**Plymouth Locomotive Works, Inc. Plymouth Office Workers Union.** Cases 8-CA-13281 and 8-CA-13621-1

May 30, 1982

## DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On August 28, 1981, Administrative Law Judge Thomas E. Bracken issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge, and to adopt his recommended Order,[4] as modified herein.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

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

Respondent also contends that the Administrative Law Judge's findings and conclusions are the result of bias and prejudice. After a careful examination of the record, we find no merit in this contention.

The Administrative Law Judge found, at fn. 12 of his Decision, that the parties had agreed to the bumping procedure contained in the shop employees contract. The record, however, indicates that the parties had agreed to the bumping procedure quoted in the second sentence of fn. 12, which is different from, and less restrictive than, the shop employees bumping procedure. This inadvertent error does not affect our decision herein.

The passage quoted by the Administrative Law Judge in the second paragraph of sec. II, F, of his Decision is from *Chet Monez Ford*, 241 NLRB 349, 350 (1979). The passage is itself a quotation from *Guerdon Industries, Inc., Armor Mobile Homes Division*, 218 NLRB 658, 659 (1975), which cites *Celanese Corporation of America*, 95 NLRB 664 (1951).

[3] We hereby amend the Administrative Law Judge's Conclusion of Law 1, as follows, to conform more closely to the violation found:

> "1. By unilaterally granting merit increases to its office and technical employees during the period of January 1979 through April 1980, and by unilaterally granting a 25-cent-per-hour wage increase on April 20, 1980, when a majority of the employees in the appropriate unit described below, at a Board-conducted election, had designated the Union as their collective-bargaining representative, without affording the Union the opportunity to bargain about such matters, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act."

[4] We find that it will effectuate the purposes of the Act to require Respondent to expunge from Howard's personnel record, or other files, any references to his unlawful demotion or constructive discharge. We shall modify the Administrative Law Judge's recommended Order accordingly.

We have modified the Administrative Law Judge's recommended Order to conform it to his recommended remedy and notice, with respect to the extension of the certification year.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Plymouth Locomotive Works, Inc., Plymouth, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Upon request, bargain with the above-named Union as the exclusive representative of the employees in the unit described above, concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The certification year shall extend 1 year from the date that such new bargaining negotiations begin."

2. Insert the following as new paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from Ervin W. Howard's personnel records, or other files, any references to his demotion effective March 1, 1980, and his subsequent constructive discharge."

3. Substitute the attached notice for that of the Administrative Law Judge.

## APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT make any changes in the wages, hours, or other terms or conditions of employment or eliminate positions of the employees in the aforesaid collective-bargaining representative unit without first giving notice

to their collective-bargaining representative and affording such representative an opportunity to engage in collective bargaining with respect to any such proposed change.

WE WILL NOT threaten to withdraw any wage increases or insurance benefits.

WE WILL NOT maintain any rule which prohibits any employee from distributing literature or soliciting on behalf of a labor organization in nonworking areas during nonworking time.

WE WILL NOT demote, discharge, or otherwise discriminate against any of you for supporting Plymouth Office Workers Union, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain collectively concerning rates of pay, wages, hours of employment, the elimination of jobs, and other terms or conditions of employment with Plymouth Office Workers Union, as the exclusive representative of all the employees in the appropriate unit described below and, if an agreement is reached, we will execute a written contract incorporating the terms of the agreement. The Union's certification year shall extend 1 year from the date such new bargaining negotiations begin. The appropriate unit is:

> All office clerical employees and technical employees employed at the Respondent's Plymouth, Ohio facility, excluding all production and maintenance employees, and professional employees, guards and supervisors as defined in the Act.

WE WILL offer Ervin W. Howard immediate and full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his demotion, less any net interim earnings, plus interest.

WE WILL expunge from Ervin W. Howard's personnel records, or other files, any references to his demotion of March 1, 1980, or his subsequent constructive discharge.

WE WILL make Margaret Reeder whole for any loss of earnings and other benefits resulting from her layoff, less any interim earnings, plus interest.

PLYMOUTH LOCOMOTIVE WORKS, INC.

## DECISION

### STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge: These cases were heard at Norwalk, Ohio, on August 25-26, 1980.[1] The original charge was filed by the Union on October 19, 1979, with a complaint being issued thereon on November 23, 1979. A second charge was filed on March 3, amended March 31, and the amended consolidated complaint was issued on April 30, 1980. Amendments to the complaint were also made at the hearing. The consolidated complaint avers that Respondent committed various acts violating Section 8(a)(1), (3), (4), and (5) of the Act. Respondent in its answers denied that it committed any unfair labor practices. The case presents the following issues:

(a) Whether Respondent unilaterally granted merit increases to employees in the bargaining unit represented by the Union during the period of April 30, 1979, to the present without notice to, or bargaining with, the Union.

(b) Whether Respondent unilaterally, without notice to or bargaining with the Union, granted to employees in the bargaining unit represented by the Union a 25-cent-per-hour wage increase on or about April 19, 1979.

(c) Whether Respondent unilaterally, without notice to or bargaining with the Union, modified on October 1, 1979, its life insurance plan for employees in the bargaining unit represented by the Union.

(d) Whether Respondent unilaterally, without notification to or bargaining with the Union, adopted and made available on November 1, 1979, a personal accident insurance plan for employees in the bargaining unit represented by the Union.

(e) Whether Respondent posted a notice on January 25, 1980, which threatened to withdraw insurance and merit increases and to reclaim such increases already paid unless increases and to reclaim such increases already paid unless the charge in Case 8-CA-13281 was withdrawn.

(f) Whether Respondent maintained overly broad no-distribution and no-solicitation rules.

(g) Whether Respondent unilaterally eliminated the timekeeper position without notice to, or bargaining with the Union.

(h) Whether Respondent demoted Ervin Howard in February 1980, and refused Howard the opportunity to bump certain employees who had less seniority than Howard and who held jobs for which Howard was qualified.

(i) Whether Respondent told employees on February 29, 1980, that Margaret Reeder would not have been laid off if the Union had not been organized.

(j) Whether Respondent withdrew recognition of the Union as the exclusive bargaining representative of its office and technical employees on or about July 23, 1980, and refused to meet and negotiate with the Union thereafter.

[1] All dates are in 1980 unless otherwise indicated.

