them. On the other hand, on the witness stand Rewakowsky agreed that, at that meeting, he was voicing an individual complaint, that he was not speaking for employees as a group. Notwithstanding Rewakowsky's intent, at the meeting a number of employees voiced agreement with Rewakowsky about insufficient training. One of the employees who expressed agreement with Rewakowsky was employee Charles Corns; it was Corns who had been the employee who had trained Rewakowsky.

Rewakowsky's group leader (and Corns') was Pam Gregory. Vicki Scott supervised Gregory, Rewakowsky and Corns. Scott had put Gregory in charge of having Rewakowsky get the training he needed. Gregory attended the same meeting that Rewakowsky did. (Group leaders at Mitchellace are not supervisors.) About a half-hour after the meeting Gregory, obviously upset, told Scott that at the meeting Rewakowsky complained that he had not received any training and that Corns had agreed with Rewakowsky.

In an affidavit given to a Board agent, Scott described her reaction to what Gregory said about what Rewakowsky had said:

I was baffled by Jamie's complaints (and Corns') because they were trained, and I didn't like the idea they had said . . . in a meeting that they weren't adequately trained. . . . I do not want other employees to think that if they get with my section that they'll get put on a machine without being trained.²⁹

Scott forthwith told Mitchellace's plant manager, Angie Meeker, about Rewakowsky's remarks. It is probable that, sometime on January 12 or 13 or, perhaps, on the morning of January 16, Scott also told Haney about Rewakowsky's complaint. Additionally, Scott raised the matter directly with Rewakowsky, showing him a document indicating the date on which Corns first became a Mitchellace employee.

As just indicated, Rewakowsky made his criticism about training on January 12. Rewakowsky was scheduled to work the following Saturday, January 14. His shift that day began at 6 a.m. Rewakowsky arrived at work about 10 minutes late. He smelled strongly of alcohol. Scott confronted Rewakowsky about his tardiness (this not being the first time he arrived late). She did not say anything to Rewakowsky about his alcoholic aura. Rewakowsky responded something on the order of, "[Y]ou should be glad I showed up at all." (The quotation is from Scott's testimony,³⁰ which I credit. Rewakowsky denied saying anything like that, although he agrees that he had gotten to work late, that he had smelled of alcohol, and that he had been out until around 2:30 a.m.) Scott wrote a situation memorandum about the incident.

On the morning of Monday, January 16, Scott spoke to Haney about her exchange with Rewakowsky on Saturday morning. As touched on above, either Scott had already spoken to Haney about Rewakowsky's complaint concerning his training or she did so at this meeting. As Haney's meeting with Scott ended, Haney told Scott to send Rewakowsky to her (Haney's) office. Rewakowsky entered Haney's office a short time later.

According to Rewakowsky, Haney told Rewakowsky that management had tagged Rewakowsky as a "troublemaker," and that the tag was associated with his January 12 comments about inadequate training. Haney went on to say, Rewakowsky testified, that she had told Scott not to hesitate to terminate him. According to Rewakowsky, thereafter (but still at the same meeting) Haney spoke to him about his smelling of alcohol when he arrived at work on January 14.

According to Haney's testimony about the meeting, she pointed out to Rewakowsky that he was still a probationary employee, that he had a history of tardiness, that arriving at work under the influence of alcohol was unacceptable, that behaving disrespectfully to a supervisor was unacceptable, that accordingly Rewakowsky was on thin ice, and that she would fire him if he repeated any of such misbehavior. Haney denied telling Rewakowsky that he was a troublemaker. Haney was not asked, and she did not testify about, whether she said anything to Rewakowsky concerning his remarks about training on January 12.

I credit Haney's testimony about her meeting with Rewakowsky, not Rewakowsky's. It may be that Haney did say something to Rewakowsky about his remarks about training. But whether she did or did not, I find that the threats that Haney made to Rewakowsky about firing him were not

associated with the remarks he made at the January 12 meeting. Rather, such threats stemmed entirely from Rewakowsky's tardiness, his arriving at work smelling of alcohol, and the disrespect he showed toward Scott on January 14. And, needless to say, threats based on such behavior do not violate the Act.

I accordingly need not consider whether Rewakowsky's remarks at the January 12 meeting constituted concerted, protected activity.

REMEDY

The accompanying recommended Order requires Mitchellace to cease and desist from violating the Act in certain respects and to post the usual notice. Additionally the recommended Order requires Mitchellace to: (1) return to the work schedule in effect prior to the schedule change on October 3, 1994, unless the Union agrees otherwise; and (2) permit employees to use the plant's elevators from 3 p.m. to 7 a.m., unless and until the Company bargains to agreement or impasse about a change in such usage.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³¹

ORDER

The Respondent, Mitchellace, Inc., Portsmouth, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the work schedules of the employees in the following bargaining unit without bargaining in good faith to agreement or impasse with the Chicago & Central States Joint Board, Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC: (the Union).

All production and maintenance employees, including receiving, shipping and print shop employees, employed by Mitchellace at its Portsmouth, Ohio, facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined in the Act.

(b) Changing rules regarding the use, by members of such bargaining unit, of the plant's elevators, without bargaining in good faith to agreement or impasse with the Union.

(c) Discriminating against prounion employees in the enforcement of rules restricting the presence of food at employee work stations.

(d) Threatening to discipline employees for talking about union-related matters during worktime while permitting employees to talk about other nonwork matters during worktime.

(e) While permitting the posting on work area bulletin boards of documents addressing personal subjects, (i) removing union-related materials from such bulletin boards; (ii) telling employees that they are prohibited from posting union-related materials on work area bulletin boards, and (iii)

²⁹ Tr. 234.

³⁰ Tr. 241.

³¹ If 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.

threatening employees with discipline for attempting to post union-related materials on such bulletin boards.

(f) While permitting employees to post on their lockers documents addressing subjects not related to their work, telling employees that they are prohibited from posting union-related materials on their lockers.

(g) 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) Reinstigate the employee work schedule in place prior to the schedule change on October 3, 1994, unless the Union agrees otherwise.

(b) Permit employees to use the plant's elevators from 3 p.m. to 7 a.m., unless and until the Company bargains to agreement or impasse about a change in such usage.

(c) Post at its facility in Portsmouth, Ohio, copies of the attached notice marked "Appendix."³² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

³² If 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 change the work schedules of the employees in the following bargaining unit without bargaining in good faith to agreement or impasse with the Chicago & Central States Joint Board, Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC.

All production and maintenance employees, including receiving, shipping and print shop employees, whom we employ at our Portsmouth, Ohio, facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT change our rules regarding employee use of the plant's elevators without bargaining in good faith to agreement or impasse with the Union.

WE WILL NOT threaten to discipline employees for talking about union-related matters during worktime while permitting employees to talk about other nonwork matters during worktime.

WE WILL NOT discriminate against prounion employees in the way we enforce rules restricting the presence of food at employee work stations.

In respect to those work area bulletin boards on which we permit personal documents to be posted, WE WILL NOT

- Remove union-related materials from such bulletin boards, or
- Tell employees that they are prohibited from posting union-related materials there, or
- Threaten employees with discipline for attempting to post union-related materials there.

WE WILL NOT tell employees that they are prohibited from posting union-related materials on their lockers while permitting employees to post other materials not related to their work there.

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

WE WILL reinstate the employee work schedule in place prior to the schedule change on October 3, 1994, unless the Union agrees otherwise.

WE WILL permit employees to use the plant's elevators before 7 a.m. and after 3 p.m. unless and until we to reach agreement or impasse with the Union about a change in this usage.

MITCHELLACE, INC.