

Tocco, Inc. and Kelley Dilbeck and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Cases 10-CA-28082 and 10-CA-28260

April 18, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On August 7, 1995, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Counsel and the Charging Party also each filed cross-exceptions and supporting briefs.

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

We adopt, for the following reasons, the judge's findings that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally and discriminatorily eliminating, for unit employees, its policy of granting education and relocation assistance.

¹ The General Counsel in his cross-exceptions has requested that we modify the judge's Order in the following manner: (1) that any unit employees in addition to Dilbeck, Burns, and McDaniel who were discharged pursuant to the Respondent's unlawfully implemented drug testing policy be reinstated with backpay and interest and have the appropriate expungement made to their personnel records; (2) that the Respondent reimburse any unit employees who have incurred expenses pursuant to educational activities or a relocation to the extent those expenses would have been reimbursable under the education and relocation policies that were unlawfully eliminated by the Respondent; and (3) that the notice to employees specify that the Respondent will reinstate the education and relocation policies that existed before the Respondent unlawfully eliminated them, and will restore the drug testing policy that existed before the Respondent unilaterally changed it.

The Charging Party in its cross-exceptions reiterates the General Counsel's request that unit employees be reimbursed for any expenses incurred pursuant to the elimination of the education/relocation policies, and additionally requests (1) that the Order be modified to require the Respondent to remove any copies of the drug test results from the personnel files of any employees discharged pursuant to the unlawfully implemented drug testing policy; and (2) that the certification year be extended for a 1-year period under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), commencing from the date the Respondent begins to bargain in good faith.

We grant all of the above cross-exceptions except for the Charging Party's request for an extension of the certification year. In denying that request, we note that there is no evidence that the Respondent's unilateral changes had any meaningful impact on the course of contract negotiations, and thus a *Mar-Jac* remedy is not warranted. *Buck Creek Coal*, 310 NLRB 1240 fn. 2 (1993), and cases cited therein.

We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). Finally, we shall further modify the judge's recommended Order and notice to more closely conform to the violations found.

We find the violation of Section 8(a)(5) and (1) because it is undisputed that the Respondent failed to bargain with the Union before eliminating the education/relocation benefits for bargaining unit employees, and we reject the Respondent's contention that the benefits had been totally eliminated on March 8, 1994, approximately 2 months before the Union won the May 20 election, and, therefore, before its bargaining obligation arose. The March 8 memorandum on which the Respondent relies was equivocal in that it stated both that the "subject policies" were eliminated "effective March 1," and that "employee relocation/education will be handled on an individual basis at the discretion of Park-Ohio." Thus, educational assistance was not, in fact, eliminated, but would simply be provided on an individual basis, i.e., case-by-case consideration. Further evidence that educational assistance remained as an employment benefit was the benefit summary that the Respondent's own witness acknowledged was in place in June 1994. It reported the availability of an "Educational Assistance Program (6 months if applicable)—100% tuition/books." In addition, there was unrefuted testimony that some nonbargaining unit employees did receive education assistance after the purported "elimination" of the benefit. In sum, even assuming that some element of individualized discretion had been introduced before the Union was selected as representative, the Respondent's across-the-board elimination of the benefit for any bargaining unit employees was clearly a change in terms and conditions of employment at a time when a bargaining obligation existed.²

We agree that the Respondent's actions respecting the education and relocation benefits also violated Section 8(a)(3) and (1) of the Act because the credited evidence reveals that the new total elimination policy applied only to the bargaining unit employees. It was unlawfully discriminatory both because it was motivated by the advent of the Union and because it discriminated against employees on the basis of their union representation. Because of this express use of union representation as a reason to deny benefits to unit employees, while providing them to unrepresented employees, the Respondent plainly lacks any plausible basis for establishing a *Wright Line*³ defense, i.e., showing that it would have denied benefits to these employees even absent their union representation.

² This case is therefore distinguishable from *Consolidated Printers*, 305 NLRB 1061 (1992), in which the Board found that an employer had no bargaining obligation as to a layoff decision that was made before the union won election as the unit bargaining representative, although the decision was not announced and effectuated until after the election. In the present case, as explained, the evidence does not establish a clear decision before the election to eliminate the benefit.

³ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Tocco, Inc., Boaz, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it has denied education assistance because the employees selected International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as their collective-bargaining representative and because the employees are eligible to join the Union.

(b) Denying education and relocation assistance to unit employees because its employees selected the Union and are eligible to join the Union.

(c) Unilaterally eliminating its education and relocation assistance policies without first notifying and bargaining with the Union as its employees' exclusive collective-bargaining representative.

(d) Unilaterally conducting drug tests among all bargaining unit employees without first notifying and bargaining with the Union.

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

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

(a) On request, bargain in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as the exclusive bargaining representative of the employees in the unit described below:

All regular full-time and regular part-time production and maintenance employees, including operators, maintenance technicians, test employees, field service employees, custodians, painters, shippers and store room employees employed by the Respondent at its Boaz, Alabama facility, but excluding all office clerical employees, professional or technical employees, temporary employees, guards and supervisors as defined in the Act.

(b) Restore conditions to the status that existed before its actions found unlawful herein.

(c) Restore to its employees in the above-described bargaining unit education and relocation assistance benefits as they existed before the Respondent unlawfully eliminated those benefits, and restore its drug testing policy to the policy that existed before it unilaterally changed its policy.

