

**Roll and Hold Warehouse and Distribution Corp.  
and United Steelworkers of America Subdis-  
trict 1, AFL-CIO. Case 13-CA-33306**

October 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND  
HIGGINS

On May 10, 1996, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs and briefs in answer to the others' exceptions.

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,<sup>1</sup> and conclusions only to the extent consistent herewith.

The judge found that the Respondent violated Section 8(a)(1) of the Act by removing a Union newsletter from a bulletin board because it objected to the content, and by threatening to retaliate against employees because the Union filed a complaint with a state agency over workplace safety issues. We adopt these findings for the reasons stated by the judge.

The judge, also, however, dismissed an 8(a)(5) and (1) allegation concerning the Respondent's unilateral implementation of a written point system attendance policy. He determined that the Respondent had provided sufficient advance notice about its intent to implement the plan to allow the Union an opportunity to bargain, and that by failing to request bargaining, the Union forfeited its rights. We disagree with the judge's disposition of this issue.

The Union, United Steelworkers of America, Subdistrict 1, has represented a unit of the Respondent's warehouse employees since 1987. Over a period of approximately 1-1/2 years, ending in October 1993, the parties engaged in negotiations for a collective-bargaining agreement. Union Staff Representative William Trella served as chief spokesperson for the Union and the Respondent's plant manager, Glenn Becker, participated as a representative for the Company. No contract was agreed upon during those negotiations. At all relevant times, the Union has been represented within the facility by two unit employees, Warren Fryer as unit chairman and Terry Edwards as grievor.

<sup>1</sup> The Respondent and the General Counsel have each 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

It is undisputed that on February 6, 1995, the Respondent implemented and has since maintained a written point system attendance policy for the warehouse employees. This system was developed by Becker, in consultation with his supervisors. It replaced an unwritten, informal attendance policy.

In January 1995, Becker began distributing written copies of the new plan to employees and met with them in small groups to explain how it would work. Based on Becker's credited testimony, the judge found that Fryer and Edwards, like other employees, each attended one of these meetings. Thereafter, in early February, just prior to the implementation date, the Respondent had all employees sign a document stating that they had received a copy of the plan's provisions.

It is undisputed that the Respondent did not notify any representative of the Union of its intention to implement a new attendance policy before distribution of the plan for discussion in the small employee groups presided over by Plant Manager Becker. Fryer, and possibly Edwards, expressed some disagreement with the new policy, but did not, in the midst of these discussions or thereafter request bargaining. Similarly, Trella, who was never notified by the Respondent, but was informed of the policy by Fryer sometime in January after the meetings, made no bargaining request.

The judge implicitly found it immaterial that the Union had not been given notice before the discussion meetings with employees, finding that the actual notice received by Fryer and Edwards when they attended the employee discussion meetings, and the notice received by Trella through them, was sufficient because it was before the policy was actually implemented. He concluded that by failing to request bargaining after such notice, the Union "defaulted its bargaining rights," and the Respondent therefore did not violate the Act by implementing the policy.

In exceptions, the General Counsel contends that the plan was presented as a *fait accompli*, precluding the possibility of meaningful bargaining, and that therefore the Union had no reason to request bargaining. By presenting the plan in the manner that it did, rather than giving advance notice to Fryer, Edwards, and Trella, as representatives of the Union, the General Counsel argues that the Respondent acted in disregard of its bargaining obligations. We agree.<sup>2</sup>

The Respondent raises four defenses against the charge that its implementation of the attendance policy change violated Section 8(a)(5) and (1) of the Act: (1) that the policy was not a material change in working

<sup>2</sup> The General Counsel also disputes some of the judge's credibility resolutions, but we find it unnecessary to disturb those. Our decision rests on facts that either were found by the judge or are not disputed by the Respondent. As indicated in our statement of facts, above, for example, we accept the finding that Trella was indirectly informed of the new policy before February 6.

conditions; (2) that there was no Union to whom any bargaining obligation was owed because the Union had abandoned the unit; (3) that the Union had waived its right to notice by a history of acquiescing in various changes to working conditions; and (4) that the Union waived the right to bargain through the failure of its representatives to request bargaining after they received actual notice of the policy and before its implementation.

The judge correctly rejected the first two defenses and little need be said about them. Under the old informal system, although discipline was imposed when employees' attendance infractions "reached the point of non-tolerance," there was no systematic weekly review of timecards. Employees thus might profit by having infractions escape notice, but also, in the absence of formal standards, might suffer under a regime of inconsistent treatment and favoritism. Indeed, it was to respond to this criticism that Becker said he changed the system. The new policy, thus, represented a material and significant change in working conditions and was therefore a mandatory subject of bargaining.<sup>3</sup> As for abandonment of the unit by the Union, the Respondent had never been advised of any disclaimer, and in-plant representatives Fryer and Edwards remained in place. Fryer testified, for example, that he regularly brought employee grievances regarding workplace matters such as wages and safety complaints to the attention of management, and that his concern over management's inaction on certain safety grievances had finally led him to file the complaint with the state safety agency in the fall of 1994.

The Respondent's contention that the Union had waived bargaining rights by acceding to unilateral changes in various other working conditions over the years is in conflict with long-established precedent that a mere failure to invoke bargaining rights over particular changes in the past does not represent a waiver of such rights over other changes in the future. *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969). Accord: *E. R. Steubner, Inc.*, 313 NLRB 459 (1993); *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989).

The waiver defense that the judge accepted—based on notice to representatives of the Union before the new policy was implemented—improperly disregards the circumstances in which those representatives learned of the policy. One of the purposes of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications. A union's role in that process is totally undermined when it learns of the change incidentally upon notification to all employees

<sup>3</sup> See *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1016 (1982), enf. 722 F.2d 1120, 1126–1127 (3d Cir. 1983).

and especially when, as here, management presides over the process by which unit employees critique the proposal. *Detroit Edison Co.*, 310 NLRB 564, 565–566 (1993). See also *Ciba-Geigy Pharmaceuticals Div.*, supra, 264 NLRB at 1017 ("most important factor" dictating finding that employer's announcement of change was "fait accompli" was that it was made without "special notice" in advance to the union, the union's officers "having become aware of this merely because they themselves were employees"). Here, as the credited testimony of Becker, the Respondent's own manager, establishes, he presided over a "full blown discussion of what the policy was about," with Fryer and Edwards present simply on the same footing as other employees, all hearing about this change for the first time.<sup>4</sup>

Cases on which the Respondent relies for its contention regarding the adequacy of this notice to the Union through notice to all employees are distinguishable. In *Haddon Craftsman*, 300 NLRB 789 (1990); *Associated Milk Producers*, 300 NLRB 561, 562–563 (1990); and *Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988), notice was given to union officials either in a meeting or in a letter before general notice was given to employees.<sup>5</sup> In no case cited by the Respondent did the employer engage the employees in direct discussion of the proposed change.

