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Komatsu America Corp. and Local Lodge No. 158 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers AFL-CIO. Cases 33-CA-14021 and 33-CA-14088

July 30, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On June 26, 2003, Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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 to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

This case arises out of the Respondent's January 25, 2002 outsourcing initiative.¹ The complaint alleged that the Respondent violated Section 8(a)(1) and (5) by failing to bargain at a meaningful time and in a meaningful manner regarding the effects of its outsourcing decision prior to its "volume-related" reduction in force on July 1. The complaint further alleged that the Respondent violated Section 8(a)(1) by prohibiting employees from wearing a Union T-shirt protesting the outsourcing. For the reasons discussed below, we agree with the judge's recommendation to dismiss these allegations.

1. In agreement with the judge, we find that the Respondent satisfied its effects bargaining obligations with respect to its outsourcing initiative.² It is well settled that Section 8(a)(5) of the Act requires bargaining at "a meaningful time and in a meaningful manner" over the effects of a decision to close a facility. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). An element of meaningful effects bargaining is timely notice to the union of the decision. *Metropolitan Teletronics Corp.*, 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). Effects bargaining also must occur sufficiently before actual implementation

¹ All dates refer to 2002 unless otherwise indicated.

² While we agree with the judge that the Respondent engaged in meaningful effects bargaining, we disavow the judge's implication that effects bargaining would be illusory because the no-strike clause in the parties' collective-bargaining agreement deprived the Union of bargaining power.

of the decision so that the union is not presented with a fait accompli. *Woodland Clinic*, 331 NLRB 735, 738 (2000); *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 fn. 3 (1990). Relevant to this determination is whether the union is afforded an opportunity to bargain "at a time when it still represented employees upon whom the Company relied for services." *Metropolitan Teletronics Corp.*, 279 NLRB at 959.

Applying these principles here, we find that the Respondent satisfied its effects bargaining obligation. The Respondent announced the outsourcing initiative in January, well in advance of its implementation. Effects bargaining ensued at the request of the Union. The Respondent transferred to its facilities in Japan a rear suspension sub-assembly in January, and one axle assembly in June, while negotiations were in progress, and also removed approximately 20 machine tools from the machine shop.³ The vast majority of assembly and manufacturing processes remained, however, following these transfers, and the General Counsel does not assert that these transfers prevented meaningful effects bargaining. The General Counsel does contend, however, that the Respondent partially implemented its outsourcing decision on July 1 when it imposed a reduction in force and thereby presented the Union with a fait accompli, which did preclude meaningful effects bargaining thereafter. In agreement with the judge, we find that the record evidence does not support this contention.

First, we find that the General Counsel failed to show a causal nexus between the outsourcing initiative and this reduction in force.⁴ As detailed in the judge's decision, the July 1 reduction in force adversely affected the entire work force, not just the machine shop, and was caused by a general downturn in business. In the machine shop, however, there were fewer volume-related layoffs than in the rest of the work force and the employee complement in the shop, as a percentage of the total work force, actually increased following the layoffs. Additionally, at the time of the layoffs, the Respondent had only outsourced two components of the nearly 300 components manufactured in the machine shop. Although not mentioned by

³ Five machine tools were moved to Japan because of the June transfer of axle production to those facilities. The remaining machine tools, which were not used in the production of axles, were obsolete and were removed as part of the Respondent's normal tool replacement scheme for the machine shop.

⁴ The judge specifically found that the evidence did not disclose how many of the layoffs in the machine shop resulted from the transfer of components to Japan and how many resulted from a general downturn in business. There are no exceptions to this finding. To the extent that portions of the judge's analysis elsewhere in his decision could be read to suggest that the record establishes a nexus between the layoffs and the outsourcing initiative, we find that the record does not support such a proposition.

the judge in his decision, the record shows that the Respondent added new work in the shop pursuant to an outside manufacturing contract that the Respondent received in June and increased the employee complement in the machine shop, as well as the entire work force, after July 1, as business improved. In these circumstances, we find that a causal nexus has not been shown between the outsourcing initiative and the reduction in force.

Second, the parties initiated effects bargaining prior to the June outsourcing and, notwithstanding the July 1 layoffs, continued bargaining for some time thereafter. Although the General Counsel asserts that no meaningful effects bargaining took place prior to the July 1 layoffs, we find that the parties had exchanged information requests and proposals. Moreover, it is undisputed that post-July 1 bargaining was substantive and covered all open issues.

In these circumstances, the Union was not deprived of its bargaining leverage nor was it presented with a fait accompli by the July 1 reduction in force. Accordingly, we find that the Respondent, by meeting with the Union and bargaining over severance benefits for machine shop employees both before and after July 1, engaged in meaningful bargaining at a meaningful time and satisfied its Section 8(a)(5) effects bargaining obligation.

2. We also agree with the judge that the Respondent did not violate Section 8(a)(1) by instructing employees to stop wearing a T-shirt created by the Union to protest the outsourcing. In general, employees have a protected right under Section 7 of the Act to make known their concerns and grievances pertaining to the employment relationship, which includes wearing union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–03 (1945); *Southwestern Bell Telephone Co.*, 200 NLRB 667, 669–670 (1972); see generally *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB No. 139, slip op. at 3 (2003), enfd. 99 Fed. Appx. 233 (D.C. Cir. 2004). Here the T-shirt read: “December 7, 1941” on the front and “History Repeats Negotiate Not Intimidate” on the back. We assume, without deciding, that wearing this T-shirt was protected activity under Section 7.

Section 7 rights, however, may give way when “special circumstances” override the employees’ Section 7 interests and legitimize the regulation of such apparel. *Evergreen Nursing Home and Rehabilitation Ctr., Inc.*, 198 NLRB 775, 778–779 (1972). The Board has previously found such special circumstances justifying the proscription of union slogans or apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees. *Nordstrom*,

and discipline among employees. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982); *Southwestern Bell*, 200 NLRB at 670 (permitting employer to ban sweatshirt criticizing the employer in an obscene manner).

Here, the Union’s Pearl Harbor T-shirt directly invoked a highly charged and inflammatory comparison between the Respondent’s outsourcing plans and the Japanese “sneak attack” on the United States on December 7, 1941. This comparison was especially inflammatory and offensive because the Respondent is a Japanese-owned company. In addition, an employer may also legitimately be concerned about the potential disruption to the harmonious employee-management relationship caused by the provocative apparel of its employees. See *Southwestern Bell*, supra, at 670.⁵ Particularly in light of the Union’s clear appeal to ethnic prejudices, we find that the T-shirt was sufficiently offensive and provocative to justify its regulation by the Respondent. Cf. *Noah’s New York Bagels*, 324 NLRB 266, 275 (1997) (stating that employer could prohibit a union T-shirt stating “If its not Union, its not Kosher”).⁶

As in *Southwestern Bell*, supra, at 671, this conclusion is fortified by the parties’ long-standing bargaining relationship with no showing of hostility between the Respondent and the Union; the Union’s previous use of hats and armbands, without objection, to publicize employee-management disputes; the fact that no employee was disciplined for wearing the T-shirt; and the fact that when employees did wear the T-shirt the Respondent urged the Union to counsel its members not to wear the shirts before communicating with employees directly.⁷

ORDER

The complaints are dismissed.

Dated, Washington, D.C. July 30, 2004

⁵ Although our colleague takes issue with our reliance upon *Southwestern Bell*, the case is well-established Board precedent dating back over 30 years and we see no reason to depart from it in deciding this case.