(d) Make whole, with interest, any unit employees who have incurred expenses pursuant to educational activities or a relocation to the extent that such expenses would have been reimbursable by the Respond-

ent under the education and relocation policies that existed before it unlawfully eliminated those policies.

(e) Within 14 days from the date of this Order, offer Kelly Dilbeck, Doyle Burns, Kurt McDaniel, and any other unit employees who were discharged pursuant to the unlawfully implemented drug testing policy, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make Kelly Dilbeck, Doyle Burns, Kurt McDaniel, and any other unit employees who were discharged pursuant to the unlawfully implemented drug testing policy, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, including any copies of the drug test results, and within 3 days thereafter notify the employees that this has been done and that the discharges will not be used against them in any way.

(h) Preserve and, within 14 days of a 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.

(i) Within 14 days after service by the Region, post at its Boaz, Alabama facilities copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, 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 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 30, 1994.

(j) 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

⁴If 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."

attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees that we have denied their education assistance program because they selected International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and because our employees are eligible to join the Union.

WE WILL NOT deny education and relocation assistance to unit employees because our employees selected the Union as their bargaining representative and because our employees are eligible to join the Union.

WE WILL NOT unilaterally eliminate our education and relocation assistance policies for employees without first notifying and bargaining with the Union.

WE WILL NOT unilaterally test bargaining unit employees for drugs without cause without first notifying and bargaining with the Union.

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, bargain in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as the exclusive bargaining representative of our employees in the unit described below and, if an understanding is reached, embody the understanding in a written, signed contract.

All regular full-time and regular part-time production and maintenance employees, including operators, maintenance technicians, test employees, field service employees, custodians, painters, shippers and store room employees employed by us at our Boaz, Alabama facility, but excluding all office clerical employees, professional or technical

employees, temporary employees, guards and supervisors as defined in the Act.

WE WILL restore conditions to the status that existed before our unilateral actions.

WE WILL restore to our employees in the above-described bargaining unit education and relocation assistance benefits as they existed before we eliminated those benefits, and restore our drug testing policy to the policy as it existed before we changed that policy.

WE WILL make whole, with interest, any unit employees who have incurred expenses pursuant to educational activities or a relocation to the extent that such expenses would have been reimbursable by us under the education and relocation policies that existed before we eliminated those policies.

WE WILL, within 14 days from the date of the Board's Order, offer Kelley Dilbeck, Doyle Burns, Kurt McDaniel, and any other unit employees who were discharged pursuant to the unilaterally implemented drug testing policy, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kelley Dilbeck, Doyle Burns, Kurt McDaniel, and any other unit employees who were discharged pursuant to the unilaterally implemented drug testing policy, whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Kelley Dilbeck, Doyle Burns, Kurt McDaniel, and any other unit employees who were discharged pursuant to the unilaterally implemented drug testing policy, including any copies of the drug test results, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TOCCO, INC.

Edward A. Smith, Esq. and Karen Neilsen, Esq., for the General Counsel.

Harry L. Hopkins, Esq., for the Respondent.

Richard Rouco, Esq., of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Boaz, Alabama, on June 12, 1995. A consolidated complaint issued on April 13, 1995. The charge in Case 10-CA-28082 was filed on November 30, 1994; Case

10-CA-28206 was filed on February 22 and amended on April 3, 1995.

All parties were represented. Each party had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent, the Charging Party (the Union), and the General Counsel filed briefs. Upon consideration of the entire record and the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted the jurisdictional allegations. It admitted that it is an Alabama corporation with an office and place of business in Boaz, Alabama. It admitted that it has been engaged in the design, manufacture, and sale of precision induction heating equipment. Respondent admitted that during the past calendar year it sold and shipped from its Boaz, Alabama facility goods valued in excess of \$50,000 directly to customers located outside the State of Alabama. It admitted that at material times it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) has been at material times a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The complaint alleged that Respondent engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by making specified unilateral changes in working condition because the employees selected the Union as their bargaining representative, without first notifying and bargaining with the Union. Respondent admitted that the following described bargaining unit is an appropriate unit. It admitted that a majority of the voting employees in that unit selected the Union as their bargaining representative in a May 12 election and that the Union was certified bargaining representative on May 20, 1994. Respondent admitted that the Union has been the exclusive collective-bargaining representative of the following employees since May 12, 1994.

All regular full-time and regular part-time production and maintenance employees, including operators, maintenance technicians, test employees, field service employees, custodians, painters, shippers and store room employees employed by the Respondent at its Boaz, Alabama facility, but excluding all office clerical employees, professional or technical employees, temporary employees, guards and supervisors as defined in the Act.

In its answer Respondent made several affirmative contentions. It affirmatively pleaded that the allegations in complaint paragraphs 10, 11, 13, and 14 were barred by Section 10(b) of the Act; that it would have denied Kelley Dilbeck educational assistance regardless of any proven union ani-

mus; that Dilbeck lacks authority to file or have remedied any of the alleged 8(a)(5) violations; the charges referenced in paragraph 1 of the consolidated complaint do not conform to the requirements of Section 102.12(d) of the Board's Rules and Regulations and should be dismissed; that complaint paragraphs 12 and 13 do not contain a clear and concise description of the acts which are claimed to constitute unfair labor practices; that Respondent's alcohol and drug use policy has been in effect and unchanged since May 4, 1992; that employees Dilbeck, Burns, and McDaniel were tested pursuant to that May 4, 1992 policy and all three tested positive and were terminated pursuant to rule 21 which has been in effect and unchanged since May 4, 1992, and those three discharges were for cause and the three employees are not eligible for reinstatement or payment of backpay.