Upon the entire record[2] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

The Company, an Ohio corporation, is engaged in the manufacture of industrial and material handling equipment at its plant in Plymouth, Ohio, where it annually ships goods valued in excess of $50,000 directly to points located outside the State. The Company admits, and I find, that it is an employer engaged in commerce and in operations affecting 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. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Background*

The Company, originally founded in 1888, manufactures three lines of products: locomotives, lift trucks, and ceramics. In 1937, the Plymouth Order of Mechanics became the collective-bargaining representative of its production and maintenence employees, who at the time of the hearing consisted of approximately 149 employees.[3]

In 1978, Ervin W. Howard commenced organizing the office and technical employees of the Company.[4] On October 31, 1978, in an election conducted by the National Labor Relations Board, a majority of the employees in the unit selected the Union as their collective-bargaining agent. On November 7 the Union was certified by the Board as the exclusive collective-bargaining representative for this unit.[5]

Howard was elected as the president of the Union and has remained in that position. Following the Board certification, the Union and the Company commenced collective-bargaining negotiations. The Union was represented by a negotiating committee, of which Howard was the chief spokesman. Originally the chief negotiator for the Company was J. W. Hickey, a labor consultant out of Columbus, Ohio. Sometime after March 1979, Hickey was replaced by Harvey B. Rector, a labor consultant out of Akron, Ohio. Gregory E. Kibler, Respondent's controller, who was also its director of industrial relations, remained as the Company's chief in-house negotiator throughout the negotiations. The parties engaged in collective-bargaining negotiations for a period of over 21 months, with the last session having taken place on July 22. By letter dated July 23, Respondent notified the Union that since the certification year had expired, it was no longer required to bargain with the Union because the Union no longer represented a majority of Respondent's employees in the office clerical and technical employee bargaining unit.

#### B. *Unilateral Changes in Wages and Insurance*

##### 1. Merit increases

During the period when the company and union representatives were engaged in negotiations, on various occasions the Company unilaterally granted what it termed merit or upgrade increases to many employees. General Counsel Exhibit 2 was a list of the 43 employees in the bargaining unit and was prepared by Controller Kibler for the Board. This list shows that, starting with increases granted to three employees in January 1979, an additional 23 employees received increases during the balance of the year. In the first 4 months of 1980, 17 employees received such increases. Kibler testified that the employees' supervisor had the discretion to determine who should receive an increase, when it should be awarded, and how much it should be. While Kibler had the right to review these increases, he candidly admitted that he would generally approve whatever increase was recommended by the supervisor, so long as it fell within the wage rate guidelines set for the employee's job classification. Kibler also admitted that the Company had not notified the Union of any of these increases prior to their being put into effect.

##### 2. The 25-cent increases

It was stipulated that all employees of the Company, in as well as out of the office and technical employees' bargaining unit, received a 25-cent-an-hour increase in their wages. Howard testified that on the payday closest to April 19, 1979, he received a memorandum from the Company that had been inserted in his pay envelope, informing him that he was receiving a 25-cent-an-hour increase commencing with that paycheck. Howard further testified without contradiction that there had been no notice or bargaining with the Union about an increase, prior to the date he received the notice.

William S. Sturman had commenced employment with the Respondent in November 1977 as its executive vice president and general manager. Sturman testified that he notified the employees of the 25-cent wage increase on April 19, 1979, by means of a payroll stuffer. The stuffer was a formal letter, dated April 19, 1979, from Sturman to each employee, advising the employee of this increase, and attributing it to the inflationary spiral. (See G.C. Exh. 15.)

Subsequently Sturman testified that he notified the chairman of the board of Respondent's parent company, by a letter dated April 6, 1979, that he had "announced" a general increase of 25 cents an hour effective April 2, 1979. When asked on cross-examination how he had announced this, he testified that he had called all of the de-

[2] The General Counsel's unopposed motion to correct the transcript dated September 11, is granted, and received into evidence as G.C. Exh. 19.

[3] The record is silent as to the type of relationship that existed between the shop union and the Company.

[4] This fact was testified to by Howard, was uncontradicted, and is credited. Most of the testimony of both the General Counsel's witnesses and Respondent's witnesses was uncontradicted and is credited. Where there is a conflict in testimony I have resolved the credibility issue at that point.

[5] The appropriate unit consists of "All office clerical employees and technical employees employed at the Respondent's Plymouth, Ohio, facility, excluding all production and maintenance employees, guards and supervisors as defined in the Act."

partment heads into his office on April 6, and told them to "dispense" that information to all the employees. He admitted that he did not follow up on the department heads to see if they announced this raise. Sturman testified that employees were paid every 2 weeks on a Friday, for the 2 weeks prior to a 1 week time lag. This meant that the Friday, April 20, pay envelope would have contained his April 19 letter of announcement, and that the paycheck was for work done from April 2 through April 13, 1979.

3. Life insurance

During the period that Respondent was bargaining with the Union, Respondent unilaterally increased the coverage limit of the life insurance that it provided for all of its employees. On October 1, 1979, the Company raised this coverage from $10,000 to $12,000. Kibler admitted that the Company notified the Union of this change in coverage, after the date of the increase. Howard also testified that the Union was never notified that there was to be an increase in life insurance prior to the Company's notification of the increase.

4. Personal accident insurance

In October 1979, Respondent, by its personnel secretary Teresa O'Dell, inserted a letter that was set forth on the stationery of the Life Insurance Company of North America and signed Terry O'Dell, in its office employees' pay envelope. This letter recommended that its employees participate in a "Voluntary Plan of Accidental Death and Dismemberment Insurance."(See G.C. Exh. 12.) The letter went on to explain that the purchase of such insurance was a voluntary matter, and that it could be purchased, "at economical group rates," through the convenience of payroll deductions. The insurance was scheduled to become effective on November 1, 1979. Also inserted was a flyer captioned "Personal Accident Insurance" which explained the coverage and costs that the employees could select under this group policy.

Dorothy Redder, the payroll clerk, testified that the Company administered the plan by deducting the premiums from the consenting employees' pay, forwarding such payments to the insurance company, and keeping records of employee contributions. It was stipulated that Respondent had not notified or bargained with the Union concerning the solicitation and administration of this program.

5. Conclusion

It is uncontested by Respondent that after the Union had been certified, and while the parties were engaged in negotiations, the Company made unilateral changes in wages and insurance programs, without any prior notice to the certified bargaining representative.

It is well settled that good-faith compliance with Section 8(a)(5) of the Act presupposes that an employer will not make unilateral changes in wages or benefits without affording the employees' statutory representative an opportunity to bargain collectively with the employer about such changes. *N.L.R.B.* v. *Benne Katz, et al., d/b/a Williamsburg Steel Products Company*, 369 U.S. 736, 747 (1962); *N.L.R.B.* v. *Crompton Highland Mills, Inc.*, 337 U.S. 217, 224, 225 (1949); *Master Slack and/or Master Trousers Corp.*, 230 NLRB 1054 (1977). Such unilateral action "tends to subvert the Union's position as the representative of the employees . . . ." *N.L.R.B.* v. *Insurance Agents International Union, AFL-CIO [Prudential Insurance Company]*, 361 U.S. 477, 485 (1960).