It would not have been difficult for the Respondent to send a note to Union Representative Trella before announcing its change to employees. The Respondent's reason for not doing so was simply that it felt it owed no obligation of giving notice and an opportunity to bargain to the Union. As the following passage from Becker's testimony on direct examination indicates, the Respondent simply believed it was entitled to act unilaterally:

Q. Tell us whether it was your position, well, tell us what your position was regarding whether you had to consult with the union, bargain with them, or given them more notice than you did when the February attendance policy went into effect.

<sup>4</sup> It is precisely this point which our dissenting colleague disregards when he asserts that the Union had time to consult with employees prior to implementation of the attendance policy change. By announcing the new policy to the Union at the same time as all other employees, the Respondent essentially ignored the representative status of the employees' bargaining agent. Such failure to acknowledge the Union's proper role in negotiating terms and conditions of employment severely diminished, if not effectively foreclosed, any meaningful opportunity for the Union to exercise its authority in any subsequent discussion of this matter.

<sup>5</sup> In *Jim Walter Resources*, supra, there had been a notice posted to employees before the meeting with union officers, but the change at issue in the case (regarding payment of insurance premiums during a strike for employees on disability) was first explained at the meeting with representatives of the union.

A. I didn't think there was any need to. We never did it before. There were all kinds of policies that were coming out. What was the difference in this policy, heck, I hadn't talked with anybody since October 27th.

Q. Of what year?

A. Ninety-three . . . .

In short, the Respondent has essentially acknowledged that it never intended to bargain in good faith over this change.<sup>6</sup> The Respondent failed to test its belief that the Union would not wish to bargain over the new policy, and it thus assumed the risk that the Union might object to lack of proper notice of the change.<sup>7</sup>

For all of the reasons stated above, we find that the Respondent had an obligation to give timely notice of its new attendance policy to a representative of the Union before it made a general announcement to the employees. By failing to do so before discussing the new policy with its employees and then implementing it, the Respondent violated Section 8(a)(5) and (1) of the Act.

#### AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 4 and renumber subsequent conclusions accordingly:

"4. By unilaterally and without providing notice to the Union, implementing a new written point system attendance policy, the Respondent violated Section 8(a)(5) and (1) of the Act."

#### ORDER

The National Labor Relations Board orders that the Respondent, Roll and Hold Warehouse and Distribution Corp., Gary, Indiana, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Threatening employees with reduced bonuses because their union representative, in concert with fellow employees, filed complaints with the Indiana Occupational Safety and Health Administration (IOSHA) which resulted in fines that it paid.

<sup>6</sup>This admission that the Respondent took the position that it had no need to consult with the Union about any change in policy distinguishes this case from *WPIX, Inc.*, 299 NLRB 525 (1990). Chairman Gould agrees *WPIX* is factually distinguishable but does not find it necessary to determine whether that case was correctly decided. Member Fox believes that *WPIX, Inc.* was incorrectly decided, but agrees that it is, in any event, distinguishable from this case.

<sup>7</sup>The Respondent's disregard for its bargaining obligation was not lost on the Union, leading to the perception that the announced policy was a fait accompli. Thus, unlike the dissent, we do not find it appropriate to penalize the Union for its failure to make a request for bargaining that it reasonably believed would be futile.

(b) Enforcing its policy permitting employees to use the employee warehouse bulletin board selectively and disparately by removing therefrom Union newsletters containing legitimate, reasonable, union business matters and telling employees that they could not post the newsletter on the bulletin board.

(c) Unilaterally and without providing notice to the Union, implementing changes in terms and conditions of employment, including changes in its attendance policy.

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

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

(a) Rescind the written point system attendance policy unilaterally implemented in February 1995.

(b) Post at its facility in Gary, Indiana, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply.

MEMBER HIGGINS, dissenting.

I do not agree that Respondent violated Section 8(a)(5) by refusing to bargain about the new attendance policy. I agree with the judge that the Union had ample opportunity to request bargaining on this subject. It never made that request. Absent a request to bargain, I find it difficult to conclude that Respondent refused to bargain.<sup>1</sup>

It is clear that the two on-site union representatives, in January 1995, learned of the proposed change. It is equally clear that they told Union Staff Representative Trella, in January, of the proposed change. Notwithstanding this, none of these persons requested bargaining prior to implementation of the change on February 6.

<sup>8</sup>If this Order is enforced by a Judgment of the 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."

<sup>1</sup>*Associated Milk Producers*, 300 NLRB 561 (1990); *Jim Walter Resources*, 289 NLRB 1441 (1988).

My colleagues find that the policy was a *fait accompli* as of the January meetings. The record does not support this finding. Indeed, the whole purpose of the January meetings was to find out whether anyone had questions or problems about the proposed policy. Even as late as February 5 and 6, Respondent was still seeking input on the proposal. Thus, there is no support for the proposition that the policy was etched in stone in January.

My colleagues also assert that the Union had no time to consult with employees before the change. I disagree. From the time of the January meetings until the implementation on February 6, the Union had time for such consultation. I recognize that the Union learned of the proposal at the same time as the employees learned of it. However, this did not preclude subsequent consultation.

Finally, my colleagues contend that Respondent would not have bargained about the new policy even if it had been asked to do so. The simple answer to this contention is that the Union never put Respondent to the test.<sup>2</sup> As stated above, it is difficult to find a refusal to bargain, absent a request to bargain or the presentation of a *fait accompli*. In this instant case, there was neither.

<sup>2</sup> *WPIX, Inc.*, 299 NLRB 525 (1990).

#### 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 threaten employees with reduced bonuses because their union representative, in concert with fellow employees, filed complaints with the Indiana Occupational Safety and Health Administration (IOSHA) which resulted in fines that we paid.

WE WILL NOT enforce our policy permitting employees to use the employee warehouse bulletin board selectively and disparately by removing therefrom union newsletters containing legitimate, reasonable union business matters, and WE WILL NOT tell employees that they cannot post the newsletter on the bulletin board.

WE WILL NOT unilaterally and without notice to the Union, implement changes in terms and conditions of employment and WE WILL rescind the written point system attendance policy we unlawfully implemented in February 1995.

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

ROLL AND HOLD WAREHOUSE AND DISTRIBUTION CORP.

*Mary F. Herrman, Esq.*, for the General Counsel.  
*Leonard R. Kofkin, Esq.*, of Chicago, Illinois, for the Respondent.  
*Mr. William Trella*, Staff Representative, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The underlying unfair labor practice charge in this case was filed on April 7, 1995, and a subsequent amended charge was filed on April 17, 1995, by United Steelworkers of America, Sub-district 1, AFL-CIO (the Union) against Roll and Hold Warehouse and Distribution Corp. (the Respondent). Thereafter, a complaint was issued against the Respondent by the Acting Regional Director of Region 13 on May 31, 1995.

