

**Intrepid Museum Foundation, Inc. and Local 1909,
International Longshoreman's Association.** Case
2–CA–30347

August 22, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN AND TRUESDALE

On November 12, 1998, Administrative Law Judge Steven Fish issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief to the Respondent's exception, and a brief in reply to the Respondent's answering brief. The Charging Party filed exceptions and a supporting brief. The Respondent filed an exception, and a brief supporting its exception and answering the General Counsel and the Charging Party's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

The Charging Party excepts to the judge's finding that the Respondent did not violate Section 8(a)(5) of the Act by reissuing its drug testing policy on January 27, 1997, and by discharging employee James Harty for failing the drug test administered pursuant to the reissued policy. Contrary to our dissenting colleague, we agree with the judge's findings.³

¹ In its brief, the Respondent contends that the General Counsel's exceptions should be rejected as untimely because they were post-marked December 10, rather than December 9, 1998, the date that exceptions had to be mailed in order to be timely under Sec. 102.46 of the Board's Rules. We find no merit to the Respondent's contention. Counsel for the General Counsel submitted affidavits advising the Board that the exceptions and supporting brief were placed in the Region's outgoing mailbox on December 9, 1998, at 4:40 p.m., and were picked up by the Region's mail service at 5 p.m. that same day. Further, the affidavit of the mail manager for the Region's mail service explained that due to unforeseen complications there have been occasions when the service failed to postmark the mail it has picked up until the following day. In view of these affidavits, we find that the General Counsel made a good-faith effort to place the exceptions and brief in the mail in a timely manner, and accordingly we shall accept them as timely filed.

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

³ We also adopt the judge's findings, for the reasons set forth in his decision, that the Respondent did not unilaterally change the 1990 drug testing policy by its decision to administer drug tests to unit employees

Beginning in 1989, the Respondent and the Union had discussions about drug use among the Respondent's employees. In December 1990, Donald Francis, the Respondent's vice president,⁴ drafted a drug testing policy. After the draft policy was reviewed and approved by the Respondent's attorney, Francis gave a copy of the policy to shop steward Kevin Kennedy, and told Kennedy to show it to Union President John Potter and to get back to Francis if there was a problem with it. A couple of days later, Kennedy told Francis that he and Potter had reviewed the document and that it was "fine just the way it is." Francis responded that Kennedy should make sure the entire crew sees the policy. Thereafter, Francis posted the notice of the drug testing policy in his office, on the Respondent's official bulletin board, and in the locker room used by the maintenance employees represented by the Union.

The 1990 policy—which was not referenced in subsequent collective-bargaining negotiations—gives the Respondent the "right to require employees" to undergo drug testing if the Respondent has reason to believe the employee has violated the Respondent's drug testing rules. The record shows, though, that the Respondent did not exercise its right to test unit employees when it received a report sometime in 1995 that a maintenance unit employee was using drugs, preferring to try to catch the employee in the act. Similarly, the Respondent declined—for financial reasons—to administer drug tests to employees on receiving a report in February 1996 that drug paraphernalia was found in areas frequented by unit employees.⁵ The Respondent discovered further evidence of drug use in the fall of 1996, and in December decided to test its employees.

In January 1997, the Respondent drafted a document reissuing the Respondent's drug testing policy. Except for a few minor and insignificant language changes, the document was identical to the 1990 policy. The Respon-

on February 12, 1997, pursuant to the republication of the 1990 policy on January 27, 1997. The policy and the decision were based on the Respondent's reasonable belief that the employees were using drugs. We do, however, agree with the judge that the Respondent's announcement of random testing of bargaining unit employees—pursuant to its February 5 memo—did constitute a unilateral change of the 1990 policy, in violation of Sec. 8(a)(5) of the Act. Although Harty was tested on February 12, this was pursuant to the 1990 policy.

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(5) of the Act by discharging Harty, Chairman Hurtgen finds it unnecessary to pass on the judge's finding that Harty was not a statutory supervisor.

⁴ Francis has been employed by the Respondent in various capacities for over 15 years, including his present position as senior vice president for operations and deputy director.

⁵ In 1995 or 1996, the Respondent received a report that its managers were using drugs, and thereafter tested a majority of its management and salaried personnel for drugs.

dent gave copies of the policy to the Union's current shop steward, Colin Payne, and asked Payne to make sure all the employees see it and to let the Respondent know if he had any problems with it. The following day, Payne told the Respondent that he had no problem with the policy because "it's the same thing we've had all along," and that "it's the same thing that you wrote way back when."

On February 6, 1997, the Respondent distributed the January 27 document to its unit employees, and had them sign a sheet indicating they had received, read, and understood the document. Later that day, the Respondent distributed another document informing unit employees that they would be taking a drug test. On February 12, the Respondent administered the drug test, and thereafter discharged employee James Harty for failing the drug test.

The judge found that the Respondent's reissuance of its 1990 policy did not violate Section 8(a)(5) of the Act. In so finding, the judge rejected the General Counsel's contention that the Respondent's failure to test employees until 1997 demonstrates that the 1990 drug testing policy was never implemented. The judge found the failure to test prior to 1997 was not significant in the absence of any evidence that the Respondent had disavowed or rescinded its policy.

The judge also found inapplicable cases where the Board found that an employer's more stringent enforcement of its work rules violates Section 8(a)(5),⁶ because unlike those cases, the instant record fails to show that the Respondent affirmatively tolerated the conduct prohibited by the existing rule. Rather, the judge found that in the two previous periods—in 1995 and in early 1996—when the Respondent suspected drug use among its employees, the Respondent decided not to exercise its right to test, preferring in one instance to try to catch the suspected employee in the act, and determining in the second instance not to test for financial reasons. Accordingly, the judge found that despite the failure to drug test employees prior to 1997, the Respondent's 1990 drug testing policy had been implemented and remained effective at the time the policy was reissued and unit employees were tested in 1997. We agree with these findings.

In finding that the Respondent's reissuance of its drug testing policy violated Section 8(a)(5), our dissenting colleague contends that the 1990 policy was never implemented and/or was allowed to lie dormant until 1997. The dissent begins by questioning the judge's credibility

resolutions that form the basis of the finding that the Respondent and the Union agreed to this policy in 1990. Further casting doubt as to its implementation, in our colleague's view, is the fact that the drug testing policy was not referred to in subsequent collective-bargaining agreements, and that neither Anthony Aversa, who became the Union's president in 1992, nor Union Attorney Herzl Eisenstadt, testified that they were aware of the policy. Most significant, according to our colleague, is the fact that the Respondent had not tested employees prior to February 1997. The dissent finds from these facts that the reissuance of the drug testing policy, and the subsequent drug testing and discharge of Harty, violated Section 8(a)(5).

At the outset, we note that while "assuming" that the Respondent and the Union engaged in collective bargaining over the drug testing policy in 1990, the dissent nevertheless goes to great lengths to express doubt about the judge's finding in this regard because it is based on the "uncorroborated" testimony of Donald Francis, who testified that after showing the proposed policy to shop steward Kennedy, Kennedy told him that Union President Potter said it was "fine just the way it is." The judge fully credited Francis' testimony on this point, and the fact that neither Kennedy (no longer employed by the Respondent) nor Potter (deceased) testified in this proceeding is not a sufficient basis for disturbing the judge's credibility finding. We find baseless our colleague's apparent contention that there is a cloud of doubt over this fully credited testimony.

Second, we disagree with our colleague's selective reliance on the testimony of Aversa and Eisenstadt with regard to their lack of knowledge of the policy, and on our colleague's heavy reliance on the lack of evidence that drug testing was an issue in subsequent contract negotiations. The dissent relies on this evidence as establishing that the policy was never implemented, but virtually ignores the testimony of Francis on this point, who testified that he posted the policy on the bulletin board, in the locker room used by the unit employees and in his office, that he told Kennedy to make sure the entire crew sees it, and that in 1997 shop steward Payne acknowledged that the reissued policy was "the same thing we've had all along." Having credited this testimony, the judge reasonably found that the 1990 policy was indeed implemented. The evidence relied on by the dissent clearly does not warrant a contrary finding.

Finally, we cannot agree with the dissent that the lack of previous drug testing of unit employees⁷ demonstrates

⁶ *Hyatt Regency Corp.*, 296 NLRB 259, 263–264 (1989); *Burns Electronic Security Services*, 245 NLRB 742, 764–766 (1979); *Bryant & Stratton Institute*, 321 NLRB 1007, 1021–1022 (1996); and *Blossom Nursing Center*, 299 NLRB 333, 341 (1990).

⁷ As noted above, the Respondent required its managerial employees to undergo drug testing in 1995 or 1996. While this fact does not establish the *existence* of a drug testing policy for unit employees during this

either a failure to implement the 1990 policy or at least an established practice of nonenforcement. Although our colleague contends that the Respondent failed to apply the drug testing policy over a long period of time, our colleague's argument concerns only two instances when the Respondent suspected drug use among unit employees and did not conduct a drug test. In one instance, in 1995, the Respondent opted to try catching the employee in the act. In the other instance, in February 1996, the Respondent decided not to test for financial reasons. The Respondent's decision not to test in those instances is not in contradiction to the policy, because the policy does not *require* the Respondent to conduct drug testing on suspicion of employee drug use; it merely gives the Respondent the "right" to do so in such circumstances. Thus, that the Respondent chose not—in just two instances—to exercise this apparently expensive option is insufficient to demonstrate that the policy was not implemented, or that it was abandoned or rescinded. To find otherwise would require an interpretation of the policy that obligates the Respondent to test employees in every instance rather than giving it the right to do so upon suspicion. We find nothing in the language of the policy that would support such an interpretation.⁸

In sum, we find, contrary to our colleague and in agreement with the judge, that the Respondent's reissuance of its drug testing policy in 1997 constituted notification to its employees of an existing policy, and thus it did not constitute a change in terms and conditions of employment of unit employees. Accordingly, we adopt the judge's finding that the Respondent did not violate the Act by reissuing this policy, or by discharging employee James Harty for failing the drug test administered pursuant to this policy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Intrepid Museum Foundation, Inc., New York, New York, its officers, agents, suc-

period, it does show that the Respondent had not abandoned the 1990 policy insofar as it applied to other personnel.

⁸ Thus, neither *Hyatt Regency Corp.*, supra, nor *Burns Electronic Security Services*, supra, relied on by the dissent, is applicable. In both cases, the employers violated Sec. 8(a)(5) by more stringently enforcing work rules after many years of continuous nonenforcement or lax enforcement. Conversely, the instant case involves two instances where the drug testing option was not exercised, and the Respondent articulated its rationale for the decisions not to test.

Further, because we do not agree with the dissent's contention that the drug testing policy had become dormant or had otherwise been rescinded, we find no merit to the dissent's attempt to distinguish the cases relied on by the judge on the ground that they did not involve enforcement of rules that had become dormant or effectively rescinded.

cessors, and assigns, shall take the action set forth in the Order.

