

Verizon New York, Inc. and Communications Workers of America, Local 1103. Cases 3–CA–22987 and 3–CA–23257

May 16, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On March 19, 2002, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief to the Respondent'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 briefs and has decided, for the reasons set forth below, to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.¹

At issue is whether the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally rescinding its longstanding practice of allowing employees to participate in blood drives during paid worktime. We agree with the judge that this change involved a mandatory subject of bargaining, and therefore that the Respondent violated Section 8(a)(1) and (5) by failing and refusing to bargain with the Union regarding the change.

Facts

The relevant facts, as more fully set forth in the judge's decision, are as follows. The Respondent had sponsored blood drives with the Union through Hudson Valley Blood Services (Hudson Valley) at least twice a year for over 30 years. Employees participating in these blood drives spent an average of 4 hours of worktime for each drive, which included a 30-minute solicitation meeting, driving time for employees in the field, and time for donating blood.

Union stewards employed by the Respondent scheduled and organized the blood drives, which generally took place on the Respondent's facilities and always occurred on paid time. Employee Joseph Barca, a union business agent, would receive a list of potential dates from Hudson Valley, eliminate busy times for the Respondent, and submit a revised list to the Respondent's management, which would then approve the dates.

¹ We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

Consistent with this longstanding practice, a 2-day blood drive was scheduled for February 7 and 8, 2001.² The blood drive was postponed by Mid-State Regional Director Tarita Miller, however, because of a pending storm and pressing service needs.

On March 6, the Respondent notified Union Executive Vice President Glenn Carter by phone that the Respondent had decided it would no longer maintain employees in a pay status for the time spent in their participation in the blood drives. The Respondent said that this change was due to customer service demands. The Respondent would continue to support the blood donation program by providing its communication media to advertise the drives and its premises for the blood drives. However, in an effort to reduce nonproductive employee time, it would no longer permit its employees to participate in the drives on paid time.

In response to the policy change, Michael Barth, the Union's chief steward at the Newburgh location, filed a grievance on March 9, alleging that "[the Respondent] bargained in bad faith by changing Blood Donation Policy without negotiating with the Union." In a March 16 first-step grievance meeting, the Respondent's representatives took the position that the policy change was a corporate level decision. A second-step grievance meeting was held on March 28, at which the Respondent was represented by George Variano, local manager for construction in Newburgh; David Dodaro, foreman at the Newburgh garage; and Lawrence Iazetti, a senior marketing manager designated to participate by Charles Lapolis, a director in the Mid-State area. At the meeting, Union Business Agent Greg Irwin requested that the Respondent negotiate the change in the blood drive policy. The Respondent's representatives took the position that the change was a corporate level decision and did not need to be negotiated because it was not a term and condition of employment. In his April 8 letter denying the grievance, Director Nick Mattia acknowledged the Union's request to negotiate and reiterated the Respondent's position that the policy change was not a term and condition of employment.

After the second-step grievance was denied, the Union filed an additional grievance requesting to have the February 7–8 drive rescheduled, but the grievance was denied and the drive was never rescheduled.

Analysis

Section 8(d) of the Act requires employers and collective-bargaining representatives to bargain about "wages, hours, and other terms and conditions of employment." Matters are subject to this mutual duty to bargain if they

² All dates are 2001 unless otherwise indicated.

are “plainly germane to the ‘working environment’” and “not among those ‘managerial decisions which lie at the core of entrepreneurial control.’”³

It is axiomatic that the payment of wages is a mandatory subject of bargaining. Thus, the issue of whether employees will be paid while they engage in nonwork activities is a mandatory subject of bargaining. Employer policies that pay employees during these nonwork activities directly affect wages. That is, if employees are not permitted to engage in the activities during paid worktime, they must take personal time, and risk losing pay, in order to perform the activities during their scheduled work hours.

The Board has held that employers violate Section 8(a)(5) by making unilateral changes in rules regarding activities, besides normal job duties, that will be permitted during paid worktime. Thus the Board has found unlawful unilateral employer action restricting employee use of telephones while on duty;⁴ withdrawing a long-standing practice of giving employees an extra 15 minutes for their Thanksgiving lunchbreak;⁵ adding or eliminating paid time on payday to facilitate banking;⁶ limiting employee use of restrooms;⁷ eliminating a paid lunch period;⁸ and canceling a 5-minute washup period for maintenance employees.⁹

In this case, the Respondent unilaterally ended a 30-year practice of allowing employees to participate in company-sponsored blood drives during worktime. Under the prior policy, employees could donate blood during working hours with no loss of worktime or pay. Following the policy change, in contrast, employees who wished to perform the same activity at the same time as

before would be required to lose worktime and pay. The fact that employees continued to have the opportunity to participate in blood drives outside their working hours, or during their working hours with loss of pay, does not make up for that loss.