At the opening of the hearing, the General Counsel moved to amend to include paragraphs 12(a) and (b) and 19(b) to allege that Respondent unilaterally discontinued its relocation program on June 1, 1994; that Respondent in June 1994, through its president, Denis Liederback, told employee Kelley Dilbeck that the educational assistance policy had been changed because the employees selected the Union; and in June, Liederback told employee Kelley Dilbeck that his application for the educational assistance program had been denied because Dilbeck might be a member of the Union. I delayed ruling on the General Counsel's motion to amend. On consideration of the record, I now grant that motion.

May 1994

Supervisor of Human Resources Andrew Huddleston testified that the following memo from Respondent's corporate office (Park-Ohio Industries, Inc.) was posted at the plant maybe during May 1994. When shown a copy of that memo Huddleston agreed that the date, June 7, 1994, printed in the upper left-hand area, may indicate that the memo was posted in the plant on June 7:

Date: March 8, 1994

TO: See Below
FROM: B. Boris
SUBJECT: Education Policy
Relocation Policy

BENEFITS BULLETIN

Effective March 1, 1994, subject policies have been eliminated and any subsequent circumstances related to employee relocation/education will be handled on an individual basis at the discretion of Park-Ohio.

Should you have any questions, please let me know.

Andrew Huddleston authenticated the following memo as one from Respondent to employee Tim Miller. No one was able to recall the date of the memo to Miller.

To: Tim Miller
Regarding the denial of education reimbursement:

1. The change in p.o.i. policy as was posted, effective 3-8-94, requires p.o.i. approvals . . . and p.o.i. will not approve benefit changes made that are now ne-

gotiable issues. (Since it was changed corporate wide, it stands as implemented 3-94.)

2. Even if the benefit had not changed, it is unlikely Tocco could afford most test personnel to be committed to a class schedule it is sponsoring during the fourth quarter.

/s/ Andy Huddleston

Andrew Huddleston recalled talking with employee Kelley Dilbeck about educational benefits in May or early June 1994. Dilbeck asked him why his education benefits were not being paid and Huddleston replied that the benefit had been changed by the corporation and, "[a]s you know, we have to bargain for benefits now."

Kelley Dilbeck testified that he participated in the education assistance program at Respondent and the last time he received pay for tuition and books under that program was in the spring of 1994. He was attending Snead State Community College. He had taken five consecutive quarters of classes under Respondent's education assistance program and he continued to qualify for that assistance.

A. Factual Determinations

1. Credibility

In consideration of witnesses' credibility, I have considered the witness' demeanor, the full record, probabilities, and how the testimony aligns with other evidence.

Kelley Dilbeck appeared to be truthful. He responded openly without evasion to direct and cross-examination. I credit Dilbeck's testimony.

Andrew Huddleston appeared to be a truthful witness. However, on several occasions he showed that his memory was poor. He appeared unsure of items including dates of important events. I credit his testimony to the extent it does not conflict with credited evidence.

To the extent there are conflicts, I credit the testimony of Dilbeck over that of Huddleston.

2. Factual findings

Park-Ohio prepared a March 8, 1994 memo showing that its policies of education and relocation assistance, were subject to individual consideration. Subsequently, by June 1994, Respondent advised bargaining unit employees of the elimination of education and relocation assistance.

3. June 1994

In June 1994, General Foreman John Browning told Kelley Dilbeck that his application for education assistance had been denied. Dilbeck asked and Andrew Huddleston replied that he could not tell Dilbeck why his application for education assistance had been denied. Dilbeck then asked President Denis Liederback about the denial of his application. Liederback told him that Park-Ohio had put a freeze or hold on the relocation and education assistance programs unless there was some special individual cases.

Liederback told Dilbeck that "the vote the people took to vote in the third-party bargaining unit was the reason my application was denied." Dilbeck asked Liederback why some specific employees that were not in the bargaining unit, had been approved for education assistance but Liederback did

not explain why those employees had been approved. Dilbeck asked Liederback if his membership in the Union caused his application to be rejected and Liederback responded that was not a reason. Dilbeck then asked if it was because he was eligible to join the Union that he was rejected and Liederback replied that "was exactly the reason why."

Dilbeck was again denied education assistance when he applied in July 1995.

Huddleston testified that a document captioned "TOCCO BENEFITS SUMMARY" was a benefit summary maintained by Respondent and that it accurately reflected the Company's benefit summary as of June 9, 1994. Included in that summary is the following: "Educational Assistance Program (6 months if applicable)—100% Tuition/Books."

B. Factual Determinations

I credit the testimony of Dilbeck regarding his conversations with President Denis Liederback. Liederback did not testify. I find that Liederback told Dilbeck that "the vote the people took to vote in the third-party bargaining unit was the reason [Dilbeck's education assistance] application was denied." Dilbeck asked Liederback if his membership in the Union caused his application to be rejected and Liederback responded that was not a reason. Dilbeck then asked if it was because he was eligible to join the Union that he was rejected and Liederback replied that "was exactly the reason why."

As shown above, the General Counsel amended the complaint to allege that Respondent engaged in a violation of Section 8(a)(1) by the above conduct. The credited evidence supports the General Counsel. I find that Liederback's comments to Dilbeck, tended to coerce employees and discouraged union activities and membership and violated the provisions of Section 8(a)(1) of the Act. *Hospital of the Good Samaritan*, 315 NLRB 794 (1994); and *Hertz Corp.*, 316 NLRB 672 (1995).

