NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Nestle Purina Petcare Company *and* District Union 271, United Food & Commercial Workers, CLC.[1] Case 17–CA–22997

August 16, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 23, 2005, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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 adopt the judge's rulings, findings,[2] and conclusions as further discussed below and to adopt the recommended Order as modified.

I. INTRODUCTION

The single issue presented in this proceeding is whether Nestle Purina Petcare Company (the Respondent) violated Section 8(a)(5) and (1) of the Act by refusing the Union's request for access to its Crete, Nebraska warehouse to conduct a time and motion study of the work performed by bargaining-unit forklift drivers who had complained to the Union of a work overload. The judge found the violation under *Holyoke Water Power Co*, 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905 (1986). We affirm.

II. THE *HOLYOKE* TEST

In *Holyoke*, the leading case on the issue of a bargaining representative's right of access to an employer's property, the Board concluded that a union is not entitled to access merely because the information it seeks through access is relevant to the union's proper performance of its representational duties. The Board explained that determining whether an employer must permit access to its facility requires a balancing of the employer's property rights against the employees' right to responsible representation. As the Board further explained:

> Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

Holyoke, supra, 273 NLRB at 1370. In subsequent decisions, the Board clarified that, although it is the General Counsel's burden to establish the relevance of the information sought by the union, it is the employer's burden to show that there are alternate means other than access that would satisfy the union's need. See, e.g., *New Surfside Nursing Home*, 322 NLRB 531, 535 (1996) ("employer's burden to establish those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access"); *Exxon Chemical Co.*, 307 NLRB 1254, 1255 (1992) (finding that the witnesses' testimony failed to establish that employer's records would provide a sufficient basis for evaluating employees' work and concluding that "nothing in the record shows that the Union could obtain the complex data that an expert could collect on the basis of observing employees at work in the plant"); *American National Can Co.*, 293 NLRB 901, 905 (1989), enfd. 924 F.2d 518 (4th Cir. 1991).

III. THE PRESENT CASE

We agree with the judge's finding, as fully set forth in his decision, that in this instance responsible representation of employees can be achieved only by the Union's having access to the Respondent's premises. The judge therefore properly found that the Respondent unlawfully denied the Union access to its Crete facility to conduct a time and motion study (time study) of the warehouse forklift drivers. In affirming the judge's finding, we emphasize: (1) that the time study was plainly relevant to the Union's proper representation of the forklift drivers on the work-overload issue; and (2) that the Respondent failed to carry its burden of showing that there were al-

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005. We shall hereafter refer to District Union 271 as the Union.

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

ternate means by which the Union could effectively represent the employees on this issue. Finally, we agree with the judge that the Respondent's reliance on *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), is misplaced, because its facts are distinguishable.

A. The Union Sought Plainly Relevant Information

The Union's request for a time study had its genesis in the Respondent's decision in mid-2002 to designate the Crete facility a "mixing" center. As a mixing center, the Crete facility became responsible for shipping products made at several of the Respondent's other facilities, in addition to those made at Crete. There is little dispute that this change increased the workload of the warehouse forklift drivers.[3] Further, there is no dispute that the forklift drivers, many of whom were older workers with seniority, complained to the Union that they were being overloaded with work.

The Union responded to the forklift drivers' complaints in two ways. First, in collective-bargaining negotiations in late 2002, the Union demanded a pay upgrade for the forklift drivers. As part of the demand, the Union proposed to have its expert conduct a time study to buttress its position that the forklift drivers' workload warranted higher pay.[4] On February 1, 2003, the parties reached a new collective-bargaining agreement that did not contain a pay upgrade for the warehouse forklift drivers. No time study had been done, but the Union continued to request access for its expert to conduct such a study.

Second, on July 3, 2003, the Union filed a grievance claiming that the forklift drivers were laboring under a "work overload" and that all affected employees be made whole. The grievance requested a time study to validate this claim.[5] At a subsequent labor-management meeting, the Union further explained that it wanted to conduct the time study because, if the warehouse forklift drivers were overloaded with work, then it might pose a safety concern.

In these circumstances, there is no question that the time study sought by the Union was relevant to its ability to represent the warehouse forklift drivers. As a general matter, a union is presumptively entitled to information concerning the workload of bargaining-unit employees. See *Beverly Health & Rehabilitation Services*, 328 NLRB 959, 961 (1999). The time study directly concerned the forklift drivers' workload and, therefore, was presumptively relevant. The same presumption of relevance applies to the extent that the Union was also trying to determine whether the drivers' workload raised a safety concern. See *Washington Beef, Inc.*, 328 NLRB 612, 619 (1999).

The relevance of the time study is further demonstrated by its connection to the Union's pending grievance. It is well established that information that enables a union to intelligently evaluate contractual grievances, and to determine whether to proceed to arbitration, is relevant and necessary to the union's performance of its representational duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437–438 (1967); *American National Can Co.*, 293 NLRB 901, 904–905 (1989), enfd. 924 F.2d 518 (4th Cir. 1991). Here, the evidence shows that the Union requested the time study to assist it in processing its grievance, which, as found by the judge, seeks to upgrade the forklift drivers' pay or to adjust their duties so that they are compatible with their existing pay grade. We concur with the judge's observation that "a high probability exists that the proposed time study will produce significant information that would aid the Union to intelligently evaluate the merits of its July 3 grievance before proceeding to arbitration." The time study was therefore relevant for this reason, as well.

The Respondent argues that the Union's grievance cannot support the relevance of the time study because the grievance does not present an arbitrable claim under the parties' collective-bargaining agreement. The Respondent points out that the parties discussed the forklift drivers' appropriate pay grade during their negotiations in late 2002 and early 2003, and that the Union ultimately accepted the new agreement without an enhancement to the drivers' pay. Based on those facts, the Respondent concludes that the Union is foreclosed from asserting in its grievance that the drivers' jobs are misgraded under the parties' contract.

The Respondent's argument lacks merit for several reasons. Primarily, the Respondent's argument boils down to a contention that the Union is not entitled to conduct the time study because its grievance lacks merit.

[3] For example, the Respondent initially set a goal for warehouse forklift drivers of loading three trucks per work shift. The Respondent then increased the goal to four trucks per shift, and acknowledged that the goal may be further increased to five or six trucks per shift. Similarly, the Respondent increased the rate at which its packaging machines dropped pallets to be picked up by the forklift drivers from every 75–85 seconds to every 50 seconds. As the Respondent's plant manager, Greg Hiser, testified, "the speed at which [customers] are asking us to modify what we are able to provide them is continuously increasing."

