Bridgestone/Firestone, Inc. (Woodridge, IL Distribution Center) ***and*** **United Steelworkers of America, AFL–CIO, CLC.** Case 13–CA–37351

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On December 23, 1999, Administrative Law Judge James L. Rose issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering brief.

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

1. Withdrawal of contract proposal

The judge found that the Respondent unlawfully refused to bargain with, and withdrew recognition from, the Union. The General Counsel contends that the Respondent also committed a separate violation of Section 8(a)(5) of the Act by withdrawing its last contract proposal on April 14, 1999, and that the Respondent should be required to reinstate the proposal. For the reasons stated below, we find merit in this contention.

On October 19, 1998,[2] the Regional Director approved a settlement agreement between the Respondent and the Union in Case 13–CA–36834.[3] The agreement required the Respondent to bargain with the Union on request "for at least six months from the date the employer resumes bargaining with the Union as if the initial year of certification had not expired and embody any understanding reached in a written agreement."

The next bargaining session was on December 11. The parties then met regularly once or twice a month, with the final session taking place on April 8. At the end of that session, the Union said that it would submit the Respondent's last (and 15th) proposal to its members and requested 50 copies.

However, on April 13, before the Union had received the copies and before any ratification vote, the Respondent received a decertification petition from the employees.

On April 14, Ken Kirkpatrick, the Respondent's distribution center manager, wrote to Craig Langele, the Union's principal representative, stating that he had received a petition from a majority of the unit employees who requested "Decertification of [the] Steelworkers Union." The Respondent revoked its last proposal and said that it would no longer bargain with the Union. Kirkpatrick reaffirmed this refusal in a July 2 letter to Langele, in which he also stated that the Respondent, having received a second petition signed by a majority of the unit employees, was withdrawing recognition from the Union.

The judge found that the Respondent breached the settlement agreement and violated Section 8(a)(5) of the Act by failing to bargain for the requisite 6 months. He also found that, because the settlement agreement provided for a 6-month extension of the certification year, the prohibition against withdrawal of recognition during the certification year applied. He noted the Board's irrebuttable presumption that a union's majority status continues throughout the certification year, and that this policy applies to a bargaining provision in a settlement agreement. Accordingly, the judge found that not even a petition from a majority of employees purporting to reject the Union would allow the Respondent lawfully to cease bargaining or withdraw recognition within the 6-month extension of the certification year.

The judge rejected the Respondent's argument that, although it suspended bargaining, it did not withdraw recognition and the Union did not request further bargaining. He concluded that the Respondent's April 14 action was a complete repudiation of the Union as the employees' bargaining representative and that the Union was not required to request resumed bargaining, which would have been a futile act. Thus, the judge found that, by ceasing to bargain, the Respondent not only breached the settlement agreement but also unlawfully withdrew recognition on April 14, as reaffirmed by the July 2 letter.

Clearly, the action taken by the Respondent that breached the settlement agreement and violated Section 8(a)(5) of the Act was the April 14 letter from Kirkpatrick to Langele, in which the Respondent revoked its last proposal and stated that it would no longer bargain with the Union. Although the judge found that by ceasing to bargain with the Union the Respondent breached the settlement agreement and therefore violated Section 8(a)(5) of the Act, he, perhaps inadvertently, did not make the same finding as to the Respondent's withdrawal of its contract proposal.

The April 14 letter stated, in pertinent part:

> Please be advised that, yesterday, the Company received a petition, signed by a majority of employees in

[1] We have modified the judge's recommended Order in accordance with our decision in *Excel Containers, Inc.*, 325 NLRB 17 (1997).

[2] All dates are within September 1998 through July 1999, unless otherwise stated.

[3] The settlement agreement expressly excluded this case Case 13–CA–37351.

> the bargaining unit represented by your Union, indicating that they no longer wish to be represented by the United Steelworkers of America. Based upon this petition, the company cannot lawfully negotiate with your Union regarding a collective bargaining agreement. Accordingly, pending the resolution of the Union's status, the Company's outstanding offer for and agreement covering the Woodridge bargaining unit employees is hereby withdrawn.