⁶ Our colleague criticizes our reliance on *Noah’s New York Bagels* because there was no specific allegation in that case that the employer’s prohibition of the T-shirt was unlawful. We have, however, recently cited *Noah’s* for the very principle cited above in *Bell-Atlantic-Pennsylvania*, supra, slip op. at 3 (cited by our colleague himself for its general principles) and we accordingly rely on it in deciding this case as well.

⁷ As noted by our dissenting colleague, the parties at one point agreed that the Union would dissuade its members from wearing the T-shirt as long as effects bargaining negotiations were fruitful. The existence of this agreement does not detract from our conclusion that the special circumstances described above justified the Respondent’s proscription of the T-shirt.

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues' discussion and adoption of the judge's recommendation to dismiss the allegation that the Respondent violated Section 8(a)(5) by refusing to bargain about the effects of the outsourcing of some production work. The judge also recommended dismissal of the allegation that the Respondent violated Section 8(a)(1) by ordering employees to stop wearing a T-shirt created by the Union to protest the outsourcing, finding that wearing the shirt was not protected activity. Although my colleagues acknowledge that employees have a protected right under Section 7 of the Act to make known their concerns and grievances pertaining to the employment relationship, and assume, albeit without deciding, that wearing the T-shirt was protected activity under Section 7, they find that "special circumstances" override the employees' Section 7 interests and legitimize the Respondent's ban on the T-shirt. A review of the record, however, does not show any special circumstances justifying the ban. Accordingly, the Respondent's ban on the T-shirt must be held to violate Section 8(a)(1).

1. Background

The Union represents all of the Respondent's production and maintenance employees at the Respondent's Peoria, Illinois plant. The unit employees were covered by a collective-bargaining agreement between the Respondent and the Union at the time of the 2002 events in question.¹

The Respondent is a Japanese-owned company. The parent company has worldwide operations. Its facilities in North America include Komex, Mexico; Candiach, Canada; Chattanooga, Tennessee; and the Peoria facility.

The T-shirts in question were in support of certain then-pending unfair labor practice charges and grievances filed against the Respondent because of its alleged failure to give the Union an opportunity to bargain with the Respondent before implementing changes in terms and conditions of employment. The T-shirts had "December 7, 1941" printed on the front and, printed on the back:

¹ All dates are 2002 unless expressed otherwise.

History Repeats

Negotiate
Not
Intimidate

The T-shirts were first worn on Friday, September 6. About 20 employees purchased them. The record does not establish, however, how many of the approximately 220 unit employees actually wore the T-shirts. In any event, the Respondent's labor relations specialist, Donna Brooks called Union President Kevin Kocher (an employee) that day to ask about the T-shirts. He fully described them to her and told her that the T-shirts were being worn in support of the above mentioned unfair labor practice charges and grievances, that the T-shirts were not being distributed en masse, that there was no demonstration planned, and that there was no plan for everyone to wear T-shirts on the same day. Kocher immediately followed up his telephone conversation with Brooks with an e-mail to her, reiterating what the T-shirts said and what they were being worn in support of.

Later that day, Gary Aubry, vice president of human resources for Komatsu North America, and the Respondent's human resources manager, Pamela Slaby called Kocher on a conference call. In response to their question about a rumor they had heard, Kocher told them that the Union was not going to have a demonstration or any other organized activity on the following Monday, September 9. After Kocher told Aubry and Slaby what the T-shirts said, Aubry expressed concern that wearing the T-shirts could jeopardize the recently-initiated negotiations between the Respondent and the Union over the effects of the Respondent's decision to eliminate the machine shop and some other jobs.² Aubry told Kocher that the Respondent would make anyone who wore the T-shirt to work on the following Monday remove it or wear it inside out, or leave the plant or be disciplined. In a subsequent telephone conversation on September 6, Kocher told Aubry that if Aubry would listen to Kocher for half an hour while Kocher voiced some concerns that he had about what had been taking place in the plant, then Kocher would make Aubry "a deal that he couldn't refuse." Aubry agreed to listen to Kocher. In return, at the end of Kocher's presentation, he told Aubry that as long as the Respondent and the Union were engaged in fruitful negotiations, Kocher would ask the employees not to wear the T-shirts. Aubry thanked Kocher, and the conversation ended.

² The Respondent and the Union had engaged in bargaining on September 4 and 5 about the effects of the Respondent's decision to eliminate the machine shop and some other jobs. They subsequently engaged in bargaining on September 11, 12, and 13 about this subject.

An additional 15 employees obtained T-shirts on Monday, September 9 (not from Kocher), but the record does not establish that any of those employees wore them. In any event, when Kocher got to the plant at about 6:40 a.m. on September 9, he immediately began searching out employees who were wearing the T-shirts. He asked approximately nine employees whom he found wearing them not to wear them again after that day. He explained to them that he had given his word in an agreement with Vice President Aubry that the Union would ask the employees not to wear the T-shirts as long as the Respondent and the Union were engaged in fruitful negotiations.

Later that day, however, Brooks informed Kocher that the Respondent was going to distribute a memorandum to all employees, requesting that they not wear the T-shirts on company property and warning that anyone who continued to do so would be subject to (unspecified) discipline. Kocher told Brooks that he and Aubry had an agreement and that no such memorandum was necessary, but Brooks said that the Respondent was still going to distribute it. Specifically, the memorandum told the employees:

The ["December 7, 1941" inscription] appearing on the T-shirt constitutes unacceptable ethnic disparagement of our Japanese co-workers. We have no interest in interfering with anyone's right to engage in protected, concerted activity. However, this particular inscription is offensive and bears no relationship to legitimate employee interests or working conditions. If you are wearing one of these T-shirts, please change or turn it inside out. . . . Anyone who refuses to cease displaying the offensive inscription will be subject to discipline.

At the time of the events in question, six individuals of Japanese descent were working at the Respondent's Peoria plant. None were unit employees. Indeed, all were actually employed by the Respondent's parent company, Komatsu Japan. Mike Nakamura and Yasuki Sato were "co-general managers" (not explained on the record) of the Peoria plant. Although their offices were in a different building from the plant building where the production and maintenance unit employees worked, they did spend significant time on the plant floor with the unit employees. Kevin Tamura worked in a different building from the plant building, but he sometimes walked through the plant building to get to a cigarette smoking area. Jum Koyama was an engineer whose office was in a different building from the plant building; he did no work on the plant floor. Rush Hiashy was on the cost reduction team and Mike Nosihioia was the quality control/quality assurance manager. Their offices were in a different building

from the plant building, and neither spent significant time inside the plant.

The judge found that wearing the T-shirts was not a protected concerted activity. My colleagues have not affirmed that finding. Rather, for purposes of their ensuing analysis finding special circumstances, they have assumed, without deciding, that wearing the T-shirts was protected activity under Section 7 of the Act. I will proceed from that same assumption in arguing against my colleagues' finding of special circumstances.