[4] The Union's expert, industrial engineer John Sittig, explained that he would perform the time study by using a stopwatch to time each component task of the drivers' job. Based on that data, he could then determine the drivers' pace of work and whether the drivers were working in excess of 100 percent efficiency, which would constitute a work overload. Sittig testified that, in a situation like this one, on-site, visual inspection is the only method to measure the pace of work.

[5] The Respondent denied the grievance, which was pending arbitration at the time of the hearing before the judge.

It is settled, however, that in assessing the relevance of requested grievance-related information, the Board does not pass on the merits of the grievance. See *NLRB v. Acme Industrial Co.*, supra, 385 U.S. at 437; *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990). Rather, the Board determines only whether the sought-after information is relevant, under a discovery-type standard, to an arguable contract claim. See *Bell Telephone Laboratories*, 317 NLRB 802, 803 (1995), enfd. mem. 107 F.3d 862 (3d Cir. 1997).

The Union has presented an arguable contract claim here. Union President Donna McDonald testified that the Union's grievance is based on article II, section 11 of the parties' collective-bargaining agreement, which provides, among other things, that when "a current job changes substantially . . . the Company shall fix such job or jobs in the proper pay grade; and if there is disagreement as to the proper pay grade, such disagreement shall be subject to grievance and arbitration." As described above, the Union's grievance seeks either to upgrade the forklift drivers' pay or to adjust their duties in light of their existing pay grade.

There is no merit to the Respondent's claim that the parties dispositively resolved the classification dispute during their 2002–2003 contract negotiations. The judge expressly found that the Union withdrew its proposal to upgrade the forklift drivers because the Respondent agreed to permit a time study by the Union. Thus, we find that the Union's grievance asserts at least an arguable claim under the contract. No more is required to conclude that the grievance is sufficient to support the relevance of the requested time study.[6]

B. The Respondent Failed To Establish Alternate Means

As stated above, a union is not entitled to access to an employer's premises simply because the information it seeks through that access is relevant to the union's performance of its representational duties. An employer may deny access if it establishes that the "union can effectively represent employees through some alternate means other than by entering on the employer's premises." *Holyoke*, supra, 273 NLRB at 1370; see also *New Surfside Nursing Home*, supra, 322 NLRB at 535. The Respondent failed to carry that burden.

Here, the Union's concern was the warehouse forklift drivers' increasing workload. The drivers complained to Union President McDonald that they would be "nit-picked and dogged" about keeping pace "until they either quit or g[o]t out." The Union's industrial engineer, Sittig, testified that a time study would focus precisely on the forklift drivers' pace of work, and would reveal whether the drivers were working in excess of 100 percent efficiency.

The Respondent contends that the Union may effectively represent the drivers on this issue by requesting information on the forklift drivers' pace of work, as well as information about the drivers' work output and production, disciplinary records, forklift speed, and safety records.[7] The Respondent, however, has not shown that it actually has any data regarding the forklift drivers' pace of work. The Respondent's warehouse manager, Eddie Furby, testified that the Respondent had never had an industrial engineer study the forklift drivers' jobs. Further, the Respondent has not shown how the other information it says the Union might request could be used to determine whether forklift drivers are working in excess of 100 percent efficiency. In short, there is no evidence that the Respondent's proposed alternative to a time study would enable the Union to effectively analyze and address the forklift drivers' concerns. See *Exxon Chemical Co.*, 307 NLRB at 1255 (records in possession of employer could not provide data union sought to collect by observing employees at work in the plant); see also *American National Can Co.*, supra, 293 NLRB at 905.

We therefore find, in agreement with the judge, that the Respondent failed to establish that the Union could responsibly represent the warehouse forklift drivers on the work-overload issue through alternate means. Consequently, the Respondent has not established that its property rights should take precedence over the Union's right of reasonable access.

The lack of available alternatives to union access distinguishes this case from *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), denying enf. to 312 NLRB 285 (1993), upon which the Respondent heavily relies. In that case, the Eighth Circuit reversed a Board decision that the employer unlawfully denied union access to its facility to conduct a time study relevant to a grievance

[6] Whether the Union's grievance actually has merit will be left to the judgment of an arbitrator. See *Consolidation Coal Co.*, 307 NLRB 1055 fn. 1 (1992).

Chairman Battista agrees that data concerning the work of unit employees is presumptively relevant. However, it does not necessarily follow that access to the plant is presumptively required. The Chairman does not pass on that issue here. The General Counsel has shown that Union access to the plant can yield relevant information concerning the pace of the work and its impact on the unit employee and that such information is relevant to the grievance. Thus, the General Counsel in the instant case does not need the benefit of a presumption.

[7] The Respondent never offered to provide the Union with any of this data as a substitute for a time study.

over the effect of new production machines on the employees' piece-rate wages.

Contrary to the Board, the court found that the union could responsibly represent the employees on the piece-rate issue without access to perform a time study. Specifically, the court observed: that the union had resolved numerous piece-rate grievances without time studies; that the employer had provided the union with information about employees' earnings, the number of items produced, and the wage rate attributable to that production; that the union could have sought production-rate data from the manufacturer of the new machines; that the union admitted that time studies performed at the employer's other plants might be available; and that the parties' contract actually provided for a joint labor-management investigation when new machinery adversely impacted employees' earnings, but the union had never requested such an investigation. *Brown Shoe*, supra, 33 F.3d at 1023–1024. Finally, given that the employer at the outset had expressed concern that its "operations could be seriously disrupted" by a time study, the court emphasized that it was "disturbed" by the union's refusal to offer the assurances that the presence of a time-study engineer would not be disruptive. Id. at 1024.

