AK Steel Corporation *and* United Steelworkers of America, Local 1865, AFL–CIO, CLC. Cases 9–CA–33261 and 9–CA–33272

August 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 14, 1997, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, AK Steel Corporation, Ashland, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

''(c) Furnish the Union in a timely manner the information requested by the Union in its letter dated August 9, 1995, consisting of blanket orders and related data insofar as it encompasses information which, in whole or in part, may affect employees who are within the above-described Ashland Works unit for the time period set forth in the remedy section of this decision.''

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

[1] The Respondent has 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.

[2] Member Higgins notes that the Respondent, in defending against the allegation that it unilaterally and unlawfully implemented a change regarding employee use of safety shoes, relied on a ''waiver'' defense. Thus, Member Higgins does not reach the issue of whether a ''contract coverage'' analysis would have been appropriate. See *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

[3] We have modified the judge's recommended Order and notice to require the Respondent to provide the Union with the information that it requested, without the necessity of making a new request. *I & F Corp.*, 322 NLRB 1037 (1997).

APPENDIX

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

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

WE WILL NOT, without notice to or bargaining with United Steelworkers of America, Local 1865, AFL–CIO, CLC, unilaterally change our prior practice of permitting our employees in the unit set forth below to use metatarsal guard shoes at their option by requiring, instead, that all unit employees must wear such equipment while at work. The appropriate unit is:

> All hourly paid production and maintenance employees and hourly rate mill clerks employed by us at our Ashland, Kentucky plant, but excluding all foremen, assistant foremen, watchmen, office and salaried employees, employees in the first aid and medical department, salaried employees in the metallurgical department and shop checkers, professional employees, guards and supervisors, as defined in the Act.

WE WILL NOT fail and refuse to furnish the above-named Union with information necessary for, and relevant to, the Union's ability to properly administer its collective-bargaining agreement with us, including blanket orders and any related data utilized, in whole or in part, in connection with our Ashland Works facility.

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

WE WILL, at the Union's request, bargain with the Union as your exclusive representative in the above-described appropriate unit concerning your terms and conditions of employment; in particular any changes to your optional use of metatarsal guard safety shoes while at work, until agreement is reached and, if there is an understanding, embody it in a signed agreement.

WE WILL, at the Union's request, rescind the unilateral change requiring that you must wear metatarsal guard safety shoes at work until we bargain in good faith with the Union or until reaching agreement or impasse.

WE WILL furnish to the Union in a timely manner the blanket orders and related data it sought in its August 9, 1995 letter insofar as the request encompasses information which, in whole or in part, may affect you

as employee-members in the above-described Ashland Works unit.

AK STEEL CORPORATION

Eric V. Oliver, Esq., for the General Counsel.
Brian P. Gillan and *John O'Connor, Esqs. (Dinsmore & Shohl)*, of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was tried in Ashland, Kentucky, upon a consolidated complaint issued pursuant to charges filed by United Steelworkers of America, Local 1865, AFL–CIO, CLC (the Union).[1] The complaint alleges that AK Steel Corporation (the Respondent or Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) in two ways: (1) by not furnishing the Union with certain requested information assertedly necessary to enable the Union to determine whether unit work was being inappropriately contracted out so as to enable it to take action to protect bargaining unit jobs; and (2) by unilaterally, without notice to or bargaining with the Union, changing its safety policy to make mandatory, rather than optional, the wearing of metatarsal guard safety shoes by unit employees while at work.[2]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered. Upon the entire record,[3] including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has been engaged in the manufacture of steel at its facilities in Ashland, Kentucky, from which, during the 12 months preceding issuance of the consolidated complaint herein, it sold and shipped goods valued in excess of $50,000 directly to points located outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, at its Ashland, Kentucky Works, manufactures steel slabs and zinc coil grips in a blast furnace operation. As successor at the Ashland facility to Armco Steel Company, L.P., it admittedly, during all times relevant herein, had been bound by Armco's collective-bargaining agreement with the Union which covered a unit of 900 to 1000 employees.[4] That contract, effective by its terms from August 1, 1989, to August 1, 1993, continued to be extended by the parties until a new agreement was reached. Since a new contract had not been executed by the time of the hearing, the 1989 contract remained in effect during the times relevant to this proceeding.

In addition to its Ashland Works, the location involved herein, the Respondent also operated a facility in Middletown, Ohio (the Middletown Works), and a Coke plant in the vicinity of Ashland. Employees at the Coke plant were represented by the Oil, Chemical and Atomic Workers Union (OCAW).

As noted above, this matter involves two basic issues—the Respondent's alleged refusal to provide the Union with requested maintenance agreements and blanket orders, information assertedly necessary to enable the Union to perform its bargaining representative functions, and an alleged unilateral change in working conditions by requiring that all unit employees wear metatarsal guard safety shoes at work. Previously, the use of that equipment had been optional to employees.

With respect to the information request issue, the above collective-bargaining agreement, in relevant part, provided at section 2.41, that the guiding principle in determining whether work should be performed by bargaining unit employees or contracted out was that work capable of being performed by unit employees shall be done by them. Accordingly, the Respondent was not to contract out work for performance inside or outside the plant unless it demonstrated that such work met certain specified contractual exceptions and standards or reasonableness sufficient to establish that it would be more reasonable for the Company to contract out such work than to use its own employees. Subject to the Respondent's demonstration of the applicability of relevant contractual exceptions, balanced by conformity with the enumerated reasonableness factors, virtually all types of work which might be performed by the Respondent's bargaining unit personnel were subject to the contracting out process.

Section 2.44 of the collective-bargaining agreement established a contracting out committee consisting of eight designated management and unit member representatives, four from each side, to meet at least once a month to discuss and

[1] The relevant docket entries are as follows: The charges in Cases 9–CA–33261 and 9–CA–33272 were filed on September 15 and 18, 1995, respectively; the order consolidating these cases and the consolidated complaint issued on December 4, 1995; and the hearing was held on June 11, 1996.

[2] All dates herein are within 1995 unless stated to be otherwise.

[3] The Respondent's unopposed motion to correct the transcript record of this proceeding hereby is granted and the same is received in evidence as R. Exh. 11.