MEMBER LIEBMAN, dissenting in part.

Unlike my colleagues, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act not only by unilaterally changing its drug testing policy on February 5, 1997, without notifying and bargaining with the Union, but also by "reissuing" its drug testing policy on January 27, 1997, and by discharging employee James Harty on February 20, 1997. I would also find, therefore, that the drug test of all unit employees on February 12, 1997, was unlawful as a result of the unlawful changes in the drug testing policy.

For the purpose of this decision, I accept the judge's finding that the Respondent and the Union reached an agreement on drug testing in December 1990. But I would find that the Respondent acted unlawfully by failing to notify and bargain with the Union before "reissuing" the 1990 policy on January 27, 1997, and applying it in February 1997.

The proper resolution of the complaint allegations turns on whether the drug testing policy issued in 1990 was actually implemented or, rather, was allowed to lie dormant until 1997. Thus, the record evidence concerning the issuance of the 1990 policy and notice to employees of the policy is material here. The record shows, in turn, that even assuming it was collectively bargained, the policy remained obscure and unused.

The finding that the drug testing policy was issued in 1990 rests entirely on the uncorroborated testimony of Donald Francis, who has been employed by the Respondent in various capacities for 15-1/2 years, including his present position as senior vice president for operations and deputy director. Francis, one of three representatives for the Respondent present at contract negotiations in 1990, admitted that there was no agreement on drug testing in those negotiations. He further testified that no joint labor-management committee was formed on the subject of drug testing; instead, he formed a so-called committee consisting of himself and an unnamed attorney for the Respondent. Francis drafted the policy, which was reviewed and approved by the attorney. Francis then gave a copy of the policy to then shop steward Kevin Kennedy and told him to show it to then Union President John Potter. A couple of days later, Francis asked Kennedy whether Potter had looked at the document; Kennedy responded, "[I]t's fine just the way it is." Based on Francis' testimony, the judge concluded that the Union had agreed to the drug policy in 1990. Yet, at the time of the hearing in this case, Kennedy was no longer employed by the Respondent and did not testify, and Potter was deceased. In other words, whether an

agreement was reached over a drug policy in 1990 turns on the contact between a dead man and a missing man and on the missing man's relaying a message. Because the judge credited a live man (Francis) that this chain of communications took place, I will assume that this was collective bargaining, although it certainly stands in contrast to the usual course of the parties' dealings with each other, which involved much more than going through the motions of bargaining.

Not surprisingly, given its unusual origins, the drug testing policy was not widely disseminated. It was not attached to the collective-bargaining agreement executed that same month in 1990. It was not referred to during the negotiations for the contract executed by the parties in 1994 or for the contract extension in 1996. Anthony Aversa, the Union's president since 1992, testified that he was unaware of the policy, as did Herzl Eisenstadt, the Union's attorney throughout this period, who did not see a copy until 1997. The policy was not mailed or otherwise distributed to any union officer. There is scant evidence showing that the policy was distributed to union-represented employees or posted at Respondent's facility at any point.¹ It was not included in an employee handbook or comparable document. That the drug testing policy remained so obscure strongly suggests that it was never implemented, despite being issued.

More significantly, it is undisputed that no drug testing was performed between December 1990 and February 1997. The policy was first applied to the maintenance unit employees on February 12, 1997. Thus, the evidence establishes that the drug testing policy remained a dead letter for more than 6 years.

The failure to implement the policy cannot be explained by a lack of opportunity to apply it. The testimony of its own witnesses shows that the Respondent not only suspected, but also had evidence of, drug use by employees. The Respondent suspected employees of drug use in 1995, based both on employee reports and managerial observation of one employee's behavior. It began to see more evidence of drug use in February 1996. A managerial employee (Scott Koen) discovered increasing amounts of drug paraphernalia (pipes, marijuana cigarette butts, and marijuana containers) in monthly inspections of the fifth deck area. Francis found rolling paper in a pickup truck, and Koen found crack vials, crack pipes, and other paraphernalia on the fifth

¹ Francis testified that he posted the notice in his office and on the official bulletin boards of the Respondent's museum. Scott Koen, an employee in 1990 and the Respondent's assistant director of operations at the time of the hearing, testified that he did not recall seeing a copy of the policy posted anywhere at the Respondent's museum. No other employee testified about receiving notice of the policy.

deck. Both Francis and Koen were both told by an employee of extensive drug use on board the ship; specific names were provided. Despite these overt grounds for suspicion, the Respondent took no steps to implement the policy.

The Respondent asserted that it performed no drug tests in connection with the incidents in 1995 because it wanted to try to catch someone in the act and that it performed no drug tests in connection with the incidents in 1996 for financial reasons. Even accepting these explanations, the fact remains that drug testing was never conducted. From an employee's perspective, then, the policy remained invisible. For more than 6 years, it had never been implemented. How an employee hired during this period would have learned of the policy, which even union officials were unaware of, is unclear.

Given the record, there is little or no basis for the judge's finding that the Respondent's action on January 27, 1997, was merely a reminder to employees of an existing policy and that the Respondent thus had no obligation to bargain with the Union over this step—more accurately described as a resurrection of the drug policy, than as a reissuance.

The judge's finding rests heavily on his view that the Respondent did not tolerate or condone any infractions of the rules. The record shows, however, that the Respondent had evidence of drug use at the facility and yet conducted no drug testing. The failure to test is doubly damaging because the drug testing policy was both a rule of conduct and the procedure or method for determining whether misconduct occurred. Thus, the Respondent's failure to apply the policy over a long period of time—given the corresponding failure to establish that employees knew of its existence—was an implicit rescission of the policy. In short, the Respondent's failure to implement and enforce the policy became the practice over time.

The cases that the judge chose to follow in reaching a different conclusion are all readily distinguishable.² By

² *Storer Communications, Inc.*, 297 NLRB 296 (1989), did not turn, as does this case, on whether a long dormant policy could be resurrected without first bargaining with the union. Similarly, the cited language in *Bath Iron Works Corp.*, 302 NLRB 898, 901 fn. 12 (1991), addresses, under deferral principles, whether a clear and unmistakable waiver occurred. *Sigma Network Corp.*, 317 NLRB 411 (1995), and *Mitchellace, Inc.*, 321 NLRB 191 (1996), turned on uniform or disparate enforcement of rules, the existence of which were not in issue. *Kroger Co.*, 311 NLRB 1187 (1993), involved the dismissal of an allegation for a simple failure of proof. Two last cases involve facts sharply in contrast with this case. *Markle Mfg. Co.*, 239 NLRB 1142, 1147 (1979) (no contention that safety rules became dormant or were otherwise rescinded; safety posters displayed throughout plant conveyed same message); *North Kingstown Nursing Care Center*, 244

contrast, the two decisions cited to the judge by the General Counsel—which the judge initially acknowledged “appear on their face to be persuasive”—bear a more direct relationship to the fact pattern in this case. Both cases involved longstanding rules that, without notice to or bargaining with the union, were suddenly more strictly enforced.

In *Hyatt Regency Corp.*, 296 NLRB 259 (1989), the Board found a violation of Section 8(a)(5) when the employer more stringently enforced timesheet rules after a representation election and subsequently discharged 12 employees. Thus, the Board emphasized the marked departure from the employer’s preelection practice of lax enforcement, which prevailed over 6-1/2 years and included no enforcement at all in the 7 months preceding the election. *Id.* at 263–264. Similarly, in *Burns Electronic Security Services*, 245 NLRB 742, 764–766 (1979), the Board found that lax enforcement, over 4 years, of a rule requiring employees to carry a gun or night stick required the employer to bargain with the Union before posting and enforcing the rule. The Respondent’s conduct here was clearly comparable.

For these reasons, I find that, by failing to implement the 1990 drug testing policy and by allowing it to lay dormant for more than 6 years, the Respondent established a practice of nonenforcement. Consequently, the Respondent had an obligation to notify and bargain with the Union before it reissued the drug testing policy and conducted the drug tests in 1997. By failing to do so, the Respondent violated Section 8(a)(5) and (1) of the Act.

Ian Penny, Esq., for the General Counsel.

Donald C. Moss, Esq. (Moss & Moss, LLP), of New York, New York, for the Respondent.

Herzl Eisenstadt, Esq. (Gleason & Mathews, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Local 1909, International Longshoremen’s Association (the Union) the Director for Region 2 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on November 26, 1997,¹ alleging that the Intrepid Museum Foundation, Inc. (Respondent) has violated Section 8(a)(1) and (5) of the Act by in substance “reissuing” a drug policy on January 27, with respect to drug testing of employees, conducting a drug test of all unit employees on February 12, and by discharging employee James Harty on February 20, as a result of such testing, without prior notice to or bar-

gaining with the Union. The trial with respect to the allegations raised by the complaint was heard before me in New York, New York, on May 11 and 12, 1998.

Briefs have been filed and have been carefully considered. Based on the entire record,² including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a nonprofit corporation located in New York, New York, has been engaged in the business of educating the public about and preserving World War II era naval vessels and aircraft. Annually, Respondent generates gross revenues in excess of \$1 million and purchases and receives at its facility, goods and materials valued in excess of \$5000 directly from points located outside the State of New York.

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

It is also admitted, and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

Respondent is a not-for-profit corporation that operates a floating museum of recent military history and space exploration. The Intrepid and two other display ships are anchored off the West Side piers, where they exhibit aircrafts and artifacts. Six boats and barges, all operating in navigable waters, and heavy machinery, like hoists, forklifts, and an aircraft tug are operated by employees.

The Museum, during its summer schedule, is opened from 10 a.m. to 5 p.m., Monday through Friday and 10 a.m. to 6 p.m. on Saturdays and Sundays. During the winter schedule, it is closed on Monday and Tuesday.

It employs approximately 120 employees, including an operations department consisting of between 52 and 60 employees divided into three divisions; maintenance, engineering, and security. The maintenance division consists of nine employees, who have been represented by the Union since the 1980s.

Major General Donald Ray Gardner is the president and CEO of Respondent and has been in that position since September 19, 1996. Donald Francis, who has been employed by Respondent in various capacities for 15-1/2 years, including his present positions of senior vice president for operations and deputy director, directly oversees the three branches of the operations department.

Reporting directly to Francis is Scott Koen who is the assistant director of the operations department and is the “direct supervisor” of the maintenance employees. Both Francis and Koen work the same hours, 7:30 a.m. to 6 p.m. but Francis

² While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses’ demeanor while testifying and my evaluation of the reality of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is discredited.

NLRB 54, 66 (1979) (performance evaluation program instituted before union was certified; implementation simply effectuated the program).

¹ All dates hereinafter referred to are in 1997, unless otherwise indicated.

works Monday through Friday, and Koen Sunday through Thursday.