The Respondent contends that its decision to engage in philanthropic activity by sponsoring blood drives for Hudson Valley is not a term and condition of employment because it lies “at the core of entrepreneurial control.” However, the Respondent’s decision to sponsor blood drives entailed establishing the practice of allowing employee participation during paid worktime, which clearly is a term and condition of employment. In these circumstances, that aspect of the Respondent’s policy that allows employees to participate in the activity during paid worktime is not “at the core of entrepreneurial control” and is subject to the duty to bargain.¹⁰

We also find no merit in the Respondent’s assertion that the Union waived its bargaining rights. We adopt the judge’s finding that the Union explicitly requested bargaining at the second-step grievance meeting on March 28, 2001, and further find that this request was timely raised following the Respondent’s March 7 notification to the Union of the change.¹¹

In addition, we find unavailing the Respondent’s argument that the Union should not have addressed its bargaining request to the Respondent’s second-step grievance officials, i.e., that those officials lacked authority to bargain. The grievance process is an integral part of collective bargaining.¹² The Board has found that the duty to bargain in good faith requires parties to give their representatives at grievance meetings the authority to resolve the grievance.¹³ In this case, the subject of the grievance was the Respondent’s change in the blood donation program without affording the Union an opportunity to bargain. Thus, the Respondent was under an obligation to see to it that its representatives had the authority to deal with the Union’s request to bargain. The Respondent will not be heard to assert, as a defense, its own failure to confer sufficient authority on its representatives.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

³ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 222–223 (1964) (Stewart, J., concurring).

⁴ *Hedison Mfg. Co.*, 249 NLRB 791, 824 (1980), *enfd.* 643 F.2d 32 (1st Cir. 1981); *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 895 (1994), *enfd.* in part and remanded mem. 96 F.3d 1439 (4th Cir. 1996), on remand 330 NLRB 900 (2000), *enfd.* in relevant part mem. 24 Fed.Appx. 104 (4th Cir. 2001).

⁵ *Rangaire Co.*, 309 NLRB 1043 (1992), *enfd.* mem. 9 F.3d 104 (5th Cir. 1993).

⁶ *Atlas Microfilming*, 267 NLRB 682 (1983), *enfd.* 753 F.2d 313 (3d Cir. 1985); *AT&T Corp.*, 325 NLRB 150 (1997).

⁷ *Production Plated Plastics*, 247 NLRB 595 (1980), *enfd.* 663 F.2d 709 (6th Cir. 1981).

⁸ *Van Dorn Plastic Machinery Co.*, 286 NLRB 1233 (1987), *enfd.* 881 F.2d 302 (6th Cir. 1989).

⁹ *Appalachian Power Co.*, 250 NLRB 228 (1980), *enfd.* 660 F.2d 488 (4th Cir. 1981), *cert. denied* 454 U.S. 866 (1981). See also *Pollution Control Industries of Indiana*, 316 NLRB 455, 463–464 (1995) (addition of grandparents to the list of relatives whose funerals employees could attend on paid time). We note that in *Sivalls, Inc.*, 307 NLRB 986 (1992), cited by the judge, no exceptions were filed to the judge’s finding that paid time off for voting was a mandatory subject of bargaining.

¹⁰ See *Ford Motor Co.*, *supra*, 441 U.S. at 498 and fn. 10 (in-plant food prices and services are mandatory subjects of bargaining, apart from decision to provide such services initially).

¹¹ Because we find that the Union made an appropriate bargaining request, we find it unnecessary to pass on the judge’s finding that the Respondent presented the change to the Union as a *fait accompli*.

¹² *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

¹³ *Paragon Paint Corp.*, 317 NLRB 747, 765 (1995).

orders that Verizon New York, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally eliminate our participation in blood programs, which allowed our employees to participate in the program on working time and to be paid for that time, without first giving notice and an opportunity to bargain to Communications Workers of America, Locals 1103 and 1120 as the collective-bargaining representative of certain of our employees.

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

WE WILL restore our participation in the blood programs as they existed prior to March 2001 by paying employees for working time spent participating in the blood programs, and WE WILL bargain with the Union prior to making any change in this program.

WE WILL make whole any bargaining unit employee who suffered a monetary loss by participating in the blood program during his/her regular working hours and was not paid for that time.

VERIZON NEW YORK, INC.

Robert Ellison, Esq., for the General Counsel.
Steven Martin, Esq., for the Respondent.
Ellen Dichner, Esq. (Gladstein, Reif & Meginniss, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 16 and 17, 2002, in Albany, New

York. The amended consolidated complaint herein, which issued on October 17, 2001,¹ and was based upon unfair labor practice charges and an amended charge that were filed on March 23, April 17, and September 5 by Communications Workers of America, Local 1103 (the Union), alleges that Verizon New York, Inc. (the Respondent), violated Section 8(a)(1) and (5) of the Act, on about March 7, by unilaterally rescinding its practice of permitting unit employees to participate, while on company time and pay, in blood solicitation/donation programs, which is a mandatory subject of bargaining for purposes of collective bargaining.

FINDINGS OF FACT

I. JURISDICTION

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

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent, and its predecessor, New York Telephone Company, have been party to collective-bargaining agreements with the Union for many years covering a large number of job classifications. In laymen's terms, the Union represents installers, repair persons, spicers, linemen, clerks, plant department, and other employees. The most recent contract is effective for the period August 6, 2000, through August 3, 2003, and is referred to herein as the Agreement. The Respondent has a number of different work areas; as set forth in the Agreement, "Mid-State" means the geographic locations north of New York City and south of the Northeast area where the Respondent conducts its operations. "Downstate" includes New York City, Nassau, Suffolk, Westchester, Rockland, and Putnam Counties, parts of Orange and Dutchess Counties, and Greenwich Connecticut. "Upstate" includes the Central area, the Western area, and the Northeast area not included in "Downstate." On the other side of the table is the Union. The Respondent deals with numerous unions depending on the area in which the employees are employed. This case relates solely to Local 1103. However, prior to the year 2001, there was a Local 1103 and a Local 1120. On about October 1, 2000, these locals merged and became one local union, Local 1103, the Union, and during all times relevant to the incidents that will be described herein, that was the situation. However, on about September 30, the parties withdrew from this merger and Local 1120 reemerged as a distinct local union. Local 1103 generally covers employees in Respondent's downstate area. Local 1120 covers Respondent's employees from about 50 miles north of New York City to just south of Albany, New York.