In defense of its actions Respondent presents a series of defenses which are reviewed below:

a. *The merit increase*

Respondent argues in its brief that it had an established policy to grant merit increases, and since no agreement had been reached, it could, and did, grant merit increases as a company prerogative.[6] However, this is not the law, as the courts and the Board have held that merit wage increases are mandatory subjects of collective bargaining, and that the continuation of a company's granting them once it has commenced bargaining with the statutory bargaining agent, violates Section 8(a)(5) of the Act. *N.L.R.B.* v. *Katz, supra* at 746; *Brockway Motor Trucks, Division of Mack Trucks, Inc.* v. *N.L.R.B.*, 582 F.2d 720 (3d Cir. 1978).

b. *The 25-cent increase*

Respondent's main contention is that this allegation of the complaint is barred by Section 10(b) of the Act, which provides for a 6-month statute of limitations. It is Respondent's position that the 25-cent wage increase was "put into effect" on April 2, 1979, and therefore occurred 6 months prior to the filing and serving of the charge on April 19, 1979, in Case 8-CA-13281.

However, the law and the evidence does not support Respondent's position. It is well settled that the 6-month period does not begin to run until the party adversely affected has received actual or constructive notice of the conduct constituting the alleged unfair labor practice. *Wayne Electric Inc.*, 226 NLRB 409, 416 (1976); *Southeastern Michigan Gas Company*, 198 NLRB 1221 (1972). Also as stated in *L. C. Cassidy & Sons, Inc.*, 185 NLRB 920, 926 (1976), the notice whether actual or constructive, must be clear and unequivocal. And, since Section 10(c) is a defense, the burden is on Respondent to establish notice. *Alabaster Lime Company, Inc.*, 199 NLRB 1116, 1118 (1972). Certainly Sturman's telling his department heads on April 6 to dispense this notice of the raise does not meet the Board's test, especially since the general manager admitted that he did not know if these supervisors had done so or not.

I find that the earliest date possible on which the Union received a clear and unequivocal notice of this across-the-board increase was on April 20, for it was on this Friday payday that the employees received their pay envelopes for the 2 prior pay weeks. There, stuffed in their envelopes, was Sturman's letter of April 19, 1979, announcing the general increase.

Even if the letters from Sturman had been received on April 19, instead of April 20, the statute of limitations

[6] No evidence was submitted by the Company in support of this allegation.

would not be a bar to this allegation, as Section 102.114 of the Board's Rules and Regulations specifies that the day on which the alleged unfair practice occurs is not computed in measuring the limitations period. *The Baltimore Transfer Company*, 94 NLRB 1680 (1951). I therefore find that the charge was timely filed within the 6-month period of limitation.

As a second defense, Respondent alleges that the wage increase was covered by a Board settlement in Case 8-CA-12502 made on July 9, 1979. However, no evidence in support of this allegation was produced and it must fail for lack of proof.

Accordingly, I find that the merit increases granted in 1979 and 1980, and the 25-cent increase granted on April 20, 1979, to the bargaining unit employees represented by the Union, constituted violations of Section 8(a)(5) and (1) of the Act.

c. *Life insurance*

Respondent's defense is bottomed on the assertion of a commercial contract between itself and an insurance company, that provides for life insurance for its production and maintenance employees, as well as its office employees. Dorothy Redden, a payroll clerk, testified that the contract with the insurer provided coverage in the amount of $10,000 life insurance effective as of October 1, 1978, with the coverage automatically increasing to $12,000 as of October 1, 1979. Respondent contends in its brief that the Union never requested any change or cancellation of the policy, therefore the insurance company contract remained in effect.

It is clear that Respondent carried such insurance for its plant employees as this is set forth in their collective-bargaining agreement (Resp. Exh. 5). But Respondent bargained with the Plymouth Order of Mechanics, and both parties agreed to these amounts of insurance and yearly increases. However, Respondent admittedly did not bargain with the office employees Union about this increase, and insurance is a mandatory subject of bargaining. *Master Slack*, 230 NLRB 1054. Certainly if an Employer could increase insurance benefits at its own discretion while bargaining with a union for a collective-bargaining agreement, it would undermine the Union's position in the eyes of its members, and cause them to wonder if they really needed a Union. This is something Respondent may not do. *American Seating Company*, 106 NLRB 250 (1953); *Consolidated Fiberglass Products Co., Inc.*, 242 NLRB 10 (1979).

d. *Personal accident insurance*

Respondent contends that the offering of the Accidental Death and Dismemberment Policy was merely a solicitation by its insurance carrier for new business.

However, the evidence shows that it was much more than that. Respondent played a substantial part in its effectuation, as it presented it to the employees, took part in the administration of the plan, deducted the premium, kept records of employee contributions, and the employees received the advantage of group rates. Certainly the union employees received something of value from the Employer, that they had previously not received. Again, such tactics have the effect of undermining the Union, as the receipt of such a benefit without the aid of its bargaining representative brings to the employee's mind the question of the need for a union. Such personal accident insurance, under the facts of this case, is a mandatory subject for collective bargaining, and Respondent should not have put it into effect without bargaining with the Union about its adoption. *General Electric Company*, 150 NLRB 192 (1964).

e. *Notice on withdrawal of benefits*

As previously stated, on October 19, 1979, the Union filed a charge with the Board, charging that Respondent had violated Section 8(a)(1) and (5) of the Act, by making unilateral changes in the terms and conditions of employment for employees in the office clerical and technical employee bargaining unit. On the following November 23, the Board issued a complaint (Case 8-CA-13281). Thereafter, on January 25, Respondent replied to this charge by posting in its office a two-page letter, giving its version of the negotiations that had been going on between the parties, and also discussed the complaint that had been issued. Management's letter then went on to say:

> The Regional Director did issue a complaint on the rate increases and insurance based upon the union charges. Therefore, this puts the Company in a position *warranting withdrawal of said insurance and merit increases and reclaiming by payroll deduction, the amounts already paid, unless* said charges are withdrawn.

Respondent defends this posting by stating in its brief that it had the right to inform employees of what had transpired during its negotiations with the Union. While this is so, it, however, had no right to threaten its employees that unless the Union withdrew the charges it had filed, Respondent would take away the economic benefits they had received in increased insurance coverage, and wage increases. The threat was also double-barreled in that not only would these benefits be withdrawn, but the employees would also have to pay back the amount of increases they had received. Certainly such threat of economic reprisal would intimidate these employees in the exercise of their statutory rights, and violated Section 8(a)(1) of the Act.

D. *No-Distribution, No-Solicitation Rules*

On or about April 1, 1979, Howard received from Hickey, the original labor consultant of Respondent, a copy of company rules and regulations that was attached to Hickey's letter dated March 28, 1979. General Rule 20, thereon, provided as follows:

> Employees will be subject to disciplinary action when it is a violation of:
>
> H. Distributing written or printed matter of any description on Company premises without proper authorization.