[4] The stipulated appropriate bargaining unit was as follows:

All hourly paid production and maintenance employees and hourly rate mill clerks employed by the Respondent at its Ashland, Kentucky plant, but excluding all foremen, assistant foremen, watchmen, office and salaried employees, employees in the first aid and medical department, salaried employees in the metallurgical department and shop checkers, professional employees, guards and supervisors, as defined in the Act.

attempt to resolve contracting out problems. Section 2.45 provided that, before the Respondent finally decided to contract out an item of work, the union members of the contracting out committee were to receive written notice sufficient to advise them of the location, type, scope, duration, and timetable of the work so as to enable the union committee members to adequately form an opinion of the reasons for such contracting out. The union committee members, under this section, were entitled to request additional committee meetings for detailed review and, upon their request, the union committee members were to be provided with all relevant information as to the reasonableness factors and opportunity to review relevant proposed contracts with the outside contractor. In the event of a timely filed union grievance, the Respondent's unjustified failure to provide the Union with the above notice so as to deprive the Union of reasonable opportunity to suggest and discuss practicable alternatives to contracting out could subject the Company to a remedial penalty fashioned at the discretion of a permanent arbitrator.

Finally in this area, section 2.49 provided for annual review where, commencing on or before October 1 of each year, company and union committee members were to meet to review all work, whether to be performed inside or outside the plant, that the Respondent anticipated would be performed by outside contractors or vendors during the following calendar year, identifying situations where the elimination of ''restrictive practices'' would promote the performance of such work by bargaining unit employees. During that process, the union committee members were entitled to review in confidence any current or proposed contracts concerning work performed for the Respondent by outside contractor and vendors.

On the issue concerning the alleged unilateral change whereby the Respondent mandated the wearing at work of metatarsal guard safety shoes, as opposed to the previous practice of using such equipment at the employees' option, section 14.11 of the labor agreement provided for company and union cooperation in eliminating accidents and health hazards and specified that ''[t]he Company shall make provisions for the safety and health of its employees at the plant during their hours of employment.'' Section 14.2, in relevant part, provided that ''*Protective devices, wearing apparel and other equipment necessary properly to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in the plant or as such practices may be improved from time to time* [emphasis added].'' That section, upon which the Respondent principally relies, stipulates that safety equipment and clothing will be furnished to employees at the Respondent's expense except in cases of loss or willful destruction, where the Respondent might assess a fair charge.

Section 14.4, et seq., established a joint safety and health committee comprised of three management and three union members, each with their own co-chairman, which held monthly meetings. The committee's function was to ''advise with plant management concerning safety and health and to discuss legitimate safety and health matters.'' The committee was to consider existing safety and health practices and rules, formulate suggested changes to the status quo, recommend adoption of new practices and rules, review those developed by management and make appropriate supported recommendations to the Respondent's Works manager for his consideration and for such action as he may consider inappropriate.

Section 14.42 provided that ''*When the Company introduces new personal protective apparel or extends the use of protective apparel to new areas or issues new rules relating to the use of protective apparel, the matter will be discussed with members of the Joint Safety and Health Committee in advance with the objective of increasing cooperation* [emphasis added].'' Differences arising from such discussions were to be subject to the grievance/arbitration procedure.

The parties stipulated that the following individuals were Respondent's supervisors and agents within the meaning of Section 2(11) and (13), respectively, of the Act at its Ashland Works: William Gonce, manager of industrial relations; R. L. (Rick) Williams, labor relations manager; Jim Gardner, section manager, timely repair planning; and Charles Holman at safety engineering. During relevant periods, W. D. Osborne and J. E. Hodges both were agents of the Respondent-Osborne as chairman of the Respondent's bargaining committee at the 1989 contract negotiations, and Hodges as a senior safety engineer. Henry J. Rossi was the Respondent's vice president, operations; Clinton Shields, senior industrial relations representative; and Paul Dillow, head of the Respondent's safety department.

Principal union representatives included Emmanuel S. Mason, International Union staff representative; Michael Hewlett, president of Steelworkers Local 1865; Harry Lee Hedrick, chairman of the safety committee; Delbert Shy, chairman of the grievance committee; and William E. Clark, chairman, and apparently sole member of the Local 1865 subcontracting out committee.

B. *The Facts*

1. Metatarsal guard safety shoes—the alleged unilateral change

a. *The events of July 25*

It is undisputed that on about July 25, as representatives of Respondent and the Union were ending that day's negotiating session for a new collective-bargaining agreement in Pittsburgh, Pennsylvania, which meeting was attended by the parties' various officials at, respectively, the corporate, International Union, and local union levels, International Union Staff Representative Emmanuel S. Mason asked William Gonce, the Respondent's manager of industrial relations, Ashland Works, if they could have a meeting the following week, when they returned to Ashland, to negotiate the metatarsal guard issue. That topic had been the subject of a July 7 memorandum to AK Steel employees from Henry J. Rossi, the Respondent's vice president, operations. This memorandum had announced that, effective October 1, all employees would be required to wear metatarsal safety shoes while at work in the Respondent's plants. At the time, the use of such equipment had been optional to employees. Gonce replied that the Company did not consider this to be a negotiable matter since it related to personal protective equipment and was company policy.[5] The Company would be willing to dis-

[5] The Respondent, as noted, contends that, under sec. 14.2 of its collective-bargaining agreement with the Union, quoted above, it had

Continued

cuss the matter, but would not consider such talks to be ''negotiations.'' Mason replied that the Union disagreed with this, declaring that this topic was a subject for bargaining and that the Union wanted to bargain over this issue. Mason told Gonce that he would call him when he returned home.