The complaint alleges, and it is admitted, that on November 30, 1987, the Union was certified as exclusive collective-bargaining agent for an appropriate unit of Respondent's warehouse employees located at its Gary, Indiana facility. The complaint further alleges that in March 1995, Respondent interrogated its employees "about the union and protected concerted activities of other employees," and "threatened its employees with use of employee bonuses to pay OSHA fines because of employees' union and/or protected concerted activities," in violation of Section 8(a)(1) of the Act. The complaint also alleges that on about February 10, 1995, Respondent "selectively and disparately" enforced a rule permitting employees to post "notices and materials on its bulletin board" by removing a certain union newsletter from the board and "advising employees they could not post the newsletter on the bulletin board" in violation of Section 8(a)(1) of the Act. Finally, the complaint alleges that in February 1995, Respondent unilaterally implemented and has since maintained a new attendance policy for its employees without giving the Union prior notice and opportunity to bargain with it as a mandatory subject of bargaining, in violation of Section 8(a)(1) and (5) of the Act.

The Respondent thereafter filed a timely answer wherein it denied the Union's continued status of exclusive employee bargaining agent, denied the aforementioned allegations, denied any obligation to provide prior notice to the Union or bargaining opportunity regarding the attendance policy change and denied the commission of any unfair labor practice.<sup>1</sup> As further argued thereafter, the Respondent's alternative defenses with respect to the 8(a)(5) allegation are abandonment of the unit by the Union, waiver by past toleration of unilateral policy changes and failure to request bargaining despite timely notice of the February 1995 conduct. With respect to the bulletin board allegation, it argues that

<sup>1</sup> The complaint does not allege a withdrawal of recognition, nor a refusal to meet and bargain with the Union.

it acted in accordance with past practice and past explicit agreement with the Union as to the purpose of the bulletin board by removing only the items that it considered to be "detrimental" and/or untrue, as it had done numerous times in the past when it had never been challenged by grievance or prior unfair labor practice charge. With respect to the alleged interrogation, the facts are not disputed but Respondent denies contextual coercion. There is some dispute as to exactly what was said to an employee about the use of money set aside for employee bonuses to pay OSHA fines levied as a result of complaints filed by an employee who was also the head grievor (i.e., chief steward) for the unit. Respondent argues that its version of its remarks was not coercive inasmuch as they constituted an objective statement of financial impact.

The matter was tried before me at Chicago, Illinois, on February 12 and 13, 1996. Briefs were filed on March 19 and 20, 1996.

Upon the entire record in this case, and my evaluation of witnesses' demeanor, and in consideration of the briefs, I make the following findings of fact and conclusions of law.

#### I. JURISDICTION

At all material times, Respondent, an Indiana corporation, with an office and place of business in Gary, Indiana (Respondent's facility) has been engaged in the distribution and warehousing of steel products. During the calendar year 1994, Respondent, in conducting its business operations, derived gross revenues in excess of \$50,000 from the transportation of freight and commodities from the State of Indiana directly to points outside the State of Indiana.

It is admitted, and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

It is stipulated, and I find that at all material times, the Charging Party Union has been a labor organization with the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

##### 1. The Gary facility

Respondent is part of what is referred to in the record as the "ATS Group" of enterprises. Its precise corporate or business relationship to what are referred to as "sister companies" is not denied. However, Respondent appears to share common employment condition policies with that group. Only Respondent is involved in this case.

The Gary, Indiana facility consists mainly of a unique heat and humidity controlled, 260,000 square-foot steel distribution warehouse, at which the main offices are situated at an upper level accessible by stairs near the employee timeclock. The main warehouse area is served by 7 overhead cranes and manned by 30 warehouse employees, 4 supervisors, 9 office clerical employees, all under the managerial supervision of Regional Manager/Plant Manager Glenn Becker. The facility operates three 8-hour shifts daily.

The Union was certified by the Board as the collective-bargaining agent for Respondent's warehouse employees on

November 30, 1987. No written collective-bargaining agreement has ever been actually executed and, according to the Union's preexisting policy, no attempt was ever made to collect union dues from employee members. The Union assigned its staff representative, Luther Jenkins, to service the unit. Upon his retirement in January 1992, he was succeeded by William Trella. The Union is also represented by certain unit employees who are designated as unit chairman and grievor. The former acts as the chief or head grievor. He is responsible for the on-site administration of the collective-bargaining agreement and he assisted Trella by participating in collective-bargaining negotiations with Becker and Respondent's attorney-negotiator. The unit chairman arranges for unit members' off-site meetings. With respect to grievances, he and the unit grievor convey employee oral or written complaints to shift supervisors and, when unresolved at that level, to the supervisory foreman and ultimately thereafter, if necessary, to Becker. The Union has encouraged its employee grievors to resolve all problems orally and at their level. Trella testified that he does not file written grievances and he relies on the employee grievors, particularly the unit chairman, to initiate all grievances or complaints relating to attendance policy changes and all Respondent policy changes which may affect working conditions. He admitted that unless the unit chairman advised him of such complaint, he would not otherwise become aware that a complaint exists. Thus he impliedly conceded that the line of communications between the Union and Respondent, except for contract negotiations, was through the unit chairman. From union certification in 1987 until his resignation in June 1995, overhead crane operator Warren "Ed" Fryer served as unit chairman. He was succeeded by overhead crane operator Terry Edwards who, at all material times before that, served as a grievor and a self-described union steward and open union supporter. Currently, Edwards is assisted by two or three other employee grievors.

##### 2. Bargaining history

The General Counsel argues that "throughout the parties' bargaining relationship the Respondent has continuously attempted to delay and avoid bargaining with the Union." There is no allegation of dilatory tactics in the underlying complaint. In his testimony, Trella acknowledged the truth of his pretrial affidavit statement that there has not been any refusal to meet or bargain by the Respondent. After a series of collective-bargaining meetings, it was alleged by the Union and admitted by Respondent that the parties reached a "handshake" agreement upon a contract in October 1988 upon which a written document, dated November 1988 and to expire November 1991, was drafted and submitted to Respondent for execution which was refused on several grounds. Respondent contended that the Union lost its majority status, withdrew recognition of it and made certain changes in employment conditions. An unfair labor practice charge was filed by the Union on January 19, 1989, pursuant to which a complaint was subsequently issued by the Regional Director against Respondent in Case 13-CA-28292. On September 20, 1990, the Board issued a decision affirming findings of the administrative law judge that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to execute an agreed-upon contract, by unilaterally changing terms and conditions of employment and by withdrawing

recognition of the Union. An appropriate remedial order issued which was subsequently enforced by the United States Court of Appeals on February 20, 1992.<sup>2</sup> There is no dispute that Respondent fully complied with that order.