2. Applicable principles

In *Bell-Atlantic-Pennsylvania*, 339 NLRB No. 139, slip op. at 3 (2003), enfd. 99 Fed. Appx. 233 (D.C. Cir. 2004), the Board recently set forth principles that are applicable here:

[E]mployees have a protected right under Section 7 of the Act to make known their concerns and grievances pertaining to the employment relation and, therefore, to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). . . . On the other hand, a Section 7 right may give way on occasion when "special circumstances" override the Section 7 interest and legitimize the regulation or prohibition of such apparel. *Evergreen Nursing Home*, 198 NLRB 775, 778-779 (1972). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

Similarly, in *NLRB v. Mead Corp.*, 73 F.3d 74, 79 (6th Cir. 1996), enfg. *Escanaba Paper Co.*, 314 NLRB 732 (1994), the court said:

In order to justify a restriction on employees' exercise of Section 7 rights, an employer must demonstrate the existence of "special circumstances" which necessitate the banning of such insignia in order to reduce employee dissension or distractions from work, maintain employee safety and discipline, protect machinery or products, or project a certain image to the public. Special circumstances arise most often where employees have significant contact with the public, where the slogans at issue denigrate the employer's product or business, and where the slogans are patently offensive or vulgar. Employers may also infringe upon employees' Section 7 rights to the extent necessary to maintain discipline and order in the workplace. Finally, employers

have an interest, where applicable, in dress uniformity where employees have extended contact with the public. [Citations omitted.]

3. Application of principles

The record is absolutely devoid of any evidence that wearing the T-shirts might jeopardize employee safety, erode employee discipline, cause damage to machinery or products, distract employees from work, exacerbate employee dissension, or interfere with a public image that the Respondent has established, as part of its business plan, through appearance rules for its employees. Indeed, as to the last two potential special circumstances, the record does not show that there *even was* any employee dissension that the T-shirts might have exacerbated, or that the Respondent (which manufactures 43,000-cubic foot/300-ton capacity mining trucks) has *even established* a public image, as part of a business plan, through appearance rules for its employees. Indeed, there is nothing in the collective-bargaining agreement about employee appearance or apparel, and there is nothing in the record about any extra-contractual rules covering employee appearance or apparel—other than, of course, the allegedly unlawful September 9 memorandum in question. Moreover, not only do the employees not have *significant* contact with the public, they do not have *any* contact with the public. The message on the T-shirts does not denigrate the Respondent's products or business, nor is it patently offensive or vulgar. There are, in sum, no special circumstances even remotely warranting the Respondent's prohibition against wearing the T-shirt. Indeed, the record shows that on Friday, September 6, the Respondent's vice president Aubry at least implicitly accepted Union President Kocher's plan simply to ask employees not to wear the T-shirt at work as long as the Respondent and the Union were still engaged in fruitful negotiations. And Kocher was in the process of implementing that plan on the morning of Monday, September 9, and fulfilling his part of his "deal" with Aubry, when the Respondent nevertheless distributed the memorandum to all employees prohibiting them from wearing the T-shirt. There is no evidence that anyone wore the T-shirt in the plant after September 9.

In his brief in support of exceptions to the judge's recommended dismissal of this allegation, the General Counsel argues forcefully that the Respondent has failed to establish any special circumstances justifying its prohibition against wearing the T-shirt. In its brief in answer to the General Counsel's exceptions, however, the Respondent argues only that wearing the T-shirt was not protected activity. The Respondent does not attempt to counter the General Counsel's argument that the Re-

spondent has not established special circumstances that would justify the Respondent's prohibition against wearing the T-shirt even if it *were* protected activity.

Nevertheless, my colleagues have taken up the special circumstances argument that the Respondent itself did not make. They find that the special circumstance justifying the Respondent's prohibition against wearing the T-shirts is that the T-shirt's (1) reference to December 7, 1941 (and, implicitly, to the sneak attack on Pearl Harbor by Japan on that date) and its (2) statement "History Repeats," in conjunction with its entreaty (3) "Negotiate Not Intimidate," were especially inflammatory in combination here, because the Respondent is owned by a Japanese company and the T-shirt could disrupt what my colleagues characterize as a harmonious employee-management relationship. But disruption of employee-management relationships is, wisely and not surprisingly, *not* among the numerous special circumstances mentioned in the above-cited precedent that might justify a restriction on the exercise of Section 7 rights. Moreover, any such fear of disruption of the employee-management relationship caused by employees wearing the T-shirt in the plant is particularly belied here by the fact that the Respondent's vice president, Aubry and Union President Kocher were able quickly and amicably to come to an agreement on September 6 about how the Union would deal with this matter—an agreement, alas, that was apparently jettisoned by local management on the very next workday, while Kocher was attempting determinedly to live up to his part of his "deal" with Aubry.

In finding special circumstances and dismissing this allegation, however, my colleagues rely on *Noah's New York Bagels, Inc.*, 324 NLRB 266 (1997) and *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972). *Noah's* has no applicability to the issue under discussion here. Specifically, *Noah's* did not present an issue of whether the employer's prohibition against wearing the "If it's not Union, it's not Kosher" T-shirt in question was justified by special circumstances. Indeed, the judge in *Noah's* expressly noted that the General Counsel did not *contend* that the employer's policy against shirts mocking the employer's kosher products was unlawful. The judge's subsequent "find[ing]" that the employer prohibition against the wearing of a T-shirt mocking the employer's kosher policy was not unlawful was therefore gratuitous and, in any event, dictum.³ Moreover, the employee who was prohibited from wearing the mocking "If it's not Union, it's not Kosher" T-shirt in *Noah's* was a product delivery driver who perforce had direct and fre-

³ The only unfair labor practice issue facing the Board in that aspect of *Noah's* was whether the employer discriminatorily enforced a rule against the wearing of union buttons. The Board found that violation.

quent contact with the employer's customers. Thus, *had there been* an issue in that case about special circumstances, the prohibition against the "If it's not Union, it's not Kosher" T-shirt arguably could have been justified on the grounds of the special circumstance that the employee had significant contact with the public and the slogan at issue denigrated the employer's product or business. *NLRB v. Mead Corp.*, *supra*. The production and maintenance employees prohibited by the Respondent from wearing the "December 7, 1941" T-shirts in the instant case, on the other hand, have no contact with the public, and the message on the T-shirts did not denigrate the Respondent's product or its business.

It is difficult to discern the basis on which *Southwestern Bell Telephone* was decided. The Board found either that the "Ma Bell is a Cheap Mother" sweatshirts were outside the scope of the Act's protection, or that in any event the employer was justified by special circumstances in prohibiting its employees from wearing them, or some hybrid of both.⁴ Regardless, the sweatshirts in *Southwestern Bell* expressly insulted the employer by name ("Ma Bell is a Cheap Mother"), whereas the T-shirts at issue here ("December 7, 1941; History Repeats; Negotiate Not Intimidate") *neither* name nor expressly insult the Respondent.

On the basis of all of the above considerations, I disagree with my colleagues' finding that the Respondent's prohibition against the "December 7, 1941" T-shirts was justified by special circumstances. I find that it was not.⁵

Dated, Washington, D.C. July 30, 2004

Dennis P. Walsh,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Deborah A. Fisher, Esq. for the General Counsel.

Roy G. Davis and Joshua A. Rodine, Esqs. (Davis & Campbell),
of Peoria, Illinois, for the Respondent.

Kevin Kocher, Local Lodge 158 President, for the Union.

⁴ In any event, as I said in my dissent in *Honda of America Mfg., Inc.*, 334 NLRB 746, 750 fn. 2 (2001), I view *Southwestern Bell* as poorly reasoned and something of an aberration in the corpus of Board law. Most of the authority cited in *Southwestern Bell* consisted of court of appeals cases denying enforcement to Board Orders. In fact, the primary case cited (*Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956) (upholding a ban on "Don't be a scab" buttons)), is clearly inconsistent with Board precedent and has been rejected by other courts. See *Escanaba Paper Co.*, 314 NLRB 732, 734 fn. 10 (1994), *enfd. sub nom. NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996), cited above. Accordingly, I would overrule *Southwestern Bell*.