The sole issue herein relates to the legality of the Respondent's termination of a program wherein the Union and the employees participated in a blood program on worktime. This

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2001.

program had been in effect for in excess of 30 years and involved union stewards and Respondent's employees conducting meetings to solicit employees to participate in the blood drive, usually at one of the Respondent's facilities. Union representatives and Respondent's employees then scheduled the blood programs and manned the stations and gave blood, all on company worktime. The Respondent has two defenses herein: that the blood drive was not a term and condition of employment and that the Union never requested that the Respondent bargain about the subject.

There was testimony from a number of witnesses regarding the past operation of the blood drives and the amount of employee time expended on the drives. Joseph Barca, who has been employed by the Respondent for 33 years, presently as a field technician, and is a business agent for the Union, has been the chairman of the blood program since 1989. He testified that, initially, he is notified by Hudson Valley Blood Service (Hudson Valley), that it would like to set up dates for blood programs for Respondent's employees. Hudson Valley then sent proposed dates to Barca, who fine tuned them by eliminating all Mondays and Fridays and the summer, which are Respondent's busy periods. He then sent the proposed list to the Respondent's representatives for approval, and the dates were usually approved without any changes. The blood drives are divided by location in order to shorten the drive time of the employees involved. The areas are northern and southern, with two drives each per year, and central, with four drives per year. The first stage of each drive is the solicitation, which took about 30 minutes. The steward meets with the unit employees at the start of the workday (with Respondent's consent) on the garage floor or in a conference room and solicits the employees to sign up to give blood. The steward then faxes the list of donors to Barca who, together with his chief steward, sets up a schedule for the employees that least disrupts the Respondent's operation, and this schedule was given to the Respondent to distribute to its supervisors. A large percentage of these blood drives were held on the Respondent's premises; in fact, the Central Westchester drive was held at the Respondent's facility in Valhalla, Westchester County, New York. On the day of the blood drive, Barca and his business agents and stewards assisted the Hudson Valley people with crowd control, food, and transportation for the donors who have no way to get to the drive. Prior to February, he and the union stewards were paid by the Respondent for their time in soliciting and assisting in the blood drive, and employees who came to give blood were paid for their time. Barca estimated that, on the average, including transportation time, the amount of working time that an employee spent in going to and from the blood drive, and giving blood was about 4 hours. This varied from 1 to 2 hours for clerical employees employed in the building where the drives were taking place, to 5 or 6 hours for some employees in the field. This includes the time donors spent giving a medical history prior to the blood donation, the actual blood donation and the post donation rest period with juice and cookies. In addition to paying its employees for their worktime assisting on the blood drive and/or actually giving blood, the Respondent paid for the food and beverage costs at the drive. Barca identified a chart that he testified he received from a manager for the Respondent in about 1995.

It is entitled "Non Productive Worktime Comparison for 1995." It includes 6 different geographic areas, and 21 different categories, including blood bank. This document states that 4646 work hours were lost in 1995 for blood bank drives, although this number includes employees who are members of Local 1107, which has about 300 members who are employed by the Respondent. Respondent introduced into evidence business records for the year 2000, which states that there was approximately 2400 hours of nonproductive worktime for blood drives for most of the unit herein² during that year.

Michael Korsak, who is employed by the Respondent as an outside field technician and is a steward for the Union, testified that the average length of time that employees spent donating blood, including transportation to and from the blood program, was 3 to 4 hours. Greg Irwin has been employed by the Respondent for 28 years and is presently a business agent for Local 1120 in the Newburgh, New York area. At the time in question, he covered approximately 150 of Respondent's employees. In his area, each business agent is responsible for the blood program in his/her jurisdiction, and the blood drive chairperson was responsible for coordinating the program with Hudson Valley. The business agents had meetings with the employees, often lasting about an hour, soliciting them to fill out cards stating that they would donate blood. They also set up the appointments and purchased refreshments for the blood drive. The managers of the facilities involved were notified of these activities and schedules and were told to notify the Union within a certain time if they had a problem with any of the dates. He testified that the average time spent by each donating employee on the day of the drive was 3-1/2 to 4 hours. The employees were paid for time spent at the solicitations and at the blood drives and the Respondent paid for the refreshments at the blood drive. Irwin was asked about the importance of the blood drive to the employees. He testified:

Well, the people who gave blood got a couple of benefits out of it . . . there was the good feeling of doing something for the community. You know, being able to participate and . . . help out. The other, I guess, more selfish reason they gave blood was four hours off the job for most of them. And they got in from the cold . . . they got in an air conditioned building during the summer. And, I mean, it's certain amount of value to that, too, I guess to them.

Michael Barth, who is employed by the Respondent as a field technician and is the chief steward for the Union at the Respondent's facility in Newburgh, New York, testified that prior to becoming steward, his sole participation in the blood drives was as a donor. After becoming steward, he was active in solicitations for the blood drives; in his area, participation was about 60 to 70 percent of the membership.