Here, in contrast, there is no evidence that the Union had previously resolved similar work-overload grievances without a time study. Although the Respondent, like the employer in *Brown Shoe*, apparently was willing to provide the Union with certain data, the Respondent failed to establish that the data would have enabled the Union to adequately assess the claimed work overload. Moreover, while the union in *Brown Shoe* might have been able to obtain relevant rate-of-work data from the machine manufacturer or from time studies conducted at the employer's other plants, the Respondent did not show that the Union had similar, alternative sources of information on the forklift drivers' pace of work. Further, unlike the situation in *Brown Shoe*, the parties' contract does not expressly provide for a joint investigation.[8] Last, even though the Respondent never asserted any concerns that a time study would disrupt its operations, the Union nevertheless offered to have Sittig jointly conduct the time study with the Respondent's own expert. As the judge found, this offer provided "substantial reassurance that the testing would be conducted in a professional manner and with as little interference in ordinary warehouse operations as possible." For these reasons, we find that the present case is distinguishable from *Brown Shoe*.

[8] It is noteworthy that the Respondent continues to dispute the judge's finding that, in the negotiations leading to that contract, it orally agreed to permit a time study in exchange for the Union's withdrawal of its pay-upgrade proposal. The Respondent has repeatedly rebuffed the Union's attempts to invoke this oral agreement.

IV. CONCLUSION

For the foregoing reasons, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by denying the Union access to its Crete, Nebraska facility to conduct a time study of the warehouse forklift drivers represented by the Union. In keeping with the Board's accommodation policy set forth in *Holyoke*, supra, the Union's access shall be limited to reasonable periods and at reasonable times "consistent with the times least likely to disrupt Respondent's operations." *Hercules Inc.*, 281 NLRB 961 (1986), enfd. 833 F.2d 426 (2d Cir. 1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nestle Purina Petcare Company, Crete, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a):

"(a) Refusing to bargain in good faith with District Union 271, United Food & Commercial Workers, CLC as the exclusive collective-bargaining representative of the employees in the following appropriate unit, by denying the Union's request for access to the Respondent's Crete, Nebraska, warehouse for the purpose of having an expert selected by the Union conduct a time and motion study of the warehouse forklift drivers:

> All production and maintenance employees, including regular part-time employees employed at Respondent's Crete, Nebraska facilities, excluding non-working supervisors, salesmen or office personnel, temporary employees or any employees being trained for sales or executive positions.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 16, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a 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 refuse to bargain in good faith with District Union 271, United Food & Commercial Workers, CLC, as the exclusive collective-bargaining representative of the employees in the following appropriate unit, by denying the Union's request for access to our Crete, Nebraska warehouse for the purpose of having an expert selected by the Union conduct a time and motion study of the warehouse forklift drivers:

> All production and maintenance employees, including regular part-time employees employed at our Crete, Nebraska facilities, excluding non-working supervisors, salesmen or office personnel, temporary employees or any employees being trained for sales or executive positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL promptly grant access to our Crete, Nebraska warehouses at reasonable times and for reasonable periods sufficient for an expert designated by the Union to conduct a time and motion study of the warehouse forklift drivers.

NESTLE PURINA PETCARE COMPANY

Michael Werner, Esq., for the General Counsel.
Bernard J. Bobber, Esq. (Foley & Lardner LLP), of Milwaukee, Wisconsin, for the Respondent.
Emily M. Yeretsky, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The issue presented here is whether Nestle Purina Petcare Company (Respondent or Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by refusing to grant a union expert access to its Crete, Nebraska facility for the purpose of conducting time and motion studies of its warehouse forklift drivers.

District Union 271, United Food & Commercial Workers, AFL–CIO–CLC (the Union) filed the underlying charge on January 3, 2005. The Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on March 28, 2005. The complaint alleges that the Respondent refused three union requests for access to its Crete warehouse in order to conduct a time and motion study as a part of its investigation of a grievance that claimed the Company overloaded its forklift operators with work. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged and interposing three "alternative defenses." In the first and second, Respondent avers that the Union had alternate means of representing employees other than access to its property and that it failed to pursue those alternate means. And third, Respondent claims that the Union failed to bargain in good faith regarding the information it sought.

I conducted the hearing in this case at Crete on June 23, 2005. Having now considered the entire record, including my assessment of the witnesses' credibility based on their demeanor, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I conclude Respondent violated the Act as alleged based on the following[1]

FINDINGS OF FACT

I. JURISDICTION

During the 2004 calendar year, the Company, a corporation with an office and place of business at Crete where it engages in the manufacture and distribution of pet food, purchased and received goods at its Crete facility valued in excess of $50,000 directly from locations outside the State of Nebraska. During the same period, the Company also sold and shipped goods valued in excess of $50,000 from its Crete plant directly to locations outside the State of Nebraska. Based on these operations, I find that the Company meets the Board's nonretail jurisdictional standard and that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this dispute.

[1] I do not credit testimony inconsistent with my findings. Generally, I have based my credibility resolutions on the factors discussed by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388–390 (1949). Certain specific credibility determinations have been noted below. Objections that appear in the transcript without any apparent ruling and any pending motions inconsistent with my findings are overruled.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Facts

The Company produces and ships canned and packaged "wet" pet food from its Crete facility. For most of the time relevant to this case, Greg Hiser served as the Crete plant manager with overall responsibility for operations there. Edward Furby served as the warehouse manager overseeing the work directly at issue. Since at least 1980, the Union has represented the Crete production, maintenance, and warehouse employees. Currently the unit consists of about 250 employees, including about 50 warehouse forklift drivers whose work gives rise to this dispute. The most recent collective-bargaining agreement (CBA) became effective on February 1, 2003, and expires at midnight, February 1, 2008, if not renewed.

Respondent has a manufacturing facility and two warehouses at Crete. A tunnel connects the main warehouse, a 96,000-square-foot facility with 14 loading docks, and the manufacturing plant. A dual conveyor system transports cases of pet food manufactured at the plant through the tunnel to two palletizing machines, known as the "920 Alvey" and the "922 Alvey," in the main warehouse. The Alveys arrange cases of pet food on slip-sheet (48" by 56" cardboard sheets) pallets, wraps the pallet, and deposits it on the warehouse floor. The other warehouse, referred to as the Boswell Distribution Center, is located a few blocks away. Both warehouses operate three shifts.

The warehouse forklifts, all battery powered vehicles, have been modified to accommodate Company's specialized uses. Thus, they have been outfitted with wide steel platinum forks, instead of the typical narrow forks, and pincers that grip the edge of the slip sheet pallet to pull it aboard and push it off. The forklifts have been programmed by the manufacturer for a maximum speed of 7- to 9-miles-per-hour. Other standard forklift equipment includes a scanning gun and a computer for use in recording the product loaded.