⁵ I would further find, if it were necessary for me to do so, that, contrary to the judge, wearing these T-shirts was protected activity.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Peoria, Illinois on March 5 and 6, 2003. The charges were filed by Local Lodge 158 (the Union) against Komatsu American Corp.¹ (the Company) in Case 33-CA-14021 on July 9, 2002² (amended September 24) and in Case 33-CA-14088 on September 16 (amended November 25). Complaints were issued on September 27 and December 6, and the cases were consolidated for trial on December 6.

At its Peoria, Illinois plant, the Japanese-owned Company builds large mining trucks, which measure up to 28 feet wide, 28 feet tall, and 55 feet long and can haul up to 300 tons, and wheel loaders (large dump trucks), which pick up and dump the loads into the mining trucks (Tr. 107-109, 235-236). The six "divisions" in the plant are the components manufacturing area (the machine shop), welding, assembly, shop clerk, transportation, and maintenance (Tr. 15, 20, 201-202).

The Union represents the production and maintenance employees (GC Exh. 2, art. 2, sec. 1, p. 2). The most recent collective-bargaining agreement, effective from August 28, 2000 to September 7, 2003, contains a no-strike-no-lockout provision (GC Exh. 2, art. 4, p. 14) and provides for payment of a severance allowance to eligible employees when "the Company determines that it will permanently close or discontinue the manufacturing operation [emphasis added]" and terminates the employees involved (GC Exh. 2, art. 19, pp. 108-109).

On Friday, January 25 (not Saturday the 26th, as discussed later), General Manager-Peoria Manufacturing Operations Kevin Casey, Human Resources Manager Pamela Slaby, and Plant Superintendent Michael Guilfooy met with Union President Kevin Kocher and the union bargaining committee (Tr. 18, 31, 101, 200, 239-240). Casey read, and gave them, a document dated January 25, entitled "Peoria Operations Restructure" (GC Exh. 3; Tr. 22, 241).

The document cited the Company's loss of \$40 million in 2000 and stated, in part:

To help ensure that someday we return to an acceptable level of profitability will require a reduction in our fixed costs. Approximately 75% of the Peoria Operations' fixed costs are wages and benefits and depreciation on assets (mostly machine tools). The components manufacturing area (axles, hydraulics, suspensions, spindle, hub and brake, general machining, etc.) represents our greatest investment in assets and support functions. These fixed costs are currently unacceptable. We must find more economical ways to manage these elements of the business and will, therefore, commence an outsourcing project for the items produced in the components area ["negatively" impacting some employees] and subsequently dispose of the machine tools. This project will be accomplished in two phases:

¹ The name Komatsu Mining Systems, Inc. in the Case 33-CA-14021 charge was changed to the correct name Komatsu America Corp. before issuance of the complaint and was formally amended at the trial (Tr. 9-10, 23).

² All dates are in 2002 unless otherwise indicated.

Phase I: Source axle assemblies for mechanical trucks and wheel loaders from Komatsu Mooka plant in Japan.

Timing: By 3d Quarter 2002.

Phase II: Develop sources for hydraulic components, spindle, hub and brake components, and general machining.

Timing: By year-end 2003.

During the meeting that followed, Casey stated that the decision had been made in Japan (by Komatsu Ltd., called Komatsu Japan). When asked about its impact, Casey said that as far as he knew, there was going to be up to five machines left at the end of the phaseout, but he did not know how many personnel would be left. (Tr. 23, 241, 266).

This was later confirmed by Plant Superintendent Guilfoxy who told employees in a meeting in May that “they would possibly keep between 10 and 15 machinists to run five machines, which would be used to machine horse collars for the large dump truck frames. The horse collars must be machined, after they are welded, to make them square and prevent them from twisting and turning, throwing the wheels off. (Tr. 102, 111–113, 197).

At the time of this January 25 announcement, there were 86 machine shop employees in a total of 342 employees in the bargaining unit (R. Exh. 2; Tr. 151). Although the axle assemblies for mechanical trucks and wheel loaders were scheduled to be transferred in Phase I by the third quarter of 2002 to the Japan plant where they were also being produced (Tr. 224–225), they were transferred months earlier.

As discussed later, Casey advised the Union in a meeting held on March 28 that business had gotten worse and that it would be necessary to lay off additional plant employees (Tr. 33). Then in June—before the layoff of a large number of machine shop and other plant employees in a reduction in force scheduled for July 1—the decision was made to immediately transfer to the Komatsu Mooka plant in Japan the production of all axles, except those for HD1500 trucks (Tr. 226; R. Exh. 1 p. 1; GC Exhs. 8(b), 16).

A machine shop headcount (R. Exh. 2) shows that by the end of July, the number of machine shop employees was reduced by 18 from the January total of 86 to 68, and the number of all bargaining unit employees was reduced 121 from the January total of 342 to 221.

The evidence does not disclose how many of the 18 layoffs of machine shop employees on July 1 resulted from the early transfer of axle production to the Komatsu Mooka plant and how many resulted from the downturn in business.

In Case 33–CA–14021, the primary issue is whether the Company violated Section 8(a)(1) and (5) by failing and refusing to bargain in good faith, in a meaningful manner and at a meaningful time, regarding the effects of the January 25 announced decision to outsource machine shop work, before the layoff of machine shop employees on July 1.

In Case 33–CA–14088, the primary issue is whether the Japanese-owned Company violated Section 8(a)(1) by threatening to discipline employees if they wore the “December 7, 1941” T-shirts at work.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures mining trucks at its facility in Peoria, Illinois, where it annually receives goods valued over \$50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

CASE 33–CA–14021

A. Bargaining Regarding Effects of Outsourcing Decision

1. Requests to bargain on effects

On January 28, Union President Kocher sent General Manager Casey a letter (GC Exh. 4) requesting the Company to “meet and discuss severance, early retirement and or any other special circumstances involved in the announced closing of the Machine Shop and other various areas of the shop. We feel there are many avenues to lessen the impact of the recent decision made by Komatsu Japan.” (Emphasis added.)

On February 5, Kocher sent Casey another letter (GC Exh. 15) requesting a meeting to discuss “any avenues to lessen the impact of the recent decision made by Komatsu Japan to close areas of the plant.” Kocher stated in the letter that “We have questions from our members, your employees, that you may be able to answer. The Union also has some suggestions to make to the Company. We would like you to consider them as a one time only possibility.”

The following day, February 6, Human Resources Manager Slaby replied to both letters (GC Exh. 5), requesting (1) relevant contract provisions “the Union believes prompts discussion regarding severance,” (2) “What aspects” of “early retirement does the Union want to discuss,” (3) “an understanding of the Union’s thinking regarding ‘special circumstances,’” (4) a “better understanding of the Union’s thought processes” regarding the “many avenues to lessen the impact of the recent decision,” and (5) “the nature of the questions from the bargaining unit members, referenced in your second letter.”

The next day, February 7, Kocher sent his reply directly to Casey (GC Exh. 6(a)), first pointing out that “we currently have a grievance . . . concerning our interpretation of the bargaining agreement. That could be discussed at this meeting if you so desired but I thought that it is better to let the grievance procedure address that.” The grievance was still pending at the time of trial (Tr. 145–146).

That grievance, dated January 25 (GC Exh. 20), states that the “Union contends that the Company is violating Article 19 . . . of the current bargaining agreement.”