February 13, 1995

Respondent required all bargaining unit employees and some other employees outside the bargaining unit, to be tested for drugs on February 13, 1995.

Andrew Huddleston testified that Respondent's Drug Policy, as well as others including handbook and disciplinary rules, were considered in directing drug testing among unit employees beginning on February 13, 1995. Huddleston testified that Respondent's drug policy was last revised in 1990. The Alcohol and Drug Use policy was the sole basis of authority to test for drugs. From that written policy, Huddleston pointed to the following paragraph as authority for the Respondent to conduct the February 13 tests:

The Company reserves the right to conduct alcohol and drug screening at Company expense to determine if the employee is under the influence of alcohol, drugs or controlled substances. Such tests may be for cause, as part of a rehabilitation program or when employees are returning to work from layoff or disability status.

According to Huddleston, Respondent was relying on the above "for cause" provision when it conducted the tests in

February 1995. As to the basis "for cause," Huddleston testified:

Okay. We had a recent history of severe incident rate in terms of individuals visiting the doctor by necessity due to on-the-job injuries. And the Plant Manager also had some efficiency difficulties. And we had some recent employee involvement that concerned us, and then one that was employed there that also concerned us. So, we felt like that it would be the prudent thing to do to make sure we didn't have a problem in the plant.

Before February 13, Respondent had conducted two drug tests. Both were on individuals. The last of those involved employee Robert Moore. Robert Moore was required to submit to a drug test around February 1, 1995. Andrew Huddleston recalled that test followed a written submission by Moore to justify his missing some Saturday scheduled work. Huddleston recalled the written submission referred to drug education or drug rehab and was from "an outside organization, court, something—." Moore was the only employee tested at that time. Moore tested positive and was discharged.

The only other drug test involved employee Jeff Yarborough. Jeff Yarborough was required to submit to drug testing because he had been arrested and charged with possession of drugs. Yarborough was the only employee tested at that time. Yarborough tested negative on two occasions. His job was not affected.

Huddleston testified that both Moore and Yarborough were tested "for cause." Those were the only drug test conducted among bargaining unit employees before February 13, 1995.

As to the decision to test all bargaining unit employees and others, Huddleston testified that attendance was not a factor but employees' performance was a factor. Individual employee performance was not considered but overall employee performance was considered. On-the-job injuries were considered. Huddleston and Plant Manager Zucs had conversations that eventually led to the February 13, 1995 drug testing. Huddleston testified that he went to Zucs with the first month of 1995 safety experience and Zucs commented they had other problems, too. Those conversations were in late January and early February. In early February 1995, Zucs commented that plant efficiency was not looking good. Zucs and Huddleston expressed concern as to what was causing their problems. The Robert Moore drug test was discussed.

Factory Manager John Zucs recalled that he discussed with Huddleston his concern with some drug problems involving employees Yarborough and Moore. They also talked about safety and accidents and production efficiency. It was during those discussions they decided to conduct drug tests. He tested the manufacturing employees and those employees in related jobs. All bargaining unit employees were tested. Zucs estimated that the bargaining unit employees made up some two-thirds of those tested. About 80 employees were tested and approximately 170 employees were not tested, on February 13. After February another group of employees was tested. That group was in jobs related to engineering. That group did not include any bargaining unit employees. Two employees out of that group tested positive and were discharged.

Huddleston testified that Respondent mailed the Union documentation of their policies in the summer of 1994.

Kelley Dilbeck worked for Respondent from April 1977 until February 20, 1995. Dilbeck was one of two temporary union bargaining committee members. On February 20, Andrew Huddleston told him that he had tested positive for marijuana during the February 13, 1995 employee drug test. He first learned that he was to be tested on February 13 when his supervisor, Tony Childress, told him to report to personnel for a drug screen. Dilbeck took the test that was a urine test. Dilbeck testified there was no showing by his actions or otherwise to indicate that he should be tested.

Anthony Peacock testified that he has worked for Respondent for 17 years. Peacock is the union chairman of the negotiating committee. He has attended all negotiating sessions. He testified that Respondent has not negotiated any change in its drug policy, its educational assistance program, or its relocation policy. Respondent does not dispute that the parties have not bargained to impasse on any of those issues. The Union has not agreed to allow Respondent to conduct a work force wide drug test. Peacock and others have had accidents in the plant in the past and none have been given a drug test because of the accidents.

Peacock recalled drug testing came up in negotiations sometime in November 1994 and the Respondent's explanation was that they give preemployment, postaccident, return from disability, and for cause testing. Respondent was happy with that policy. The Union had no prior knowledge that Respondent planned to test the entire work force. According to Peacock, the Union has not agreed to any form of random drug testing. The Company proposed random testing and the Union has not agreed to that proposal.

C. Factual Determinations

1. Credibility

As to my credibility findings I have considered witness demeanor, the full record, probabilities, and how the testimony aligns with other evidence.

As indicated above, Kelley Dilbeck appeared to be truthful. I credit Dilbeck.

Andrew Huddleston appeared to have some difficulty recalling events and dates. I have credited his testimony only to the extent it does not conflict with credited evidence.

Anthony Peacock appeared to be truthful. He was not evasive. I credit his testimony.

I generally credit John Zucs to the extent his testimony does not conflict with credited evidence.

The testimony of Zucs and Huddleston regarding the reasoning behind their decision to conduct the February 13 drug test was somewhat confused and some of the incidents such as the drug test of employee Robert Moore and some employee injuries, appeared to have actually occurred after Zucs made the decision for the February 13 tests. Moreover, the reasoning behind the tests was different from any reasoning used for tests before that date. I am unable to credit the testimony of Zucs or Huddleston regarding their reasoning behind the February 13 drug test.