Warehouse forklift drivers, known as "line pullers," transport the pallets of product from the Alveys to a designated warehouse location. This staging process requires the line pullers to exercise care in stacking pallets evenly so that "loaders" can later grip the slip sheet while performing their work. Based on a loading sheet provided by the shipping clerk, the loaders retrieve the palletized product and stack it into semitrailers for shipment to customers. In the process, they scan the bar code on each pallet which records, among other things, the time the loader picked it off the staging stack. At the other end, loaders scan a bar tag at the loading dock door to insure that they unload that particular pallet on the proper truck. After finishing the loading product by the loading sheet, the loader returns to the shipping clerk for another loading sheet. The loaders also unload and stage product shipped from sister plants for shipment from Crete. Each loader also maintains a daily loading log (provided by the shipping clerk) designed for recording the work they perform throughout their shift.[2]

Nestle purchased the Purina company in mid-2002. Shortly thereafter, the Nestle management designated the Crete warehouse as the Company's main distribution, or mixing, center. As such, the Company ships products made at Crete as well as other plants from the Crete warehouses.

Several significant changes occurred when Crete became a mixing center. First, the Company changed the software program on the warehouse forklifts from the RMS system to the WMS system in order to be compatible with its other warehouses. Second, for competitive reasons, the Company began filling orders that called for less than a full pallet of product. This change required loaders to manually disassemble and rebuild pallets previously prepared by the Alveys. Third, upgrades to the packaging machinery located in the manufacturing plant reduced the Alveys' pallet drops from about 75 to 85 seconds to approximately 50 seconds, thereby significantly increasing the line-puller's workload.[3] Fourth, the daily inbound and outbound truckloads increased from 40 to 60 to approximately 95 due to Crete's role as a mixing center.

The changeover to the WMS software proved to be more than a minor matter. All drivers received a 4-hour training course on the use of the new program. When the Company commenced using the new software, 21 drivers experienced with its use at sister plants provided hands-on assistance to the Crete warehouse drivers. Three or four stayed for another week, and a few returned at intervals to deal with specific issues the Crete drivers encountered with the WMS program. Some drivers believe the WMS program is an improvement; others describe it essentially as a time-consuming hindrance.

The increased speed of the upgraded packaging machines presented other challenges, particularly for the line pullers. Because of the increased frequency of the pallet drops, the line pullers must transport and properly position a loaded pallet much more quickly to its storage site and return in time for the next pallet drop. As a result, the drivers themselves established an informal rule giving the line pullers the right-of-way in the warehouse at all times. Even so, loaders must lend assistance on occasion so the line pullers can keep abreast of the output.

The mixed pallet orders created a different time-consuming problem that required the assignment of a loader or two each day to the task of tearing apart the wrapped pallets to build a new pallet by hand containing the mixed cases of product ordered by a customer. After building a new pallet, the driver wraps it and stages it for loading later. Usually, first shift drivers build the mixed pallets and the second shift drivers load them for shipment.

The Company hired several new forklift drivers to meet the added demands resulting from the increase in both outbound and inbound loads. Even this recruitment program produced turmoil. Most of the new hires lacked experience driving a forklift and required substantial training. On occasion, supervision assigned an experienced driver to follow a new driver for on-the-job training. Several of the new employees gave up

[2] Some evidence suggests that a few employees have forklift driving duties in areas other than the warehouse. Only the warehouse drivers are directly involved in this dispute.

[3] The use of the slip-sheet pallet, apparently a tricky device for drivers to master, appears to have come into use along with the Alveys and, therefore, not a change made in connection with the conversion of the Crete warehouse's to a mixing center.

after they concluded that they lacked the skills required for the position. The rest went through a learning-curve period before becoming fully productive. Through this period several drivers worked as many as 12 to 16 hours per day, 6 or 7 days per week in order to meet the increased demands.

Initially, the warehouse supervisors set a goal for the loaders to load three trucks per 8-hour shift. Later, the supervisors increased that goal to four trucks per shift after most drivers acquired the skill and familiarity with the system to load that many trucks during their shift. The warehouse manager suggested that the goal may be increased to five or even six in the future if most drivers demonstrate the ability to reach output at that level. Although the Company eschews any suggestion that it established a standard for the warehouse drivers, shift supervisors typically conduct individual conferences in the warehouse office with loaders who fail to meet the current goal for 3 or 4 consecutive days in an effort to learn the reasons for failing to meet the goal and to help the loader toward that end. In preparation for this discussion, the supervisor usually reviews the driver's daily loading log for the assignment of ancillary duties and the computerized activity log to determine if the loader has extensive time gaps when pulling pallets. Ordinarily, the warehouse management expects a loader to pull a new pallet every 8 to 10 minutes in order to meet the current loading goal.

By September 2002, after the Crete warehouses largely completed the mixing center changeover, Union President Donna McDonald began receiving telephone calls from the warehouse forklift drivers complaining about the impact of the changes and the excessive number of hours the Company required them to work. These complaints prompted McDonald to telephone Gwen Herzog, the Company's human resources representative at the time, seeking a meeting to discuss these problems. Herzog requested that they take those matters up during negotiations for a new contract about to begin in a few months. McDonald went along.

The first negotiation session occurred on December 17. During this session, the bargaining committees essentially exchanged and reviewed their initial proposals.[4] Union proposal 73 sought to upgrade 13 job categories including the warehouse loaders and line pullers.[5] The current collective-bargaining agreement (CBA) contains 10 pay levels. It classes all forklift operators at pay level two, one step above the lowest pay level. Proposal 73 did not specify the pay level upgrades but Rick Skillett later requested the warehouse forklift drivers be upgraded to pay level four during subsequent grievance meetings. The parties agreed to postpone discussions about the union proposal 73 until they dealt with economic terms.

The parties reached the economic subjects toward the end of January. During discussions about upgrading the warehouse forklift drivers, they talked about the changes that had occurred and the increased complexity of those positions after the conversion of the Crete warehouses to a mixing center. Cooper told the union committee that he did not oppose a time study for those positions but he warned that it could result in jobs being downgraded. McDonald responded by saying, according to the Company's notes, "Those are the rules of the game." Plainly, her remark implicitly acknowledges a practice that typically includes the use of time and motion studies for determining pay grade levels.