The Rossi memorandum, to which Mason had referred, began by noting that the Respondent had made substantial progress in its safety program, its highest priority; that it had not yet reached that its goal of zero injuries but was heading in the right direction; and that the safety statistics recently released by the American Iron and Steel Institute ranked the Respondent number one among the top eight steel producers in the seven different measures the Institute tracked. However, compared to the national average, as compiled by the National Safety Council, the Respondent was above average in its occurrence of eye and foot injuries. The memorandum, in most relevant part, provided:

> To take another step in helping prevent these kinds of injuries, effective October 1, 1995, all employees will be required to wear metatarsal safety shoes while working in the plants.[6]

On July 28, Mason, by telephone, asked Senior Industrial Relations Representative Clinton Shields to set up a negotiating meeting on the matter of the newly required use of metatarsal guard safety shoes. A date was set for August 3.

b. *The August 3 meeting*

The August 3 meeting was held in a company conference room at the Ashland Works. The union committee consisted of Mason for the International Union, and Local Union Representatives Michael Hewlett, Delbert Shy, and Tommy Lee Hedrick, respectively Local Union president, chairman of the Union's grievance committee, and chairman of its safety committee. The Company was represented by Ashland's labor relations manager and spokesman, R. L. (Rick) Williams, Shields, and Safety Engineering Representative Charles Holman.

Mason[7] testified that Williams declared at the outset that he wanted Mason to understand that the Company was willing to meet, but that it was not negotiating. Metatarsal safety shoes were not a subject for negotiations; the matter was company policy. Mason replied that he disagreed and felt it necessary that the parties negotiate with respect to this mandatory bargaining subject. The Company then gave the Union the Kellar review documents, referenced above, relating to accidents assertedly affected by the absence of metatarsal safety shoes, and the Union handed the Respondent's representatives certain papers, the most important of which was a document that had been prepared in July 1989 by J. E. Hodges, senior safety engineer.

Mason related that, with respect to the immediate bargaining unit, the provided company materials showed that of the 25 accidents at the Ashland plant in 1992, 13 might have been prevented/minimized by the wearing of metatarsal safety shoes; of the 19 and 13 accidents in 1993 and 1994, respectively, 8 in each of those years might have been so prevented/minimized. Additional analogous figures were provided for the Respondent's Middletown Works. The parties discussed who had made these determinations as to causation, the Union wanting a like decisional role.

The Hodges' document, on which the Union relies, was prepared in July 1989 during negotiations for the parties' more recent collective-bargaining agreement. It, in relevant part, was as follows:

SAFETY SHOE REQUIREMENTS

ASHLAND WORKS ARMCO STEEL COMPANY, L.P.

> During the recent negotiations between the Ashland Works Armco Steel Company, L.P. and the U.S.W.A., Local #1865, an agreement was reached permitting all employees represented by the U.S.W.A. Local #1865 to exercise the *personal option*[8] to purchase work shoes with hard toes only without metatarsal guards. This *option* is contingent on no increased accident rate of foot and toe injuries and will be subject to a joint review by Armco and the Union if there is an increase of foot and toe injuries as a result of employees exercising this *option*.
>
> This *option* similarly includes all salaried personnel at the Ashland Works on a trial basis and will be discontinued if it is determined that this *option* reflects an increase in foot and toe injuries.
>
> . . . .
>
> Prepared at the direction of W. D. Osborne.
>
> J. E. Hodges
> Sr. Safety Engineer

Mason testified that when he gave the Respondent's representatives the Hodges' paper, he reminded them that the parties had been living with that document for the last 6 years. Noting that the optional use of metatarsal guard safety shoes had been made contingent in that document upon there being no increased rate of foot and toe injuries, it further had provided that should there be an increase in such injuries as a result of employees exercising this option, this option's continued availability would be subject to a joint management/ union review. Accordingly, Mason maintained that, while it might become applicable to require the use of metatarsal guard safety shoes with an increase in injuries,

the independent right to mandate the use of protective devices, wearing apparel, and other equipment.

[6] Gonce, manager of industrial relations at Ashland, testified that the Rossi memorandum had issued following discussions between himself, his Middletown Works counterpart, Dale Gerber, and then-Director of Safety John Matysiak, where those officials had concluded among themselves, from their prior experience, that it was paramount for the Respondent to have a metatarsal foot protection program. Pursuant to Gonce's July 14, 1995 request, Marilyn Kellar, hazardous materials coordinator, on July 18, provided the results of a review she had made to determine the possible use of metatarsal guards in preventing or reducing the severity of foot injuries below that which had occurred during 1992, 1993, and 1995 at the Ashland and Middletown Works. Since Gonce's request for this data and Kellar's responding report postdated Rossi's July 7 memorandum by 7 and 10 days, respectively, Rossi could not have had the benefit of Kellar's review when he issued his memorandum.

[7] Mason's testimony was supported by that of Shy.

[8] The word ''option'' appears underlined throughout as in the Hodges' document. Although Hodges' name and job title were typed at the end, the document never was signed.

this could occur only after talks between the Company and the Union. The Respondent could not unilaterally mandate their use. Williams, however, continued to adhere to his original position, declaring that it did not make any difference as to what the Union presented, the Company was not going to negotiate about metatarsal guard safety shoes. Before leaving, at the Union's request, the parties scheduled another meeting for August 23 at a company meeting room.

Williams, who chaired the August 3 meeting for the Respondent, and Gonce averred that the Respondent's position as stated at that session was that the metatarsals were personal protective equipment the use of which the Respondent was authorized to adjust under section 14.2 of the contract, above.[9] Williams complained that he had told the Union that the Respondent's representatives were not at the meeting to negotiate the change in policy concerning metatarsal guards. Section 14 of the labor agreement, on its face, gave the Company the right to improve safety or to implement reasonable rules which the Union, also under section 14, could challenge.

The Respondent's most comprehensive position as to what happened at the August 3 meeting was set forth in its detailed minutes of that session. These minutes reaffirmed the parties' respective positions as to the negotiability of the metatarsal guard safety shoes issue.

During the course of that meeting, as described above by Mason, the Respondent furnished the Union with the lists, prepared by its safety department, of foot injuries at both its Coke plant and Ashland Works, and for Ashland alone, for 1992, 1993, and 1994. The Union was interested only in the Ashland figures. The Respondent's officials, in preparing this report, had taken into account any injuries which, in their view, could have been lessened or prevented by the use of metatarsal guards. Mason expressed concern that, although Rossi's memorandum was dated July 7, the study on which those reports were based had not been made until recently. Williams explained that there had been ongoing discussions before the report was compiled and that management had received prior input from the safety and/or medical departments. The Respondent's representatives at that meeting were concerned that Rossi's memo be implemented on a company-wide basis.