Article 19.1, section 1A, provides that “When the Company determines that it will permanently close or discontinue the manufacturing operation covered by this Agreement [emphasis

added]” and terminates the employees involved, employees with 5 or more years of continuous service will be eligible for a severance allowance. Section 1B provides that the service allowance will be 40 hours for each year, not to exceed 20 years, at the base wage rate in effect at the “time of closing or discontinuance.” (GC Exh. 2, pp. 108–109).

The grievance also states: “Specifically, the Company has permanently closed the Cut and Form manufacturing and refuses to offer severance to the employees affected,” referring to the Cut and Form work transferred from the Peoria plant to the Company’s KOMEX plant in Mexico in June 2001 (following the earlier transfer of some welding department work to KOMEX in March 2000, before the 2000–2003 agreement was signed) (Tr. 26, 147, 167; GC Exh. 2).

Kocher testified on cross-examination (Tr. 145) that the Union’s position is that the severance language in article 19 should apply in situations like the machine shop, where there is “outsourcing and people lose their jobs,” whereas the Company’s position, “given to us many times, and told to us by the officials of the Company,” applies only “when the entire Peoria facility is shut down” (Tr. 145).

I find that Kocher filed this grievance, about 7 months after the June 2001 transfer of Cut and Form work, in response to Casey’s announcement of Komatsu Japan’s outsourcing decision on January 25—not on January 26, the date that was suggested to Kocher in a leading question on direct examination (Tr. 18): “Directing your attention to January 26, 2000.” Later at the trial, Slaby credibly recalled (Tr. 240) that Friday, January 25, was the date of the meeting in which Casey made the announcement.

Also in Kocher’s February 7 letter to Casey (GC Exh. 6(a)), in response to Slaby’s February 6 inquiry (GC Exh. 5), Kocher stated that “we are looking for severance in some cases and retirement in others, not both for any individual, that ‘We would also like to discuss some type of point system for early retirement without supplemental,’ and that these are considered by us as ‘special circumstances’” [emphasis added].

Kocher testified that he attached to his February 7 letter, excerpts (GC Exh. 6(b)) from a memo of understanding in the 1985–1988 bargaining agreement, when there was a large 1985 reduction in the plant—“not what we were asking for” but as “an example of what had been done in the past.” He testified that he wanted Casey, Slaby, and Guilfooy to “familiarize themselves” with that “to give them some idea of why we were asking for what we were asking for” and “Not only in the machine shop, but the people that have lost jobs in welding” (in March 2000) and in “cut and form” (referring to the January 25 grievance). (Tr. 26, 140–144, 147.)

That 1985 memo of understanding, which was not included in the current 2000–2003 agreement, was reached with the Company’s predecessor, Dresser Industries, in which Komatsu Japan was then only a partial owner. (Tr. 28, 143–144, 282–283.)

On February 27, Kocher sent Slaby a letter (GC Exh. 7), again requesting to discuss “severance” and stating: “I am requesting a meeting with yourself and Mr. Casey by March 13, 2002 or I will have no recourse than to prefer charges with the NLRB.” No NLRB charge was filed at that time, apparently

because, as Slaby credibly testified (Tr. 240), “We arranged for a meeting in early March, in order for us to get a better feel as to what the Union might be looking for.”

2. Meetings on effects before July 1

a. The March 6 meeting

Slaby testified that Casey did not attend the scheduled March 6 meeting, because his mother became ill and he was called out of town the prior afternoon. Casey told Slaby that she could get Plant Superintendent Guilfooy to go with her to the meeting (Tr. 242).

Regarding the date of this first meeting, Kocher was asked by counsel on direct examination, “Okay, directing your attention to April 2002 [emphasis added], did you meet with Pam Slaby and Mike Guilfooy?” Kocher answered, “Yes, myself and the Bargaining Committee met with them” (Tr. 31). He did not give his personal recollection when the meeting was held. Kocher did recall Slaby’s stating at the meeting that Casey wanted to be there, but had to leave the night before because of a family emergency (Tr. 32). I credit Slaby’s testimony that this meeting was held on March 6, not in April.

When asked “what was said and by whom, at this meeting?” Kocher answered that he believed Slaby started the meeting by saying “You asked for the meeting,” and “I stated that we had asked for the meeting to discuss severance, retirement, early retirement”—without giving any details about what was said (Tr. 31–32).

The counsel then asked only one other question about the meeting (Tr. 32):

Q. Did you discuss a specific letter that you had written to the Company, at that meeting?

A. Yes, we discussed—excuse me, the letters that I had written to Mr. Casey, asking for the severance, the early retirement, and retirement.

On cross-examination, when asked specifically what he was referring to in his January 28 letter to Casey (GC Exh. 4) and in his 1985 memo of understanding attachment to his February 27 letter to Casey (GC Exh. 7), Kocher gave many details about severance, early retirement, and retirement (Tr. 139–146). These included the example of an individual age 52 with 28 years of service and the contractual 55/30 retirement policy (Tr. 140–141).

In the Company’s defense, Slaby testified what she remembered was discussed at the March 6 meeting (241–243):

Q. Did the parties ever sit down to actually talk about the effects of that decision on the bargaining unit?

A. We arranged for a meeting in early March, in order for us to get a better feel as to what the Union might be looking for.

Q. Tell us what happened at that meeting?

A. . . . I did ask them if they wanted to go forward with the meeting, or if they wanted to wait until Kevin Casey was able to return, and they indicated that they would like to go ahead.

Q. Okay.

A. And basically, we were trying to determine what it is that they were looking for.

Q. Do you remember any of the discussions that went on at that meeting?

A. Yes. I do believe that there was a reference to the 1985 agreement, which did involve some severance for individuals who lost work during that time period. They indicated that they were looking for something along that line, and . . . it took me a while to really get it out of them, but . . . they had a concern about employees who might not yet be at a point where they could get the 55/30 pension, which is an unreduced early pension with a supplement to age 62.

Q. Okay.

A. And, they brought up an example of a person who might be age 53 and have only 27 or 28 years of service, and they said that this was the sort of person that they were concerned about. They didn't have a specific idea.

Q. Any other parts of that meeting that you recall?

A. That was primarily it. Primarily we were looking to determine what they were looking for, so that we could look at the feasibility of it.

b. The March 28 meeting

At the next meeting with the Union on March 28, attended by Casey, Slaby, and Labor Relations Specialist Donna Brooks (Tr. 244), Casey made it clear that Komatsu Japan was exercising control over the Company's Peoria plant. Referring to the January 25 outsourcing announcement, as Kocher testified, Casey stated that the decision had been made in Japan and that "some people had almost lost their jobs fighting for us." (Tr. 134.)

Q. What do you remember about that meeting?

A. Well, Kevin Casey . . . indicated that he was there to listen, and asked if they would go back over what it was that they had essentially shared with the Company at the meeting in early March.

Q. And did they?

A. Yes, they did.

Kocher testified that after "We talked about the early retirement, retirement, and severance, and I . . . asked him if there was any way that we could lessen the effect on the personnel," Casey's only answer was what he had already stated, that "it was not something that he was happy about, but that it was something that he had to do" (Tr. 33)—clearly indicating that any requested noncontractual benefits required the approval of Komatsu Japan.

Kocher also testified that after he related to Casey what he had told Slaby and Guilfooy (at the March 6 meeting) about early retirement, retirement, and severance, Casey stated he would look into it, but at that time, "the Company's position was that there would be no severance offered." Kocher asked if there could be voluntary retirement for senior machine shop employees so that junior employees could keep working, and Casey answered that would be something for discussion between the Union and Slaby. (Tr. 32–35).