Thus, the Respondent informed the Union that it was withdrawing its outstanding offer assertedly *because* it could not lawfully negotiate with the Union. The withdrawal of the offer was the vehicle by which the Respondent expressed its erroneous view that it was no longer permitted to bargain with the Union, and by which it therefore effectively withdrew recognition from the Union, as confirmed by the July 2 letter. As such, the Respondent's withdrawal of its contract proposal was part and parcel of its unlawful action of April 14. We find that, in addition to the violations specifically noted by the judge, the Respondent violated Section 8(a)(5) of the Act by withdrawing its contract proposal.

To remedy this additional violation, we shall require the Respondent to reinstate the contract proposal and afford the Union an opportunity to accept the proposal or resume negotiations.[4] If the Union accepts the contract proposal, the collective-bargaining agreement shall be given retroactive effect and a commencement date of May 1, 1999, the effective date specified in the contract proposal.

2. Change in antiharassment policy

The judge correctly found that the Respondent unlawfully implemented a new anti-harassment policy in September 1998, and ordered the Respondent to cease and desist from unilaterally altering terms and conditions of employment. The judge, however, did not specifically require the Respondent to restore the status quo by reinstating its former policy. We shall modify the judge's recommended Order and notice to require the Respondent to do so and to retract any discipline issued to employees pursuant to the new policy and to make employees whole for any losses they incurred as a result of the implementation of the new policy.

In objecting to the addition of these requirements, our colleague cites the important legal and policy reasons for having rules against harassment on the basis of (race, color, national origin, religion, age, or disability) added by the Respondent in September 1998 to its preexisting antisexual harassment policy. We agree with our colleague as to the importance of the public policy in question. However, we perceive no affront to that public policy by virtue of our requirement that the Respondent first bargain with the Union if it wishes to pursue the laudable goal of promulgating a policy of its own against these forms of harassment, by implementing a new work rule prohibiting them.

3. Extension of certification year

The judge, in ordering the Respondent to recognize and bargain with the Union, provided for a new certification year to commence when the Respondent enters into negotiations with the Union. We disagree with the judge's view that the Respondent's refusal to bargain warrants extending the certification year for another full year. The Respondent bargained with the Union in apparent good faith from December 11, 1998, to April 14, 1999, a period of about 4 months. Under all the circumstances, we conclude that a 6-month extension of the certification year is appropriate. This period will provide the parties with a reasonable interval in which to resume negotiations and possibly reach an agreement, without unduly imposing on the employees a bargaining representative they may no longer support. In fashioning this remedy, we stress that the Respondent's duty to bargain will not automatically end after the 6-month extension of the certification year expires. Rather, at that point, the Union will enjoy a rebuttable presumption that its majority status continues. See, e.g., *JASCO Industries*, 328 NLRB 201 (1999).

4. Affirmative bargaining order

We find for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required that the Board justify, in the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. 2000); *Lee*

[4] See, e.g., *TNT Skypack, Inc.*, 328 NLRB 468, 470 (1999), and enfd. 208 F.3d 362 (2d Cir. 2000) (ordering the respondent to reinstate its proposal for a collective-bargaining agreement); *Northwest Pipe & Casing Co.*, 300 NLRB 726 (1990) (agreeing with the judge's recommended order, requiring the respondent to reinstate its offer); and *Mead Corp.*, 256 NLRB 686, 687 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983) (ordering the respondent to reinstate its unlawfully withdrawn offer).

Lumber & Building Material Corp. v. NLRB, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act overrode the rights of employees to choose their collective-bargaining representative: and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

We respectfully disagree with the court's requirement, for the reasons set forth in *Caterair*.[5] Nevertheless, we have examined the particular facts in this case as the court requires, and we find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition from the Union. At the same time, an affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its attendant status is temporary.

(2) An affirmative bargaining order also serves the important policies of the Act to foster meaningful collective bargaining and industrial peace. The temporary decertification bar inherent in this order removes the Respondent's incentive to further delay bargaining or to engage in any other conduct that would further undercut employee support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their chosen representative in an effort to reach a collective-bargaining agreement. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation by the Union.

For all of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent's unlawful refusal to bargain with the Union in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Bridgestone/Firestone, Inc. (Woodridge, IL Distribution Center), Woodridge, Illinois, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to bargain with the Union for the prescribed period as set forth in the settlement agreement executed by the Respondent and approved by the Regional Director in Case 13–CA–36834.

(b) Withdrawing its contract proposal made on or about April 8, 1999.