Later, on January 29 negotiating session, McDonald offered to withdraw union proposal 73 if the Company would permit John Sittig, the Union's expert,[6] to conduct time and motion studies of the warehouse forklift drivers. Although this discussion occurred in the context of the Union's upgrade proposal, McDonald credibly asserted that the Union wanted its own time study so it could seek job modifications to make the warehouse positions fit within its current pay level should the Company refuse to upgrade the pay level. She claims Cooper assented to the Union's offer to withdraw proposal 73 in exchange for a time study by Sittig. The Company disputes that any such deal occurred.[7] Regardless, the union members ratified the new agreement on February 1.

The new CBA contains various provisions pertinent to this dispute. Thus, article IX, section 3, provides for access to the Company's premises by union agents for the purpose of transacting union business during working hours so long as the visiting agents do not take anyone off their job without permission by a Company official, or otherwise disturb the orderly work flow. The CBA also requires the union agent to notify management prior to entering the facility and upon departure. McDonald, the union president for the past 6 years, estimates that she visits the plant premises about 12 times a year, and Lee, the business agent assigned to service this unit, visits the facility once or twice a week. Ordinarily, visiting union officials do not seek access to working areas. Instead, they meet with employees during their breaks in the lunch room. How-

[4] McDonald headed the Union's committee. Others included Union Vice President Rick Skillett, Business Agent Linda Lee, Chief Steward Jerry Degenhardt, Third-Shift Steward Matt Summers, maintenance worker Ray Hollman, a maintenance worker, and second-shift employee Shelly Vyhnalek. Ken Cooper, a corporate manager, headed the Company's committee. Others with him included Herzog; Stacy Olson, Herzog's successor, Maintenance Superintendent Harry Pulliman, and Safety Supervisor Jim Heitman. Plant Manager Steve Shultz attended some, but not all, sessions.

[5] Union proposal 76 sought to change the job title for the loaders. It appears to have been treated as an adjunct to union proposal 73.

[6] Sittig, currently the director of the UFCW International Union's engineering department, has worked for the UFCW as an industrial engineer since 1981. Although not a licensed engineer, Sittig received training at Ohio State University relating to time studies and on-the-job training pertaining to that subject at the industrial engineering department of the John Morrell Company in Sioux Falls, South Dakota. Since his UFCW appointment in 1981, he conducted numerous time studies at plants from coast-to-coast. He belongs to the Institute of Industrial Engineers and served on the board of its Society of Engineering Management Systems.

[7] Stacy Olson, the only Company official present at the negotiations who testified, denied that that the Company made a commitment that would permit Sittig's testing. She also identified an incomplete set of Company bargaining notes prepared by her predecessor which contains no information about the disposition of union proposal 73. Because of Olson's secondary role during the negotiations, and as McDonald exhibited a more detailed recollection concerning the disposition of union proposal 73, I find the latter's account more reliable and credible.

ever, no union representative has ever visited the premises for the purpose of conducting a time study or any other type of technical information-gathering study.

In addition, when the Company creates or bids a new job, substantially changes a current job, or adds a new department, article II, section 11, requires the Company to "fix such job or jobs in the proper grade." This provision provides for the resolution of any grade determination disputes under the CBA's grievance-arbitration system.

The CBA's management's rights clause (an unnumbered section preceding article I) specifically provides that, unless otherwise limited by the CBA, the Company retains, among other things, the right to "make and enforce reasonable plant rules and regulations, . . . determine and enforce reasonable standards of production, . . . determine the type and quantity of machines and equipment, . . . [and] introduce new or improved production methods, machines or equipment. . . ."

Finally, CBA article IV, section 5 requires the Company to provide "reasonably safe" working conditions and "to give consideration to suggestions from the Union or individual employees concerning safety devices or procedures."

After discussing the forklift driver problem with Sittig, McDonald requested that he time study the warehouse forklift drivers.[8] According to Sittig, a time and motion study seeks to determine if the job requirements that the employer has established for a particular position amounts to a "fair work requirement . . . [for] the members of our union." By contrast, an industrial engineer's "job evaluation" seeks to determine if the labor rate "is correct for the job in question." When requested to do a time study, Sittig (in accord with professional standards) uses a stopwatch to time an operator while performing the requirements of the position. If the position consists of repetitive elements, the study would not likely require the tester to time the employee throughout an entire shift. In the process, the engineer "pace rates" the worker, i.e., makes a judgment based on expert knowledge and experience of the task being performed as to whether the worker exceeds, or fails to meet, a "normal" pace. By contrast, for a job evaluation, an engineer such as Sittig uses the employer's own system and makes an independent determination as to whether the labor rate is correct after a period of observation.

A month or so after ratification McDonald telephoned Stacy Olson to arrange for Sittig's time and motion study of the forklift drivers. Olson responded that she wanted to discuss the matter with Greg Hiser who became the Crete plant manager in March and had not been involved in the negotiations.[9] Having heard nothing further, McDonald e-mailed Olson on May 23 to report that Sittig would be "in Crete on May 28th to do a time study on the 'slip sheet loader and unloader' position." In response, Olson advised that the Company would not permit Sittig in the warehouse until Hiser, the new plant manager, discussed the subject with McDonald at the semiannual joint labor/management meeting scheduled for June.

At the June joint meeting, McDonald reiterated the Union's request to have Sittig to time study the warehouse forklift drivers to determine "if there was truly a workoverload." When Hiser pressed McDonald to explain the Union's "rationale" for wanting a time study, McDonald responded that several workers complained about the added burdens resulting from the job changes and the increased complexity of the system so the Union needed to "check out it out." Miser told McDonald that he would get back to her after he investigated the system.

Two or 3 weeks after the joint meeting, McDonald called Olson to ask about Hiser's investigation. Olson reported that Hiser had not yet completed his study and that she would get back to McDonald later.[10]

On July 3, Union Steward David Kraus filed a grievance claiming that the Company had overloaded the warehouse forklift drivers with work since September 2002. The grievance requests that the forklift operators positions be time studied immediately and that all "affected employees be made whole."