Tarita Miller, who is currently employed by the Respondent as director of operations, testified that when she was employed by the Respondent as a technician, the blood program solicitations by the business agents usually lasted from 15 to 30 min-

² This did not include the CX&M employees (the construction employees) for the first half of the year and engineering, switch employees and, some other employees for the entire period.

utes. She filled out a card, was given an appointment, and when the time came, she went to the designated location, was checked and gave blood. George Variano, a local manager of the Respondent for construction in Newburgh, had a similar experience; a union representative, either a steward or business agent, came to a facility, met with some employees and solicited them to sign cards to donate blood. This usually took about 30 minutes and, sometime thereafter, the employees would be notified of when they were scheduled to donate blood.

Respondent discontinued this policy of paying employees and union representatives for time spent on blood drives sometime in February and March, this policy had been discontinued by the Respondent in other regions years earlier. Miller, who transferred from a location in Queens, New York, to Mid-State in February 2000, learned that the blood program was still in existence in the Mid-State area. She testified that the Respondent has obligations to the Public Service Commission (the Commission) that requires the Respondent to comply with certain time targets set by the Commission. Failure to comply with these time targets could result in penalties to the Respondent, and “at that time,” the Respondent was paying millions of dollars in penalties. One of the problems that the Respondent had in complying with the Commission’s rules was:

If the techs are doing something other than working on customer troubles, they’re not available to provide the service so when we had blood drives . . . the people that were at the blood drives weren’t available to provide the service to the customers.

In about the end of January or beginning of February, she and Santo Cali and Nicholas Mattia, both directors for the Respondent, decided to discontinue the Respondent’s participation in the blood program to the extent of paying employees for their time spent participating in the program. She testified that she notified Barca of the change on about February 5. She called him on about that day because “I understood . . . it was his baby so I didn’t want his first piece of correspondence to be a letter.” In this call she told Barca that the decision was made that the Respondent would no longer pay employees for time at the blood bank:

Basically, just I wanted to let him know ahead of time before it was official . . . before we sent the policy out, that I was planning on making a change . . . with respect to the way I assigned people for the blood drive and . . . he asked me why and I explained to him the customer service issues that I was facing . . . and, basically, that was it.

She testified that Barca’s only response was to ask why, and she told him that it was because of customer service; he never requested bargaining over the issue. Barca testified on rebuttal that he never had any such conversation with Miller on about February 5. Although Miller had a conversation with him a few days later about the need to reschedule the February 7 and 8 blood drive, which will be discussed below, she testified that the next occasion when she discussed the termination of the blood program was at a meeting that she had with Barca on about February 25, when they were discussing other issues. She testified that at this meeting, he asked her if she had changed

her mind on the issue, and she said that she hadn’t. Barca testified that he does not recall such a meeting. He testified that the first he learned that the Respondent was discontinuing its payments to employees for participating in the blood program was Miller’s March 29 letter to McCracken. By letter dated March 29, Miller, Cali, and Mattia wrote to Robert McCracken the union president:

We wholeheartedly support the efforts of Hudson Valley Blood Services, the New York Blood Center and CWA Local 1103 regarding the New York Blood Drive. We know how important your work is and how difficult it can be for you to recruit candidates to donate blood, particularly in the New York Metropolitan Area.

First at NYNEX, then Bell Atlantic and now at Verizon we take our corporate citizenship responsibilities very seriously and we value the long relationship we have had with both Hudson Valley Blood Services and the New York Blood Center. That is why we will continue to open our facilities, publicize your recruiting drives and do all we can to encourage our employees to donate blood.

However, while we are 100 percent behind your efforts, we must balance our community involvement efforts and our commitment to our customers. So all we ask is the Blood Drive take place on our employees’ own time. We will continue to make our facilities available to you so you can hold the Blood Drives on our premises after work or on weekends when our employees are off. We will continue to use our internal communications networks—e-mail system, web site and company publications—to let our employees know where they can go to donate blood.

We look forward to continuing the strong partnership that Verizon has with Hudson Valley Blood Services, the New York Blood Center and CWA Local 1103 regarding the New York Blood Drive. We value your relationship and will continue to do our part to help make your Blood Drives successful.

By letter dated April 4, McCracken responded to Miller, Cali, and Mattia’s letter of March 29. Initially he inquired whether it was a “bogus” letter, since it was unsigned. (Miller faxed the letter to McCracken with the names typed on the bottom, but without signatures, so that she would not have to send the letter to the others in order to get their signatures.) McCracken also wrote:

If you have ever donated blood, you know that we receive much more participation when your employees, my Members, are allowed to donate during company time. As you know, there have been times in the past, when during a Blood Drive, our commitments to the customer would not have been met if your employees, my Members, took the time out to donate, and we postponed donations from those employees who were necessary to meet our customer commitments.

In about the first week in April, Miller was visited by Phyllis Cole-Hollis and Kevin Shields, employees of Respondent and union stewards. Cole-Hollis told her of the history of the program, how the Union operated it and why it was so important to her. Miller told them that her decision was based upon the

problem that she was having with service in the area and that was why the Respondent decided not to participate any more. Neither Cole-Hollis or Shields requested that she bargain with the Union about the subject.