B. Alleged Supervisory Status of James Harty

James Harty was one of three foremen employed by Respondent in the maintenance unit. He was the foreman for weekdays, and he worked Monday through Friday from 8 a.m. to 4 p.m.. David Mentez served as weekend foreman, and Colin Payne as substitute foreman, where it is necessary to have an additional foreman.

All three foremen perform essentially the same functions when they serve in that position, and the foreman has always been covered under the contract as a member of the bargaining unit. Indeed the job is listed in the schedule of wages as "supervisor" with an extra \$3-per-hour salary over the maintenance workers. However, the category of timekeeper has the same hourly salary as the supervisor."

The number of employees under Harty's supervision, varied from four on Mondays and Fridays to six on Tuesdays, and eight on Wednesdays and Thursdays. His supervision of these other members of the crew consists of assigning them work, making sure that assignments are completed, and at times, instructing employees on how to perform their work.

In this regard, however, from 8 to 10 a.m. (before the Museum opens), the maintenance employees generally have the same identical jobs to perform which do not change. In fact, most of these jobs had been assigned before Harty became foreman, and he did not change the assignments. When an employee left, Harty simply slotted in the replacement to perform the same tasks as the former employee. During this period of time, Harty would either assist the crew in cleaning if it was shorthanded, or took care of deliveries that came in. In such a situation, Harty would receive a call that a delivery came in, and then bring it up on the lift, check and sign for the order, and then ask either Koen or Francis where the item should go.

After 10 a.m. and until the end of the shift, the crew performs general cleaning, moves boxes, loads and unloads deliveries, and moves exhibits from place to place. When an order came to Harty for maintenance workers to perform these tasks, Harty would make the assignment. However, for the most part, Harty would select employees who were standing next to him at the time or who were free at the time to do the work, or if no one was available, Harty would do the work himself. Harty testified that he spent about 50 percent of his time performing similar kinds of physical work that is done by members of the crew.

The crew including Harty operated various kinds of equipment to move objects, such as fork lifts, an aircraft tug, a man lift, a bomb elevator, and a saddle hoist. Harty would decide which employees would be assigned to use the various types of equipment, in part based on Harty's assessment of their intelligence and ability to operate the equipment properly. However, most of the equipment could be operated by any of the employees. With respect to the hi-lo and the saddle hoist which is a crane used to move planes, only certain employees were qualified to perform such work. Harty would decide which employees were to be assigned to operate such equipment, but often Harty himself would do so. Additionally, Harty was informed by shop steward Colin Payne that Francis had informed Payne

that only Payne, Mentez, and Harty should be allowed to operate the hi-lo. This instruction was reinforced directly from Francis to Harty on several occasions when a maintenance employee burned the carpet on the hanger deck when using the hi-lo, and Francis told Harty that he wanted only certain men to drive the hi-lo.

With respect to the saddle hoist-crane, which was used to move planes, Harty would usually operate that equipment himself, but on occasion either Payne or Mentez would be assigned by Harty to do so. This equipment would be used only once or twice a year, either during fleet week or during a big party.

Respondent frequently rents out its facility for special events, such as parties, weddings, and bar mitzvah's. On these occasions, temporary maintenance workers are sometimes hired to supplement the regular maintenance crew. According to Francis, Respondent uses some amount of extra or temporary workers on approximately 30 events of the 100 events held each year.

While Francis testified and Respondent contends that Harty made the decision as to which temporary employees were to be hired, such testimony is refuted by the credible testimony of Harty and Anthony Aversa the Union's president, as well as documentary evidence. In fact, while Respondent's officials do notify Harty or whatever foreman is on duty at the time as to the number of temporary employees needed for a particular event, Harty's role in obtaining these employees consists of merely transmitting this information to the union shop steward, who in turn makes the selection of temporary employees from a list that the steward maintains.

That procedure is in fact mandated by the collective-bargaining agreement, which requires Respondent to in the first instance request the Union by its shop steward, to refer employees for temporary positions. The record also reflects that prior to 1992, shop steward Payne had been failing to utilize the union list for this purpose, and instead referring his friends. Thus, Aversa sent Payne a memorandum dated November 13, 1992, directing him to hire off the union list.³

Further, after the Union and Respondent wrapped up negotiations in late 1996, Gardner asked Aversa for a copy of the list that the Union is using to select temporary employees. Aversa sent such a list to Gardner with a letter dated December 1996, requesting that Gardner notify either Harty or Payne if Respondent had any problems with any of the individuals on the list.

The record also reflects that Harty recommended to Payne that Angelo Imperato, a friend of his, be added to the list when Payne needed an additional worker for a large event. A worker was needed quickly, and Imperato who lived close by was called and added to the list. On another occasion, when Payne was only able to obtain four of the five men needed for an event, Payne asked Harty if he could call Imperato and see if Imperato was available to work. Harty called Imperato who did agree to work that particular job.

Subsequently, when an opening for a permanent position developed, Harty recommended to Francis that Imperato be hired to fill that position. However, Francis did not follow Harty's recommendation, and hired another individual, Errol Ward, who Harty had not recommended for the position.

³ A copy of this memo was sent to Francis.

Testimony was adduced concerning Harty's alleged role in recommending the suspension of employees. Both Koen and Francis testified that Harty recommended that employee Paul Jacobowski be suspended for 3 days on one or two occasions, and that this recommendation was followed on each occasion. However, Koen further testified that prior to Harty's recommendations, he himself had spoken to Jacobowski and reprimanded him for his attendance problems. Moreover, after Harty made the recommendations to suspend Jacobowski, Koen asserts that he (Koen) discussed the matter with Francis, checked Jacobowski's timesheets to make sure that Harty was "correct in his facts," and finally agreed to Harty's recommendations to twice suspend Jacobowski for 3 days.

Harty recalled that he informed Koen that Jacobowski was constantly out of work, and that other employees had been complaining about doing Jacobowski's work, but denies that he recommended that Jacobowski be suspended.

Koen also testified concerning an employee named Anthony Hernandez, and asserted that Harty had recommended that Hernandez be suspended for lateness, and that Respondent did so. Once again, Koen testified that after this recommendation was made by Harty, that Koen and Francis looked over Hernandez' file and concurred in the recommendation to suspend Hernandez.

According to Harty, he never recommended that Hernandez be suspended, but did complain to Koen that Hernandez was coming in late, disrupting the men, and the men were complaining to Harty.

Koen also testified that on one occasion, Harty on his own, told Hernandez to go home, without receiving pay, because he had come in late. Koen further testified that Harty may have done the same thing with respect to Jacobowski, but he was not sure.

Harty denies that he ever sent Hernandez home because of lateness, and asserts that he would only send an employee home if Koen gave him instructions to do so. Harty recalled that he had on one occasion received such instruction concerning Jacobowski, and that he related this instruction from Koen and sent Jacobowski home.

Koen and Francis testified that Harty would release workers early when they performed a particularly "dirty" or "bad" job, with full pay, without any approval from other supervisors. However, neither Francis nor Koen provided any specific examples of such conduct. Harty testified that the only such incident he could recall was maintenance employees cleaned out the compactor and the septic tank on one occasion, and that their clothing was soiled with "human waste." At that time, according to Harty, he discussed the situation with John Kelly, Koen's predecessor and it was agreed that the employees involved could leave early and go home.

Testimony was also provided by Francis that Harty would release the crew that was employed at a special event before the end of the shift, and the crew would be paid for the entire shift. However, according to Harty, he would at times allow the crew to leave early at a special event when all work was completed, but on most of these occasions, either Francis or special events Coordinator O'Keefe would specifically authorize the crew to

leave when work was completed, even though the shift had not ended.

O'Keefe did not testify, but Francis admitted that 40 percent of the time, he would give specific approval to let the crew leave when work was completed and pay them until the end of the shift. As for the remaining 60 percent of the time when this occurred, Francis testified that Harty would "do it on his own or in conjunction with the Special Events Coordinator." Francis did not indicate how often Harty, "did it on his own."

Harty testified that "most of the time" O'Keefe was present at the special event, and would authorize the crew to leave prior to the end of the shift. Harty did admit that there were a few occasions when he released the crew on his own, without the specific authorization of Francis or O'Keefe, who were not present at the time. As to these incidents, Harty testified that he merely continued the same policy that had been in effect prior to Harty becoming foreman.⁴

Koen testified that where an employee is notified of a family emergency during the shift, the employee will inform Harty, and Harty would let Koen know the next day. Koen concedes that the employee would not be paid for the time that they did not work.

Harty testified that most of the time in such situations, he normally would let either Koen or Francis know at the time that the employee left, but concedes that occasionally he would be busy and would forget to let Francis or Koen know. While Harty admits that he sometimes would ask the employees for the reason why they needed to leave early, he never denied any employee permission to do so.

C. The Drug Testing

The parties began negotiations for a new collective-bargaining agreement sometime in 1989. Francis was present at the negotiations for Respondent, along with Larry Sowinski and Wayne Schmidt, Respondent's director of exhibits and executive director respectively, at that time. The Union was represented by its president, John Potter, and its attorney, Herzl Eisenstadt.⁵ During these negotiations, the subject of drug use by employees of Respondent was discussed.

On December 12, 1989, Eisenstadt sent a letter to Respondent's attorney, Vincent Pitta, summarizing what Eisenstadt believed to be the status of negotiations with respect to various issues. The paragraph in the letter concerning drug use reads as follows:

The Union has indicated its strong support of the [Intrepid's] anti-drug efforts. It will participate in a joint Management-Labor Committee on Drug Education among the employees. However, it is management's responsibility to 'police the area' to enforce rules intended to stem drug use by workers as well as the general public, which rules may be included among the 'work rules' appended to the Agreements (as in the

⁴ Harty had previously worked as a temporary employee before becoming a full-time employee.

⁵ Francis at one point in his testimony stated that Kevin Kennedy, the union's shop steward was also present. Later on in his testimony, Francis was uncertain whether or not Kennedy was present at the negotiations.

case of the existing rules, the parties are in agreement that they will be implemented reasonably and equitably). These will not, however, provide for random drug testing. Should supervision demonstrate to the Union that a particular employee has been or is using drugs while on the job or is then under the influence of drugs, the employee may be tested and, if the results are positive, may be disciplined, including dismissal, for just cause. As with any other suspension or discharge, it may be grieved.

Pitta replied to Eisenstadt's letter of December 20, 1989. In his December 20 letter Pitta writes, "In connection with the [Intrepid's] anti-drug efforts, enclosed please find a draft of its proposed contract language establishing a joint labor-management committee." The proposed language, contained in addendum 1 to Pitta's letter, provides, in part:

The Union and the Employer agree, effective as of the date of this Agreement, to establish a joint committee consisting of two (2) representatives of the Union and two (2) representatives of the Employer for the purpose of studying and upon their mutual agreement implementing policies and procedures designed to prevent, detect and/or remedy employee drug and alcohol abuse.