Olson met with Union Vice President Rick Skillett, a Crete employee, and Kraus on July 30. She first asked for more information about the matter grieved. In response, Skillett and Kraus talked about changes in the warehouse and argued that the forklift drivers should be upgraded to pay level 4 because of increased complexity involved with the WMS program and added responsibilities they now shouldered for inventory control in the warehouse.[11] Olson interpreted their arguments to be an extension of the pay upgrade discussions during the recently concluded negotiations where Skillett made similar contentions on the drivers' behalf. Skillett and Kraus raised no concerns about safety at this meeting nor did they specifically address the grievance's demand for a time study. After hearing them out, Olson told Skillett and Kraus that she would relay their arguments to Hiser because she lacked the authority to respond to this grievance. Skillett asked Olson arrange for him to meet with Hiser and she did.

On August 6, Olson and Skillett met with Hiser. Hiser asked Skillett to explain what the Union sought as a remedy for the grievance. Skillett explained again that the grievance sought to have the warehouse forklift driver's position upgraded to pay level 4 and he supported his position with the same arguments made at the July 30 meeting. Hiser asked Skillett to explain why this matter had not been taken care of during the recent negotiations. According to Olson, Skillett responded that the matter "just slipped through." Presumably, Hiser denied the grievance but the record contains no written response to the grievance. By the time of the hearing, the grievance was pend-

[8] McDonald explained that the Crete work force generally has "high seniority." This caused the Union to harbor a concern about the physical ability of the forklift drivers to keep up with increased daily work demands imposed by the Company.

[9] I base this finding on McDonald's credible testimony. Olson had no recollection of this call. Some of Olson's memory lapses struck me as creations of convenience.

[10] Concededly, Hiser never talked directly to McDonald apart from the semiannual joint meetings and, even then, he left the sessions to conduct other business. Rather, he invariably relied on Olson as a conduit to McDonald.

[11] Pay level 2 employees earned an hourly rate of $13.65 in 2003. Pay level 4 employees earned $14.07. GC Exh. 2: 48–49. However, the Company also maintains a performance incentive program that results in quarterly bonuses ranging from 2-1/2 to 7-1/2 percent of their quarterly earnings provided employees meet key performance indicators.

ing arbitration. Because of its current status, McDonald claims that the Union needs its own time study to aid in deciding whether to proceed to arbitration.

For unexplained reasons, more than 10 months elapsed before the time study issue arose again. On May 11, 2004, McDonald e-mailed Olson about two matters. In the part pertinent here, McDonald asked: "When would be a good time for [the Company's] Industrial Engineer to do a time study with the Union time study person in the Warehouse?" She reminded Olson that the Union still had an outstanding grievance "on this issue with the fork drivers." Olson replied advising McDonald that the Company expected executives from its Switzerland headquarters in early August so management would not be able to focus on the time study matter until they left.

On August 18, 2004, McDonald again e-mailed Olson seeking the name and telephone number of the Company's industrial engineer so Sittig and that person could coordinate schedules for the completion of the warehouse time study. In discussions that followed, McDonald and Olson agreed to take the matter up at the joint labor-management meeting scheduled for September 14. The agenda of that meeting reflects this topic as the second matter following a general discussion of safety protocols.

At the outset of the September 14 meeting, McDonald sought to establish a protocol for employees to utilize if they believed a safety issue existed. After that, the parties discussed the warehouse forklift drivers. When McDonald again asked for a time study, Hiser asked her to explain why she needed it. She told him that the Union wanted its own time study expert to determine if a work overload situation existed in order to properly represent the employees. McDonald also argued that the drivers' extended work schedules posed a safety problem. Hiser told McDonald that he did not quite understand why the Union thought a time study would accomplish that and asserted that no safety concern existed in the warehouse. McDonald reiterated that the time study would tell the Union whether the Company overloaded the drivers with work and, if so, then it might be a safety concern. She argued that the Union had a right by law and by contract to have the time study and after that had been accomplished, she also wanted to schedule a time after the national elections to review the Company's OSHA 300 logs. Hiser responded that the Company would have its safety manager "pull information together" about the Company's safety incidents and they would go over it with her in a subsequent meeting. In addition, the Company also committed itself to doing "some follow up analysis" regarding the pay and safety issues related specifically to the warehouse forklift drivers.

Following this meeting, Hiser directed Warehouse Manager Furby, Safety Director Heitman, and Logistics Manager Robert Taylor to conduct a "risk analysis" of the warehouse operation. Despite Hiser's off-handed claim at the September meeting that no safety problems existed in the warehouse, his own management group recommended changes such as the widening of aisles, removal of some racks adjacent to a loading dock door (one of which had been implicated in an accident that caused injury to a worker), and restriping some rows. The Company adopted these recommendations and made the changes.

Hiser also requested Olson to do an analysis of the forklift drivers' pay in relation to the other jobs at the Crete and at sister plants. Her analysis, Olson vaguely testified, "showed it was kind of a mixture, nothing seemed out of whack. What we were doing was pretty comparable on the whole to what they were doing at the other plants."

In October, an OSHA investigator conducted an inspection of the warehouse operation based on a worker's complaint alleging "an inadequate Powered Industrial Truck program and unsafe forklift usage." At the conclusion of the on-site inspection, the investigator orally informed Company officials that he found no violation of OSHA rules. The OSHA area director confirmed that conclusion in a letter dated May 23, 2005.

When McDonald went to the plant on November 3, she met initially with Olson and Heitman. At that time, they made a slide presentation to McDonald based on Heitman's analysis of the Company's safety incidents and provided McDonald with a summary.[12] This analysis showed that the bulk of the safety incidents occurred earlier in the workweek and earlier in a shift which suggested to Company officials that no safety problem resulted from long workdays or workweeks.

After Heitman's presentation, McDonald asked Olson about the Union's time study request. Olson told McDonald that the Company still would not let Sittig do a time study. She said that Hiser wanted her to submit a letter summarizing the Union's rationale for requesting the time study. Although McDonald agreed to do so, she accused the Company of interfering with the Union's ability to properly represent the unit workers by denying access to investigate working conditions in the warehouse. McDonald asserted that the Union needed the time study to evaluate the warehouse forklift jobs in order to determine if a work overload or a safety issue existed. The Company never provided McDonald with the OSHA 300 logs requested earlier but it does not appear that she pressed this issue with Olson at this meeting.