2. Factual findings

The credited evidence proved that before the Union became the unit employees' bargaining representative on May

12, 1994, Respondent had a written drug and alcohol screening policy which permitted the testing of employees on the basis of cause, being part of a rehabilitation program, and when employees are returning to work from layoff or disability. Before May 12, Respondent had not tested for cause on anything other than an individual employee basis. Before February 1995, when Respondent decided to conduct a drug test among all unit employees and others, Respondent had not tested a large group of employees on any basis.

The testimony of Andrew Huddleston and John Zucs shows they considered overall employee performance, on the job injuries, the drug testing of employee Robert Moore, and employee efficiency, in deciding to conduct drug test among all bargaining unit employees and others on February 13, 1995. The evidence failed to show that Respondent had ever used those criteria in determining to test employees for drugs before that time.

During the summer of 1994, Respondent mailed its written documentation of policies to the Union. In November 1994, negotiations Respondent and the Union discussed Respondent's drug testing policy. Respondent stated that its policy included drug tests for preemployment, postaccident, return from disability, and for cause. Random drug testing has been mentioned by Respondent during negotiations but the Union has not agreed to a policy that included random drug tests.

D. Conclusions

1. The education/relocation assistance program

Respondent contended that the allegations in paragraphs 10, 11, 13, and 14 are barred by Section 10(b) of the Act. Paragraph 10 alleges that Respondent unilaterally eliminated its education assistance and relocation policies on or about June 1, 1994; paragraph 11 alleges the actions alleged in paragraph 10 were caused by the employees' selection of the Union; paragraphs 13 and 14 allege that the actions alleged in paragraphs 10 and 11, among others, constitute violations of Section 8(a)(1), (3), and (5) of the Act.

In essence Respondent does not dispute that its education and relocation assistance policies were changed. However, it does dispute they were changed during a period in which it had a bargaining obligation with the Union and it disputes that those policies were changed within 6 months before charges were filed.

As shown above Park-Ohio prepared a March 8, 1994 memo regarding the elimination of the education assistance and relocation policy absent individual consideration. The employees learned of those changes by June 1994.

The charge in Case 10-CA-28082 alleging that Respondent unilaterally discontinued its education assistance program was filed on November 30, 1994. Six months before November 30 would fall on May 30, 1994.

Respondent argued that the Union prevailed in a May 12 election and was certified on May 20, 1995. On those dates Respondent's education and relocation assistance policy was as expressed in the March 8, 1994 corporate memo (i.e., the education and relocation assistance had been eliminated). Respondent argued that the record evidence illustrated that no bargaining unit employee was awarded education or relocation assistance from March 8 until the Union was certified on May 20, 1994, or at any time thereafter.

However, I note that the record evidence is not so clear cut as to establish without question that Respondent's education and relocation assistance policy had changed on March 8, 1994. As shown above, when Kelley Dilbeck questioned President Denis Liederback in June 1994, Liederback told him his application for education benefits had been rejected because the people voted in the third party. Liederback also told Dilbeck that it was because (Dilbeck) was eligible to join the Union that he was rejected for education benefits. Nevertheless, Andrew Huddleston admitted that "Tocco Benefit Summary" on June 9, 1994, showed that Respondent had an education assistance program that paid 100-percent tuition/books. Huddleston testified that it was May when the notice of discontinuance of the education and relocation assistance was posted but he then admitted that the date June 7, 1994, typed on the notice may show that the notice was posted on that date.

Subsequently in November 1994, Respondent presented its education policy to the Union for bargaining. The Union proposed tuition reimbursement but the parties have not reached agreement.

I find that despite the March 8 Park-Ohio memo, the credited record failed to prove that Respondent actually changed and notified the employees of that change in its education/relocation assistance policy until some time on or after June 7, 1994. I find that the evidence failed to show that the charge was not timely filed. *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986); and *Newark Morning Ledger Co.*, 311 NLRB 1254 (1993).

Respondent affirmatively pleaded that it would have denied Kelley Dilbeck educational assistance regardless of proven union animus. As to that allegation, the complaint does not specifically allege that Respondent's denial of education assistance to Dilbeck constituted a violation of the Act. The overall cancellation of education assistance was alleged as violation of Section 8(a)(1), (3), and (5) of the Act. In view of the complaint, during the hearing there was no issue as to the specific denial of Dilbeck's education benefits. At that time there was a question of whether I would find that Respondent illegally eliminated education benefits. Only if I should find a violation, as I do herein, would there be a question of whether Dilbeck's education assistance benefits were affected by that illegal action. Before now that consideration was premature. In view of my finding herein, Dilbeck's loss of education benefits may be considered if necessary, in compliance proceedings.

Respondent affirmatively alleged that Kelley Dilbeck lacks standing to file 8(a)(5) charges. It has been established that any person or organization may file a charge under the Act. *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977).

Respondent affirmatively alleged that the charges alleged in paragraph 1 of the complaint do not conform to the requirements of Section 102.12(d) of the Board's Rules and Regulations.

Section 102.12 *Contents*.—Such charge shall contain the following:

...

(d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

I have examined the charges alleged in paragraph 1, Cases 10-CA-28082, 10-CA-28260, and amended Case 10-CA-28260, and I find that Respondent's contention they fail to comply with the requirements of Section 102.12(d), lacks merit.