Reasons for the Union's objections to the required universal use of the metatarsal guard safety shoes were reflected in the Respondent's minutes. Hedrick pointed out that railroaders and crane operators had been exempted from the use of the metatarsal guards because such equipment had made them trip and fall. In Hedrick's view, there was no showing that railroaders even needed the metatarsals. The crane operators felt particularly vulnerable on ladders and on the thick, high weeds in the Respondent's assertedly unkept yard. Shy contended that he had sustained two injuries caused by wearing metatarsal guards. The meeting ended without agreement.

Augmenting the Union's objections to the use of metatarsal guard safety shoes, Mason testified that, when he had worked at the Respondent's River Terminal in the 1970s, he had been required to climb over a railing and descend a ladder 40 feet into a barge. The metatarsal guards were attached to the shoe by two or three rivets and at the shoe laces. Mason explained that, in his experience, the danger had been that the metatarsal guards could get caught on a barge flange or on one of the ladder rungs. The biggest obstacle was in climbing up the ladder rungs since the guards fit over the foot, but stuck out at points where they were not firmly against the shoe leather. This created gaps which could catch onto a ladder or piece of metal. Plastic pieces placed at the sides to improve the appearance of the metatarsal guards also could get caught as the wearer walked. Mason, however, did concede during cross-examination that since the 1970s, metatarsal safety shoes technology had changed, with the current availability of internal as well as external guards.

c. *The August 23 meeting*

The parties met again on the issue of metatarsal guard shoes on August 23, at 10 a.m. Gonce, Williams, Shields, and Paul Dillow, the new head of the Respondent's safety department, appeared for the Respondent. Mason, Shy, and Hedrick attended for the Union. Gonce and Mason served as principal spokesmen for their respective sides.

Combining the testimony of Mason and Shy, Mason opened the meeting by saying that he was there to negotiate on the issue of whether metatarsal guards were optional. Gonce answered that the matter was not negotiable; it was company policy. The parties discussed the 1992, 1993, and 1994 accidents referenced in the materials the Company previously had given the Union. Although the union representatives again put forward the Hodges' memorandum, the Respondent consistently maintained that regardless of what documents the Union had, the matter was not a subject for bargaining and that, effective October 1, the Company was going to implement its metatarsal safety shoes policy as announced in Rossi's July 7 letter. The Union told the company representatives that they were as safety-minded as was the Company, maybe more so. The Union recognized that there were certain jobs where metatarsal guards were needed and jobs where they were not. If the Respondent would negotiate this issue the parties could reach closure.

This suggestion was not accepted and the Respondent, on October 1, did implement its announced policy requiring the wearing at work of metatarsal safety shoes. Mason had no further discussion about metatarsal safety shoes after this August 23, 1995 meeting. At both the August 3 and 23 sessions, Williams and Gonce, respectively, had declared that they would discuss the metatarsal issue and receive union suggestions but that they were not there to negotiate about it.

The Respondent's account of the August 23 meeting again is contained in its minutes of that session. There, Gonce reiterated the Company's rejection of Mason's demand to classify their gathering as a negotiating meeting on a negotiable item stating, instead, a willingness to discuss the matter with the Union. Mason reiterated the Union's position that the metatarsal guard safety shoes could cause accidents. The Union was not opposed to their use for those whose jobs required them, but clerks and crane operators did not need them. Metatarsal guard safety shoes had been taken off train crews and the River Terminal long before because the Terminal employees had had to climb into and out of barges. Gonce replied that, at that time, the Respondent saw no exceptions, although the Company was prepared to evaluate

[9] Gonce had taken the same position when meeting with Oil, Chemical and Atomic Workers Union (OCAW), with whom the Respondent negotiated for other of its employees.

medical reasons should such information be submitted by employees. The Respondent, contrary to the Union, had found no place where they had caused accidents as opposed to preventing.

The parties continued to discuss the relative hazards assertedly caused by the metatarsal guard safety shoes, including whether clerks, who principally left their offices to proceed along safety walks to post notices, needed them; whether the Hodges' 1989 document giving employees the personal option of wearing them made the issue negotiable; and the relevance of accidents reported at Respondent's facilities other than Ashland. Gonce, answering an earlier union inquiry, reported that contractors' personnel coming onto the Respondent's premises would be required to wear safety shoes only, and not the metatarsal guards. Gonce reiterated the Respondent's position that metatarsal guard safety shoes only, as opposed to hard-toed safety shoes, were the only footwear approved for plant use and the only shoes subject to the company shoe allowance.

d. *The Hodges' document*

Homer B. Moore Jr.[10] testified that the July 1989 Hodges' document, was prepared pursuant to negotiations between himself, Hedrick, J.P. Collins, for the Union, and Company Representatives James E. Hodges and Joe Salyers. The discussions covered the reasons for and against wearing metatarsal guard safety shoes—where they should and should not be worn, the hazards they caused, and the hazards they protected against. The parties considered the entire plant in their effort to decide where to eliminate the use of metatarsal guard safety shoes and where they should be made mandatory. After almost 2 days, it was determined that the metatarsal safety shoes should be excluded from more places than they should be used. Accordingly, the shoes were left as an option and the Hodges' document was prepared.

As Moore related, in July 1989, general contract negotiations had been progressing in Pittsburgh, while local issues, such as the use of metatarsal guard safety shoes, were being discussed at a hotel in South Point, Ohio. W. D. Osborne, who then headed the Respondent's Pittsburgh negotiating committee had directed Hodges, then-head of the local management team, to engage in those talks and to prepare the document which later became associated with his name. The language of that document actually had been prepared by the Company's safety and health department from a rough draft hacked out at the South Point Hotel. It was prepared before the collective-bargaining agreement was signed on August 1, 1989, and memorialized the joint committee's agreement.

As Respondent's representative Allen recalled, the 1989 meeting which led to the February 13 accord, described above by Hewlett, and had been attended by Shields and himself for the Respondent and by a union committee, consisting of Hewlett as chairman, Jim Womack, Al Blanton, Bob Reynolds, and Gerald Johnson. The parties had considered a union contract negotiating proposal to remove metatarsals from all high work. The issue raised by this proposal was resolved by the conferees' agreement to refer it to a company-union committee for review and recommendations. The recommendations were to be passed on to the manager of human resources, Osborne, who then would review them with the plant manager. The resolution to create this joint committee was drafted by Allen and signed by the two negotiating committees on February 13, 1990, effective retroactively to August 1, 1989.[11] As Homer Moore, according to Allen, had not been a member of the Union's negotiating committee, he did not sign this accord.