(c) Withdrawing recognition from the Union during the period in which the Union enjoyed an irrebuttable presumption of majority status.

(d) Refusing to bargain by unilaterally altering terms and conditions of employment.

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

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

(a) Recognize and bargain with United Steelworkers of America, AFL–CIO–CLC, as the duly certified representative of its employees in the following appropriate unit and if agreement is reached, execute a collective-bargaining agreement. The 6-month extension of the certification year is to commence when the Respondent enters into negotiations with the Union:

> All full-time and regular part-time material handlers and material handler lead persons, employed by the Respondent (presently) located at 2100 International Parkway, Woodridge, Illinois, but excluding all office clerical employees, temporary service employees, lumpers, truck drivers, supervisors, managerial employees, confidential employees, and guards as defined by the Act.

(b) Reinstate the contract proposal made on or about April 8, 1999, and, should the Union accept that proposal, give the collective-bargaining agreement retroactive effect with a commencement date of May 1, 1999.

(c) Rescind the antiharassment policy implemented in September 1998, reinstate the previous policy, retract any discipline issued to employees pursuant to the Sep-

[5] Chairman Hurtgen agrees with the court's requirement.

tember 1998 policy, and make employees whole for any losses they incurred as a result of the September 1998 policy, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its 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 April 14, 1999.

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

CHAIRMAN HURTGEN, concurring and dissenting in part.

I agree that Respondent should have bargained about its new rules concerning harassment. Although there are important legal and policy reasons to have such rules in place, that is no justification for a failure to bargain about the precise parameters of such rules and the discipline to be imposed for breaches thereof. Thus, I find the violation.

However, in view of the important legal and policy reasons involved, I would not require that Respondent now withdraw its new rules. That would leave Respondent with no rules at all pertaining to harassment on basis other than sex. Instead, I would require Respondent to bargain with the Union about possible changes to the new rules and disciplinary consequences.

My colleagues say that a requirement to bargain about antiharassment policies is no affront to public policy. I agree. However, the issue is whether there is to be an abolition of the antiharassment rule (other than the prior one regarding sex), pending such bargaining. It is this remedial matter to which the policy issue pertains.

In addition, I agree that the Respondent must rescind any discipline that was imposed because of breaches of the new rules. However, in my view, this is another reason to permit the rules to stand while possible changes are being negotiated. Otherwise, there would be a risk that an offender would be reinstated and not be subject to any of the new rules.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with, or withdraw recognition from, United Steelworkers of America, AFL–CIO–CLC during the prescribed period set forth in the settlement agreement executed by the Respondent and approved by the Regional Director in Case 13–CA–36834 of this Order.

WE WILL NOT withdraw our contract proposal made on or about April 8, 1999.

WE WILL NOT refuse to bargain by unilaterally altering terms and conditions of employment.

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.

WE WILL bargain with United Steelworkers of America, AFL–CIO–CLC, as the certified representative of our employees in the following appropriate unit and we will embody any understanding reached in a written signed contract.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All full-time and regular part-time material handlers and material handler lead persons, employed by the Employer (presently) located at 2100 International Parkway, Woodridge, Illinois, but excluding all office clerical employees, temporary service employees, lumpers, truck drivers, supervisors, managerial employees, professional employees, confidential employees, and guards as defined in the Act.

WE WILL reinstate the contract proposal made on or about April 8, 1999, and, should the United Steelworkers of America, AFL–CIO–CLC, accept that proposal, WE WILL give the collective-bargaining agreement retroactive effect with a commencement date of May 1, 1999.

WE WILL rescind the antiharassment policy implemented in September 1998, reinstate the previous policy, retract any discipline issued to our employees pursuant to the September 1998 policy, and make our employees whole for any losses they incurred as a result of the September 1998 policy, with interest.