At the next negotiating meeting Howard, as president of the Union, questioned Hickey who was present with Kibler, about the accuracy of these rules and regulations. Hickey advised Howard and the other four members of the negotiating team that the document contained a complete set of rules that were currently in effect. Upon perusing its contents, Howard countered by requesting that the Company pay the backpay, that would be required under the cost-of-living provisions contained in the document. Thereupon, Hickey advised the union negotiators to cross out that cost-of-living provision. Howard then asked for an up-to-date copy of the rules and regulations. A month or two later, at a subsequent negotiation session, Hickey provided the Union with a second set of such rules (G.C. Exh. 13). This document contained the identical no-distribution rule as set forth above. Howard was never told that this rule was no longer in effect.

A third set of Respondent's rules and regulations was also received into evidence (G.C. Exh. 10). It was stipulated that these rules had been in effect in the office since July 11, 1979. Listed under the Minor Offenses category were the following:

> 18. Distributing literature, written or printed matter of any description on Company time in work area not incidential to Company business.
>
> 19. Soliciting or collecting contributions, for any purpose, on Company time, without approval of management.

Respondent's witness Teresa O'Dell, the personnel department secretary, testified that to the best of her knowledge, no company personnel had prohibited union members from distributing union literature. She also testified that, in fact, its members had distributed meeting notices and other union literature.

1. Conclusion

Respondent's defense is that since there is no evidence that it ever enforced these rules, and in that it did allow union members to distribute union literature, it has not violated the Act.

However, this defense is wide of the mark. The Board and the courts have long held that the promulgation and maintenance of an awful rule is a violation of the Act. *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945); *N.L.R.B.* v. *Lexington Chair Company*, 361 F.2d 283 (4th Cir. 1966). The potential inhibitory effect of the rules, even if they were not enforced, justifies Board action. *Paceco, a Division of Fruehauf Corporation*, 102 NLRB 2149 (1979). That all of these quoted rules were unlawful is readily apparent.

The original and second rule would prohibit distributing union literature on company primises at any time, and in any area, which must include nonworktime, and such nonwork areas as restrooms and cafeterias, and therefore violated the Act. The third rule, put into effect on July 11, 1979, while not as broad as the original rules, were nevertheless too ambiguous and overly broad to satisfy the requirements of the statute. In *Florida Steel Corporation*, 215 NLRB 97 (1974), the Board held that "the term 'company time' like 'working hours,' is unduly ambiguous and tends to connote all paid time from the beginning to the end of the work shift, and can easily be interpreted as a restriction on solicitation during breaktimes or other periods when employees are compensated though not actively at work." Since Respondent's rules can fairly be interpreted by an employee to prohibit the distribution of union literature during nonworking hours, they violate Section 8(a)(1) *Drum Parts, Inc.*, 222 NLRB 511 (1976); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).

The first two rules are also unlawful as they prohibit any distribution of any printed matter on company premises "without proper authorization." This requirement of prior company authorization has been prohibited by the Board, as stated so clearly in *AMC Air-Conditioning Co.*, 232 NLRB 283, 284 (1977): "However, Respondent cannot lawfully require an employee to secure permission as a precondition to engage, without fear of management interference or retaliation, in protected concerted activities on company property in nonwork areas on the employees' free time."

Accordingly, I find that by promulgating and maintaining these unlawful no-distribution, no-solicitation rules, Respondent violated Section 8(a)(1) of the Act.

E. *Elimination of Timekeeper Position and Demotion of Howard*

1. The General Counsel's case

Howard started working for Respondent in July 1971 as an errand boy. After several weeks he was put in the production office, where he worked with expeditors as a clerical worker.[7] Besides performing clerical duties he also was required to go to the stockroom and check the availability of parts, and at the time of vacation of an expeditor, fill in for him. Howard testified that in 1973[8] he was made the timekeeper for the factory employees, which job required him to go into all parts of the shop, during the course of a day. His typical day consisted of collecting each shop employee's daily labor reports, and then calculating the time an employee performed on the parts shown in the reports. He would then post this time into ledgers. He would then go into the shop, pull the timecards of the production and maintenance employees, and verify the timecard with the daily labor report. Next he would close out shop orders that had been completed, keep records of the employees' absences, and fill out shop orders when they were needed in case of rework. This work gave Howard substantial knowledge of the parts the Company produced, because if there was any discrepancy in the labor reports he would have to go to the files, check the part number, check the shop order and pull the blueprints. Howard admitted that he could

[7] Expeditors were subsequently called planners, and their department name was changed to "planning" at some undisclosed date.

[8] Howard's recollection as to the date is apparently in error, as Resp. Exh. 1, captioned "Update Report," dated 9/11/72, states that Howard was the timekeeper at that time. This report shows that Howard was offered a position that had opened up in the planning department which offered a greater chance for advancement, more responsibility, and an immediate increase in pay. Howard declined the job offer because of off-the-job factors.

not read complicated blueprints, but testified that he had learned to read blue prints on parts, through his handling of blueprints.[9]

Howard continued his duties as a timekeeper for the next 6 years, and in July 1978, when he organized the Union, he was still working as the factory timekeeper. Subsequently, when he was serving as the chief negotiator for the Union, he continued to perform his duties of timekeeper.

In July 1978, the Company started a job evaluation program, and Howard was evaluated by his then supervisor, Jerry Slone, the chief manufacturing engineer. Howard testified that Slone filled out his appraisal form, rated him with scores of 7 to 8 on a basis of 10, for three of the four evaluations, and gave him a low rating in the category "attitude." Slone informed Howard at this time that he would not receive a merit increase because of his point total. This was the first time Howard had ever been told that he had a poor attitude, and, prior to this time, supervisors had told him that he did a very good job.

A year later, on Howard's anniversary date in July 1979, he asked Slone if he had received Howard's job approval form.[10] Howard testified that Slone said he had it in his drawer, but commented that there was no use in filling it out and get Howard "all riled up," because there was no way he was going to get an increase. When Howard asked Slone if this was because of his being in the Union, Slone replied "that was probably so."

In September 1979, Howard met with Kibler, told him that his job appraisal form had not been filled out, and that Slone's reason for not doing so was because of his union activity. Kibler's reply was, "He [Slone] is probably right, but I would not swear to that in court."[11]

In December 1979, Howard learned for the first time from labor consultant Rector that his job of timekeeper was to be abolished. Rector advised Howard that the Company was going to go along with the bumping procedures agreed to in the collective-bargaining negotiations,[12] and that Howard would be allowed to bump any office employee as long as Howard had more seniority and the qualifications to perform the job.

On February 18, Howard received a memo from Plant Manager Collins that his job was to be abolished as of March 1. The memo also informed Howard that he would have the right to bump a less senior employee, providing he could perform the work, and that he was to contact Kibler to discuss his options.

Three or four days after Howard received this brief memo, he met with Kibler and informed the controller that he thought he was qualified for the jobs of shipping clerk, parts salesman, and planner. On February 27, Howard again met with Kibler. At this meeting, Kibler advised Howard that he had checked with his supervisors, reviewed his file, and had concluded that he was only qualified to do one job, inventory control clerk,[13] and that he could bump Margaret Reeder, the inventory control clerk. When Howard asked what would happen to Reeder, Kibler replied that she would be laid off, as she was not qualified to bump anyone. On February 27, Howard informed Kibler that he had decided to bump Reeder. Kibler then told Howard that his job was going to be put on a computer, and when Howard asked what about the parts of his job that could not be put on a computer, Kibler replied that he did not know.