Allen testified that, during the 1989 negotiations, the parties did not reach agreement that all employees represented by Steelworkers Local 1865 had the personal option of deciding whether to wear metatarsal guard safety shoes.

Hodges, the purported author of the document in question, denied that he had been given authority by the Company, then-Armco, to negotiate the issue of metatarsal guard safety shoes in the joint meetings with the Union, explaining that Osborne only had wanted a discussion of that matter. He also denied having been a member of the Respondent's negotiating committee, having served at the time simply as chairman, on the Company's side, of the general safety committee.

Hodges related that, on July 12, 1989, he had met with the Union to discuss metatarsal guard safety shoes. The minutes of that meeting, which Hodges drafted and which the Respondent put forward, showed that, on the above date, the joint company/union safety and health committee of Armco and members of Steelworkers Local 1865 had met ''to review and make recommendations regarding the wearing of metatarsal guard shoes by employees of the Ashland Works . . . conducted under Section 14 of existing Basic labor Agreement.'' Hodges testified that no committee member at the July 12 meeting had voiced an opinion that they were empowered to negotiate over the metatarsal guard safety shoes issue.

Nonetheless, the minutes of the July 12 meeting, propounded by the Respondent, show that the members present, Hodges and J. E. Salyers, for the Respondent, and Hedrick, Moore, and J. P. Collins, for the Union, ''reviewed all the job positions at the Ashland Works (approximately 150) in an effort to determine on which jobs they should be optional to the employee.'' By full consensus, the joint committee, in nine listed work areas, recommended that metatarsal guard safety shoes should be required for only about 14 job classifications. All other jobs not there specified should leave metatarsal guard safety shoes optional to the employee. However, steel-toed safety shoes were to remain a requirement on all jobs within the plant proper.

The minutes of the July 12 meeting ended with the following paragraph:

> Due to the small number of job positions in which metatarsal guard shoes are recommended as required as compared to the much larger number of job positions on which they are recommended as optional to the em-

[10] Moore, successively employed since 1969 by Armco and the Respondent, was a safety and health representative in the Respondent's safety and health department. Since 1979, Moore has served on the safety committee, checking daily safety and health activities.

[11] Allen, then a Respondent's supervisor, industrial relations, at Ashland, and later a purchasing agent, had no involvement with the work of the joint committee. His substantive role with respect to that issue ended with the execution of the February 13 accord. The testimony of Local Union President Michael Hewlett concerning the February 13 accord generally conformed to that of Allen, except that Hewlett further related that the Hodges' document had resulted from this accord.

> ployee, taking into consideration the results of an Ashland Safety Department study (1987) which strongly indicated that the use of metatarsal guard shoes had little value in minimizing foot and toe injuries, the joint committee makes the general recommendation that metatarsal shoes not be required by any employee at the Ashland Works on a trial basis.

Hodges testified that years later, on June 6, 1996, while at the Respondent's premises on business, he encountered Union Safety Committee Chairman Hedrick who asked if Hodges had been told to appear at the hearing in these proceedings. Hodges told him yes. After some additional discussion, Hedrick expressed his belief that they earlier had negotiated something (on metatarsal guard safety shoes). Hodges replied, ''Harry, you know and I know that none of us were empowered to negotiate anything. We're simply over there to discuss and make recommendations.'' Hedrick told him, ''We went over there to negotiate.''

Hedrick, in turn, described that 1996 conversation with Hodges as having occurred in the union safety representative's office in the Respondent's safety department. Hedrick had not seen Hodges for about 1-1/2 years. After some amenities, Hodges asked if Hedrick had a copy of the letter he had put together on the metatarsals. When Hedrick said that he did not, Hodges continued that he would like to read it, telling Hedrick that ''by now you know we wasn't at negotiating.'' Hedrick replied that that might be Hodges' position, but it was not his. While these two accounts of their 1996 reminiscence of what had been said during their 1989 discussion of metatarsal guard safety shoes, which led to the Hodges' document, might differ in details, there was no conflict in the most important respect, the statements by Allen and Hedrick describing their respective positions and that taken by the other during that conversation about what had transpired 6 years before. Nonetheless, I credit Hedrick's account of what was said on that occasion because, being the more comprehensive and detailed, it was more convincing.

2. Maintenance agreements and blanket orders—the alleged refusal to furnish information

On August 9, 1995, William E. Clark,[12] sent a letter to Jim Gardner, chairman of the Respondent's contracting out committee,[13] requesting on behalf of Local Union 1865, copies of any and all maintenance agreements and blanket orders for outside vendors and contractors. The letter also requested that the Respondent cease and desist from issuing blanket orders and making maintenance agreements with outside contractors and vendors until the Union's contracting out committee had been properly notified. Clark presented this letter to Gardner on August 10.

Clark explained that the Union's contracting out committee usually met weekly with its management counterparts to discuss issues relating to the contracting out of unit work, a practice permitted under the collective-bargaining agreement in certain circumstances and conditions. The two committees could meet more frequently, if requested. At these meetings, the Company provided the Union with notification of work it intended to contract for performance both outside the Respondent's premises and inside, where employees of other employers were to be brought into the Respondent's plant to do the work. The Respondent also gave the Union's contracting out committee the anticipated involved job descriptions, man hours, locations and crafts. This would be followed by the parties' discussion of whether the subject work was to be done by unit employees under the collective-bargaining agreement, or whether the union committee could agree that, under the labor agreement, it could be contracted out. Clark could ask questions at these meetings and the Respondent's representatives often would get back to him with additional information.

Clark testified that he had requested the maintenance agreements and blanket orders in order to obtain documentation which might enable him, as committee chairman, to determine whether bargaining unit work was being lost unduly to outside vendors or contractors, so that he could grieve or approve the performance of such jobs. Unit maintenance jobs could be lost as a result of maintenance agreements where the Respondent leased equipment and contracted that the lessor perform the relevant maintenance work. Clark conceded that, in his testimony, he had used his own definition of a maintenance contract.