BRIDGESTONE/FIRESTONE INC. (WOODRIDGE IL DISTRIBUTION CENTER)

Mary F. Herman, Esq., for the General Counsel.
Brian Easley, Esq. of Chicago, Illinois, for the Respondent.
Stephanie Brinkerhoff, Esq., of Geary, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Chicago, Illinois, on October 12 and 13, 1999, upon the General Counsel's complaint which alleged that in several respects the Respondent violated Section 8(a)(5) of the National Labor Relations Act.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that certain allegations of the complaint should be dismissed as being barred by a settlement agreement in Case 13–CA–36834 with which it fully complied, and that it appropriately withdrew recognition from the Union based on petitions signed by a majority of its unit employees.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the retail sale of automobile tires and related services with a facility in Woodridge, Illinois, the only facility here involved. In the course and conduct of this business, the Respondent annually derives gross revenues in excess of $500,000 and annually purchases and receives at its Woodridge facility goods valued in excess of $50,000 directly from points outside the State of Illinois. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, AFL–CIO–CLC (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Union was certified as the exclusive collective-bargaining representative of the Respondent's Woodridge employees on December 7, 1997.[1] On February 4, 1998,[2] the Union filed a charge in Case 13–CA–36834 alleging certain violations of the Act, including the Respondent's refusal to bargain. The parties exchanged correspondence and then held their first negotiation session on March 18. To September 17, the parties held 12 negotiation sessions, the Respondent submitted eight counter proposals, and the parties reached tentative agreement on numerous issues.

On October 19, the Regional Director approved the settlement agreement in Case 13–CA–36834. Among other things, that settlement agreement required the Respondent to bargain with the Union on request "for at least 6 months from the date the Employer resumes bargaining with the Union as if the initial year of certification had not expired." The next negotiation session following approval of the settlement agreement was on December 11.

On April 14, 1999, distribution center manager Ken Kirkpatrick wrote Craig Langele, the Union's principal representative, to the effect that he had received a petition from a majority of the unit employees who were requesting "Decertification of [the] Steelworkers Union." Therefore the Respondent revoked its last proposal and stated that it would no longer bargain with the Union. This refusal to continue bargaining with the Union was reaffirmed by Kirkpatrick in a letter to Langele dated July 2, 1999, at which time he also stated that the Respondent was withdrawing recognition, based on receiving a second petition signed by a majority of unit employees.

It is alleged that the Respondent's conduct breached the settlement agreement and violated Section 8(a)(5) of the Act. The Respondent argues that a meeting Kirkpatrick had with stewards on October 9, to discuss certain working conditions started the period set forth in the settlement agreement, therefore it did bargain for 6 months as required. Then, when presented with a petition signed by a majority of employees, it had a good faith doubt of the Union's continued status as the representative of those employees, and since the 6-month period had expired, it lawfully suspended bargaining.

[1] The appropriate unit within the meaning of Section 9(b) is: All full-time and regular part-time material handlers and material handler lead persons, employed by the Employer (presently) located at 2100 International Parkway, Woodridge, Illinois, but excluding all office clerical employees, temporary service employees, lumpers, truck drivers, supervisors, managerial employees, professional employees, confidential employees and guards as defined in the Act.

[2] All dates are in 1998, unless otherwise indicated.

The complaint also alleges that on September 10, the Respondent unilaterally instituted and has since utilized "Selector Trainee Review and Selector Trainee Checklist" forms to evaluate probationary employees; instituted a new sexual harassment policy in September; and, since September 11 unilaterally change the probationary period for new employees from 90 working days to 180 calendar days.

B. Analysis and Concluding Findings

1. Breach of the settlement agreement and withdrawal of recognition

Prior to entering into the settlement agreement, the parties had last met for collective-bargaining negotiations on September 17. They resumed negotiations on December 11. Thereafter, the Union stated that it would submit the Respondent's last (and 15th) proposal to its membership and requested 50 copies. Prior to receiving such copies and before any ratification vote was taken, the Respondent received the first petition from employees. On April 14, Kirkpatrick wrote the Union that based on the belief that the Union no longer represented a majority of employees, the Respondent was withdrawing its proposal and would discontinue bargaining. This act is alleged to be violative of the settlement agreement since it occurred within 6 months of October 19, and to constitute a refusal to bargain.

The Respondent argues that the day after it executed the settlement agreement on October 8, Kirkpatrick met with stewards to discuss grievances and that this was bargaining within the meaning of the settlement agreement. Thus its announced refusal to continue to negotiate with the Union on April 14, was more than 6 months after it agreed to the Union's request to bargain. I reject this argument.

Although meeting to discuss grievances is within the scope of an employer's duty to bargain, I conclude that the phrase in the settlement agreement "WE WILL upon request, bargain with the Union" refers to negotiations for a collective-bargaining agreement. From the following language in the settlement agreement, it is clear that the intent was to extend the certification year. The agreement provides that the Respondent will bargain "for at least six months from the date the employer resumes bargaining with the Union as if the initial year of certification had not expired and embody any understanding reached in a written agreement." Therefore, meeting with stewards to discuss grievances would not start the 6-month period set forth in the agreement.