By letter dated May 4, Barca wrote to Mattia that he was “amazed” that the March 29 letter about the blood program was asking the Union to “kill it by moving it to off-work hours.” He further stated that off-work hour blood drives in the past had not been successful and that the Respondent had approved the blood drive schedule for 2001 in the fall of 2000, and that the Union “strongly insist that we hold all of the remaining 2001 drives according to the commitment made by [Respondent’s agent].” He further stated: “If the changing of Verizon’s community commitment was necessary, it would have been more appropriate if it was done when the 2001 schedule was first presented and not now in mid-year of the program.” Mattia responded to Barca’s letter by letter dated May 21. Where relevant, Mattia stated that he was “somewhat puzzled and disappointed” by Barca’s assertion that Respondent’s employees would only participate in a blood drive if it took place on company time, stating that this “takes a very cynical and demeaning view toward our employees.” Mattia stated further that the Respondent would continue to publicize the blood drives and make its facilities available for the program before and after work, but “in today’s ultracompetitive environment, we must balance our community involvement efforts, and our commitments to our customers to deliver top-notch service. So we ask that our employees donate blood on their own time.” Miller testified that no representative of the Union ever requested that she bargain about the Respondent’s change in the operation of the blood program.

Glenn Carter, who was employed by the Respondent for 31 years, is the president of CWA, Local 1120 and, during the time in question, was executive vice president of the Union. On about March 6 or 7, he received a telephone call from Cali, who told him that the Respondent was no longer going to participate in the blood program.³ Carter asked if that was statewide, and Cali said that it was and Carter said that he didn’t think the Company could do that. Carter then wrote a note dated March 7 to all the business agents in the area: “Company pulled out of Blood Bank.” Vincent Auletta, an area manager for the Respondent, testified that on March 6 he received a call from Cali saying that from then on, the Respondent would no longer participate in the blood program on company time, but would offer its facilities, after hours, to the program. Cali asked him to notify the Union of the change. On the same day, Auletta called Carter and told him exactly what Cali had said. Carter asked him, “When are you going to learn to stop screwing our members?” Auletta said that he was just relaying a message; if he wanted to discuss it further, he should call Cali. Carter did not request that the Respondent bargain with the Union about the change in the blood program. A few days later, Carter called Irwin; they discussed the change in the blood program and both

³ The unfair labor practice charge filed by the Union on March 23 alleges that on about March 7 Cali advised representatives of the Union that the Respondent would no longer support the blood programs in the area.

felt that the Respondent should not have made the change without first discussing it with the Union. They agreed that Irwin would request that the Respondent bargain about the subject. Shortly thereafter, Carter spoke to McCracken and told him of the Respondent’s change in the operation of the blood program and “that we were going to look into requesting negotiations with the company, and that I had Greg Irwin working on it.” Irwin testified that on about March 7, he had a telephone conversation with Carter, who told him that Cali told him that the Respondent was pulling out of the blood program; about a day or two later, he received the memo that Carter had written about this conversation with Cali. Irwin then instructed Barth, his chief steward, to file a grievance about the Respondent’s withdrawal from the blood program and in the grievance to ask the Company to negotiate about it. Barth filed the grievance on March 9 alleging: “Company bargained in bad faith by changing Blood Donation Policy without negotiating with the Union.” Under “What Settlement is Expected,” Barth wrote: “Negotiate all policy changes with Union.”⁴ At the first- and second-step grievances, the Respondent’s positions were that it was a corporate level decision and it was not a term and condition of employment.

Barth testified that at the first-step meeting on about March 16, he told Variano and David Dodaro, at the time a foreman at the Newburgh garage, that he would like the Respondent to sit down and negotiate the changes in the blood program because it was a term of his employment. They said that it wasn’t a term of employment, that the decision came from above, and they could not do anything about it. At the second-step meeting with Irwin present, they told the Respondent’s representatives that “we should negotiate if there was a change.” Irwin was not present at the first-step meeting, but attended the second-step of this grievance on March 28. He testified that he was there with Barth and another steward; representing the Respondent were Larry Iazzetti, senior marketing manager, Variano, and Dodaro. Irwin testified that a number of grievances were discussed that day. When they got to the blood program grievance, they asked Respondent’s representatives why they pulled out of the program.⁵ Iazzetti said it was corporate policy, that it was done throughout the Company. “And then I offered him a chance to negotiate.”

At that point, I had a blood bank scheduled for that Spring. And I said, I told him . . . that I had one scheduled for the Spring, and that we could still resolve this problem before that date occurred. And I asked him if he could negotiate it, and he told me no, he wasn’t responsible for corporate policy.

⁴ This copy of the grievance was introduced into evidence by the General Counsel. Respondent introduced the first page of this grievance in evidence as well, but it did not have “Negotiate all policy changes with Union” written in. This can be explained by Barth’s testimony that he only fills out the top of the form when he hands it to the Respondent’s representative; the writing on the lower half of the form is filled out on the day of the grievance.

⁵ In an affidavit given to the Board on April 11, Irwin stated that he had no conversation with Cali or any representative of the Respondent on the issue since the Respondent ended its participation in the blood program. Irwin testified that this statement in his affidavit was incorrect.