By letter dated February 12, Trella requested negotiations for a succeeding contract, the first having expired. Negotiations commenced in March 1992. Simultaneously, on March 12, Respondent filed a petition in Case 13-RM-1580, wherein it attempted to raise a question concerning representation. That petition was dismissed on May 14, 1992, by the Regional Director whose decision was affirmed by order of the Board dated October 21, 1992.

Trella testified that about 25 collective-bargaining sessions, approximately 2-1/2 hours each session, commenced with Respondent which continued throughout a period ending with the last session on October 12, 1993.<sup>3</sup> Among the union negotiators were Trella, Fryer, and Edwards. Becker and Respondent's attorney, Leonard R. Kofkin, negotiated for Respondent. Trella testified that although much had been agreed upon, certain contractual sections could not be agreed upon which he vaguely described as those "dealing with" arbitration and seniority. According to Trella, he agreed to draft a document containing all agreed-upon provisions and to thereafter send it to Kofkin as a basis for further negotiations. Trella drafted a document which he conceded did not contain all agreed-upon provisions which included, inter alia, managerial rights, no-strike clauses, union-security provisions, dues check-off clauses, certain seniority provisions and jury pay language. He failed to testify exactly what else was agreed upon. Trella testified that he never thereafter forwarded the promised document to Respondent. Trella explained that he was unable to fulfill his promise to Respondent because he became preoccupied with 16 other concurrent contact negotiations with other employers, two of which are still ongoing. He described his work schedule as "horrendous." He also explained that the Teamsters Union in early 1995 attempted to organize Respondent's employees not represented by the Union and he spent some time in providing that Union with informational assistance. Trella testified that he attempted to contact Kofkin by telephone twice but that Kofkin on those unspecified dates was out of town. The last message, he testified, was in January 1995.<sup>4</sup> Trella's testimony as to these messages is very skeletal. He failed to identify the person to whom he spoke. It is not clear that those messages requested a specific bargaining meeting. Indeed, Trella merely testified that he attempted to contact Kofkin by telephone but failed to testify what his purpose was or what the message was that he left with an unidentified person at Kofkin's office. In view of his pretrial affidavit admission that Respondent never refused to meet and bargain with the Union, I cannot find that those messages con-

stituted bargaining requests despite Kofkin's failure to testify.<sup>5</sup>

Trella explained in rebuttal testimony that negotiating meeting dates were normally agreed upon at the last session and that all confirmation or cancellation contacts were made between himself and Kofkin. He now testified that meetings were scheduled after October 1993 which were canceled by him because of his preoccupation with other negotiations. He admitted that several negotiation meetings had been canceled by the Union. At most, Respondent canceled only one meeting.

In rebuttal testimony, Fryer claimed that between October 1993 and June 1995, he encountered Becker in the warehouse and told him that "we" need to get another meeting going and to contact Kofkin to arrange it. He testified that the last such request he made was in January 1995. Then he placed it in March 1995. But when referred to his affidavit testimony by counsel for General Counsel, he quickly changed the date to May 1995. From his inconsistent answers and his uncertain demeanor, it is clear he was either picking dates out of the air or to accommodate counsel's leading examination.

Attempted corroboration by Edwards did not help Fryer who did not even place Edwards as present in those conversations with Becker. Edwards recalled two such events as having occurred from either October or November 1993 to the present time when Fryer asked Becker to set up a negotiation meeting. The first incident recalled by Edwards was placed in April. He did not designate the year. Unlike Fryer, he testified it occurred in the office. Edwards failed to testify what either Fryer or Becker actually said between them as to a negotiation meeting. The second occasion, he again placed as having occurred in the office although Fryer said all five or six requests were made on the warehouse floor. The date he fixed was mid-May 1995. Edwards failed to testify as to what Fryer actually said to Becker. He also was unsure of Becker's response although he recalled something about Becker referring to Kofkin's trial schedule.

Neither Fryer nor Edwards explained why they deviated from the practice as described by Trella, i.e., meetings were arranged by contact between Trella and Kofkin. Nor did they explain why they did not consult Trella as to his availability which was very limited due to his work schedule. Clearly, Trella served as the chief union negotiator and his participation was essential.

Because of the inconsistency and uncertainty of Fryer and Edwards, I credit Becker that between October 1993 to the filing of the unfair labor practice charge in April 1995, neither Fryer nor Edwards asked for a negotiation meeting. However, after that filing in April, Fryer did suggest such a meeting.

#### B. *The Bulletin Board*

For the reasons noted above, I credit Becker to the date and sequence of bargaining sessions and also as to the date of the bulletin board agreement. Furthermore, I credit Becker's uncontradicted and un rebutted testimony and tape recording transcript of that part of the negotiation. Accordingly, I find that during a July 1992 negotiating session, Trella requested the establishment of a bulletin board for em-

<sup>2</sup> 299 NLRB 751 (1990); 957 F.2d 328 (7th Cir. 1992).

<sup>3</sup> With respect to dates, meetings, sequences of events relating to collective bargaining, General Counsel witnesses Trella and Fryer were internally and externally contradictory, inconsistent, shifting in their testimony as well as hesitant and uncertain. Accordingly, I credit the far more consistent, coherent, certain testimony of Respondent witness Becker.

<sup>4</sup> In rebuttal testimony, he testified that he attempted to call Kofkin in November 1993 and January 1994.

<sup>5</sup> Kofkin represented Respondent at trial.

ployee use. It was readily agreed upon at the August 27, 1992 session. The discussions related to its warehouse location and the nature of its use. The placement was in accordance with Fryer's suggestion, i.e., near the timeclock to the left of the stairway that leads into the warehouse from the upper office area and between the warehouse area. That location also happens to be a high traffic area for employees, outside contractors, owner-operators, customers, potential customers and plant visitors.

Becker stated, however, that he did not want the board to be used for the publication of "dirty laundry" or items that were "detrimental" to the Respondent. The transcript of the discussion reveals the following dialogue:

Glenn Becker—"we'll get a bulletin board and put it up tomorrow."

Ed Fryer—"maybe something to put notes on, something for sale, is anybody interested in my Saturday overtime, I'd be willing to trade, contact Ed."

Bill Trella—"and we are allowed to post union notices,"

Leonard Kofkin—"you want that to be the union board?"

Bill Trella—"yeah"

Ed Fryer—"union board, that would work yeah."

Bill Trella—"we do not post anything that is detrimental to the company . . . or . . . become detrimental to the company. It's not intended for that purpose."

Ed Fryer—"does it seem like I base my life on such little things sometimes?"

Bill Trella—"no, not you, it's other people do that. Some boy gets pissed off at something, they post a note about a foreman, and."

Ed Fryer—"yeah, that's true, that would be in the interest of fairness."