2. Section 8(a)(3)

In consideration of the merits of the allegation that Respondent violated Section 8(a)(3) by eliminating education and relocation assistance, the test is that set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As to whether Respondent illegally eliminated its education and relocation assistance, I shall first consider whether the General Counsel proved prima facie that one of the reasons why Respondent eliminated those programs was union activity. If I find in support of the General Counsel then I shall consider whether Respondent proved that it would have made the changes in working conditions in the absence of his union activities. *Wright Line*, supra; and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[I]n order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish (1) that the alleged discriminatees engaged in union activities; (2) that the employer had knowledge of such; (3) that the employer's actions were motivated by union animus; and (4) that the discharges had the effect of encouraging or discouraging membership in a labor organization. [*Electromedics, Inc.*, 299 NLRB 928, 937, affd. 947 F.2d 953 (10th Cir. 1991).]

As to whether the employees engaged in union activities and whether Respondent knew the employees engaged in union activities, there is little doubt. The Union prevailed in a May 12 election and was certified bargaining representative of the unit employees on May 20, 1994. The record shows a connection between those known union activities and Respondent's actions in denying education and relocation benefits. One example of such evidence occurred when Respondent advised the employees of cancellation of the education and relocation assistance, it associated cancellation of those benefits with negotiable issues. Additionally, Respondent issued the following memo:

To: Tim Miller

Regarding the denial of education reimbursement:

1. The change in p.o.i. policy as was posted, effective 3-8-94, requires p.o.i. approvals . . . and p.o.i. will not approve benefit changes made that *are now negotiable issues*. (Since it was changed corporate wide, it stands as implemented 3-94).

2. Even if the benefit had not changed, it is unlikely Tocco could afford most test personnel to be committed to a class schedule it is sponsoring during the fourth quarter.

/s/ Andy Huddleston [Emphasis added.]

Moreover, Andrew Huddleston admitted that when he explained to employee Kelley Dilbeck why Dilbeck's education benefits were not paid he stated, "As you know, we have

to bargain for benefits now." The credited testimony of Kelley Dilbeck proved that Respondent's president connected selection of the Union with the employees' loss of education benefits when he talked with Dilbeck in June 1994.

The above evidence shows that the employees engaged in union activity and that Respondent was aware of that activity which included the employees' selection of the Union as their bargaining representative.

As to whether, (3) the employer's actions were motivated by union animus; and (4) the discharges had the effect of encouraging or discouraging membership in a labor organization, the credited record shows the following.

Kelley Dilbeck asked President Denis Liederback about the denial of his education assistance application. Liederback told him that Park-Ohio had put a freeze or hold on the relocation and education assistance programs unless there was some special individual cases.

Liederback told Dilbeck that "the vote the people took to vote in the third-party bargaining unit was the reason my application was denied." Dilbeck asked Liederback why some specific employees that were not in the bargaining unit, had been approved for education assistance but Liederback did not explain why those employees had been approved. Dilbeck asked Liederback if his membership in the Union caused his application to be rejected and Liederback responded that was not a reason. Dilbeck then asked if it was because he was eligible to join the Union that he was rejected and Liederback replied that "was exactly the reason why." Dilbeck was again denied education assistance when he applied in July 1995.

That evidence shows that Respondent held out to its employees that their education assistance had been eliminated because they "took to vote in the third-party" and because unit employees were eligible to join the Union. I find those comments which I found constitute an 8(a)(1) violation, evidence animus. The employees were told their benefits had been eliminated because they had an election and because they were eligible to join the Union. I find that Respondent's action in that regard had the effect of discouraging membership in a labor organization.

I find that the General Counsel proved a prima facie case in support of its allegation that Respondent eliminated its education and relocation assistance because of its employees' union activities.

Respondent contended the elimination of those benefits was corporatewide and occurred before the Union was selected as bargaining representative. As shown above the March 8, 1994 Park-Ohio memo illustrated that the education and relocation policies were eliminated and subsequent circumstances will be handled on an individual basis at the discretion of Park-Ohio. For that reason, according to Respondent, it would have eliminated education and relocation benefits for unit employees in the absence of its employees' union activities.

However, as shown above, there was no indication to Respondent's unit employees or the Union, that education and relocation benefits were eliminated until June 1994. During June, President Liederback did not respond to Kelley Dilbeck's query as to why nonbargaining unit employees were being approved for education benefits and both Liederback and Huddleston indicated that benefits were being withheld because of the union position of bargaining

representative. Huddleston told Dilbeck, "As you know, we have to bargain for benefits now." Liederback told Dilbeck that his application for education benefits had been denied because the employees voted and because Dilbeck was eligible to join the Union.

The effect of that evidence is to leave unanswered a bargaining unit employee's query as to why unit employees were being denied education benefits while some nonunit employees were not being denied those benefits. Despite the fact that the corporate memo is dated before the May 12 election, the employees were not told that unit employees were denied education benefits until June 1994.

Moreover, when Respondent's employees were told of the elimination of education and relocation benefits, a unit employee was told they could not enjoy those benefits because they voted in the Union and because they were eligible to join the Union.

In view of that evidence I find that Respondent failed to prove that Dilbeck and other unit employees, would have been denied education and relocation benefits in the absence of their union activities. I find that Respondent engaged in conduct in violation of Section 8(a)(1) and (3) by eliminating education and relocation benefits for unit employees in June 1994. *Whitewood Maintenance Co.*, 292 NLRB 1159 (1989); and *CBF, Inc.*, 314 NLRB 1064 (1994).