On the morning of February 29, a union committee consisting of Howard and two others, met with Kibler to discuss the abolishing of the timekeeper job. Howard made a recommendation that he be a locomotive planner, but was turned down. Kibler then told the committee that the decision of the Company to abolish the position of timekeeper, was final. Later in the morning, Howard and Reeder met with Kibler, and two other company officials. Kibler proceeded to inform Reeder that Howard had bumped her job and that she was to be laid off. Howard further testified that during the conversation "Mr. Kibler made the remark to Margaret Reeder that this would not have happened if it wasn't for the Union." Reeder, when asked if there was any reference to the Union at this meeting, testified that she was upset and crying when Kibler said, "That is what comes from having a Union," or some words to that effect.

Kibler admitted that he made a reference to the Union at this meeting, and described the reference as follows: "The reference was that had an organization not existed, we would not have used the bumping procedure to eliminate a particular individual." On being shown his prehearing affidavit, Kibler agreed that he told Reeder, "If the Union had not been organized she would not have been bumped."

On March 1, Howard commenced the duties of the inventory control clerk and worked for 1 week. He then met with Kibler and told him that he would take the layoff instead of Reeder. Respondent agreed with Howard's request, Reeder returned, and Howard was laid off on March 7.

[9] Roger Collins, who became plant superintendant on February 1, after serving as general foreman, verified that Howard's duties as a timekeeper were as described by Howard, except that he had never seen Howard write up orders. Howard was completely a credible witness, his testimony is uncontradicted, and I find that he wrote up orders.

[10] The testimony of Kibler indicates that the practice of having job appraisals started in 1978.

[11] Slone was called by Respondent as its witness and was asked a few preliminary questions. After testifying that he was at one time Howard's supervisor, he was questioned as follows:

> Q. Now there has been some testimony here that you told Mr. Howard that you thought that the elimination of his job was because of his Union activity.
>
> Did you ever make any such statement as that?
>
> A. No, sir, I did not.
>
> Mr. Rector: No further questions.

Since Slone was not questioned as to his conversation with Howard about his failure to receive an increase, Howard's testimony is uncontradicted and I credit it. I also credit Howard's testimony as to his conversation with Kibler, as this testimony remains uncontradicted.

[12] The parties had agreed to the already existing bumping procedure contained in the shop employees contract. The language contained therein as to bumping provided that when an employee was laid off, such employee could "Bump an employee of lesser seniority provided he is qualified for the work by work experience and can perform the work with a minimum amount of supervision."

[13] An inventory control clerk was paid $5.07 an hour, whereas the timekeeper received $6.42 an hour.

2. Respondent's defense

Respondent contends that the decision to eliminate the timekeeper position was made some years before its actual elimination, and that Howard became aware of the decision on March 21, 1978. Donald Branthouse, who had been involved with computers for Respondent since 1968, testified that Respondent projected, in apparently 1969, that some of the duties of the timekeeper could be assigned to a computer.[14] Branthouse testified that this "labor projection" would eliminate the factory timekeeping operation completely. He also testified when Howard's duties were computerized, his duties of verifying the absentees and getting this data into data processing was given to foremen, so as to give them more of a handle of their work force.

General Manager Sturman testified that on March 21, 1978, he held a meeting with four of Respondent's high officials[15] and Howard. The purpose of the meeting was to discuss ways and means of improving shop time reporting, and to correlate it with the manufacturing process so as to improve Respondent's cost accounting. When asked if those present were informed that the timekeeper's job would be computerized, Sturman vaguely answered:

> The essence of this meeting was to discuss the volume of the data and the best way to go about accumulating and recording. And the computer was definitely the consideration at the time.

At the end of the meeting Sturman concluded that the three computers the Company had were inadequate, and that they were going to have to wait until they upgraded the system.

According to Kibler the Company decided to eliminate the timekeeper job about the first of 1980, and the controller admitted that this decision was made before it was discussed with the Union or Howard. He also testified that he did not remember when he first discussed the elimination of the job with Howard, but did not believe that it occurred before February 1980.[16]

Kibler admitted he met with Howard in the latter part of February, at which time he told Howard that he had two options, (1) layoff, or (2) bump another employee in the bargaining unit, as long as he had more seniority and could perform the duties of that job. He also admitted that a day or so thereafter he told Howard that there was only one position for which he was qualified to bump to, inventory control clerk.

Respondent in its brief contends that Howard was not qualified for any of the three positions he spoke to Kibler about: shipping clerk, parts salesman, and planner. Respondent also contends that even if he were, he would not be allowed to bump any employee currently in those positions, because all three positions are in a higher labor bracket, grade 5, and bumping up from Howard's grade 3 would not be permitted.

3. Analysis and Conclusion

a. *Elimination of position*

The Board has long held that the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act. *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022, 1027 (1962). Accordingly, where the automation of bargaining unit work will result in the elimination of unit jobs, it is the duty of the employer to bargain with its employees' bargaining representative over the decision to install automated equipment, as well as the effects of such decision. *John Hutton Corp., d/b/a KUMU Radio AM/FM*, 213 NLRB 85 (1974); *Richland Inc.*, 180 NLRB 91 (1969). It is also required that the employer in such circumstances give sufficient notice and be willing to bargain in good faith so that the bargaining representative can have a meaningful opportunity to bargain. *Rochet and Ruud, d/b/a The Renton News Record, and Bellevue American Publishing Company, Inc., and Northwest Business Machines Company, Inc., and The Production Company, Inc.*, 136 NLRB 1294 (1962).

However, in the instant case, Respondent neither gave sufficient notice, nor did it bargain with the Union about the elimination of the job of timekeeper. When Howard first learned in December 1979 from Rector that the job of timekeeper was to be abolished, there is nothing in the record to show that this was being presented to Howard as the union representative to be bargained over. Rather it was presented to Howard as the employee whose job was simply going to be abolished. The decision had already been made by management, and there was nothing to bargain over. Howard's only decision, as it was laid out to him by the consultant, was to decide which office employee he wanted to bump, provided such employer had less seniority and Howard had the qualifications to perform the job.

Kibler confirmed that the decision to eliminate the job was made before Respondent notified Howard or the Union. Yet, Howard was not notified of the specific date until he received Collins' memo on February 18, which was less than 2 weeks before the elimination became effective. It was not until February 29 that union representatives met with Kibler to bargain over the job elimination and its effects, and they were summarily rebuffed by the director of industrial relations who told them that the decision of the Company was final.