Variano testified that the first time he heard of the Respondent's change in the blood program was in early March, when he received the grievance from Barth. He testified that at the first-step meeting with Barth and another steward, they requested to have the blood program reinstated. Since it was a corporate decision and there wasn't much he could do about it, "I was just going to deny and we were going to move it along the process." There was no request by the Union to bargain. Irwin, along with Barth, was present at the second step; Iazzetti, Variano, and Dodaro were present for the Respondent. He testified that Irwin opened with a long statement that the Respondent could not discontinue the blood program because it was a term and condition of employment, and they wanted the program restored. Iazzetti, who was a manager from another area, said that he thought that the blood program had been ended earlier, and that it was not a term and condition of employment. On direct examination, Variano testified that nobody from the Union requested that the Respondent bargain with them about the change. On cross-examination he was asked:

Q. Okay. Do you recall anybody from the Union making a statement to the effect that the Company needed to negotiate with the Union regarding the Blood Program?

A. That very well may have been stated. Could you repeat that again?

Q. Yes, do you recall any reference made by the Union at that meeting, concerning the Company's need to negotiate with the Union over the program?

A. Yes, a statement may have been made.

Q. Okay . . . does that refresh your recollection any better as in terms of what actual statement along those lines was made?

A. A statement may have been made that if the Company chooses to change the blood bank policy, they must first negotiate the policy change.

Q. Okay

A. . . . something along those lines.

The Respondent's position at the second step was that it was not a term and condition of employment.

Dodaro testified that the first he knew of the change in the blood program was when Barth told him about it on about March 7; he received the grievance 2 days later. At the first-step meeting, Barth said that the Union wanted the blood program restored; Dodaro and Variano replied that it was a corporate decision and they did not have the authority to change it and that it was not a term of employment. At the second-step meeting Iazzetti and Irwin joined them. Irwin repeated that the Union objected to the change and wanted the program restored. Iazzetti said that he was surprised that it was still in effect, that it had previously been canceled in his area. Regardless, it was a corporate decision and they weren't going to change it. Neither Irwin nor the other union representatives requested that the Respondent bargain with the Union about the change.

Iazzetti testified that, at the time in question, he was employed by the Respondent as a senior marketing manager in retail markets in New York City. As far as he knew, the practice of assigning and paying employees to participate in the blood program was discontinued in about 1990. In March, he

was asked to cover grievances in the Mid-State area. This second-step meeting took place on March 28. Barth and Irwin were present for the Union; he, Dodaro, and Variano were there for the Respondent. When they got to the blood program grievance, Irwin said that the blood bank was a term and condition of employment and "in order to remove the Blood Bank, it needed to be negotiated." Iazzetti replied that he thought that the blood bank had been eliminated years ago, but that it was not a term and condition of employment, and did not need to be negotiated to be removed. Other than Irwin's statement as set forth above, nobody asked him to negotiate about the change.

By letter to McCracken dated April 8, Mattia denied the grievance on the basis that the blood program was not a term and condition of employment. In addition, he wrote, *inter alia*: "This is in response to the above grievance, which was heard at second step of the grievance procedure on March 28, 2001. As discussed in the meeting, the Union believes that the Blood Bank is a term and condition of employment and any change to the program must be negotiated."

There was some testimony about a blood drive that had been approved in 2000 and was scheduled to take place at the Respondent's principal facility in Valhalla, Westchester County, New York, on February 7 and 8. Barca testified that, about a half hour before the blood drive was scheduled to begin, he received a call from Miller saying that "due to the weather, she would have to cancel or postpone the outside technicians from participating in those two days of blood drives." Barca was upset, because it is very difficult to postpone a drive at such a late time. However, Miller said, "We're under the gun, very busy. Plus, we have this very bad weather. I promise to reschedule it in the next two or three weeks." The drive did continue that day, but only for employees employed in the building. Barca's testimony on this subject is not very clear, but it appears that this drive was never rescheduled, and became involved with the overall cancellation of blood drives as discussed above. Korsak testified that some of the employees in his garage were supposed to go to the Respondent's facility in Valhalla to donate blood and assist in the program on February 7. However, he received a telephone call from one of the Respondent's managers saying that because of the bad weather, they were not going to send anybody to the blood program that day.

Miller testified that she did have a conversation with Barca on about February 7 regarding the blood drive scheduled in Valhalla for that day, but that conversation was a "different issue" from her conversation 2 days earlier (denied by Barca) where she informed him of the overall cancellation of the program:

basically, the conversation was because of the pending storm and of the issues with service and having people on the load. I initiated the call because I didn't want to just cancel the calls, especially in light of the fact that we had just recently had a conversation pertaining to the blood drive and the original conversation had nothing to do with the February Seventh and Eighth so I didn't want to even make it assumed that I was canceling these two blood drives as a result of that, so basically, it was just to let him know that it was a service issue

and I wasn't canceling these two, I was postponing them to another day. Actually, I think the term that was used was, "rescheduled."

Miller testified that even though she told Barca that the blood drive for February 7 and 8 was to be rescheduled, some employees, including outside technicians and clerical employees did participate on those days and she paid for 110 hours of nonproductive hours for those days. Miller testified further that she thought that the postponed blood drive would be rescheduled, but since a grievance was filed on the refusal to reschedule the February 7 and 8 blood drives, "I would guess that one area didn't follow and reschedule." She could not testify with any certainty if that blood drive or subsequent blood drives took place because she was out sick from April until August. However, she testified that it was her intent that all blood drives after her March 29 letter would be canceled. On March 29, Korsak filed a grievance over the Respondent's failure to reschedule the February 7 and 8 blood program; this grievance was denied.