On November 26, 1990, Eisenstadt wrote Pitta concerning the ongoing collective-bargaining negotiations. In paragraph 6 of the letter, Eisenstadt states, "A drug testing program is to be drafted by counsel to effectively address the Foundation's concerns while protecting employee privacy and due process." Eisenstadt testified that neither counsel nor representatives of the parties, ever drafted a testing program in response to his November 26 proposal. Eisenstadt further testified that when he wrote the November 26 letter, he intended to address a number of issues relating to employee privacy and due process, including employee confidentiality and the right to challenge the basis for the test. Francis admitted that "there was no agreement at this negotiation on testing." Francis recalled Eisenstadt stating at the negotiations that he would help "draft a policy" and that they should "put together a group of labor and management." However, Francis admitted that no joint committee was formed between the Union and the Intrepid on the subject of drug testing. Francis claimed instead that he formed a committee on the subject that consisted of himself and an Intrepid attorney.

The collective-bargaining agreement between the parties was executed by Respondent on December 6, 1990, and contained no reference to or agreement on the subject of drug testing. However, the Agreement did contain a number of work rules which were agreed on and attached to the contract. Work rule #7 reads as follows:

Gross Misconduct: Any employee observed in lewd or indecent conduct, using obscene or indecent language, fighting, threatening anyone, destroying Museum property, soliciting money or gifts, or in any way harassing anyone at the Museum, will be in violation of the work rules and a letter of grievance will be issued to the Union. Two grievance letters of gross misconduct will result in dismissal of the employee.

Drinking of alcoholic beverages, or the taking or using of any illegal drug, will also be considered gross misconduct.

According to Francis, sometime between December 6 and 11, 1990, he drafted a drug testing policy which was reviewed and approved by Respondent's attorney. Francis further testified that he then gave a copy of the policy to shop steward Kevin Kennedy, and told him to show it to Union President Potter, and get back to Francis if there was a problem with it. A couple of days later, Francis asserts that he asked Kennedy whether he and Potter had reviewed the policy and if the Union had a problem with it. Kennedy allegedly replied that he and Potter had looked at the document and "its fine just the way it is."⁶

Francis further asserts that he told Kennedy to make sure the entire crew sees it, and that he posted the notice in his office as well as on the official bulletin board of the museum outside the finance department and in the locker room used by the maintenance employees represented by the Union.

Koen testified that in 1990, he was employed by Respondent in the exhibits department and that he did not recall seeing a copy of the "Drug Testimony Policy" posted anywhere at the Museum. However, Koen did recall receiving a copy of that policy in his mailbox at that time. The Drug Testimony Policy as testified to by Francis and Koen was as follows:

MEMORANDUM

TO: ALL DEPARTMENTS
FROM: DONALD FRANCIS
DATE: DECEMBER 11, 1990
SUBJ: DRUG AND ALCOHOL ABUSE POLICY

Attached hereto is a copy of the Museum's Drug and alcohol abuse policy adopted by the Intrepid Museum after consultation with our attorneys.

Donald Francis
 Deputy Director

COMPANY POLICY ON ABUSE
 OF DRUGS AND ALCOHOL
 IN THE WORKPLACE

The Intrepid Sea-Air Space Museum (the Company) recognizes that the future of the Company is dependent on the physical and psychological health of all of its employees. The misuse and abuse of drugs and alcohol poses a serious threat to both the Company and its employees. It is the responsibility of both employees and the Company to maintain a safe, healthful, and efficient working environment.

Therefore, the Company has adopted the following policies:

I. On-the Job Use, Possession, Sale or Distribution

⁶ Neither Kennedy nor Potter testified. Potter was deceased at the time of the hearing. Kennedy was no longer employed by Respondent, having been terminated at a time undisclosed by the record.

The use, possession or sale of unauthorized or illegal drugs or the misuse of any legal drugs on Company premises or while on Company business is prohibited and will constitute grounds for appropriate discipline, up to and including discharge.

The use of Company property, including Company vehicles and telephone, or an employee's position within the Company to make, transfer, or sell intoxicants, or illegal drugs, is prohibited and will constitute grounds for appropriate discipline, up to and including discharge.

II. Employee Impairment and Drug Use

Any employee under the influence of drugs or alcohol which impairs judgment, performance or behavior while on Company business will be subject to appropriate discipline, up to and including discharge.

Employees must promptly notify their supervisors if they are convicted of a criminal drug offense occurring in the workplace. Employees must promptly report to their supervisors the use of any prescribed medication which may impair their judgment, performance or behavior.

III. Employee Drug Testing

The Company has a right to require employees to undergo testing for alcohol or drug use if it has reason to believe that the employee is in violation of the aforementioned rules. Refusal to submit to such testing will result in appropriate discipline, up to and including discharge.

The Company has the right to decide whether the employee will continue work pending receipt of the test results.

Upon receipt of the results of a drug test, the employee will be notified. If the results are positive, the employee will be given an opportunity to explain.

Upon receipt of a verified or confirmed positive drug or alcohol test result which indicates a violation of the Company's written policy, the Company may impose disciplinary or rehabilitative action. Such action may include a requirement that the employee enroll in rehabilitation, treatment or counseling program, approved by the Company, which may include additional drug or alcohol testing as a condition of returning to work.

This drug policy was not attached to the collective-bargaining agreement executed in 1990, nor was it ever mailed to or otherwise distributed to any officers of the Union.

Following the expiration of the 1990 contract, the parties did not negotiate a successor contract until 1994, when they reached an agreement that covered the period October 14, 1994, to December 31, 1996. In the six bargaining sessions that produced the 1994 contract, the subject of drug testing was not raised by either party. The language of work rule 7 in exhibit C of the 1990 contract was modified in 1994. In this regard, Francis testified that the Union demanded in negotiations that the rule on drug usage be limited to cases where the usage officers "on the premises" of the Intrepid. Accordingly, the 1994 version of work rule 7 provides as follows:

7. Gross Misconduct: Any employee observed acting lewdly, or indecently or using obscene or indecent language, or fighting, or threatening anyone, or destroying Museum property, or soliciting money or gifts, or in any way harassing anyone at the Museum, will be in violation of those work rules and a letter will be issued to the employee with a copy of the Union. Two such letters regarding the employee's gross misconduct will result in dismissal of the employee. Drinking of alcoholic beverages in the public portions of the Museum's premises or during working hours anywhere, or the taking or using of any illegal drug anywhere or anytime on the premises shall constitute gross misconduct.

In 1996, Aversa and Gardner participated in negotiations of an extension agreement to the 1994 contract, which was executed on November 25, 1996, and effective from December 31, 1996, to December 31, 1997. This agreement provided that all the terms of the prior agreement shall be extended for 1 year, as well as several minor modifications. The subject of drug testing was not raised by either party during the negotiations for this extension agreement.

According to Aversa, who became union president in late 1992, he was unaware (prior to February 1997) that Respondent had ever issued a drug testing policy or that the maintenance employees were subject to such a policy. Aversa also testified that he was never informed by his predecessor as president, a woman named Cathy Myers that such a policy had been in effect.

Eisenstadt, who as noted above was the Union's attorney in 1989-1990 also testified that he was unaware of such a policy, and that he did not see a copy of such a policy until 1997 at the unemployment hearing for Harty. Eisenstadt also testified that neither Potter (union president) nor Kennedy (union shop steward) ever informed him that they were made aware of such a policy or at any other time. Further, Eisenstadt testified that he searched his files and did not find a copy of this 1990 drug testing policy.

It is undisputed that between December 1990 (when this testing policy was allegedly announced), until February 1997, no testing had been conducted of bargaining unit employees. However, sometime in 1995 or 1996, Francis received a report that a member of management was using drugs. Therefore, at that time he decided to test a majority of Respondent's management and salaried personnel for drugs. The record does not reflect the results of such testing, or whether any of these managerial or salaried employees were disciplined as a result of such test.

Sometime in 1995, Francis received a report that one member of the maintenance unit was using drugs, and that based on his own observation of that person's behavior, he believed that the employee was taking drugs. However, that employee was not tested.

Francis also testified that the reason that he instituted the drug testing policy in 1990 was that he had found drug paraphernalia in the ship. He further asserts that after the policy was announced to employees, Respondent did not find very much thereafter, "so maybe it worked."

In or about February 1996, Koen found various kinds of drug paraphernalia⁷ on the fifth deck, which is an area frequented by operations personnel, including members of the maintenance department. Koen reported his discovery to Francis and they decided to try to catch someone in the act of using drugs, and to continue to monitor the situation. They did not discuss whether or not to test employees at that time, and concluded that Koen would monitor the situation. Thereafter, Koen would inspect the fifth deck area every month or so, and discovered increasing amounts of drug paraphernalia, but Respondent was unable to catch anyone using drugs.

In the fall of 1996, Francis found rolling paper in the pickup truck that is used by employees in the engineering and maintenance department. Additionally, Koen found crack vials and crack pipes on the fifth deck, along with the other drug paraphernalia described above.

Also, both Francis and Koen were told by an employee that there was extensive drug use on board the ship during business hours, and that some of these individuals were operating heavy equipment. They were both given specific names of employees who were allegedly using drugs, which included eight or nine members of the operations department. Harty was one of the names given to Koen and Francis by a fellow employee as one of the employees were using drugs. Francis, in fact, was told by this employee, “[N]o one in the maintenance crew would pass the test.”

In mid-October 1996, shortly after Gardner became C.E.O., Francis reported to Gardner that Respondent had a drug problem on the Intrepid. Francis informed Gardner of the evidence that he and Koen had uncovered, including the “hearsay” statements from an individual that drug use was rampant among the operations department employees. General Gardner was most concerned about this report, and in fact he had himself smelled marijuana in the bathroom. Gardner asked Francis if Respondent had a drug testing policy, and Francis produced a copy of the 1990 policy. Francis informed General Gardner that the policy was applicable to all employees, but that no employee in the maintenance department had been tested previously. According to Gardner, the only reason given to him by Francis that he recalls, for the failure of Respondent to previously test these employees was “financial reasons.” Gardner indicated to Francis that he believed that Respondent should be “proactive” in testing, and then proceeded to review various documents including the 1990 policy, the collective-bargaining agreement, and the Union’s letters to determine how and when to proceed. Gardner asserts that he also consulted with Respondent’s attorney to see if its drug policy conformed with New York State law.

Sometime in December 1996, General Gardner decided that he would test all the employees in the operations department. With respect to the maintenance department, Gardner asserts that he believed that he had “reasonable cause” to warrant drug testing of all employees in the department, since Respondent had found drug paraphernalia in areas where the employees work, including the pickup truck which employees, including

⁷ The paraphernalia found by Koen included pipes, roaches, and marijuana containers.

Harty drive. Gardner admitted that he did not believe that Harty was one of those who was taking drugs. However, he asserts that he knew that at least one and probably more of the employees were using drugs, and, therefore, decided to test all nine employees in the department.