Blanket orders were computerized order formats used for frequently purchased items bought from regular suppliers. These contained certain preentered data, such as merchandise specifications and prices therefor which, when augmented with data necessary to complete an immediate transaction, enabled company representatives to electronically place orders with outside vendors for items which the Respondent's employees otherwise might have fabricated inside the plant. The result again might could be that the work required to produce such items would be done by employees of outside vendors instead of by unit employees. This could adversely affect job opportunities inside the unit.

In his August 9 letter, Clark had asked the Respondent to stop entering into maintenance contracts with outside contractors and vendors before the Union's contracting out committee was notified because the basic steel collective-bargaining agreement had given the Union the right to be notified in advance. Clark had sought to be notified in advance in order to be able to decide which subcontracted work to grieve. He also had wanted the information requested in his letter to possibly recapture any maintenance work which may improperly have gotten away from the bargaining unit by use of maintenance contracts and blanket orders.

Clark never received a written answer to his August 9 letter or any of the requested information. One to two weeks after Clark's request, Gardner did orally inform him that he did not believe that the information sought was available. The data was somewhere, but Gardner did not know if it could be made available to the Union or to Gardner, himself. Gardner explained to Clark that he obtained his information from the other departments. If those departments did not tell Gardner what they were doing, he would not know, either. The Respondent did not ask the Union to clarify its position.

Clark testified that he first had learned about blanket orders from a computer readout showing that a job which had been performed in the rigger shop no longer was being done

[12] Clark, employed in the rigging separtment at the Ashland Works since 1963, was chairman and sole member of the Union's contracting out committee.

[13] As noted, Gardner's regular position with the Respondent was section manager, timely repair planning.

there. When Clark checked this out, he obtained another computer readout indicating that the work, in effect, had been contracted out by use of a blanket order. This indicated to Clark that the Respondent could use blanket orders to order particular items by computer at will and, accordingly, that items which might have been produced in the Respondent's shop possibly were being made elsewhere.

Richard S. Allen, identified above as a former labor relations supervisor for the Employer and, for 3 years prior to the hearing in this matter, a purchasing agent at the Respondent's Middletown Works, testified without effective contradiction that the Respondent did not have maintenance agreement documents, as such, although that term might appear in the Company's purchase orders.

Allen testified that the Respondent did have computerized blanket orders—standardized purchase contracts—set up with vendors with whom the Respondent did recurring business, which generally contained previously-agreed terms and conditions. Such entries typically included the pricing of items to be purchased, insurance identification information for work to be done inside the plant, and the hourly rates for involved craft employees. For example, many blanket orders contained established rates for welders, engineers, or electronic servicemen, prices for pencils or hammers—itemized rate schedules for pieces and/or services. Some blanket orders provided for specific activities, detailing the work to be done, but most just set forth rate structures for classifications of skills or items to be used for repeat orders. When activated, the blanket orders electronically issued purchase releases via its auto-fax capability, transmitting a faxed document not printed on paper.

The computerized purchasing data was kept at the Respondent's Middletown Works, about 150 miles from Ashland, and was accessible on the networked system at either location.[14] About 80 percent of the blanket orders were considered to be active; 25 percent were for the purchase of services and 75 percent for items. Of the blanket orders for services, 50 percent, or less, contained detailed descriptions of the services to be rendered. For the remaining half, examination of the individual releases would be necessary to determine the activities performed by the specified craftsman. Those departments that had requested specified work had access to those blanket orders, but others might have had such access, as well.

While the great majority of the Respondent's purchasing was done through the computer system, all computerized orders were not blanket orders. In addition to the blanket order releases containing for repeated use the terms and conditions of preset agreements, some computerized orders were single transactions with no underlying blanket order agreements. Also, the Respondent had not yet placed its raw materials purchases on its computer system.

Since the Union's information request did not limit the retroactive period for which the requested information was being sought, Allen pointed out that, before 1992, purchase order data existed only in this form of paper documents. To retrieve pre-1992 data, members of the Respondent's purchasing department would have to go to the archives basement and manually open and search boxes to see what might be found. While such a search could reach a point where the purchasing department would know it had found everything in archives, the Company would not know if everything had made it to there. There was no good cross-indexing system. The Respondent also was concerned that the information request was not restricted to blanket orders for the Ashland Works, but, on its face, apparently applied to all such orders for the entire company.

Allen further described the Respondent's difficulties in obtaining and providing the requested computerized blanket orders. He explained that the approximately 1000 Respondent's blanket orders, companywide, contained some 50–100,000 purchase order releases. The more than 400 blanket orders specific to the Ashland Works, following the same ratio, were used to produce 20–40,000 purchase releases a year. In order to obtain the blanket orders requested by the Union, Allen related that it procedurally would be necessary to learn, from the orders themselves, the purchase order numbers that had been released on each blanket order; to insert the purchase order numbers; to change a little flag to ensure that a release would not be faxed to an outside vendor; and to print the purchase orders. Each such order, depending on its size, typically could be one to five pages in length. After a list of purchase orders was compiled, it could take 10–15 seconds to reproduce each one. However, as noted, Ashland alone generated 20–40,000 purchase orders/year.

Gonce, manager of industrial relations at Ashland, testified, in effect, that the parties' collective-bargaining agreement contained the language and procedures necessary to deal with this situation. The contract provided a process whereunder the Respondent gave the Union advance notice of all contracting out events to occur outside of, or on, company property. At the weekly contracting out committee meetings, which Clark attended for the Union, Gardner and Shields, Clark's company counterparts, presented the contracting out notices[15] and the Respondent's position. Often, this was followed by detailed discussions and there were occasions when Gardner and Shields, Clark's company counterparts on the contracting out committee, would go back to the Company to obtain and provide the Union with additional information. Occasionally, certain such topics were considered during more than one meeting. Should the Company, after such discussions still decide to contract work out, the Union either could appeal through the expedited arbitration process or file a grievance. The Union has exercised both options in the past.