Barca and Irwin testified about the different levels of blood donations before and after the change in March. Barca testified that prior to the change about 25 percent of the employees, about 1000 employees, donated blood. After the Respondent instituted the change in the blood program, the Union attempted to hold a drive for employees to donate blood after working hours, but Hudson Valley told him that only two or three members donated and "it fell on its face." Irwin testified that he has about 150 of Respondent's bargaining unit employees in his area. Prior to March, the usual blood drive received about 60 blood donors. When the Union attempted to have a blood drive after March, they received 12 pints of blood from employees.

IV. ANALYSIS

Admittedly, the Respondent unilaterally changed its participation in the blood program in the areas involved herein by discontinuing paying its employees for the working time spent soliciting for the program and donating, or attempting to donate, to the program. The Respondent's defenses are that the employees' participation in the blood program was not a term and condition of employment and that it could therefore unilaterally make changes in the program, and that, even if it were a term and condition of their employment, the change did not violate the Act because the Union never requested bargaining.

There are some credibility issues herein. Miller testified that she first notified the Union (through Barca) that the Respondent would no longer pay employees for their participation in the blood program on February 5 and again on February 25; Barca denies having received any notification of this change until seeing the March 29 letter. Although Barca and Miller appeared to be equally credible, I credit Barca based upon the facts of this case and common sense. Barca is clearly an active union representative and has been chairman of the blood program since 1989; Miller testified that the blood program "was his baby." After observing Barca as a witness, I find it highly unlikely that if Miller had told him on February 5 that the Respondent was discontinuing its participation in the program, he would simply have asked why, and done nothing about it. Further, if there were such a conversation on February 5, I find it

likely that Barca would have asked Miller about the status of the February 7 and 8 blood drive. It is possible that Miller confused that conversation with her discussion with Barca about rescheduling the February 7 and 8 blood drive. The other credibility issue involves what was said at the second-step grievance meeting on March 28. Recognizing the difficulty of reconstructing a conversation that occurred almost a year earlier, when the blood program was only one of a number of grievances that were discussed at that meeting, I find that during this meeting, Irwin asked the Respondent's representatives to negotiate about the change. Because Irwin and Barth knew that the Iazzetti, Dodaro, and Variano were not authorized to overturn Miller's decision, it was probably a brief, pro forma request that they knew would have no effect, but was made to protect their rights.

In *NLRB v. Katz*, 369 U.S. 736, 747 (1962), the Supreme Court stated:

Unilateral action by an employer without prior discussion with the Union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be violation of Section 8(a)(5), without also finding the employer guilty of over-all subjective bad faith.

The initial issue herein is whether the Respondent's participation in the blood program, by paying its employees for working time spent soliciting for, and otherwise participating in the program, was a mandatory subject of bargaining. Although I was unable to find a case right on point, there are numerous cases that can be analogized to the instant matter. In *NLRB v. Central Illinois Public Service Co.*, 324 F.2d 916, 917 (7th Cir. 1963), the employer was a public utility providing gas and electricity to its customers. For 36 years, the employer had been giving its employees a 33-percent discount on the price of gas. Fewer than half of its employees took advantage of this discount, which was worth about \$48 in 1960. The court found that this was a term and condition of employment as it was an "emolument of value which accrued to employees out of their employment relationship." In *Sivalls, Inc.*, 307 NLRB 986, 1007 (1992), the Board found that the employer violated Section 8(a)(1) and (5) of the Act by unilaterally changing a practice of giving the employees 1 hour of paid leave in order to vote. The Board has also found jury duty rights to be mandatory subjects of bargaining and terms and conditions of employment under Section 8(d) of the Act. *Newspaper Printing Corp.*, 232 NLRB 291 (1977); *Merrill & Ring, Inc.*, 262 NLRB 392 (1982). In *Ohio Power Co.*, 317 NLRB 135 (1995), it was found that an employer's practice of allowing union workmen's compensation officers to take worktime off, without pay, to assist employees at workmen's compensation hearings was a mandatory subject of bargaining, when the employer unilaterally discontinued this practice. In *AT&T Corp.*, 325 NLRB 150 (1997), the employer had been providing check cashing services to its employees or, in lieu thereof, 15 minutes of paid time to cash their paychecks. After the employer unilaterally

discontinued this privilege, the administrative law judge and the Board found that this was a material, substantial and significant change, and a term and condition of employment, and the change violated Section 8(a)(5) of the Act.

In *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), the employees had a “bank” of hours that depended upon the employees’ length of service with the employer and the number of hours that they worked. The employees used the time accumulated in this bank for vacations, sick, and personal days. This was found to be a mandatory subject of bargaining when the employer unilaterally changed this system to make it identical to a system it employed for a different unit of employees. In *Mackie Automotive Systems*, 336 NLRB 347 (2001), the employer employed approximately 16 employees at its facility, which is dedicated to supplying parts to General Motors, its only customer. In addition to the employer’s 16 employees, there were approximately 200 General Motors employees at the facility who are supervised by the employer. Because of its dependence on General Motors, the employer’s operational practice mirrored that of General Motors. So when General Motors shut down its operation, for whatever reason, the employer did the same. In the past, the General Motors’ employees had worked a 9-1/2-hour workday, with no lunchbreaks and the employer did the same, paying its employees time and a half for the 30 minutes each day that they worked during what would otherwise have been their lunchbreak. When General Motors notified the employer that, effective immediately, they were changing their practice and their employees would receive a 30-minute lunchbreak, during which they would not be paid, the employer, without prior notice to the union, changed its practice to mirror the General Motors’ change. The employer defended that it had to make the change because the work schedule of its employees was always subject to change based upon the General Motors’ schedule of operations. The Board found a violation of Section 8(a)(5) of the Act: lunchbreaks are mandatory subjects of bargaining, adherence to past practice (mirroring the General Motors’ practice) is no defense, and it does not come within the limited Board exception which, at times, allows unilateral action when prompt action is compelled by economic exigencies or business emergencies.