Gardner does recall being told about the “hearsay” information from Francis concerning drug use, but did not remember if Harty was one of the individuals named as a drug user. However, General Gardner testified that although he did not disregard this “hearsay” information, these reports were less valid than the physical evidence that had been discovered, which had the most importance to Gardner in deciding that he had reasonable cause to test.

General Gardner conceded that he also believed that he had the inherent right to test all employees even absent reasonable cause, because of the collective-bargaining agreement’s reference to drug use and the letter from the Union’s attorney in 1989, which in his view recognized and agreed to a drug free workplace. Gardner also testified that he did not need reasonable cause to test the engineering and security guard employees in the operations department, since the former employees were not represented by a Union, and the latter group of employees were parties to a collective-bargaining agreement which expressly permitted testing.

General Gardner concluded, however, that it would be appropriate for Respondent to reissue the 1990 drug testing policy under his own name, so employees would understand its importance and “that this was a museum policy that was in effect.”⁸ Accordingly, he drafted a document entitled “*POLICY LETTER #4 COMPANY POLICY ON ABUSE OF DRUGS AND ALCOHOL IN THE WORKPLACE*” which was signed by Gardner, and dated January 27, 1997. After the document was reviewed by Respondent’s attorney and some minor changes made, it was distributed to Respondent’s employees. Except for a few minor and insignificant language changes, the 1997 document was identical to the 1990 policy that Respondent’s witnesses testified was issued and posted in 1990.

Francis and Koen met with Colin Payne, the Union’s shop steward, on or about January 27, 1997. Payne was handed a number of copies of the policy and was told to give copies to all the maintenance employees and to let Respondent know if he (Payne) had any problems with it. The next day, Francis, in Koen’s presence, asked Payne if he had read the policy and if he had a problem with it. Payne replied that he had no problem with it, since “it’s the same thing we’ve had all along. It’s the same thing that you wrote way back when.” Payne also confirmed that he had given a copy to each employee and they all had read it and understood it.⁹

Respondent admittedly did not send a copy of the policy to Aversa or any official of the Union. Francis asserts that the notice to the shop steward was sufficient in his view.

⁸ In fact, Gardner also reissued six or seven other museum policies in his name.

⁹ The above findings concerning the conversations between Francis, Koen, and Payne is based on the essentially mutually corroborative testimony of Francis and Koen. Payne did not testify.

On February 6 or 7, Koen met with employees of the maintenance department, as well as other members of the operations department. Koen redistributed a copy of the January 27 memorandum, and had employees sign a sheet indicating that they had received, read, and understood it. Harty was among the employees who signed this document.

On the same day, Koen distributed another memorandum, dated February 5, 1997, and issued by Francis entitled "*Drug Testing*."

This memorandum reads as follows:

MEMORANDUM

TO: All Operations Staff DATE: February 5, 1997

FROM: Donald Francis—Vice President

THE: *Drug Testing*

The Intrepid Museum is committed to assuring the safety and well-being of all of its employees and visitors. This commitment includes a strict prohibition against the use of alcohol and/or drugs at any time on company property. Since an employee whose judgment is impaired is a danger to himself and others, this prohibition also included coming to work under the influence of alcohol and/or drugs. The Museum will take all steps to make sure this policy is complied with. In accordance with our long-standing drug testing policy (which was recently reiterated in General Gardner's policy letter #4 dated January 27, 1997) employees will be asked to undergo testing for the presence of alcohol and drugs when problems or circumstances indicate cause to believe that an employee (or group of employees) is in violation of the Museum's prohibition against the use of drugs or alcohol at work or that employee (or group of employees) is coming to work under the influence of such substances.

Additionally, the Museum is required pursuant to U.S. Coast Guard regulations to register all employees who are involved in the operation of vessels on United States waterways in a certified random drug testing program. Therefore, all personnel who are involved in such operations will be tested to qualify for the program. Thereafter, those employees will be tested randomly as determined by a certified drug testing laboratory.

Moreover, because management has cause to believe that there have been violations of the Museum's prohibition against employees using or being under the influence of drugs and/or alcohol in the workplace, all personnel involved in the use of machinery or equipment, or the health and safety of our visitors and staff will also be tested.

You will be notified of the results of your test. If the results are positive you will be given an opportunity to explain. A verified or confirmed positive test result indicating a violation of the Museum's prohibition against employees using or being under the influence of drugs and/or alcohol during working hours or on company property will result in corrective or disciplinary action up and including termination of employment.

Koen conceded that the February 5 memorandum represented a change from past practice, in that it permitted random drug testing of maintenance employees when such employees are involved in the operations of vessels on United States Waterways.¹⁰

On February 12, 1997, Respondent tested all 60 employees in the operations department, including the nine employees in the maintenance department.

Union President Aversa was first notified of the testing by Harty, who informed him that the maintenance employees had already been tested. He then notified the Union's attorney, Eisenstadt, who informed Aversa that Respondent had violated the contract by testing its maintenance employees.

However, the Union did not file a grievance over the Respondent's action in testing, and did not even contact Respondent about such action until after February 20, 1997, when Harty was terminated for failing the drug test.¹¹

After the discharge of Harty, Aversa called Gardner and told him that it was "illegal" for Respondent to test the men and that Harty should not have been fired. Aversa requested that Gardner reinstate Harty, urging that the drug policy includes rehabilitation. Gardner replied that Harty had tested positive for cocaine, and Aversa responded that it doesn't make any difference, "a drug's a drug." Gardner refused to change his mind and the matter was turned over to the parties attorneys.

Eisenstadt prepared a draft letter dated February 21, 1997, to General Gardner. The letter asserts that the Union has been in the forefront among unions in insuring a drug-free workplace, and has negotiated many drug programs, which are grounded in rehabilitation and not punishment or retaliation. The letter adds that testing has not been negotiated, and that the Union has never consented to Respondent's right to test employees.

The letter further requests that Harty's termination be converted to a suspension, with an opportunity for his application for reinstatement on his certified completion of an approved rehabilitation program, subject to further testing. Finally the letter asserts that Respondent has violated the Act, as well as the contract, but hopes that filing charges or a grievance will not be necessary.

Eisenstadt discussed the letter with Respondent's attorney and faxed him a copy, but never actually sent it to Gardner, since Respondent's attorney subsequently informed Eisenstadt that General Gardner had been shown a copy of the letter, and the Union's message had been conveyed.

The Union finally decided not to file a grievance under the contract, but rather to file a charge with the Board, "because we felt that that would be the most direct method of remedying it."

General Gardner testified concerning his interpretation of Respondent's work rule 7 and its reference to two warnings. According to Gardner, a warning letter is not required for violations of the drug and alcohol sections of the rule, since only the

¹⁰ Working on vessels in U.S. Waterways refers to working on barges, not on the Intrepid itself. From time-to-time, the maintenance employees do perform some work on such barges.

¹¹ Two other employees in the operations department, one in engineering and one security guard also failed the test. These employees were also terminated by Respondent.

preceding sentences which discuss other less serious offenses such as acting lewdly or using obscene language require the two warnings. The prohibition of drinking alcoholic beverages and using drugs is contained in the sentences after the two warning requirement, and, therefore, he believes that it is not mandated that a warning be issued in such circumstances Gardner also testified that he believed that Harty's conduct was "egregious," and since Harty was a foreman and admitted to using cocaine, he decided that termination was warranted.

The parties entered into a memorandum of understanding on April 13, 1998, that contained the terms of a new collective-bargaining agreement. The memorandum contains the following provision relating to drug testing:

16. A new drug and alcohol testing program to be inaugurated, to include pre-hire, reasonable cause and random testing (per Coast Guard requirements); split samples, secure chain of custody; testing for alcohol and major prohibited drugs, per NDA standards; and an MRO review. Provision of union's or employee's challenge to basis for testing, with testing to proceed but results to be sealed pending resolution. Employee who tests positive to be permitted to undergo rehabilitation and to be individually tested randomly at employer's instance for one year. A second offense subjects the employee to immediate termination. Contractual grievance procedures, to apply to all aspects of program.

D. Alleged Supervisory Status of Harty

Respondent asserts that the evidence establishes that Harty was a supervisor under Section 2(11) of the Act, inasmuch as he hired individuals on his own authority, effectively recommended the hiring of a permanent staff member, assigned work to the other employees, effectively recommended disciplinary action, and rewarded employees by permitting them to leave before the end of the shift without loss of pay. I do not agree.

The record fails to support Respondent's assertion that Harty hired temporary employees for special events without prior approval and "in the exercise of his own judgment and discretion." On the contrary, the evidence is clear that the hiring of temporary employees is done by the shop steward from a list maintained by the steward, pursuant to the contract between the parties. Harty's role in this process is solely to transmit the request of Respondent's officials for a particular number of temporary employees to the shop steward.

Therefore, there is no basis to conclude that Harty exercises any judgment, independent or otherwise, in connection with the hiring of temporary employees.¹²

The record does not reflect as Respondent contends that Harty effectively recommended the hiring of a permanent staff

member. Rather the one recommendation that Harty did make in this regard, to hire his friend Angelo Imperato for such a position was rejected by Respondent. Harty was instrumental in adding Imperato to the list of temporary employees maintained by the Union, when the steward asked if Harty knew of a worker who lived close by. On another occasion, the steward asked Harty to call his friend Imperato to see if he was available for a particular job. These actions by Harty can hardly be construed as effectively recommending the hiring of an employee, and are insufficient to establish 2(11) status.

While the record does establish that Harty does assign and direct the work of the members of his crew, Respondent has fallen short of meeting its burden of establishing that Harty exercised "independent judgment" in carrying out these functions. *Hausner Hard-Chrome of Kentucky*, 326 NLRB No. 136, slip op. at 1-2 (1998) (not reported in Board volumes).

The large majority of the work by the crew such as general cleaning, moving boxes, loading and unloading boxes, and moving exhibits from place to place, are routine, unskilled tasks, which do not require the exercise of independent judgment by Harty to assign. *Greenhorne & O'Mara, Inc.*, 326 NLRB 514 (1998); *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162 (1995) (maintenance supervisor); *Sears & Roebuck & Co.*, 292 NLRB 753, 754-755 (1989); *Esco Corp.*, 298 NLRB 837, 839 (1990). Indeed, in this connection Respondent has not established that the skills of the employees differ significantly with respect to most of their work tasks. *Providence Hospital*, 320 NLRB 717, 731 (1996).

Additionally between 8 and 10 a.m. in the morning the employees perform the same tasks every day. After 10 a.m., when it is necessary to assign an employee to a particular job, Harty generally selects crew members who were standing next to him at the time or who were free at the time to do the work. Such assignments by Harty is a function of routine work judgment and not a function of authority to use the type of independent judgment required of a supervisor. *Clark Machine Corp.*, 308 NLRB 555, 556 (1992); *Illinois Home*, supra.