McDonald explained the basis for the time study request in a letter dated November 26. She stated:

> First of all the Union has filed a grievance on behalf of the workers in the Warehouse for a work overload. These workers have seen an increase in responsibility in work duties, they are being challenged daily with time constraints as well as logistical challenges, the configuration of the plant itself presents challenges, with an increased workload comes safety concerns, and this very same issue was discussed during the last negotiations. The Company has also stated that there is no standard for forklift drivers currently and that the work requirement is only compared to other plants of Nestle Purina. During the last negotiations, the Union had requested an upgrade to these workers as their job duties do vary from the other "forklift" workers in the plant. Mr. Ken Cooper, Nestle Purina's Chief negotiator, stated that there were some jobs that would need to be time studied, this job being one of those.

[12] The date of this presentation is based on McDonald's credited testimony. Olson and Heitman thought the presentation occurred on September 23, but their recollection appeared largely influenced by the fact the analysis (GC Exh. 9) had "9/23/04" written on it.

The letter concludes by notifying Olson that Sittig would be at the plant on January 4 for the time study and asked that she notify the Company's industrial engineer of Sittig's planned visit.

Olson responded in a letter dated December 7 saying that the Company still did not have a "clear understanding of what a time study is going to establish." Olson reminded McDonald that she had been presented with information "regarding an assessment of the safety risks in the warehouse and an evaluation of the pay for the forklift operators." Olson advised that the Company saw no need for any changes after comparing the warehouse forklift drivers with other Crete forklift drivers and drivers at other Company plants. Additionally, Olson said, "we do not concur that a commitment was made to conduct a time study." Olson concluded by telling McDonald that Sittig's time study would not be permitted.

Hiser admitted that he made the decision to deny the Union's time study request because he concluded "that admitting the industrial engineer offered no advantage to the employees or the [C]ompany." Even though Hiser asserted in his testimony that the presence of an outsider moving throughout the warehouse presented an increased "risk of something negative happening from a safety perspective or a distraction perspective" because the warehouses are high activity areas, no evidence shows that any Company official ever articulated this rationale to McDonald as a reason for denying access.

B. Further Findings and Conclusions

For some time, the Board treated a bargaining representative's request for access to an employer's plant in order to conduct technical tests—such as a time and motion study—as tantamount to a request for information. *Fafnir Bearing Co.*, 146 NLRB 1582, 1585 (1964), enfd. 362 F.2d 716 (2d Cir. 1966). Ordinarily when a union requests of an employer information deemed relevant and reasonably necessary to the proper performance of its duties as the employees' exclusive bargaining representative, the employer's duty to bargain in good faith under Section 8(a)(5) requires prompt compliance with the request. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). A bargaining representative's right to relevant information exists not only for the purposes of negotiating a collective-bargaining agreement, but also for proper administration of an existing contract. *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978).

Based largely on the Court's opinion on review in *Fafnir,* the Board later formulated a balancing test for use in deciding whether an employer must accommodate a request for access to its premises by union experts for the purpose of conducting technical studies. *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985). The Board articulated the following rationale for this balancing test:

> We agree with the Respondent's contention that an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Thus, we disagree with the judge's analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, *ipso facto*, obligates an employer to open its doors. Rather, each of two conflicting rights must be accommodated. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966). First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox*, supra, 351 U.S. at 112, the Government protects employee rights as well as property rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."
>
> Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees' can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

Applying the *Holyoke* balancing test here, I have concluded that the Union's request for warehouse access to conduct a time study outweighs the Company's property rights. Accordingly, I have concluded that the Company must afford the Union's designated expert reasonable access to conduct the proposed time and motion study. *Exxon Chemical Co.*, 307 NLRB 1254 (1992).

Hardly any dispute exists about the fact changes occurred at the Crete warehouses in mid-2002 that substantially impacted the work of the loaders and line pullers. This had become apparent to the Union as early as September 2002 when it sought a meeting to address the resultant worker complaints. However, at the Company's request, the Union deferred that discussion until collective-bargaining negotiations. When the new contract negotiations started, the Union submitted its proposal 73 seeking to upgrade those two classifications as well as several others based on various changes. Although the Company did not agree to an immediate upgrade, its negotiator expressed his willingness to time study the jobs but explicitly stated that such a study could result in a downgrading of the forklift driver's position. The unmistakable inference is that any up-

grade for the forklift drivers would require a time study justification. Moreover, I conclude that the Company induced the withdrawal of proposal 73 by agreeing to permit Sittig's time study. For those reasons, I find the situation here factually distinguishable from *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), a case cited and heavily relied upon by Respondent.

Consistent with the understanding during negotiations, the Union sought access to time study the warehouse, the loaders, and line pullers shortly after the contract's ratification. The July 3, 2003 grievance formalized this time-study demand. The grievance, prepared by an in-plant steward, explicitly complains of a "work overload," but impliedly embraces the forklift drivers' added duties, and increased job complexity and responsibility. The upgrade arguments Rick Skillett made at the grievance meetings and McDonald's subsequent reference to the Union's safety concerns establishes the hybrid character the grievance acquired. As McDonald explained, the Union ultimately seeks to either upgrade the loaders and line pullers because of the 2002 changes or, to adjust their duties so they become compatible with their existing pay level.[13] Regardless, the access requests have a very legitimate and intimate connection to the Union's duties and obligations as the exclusive employee representative.

I also find the Union's access requests relevant and reasonable. At negotiations, the Company's chief spokesman undeniably tied any change of grade for these positions to time studies. This prompted the Union to propose a time study by its own expert, a particularly understandable request in light of the lead negotiators common understanding that a time study could result in a position downgrade instead of an upgrade. In view of the Company negotiator's own assertions about the necessity of a time study for the driver positions, it becomes difficult logically to conclude that the requested testing might lack relevance or have a meaningful alternate approach.[14] Clearly, a high probability exists that the proposed time study will produce significant information that would aid the Union to intelligently evaluate the merits of its July 3 grievance before proceeding to arbitration. In this context, I conclude that no adequate substitute exists for actual on-the-job testing. *Exxon Chemical Co.*, supra; *Wilson Athletic Goods Mfg. Co.*, 169 NLRB 621 (1968). Respondent's arguments faulting the Union for failing to request and analyze work output data, safety data, and disciplinary record lacks merit. Based on the position Respondent took during negotiations that shows a clear connection between a time study and its willingness to upgrade these positions, I fail to see the efficacy of these alternative materials.