On the basis of the above, I find that the Respondent’s participation in the blood programs was a mandatory subject of bargaining. Like in *Central Illinois*, supra, this practice had been in effect for over 30 years and provided a number of substantial and material benefits to those employees participating. As testified to by Irwin, the employees derived satisfaction from doing something for the community, giving blood, and more selfishly, coming in from the cold or heat and getting paid for the time. The amount of pay that the employees received for this time spent, up to 8 hours for two contributions a year, is not insubstantial. Counsel for the Respondent in his brief argues that the blood programs were a benefit to Hudson Valley, rather than Respondent’s employees, and that the cases cited by counsel for the General Counsel in his brief to establish that the blood programs are a term and condition of employment are not applicable because the items listed, such as jury duty, “is a direct benefit to the individual” which he differentiates from the instant matter. I do not agree. Jury duty and voting are more of

a civic duty, such as giving blood; although they do not result in any extra remuneration to the employees participating, they are a term and condition of their employment.

Having found that participation in the blood program is a term and condition of employment for the Respondent’s employees, the ultimate issue is whether the elimination of this program by the Respondent violated Section 8(a)(5) of the Act. The Respondent defends that it did not because the Union did not request bargaining. I have found that the first time that the Union requested bargaining was at the second-step grievance on March 28, about 3 weeks after it was first notified of the elimination of the program.⁶ Although the Union was clearly less than vigilant in requesting bargaining, I find it unnecessary to decide whether this constitutes a failure to request bargaining because the change would still have violated the Act as it was announced to the Union on March 7 and 29 as a *fait accompli*. In *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1979), Administrative Law Judge Julius Cohn, as affirmed by the Board, stated:

The other aspect of the waiver issue arises from Respondent’s contention that the Union waived its right to bargain over the changes simply because it failed to request bargaining. The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*. [Footnotes omitted.]

In *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981), the court stated: “a union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*” and the court, in *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964), stated: “an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.” In *Pontiac*, supra, the Board stated: “The issues of ‘*fait accompli*’, ‘request to bargain’, and ‘waiver’ are related in the sense that a finding of *fait accompli* will prevent a finding that a failure to request bargaining is a waiver.” In *Hadden Craftsmen*, 300 NLRB 789 at fn. 8 (1990), the Board stated: “Board law requires an employer, after reaching a decision concerning a mandatory subject, to delay implementation of the decision until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making process itself.”

On March 6 or 7, Carter, who I found to be a totally credible and believable witness, was told that the Respondent was no

⁶ A further defense of the Respondent is that, even this request was not a proper request to bargain because it was made to individuals who lacked the authority to negotiate. I disagree. At the time, Iazzetti was senior marketing manager for the Respondent. However, because of my finding that the change was a *fait accompli*, I find it unnecessary to decide this issue.

longer going to participate in the blood program. Miller's March 29 letter to McCracken, while not as direct, had a similar message. Neither one asked the Union for a response or gave the Union an opportunity to bargain. Rather, this was a classic fait accompli situation where the Respondent was telling the Union that it decided that it was ending its participation in the blood program; at that point, there was nothing to negotiate about. I therefore find that by unilaterally rescinding its practice of paying its employees for worktime spent participating in the blood program, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By unilaterally rescinding its practice of permitting its employees to participate in blood programs while on company time and pay, on about March 7 and 29, 2001, the Respondent violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Respondent has unlawfully unilaterally discontinued its long tradition of paying employees for worktime spent participating in the blood programs. I shall recommend that the Respondent be ordered to rescind and withdraw this change, and reinstate the policy that was in effect prior to February 2001, and to bargain with the Union about this subject, prior to implementing such a change. If any employee donated blood during worktime during this period, and was not paid for this time, that employee would be entitled to be reimbursed by the Respondent for the time lost. I will leave it to the compliance proceeding herein to determine whether this situation exists and, if so, the amounts owed.

On these findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended⁷

ORDER

The Respondent, Verizon New York, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Unilaterally eliminating its participation in blood programs, which allowed its employees to participate in the pro-

⁷ 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.

gram on working time and to be paid for that time without first giving notice and an opportunity to bargain to the Communications Workers of America, Locals 1103 and 1120 as the collective-bargaining representative of certain of its employees.

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

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

(a) Restore its participation in the blood programs as they existed prior to March 2001, i.e., paying employees for working time spent participating in the blood programs, and bargain with the Union prior to making any change in this program.

(b) Make whole any employee who gave blood during working time, in accordance with the remedy section of this decision.

(c) 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.

(d) Within 14 days after service by the Regional Director for Region 3 of the Board, post at each of its facilities in the Midstate, Upstate, and Downstate areas copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 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 any of the facilities involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees in the facility involved who were employed by the Respondent at any time since March 1, 2001.

(e) 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 the Respondent has taken to comply.

⁸ 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."