Respondent emphasizes Harty's admission that he selected individuals on the crew who could operate heavy equipment based on his assessment of the intelligence or abilities of the particular employees. However, I note that the discretion exercised by Harty in such assignments is circumscribed by previous instructions from Francis limiting the employees that Harty could choose to operate certain equipment such as the hi-lo and saddle hoist. In any event, these kinds of assignments, are not sufficient to confer supervisory status on Harty, since they are merely acts of "an experienced employee who knows which employee can better operate certain equipment." *Sears & Roebuck*, supra at 755 (selection of one employee over another to operate a forklift does not support finding of supervisory status). See also *Hausner Hard*, supra (maintenance assignments on the basis "that a skilled leadman generally makes such assignments, namely by taking note of employees' skills and experience with respect to particular tasks," held to be routine); *Quadrex Environmental Co.*, 308 NLRB 101 (1992) (assignment by leadmen of tasks to work crew employees demonstrates nothing more than the knowledge expected of experi-

¹² Indeed, even if as Respondent asserts, but the record does not support, Harty made the calls to hire the temporary employees, such would not be sufficient to establish supervisory status, since the names were derived from a list that Harty had not compiled. Thus, his function in that regard would be construed as clerical in nature, and does not require the exercise of independent judgment or discretion. *Illinois Veterans Home*, 323 NLRB 890 (1997); *L. Suzio Concrete Co.*, 325 NLRB 392, 395 (1998).

enced persons regarding which employees can perform particular tasks).

Respondent also alleges that the evidence establishes that Harty effectively recommended disciplinary action with respect to employees Jacobowski and Hernandez, and on another occasion sent Hernandez home without receiving pay, because of lateness. Koen and/or Francis testified concerning these matters, and if credited, would establish that Harty did recommend that Respondent suspend Hernandez and Jacobowski for 3 days for lateness and that Respondent followed this recommendation. Koen testified that Harty sent Hernandez home without pay, also for coming in late.

Harty admits that he did complain to Koen about Jacobowski's lateness, but denies recommending that Jacobowski or any employee be suspended. Harty also denies ever sending an employee home on his own initiative, and asserts that he would only do so if Koen gave him such instructions. Harty recalled receiving such instruction with respect to Jacobowski.

I need not make credibility resolutions with respect to the above conflicts in testimony between Respondent's witnesses and Harty, because in my view, fully crediting Francis and Koen in these areas does not establish supervisory status of Harty.

Thus, as to the recommendations to suspend employees Jacobowski and Hernandez, Respondent's witnesses concede, that after receiving Harty's recommendations, Koen and Francis discussed the recommendation, checked the timesheets of the employees involved to make sure that Harty was "correct in his facts," and looked over the employees' files. In such circumstances, where no disciplinary action is taken without acknowledged supervisors having conducted their own independent investigation of the matter, such recommendations are not "effective" recommendations sufficient to confer supervisory authority. *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994); *Northcrest Nursing Home*, 313 NLRB 491, 497, 506-507 (1993); *Polynesian Hospitality Tours*, 297 NLRB 228, 235-236 (1989); *Ball Plastics Division*, 228 NLRB 633, 634 (1977).

As for the one incident, where Harty allegedly sent employee Hernandez home without pay when he showed up late for work, this conduct is insufficient to establish supervisory status, inasmuch as the exercise of such restricted and sporadic authority does not require independent judgment, *Lincoln Park*, supra at 1162; *Northcrest Nursing*, supra at 497, and the evidence does not establish that any ultimate personnel decision was made by Harty as a result of Harty sending Hernandez home. *Quadrex*, supra at 101. Moreover, this single instance of conduct by Harty, even if considered supervisory in nature, is too isolated to establish supervisory status. *Brown & Root*, supra at 21; *Polynesian Tours*, supra at 236.

Respondent also contends that Harty exercised supervisory authority by rewarding employees when he permitted employees to leave work early before the end of the shift without loss of pay. In that regard, Harty admitted that on one occasion, after some employees cleaned out a septic tank resulting in their clothing being soiled with human waste, he allowed these employees to leave early and go home without loss of pay, but that he did so, only after receiving permission from a higher supervisor. This action by Harty is hardly sufficient to estab-

lish the requisite discretion indicative of supervisory status, and is again a single isolated incident. *Brown & Root*, supra.

Testimony was also adduced concerning Harty allowing employees to leave early while working at special events. However, the record reveals that while Harty did at times permit the crew to leave early, as long as work was completed, he did so either with the specific permission of higher management, or as a continuation of the policy that had been in effect prior to his becoming foreman. Accordingly, I do not find that Harty's actions in this respect to be indicative of 2(11) supervisory status.

Respondent also places reliance on several other factors, such as Harty's additional salary of \$3 per hour, the fact that at times he is the only "supervisor" present, and that he permitted on his own employees to leave work early in emergency situations. However, since I have not found, as described above that Harty exercised any of the primary indicia of supervisory status as enumerated in Section 2(11) of the Act, it is unnecessary to consider these "secondary" indicia of supervisory authority. *S.D.I. Operating Partners, L.P.*, 321 NLRB 111, 112 fn. 2 (1996); *J. G. Brock Corp.*, 314 NLRB 157, 159 (1994).

Moreover, even if I were to consider these secondary indicia, they are not indicative of supervisory status herein. The additional salary of \$3 per hour has little significance, since the Board routinely finds employees who receive extra pay for assuming leadman responsibilities not to be supervisors under Section 2(11) of the Act. *Lincoln Park*, supra at 1162-1163 (maintenance supervisor received extra \$2 per hour), *Jordan Marsh Stores*, 317 NLRB 460, 467 (1995); *Brown & Root*, supra.

As for the authority to allow employees to leave work early in an emergency situation, the discretion exercised by Harty in this regard is routine and clerical, does not involve the exercise of independent judgment, *L. Suzio*, supra, 325 NLRB at 393; *Azusa Ranch Market*, 321 NLRB 811, 812 (1996), and is not determinative of supervisory status. *J. C. Brock*, supra at 160; *Providence Hospital*, supra at 732; *McCullough Environmental Services*, 306 NLRB 565, 566 fn. 5 (1992).

Finally, the fact that at times, Harty is the highest ranking official working at the museum is also far from sufficient to establish his supervisory status. *McCullough*, supra at 566 fn. 6; *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996); *Esco*, supra.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has failed to establish that Harty was a supervisor as defined in Section 2(11) of the Act.

E. The Alleged Unilateral Changes

The complaint alleges, and the General Counsel contends that Respondent by "reissuing" its drug policy on January 27, 1997, and subsequently conducting a drug test on February 12, 1997, and discharging Harty on February 20, 1997, as a result of such test, without notifying and bargaining with the Union, has violated Section 8(a)(1) and (5) of the Act.

In assessing these allegations, it is well settled and undisputed that drug testing is a mandatory subject of bargaining, and that employers must notify and bargain with the Union that represents its employees before it institutes a policy of drug

testing of its employees or makes changes in any existing drug policy that was in effect for such employees. *Johnson-Bateman Co.*, 295 NLRB 180 (1989); *Tocco, Inc.*, 323 NLRB 480 (1997); *Delta Tube & Fabricating Corp.*, 323 NLRB 856 (1997).

Here, Respondent on January 27, 1997, “reissued” its drug testing policy, that had been previously issued by it on December 11, 1990. Respondent contends that the drug testing policy previously issued on December 11, 1990, was agreed to by the Union, and was still in effect as of January 27, 1997. Therefore, it was not required to notify or bargain with the Union prior to the “reissuance,” since this action was merely a statement of a preexisting policy that had previously been agreed to by the Union.

The General Counsel makes a number of alternative contentions in response to Respondent’s arguments, which I shall deal with seriatim. Initially, the General Counsel asserts that the testimony of Francis concerning his alleged conversations with the shop steward in 1990 should not be credited. While as the General Counsel points out, Francis was not credible in some of his testimony with respect to the authority of Harty, I do not believe that these problems with his testimony are sufficient to discredit Francis’ unrefuted accounting of his discussions with Kennedy. I note in this regard that not only is Francis’ version not contradicted by either Kennedy or Potter (who is deceased), but is implicitly corroborated by the further uncontradicted testimony of Francis, supported by Koen, concerning their conversations with Payne, the Union’s shop steward in 1997. Thus, after Francis showed Payne a copy of the “reissued” drug policy in 1997, Payne replied that he had no problem with it since “it’s the same thing we’ve had all along. It’s the same thing you wrote way back when.”

The General Counsel conveniently ignores this highly significant evidence, particularly since Payne is still employed by Respondent, and could have been called by the General Counsel or the Charging Party to refute this testimony of Respondent’s witnesses. I, therefore, credit the testimony of Francis concerning both his 1990 and 1997 conversations with union shop stewards Kennedy and Payne, respectively.

Therefore, this testimony establishes that Francis, in 1990, showed Kennedy a copy of the proposed drug testing policy, told him to show it to Union President Potter and get back to Francis if there was a problem with it. Several days later, Francis asked Kennedy whether he and Potter had reviewed the policy and Kennedy responded, that he and Potter had looked at the document and “it’s fine just the way it is.”

Respondent asserts that the above evidence constitutes sufficient proof that the Union agreed to the policy, the General Counsel argues however that even if credited, no agreement by the Union has been established. The General Counsel points out that the issue of drug testing had been the subject of negotiations in 1989 and 1990, but no agreement had been reached. Moreover, the parties through their attorney’s had discussed the formation of a joint labor management committee to explore the issue. However, no such joint committee was formed, but instead Francis “in effect” formed his own committee with Respondent’s attorney, and drafted the 1990 policy. Further, the General Counsel asserts, that although Francis may have

notified and secured the agreement of the shop steward to the policy, the Union cannot be said to have agreed to it, since the shop steward was not authorized to negotiate a modification of the contract. *McDaniel Ford, Inc.*, 322 NLRB 956, 963 (1997); *Union Child Day Care Center*, 304 NLRB 517, 523 (1991); *TLI, Inc.*, 271 NLRB 798, 804 (1984); *Spriggs Distributing Co.*, 219 NLRB 1046, 1049 (1975). I disagree.

Respondent did more than just notify or discuss the proposed drug policy with the shop steward. It asked the steward to show to the union president and obtain the approval of the president. There is no question that the union president was authorized to negotiate on behalf of the Union, and Potter had been present throughout the negotiations when the issue had been discussed. Thus, Respondent in effect negotiated with the president through the shop steward. While this may not be the preferred method of negotiating, it is not illegal, and in my view is sufficient based on all the circumstances herein to establish that the Union agreed to the drug testing policy in 1990.¹³ It is also significant that in none of the above cases cited by the General Counsel, did the discussions with the shop steward also result in further discussions with higher union officials concerning the matter by the steward. Indeed, in *Union Child*, supra, the administrative law judge specifically noted that the Respondent therein, did not seek to have the shop steward inform the certified representative of the substance of the discussion so that the union would have prior notice of the charges and an opportunity to bargain. *Id.* at 523. Here, Respondent did precisely that. Francis asked the shop steward to have the union president review and approve the policy and that is what happened. The Union had full opportunity to protest or bargain about the policy in 1990. It not only did not do so, but expressed its agreement with the policy, by the president stating, through the shop steward, “it’s fine.”