Bill Trella—"that's right."

The discredited testimony of Fryer places the bulletin board agreement as having occurred at the outset of negotiations which started on March 10, 1988. Fryer claimed that the bulletin board was erected at least in early 1988 and possibly in 1987, clearly an impossible date. His testimony is improbable in light of the failure to incorporate the agreement in the body of the 1988 contract. Furthermore, Fryer is contradicted by Edwards who placed the agreement during the 1992 negotiations. Moreover, Trella, a General Counsel witness, failed to corroborate either Fryer or Edwards and did not contradict Becker nor rebut the transcript of the August 1992 session. Because of inconsistencies, lack of mutual corroboration and failure of explicit rebuttal of Becker, I credit Becker and the transcript evidence. Fryer's description of the purpose of the bulletin board, although impressionistic, is essentially in accord with Becker's account of the 1992 agreement. With respect to 1992 negotiations, Fryer was equivocal and uncertain as to subsequent bulletin board discussions. Finally, he claimed that there were some discussions that "touched upon" the issue, i.e., "to be sure." He gave no details. In cross-examination, Fryer contradicted his earlier testimony and also that of Edwards when he admitted that there was no agreement to allow the employees to use the board for "anything they wanted." Thus he implicitly conceded that some limitations were understood.

Initially, a wood and cork board was erected, but it was quickly replaced by a locked glass door structure accessible only by Becker and the unit chairman who each possessed the only keys. From August 1992, various postings had been placed on the Board by Fryer including announcement of the agreement to a "Community Bulletin Board" to be used "responsibly" by all employees; newspaper clippings referring to employment rights; National Rifle Association propaganda; employee rights under the Act, a United Transportation newsletter regarding Florida workers; political news clippings, railroad worker union news clippings; a handwritten notice of a union meeting of Respondent employees for Sunday, April 26, regarding contract negotiations;<sup>6</sup> an undated second contract negotiation report signed by Fryer and Edwards (G.C. Exh. 6, p. 8); a contract negotiation report drafted by Fryer dated February 1993; a letter from the State of Indiana to Fryer dated March 22, 1995, responding and referring to Fryer's formal complaint of safety/health hazards at Respondent's Gary facility and to the Indiana Occupational Safety and Health Administration (IOSHA) inspection thereat and an attached copy of citation and penalty form sent to Respondent on March 21, 1995, setting forth fines of \$5700 against the Respondent; and numerous personal employment announcements. The vast preponderance of Fryer's posting, including those alluding to employment rights, politics, the NRA, and various union-referenced articles, remained there for several years, up to at least Fryer's resignation of employment on June 1, 1995. The IOSHA letter remained posted until at least June 1, 1995.

It is undisputed that throughout the duration of the bulletin board, Becker exercised his independent discretion to remove about six items from the bulletin board prior to the alleged unlawful removal of January 1995. These removals included the negotiation update reports to members by Fryer of July 1992 and February 1993; a February 14, 1994, "update on issues concerning all of us"; a February 16, 1995, "update" to members signed by Fryer and Edwards referencing "I.O.S.H.A. complaints from the Steelworkers at R & H, Gary, In. [sic]," wherein a variety of unsafe working conditions are alleged; as well as areas to be taken up with the "labor board" on such matters as wages, seniority, overtime pay and "favoritism"; and an April 25, 1995, "Union at Roll & Hold Update" report to members by Edwards and Fryer referring to Case 13-CA-28292 and alleged non-compliance by Respondent; and also a reference to the I.O.S.H.A. fines, safety improvements and an alleged threat by Becker to pay the fines out of allocated employee bonus money. It is undisputed that none of these remarks were the subject of any complaint or protest or grievance by the Union. Becker testified that he considered those items he removed to be inflammatory, detrimental to Respondent and/or untrue, e.g., he testified that he did not at one time fire all office employees as asserted; that he did not fire an employee for union activity; that it mischaracterized the Board's findings; and that he fully complied with the Court-enforced Board order. Becker also testified without rebuttal contradiction that on several occasions he had explained to Fryer and Edwards in 1993 that he had removed Fryer's postings because he considered them to be inflammatory, untrue and detrimental to Respondent's interests and therefore not what

<sup>6</sup>The only Sunday, April 6, occurred during the year 1992.

had been agreed upon and that both Fryer and Edwards responded "yes, I can see what you are talking about."

On the morning of February 10, 1995, Fryer posted on the bulletin board a document entitled, "Your Union Newsletter January, 1995." That newsletter enumerated issues to be discussed at future negotiation sessions and contained allegations of favoritism with respect to certain work conditions. There was also reference to future NLRB proceedings and a solicitation of employee complaints, as well as a reputed quotation from Theodore Roosevelt. Becker testified that he removed that newsletter for the "same reason" he had removed prior postings. He did not explain. He testified without contradiction that he received no complaint about it except for the underlying unfair labor practice charge in this case in April 1995.

Fryer testified without contradiction that at about 2 p.m. on February 10, he was sent to Becker's office where Becker returned the posting to him and told him "If you want to promote this g—d— shit, you have a union hall! Go over there!"

### C. The Attendance Policy

The parties stipulated that since February 1995, Respondent implemented and has since maintained a new written point system attendance policy for Respondent's warehouse employees. The parties further stipulated that, pursuant to the new attendance policy implemented by Respondent, many points, warnings and suspensions were issued to Respondent's warehouse employees and that two employees were discharged.

Respondent's new attendance policy which became effective on February 6, 1995, is a written policy based on a revolving point system. Points accumulate on an employee's record according to the type of attendance infraction committed by that employee. The amount of points accumulated acts as a guide for determining the appropriate disciplinary action, including oral warning, written warning, suspension, and discharge. In order to process and enforce the new attendance policy, Glen Becker reviews each employee's timecard every Monday to ascertain if an employee was late, absent, or left early from work. If there is an attendance infraction, the employee's record is charged with the appropriate points and the employee is provided with an attendance update report. An attendance update report states how many points an employee is given for each infraction during the prior week and the total accumulated points to date. Prior to February 1995, there was no written attendance policy at the Gary facility; Glenn Becker did not make a weekly review of the timecards; the employees did not receive attendance update reports. However, Becker testified without controversy that those employees suspended or discharged would have sustained the same punishment under the preexisting oral and written warning and preexisting policy of discharging and/or suspending employees when they had reached a point of non-toleration according to Becker's subjective determination. The new system is thus more objective, formal and committed to an objective progressive discipline. The prior system operated under an unwritten general policy and warnings were not universally memorialized in the Respondent's records. Becker testified that employee complaints as to the fairness of the application of the old system motivated him to consult with his foreman in late December 1994 and ob-

tain their ideas for a fair policy. The foreman responded with a suggested joint structure system. Becker testified that that he then started bringing small groups of employees of two or three persons into his office in mid-January 1995 to explain to them the new attendance policy he intended to adopt and how it would be implemented. In January 1995, Becker reduced the policy to written form, duplicated it and distributed copies of it to the employees by the same medium of small group meetings in his office on February 5 and 6 where they were invited to ask questions or state problems that they had with the system. Employees acknowledged receipt by signing the document which became effective February 6, 1995.