Several other considerations support an accommodation in this case. Thus, as the postnegotiations access requests evolved, McDonald actually invited the Company's time study expert to jointly participate with Sittig during the testing. This request for joint participation strongly indicates the Union's amenability to testing in a manner likely to be least disruptive to the Company's operations as required under *Holyoke* principles. At a minimum, the presence of the Company's own expert along with Sittig provides a substantial reassurance that the testing would be conducted in a professional manner and with as little interference in ordinary warehouse operations as possible. Moreover, the Company's rejection of Skillett's upgrade requests during the grievance meetings, and the Company's subsequent rejection of an upgrade based on Olson's informal and unilateral survey of similar classifications at other Company facilities elevated the relevance of the request by arguably triggering the application of contract article II, section 11, which provides for the resolution of such issues under the contractual grievance/arbitration system.[15] The fact that the Union advanced contentions from time-to-time about the safety resulting from added work load requirements only enhances the relevance to the information the Union seeks from direct observation and testing. *C.C.E., Inc*., 318 NLRB 977, 998 (1995); *Minnesota Mining & Mfg. Co*, 261 NLRB 27, 29 (1982). In fact, the physical changes made in the warehouse following the Company's risk analysis ordered by Hiser after the September 2004 joint meeting demonstrates the value of direct, expert observation the Union sought all along and continues to seek.

Here, as in *American National Can*, 293 NLRB 901, 905–906 (1989), Respondent has already "contractually agreed to a limited infringement of its property rights." Aside from the recent negotiations, the contractual commitments and practices concerning access by union agents substantially diminish Respondent's property claims. The CBA provides for union access and union representatives regularly avail themselves of this privilege. Although Union Agent Lee nearly always confines her visits to the lunchroom when meeting with employees, both Lee and McDonald have toured plant's work areas. In the absence of evidence to the contrary, this history demonstrates the Union's respect for the Company's production requirements. No basis exists to conclude, as Respondent argues in its brief, that the contractual access provision only contemplates lunchroom visits.

Respondent makes numerous unmeritorious contentions regarding the deficiencies of the pending grievance under the contractual grievance-arbitration system. Thus, it argues that

[13] Respondent fashioned various arguments in its brief premised on McDonald's reference to the Union's concern about safety. I find these arguments lack merit as they incorrectly assume that her incidental safety contentions at the September 2004 joint meeting represented the sole motivation for the time study request. The evidence strongly supports the conclusion that her safety argument at that time grew out of the overall safety discussion that immediately preceded the discussion about the forklift drivers. Consequently, when that discussion concluded and the long-festering forklift driver issue came up next, Hiser (as he did several times) demanded that the Union justify its request for a time study. McDonald immediately addressed a safety concern about the forklift driver situation. I find her justification effort an incidental and logical outgrowth of the safety discussions the parties just completed.

[14] In its brief, Respondent also contends that a time study cannot be done because it neither has nor enforces a work performance standard. I reject this contention in view of the ample evidence showing the Respondent pressures its loaders to load four trucks per shift or explain why they did not. Likewise, the drop rate for the Alvey palletizer appears to establish an ad hoc standard for the line pullers.

[15] Under sharp questioning by Respondent's counsel, McDonald specifically alluded to this provision as being relevant to the pending grievance. Tr. 68: 22.

the grievance is untimely under article XII, section 2. However, by its terms, that provision refers to grievances filed by an employee. By contrast, article XII, section 6, provides "either party" may file a grievance, and, unlike section 2, that provision contains no time limits. Respondent cites section 6 for an added claim that the grievance is not arbitrable because it fails to "clearly set forth the issues and contentions of the aggrieved party," and this grievance makes no reference to safety. As found above, I have concluded that even though the Union raised an incidental safety contention, it advanced abundant other reasons for its work overload claims. Finally, Respondent argues that the grievance would not be arbitrable because it does not relate to some specific contractual provision as required under article XII, section 7. Having concluded that the grievance concerns a claim that Respondent improperly graded the two warehouse driver classifications following changes in 2002, I find this contention without merit as article II, section 11, specifically provides for the resolution of these types of disputes.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive collective-bargaining representative of the following appropriate union of employees within the meaning of Section 9(a) of the Act:

> All production and maintenance employees, including regular part-time employees employed at Respondent's Crete, Nebraska facilities, excluding non-working supervisors, salesmen or office personnel, temporary employees or any employees being trained for sales or executive positions.

3. By refusing to grant the Union's industrial engineer access to its Crete, Nebraska warehouses in order to conduct a time and motion study of the warehouse forklift operators, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act. My recommended Order will require that Respondent, upon request, grant access to a Union-designated expert for the purpose of conducting a time and motion study of Respondent's warehouse forklift drivers. This accommodation may be limited to reasonable periods and at reasonable times, consistent with the times least likely to disrupt Respondent's operations but which will permit the Union's expert to complete the testing requested. *Hercules Incorporated*, 281 NLRB 961 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Nestle Purina Petcare Company, Crete, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with District Union 271, United Food & Commercial Workers, AFL–CIO–CLC, (Union) by denying the Union's request for access to Respondent's Crete, Nebraska warehouses for the purpose of having an expert selected by the Union conduct time and motion studies of the warehouse forklift drivers.

(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) Upon request, grant access to its Crete, Nebraska warehouses at reasonable times and for reasonable periods sufficient for an expert designated by the Union to conduct time and motion studies of the warehouse forklift drivers.

(b) Within 14 days after service by the Region, post at its facility in Crete, Nebraska, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, it has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2004.[18]

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

Dated, Washington, DC December 23, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[16] 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.

[17] 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."

[18] The Union's request for access has clearly been renewed continuously throughout this lengthy dispute. However, as the Union filed the charge on January 3, 2005, no unfair labor practice finding could predate July 3, 2004, because of the limitations contained in Sec. 10(b). For that reason, I find this date comports with the requirement in *Excel Container, Inc.*, 325 NLRB 17 (1997).

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 a 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 refuse to bargain in good faith with District Union 271, United Food & Commercial Workers, AFL–CIO–CLC (Union) by denying the Union's request for access to our Crete, Nebraska warehouses for the purpose of having an expert selected by the Union conduct time and motion studies of the warehouse forklift drivers.

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 upon request, grant access to our Crete, Nebraska warehouses at reasonable times and for reasonable periods sufficient for an expert designated by the Union to conduct time and motion studies of the warehouse forklift drivers.

NESTLE PURINA PETCARE COMPANY