Gonce pointed out that the Respondent's policy was to furnish the Union with requested information when such data was relevant to the bargaining process and could reasonably be provided. Accordingly, the Company has supplied the Union with information as to where contracted out work was to go, the anticipated involved man hours broken down by craft, the jobs to be performed and the time lines for per-

[14] Allen testified that, because since 1994 no one at Ashland had had responsibility for purchasing, that function was handled from Middletown. Allen, responsible at both Ashland and Middletown for major purchasing for products, labor and services, reported to the purchasing manager, MRO (materials, repairs, operating), who bought materials and repair items.

[15] To facilitate its provision of information to the Union, the Respondent had promulgated separate contracting out notice forms whereon it, respectively, could furnish data concerning work to be performed outside the plant and work to be done inside the plant by employees of other employers.

formance. On capital projects, the Union has received time lines, identification of the crafts to be performing the work and of any peripheral work to be performed by plant employees, if available. The Company also has given the Union copies of contracts dealing variously with different types of construction jobs and with the vendors whose employees might perform bargaining unit work. Since 1986, when the present relevant contract language was incorporated, the collective-bargaining agreement specifically had given an umpire authority to penalize the Respondent for not furnishing the Union with information pertinent to particular contracting out events.[16]

Although the contract also provided for annual review by the Union, at its request, of all contracting out events followed by discussion of same, except in 1994 when Gonce first arrived, the Union had not asked for this.

The minutes of the contracting out committee's weekly meetings between November 9, 1995, and April 12, 1996, most of which were received in evidence, confirmed Gonce's testimony that the Union had not requested blanket orders during the weekly meetings there-represented, when information regarding the letting out of unit work was supposed to be exchanged. Also, the minutes confirmed that, during those meetings, there, in fact, had been exchanges of information.

C. *Discussion and Conclusions*

1. Metatarsal guard safety shoes—the alleged unilateral change

In the absence of waiver by a union of its bargaining entitlement, ''an employer violates Section 8(a)(5) and derivatively (1) of the Act by unilaterally changing the terms and conditions of employment of its employees without first providing their collective-bargaining representative a meaningful opportunity to bargain about those changes. *NLRB v. Katz*, 369 U.S. 342 (1962); *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958).''[17] ''In order to establish the waiver of a statutory negotiating right as to a specific mandatory bargaining subject, there must be clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the Union consciously yielded or clearly and unmistakably waived its interest in the matter.''[18] Generally worded contract language, whether in a management rights clause or elsewhere in the labor agreement, does not constitute a waiver of the union's statutory right to bargain about specific mandatory bargaining subjects.[19]

Equipment and work rules related to job safety are ''germane to the working environment,'' are not ''among those managerial decisions which lie at the core of entrepreneurial control,'' and, therefore, are mandatory subjects of bargaining.[20] In bargaining cases, ''the Board does not seek to make an assessment as to whether a given change would make the workplace 'safer' or otherwise 'better.' The issue in such cases is whether the change is of legitimate concern to the union as the representative of employees, such that the union would be entitled to bargain about the matter on behalf of the employees.''[21]

The Respondent, relying on section 14.2 of the collective-bargaining agreement that ''[p]rotective devices, wearing apparel and other equipment necessary properly to protect employees from injury shall be provided by the Company in accordance with practices now prevailing or as such practices may be improved from time to time,'' principally argues that the Union had waived its right to negotiate over company improvement of protective devices and wearing apparel. The Respondent asserts that such waiver extended both to the Respondent's rights and duties with respect to safety issues and to the Union's ''agreed upon advisory role . . . regarding Company decisions about safety improvements.''[22] The Respondent further contends that this waiver was not modified by the Hodges' document, which provided for union participation in determining the use of metatarsal guard safety shoes, because Hodges had not been a member of the Respondent's bargaining committee, had not been authorized by the Company to negotiate concerning that matter during the 1989 contract negotiations and because that document was neither signed nor incorporated into the subsequently executed collective-bargaining agreement.

The relevant language from the parties' most recent collective-bargaining agreement is not sufficiently clear and unequivocal to support the Respondent's argument of waiver. As to prevailing practices referenced in section 14.2, since the wearing of metatarsal guard safety shoes in the plant had been mostly, if not completely, optional for the 6 years preceding Rossi's memorandum, the only relevant prevailing practice which validly could have been in effect during that period would have been the Respondent's furnishing of such equipment to employees who had requested same. As to the remaining part of that section, whether a mandated use of metatarsal guard shoes by all unit employees regardless of the work that they did actually would constitute a safety improvement under section 14.2 was the very issue over which the Union has sought to bargain. To conclude, as the Respondent urges, that it has the right to unilaterally determine what constitutes improvements with respect to a statutory mandatory bargaining subject, the work use of safety equipment, would be to assume that issue even in the absence of clear contract language unequivocally giving the Respondent the right to so make such decisions.

Rather, it would appear that section 14.2 of the collective-bargaining agreement should be read in conjunction with contract section 14.42, which provided that ''[w]hen the Company introduces new personal protective apparel or extends the use of protective apparel to new areas or issues new rules relating to the use of protective apparel, the matter will be discussed with members of the Joint Safety and Health Committee *in advance* with the objective of increas-

[16] Gonce, in effect, conceded that the Union's ability to obtain a contractual remedy in contracting out cases was dependent upon the Respondent's compliance with the notification procedures contained in the collective-bargaining agreement. The Union would have no such remedy were that notification procedure to be bypassed since the Union, in that event, could not learn of any intended relocation of what otherwise might be bargaining unit work.

[17] *Cypress Lawn Cemetary*, 300 NLRB 609, 613 (1990).

[18] *Hi-Tech Corp*., 309 NLRB 3, 4 (1992).

[19] Id.

[20] *Northside Center for Child Development*, 310 NLRB 105 and at fn. 2 (1993), citing *Johnson-Bateman Co*., 295 NLRB 180, 182 (1989), and *Ford Motor Co. v. NLRB*, 441 U.S. 488 at 489 (1979).

[21] *Northside Center for Child Development*, supra.

[22] R. Br. at 21.

ing cooperation [emphasis added].'' Differences arising from such discussions were to be subject to the grievance/arbitration procedure. From this language, it is evident that the parties to the labor agreement had not agreed that the Respondent would have discretion to unilaterally promulgate new rules affecting the use of safety apparel without prior discussion with the Union. Moreover, since there was no contract language limiting the scope of such resort to the grievance/arbitration procedure in such cases, section 14.42 of the contract does not prevent the Union from grieving and proceeding to arbitration on any aspect of its disagreement with the Company concerning that Employer's proposed changes in protective apparel, including whether new rules concerning usage should be implemented.