Moreover, even if the above evidence is deemed insufficient to constitute agreement by the Union to the policy, there can be no doubt the Union was notified about the issuance of the policy, and that it did not object. Therefore, since the policy’s institution was in 1990, Section 10(b) would preclude any attack on the lawfulness of Respondent’s conduct at that time in connection with the institution of the policy. Thus, the significant fact to be derived from the above is simply that Respondent issued its drug testing policy in 1990 and that it was applicable to the bargaining unit employees. I so find.

That brings me to the next and indeed most substantial issue to be decided. The complaint alleges that although Respondent issued a drug policy in December 1990 “at all material times, the drug policy described above in paragraph 9 was not implemented by Respondent with respect to unit employees.” The General Counsel contends consistent with this allegation that the policy was never implemented, since no testing was ever conducted on bargaining unit employees. Thus, the General Counsel argues that “the Board has long held that where a work

¹³ I also rely on the 1997 discussion with shop steward Payne where he conceded that the 1997 reissuance of the policy was the same as Respondent had all along and had “written way back when.” This evidence is an admission on the part of the Union that it both agreed to and was aware of the 1990 drug policy.

policy has remained dormant for an extended period of time, an employer may not resurrect and begin strictly implementing that policy without first notifying the Union and giving it an opportunity to bargain about the change.” The General Counsel relies on *Hyatt Regency Corp.*, 296 NLRB 259, 263–264 (1989), where the Board relying on a practice of lax enforcement of its preexisting rules on signing in and signing out, concluded that “the enforcement of these rules more stringently that had been the practice before the Union’s election, represented a change in the employees’ terms and conditions of employment over which the Respondent had an obligation to bargain.” Id. at 263. The General Counsel also cites *Burns Electronic Security Services*, 245 NLRB 742, 764–766 (1979), where similarly the Board concluded that lax enforcement¹⁴ of a rule requiring employees to carry a gun or night stick, required the employer to bargain with the union before posting and enforcing this rule.

The General Counsel further points out that in *Hyatt Regency*, supra, lax enforcement of the rule for a 7-month period was deemed sufficient to prove that the practice (lax enforcement) had become an established term and condition of employment which could not be changed to one of strict enforcement without notifying and bargaining with the union.

While the General Counsel’s arguments do have some surface appeal, and his citation of authorities appear on their face to be persuasive, a close analysis of the facts of these cases, as well as other cases following this rationale,¹⁵ convince me that the General Counsel’s position must be rejected.

Initially, in my view the assertion that the drug testing policy was not “implemented” is neither accurate nor determinative. This issue was resolved by the Board in *Storer Communications, Inc.*, 297 NLRB 296 (1989), where the administrative law judge had dismissed an 8(a)(5) allegation of a unilateral charge in an employer’s drug testing policy because none of the employees were tested until after bargaining took place. The Board reversed this finding, and observed:

although we do not wish to quibble over the precise meaning of implemented in this context, it is plain that the Respondent here announced in no uncertain terms that, as of the date of its notice, its employees could be subject *at any time* to a demand by one of its supervisors to submit to a search or to a blood or urine test *as a condition of employment*. Thus, for all intents and purposes, the unit employees’ working conditions were changed unilaterally as of the time the Respondent announced its revised policy, and that unilateral change violated Section 8(a)(5). This unlawful act is not redeemed by the fortuity that the Respondent happened not to cause any unit employee to submit to a drug test for several months, be-

cause the Respondent claimed the right to require such a test at any time. [Id. at 296–297.]¹⁶

Although the context of these cases is somewhat different, the rationale and reasoning is dispositive of the relevant issue here. As of December 1990, the bargaining unit employees of Respondent have been subject to the Respondent’s drug testing policy, and could have been tested at any time. Thus, the terms and conditions of employment of its unit employees were changed in 1990, and the fact that no unit employee have been tested is not significant, particularly since there is no evidence that Respondent disavowed or rescinded the rule.

Also supportive of this conclusion is *Bath Iron Works, Corp.*, 302 NLRB 898, 901 (1991). There, the Board reversed an administrative law judge’s conclusion that an arbitrator’s decision upholding an employer’s right to engage in drug testing allegedly consistent with an existing rule was repugnant to the Act. The judge had relied heavily on the fact that the employer had never engaged in any drug testing notwithstanding the existence of the rule which allegedly permitted it. The judge had observed, “drug testing did not exist at the facility prior to the implementation of the Substance Abuse Policy. The introduction of testing where no such test had been utilized heretofore certainly was a change.” Id. at 910. The Board in reversing the judge on her ultimate conclusions in most respects specifically addressed this issue. It concluded, “[W]e do not agree with the Judge’s implication that the Respondent itself waived its authority under rule 19 concerning drug testing by failing to engage in it prior to the SAPP. . . . It would be inappropriate to conclude that the Respondent had abandoned its right under the rule merely by not exercising it from the beginning.” Id. at 901 fn. 12.

Although *Bath Iron Works*, supra, was decided under deferential principles, the reasoning of the Board in the above cited footnote is consistent with *Storer*, supra, and is in my view more pertinent to the instant case, than the cases cited by the General Counsel. All of these cases as well as others following the rationale are clearly distinguishable from the present case, in that in each of them the Employer’s therein affirmatively tolerated conduct which had been allegedly prohibited by the “existing” rule. *Hyatt Regency*, supra (rule prohibiting signing in and signing out for another employee); *Burns Electric*, supra (rule requiring employee to use gun and night stick); *Bryant & Stratton*, supra (rule requiring faculty to hold classes for entire period); *Blossom Nursing*, supra (rule against garnishments). Thus the rationale of these cases as expressed in *Hyatt Regency*, supra, is that the employer by tolerating and condoning infractions of the rule involved, had “changed from a system of lax, sporadic enforcement into one of stringent enforcement.” Therefore, the employer was obligated to notify and bargain with the union before it instituted and implemented its “more stringent enforcement of the rules.”

¹⁴ Here, the judge found 4 years of either no uniform or nonenforcement of the rule.

¹⁵ *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1021–1022 (1996) (lax enforcement of rule requiring faculty to hold classes for entire period); *Blossom Nursing Home*, 299 NLRB 333, 341 (1990) (rule subjecting employees to discharge for employee garnishments, unlawful unilateral change, in view of prior practice of tolerating garnishments without any disciplinary action).

¹⁶ See also *Electra-Flex Co.*, 238 NLRB 713, 731 (1978), enf. mem. 624 F.2d 2303 (7th Cir. 1979) (Bd. affirmed ALJ’s finding that announcement of new rule violated the Act, although no evidence that it was ever enforced. ALJ observed that rule was “neither disavowed nor rescinded,” and therefore Act was violated although no one was ever disciplined for violating the rule).

Such is not the case herein, since there is no evidence that Respondent tolerated or condoned any infractions of its rules, which can be construed as establishing a change in terms and conditions of employment. While Respondent had suspected some employees of drug use in 1995, it decided not to test at that time, but rather to try to catch someone in the act. Similarly in February 1996, it began to see more evidence of drug use, but for financial reasons decided not to test at that time. This evidence is hardly sufficient to establish that Respondent tolerated and condoned any infractions of its rule. Rather, Respondent simply chose not to exercise its right to test until January 1997.

There can be no reasonable contention that employees were misled into believing that Respondent would not test if necessary, and it cannot be concluded that the mere failure of Respondent to test employees in the past establishes that employees were no longer subject to this policy. Indeed, the evidence establishes to the contrary that the policy was still in effect, in view of the admission of the Union's shop steward that the "reissuance" of the testing policy in 1997 was "the same thing we've had all along. It's the same thing that you wrote back when."

Therefore, I conclude that the more dispositive precedent, in addition to *Storer*, supra, and *Bath Iron*, supra, are such cases as *Sigma Network Corp.*, 317 NLRB 411, 415-417 (1995) (drug testing based on existing policy, that employer reserved the right to require if warranted in its opinion); *Mitchellace, Inc.*, 321 NLRB 191, 195-196 (1996) (enforcement of no-smoking rule based on preexisting rule); *Kroger Co.*, 311 NLRB 1187, 1193 (1993) (posting of notice of existing rule prohibiting employees access to copy machine and telephones not violative of Act); *North Kingstown Nursing Care Center*, 244 NLRB 54, 66 (1979) (employer effectuated a long-existing policy concerning performance evaluations); *Markle Mfg. Co.*, 239 NLRB 1142, 1147 (1979) (Posting of safety rule which was first posted years before and had never been rescinded not violative of the Act. Rules held to be merely a "codification of rules which had been in existence for several years, and their posting does not constitute a unilateral change in working conditions about which respondent must bargain with the union)."

Accordingly, based on the above analysis and authorities, I conclude that Respondent's action in "reissuing" its drug testing policy was merely a notification and reminder to its employees of an existing policy, which was still in effect and that employees were still subject to. Thus its action at that time did not constitute a change in terms and conditions of employment of its employees, and it was not obligated to notify or bargain with the Union prior to such "reissuance."

I, therefore, shall recommend that this allegation of the complaint be dismissed.

The General Counsel also contends, consistent with the complaint, that Respondent's action in testing James Harty on February 12, 1997, constituted a unilateral change to its own policy, even if that policy was in effect. Thus, the General Counsel asserts that Respondent under its policy, can require employees to undergo testing "if it has reason to believe that *the employee is in violation* of the aforementioned rules." (Emphasis added.) Therefore, it follows according to the Gen-

eral Counsel (as well as the Charging Party) that a generalized suspicion that a group of employees may be involved with drugs is insufficient to constitute a reasonable belief that a particular employee (i.e., Harty) has violated the Respondent's rules. Further, the General Counsel correctly points out that General Gardner admitted that he personally did not believe that Harty was guilty of drug use although he suspected at least one of the unit employees was involved with drugs. Therefore, this represents a change from particularized suspicion to generalized suspicion, and is akin to a change from reasonable cause to random testing which is material and substantial and therefore unlawful. *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970).

Respondent, on the other hand argues that the evidence discloses that it had reasonable cause to believe that all employees (including Harty) might have been using drugs, so that it was within its rights to test the entire maintenance unit. Thus, for a period of nearly a year, both Koen and Francis had found increasing amounts of drug paraphernalia in areas frequented by all members of the unit, including Harty. Moreover, Francis and Koen were informed by an employee that drug use was extensive aboard shop during business hours and that some of such employees were operating heavy equipment. Several specific names of employees allegedly using drugs were given to Francis and Koen, and Harty was one of the names reported to them as a drug user. Finally, Francis was told by the employee that "no one in the maintenance crew would pass the test."