Becker testified that Edwards and Fryer were present at both the January and February meetings. Becker did not communicate with Trella and considered the Union, in effect, to consist of the unit chairman and the grievors. Becker testified that Fryer stated that he did not agree with the policy, but that Edwards said nothing at all about it to him. According to Becker, neither requested that he bargain with the Union about the new policy either there or with Trella. Becker testified without contradiction that he has, upon numerous past occasions, made unilateral changes in policies concerning working conditions throughout his relationship with the Union, with no grievance or objection ever having been made by the Union.

Trella testified that he first became aware of the existence of the new policy in late February or early March 1995. But he conceded that any grievances as to the propriety of that policy should have been initiated by Fryer as it was the unit chairman's responsibility.

Edwards testified initially that on some unspecified date, he was called into Becker's office where Becker explained the new policy to him and a fellow crane operator. He testified as to only one such meeting. He testified that he had heard other employees talking about it 2 days before then. According to Edwards, Becker explained the policy and solicited their signature on it. Edwards testified that he asked Becker whether he contacted "Bill [Trella] or the Union hall." His testimony is not clear as to whether he actually expressed to Becker his opinion that Respondent could not implement a "new rule or regulation" without first contacting the Union, or whether it was an unexpressed mental reservation. Edward did not recall that Becker made a response. Edwards testified in cross-examination that he believed the policy was to be effective on February 1, 1995. However, he thought it was "about three days before it went into effect" that Becker confronted him with it and 2 days earlier, that he had heard other employees discussing it. Edwards testified that the next day, he gave Becker a facsimile copy of the portion of the Board's notice in Case 13-CA-28292 relating to unilateral changes but made no comment about it. Overall, his recollection of critical dates was very poor. He conceded that it was difficult for him to recall past dates. Becker denied that Edwards handed him that document. Rather, he claimed that on an unspecified date, he had observed it on the bulletin board with the word "point system" written on it, which he removed.

Fryer's testimony with respect to his first awareness of a proposed new attendance policy was internally and externally inconsistent and contradictory. He first testified that Becker discussed it with him alone before it was posted, at which

time they reviewed the written policy together and Fryer was then asked to sign it. Fryer testified hesitantly and with lack of certitude that he merely told Becker that the policy was not something that they had negotiated but he could not recall Becker's response. He recalled only one such conversation. Next, Fryer testified that the conversation occurred "within a couple of weeks" before the actual posting. In cross-examination, however, Fryer testified that he discussed the new attendance policy with Trella, "right around the time it was implemented," but after it was implemented. When asked whether he did not discuss it with Trella within the several weeks preceding its implementation, he answered enigmatically:

A. We were never told that.

When pressed further as to specific sequence of events, he conceded his discussion with Trella occurred prior to the effective date of the policy and that he orally conveyed to Trella Becker's expressed intent to implement it.

In a leading redirect examination, Fryer again expressed uncertainty as to the sequence of Becker's discussion, posting (effective date) and the Trella conversation but asserted again that the Trella conversation preceded the date of posting and implementation. As noted earlier, Fryer was a very unreliable witness as to dates and sequences of events. His demeanor was equally debilitating as it was marked by hesitation, uncertainty, lack of conviction and spontaneity. I found his credibility to be impaired not only as to dates and sequences of events but also as to the substance of these conversations. Accordingly, I credit the greater certitude and consistency of Becker and find that in mid-January, the unit chairman had been notified by Becker of Respondent's intent to implement a written point-oriented attendance policy prior to its February 6, 1995 implementation; that Fryer expressed a generalized disagreement; but that neither Fryer nor Trella requested bargaining or even a discussion of it. Based upon Fryer's admission that he notified Trella of a proposed change in attendance policy before its effective date, which I find occurred in mid-January, and based on Trella's own poor recollection as to dates, I discredit Trella as to the date of his notification and find that even he was aware of the proposed change and that he failed to either protest or requested bargaining. Indeed, Trella testified that the appropriate procedure would have been for the unit chairman to initiate union reaction. I further find that even if I credit Edwards, his testimony does not reveal a clear request to bargain about the proposed change in attendance policy nor even a clear objection to it when he became aware of it prior to its implementation. Because of Edwards' poor recollection as to date and inconsistencies with Fryer and Trella in other areas as well, I credit Becker that Edwards was notified of Respondent's intent to change the policy in mid-January 1995. I conclude that Fryer and Edwards in their recollection compressed two meetings into one, which resulted in the confusion and inconsistencies described above.

#### D. The IOSHA Related Allegation

##### 1. Interrogations

There is no factual dispute on this issues as there was no contradiction of the General Counsel's witnesses, i.e., primarily Edwards.

Throughout Fryer's tenure as unit chairman, Respondent's warehouse employees routinely came to him with their work related problems. Some of their more common concerns were various safety issues. On some indeterminate dates, warehouse employees Matt Luke, Steve Morton, Eli Pakoviski, and Terry Edwards each came to Fryer with what they believed were areas of warehouse safety hazards. Fryer discussed these concerns with Edwards and proceeded to relate and discuss them with Shift Foremen/Supervisors Terry Benjamin and Mark Nosich. Both of these shift foremen referred Fryer to Glenn Becker to discuss the more substantial safety concerns. When Fryer brought these safety concerns to Becker, Becker responded that he would look into it and get back to Fryer. However, despite Becker's assurances, no subsequent changes or improvements were made to Fryer's satisfaction.

Because Fryer concluded that Respondent was not satisfactorily responding to these safety concerns, he decided to contact the Indiana Occupational Safety and Health Administration (IOSHA). Before calling IOSHA, Fryer told Shift Foremen/Supervisors Terry Benjamin and Mark Nosich, as well as all the warehouse employees, that he intended to file a complaint with IOSHA. He also discussed it with Edwards. Fryer then called IOSHA and subsequently filed a formal complaint in the fall of 1994. In response, IOSHA conducted an inspection at the Gary facility on February 28, 1995. Fryer received copies of the IOSHA inspection results and posted such results on the union bulletin board shortly after March 22, 1995, the date of IOSHA's forwarding letter on some unspecified date.