Respondent's defense that the decision to eliminate the position was made before the advent of the Union, and that Howard was aware of the decision in March 1978 is not supported by the evidence. It is true that in 1969 Respondent projected that some of the timekeeper's duties could some day be put on a computer, but there is no evidence this was ever conveyed to Howard after he was hired in 1971. Then, at the meeting called by the Company in March 1978 to discuss ways and means of

[14] Resp. Exh. 6 is a labor flow chart that is dated March 6, 1969.

[15] Bill Ross, his operating assistant; Gerald Sanders, director of engineering; Jerry Slone, director of manufacturing; and Glen Dowd, manufacturing engineer manager.

[16] Howard fixed the date as February 18, the date he received the letter from Collins, G.C. Exh. 17, and I so find.

improving shoptime reporting and cost accounting, Sturman's testimony established, at most, that putting some timekeeping data on a computer was discussed as a possibility at some unknown future date. In no way does the evidence establish that at this meeting, or at any other time prior to Rector's conversation with Howard in December 1979, that Howard or the Union was told the timekeeper's job would be computerized, and the position eliminated.

Thus, 13 months elapsed from the date that the Union was certified until Respondent finally told Howard that the timekeeper's work was in part to be computerized and the position eliminated. Yet, during these many months, the Company never broached at any of its negotiating meetings, that the Company was desirous of and planning to eliminate this job. When it finally was presented, it was a *fait accompli*. No opportunity to negotiate the effects of the computerization was proffered to the Union, and at every turn Howard and the union negotiators were told that the decision was final. There were parts of the timekeeper's job that were not taken over by the computer, and Kibler admitted that he did not know how they were to be handled. Also, some parts of the job were even assigned to supervisors. Certainly, there were meaningful negotiations that could have been engaged in, concerning the ramifications of this vital change in operations. But Respondent adamantly refused to do so.

I find therefore that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the position of timekeeper without notice to or bargaining with the Union.

b. *Demotion*

Although Respondent contends in its brief that there was no union animus in the record, I do not find this to be so. After Howard organized the Union in 1978, he suddenly learned that he had a bad attitude, and was denied a merit increase. Then, 1 year later, Howard's supervisor, Slone, told him that his union activities would probably prevent him from getting any increase, and he, in fact, received no increase. Kibler in turn verified Slone's statement when Howard questioned him about not having his job appraisal filled out. Clearly, Respondent harbored animus toward the founder and president of the Union, and through him to the Union.

Based on the foregoing evidence of Howard being the organizer and president of the Union, Respondent's knowledge of his union activities, the union animus, and Respondent's failure to grant or consider Howard for a merit increase, and its unilateral elimination of the timekeeper job without bargaining with the Union, I conclude that the General Counsel has made a *prima facie* showing of unlawful motivation. Under *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980), this causes the burden to shift, and the Respondent must prove affirmatively that the demotion of Howard would have occurred even in the absence of his protected activities.

We now turn to the first of Respondent's defenses: that Howard was not qualified for the position of shipping clerk, parts salesman, or planner.[17] As Kibler testified it was he who made the decision as to what other jobs Howard was qualified for. However, Kibler, who was never Howard's supervisor, and not really familiar with his duties, did not discuss Howard's qualifications with Jerry Slone or Roger Collins, who had been Howard's supervisor during the 1-1/2-year period prior to the elimination of his job. This is all the more remarkable since Kibler had admitted that the supervisors evaluate the performance of employees and actually decide what increase in pay should be given to them.

Kibler did assert that to determine Howard's qualifications for the other jobs, he reviewed the positions for which Howard had more seniority than the incumbent employee, looked at the qualifications required of these employees, and examined Howard's personnel file. However, when the personnel director was questioned specifically about these positions, he admitted a lack of knowledge about the training and qualifications needed to perform their duties. The record shows that Howard had more seniority than the following employees in the classifications reviewed by Kibler:

| *Name* | *Classification* | *Hourly Rate* |
|---|---|---|
| Dan Carter | Planner | $6.55 |
| Francis Dorian | Shipping Clerk | 8.19* |
| Terry Hopkins | Lift truck parts sales | 7.00 |
| R.E. Kleman | Planner | 7.28 |
| Terry Perkins | Planner | 6.08 |
| Barbara D. Slone | Planner | 5.84* |

* The hourly rate of these two employees, who were paid monthly, is calculated on the basis of a 40-hour week, 173 hours a month.

While the General Counsel contends that Howard had the qualifications to handle the shipping clerk's job, I do not find that to be the case. Respondent makes not only domestic shipments but also shipments to foreign countries, which requires the knowledge of a vast amount of specialized shipping rules and regulations. Howard's work experience with the Company in no way gave him experience in this unique field.

However, when Howard's work experience is matched with the duties of the other two classifications, it is readily apparent that Howard was qualified to handle those jobs and was entitled to bump five employees other than Reeder. According to Kibler, he considered Howard for the positions of parts sales and planner and in both in-

[17] I have not included reproduction clerk in this review as the General Counsel did in his brief, because Howard did not express to Kibler any interest in this classification. Also, it is doubtful if Howard was qualified for this position, since it required not only the operation of various sizes of blueprint machines, but also required the ability to disassemble and assemble their parts. There is nothing in the record to indicate that Howard possessed such mechanical skills.

stances decided that he was not qualified because he did not have a sufficient knowledge of the parts.

In the almost 9 years that Howard worked for Respondent he was around parts for the entire time, with the possible exception of his first 2 weeks when he was an errand boy. During the period he was in the production office he went into the stockroom and checked the availability of parts for the expeditors. For the 7 or 8 years in which he worked as the timekeeper it must be remembered that he was the factory employees' timekeeper, not the office employees', and he was constantly in and about the factory. His first duty each day was to pick up the daily labor reports of the shop employees, which described the part each production employee was working on. Later he went through the shop and pulled timecards and matched the time thereon with the time shown in the daily labor report for the parts. He closed out shop orders, and he filled out shop orders, all of which required a knowledge of parts. When there was a discrepancy in records he would pull the blueprint and check it against the labor reports. Since Howard was working on records concerning parts, and working around them in the shop and stockroom as a daily matter for over 8-1/2 years, I find that he did have a substantial knowledge of the parts manufactured, purchased, and used by Respondent.

Raymond E. Kleman, a planner for Respondent for the past 7 years, testified that he started with the Company as a stockman, then was a stock chaser, moving material from one machine to another. After approximately 2 years of such duties he was made a planner, with virtually no training and little supervision. He testified that a planner receives an order for a part from data processing, then checks the records to see if the part is on hand. If it is not in stock, he requisitions a blue print by the part number, and then determines if the part is to be manufactured in the shop or purchased. If the item is to be purchased, he makes out a requisition and sends it to the purchasing department. If the part is to be made in the shop, he writes up a shop order, and sends it down to the shop. Whether manufactured or purchased, the planner follows through on the part's delivery so as to see that it is on hand by its scheduled date.