The certification year is meant to give some stability to collective-bargaining relationships and to provide a reasonable period within which the parties can negotiate a contract free of questions about the union's status as the representative of employees in the bargaining unit. The certification year deals with negotiations for a contract, and not with other possible aspects of an employer's duties under Section 8(d). By requiring the parties to "embody any understanding reached in a written agreement," the settlement agreement language extending the certification year clearly meant to deal with contract negotiations.

But regardless of whether meeting to discuss grievances is bargaining within the meaning of the settlement agreement, by the terms of the agreement, the period did not begin to run until it was approved by the Regional Director. This did not occur until October 19. The 6-month period in the agreement would therefore begin when after that date the Respondent commenced bargaining. That was on December 11; but even if it could be found earlier based on discussions with the stewards, the Respondent did not bargain for 6 months after October 19—that is, for the agreed-to extension of the certification year. The Respondent thereby breached the settlement agreement and violated Section 8(a)(5) of the Act.

Since the terms of the settlement agreement provide for a 6-month extension of the certification year, the rules concerning withdrawal of recognition during the certification year apply. In order to provide a reasonable time during which the parties can negotiate free of other influences, the Board has adopted an unrebuttable presumption that a union's majority status continues during the entire certification year. This policy is applicable to a bargaining provision in a settlement agreement. E.g., *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). Thus, even a petition from a majority of employees purporting to reject the Union as their bargaining representative would not suffice to allow the Respondent to cease bargaining or withdraw recognition within that period.

The Respondent further argues that while it suspended bargaining on April 14, based on the employee petition, it did not withdraw recognition nor did the Union request further bargaining. I conclude that the Respondent's action on April 14 was a complete repudiation of the Union as the employees' bargaining representative and that the Union was not required to do a futile act, such as making a request to resume bargaining. By ceasing to bargain with the Union, the Respondent not only breached the settlement agreement but unlawfully withdrew recognition in violation of Section 8(a)(5) of the Act on April 14, 1999, which was reaffirmed by letter of July 2, 1999.

2. Alleged unilateral changes

In the amended complaint it is alleged that the Respondent (a) since September 10 instituted and has utilized a selector trainee review and selector trainee checklist, (b) in September instituted a new sexual harassment policy, and (c) on September 11, changed the probationary period from 90 working days to 180 calendar days.

The Respondent moved to dismiss the allegations of unilateral changes on grounds that these events took place prior to execution of the settlement agreement and are thereby barred by operation of that agreement, citing *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978).

The Board has recently limited application of *Hollywood Roosevelt Hotel*, and held that its bar of subsequent litigation does not apply if such was specifically reserved from the settlement by the parties. *Outdoor Venture Corp.*, 327 NLRB 706 (1999). Here the "Scope of the Agreement" clause is identical to the one in *Outdoor Venture* with the addition that this case is specifically excluded from operation of the agreement.

I therefore conclude the settlement agreement in Case 13–CA–36834 does not bar litigation of the issues in paragraph VI of the complaint.

a. Selector trainee review and selector trainee checklist

No doubt the selector trainee review and selector trainee checklist forms first came into being in September following a meeting between members of management and union representatives, including stewards and Langele. The purpose of this meeting was to discuss the discharge of a probationary employee.

Kirkpatrick testified that the forms were created following this meeting after Langele said the Respondent ought to have some kind of a form to evaluate probationary employees so they would know what to expect. Langele denied making such a statement, which denial is supported by former employee and steward John Lipjak.

The parties do agree that after this meeting the Respondent created the forms and began using them. Although the completed forms were shown to union representatives, to create and use them was not a subject of bargaining. At best, if Kirkpatrick is credited, union representatives told him that some kind of a form would be a good idea. Such does not amount to the union's participation. I conclude that in fact the forms were created and implemented unilaterally. The issue is whether such is a violation of the Respondent's duty to bargain. I conclude not.

It is clear that the Respondent has the right to evaluate probationary employees. And the Respondent has always done so. Indeed, the individual who was discharged and about whose situation the parties met, was evaluated. There is no question the Respondent had the authority to do so. The only question at the meeting between management and union officials concerned whether the facts—that is, management's evaluation—were sufficient to justify discharge. (Following the meeting the individual was offered his job back, but he declined.)