Edwards testified that the notice was posted "around the last of December of '94 or the beginning of '95 . . . ." That testimony is indicative of Edward's poor recollection of dates as it was clearly an improbable estimate. However, on the date of posting which was near the foremen's offices, Edwards encountered foreman Terry Benjamin in front of the foreman's office. Benjamin asked him if he had seen the IOSHA material posted on the bulletin board. When he said he had not, Benjamin told him to "check it," which he did. He looked at the posted IOSHA letter addressed to Fryer and attachment with violations referred to therein. Later in the day at some unspecified facility location, Benjamin and Edwards encountered each other under unspecified circumstances and in a conversation for which no context was given, Benjamin asked Edwards "what Ed was trying to do." Edwards told him that it was out of his hands and that he had no control over it. At 3:30 p.m. the same day, Edwards came to be present in the foremen's office under unspecified circumstances and for unexplained reasons. At first, he was alone with Foreman Matt Redenic. Edwards testified that he had a "conversation" with Redenic during which at a later point they were joined by Chief Foreman Mark

Nosich. No context was given for this conversation. The only fragment narrated by Edwards was Redencic's statement: "what the hell was Ed trying to do?" At that point, Nosich walked into the office and said, "[Y]eah, I can't believe that he's doing this; what's he trying to do?" Edwards failed to testify as to what, if anything, was said by any of them after that. There is no context from which to conclude that Nosich expected an answer or whether one was given or not. That is the only conversation Edwards had with any supervisor about the IOSHA complaint or posting except for a subsequent conversation with Becker. At the time Edwards was a union griever and self-described union steward who had frequently confronted the supervisors with employee grievances and complaints about working conditions, some of which he resolved at his level. He had cosigned union postings with Fryer. He had served on the Union's negotiating team with Jenkins, Fryer and two other employees; he had cosigned with Fryer the February 6, 1995, union update which referred to IOSHA complaints filed by the Union against Respondent then under investigation.

## 2. Alleged threat

Edwards testified that on an unspecified date "around March" of 1995, he was against the bulletin board reading the posting relating to IOSHA-levied fines at about 3:30 p.m. at the end of his shift when Becker approached and asked him into his office. Edwards followed him in and, according to Edwards, the only thing that was said was by Becker, i.e., "Tell [your] buddy, Mr. Fryer, that all the fines from OSHA [sic] [are] going to come out of [your] bonus checks."

Becker testified that bonuses are paid to managers, supervisors and employees from Respondent's profits and that the money available for bonuses were limited by the overtime work compensation necessary to comply with the IOSHA remedial order and to pay the IOSHA fines. He testified that he explained this to Edwards at the timeclock, not in his office. He testified that he admonished Edwards for not conveying the safety complaints to him before going to IOSHA. He denied that Edwards or Fryer ever came to his office regarding the matters reported to IOSHA.

Despite Edwards' vulnerability with respect to the recollection of dates and his confusion as to meetings with Respondent, my impression is that he was a basically honest, if sometimes confused witness. Furthermore, I give deference to his status as an employee who was constrained to testify against his present employer. Although he was the unit chairman, it was not a trivial matter for him to incur the risk of his employer's displeasure by testifying against it. Between the two of them, Becker's potential bias as a more directly interested party outweighed that of Edwards as a union steward. Furthermore, Edwards' demeanor on this issue was more assertive, confident, and fluent. Unlike the other areas described above, he displayed no hesitancy and was fluently responsive. Becker, moreover, was more guarded, less spontaneous, and he presented a somewhat calculating, artificial demeanor. Accordingly, I credit Edwards as to the threat. For the very same reasons, I credit Fryer's testimony that he did take those safety hazard complaints of employees to Becker. His testimony is uncontradicted that he took those complaints first to the foremen who, with respect to the more serious complaints, referred him to Becker. Given that uncontradicted and therefore credited testimony, it is most probable

that Fryer did take those very safety complaints to Becker, contrary to Becker's less probable and less credible testimony.

## E. Analysis

### 1. I.O.S.H.A related interrogation threat

In the *Meyers Industries* cases (*Meyers I* and *Meyers II*),<sup>7</sup> the Board defined concerted protected activities to consist of activity engaged in with or on the authority of other employees, the concerted nature of which is known to the employer. The Board has held that the act of one employee in filing a complaint with a state regulatory agency concerning work conditions is not concerted and therefore is not protected and that resulting threats by an employer are not violative of the Act. *Oakes Machine Corp.*, 288 NLRB 456 (1988). However, when an employer threatened one employee that it would close its business if another employee made an individual complaint to OSHA, the Board found that although the individual complaint was unprotected, the threat to the other employee was unlawful. There, the Board considered the determinative factor to be the presence of other employees in the shop where and when the threat was made, and the implication in the threat that adverse action would be taken if either one individual, or employees in concert, filed complaints with OSHA. As the General Counsel notes, citing *House Calls, Inc.*, 304 NLRB 311, 312 (1991), the Act protects employees (plural) when they seek to improve working conditions by resorting to an administrative forum, i.e., the U.S. Department of Labor.

In this case, Fryer acted in consultation with and on behalf of fellow employees and relayed their complaints to Respondent's foremen and manager. Fryer acted in his capacity as union representative. Clearly, his conduct constituted not only concerted but also union representational activity and thus was protected by the Act.

With respect to the allegation that the foremen coercively interrogated Edwards concerning Fryer's protected activity, I find no merit. Both were active union representatives who carried complaints to the foremen and negotiated those complaints. Even had Edwards been expected to explain his representational colleague's motivation for going beyond the grievance procedure, I would not find such questioning to be coercive. However, I agree with Respondent that these questions were not calculated to nor were they perceived by Edwards to demand explanations. They were in reality rhetorical expressions of bewilderment and incredulity that the unit chairman had abandoned the grievance procedure and resorted to an outside agency. Considering the realities of the work place and the contextual background, I am unable to find that the remarks of Respondent's agents tended to be coercive. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). It should be noted that Fryer's posting to which the foremen reacted was not even removed from the bulletin board.

With respect to Becker's subsequent threat to Edwards, as found above, I find it to constitute a patently overt threat of

<sup>7</sup> 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), 281 NLRB 882 (1986), enf'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

adverse consequences to employees at large because of the concerted and representational activity of their union representative on their behalf and thus is violative of Section 8(a)(1) of the Act.

## 2. The bulletin board allegation

The General Counsel recognizes that employees have no statutory right to use an employer's bulletin boards but that if permission is granted, it must not be accorded selectively and disparately to prevent union postings whereas other non-business postings are permitted, citing *Honeywell, Inc.*, 262 NLRB 1402 (1982), *enfd.* F.2d 405 (8th Cir. 1983). The General Counsel cites other Board authority wherein an employer permitted nonbusiness postings but excluded union related material, i.e., *Kroger Co.*, 311 NLRB 1187, 1199 (1993); *Fairfax Hospital*, 310 NLRB 299, 304 (1993). There is no allegation here that Respondent's unilateral conduct breached any bargaining obligation.