Certainly if Kleman's 2 years of working around parts fitted him for the job of a planner, Howard's almost 9 years of working around parts gave him enough on-the-job training to hold down such a job. Barbara Slone, the most junior of the four planners, of whom Howard had grater seniority, had been an inventory control clerk and secretary before she became a planner. Respondent produced no evidence to show that she had any experience with parts in the shop, prior to being made a planner.

Terry Hopkins, the lift truck parts salesman, had started with the Company in the stockroom, had worked as a stock chaser, then as a lift truck operator. In 1977, he moved into the sales department for lift truck parts. He receives oral and written inquiries from customers about parts and prices. To supply this information he consults an inventory card file, a computer and price book. When he takes a telephone order he writes it up and sends it to data processing for processing. If a customer calls in about an overdue part, he contacts the purchasing department or shop to expedite delivery. Each of the Company's other tow lines of products also had a parts salesperson but both had more seniority than Howard. However, Howard had seniority over Hopkins, and I find that Howard did have the qualifications to handle the position of lift truck parts sales, and could have bumped Hopkins.

Of particular significance in weighing Respondent's motive as to its not offering the job of planner to Howard, is the fact that in late 1972, it obviously considered him qualified for the job, because it offered that position to him. Yet, after he acquired 7 or 8 more years of further knowledge of the plant, its parts and its products, he is adjudged to be unqualified.

Respondent contends in its brief, as its second defense, that Howard could not bump up from his grade 3 to the planners and parts sales grade 5. However, a reading of the bumping procedure in General Counsel's Exhibit 16 does not show that an employee cannot bump to a higher grade. Even if it did, this would be waived and no defense, as Kibler testified that he reviewed these three positions to see if Howard was qualified for them. Plainly the director of industrial relations saw no bar to bumping up.

While I find from the record before me that Respondent did want to put some of the timekeeper's duties on the computer, it seized up this strategy to demote Howard and cut his wage by $1.35 an hour, to a rate lower than that of any of the four planners and parts salesmen, all of whom were junior to him in seniority. But for his union activity, he would have been permitted to bump into a planner's job or a sales parts job, and one of these employees would have been bumped in the ordinary course of procedure, so that some junior employee would have been laid off for a bona fide economic reason. It is true that Howard did work for a week as the inventory clerk, and then quit, but Respondent's demotion amounted to a constructive discharge. "Where . . . an event or requirement imposes on an employee an onerous or burdensome choice between remaining in employment or acceding to his employer's request and such event or requirement is generated by an employer's union animus, it does not matter how burdensome is the choice or how convenient are the alternatives." *John Dory Boat Works*, 229 NLRB 844, 850 (1977). *Central Dispatch, Inc. and Mike D. Gigirolamo*, 229 NLRB 979 (1977).

However, I do not find that the General Counsel has proved by a preponderance of the evidence that the Respondent violated Section 8(a)(4) of the Act by demoting Howard and refusing him the opportunity to bump employees with less seniority. The General Counsel recites in his brief that Howard filed three charges against the Company. Since one of these was filed after his demotion it could not have contributed to the Company's motive to retaliate against Howard. Also, it is true that Respondent's labor consultant during the course of the hearing expressed irritation at the number of charges filed, and asserted that "half of our negotiating time was spent arguing about something that had already been settled." Since the parties bargained until July 22, Respond-

ent's hyperbole could be referring to negotiating sessions that took place after Howard's demotion, and events which occurred at such sessions could not have influenced Respondent's decision to demote Howard in February. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

c. *Statement to Margaret Reeder*

As previously set forth, Kibler told Reeder on February 29 that, because Howard had bumped her, she was being laid off. I find that under Howard's testimony of what Kibler said, "This would not have happened if it wasn't for the Union," or under Kibler's version, "If the Union had not organized, she would not have been bumped," Respondent interfered with Reeder's Section 7 rights. The words expressed by the director of industrial relations clearly indicated that the Union was the malefactor, the root cause of her being laid off, and but for it she would still have a job. While Kibler tried to explain at the hearing what he meant, it has long been settled that a violation of Section 8(a)(1) does not turn on the employer's motive, but rather on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *America Freightways, Co. Inc.*, 124 NLRB 146, 147 (1959). In the context of this meeting, Kibler's statement to Reeder concerning the Union constituted a violation of Section 8(a)(1).

F. *Withdrawal of Recognition*

The General Counsel's evidence as to this allegation is a letter dated July 23, 1980, in which Respondent notified the Union that the Company believed that the Union had lost its majority. The letter concluded by stating two reasons why the Company believed that the Union had lost its majority: "Since the certification year expired October 31, 1979, and the bargaining unit did not support a strike vote the Company is no longer required to bargain." At the hearing Respondent's labor consultant stated on the record that the Company had called off any further meetings after the negotiation session of July 22.

The legality of an employer's withdrawal of recognition from a certified union is governed by long-established rules which were restated by the Board in *Chet Monez Ford*:[18]

> Under these rules, as set out in the Board's decision in *Celanese Corporation of America*,[19] a certified union, upon the expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. The presumption may be rebutted, however, by evidence establishing that the union no longer enjoys majority representative status. Also, even without showing loss of majority, an employer may refuse to bargain if he relies on a reasonably based doubt as to the continued majority status of the union. As to a reasonably based doubt, two prerequisites for sustaining that defense are that the asserted doubt must be based on objective considerations and such doubt must be raised in a context free of unfair labor practices.

Certainly Respondent presented no hard evidence to show that the Union no longer represented a majority of the employees in the bargaining unit. Respondent then must claim that in refusing to bargain it relied on a reasonable doubt as to the Union's majority status. Turning then to the first of the prerequisites, Respondent contends that the employees in the bargaining unit did not support a strike vote. However, the Company produced no affirmative evidence to support this assertion. The only testimony concerning a strike vote was that of Howard. The union president testified that in April or May, at a meeting, at which a quorum was present in accordance with the bylaws of the Union, a strike vote was taken, and it was in favor of a strike. Howard's testimony is uncontradicted and credited. The union president admitted that no strike had been called.

Assuming arguendo, that a majority of the union members refused to go out on strike, this would not provide support for a "reasonably based doubt" as to the Union's majority status. Courts and the Board have long held that the failure of a majority of employees to support a strike falls short of overcoming the presumption concerning the Union's continued majority status. *Cavalier Division of Seeburg Corporation*, 192 NLRB 290, 305 (1971), enfd. *sub nom. Allied Industrial Workers, AFL-CIO, Local Union No. 289* v. *N.L.R.B.*, 476 F.2d 868 (D.C. Cir. 1973); *Coca-Cola Bottling Works, Inc.*, 186 NLRB 1050, 1053 (1970). This is so because obedience to a Union's strike call depends not only on loyalty to the Union but also on a willingness to weather the economic hardships of a strike. *Anvil Products, Inc.*, 205 NLRB 709 (1973).