Respondent concedes that Gardner, who made the ultimate decision to test everyone in the department, did not believe that Harty was involved, and testified that he placed little reliance on the "hearsay" reports of drug use from other employees. Nonetheless, Respondent correctly points out that Gardner did not disregard these reports, but merely placed more reliance on the physical evidence of drug use that Respondent's officials found in areas where all maintenance employees, including Harty worked from time-to-time. Thus Respondent contends that all of the above evidence can be considered as probative of reasonable cause to believe that potentially every employee in the department may have been using drugs. Therefore, in order to help determine which of the employees were using drugs, it complied with the requirement of "reasonable cause to believe that *the employee* is in violation of the rules.

I find that the arguments and contentions of both the General Counsel and Respondent to have some merit, and to be reasonable and plausible interpretations of Respondent's drug policy. If I were an arbitrator considering this matter, I would be compelled to decide which of the two interpretations is correct or more plausible.

However, while the Board does in various circumstances interpret contractual clauses, where as here, the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith or an intent to undermine the Union, the Board will not seek to determine which of two plausible contract interpretations is correct. *Westinghouse Electric Co.*, 313 NLRB 452 (1993); *Crest Litho, Inc.*, 308 NLRB 108, 110 (1992); *Atwood Morrill Co.*, 289 NLRB 794, 795 (1988); *Thermo Electron Co.*, 287 NLRB 820 (1987); *NCR Corp.*, 271 NLRB 1212, 1213 (1984); and *Vickers, Inc.*, 153 NLRB 561, 570 (1965).

Based on the above cited precedent, I conclude that Respondent “had a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it.”¹⁷ *Crest Litho*, supra at 110. Therefore, Respondent has not made an unlawful unilateral change in violation of the Act, by testing Harty along with the other employees in the maintenance department.

The General Counsel also asserts that the discharge of Harty on February 20, 1997, is an unlawful unilateral change in violation of Section 8(a)(1) and (5) of the Act. The primary argument in support of this contention is that Harty was terminated pursuant to the alleged unlawfully announced and implemented test. *Hyatt Regency*, supra. Since I have concluded above that the test was neither unlawfully announced nor unlawfully implemented, this theory of a violation with respect to the discharge of Harty has no merit.

However, the General Counsel and the Charging Party make alternative contentions that even if the testing of Harty was lawful, the discharge was not, since Respondent unilaterally changed the agreement by failing to adhere to two contract requirements in terminating Harty. Thus, they assert that work rule 7 requires both that Harty be given a warning letter for a first offense and that any discipline be based only on taking or using drugs on the premises.

Respondent argues on the other hand that work rule 7 must be read in conjunction with the existing drug policy which does not contain the requirement of two warnings before an employee is discharged or disciplined for failing a drug test. Moreover, rule 7 itself according to Respondent does not necessarily mandate warning letters for violation of Respondent’s prohibition of drug use, since the sentence mandating two letters before an employee can be discharged appears before the sentence describing misconduct of drug and alcohol use, and after the sentence describing other types of less serious misconduct, such as acting lewdly or using obscene language. Thus, Respondent asserts, consistent with the testimony of Gardner, that although awkwardly written, the only sensible construction of this rule is that only for less serious offenses is Respondent required to issue a warning letter. But for the most serious offenses in that rule, such as drug or alcohol use, no warning letter is necessary.

As for the section of the rule which refers to taking or using drugs “on the premises,” Gardner testified that in his view Respondent is permitted to discipline an employee for coming to work under the influence of drugs, regardless of where the employee actually took the drugs. Indeed, Gardner conceded that Harty informed him that he (Harty) had taken the drug at a party. However, in Gardner’s view once Harty failed the drug test, this demonstrated that Harty came to work under the influ-

¹⁷ While this case does not involve the interpretation of a contract clause, this fact is not significant. Respondent’s drug testing policy was as I have found in effect and part of the terms and conditions of employment of Respondent’s maintenance employees. Therefore, for purposes of assessing whether an action constitutes an unlawful unilateral change, the policy is considered as if it were part of the contract.

ence of drugs and permitted Respondent to discharge him under its policy.¹⁸

In my view, these issues are once again controlled by the above-cited precedent, as I conclude that Respondent acted once again pursuant to a plausible interpretation of the contract. Thus, I find that Respondent’s construction of the agreement, i.e., that it must be read in conjunction with its preexisting testing policy is plausible. Further, I also find that the above-described interpretations of these documents, that Respondent is not required to issue a prior warning letter to an employee who fails a drug test before disciplining said the employee, and that an employee who fails a drug test can be construed as having come to work “under the influence” of drugs, are also plausible and reasonable.

Accordingly, since I conclude that Respondent acted pursuant to plausible interpretations of its contractual obligations to the Union, I conclude that it has not unilaterally changed its employees terms and conditions of employment by terminating Harty.

I also find that the application of other precedent warrant dismissal of this contention by the General Counsel. Thus, an action by an employer directed at a single employee is not considered to be on unilateral charge in working conditions, unless it is established that the action represent a change in policy applicable to employees in general. *88 Transit Lines, Inc.*, 300 NLRB 177, 179 (1990); *Cable Vision, Inc.*, 249 NLRB 412, 416 (1980), enfd. 660 F.2d 1(1st Cir. 1981); *Brown & Connolly, Inc.*, 237 NLRB 271, 280 (1978); and *Mike O’Connor Chevrolet-Buick G.M.C. Co.*, 209 NLRB 701, 704 (1974).

Therefore, based on the evidence disclosed herein, Harty was the only unit employee discharged, and it was not established that Respondent changed its policy, even if it is construed as a change from the contract’s requirements, to make it applicable to employees in general or to any other employee in the unit for that matter. Thus, even if I were to conclude that Respondent’s interpretation of the agreement was not plausible, since its action involved only Harty, and the evidence does not disclose that it would take the same position with respect to other employees, the discharge of Harty cannot be found to be a unilateral change.

Further, in my view a logical extension of the General Counsel and the Charging Party’s position on this issue would result in the Board having to judge whether a discharge violates the “just cause” provisions that appear in many collective-bargaining agreements. Indeed, in the instant case, the contract between the parties does not contain a clause providing that discharges must be for “just cause,” or other similar language that frequently appears in collective-bargaining agreements. Instead the parties negotiated a comprehensive set of work rules which define Respondent’s rights to discipline employees which includes work rule 7, the rule in question herein. Thus, by arguing that Respondent has unilaterally changed working conditions, by terminating Harty without following work rule

¹⁸ I note in that connection that Respondent’s drug policy specifically states that “any employee under the influence of drugs” . . . while conducting Company business will be subject to appropriate discipline, up to and including discharge.”

7's requirements, the General Counsel has in effect asserted that Respondent has not established the requisite "just cause" under the contract justifying Harty's discharge. I do not believe that the Board intends that its precedent concerning unilateral changes mandates deciding whether a particular discharge was effectuated for "just cause." Yet, the acceptance of the General Counsel's argument concerning this issue, would in my view open the door to such a contention to be made.

Accordingly, based on the foregoing I recommend that the complaint be dismissed insofar as it alleges that the discharge of Harty is violative of the Act.

However, the General Counsel also alleges that Respondent violated the Act by its issuance of its drug testing memorandum dated February 5, 1997. Although this memorandum had no bearing on the termination of Harty,¹⁹ the General Counsel argues that it represents a significant change in Respondent's existing policy, and was unilaterally implemented in violation of Section 8(a)(1) and (5) of the Act. I agree.

The February 5 memorandum significantly expands the Respondent's prior policy by adding random testing for employees who are involved in the operation of vessels, which admittedly applies to bargaining unit employees who do at times perform such work. Random testing is "a distinctly different condition of employment" than testing based on reasonable suspicion, and Respondent's inclusion of random testing in its February 5 version of its policy, "fundamentally alters the nature of the policy and its effect on employees." *Delta Tube*, 323 NLRB 85 (1997); see also *Tocco*, 323 NLRB 480 (1997).

Since it is undisputed that Respondent announced this change in its policy without notifying or bargaining with the Union, it has thereby violated Section 8(a)(1) and (5) of the Act by such conduct.²⁰

I would also note that although there is no evidence that Respondent ever tested any unit employees pursuant to this unlawful expansion of its policy, a violation is nonetheless warranted, since employees were subject to this policy for some period of time, until the parties reached agreement on a drug testing policy to be included in their contract. *Storer*, supra at 296-297.

CONCLUSIONS OF LAW

1. The Respondent, Intrepid Museum Foundation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1909, International Longshoreman's Association (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit as described below:

¹⁹ The General Counsel does not so assert, and the evidence based on the credible testimony of Gardner establishes that this memorandum was not considered in Respondent's decision to either test unit employees on February 12, 1997, or to terminate Hardy on February 20, 1997.

²⁰ In view of this finding, I need not decide whether as the General Counsel contends, Respondent's addition of the term group of employees to the definition of reasonable suspicion, constitutes a material, substantial and significant change in employees' conditions of employment.

All full-time and regular part-time timekeepers, cleaners, rest-room matrons, coat checkers, and maintenance workers employed by Respondent at its facility at Pier 88, 46th Street and 12th Avenue, New York, New York, excluding all other employees, including office clerical employees and guards, professional employees and supervisors as defined in the Act.

4. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by unilaterally changing its drug testing policy on or about February 5, 1997, without notifying or bargaining with the Union.

5. Respondent has not otherwise violated the Act as alleged in the complaint.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act.

Although ordinarily, the Board requires recession of unlawful unilateral changes, where as here, the parties have bargained over and subsequently reached agreement concerning a drug testing policy, it is not appropriate to order such a recession. *Storer*, supra at 297. In such circumstances a cease and desist order is deemed sufficient to remedy the violations found.

Based on the foregoing findings of fact and conclusions of law and the entire record, I make the following recommended²¹

ORDER

The Respondent Intrepid Museum Foundation, Inc., New York, New York, its officers, agents, representatives, and assigns, shall

1. Cease and desist from

(a) Changing its drug testing policy as it applies to the employees in the following appropriate bargaining unit without first affording the Union the opportunity to bargain over the proposed changes.

All full-time and regular part-time timekeepers, cleaners, rest-room matrons, coat checkers, and maintenance workers employed by Respondent at its facility at Pier 88, 46th Street and 12th Avenue, New York, New York, excluding all other employees, including office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its 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) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 2, 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 February 5, 1997.

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

(c) IT IS FURTHER ORDERED that all violations alleged in the complaint but not found are dismissed.

²² 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."

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

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

WE WILL NOT change our drug testing policy without giving Local 1909, International Longshoremen's Association a meaningful opportunity to bargain over the proposed changes on behalf of employees in the following appropriate unit:

All full-time and regular part-time timekeepers, cleaners, rest-room matrons, coat checkers, and maintenance workers employed by us at our facility at Pier 88, 46th Street and 12th Avenue, New York, New York, excluding all other employees, including office clerical employees and guards, professional employees and supervisors as defined in the Act.

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

INTREPID MUSEUM FOUNDATION, INC.