The facts in this case are somewhat distinguishable from the foregoing cited cases which deal with 8(a)(1) violations. Here, the Respondent did not discriminate against all union related materials, but rather it removed one posting, which is the subject of the complaint, and certain other union postings of which there had been no charge or grievances filed. A plethora of other union related postings were permitted to be posted for great lengths of time. This distinction is not addressed by the General Counsel nor does the General Counsel evaluate the Respondent's argument that the agreement to provide an employee-union bulletin board incorporates an understanding that it not contain matters detrimental to Respondent. What is "detrimental" was never defined by the parties; however, the discussion that led to the oral agreement indicates that it was understood to refer, at least in part, to individual employees' written hostile references to foremen. There is undisputed evidence that at least on one occasion, Becker consulted with Fryer and Edwards regarding a similar removal wherein they acquiesced to his characterization of the material as detrimental to the Respondent.

The General Counsel further cites *Monongahela Power Co.*, 314 NLRB 65, 68 (1994). That case goes beyond the limited point for which it was cited and very closely parallels the facts in this case. There, an incumbent union maintained an agreement with an employer regarding a union bulletin board which was incorporated in the ongoing collective-bargaining agreement. It stated as follows:

The Company will provide bulletin board space at all reporting headquarters for the Union to post reasonable and proper notices covering legitimate Union business. Any other posting must be approved by the Manager, Morgantown Division or his designated representative before being posted.

The limiting language in that proviso referred to "reasonable and proper notices." That undefined generalized restraint is comparable to the one on this case. There was no 8(a)(5) violation alleged in the cited case, nor were there allegations of general discrimination against union related materials. Rather, the cited case involved the unilateral removal of two newsletters by the employer which in part referred to an alleged discriminatory discharge contested by that union before the Board in the same case. The employer's objec-

tions to the newsletters were that they contained falsehoods and remarks which defamed the employer and "made it look bad" and, as such, were within its prerogative to remove. The administrative law judge's findings and conclusions were adopted by the Board. He described that employer's conduct as "censorship" of the union's effort to communicate with its members as to matters and issues of interest to them and which affected their well-being, i.e., "inherently legitimate union business." The judge conceded that the objectionable references "may be considered to be biased, and pro union" but he found that they did not "approach any reasonable concept of defamatory, profane, outrageous, or inflammatory language by an objective standard." The judge then concluded "this leaves Respondent's only basis for its action the rationale that it can censor the Union's free speech because it doesn't share the same opinions or perception of the events described [in the newsletters]." The judge further concluded that factual inaccuracies did not justify the employer's removal of the entire newsletter without the union's consultation. The judge found that the employer's action in effect was an attempt to "stifle any dissemination of information about [the alleged discriminatory discharge] as well as other legitimate union business, in a union newsletter placed on a bulletin board [which] conveys a chilling and coercive effect on employee rights under Section 7 of the Act . . . [and which] violated Section 8(a)(1) of the Act."

In this case, the bulletin board was established by oral agreement to provide unit members with a means of communication with one and another, to provide the Union with a means of communicating union business with its members and, by agreement, was located at a place known to be subject to warehouse visitors. Under Board law, having established the bulletin board, Respondent was not free to regulate its use selective or disparately. In the *Monongahela* case as herein, a similar generalized restraint was placed upon its use. There, as here, the respondent unilaterally censored the union's communication of "inherently union business," albeit biased and prounion, for similar reasons. I must conclude that here, as in that case, there is nothing defamatory, profane, outrageous, or inflammatory in the Union's newsletter as was impliedly contemplated by the agreed-upon limitation in both cases. Respondent's action, as in that case, was an attempt to stifle communication about alleged unfairness with respect to, inter alia, job bidding practices, overtime assignment, favoritism in job assignment and job descriptions. The accuracy of the content, according to the *Monongahela* holding, is not relevant. Accordingly, I find that as in that case, the effected censorship tended to have a "chilling and coercive effect" on employee rights under Section 7 of the Act and thus was violative of the Act. The argument that the Union acquiesced in past removals and thus ceded to Respondent the right of unilateral disparate, discretionary censorship is not compelling. One such removal involved a general cleanup in advance of a special visitation of a Japanese business delegation. There was no evidence of any expected special visitation on February 10, 1995. Another occasion involved consultation with the Union. A union does not waive its statutory rights under Section 8(a)(5) of the Act by failure to object to past instances of unilateral changes in employment policy. *E. R. Steubner, Inc.*, 313 NLRB 459 (1993); *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993); *Dubuque Packaging Co.*, 311 NLRB

386, 397 (1991). Similarly, I conclude that the Union has not waived its right to consultation about the Respondent's censorship of its means of unit member communication because it agreed to or acquiesced in past acts of selective censorship. Further, I conclude it necessarily did not, and would not, have waived its employees' rights under Section 8(a)(1) of the Act as described in the *Monongahela* case.

3. The 8(a)(5) allegation unilateral change in attendance policy

There need be no citational discourse for the proposition that an employer may not lawfully change a term or condition of employment without first providing notice and bargaining opportunity to the affected employees' bargaining agent. Certainly, the attendance policy was a mandatory subject of bargaining. Respondent's contention that the Union abandoned the unit can be immediately dismissed on the fact that Becker recognized its presence in the ongoing grievance activities of its employee representatives.

The facts found above, however, establish that the Union's responsible on-site representatives and Trella himself had sufficient advance notification of Respondent's intent to establish a new point system attendance policy and failed to clearly request that Respondent bargain about it. The Board in *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952 (1988), recognized that a union has an obligation to seize the bargaining opportunity afforded by advance notification of a proposed employment condition change and it must do something about it lest by its own inactivity it waives its statutory right. The Board cited *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984), and *Smyth Mfg. Co.*, 247 NLRB 1139, 1168 (1980), wherein a union defaulted its rights by inactivity. See also *Allstate Distributors*, 307 NLRB 676 (1992); *Haddon Craftsman*, 300 NLRB 789, 790 (1990); and *Associated Milk Producers*, 300 NLRB 561 (1990), citing *Citizens Bank of*

*Wilmar*, 245 NLRB 389, 390 (1979) (where a mere protest was considered insufficient action). Accordingly, I find that the Union here defaulted its bargaining rights regarding the proposed change in attendance policy.

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent violated Section 8(a)(1) of the Act by threatening its employees with reduced bonuses because their union representative, in concert with fellow employees, filed complaints with the Indiana Occupational Safety and Health Administration (IOSHA) which resulted in fines that it paid.

3. As found above, Respondent violated Section 8(a)(1) of the Act by enforcing its policy permitting employees to use the employee warehouse bulletin board selectively and disparately by removing therefrom union newsletters containing legitimate and reasonable union business matters and informing employees that they could not post the newsletter on the bulletin board.

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

5. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]