It was in this meeting that Casey advised Kocher and the bargaining committee that business had gotten worse since the January 25 outsourcing announcement and that it would be necessary to lay off additional plant employees (Tr. 33).

After the March 28 meeting, Slaby went to the corporate benefits office in Vernon Hills, Illinois, and asked the director to have the corporate actuaries look into the cost of each of the benefits the Union was seeking for machine shop employees to be laid off, "so that we could put together a proposal that could be approved by upper management" (Tr. 245, 249–250).

Slaby first submitted two or three different scenarios to provide employees an opportunity to grow into a 55/30 pension. There were also other scenarios for various benefits. She recalled first receiving back information from the actuaries in mid-April, and that it was sometime in mid-May "before we actually had any concept of what early retirement might cost, and at that point, it became clear to us that . . . it was far too much money." (Tr. 245–250.)

Kocher testified he believed, from what Slaby explained to him, that the actuaries were looking at the cost of severance, early retirement, and retirement (Tr. 149).

c. Other meetings before July 1

On May 6, as Kocher testified, he met with Slaby and discussed the terms for a voluntary layoff, that would allow a senior person to accept such a layoff and draw unemployment compensation, to keep a junior person with a young family from being laid off, and provide that if "things would change," the senior person would be recalled. The Company agreed, but would not apply it to machine shop employees. Kocher asked if there was any change in the Company's position on severance, and Slaby said, "No, the actuaries were looking at it." (Tr. 37–38.)

About June 16, Kocher met with Plant Superintendent Guilfooy and asked if machine shop employees could be included with other employees in voluntary layoffs. Guilfooy said "they could not be, because it was basically going to be a permanent reduction [of machine shop employees]. Those people were going to lose their jobs." (Tr. 41–42.)

On June 21, the Company advised the Union by letter (GC Exh. 16) of the layoff of machine shop employees, as well as other plant employees, on July 1. The letter listed 21 machine shop employees, 3 of whom were later given a downgrade and not laid off on that date (GC Exh. 8(b)), reducing the number to 18 layoffs in the machine shop. As found, the July 1 layoffs reduced the number of machine shop employees from the January total of 86 to 68.

3. Bargaining after July 1

On July 8, after the layoffs, Kocher told Slaby (Tr. 45) that the Union had asked "I believe seven or eight times . . . for severance, and that if the Company did not at least agree to sit down and talk to us, I was going to have no choice but to file an unfair labor practice."

On July 9, Kocher filed the union charge in Case 33–CA–14021 (GC Exh. 1(a)), alleging:

Since on or about February 2002, the above-named Employer has failed and/or refused to meet and bargain

with the Union despite repeated written requests over the phasing out of the Machine Shop. Since on or about July 1, 2002, the Employer has unilaterally implemented the phase out of the Machine Shop. Such implementation constitutes a midterm modification of the collective bargaining and/or unilateral change. [Emphasis added.]

Thus, in this charge, the Union challenged the Company's unilateral decision (made in Japan) to outsource machine shop jobs, without specifically alleging a failure or refusal to bargain on the effects of the decision. The Union amended the charge on September 24 (GC Exh. 1(d)) to allege that since January 28, the Company has "refused and/or failed to bargain in a timely manner with the Union over the effects on the unit employees of the decision to phase out the machine shop." Three days later, on September, the complaint (GC Exh. 1(g), p. 3) was issued, alleging that since January 28, the Company has failed and refused to bargain in good faith "regarding the effects of the closing of the Machine Shop."

On August 2, at a disciplinary meeting, Kocher asked Slaby if the Company was going to offer severance to employees who had been laid off and probably were not coming back. Slaby said she would let me know. (Tr. 45–46.) Kocher followed up this conversation with a letter to Slaby, dated August 8, and explained his reasons for filing the July 9 charge. The letter stated, in part (GC Exh. 9):

I am once again requesting the Company to discuss the decision to close the Machine Shop and the impact on our members. . . .

I have had no choice other than to prefer charges with the NLRB for lack of negotiating with us over the decision to close the Machine Shop, severance and retirement. [Emphasis added.]

By this time, Komatsu Japan had authorized the Company to bargain on severance for the machine shop. Slaby recalled that sometime in June, after receiving information on the cost of various scenarios, the Peoria office had put together a proposal based on straight severance and sent it to the corporate office (in Vernon Hills), which had taken the proposal to the board of directors in Tokyo sometime in mid-July, during the summer shutdown of the plant. (Tr. 250.)

Slaby explained that the Company did not negotiate with the Union about severance after the summer shutdown, because "we were hearing about [Komatsu Japan's further layoff plan, which was announced on August 19, discussed below, and] we were going to include those individuals in those discussions" (Tr. 250–251).

That explained her reason for telling Kocher on August 2 that she would let him know if the Company was going to offer a severance to employees who had been laid off.

Slaby's statement also confirmed why, in the March 6 and 28 meetings—when the Union discussed proposed "avenues to lessen the impact" of Komatsu Japan's outsourcing decision announced on January 25, "negatively" impacting some machine shop employees—the Company could not offer in effects bargaining any of the requested severance, early-retirement, and retirement benefits the Union sought. The Company was

not then authorized by the owner, Komatsu Japan, to bargain about undertaking such an expense.

On August 19, Casey met with Kocher and the union committee and gave and read to them a document, dated August 19 (GC Exh. 25; Tr. 46–47), informing them that "Komatsu has completed an aggressive internal restructuring of its Japanese manufacturing operations over the last two years" and was converting the Peoria plant into a "Mother" plant. Casey explained that the Peoria plant "would stop being a manufacturing and assembly plant, and simply go to being an assembly plant." (Tr. 46–488.)

Later that day, Kocher and Union Vice President Michael Damm went to Slaby's office and discussed whether there was going to be any negotiations for severance or retirement. Slaby said the Company wanted to meet with them and provided some dates in September for the negotiations. They agreed on dates. (Tr. 49–51.)

On September 4–5 and 11–13, the Company and Union engaged in bargaining over the effects of eliminating machine shop and other plant jobs, but no agreement was reached (Tr. 52, 161–166, 251). There is no allegation that the Company failed to bargain in good faith at these meetings. The evidence does not disclose what proposals were made in the negotiations.

Meanwhile on August 25, at a regular union meeting, Kocher was "bombarded with questions from the membership about what the Union was doing" about the August 19 elimination of jobs. Members were "very vocal that they didn't think that the Union was doing a good job as far as representing them or objecting to the things that were going on." Kocher told them that Casey had said he didn't have any choice in the matter. They asked "Well, what can we do? What is our legal right to do?" When two or three members suggested "Let's strike!" Kocher responded, "That is illegal. It is in our contract" (Tr. 55–56).

Thus, Union President Kocher admitted, in effect, that because of the no-strike provision in the 2000–2003 agreement with the Company (GC Exh. 2, art. 4, p. 14), the Union had no bargaining power to persuade the Company to agree to any of the Union's proposed severance, early-retirement, or retirement benefits.

B. Analysis and Concluding Findings

The General Counsel's principal contention (in brief at 1, 21–25) is that the Company's delay in effects bargaining from January 28 to September 4 precluded bargaining "at a meaningful time" before the July 1 layoff of machine shop employees.

In doing so, the General Counsel ignores the Board's precedent that effects bargaining "at a meaningful time" means that there must be "timely notice" of an employer's decision, giving the union an opportunity to bargain when the union has "at least a measure of bargaining power." The General Counsel ignores President Kocher's admission, indicating that the Union had no bargaining power to persuade the Company to agree to any of the Union's proposed severance, early-retirement, or retirement benefits.