3. Section 8(a)(5)

As shown above, in addition to its allegation that Respondent violated Section 8(a)(1) and (3) by eliminating its education and relocation benefits for unit employees, the General Counsel also alleged that Respondent violated Section 8(a)(1) and (5) by engaging in that same conduct. In simplified terms, Section 8(a)(3) required a showing by the General Counsel that Respondent was motivated by its employees' union activities. Section 8(a)(5) on the other hand, deals with Respondent's obligations to bargain and in order to prove a violation, the General Counsel must show that Respondent had an obligation to bargain before eliminating its education and relocation benefits.

An employer has an obligation to notify and bargain with its employees' collective-bargaining representative before it changes established mandatory terms and conditions of employment. The elimination of education and relocation benefits involves mandatory subjects of bargaining.

The record showed that Park-Ohio issued a March 8, 1994 memo to the effect that education and relocation assistance was eliminated and would be handled on an individual basis. Respondent or Park-Ohio, continued to have the discretion of granting applications for those benefits and, apparently some nonunit employees continued to receive those benefits. President Liederback did not respond to Kelley Dilbeck when Dilbeck asked why nonunit employees were receiving education benefits while unit employees were being denied those same benefits. Later Liederback told Dilbeck that he had been denied education benefits because he was eligible to join the Union. Additionally, in a memo to employee Tim Miller (above), Andrew Huddleston referred to P.O.I. approvals and "P.O.I. will not approve benefit changes made that are now negotiable issues."

Andrew Huddleston admitted that 100-percent education benefits were shown as a unit employee benefit in a document dated June 1994.

The credited record shows that Park-Ohio may have changed its position on employee education and relocation assistance and announced that change on March 8, 1994. However, Respondent's unit employees were not informed of any change in education and relocation assistance until June 1994. There was no evidence that bargaining unit employees were automatically denied education and relocation benefits until June 1994 when, according to the record, both Huddleston and Liederback told unit employees they were ineligible for education benefits because that was a negotiable issue.

In view of the above evidence I am convinced that Respondent held out to its employees that they were entitled to education and relocation assistance until after they selected the Union as their bargaining representative. Afterward, without notice or bargaining, it unilaterally eliminated those benefits for unit employees.

Loss of education and relocation benefits constitute mandatory bargaining issues and Respondent's elimination of those benefits without notifying and bargaining with the Union constitute a violation of Section 8(a)(5) of the Act. *Fire Fighters*, 304 NLRB 401 (1991); *Daily News of Los Angeles*, 315 NLRB 1236 (1994); *E. I. du Pont & Co.*, 311 NLRB 893 (1993); and *W-I Forest Products Co.*, 304 NLRB 957 (1991).

4. The drug test of February 13, 1995

The question presented here is did Respondent by conducting a drug test among all its unit employees, on February 13 engage in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

Respondent affirmatively alleged that Respondent's alcohol and drug use policy has been in effect and unchanged since May 4, 1992; that employees Dilbeck, Burns, and McDaniel were tested pursuant to that May 4, 1992 policy and all three tested positive and were terminated pursuant to rule 21 which has been in effect and unchanged since May 4, 1992, and those three discharges were for cause and the three employees are not eligible for reinstatement or payment of backpay.

Respondent cited *Johnson-Bateman Co.*, 295 NLRB 180 (1989), in arguing that its drug testing policy has not changed as alleged by the General Counsel.

Respondent also affirmatively alleged that paragraphs 12 and 13 of the complaint do not contain a clear and concise description of the acts claimed to constitute unfair labor practices. I have examined those paragraphs and I find they do contain a clear and concise description. I find that Respondent's allegation lacks merit.

As shown above the Union was exclusive bargaining representative for bargaining unit employees from May 12, 1994. At all times from before May 12, Respondent had a written policy of testing employees for drugs under certain circumstances. The circumstance which Respondent pointed to as justification for the February 13, 1995 testing of all the bargaining unit employees and some other employees as well, was a provision in its written policy enabling it to conduct drug test for cause.

It is well established that an employer has an obligation to notify and bargain with its employees collective-bargaining representative before it changes established mandatory terms and conditions of employment and that a change in an employer's drug testing practice does constitute a mandatory

subject of bargaining. *Johnson-Bateman Co.*, supra; *Chicago Tribune Co.*, 304 NLRB 495 (1991); and *Bath Iron Works Corp.*, 302 NLRB 898 (1991).

The evidence established that Respondent did not notify the Union before testing unit employees on February 13, 1995. The record through the credited testimony of Kelley Dilbeck, showed that the employees were not advised of the drug tests until the day the tests were administered.

Respondent contends that the February 13 tests do not constitute a change in mandatory terms and conditions of employment. Instead Respondent points to the following provision of its written Alcohol and Drug Use Policy which was in effect before the Union came into the picture:

The Company reserves the right to conduct alcohol and drug screening at Company expense to determine if the employee is under the influence of alcohol, drugs or controlled substances. Such tests may be for cause, as part of a rehabilitation program or when employees are returning to work from layoff or disability status.