There is no indication in the record that these evaluation forms in any way changed the criteria by which probationary employees were to be evaluated. Certainly the standards which an employee must meet are a condition of employment; but these forms are simply an aid for management. The forms are not themselves a condition of employment. E.g., *The Trading Port, Inc.,* 224 NLRB 980 (1976). I therefore conclude that to create such evaluation forms was not a mandatory subject of bargaining and that the Respondent did not violate Section 8(a)(5) by creating them. I shall recommend that paragraph VI (a) be dismissed.

b. New sexual harassment policy

It is alleged that in September the Respondent unilaterally implemented a new sexual harassment policy. The old policy was entitled: POLICY AGAINST SEXUAL HARASSMENT. The new one is entitled: BRIDGESTONE/FIRESTONE, INC. POLICY AGAINST HARASSMENT. The new policy was posted on the company bulletin board in September. Although General Counsel witnesses testified that there had been no such policy posted prior to September, I credit the Respondent's witnesses that in fact it has for some years had a policy against sexual harassment. However, it is also clear that the policy posted in September differs from the previous one with the addition of the following paragraph:

> *Other Harassment*: This policy also prohibits unwelcome and offensive conduct or materials that pertain to race, color, national origin, religion, age or disability. Some examples include: racial or ethnic jokes or comments; disparaging remarks about a person's age, religion or disability; the possession or display of materials that mock or show disrespect for a particular race, religion, ethnic group, age group or disability.

Inasmuch as this is a Company policy the breach of which could lead to discipline or discharge, it necessarily is a term or condition of employment. I therefore conclude that the Respondent's unilateral change in the harassment policy, however appropriate it might be, was a material and significant change in working conditions and it thereby violated Section 8(a)(5) of the Act. E.g., *NLRB v. Roll & Hold Warehouse & Distribution Corp.,* 162 F.3d 513 (7th Cir. 1998).

c. The probationary period

It is alleged that on or about September 11, the Respondent unilaterally changed the probationary period for employees to 180 calendar days from 90 working days. The Respondent argues that the probationary period has always been 180 days, and offered its personnel guidelines in support. By contrast, the General Counsel offered no competent evidence that the probationary period was ever 90 working days.

The General Counsel did offer a Company memorandum entitled "Compensation Program for Chicago-Area Warehousing," which lists rates of pay for various lengths of service beginning with a starting rate followed by rates "after 4-month probationary period," after 8 months, after 12 months, after 24 months, and after 36 months.

Counsel for the General Counsel argues that "90 working days, your honor, I would say, is about four months" and therefore this document proves that the Respondent had a 90-day probationary period. I reject this argument. It is clear that this document deals with pay rates, which even Langele agreed is different from a probationary period. It might be some proof that the Respondent had a 4-month probationary period (120 to 122 days), but no one makes this contention. I do not accept as proof that the period was 90 days evidence from which it can be argued that it was "about" 90 working days.

According to Liptak, at the April 27 meeting the Union proposed 90 days, on grounds this is what he believed it had always been. The Respondent countered saying the period had always been 180 days. By June or July, according to Liptak, the parties agreed to 100 days. Other than Liptak's belief, there is no evidence the period had ever been anything other than 180 days. Indeed, the only objective evidence is the Respondent's personnel guidelines which in several places gives the probationary period as 180 days.

But even if there had been a 90-day period prior to the beginning of negotiations, there is no competent evidence that the Respondent did anything on or about September 11, which would suggest that a new period was being implemented. In June or July, the parties did tentatively agree to 100 days, but there is not evidence that such was ever implemented. The only evidence offered concerning the probationary period in September was one unreliable and inadmissible hearsay assertion, which I rejected. I therefore conclude that the General

Counsel did not prove the Respondent made a unilateral change in violation of the Act.

IV. REMEDY

Having concluded that the Respondent violated its bargaining duty in certain respects, I shall recommend that it cease and desist such activity and affirmatively recognize and bargain with the Union as the representative of its employees in the above-described unit, and if an agreement is reached, embody such in a written, signed contract. A new certification year will commence when the Respondent enters into negotiations with the Union.

[Recommended Order omitted from publication.]