The General Counsel (in brief at 20) first cites *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981), in which the Supreme Court held that "bargaining over the effects

of a decision must be conducted in a meaningful manner and at a meaningful time [emphasis added].”

The General Counsel then cites *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987), in which the Board held that the employer “failed to provide timely notice, thus denying the [union] an opportunity to bargain when [the union] retained at least a measure of bargaining power [emphasis added].”

After citing these two controlling precedents, the General Counsel cites clearly inapplicable Board decisions in cases in which the employer’s untimely notice confronted the Union at the bargaining table with a “fait accompli” (accomplished fact).

The General Counsel cites (in brief at 20, 24–25) the Board’s decision in *Woodland Clinic*, 331 NLRB 735, 737–738 (2000), in which the employer did not respond to the Union’s request for effects bargaining until November 2, merely 3 days before the employer on November 5 closed a department and laid off or terminated two employees. The Board held, 331 NLRB at 738:

The [union’s] right to discuss with the [employer] how the closure of the department impacts unit employees requires that bargaining occur sufficiently before actual implementation so that the [union] is not confronted at the bargaining table with a fait accompli. *Williamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990).

In *Williamette Tug & Barge*, 330 NLRB at 283, the Board decided that, barring particularly unusual or emergency circumstances, the same-day notice of closing and termination of employees deprives the union’s right to discuss with the employer how the impact of the sale on the employees can be ameliorated and confronts the union at the bargaining table with a sale that is a fait accompli.

Concerning this case, the General Counsel argues (in brief at 23):

The Union retained some bargaining leverage [emphasis added] prior to implementation on July 1, but once the Union was presented with a fait accompli, the Union was “relegated to the status of a supplicant, a position incompatible with the purposes and policies of the Act.” *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000).

I note that the General Counsel does not indicate what bargaining leverage the Union had, or could have invoked, after the January 25 notice of the outsourcing, in view of the no-strike provision in the collective-bargaining agreement. The Union was seeking severance, early-retirement, or retirement benefits for all machine shop employees who would be laid off as a result of the announced outsourcing—not only those to be laid off in Phase I by October as a result of outsourcing certain axle assemblies, nor the machine shop employees who were actually laid off on July 1 because of the early outsourcing of axle assemblies.

I also note that the General Counsel omits from the case citation the page number, 331 NLRB at 1613, where it is pointed out that the respondent “conceded that it laid off the [six] employees and that it did so without giving prior notice” to the

union—the reason for the fait accompli finding (emphasis added).

In sharp contrast, there clearly was no untimely notice in this case, confronting the Union with a fait accompli.

As found, (1) the Company announced its outsourcing decision on January 25, long before the rescheduled Phase I layoffs on July 1, (2) in the March 6 and 28 meetings with the Company, the Union made its proposals for severance, early-retirement, and retirement benefits, (3) General Manager Casey notified the Union at the March 28 meeting that he would look into the Union’s proposals, but at that time, “the Company’s position was that there would be no severance offered,” (4) the Company’s corporate actuaries were assigned to determining the feasibility of various scenarios of the proposed benefits, (5) the Union understood that the actuaries were looking at the cost of its proposed severance, early retirement, and retirement for the machine shop employees to be laid off, (6) the Company advised the Union on June 16 that machine shop employees could not be included with other plant employees in voluntary layoffs, because their layoffs were going to be a permanent reduction, and (7) on June 21, the Company notified the Union by letter the names of machine shop employees who were to be laid off on July 1.

The Union’s real complaint about the Company not engaging in good faith effects bargaining was that the Company, after hearing its proposals, was unwilling to offer any of the severance, early-retirement, and retirement benefits sought by the Union.

Regarding whether the Company bargained over the effects of the decision “in a meaningful manner” and “at a meaningful time,” (a) it timely announced the decision to outsource machine shop work on January 25, long before the rescheduled Phase I layoffs on July 1, (b) it twice met in response to the Union’s requests to bargain on effects of the decision, (c) Human Resources Manager Slaby, at the first meeting on March 6, gave the Union the opportunity to fully explain its proposals for severance, early-retirement, and retirement benefits, (d) General Manager Casey, at the second meeting on March 28, listened to and responded to the Union’s proposed benefits, (e) Slaby met with Union President Kocher on May 6, discussed the terms for voluntary layoff of plant employees, but refused to apply the resulting agreement to machine shop employees, and (f) Plant Superintendent Guilfooy met with Kocher about June 16 and still refused to apply the agreement for voluntary layoffs to machine shop employees.

All of these meetings dealt with effects of the decision, announced on January 25, to outsource most of the machine shop work, negatively impacting all of the machine shop employees, except possibly between 10 or 15 machinists whom the Company planned at that time to retain.

After considering all the evidence and the controlling legal precedents, I find that the Company did not unlawfully fail or refuse to bargain on the impact of the outsourcing decision by not meeting with the Union “at a meaningful time.” *First National Maintenance Corp.*, 452 U.S. at 681–682. The Company began meeting with the Union regarding effects of the January 25 announced outsourcing decision on March 6 and 28, long before the rescheduled Phase I layoffs on July 1.

In these meetings, the Union was not denied “an opportunity to bargain when [it] retained at least a measure of bargaining power [emphasis added].” *Metropolitan Teletronics*, 279 NLRB at 959. Because of the no-strike provision in the collective-bargaining agreement, the Union had no bargaining power, not even a measure of bargaining power, to persuade the Company to agree to any of the Union’s proposed severance, early-retirement, or retirement benefits.

Furthermore, the General Counsel has not proved that the Company failed or refused to bargain in good faith on the effects of the outsourcing decision at the two March meetings “in a meaningful manner.” The Union detailed its proposals for severance, early-retirement, and retirement benefits at the March 6 meeting to Human Resources Manager Slaby and Plant Superintendent Guilfoy (in the emergency absence of General Manager Casey). At the March 28 meeting, in which the Union again detailed its proposals, Casey made it clear to the Union that the owner, Komatsu Japan, was exercising control over the Peoria plant, meaning that its authorization was required for granting the machine shop employees any noncontractual benefits.

At the March 28 meeting, the Company promised to look into the Union’s proposals, to determine their feasibility, for deciding what benefit Komatsu Japan might authorize the Company to offer the Union in the effects bargaining. Regarding severance—in accordance with its longstanding position that laid off employees were not eligible for a severance allowance unless “the entire Peoria facility is shut down”—the Company advised the Union that at that time, no severance was offered. After the meeting, as it informed the Union, the Company was fulfilling its promise to determine the feasibility of severance and other proposed benefits, by having the corporate actuaries look into their cost.

By June the actuaries had supplied enough information on the cost of various proposed benefits, for the Peoria office to decide on a feasible proposal based on straight severance, for approval first by the corporate office. The corporate office approved the proposal.

But in the meantime, because of worsened business conditions, the Company changed the timing of the first planned layoffs, from sometime before October to July 1. It did not receive authorization from Komatsu Japan to offer its proposal on severance to the Union in the effects bargaining until later in July, after the rescheduled July 1 layoffs, during the summer shutdown.

I find that the Company was bargaining before July 1 in a meaningful manner, to the limit of its authority, over the effects of the decision to outsource machine shop work. I also find that the Company did not fail or refuse to provide timely notice and did not deny the Union an opportunity to bargain when the Union retained at least a measure of bargaining power, in view of the Union’s admission, indicating that it had no bargaining power because of the contractual no-strike provision, to persuade the Company to agree to any of the Union’s proposals.