Respondent also failed to meet the second prerequisite, as its purported doubt was raised in a context of unfair labor practices. As has been previously found, Respondent by its various unilateral changes had undermined union support in various ways in violation of the Act. Then, in February and March, it eliminated the position of timekeeper without notice to or bargaining with the Union and refused to give Howard the opportunity to bump employees who had less seniority than he and who held jobs for which he was qualified. Finally, it maintained overly broad, no-distribution rules and no-solicitation rules right up to the time of its notice to the Union, that it was refusing to bargain with it.

While Respondent stated in its letter in which it withdrew recognition of the Union, that an impasse had been reached at the March 13 negotiation, I do not find that this assertion is supported by the record. At this meeting, as Howard testified without contradiction the parties reached agreement on vacation and on holiday clauses. At the last meeting, July 22, the parties agreed on the hours of work, and the Union reduced its demand for a wage increase from 14 percent to 10 percent. Thus, there was give-and-take bargaining right up to the day prior to Respondent's notice of its refusal to bargain. Even so, if an impasse had been reached, the obligation to bargain is

[18] 241 NLRB 349, 350 (1979).

[19] 218 NLRB, 658, 659 (1970).

not concluded, but merely halted temporarily. *Mechanical Contractors Association of Newburgh*, 202 NLRB 1, 11 (1973). The Board long ago enunciated this principle in *Central Metallic Casket Co.*, 91 NLRB 725, 573 (1950):

> The existence of a bargaining impasse does not destroy either the authority of the representative to act within the sphere of its representation nor the right of the employees to seek by collective action (which may take the form of either further negotiations or concerted application of economic pressures) to pursuade the employer to accept the collective position of the group as to the particular terms which shall govern the employment relations.

Accordingly, I find that on or about July 23, 1980, Repondent, in violation of Section 8(a)((5) of the Act withdrew recognition, of the Union, at all times thereafter refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit of office and technical employees, and by such conduct interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

## Conclusions of Law

1. By unilaterally granting merit increases to its office and technical employees during the period of April 30, 1979, through April 1980, and by unilaterally granting a 25-cent-per-hour wage increase on April 20, 1980, when a majority of the employees in the appropriate unit described below at a Board- conducted election designated the Union as their collective-bargaining representative, without affording the Union the opportunity to bargain about such matters, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

2. By modifying its life insurance plan for its office and technical employees on October 1, 1979, and by adopting and making available on November 1, 1979, a personal accident insurance plan for its office and technical employees, when a majority of the employees in the appropriate unit described below at a Board-conducted election designated the Union as their collective- bargaining representative, without affording the Union the opportunity to bargain about such matters, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

3. By posting a notice on January 25, 1980, threatening to withdraw insurance and merit increases, and to reclaim such increases, and by maintaining overly broad no-distribution and no-solicitation rules, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By unilaterally eliminating the timekeeper position without notice to, or bargaining with the Union, when a majority of the employees in the appropriate unit, described below at a Board-conducted election designated the Union as their collective-bargaining representative, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By discriminatorily demoting Ervin W. Howard on February 29, 1980, and refusing him the opportunity to bump certain employees who had less seniority than Howard, and who held jobs for which Howard was qualified, thereby discouraging membership in the Union, Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. By telling employees on February 29, 1980, that Margaret Reeder would not have been laid off if the Union had not been organized, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

7. By withdrawing recognition of the Union as the exclusive bargaining representative of its office and technical employees on or about July 23, 1980, and refusing to meet and negotiate with the Union thereafter, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

## The Remedy

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

Respondent, having discriminatorily demoted Ervin W. Howard, having refused him the right to bump junior planners or lift truck parts salesmen, and in effect having constructively discharged him, I find it necessary to order it to offer him reinstatement to his former position of employment of timekeeper, if it still exists, and if it does not exist, then to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for lost earnings and other benefits, computed on a quarterly basis from date of demotion to date of proper offer of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 289 (1950). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). As part of the remedy, I consider it necessary to make Margaret Reeder whole for the week's pay and benefits she lost in March 1980, as a consequence of Respondent's illegal demotion of Ervin W. Howard. *Central Dispatch, Inc.*, 229 NLRB 979, 985 (1977).

It has been found that Respondent, without notice to or bargaining with the Union, granted increases in pay, modified the life insurance plan, made available a personal accident insurance plan, and eliminated the timekeeper position. It will therefore be recommended that Respondent cease and desist from unilaterally changing

wages and conditions of employment, and eliminating positions.

Having found that Respondent failed to bargain in good faith with the Union as the certified collective-bargaining representative of employees in an appropriate unit of Respondent's employees, and having found that Respondent refused to meet and negotiate with the Union on or about July 23, 1980, and thereafter, I shall recommend that Respondent, upon request, bargain collectively in good faith with the Plymouth Office Workers Union as the exclusive representative of all employees in the unit herein found to be appropriate for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. To insure that the employees in the appropriate collective-bargaining unit will have the opportunity to enjoy the full benefits that may be derived from their selection of a bargaining agent as contemplated by the Act, I recommend that the initial year of certification be deemed to begin on the date that the Company commences to bargain in good faith with the Union as the recognized bargaining representative of the employees in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815, 826 (1975).

As Respondent has engaged in such egregious misconduct as to demonstrate a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring Respondent to cease and desist from infringing in any manner upon rights guaranteed employees by Section 7 of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[20]

The Respondent, Plymouth Locomotive Works, Inc., Plymouth Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from and refusing to bargain collectively in good faith with Plymouth Office Workers Union, as the exclusive bargaining representative of all of its employees in the unit described below.

(b) Making or effecting any change in the wages, hours, or other terms or conditions of employment of employees in the collective-bargaining unit described below, and eliminating any position in the bargaining without first giving notice to their collective-bargaining representative and affording such representative an opportunity to engage in collective bargaining with respect to such change. The appropriate collective-bargaining unit is:

> All office clerical employees and technical employees employed at the Respondent's Plymouth, Ohio, facility, excluding all production and maintenance employees, and professional employees, guards, and supervisors as defined in the Act.

(c) Demoting, discharging, denying the right to bump, or otherwise discriminating against any employee for supporting Plymouth Office Workers Union, or any other union.

(d) Threatening employees with withdrawal of insurance and wage increases, and with the reclamation of such increases unless a charge at the Board was withdrawn.

(e) Maintaining any rule which prohibits any employee from distributing or soliciting literature on behalf of a labor organization in nonworking areas during nonworking time.

(f) Expressing to employees that, but for the Union, employees would not be laid off.

(g) In any other 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, bargain with the above-named Union as the exclusive representative of the employees in the unit described above, concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Offer Ervin W. Howard immediate and full reinstatement to his former job of timekeeper or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the Decision.

(c) Make Margaret Reeder whole for any loss of earnings and other benefits she may have suffered as a result of her 1-week layoff.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its plant in Plymouth Ohio, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon their receipt, and be maintained by it for 60 con-

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Kules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In the event that 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 Baord."

secutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.