Respondent pointed to testimony of Andrew Huddleston and John Zucs as showing "cause" for the February 13 tests. The "cause" involved in their considerations according to Huddleston and Zucs, included overall work performance; overall safety and overall efficiency. Respondent argued that it has consistently tested for cause and the evidence available to Respondent in early 1995 furnished cause for its large scale tests. It argued that the large scale tests of February 13 did not differ as to cause from the only drug tests it had conducted before that time, those of individual employees Yarborough and Moore. Neither Yarborough nor Moore were actually observed to be unable to perform quality work in a safe and productive manner, as specified in Respondent's policy. Instead Respondent suspected their use of drugs from documents it received showing that both Yarborough and Moore had been possessors or users of drugs. Respondent argued that the February 13 tests were also caused by examination of documents (i.e., those showing the safety, performance, and efficiency records).

In consideration of Respondent's point, the record does show that its "for cause" regarding Yarborough and Moore came from documents. However, unlike the documents claimed to give rise to the large scale tests on February 13, the Yarborough and Moore documents actually related to possession and use of drugs. Before February 13, there was no documentation showing that any of the large number of employees tested on February 13 were in possession of or were using drugs.

Additionally, Respondent's drug policy contains an "Examination for Cause" provision in which it sets out how it may determine when cause exists. In essence that provision requires some evidence that the employee is unable to perform quality work in a safe and productive manner.

The fact that the Union did not object that the documentation used to determine that employees Yarborough and Moore failed to qualify under the "Examination for Cause" provision does not establish that testing for any cause qualifies under Respondent's policy. *Bath Iron Works Corp.*, supra, 302 NLRB at 900, 901. As shown above, documents showed to Respondent that Yarborough and Moore were charged with possession or use of drugs. The Union did not

quarrel when Respondent concluded that evidence justified for cause testing. However, before February 13 there was no showing that all the bargaining employees and others, were taking or possessing drugs and the Union did object to the testing. The "cause" pointed to by Respondent was materially different than any "cause" it had previously used in determining to conduct a drug test.

The General Counsel and the Union, on the other hand, point out that Respondent had never before used "cause" to justify large scale drug tests. The record shows that previous tests including those administered to employees Robert Moore and Jeff Yarborough, followed specific indications that those employees may have been using drugs. Moreover, the Union points out that the tests conducted on February 13 were random and the parties had not agreed to random testing.

In that regard the record shows that Respondent brought up the subject of random testing but the Union has not agreed to include such a provision in a collective-bargaining agreement and the parties have not bargained to impasse.

In consideration of whether as Respondent contends, it determined to test all bargaining unit and other employees on February 13, "for cause," I have examined how Respondent made that determination in the past.

The record shows that Respondent previously applied the for cause provision of its alcohol and drug policy on only two occasions. Both those occasions involved individual employees and in both those occasions Respondent had reason to suspect the particular employee was possessing or using drugs. During November 1994, in contract negotiations, the subject of drug testing came up and Respondent stated that it was happy with its current policy. The evidence also showed that Respondent mentioned random testing but negotiations on that issue have not continued. The Union has neither rejected nor accepted random testing and that issue has not been involved in negotiations to impasse.

I fail to find as Respondent argued, that evidence proved that it did not change its policy by the February 13 tests. The record proved the contrary was true. By changing from a policy of determining cause on the basis of evidence of possession or use of drugs by a specific employee, to one of determining cause on the basis of overall safety, efficiency, and production records, constitutes a change in mandatory subjects of bargaining.

In view of the full record, I find that Respondent unilaterally changed its drug testing policy for unit employees by testing all unit employees on February 13, 1995. Respondent did not notify the Union before its change and it did not give the Union an opportunity to bargain about that change. The drug testing policy constituted a mandatory subject of bargaining. Employees Dilbeck, Burns, and McDaniel were tested and all three tested positive and were terminated. I find that by changing its drug testing policy and testing employees resulting in the discharge of unit employees Kelley Dilbeck, Doyle Burns, and Kurt McDaniel, without notifying and bargaining with the Union, Respondent engaged in conduct in violation of Section 8(a)(1) and (5) of the Act. *Talsol Corp.*, 317 NLRB 290 (1995).

ADDITIONAL CONCLUSION OF LAW

Respondent violated Section 8(a)(1) during June 1994, when its president told employee Dilbeck that the edu-

cational assistance policy had been eliminated because the employees elected the Union and because Dilbeck was eligible to join the Union; Respondent engaged in conduct in violation of Section 8(a)(1), (3), and (5) by unilaterally eliminating its education and relocation assistance policies because the employees selected the Union as their bargaining representative without first notifying and bargaining with the Union; and Respondent engaged in conduct in violation of Section 8(a)(1) and (5) by unilaterally testing all bargaining unit employees for drugs, without first notifying and bargaining with the Union; by discharging three employees that failed those tests; and Respondent thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

Having found that Respondent violated Section 8(a)(1), (3), and (5) of the Act by unilaterally eliminating its education and relocation assistance policies and unilaterally drug testing all bargaining unit employees on February 13, 1995,

which resulted in the discharge of employees Kelley Dilbeck, Doyle Burns, and Kurt McDaniel, I shall order Respondent to restore the status quo ante to conditions that existed at the time of its unlawful action, by restoring its unit employees education and relocation assistance benefits; by restoring its drug testing policy to the one that existed at that time; and for Respondent to offer Kelley Dilbeck, Doyle Burns, and Kurt McDaniel immediate reinstatement to their former positions or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. I further order Respondent to make Kelley Dilbeck, Doyle Burns, and Kurt McDaniel whole with interest, for any loss of earnings suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against Kelley Dilbeck, Doyle Burns, and Kurt McDaniel and notify Kelley Dilbeck, Doyle Burns, and Kurt McDaniel in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. *SMCO, Inc.*, 286 NLRB 1291 (1987). Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]