I therefore find that the Company did not violate Section 8(a)(1) and (5) by failing or refusing to bargain in good faith, in a meaningful manner and at a meaningful time, regarding the effects of the January 25 announced decision to outsource ma-

chine shop work, before the layoff of machine shop employees on July 1.

CASE 33–CA–14088

A. Threatened Discipline for Wearing “December 7, 1941” T-Shirts

On September 6, Union President Kocher and other employees began wearing the “December 7, 1941” T-shirts at the Japanese-owned plant (Tr. 59, 61, 63).

This was after (1) Komatsu Japan authorized the Company in mid-July to bargain on severance for the machine shop, (2) the Company announced at the August 19 meeting that Komatsu Japan decided to engage in further outsourcing and convert the Peoria plant into a “Mother” assembly plant, (3) the Company and Union agreed later that day on dates in September to engage in effects bargaining for both machine shop and other plant employees, and (4) the union members decided in the regular union meeting on August 25 to have the T-shirts printed, when told that striking in protest of the Company’s actions would be illegal because of the no-strike provision in their agreement. The Company and Union engaged in effects bargaining on September 4 and 5.

The T-shirts were solid black with “DECEMBER 7, 1941” boldly printed with large white, black-trim lettering over a white background, measuring 1 3/4 inches in height and stretching 10 inches across the front of the shirts. On the back, the words “HISTORY REPEATS” were printed, with the same large lettering, followed by the words “NEGOTIATE NOT INTIMIDATE” on three lines in smaller, all-white 1-inch lettering (GC Exh. 10).

Reaction at the Japanese-owned Company was immediate. Upon Labor Relations Specialist Brooks’ hearing about the new “December 7th, Pearl Harbor Attacks” T-shirts, she called the union hall about 11:10 that morning and questioned President Kocher about them (Tr. 62–64). Brooks notified Human Resources Manager Slaby, who said that “December 7, 1941” meant to her “The bombing of Pearl Harbor” (Tr. 260). Slaby, in turn, notified Vice President of Human Resources Gary Aubry at the corporate office in Vernon Hills (Tr. 78, 261).

Later that afternoon, Aubry placed a conference call to Kocher at his home, with Slaby on the line. After Kocher told Aubry the exact wording on the T-shirts, Aubry referred to the negotiations on the 2 days before, September 4 and 5, and asked why they were doing this, stating that he felt that they were making some good progress. (Tr. 78–79, 262.)

Regarding Aubry’s statement about the date December 7, 1941 being offensive, Kocher responded that although Franklin Delano Roosevelt stated that date “will live in infamy,” the date to us “simply meant that there had been a sneak attack on America, and that is how the Union viewed it, that the Union was being attacked by the Company, without any provocation” (Tr. 84).

Aubry told Kocher that the Company’s position was going to be that if somebody wore the T-shirt on Monday, September 9, they would either be sent home or disciplined. Kocher responded that Aubry should check with his legal counsel, and Aubry said he would call Kocher back in 30 or 45 minutes. (Tr. 81.)

When Aubry called back, Kocher told him that the whole purpose of the T-shirts was “to get the Company to negotiate and to stop what they had been doing,” and “As long as we are in fruitful negotiations,” he would “ask the members not to wear the T-shirts” (Tr. 82–83).

The following Monday, September 6, the Company prepared a memo to all the Peoria employees, quoting the wording on the front and back of the T-shirts and stating (GC Exh. 12):

The [“December 7, 1941” inscription] appearing on the T-shirt constitutes unacceptable ethnic disparagement of our Japanese co-workers. We have no interest in interfering with anyone’s right to engage in protected, concerted activity. However, this particular inscription is offensive and bears no relationship to legitimate employee interests or working conditions. If you are wearing one of these T-shirts, please change or turn it inside out. . . . Anyone who refuses to cease displaying the offensive inscription will be subject to discipline.

When asked if she, as the human resources manager, considered the T-shirts to be offensive, Slaby testified yes, because this was a Japanese-owned company and to a Japanese person, “this can be something of sensitivity.” She named the Japanese working at the plant. (Tr. 265–266, 268–272.)

Meanwhile, Brooks assured Kocher that the employees could wear “Negotiate Not Intimidate” on T-shirts “all day long,” but told him that the date “December 7, 1941” was very offensive (Tr. 279–280).

B. Analysis and Concluding Findings

The General Counsel’s contends (in brief at 34) that employees had a Section 7 right to wear the “December 7, 1941” T-shirts, because the shirts were “not so offensive as to be unprotected.”

The General Counsel primarily relies (in brief at 31–34) on *Alaska Pulp Corp.*, 296 NLRB 1260, 1262, 1272–1273 (1989), a decision in which the Board held that a member of a union’s public relations committee engaged in protected concerted activity in writing a letter, dated August 19, 1986, sent to the management of Alaska Pulp Corp. (APC) in Japan and to various newspapers, including the Sitka, Alaska newspaper.

The August 19 letter stated in part (296 NLRB at 1272):

APC [in Sitka] is a company controlled by the Industrial Bank of Japan and other Japanese companies which are in turn controlled by the government of Japan. . . . “Beware of Japan. Her offer of friendship is but a Trojan Horse that once taken in will open to plunder our vast resources, leaving only a hollow shell to be cast aside when no longer profitable.”

That letter, however, is not comparable to the “December 7, 1941” T-shirts that the Company prohibited the employees from wearing at work.

As held in *Alaska Pulp Corp.* (296 NLRB at 1271, 1273), the union committeeman wrote the August 19, 1986 letter during a strike that began in July 1986 “to elicit community support for the strike and also, apparently, to persuade responsible representatives or principals of [the employer] to ‘right the wrongs’ and become more sympathetic toward the Union’s concerns.” Being part of a strike situation “where the very livelihoods of individuals and the profitability” of the employer was being determined, the August 19 letter was protected concerted activity.

In sharp contrast, the “December 7, 1941” date on the T-shirts clearly refers to the Japanese bombing of Pearl Harbor, over 60 years before, “at the start of World War II” and at the cost of “tens of thousands” of lives (as pointed out in the Company’s brief at 17).

As also pointed out in the Company’s September 9 memo to all the Peoria employees, explaining the ban on the T-shirts, the “December 7, 1941” inscription on the shirts “bears no relationship” to the 2002 working conditions, is “offensive,” and “constitutes unacceptable ethnic disparagement of our Japanese co-workers.”

The General Counsel cites no case remotely relevant to the wearing of an offensive union button, insignia, or T-shirt that concerns no current working conditions, but refers to something in the remote past.

I find that because the offensive “December 7, 1941” inscription on the T-shirts refers to an occurrence over 60 years in the past and bears no relationship to working conditions at the plant, wearing the shirts was not a protected concerted activity. I therefore agree with the Company that it did not violate Section 8(a)(1) as charged.

CONCLUSIONS OF LAW

1. In Case 33–CA–14021, the Respondent did not violate Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith, in a meaningful manner and at a meaningful time, regarding the effects of the January 25, 2002 announced decision to outsource machine shop work, before the layoff of machine shop employees on July 1, 2002.

2. In Case 33–CA–14088, the Respondent did not violate Section 8(a)(1) of the Act by threatening to discipline employees if they wore the “December 7, 1941” T-shirts at work.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.³

ORDER

The complaints are dismissed.

Dated, Washington, D.C. June 26, 2003

³ 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.