However, in the present matter, the July 7 Rossi memorandum changing the use status of metatarsal guard safety shoes from optional to mandatory for all unit employees was issued without advance discussion with members of the joint safety and health committee, as required under section 14.42, or with any other group where the Union was represented. Such discussions as did take place on August 3 and 23 concerning the subject matter of this memorandum occurred at the Union's after-the-deed July 25 request. At those sessions, including on July 25 when the Union first had asked to negotiate the matter, the Respondent's representatives treated these meetings merely as implementation sessions and the mandated change as a nonnegotiable accomplished fact. While the Respondent's representatives at these meetings expressed a willingness to listen to union suggestions about the use of the metatarsal guard safety shoes and, perhaps, to adopt such changes as, in the Company's judgment, seemed worthwhile, the policy change announced in the Rossi memorandum, as noted, was not open to negotiation. In the Respondent's view, the Union's rights in this area under the grievance/arbitration procedure, if any, were limited to contesting details relating to implementation of the new mandatory rule, but not whether the policy change, itself, could or should be put into effect. As held in *High-Tech Corp.*,[23] to allow the union recourse to the grievance procedure concerning only the reasonableness of the Employer's announced unilaterally changed work rule does not afford the full bargaining rights assured by Section 8(a)(5) of the Act. Where the grievance procedure is used after the Employer has decided to implement the changed rule and the procedure is confined to reasonableness, or is similarly limited in scope, it is not a ''substitute for full bargaining prior to implementation of the rule.''

Although the formal relationship of the July 1989 Hodges' document to the August 1, 1989 collective-bargaining agreement is not established,[24] that paper is significant in three respects. First, it established the principle of joint company and union action. Taking its inception from the July 12, 1989 meeting between representatives of Respondent and the Union, at which all jobs at the Ashland Works were jointly reviewed in an effort to determine on which positions metatarsal guard safety shoes should be optional to the employees, it was concluded that the metatarsal guards should be made mandatory for only a distinct minority of positions and be made optional for a much larger number. In setting forth this conclusion, the Hodges' document, in noting the contingency of this option upon there being no increased rate of foot and toe injuries, provided that, if such injuries should increase, further action would be subject to a joint review by the Employer and the Union. Accordingly, in the period immediately before the execution of the still-effective 1989 collective-bargaining agreement, both at the July 12 meeting and in the Hodges' document which resulted therefrom, the parties had followed a practice of joint review in seeking to determine whether metatarsal guard safety shoes should be made optional. Having jointly decided that the use of such equipment principally should be left to the employees' discretion, the parties further had agreed that, should increased employee injuries warrant reviewing whether that option should be continued, such review, again, should be jointly conducted by representatives of the Employer and the Union.

Second, the Hodges' memorandum and the deliberations that preceded it, contrary to the Respondent, illustrated that the parties had recognized that material questions existed concerning whether the mandatory use of metatarsal guard safety shoes by all unit employees, regardless of duties performed, necessarily would be a safety improvement and further demonstrated that such questions historically had been jointly addressed.[25]

Third, although, as noted, the Hodges' memorandum never was signed or formally incorporated in the collective-bargaining agreement, its substance and conclusions, however de facto, were carried forward into the contract term in two ways. During the 6 years between the execution of the labor agreement on August 1, 1989, until the July 7, 1995 Rossi memorandum, employees at the Ashland Works, in fact, were free to use metatarsal safety shoes at their option. Next, its principle of joint employer/union review of changes in safety equipment generally was embodied in section 14.42 of the contract where, as noted, it was provided that any employer actions to be taken with respect to protective apparel be discussed in advance with members of the joint safety committee and that the Union have the right to grieve and arbitrate any disagreements without specified limitation as to the scope of such proceedings. Ironically, although the Re-

[23] 309 NLRB at 3–4.

[24] The Hodges' document is not among the various letters and other miscellaneous papers appended to, and made part of, the labor contract.

[25] This matter is distinguishable from *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992), where, the Respondent argues, waiver had been found on contract language less specific than here. In *Allied Signal*, the Board ruled that the employer had been entitled to unilaterally implement a smoking ban, the union having waived its right to bargain concerning that issue. It was noted that, over a 19-year period, the Union never had filed a grievance contesting that Employer's asserted contractual right to unilaterally implement various smoking restrictions. While the collective-bargaining agreement in *Allied Signal*, in relevant part, provided that ''[t]he Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment,'' the Board did not solely rely on that contract language but held, in finding waiver, that there was no need to decide whether the relevant contract language, by itself, constituted waiver because waiver could be construed from that language together with the parties' historical practice of permitting the Respondent to make unilateral changes in its smoking policy. Here, it has been found that there was no comparable history of employer unilateral conduct and that the indicated language of the labor contract, by itself, does not support the Respondent's argument of waiver.

spondent, where it felt its purposes served, relied on contract language to support its argument that the Union had waived bargaining rights, in its conduct, the Respondent did not follow the express contractual requirement of section 14.42 that it discuss in advance proposed changes in the use of metatarsal guard safety shoes before announcing its decision to make such changes.

The Memorandum of Understanding, signed February 13, 1990, and propounded by the Respondent, does not buttress the Respondent's position. That memorandum stemmed from a February 1990 company/union meeting to consider a union contract proposal to remove metatarsals from all high work. This issue, which was narrower than the general use of metatarsal guard shoes by all unit employees, addressed in the Hodges' document, apparently was resolved by the conferees' signed agreement, embodied in that February 13 Memorandum, to refer it for review and recommendations by a company-union committee. This committee's recommendations were to be passed on to the Respondent's manager of human resources, Osborne who, in turn, was to review them with the plant manager. The memorandum was made effective retroactively to August 1, 1989, the date the labor agreement was signed, evidently to relate this method for resolving this union contract proposal to the effective date of the collective-bargaining agreement. Since, as found above, the memorandum postdated the preparation of the Hodges' document, there is no established relationship between the two instruments. In any event, the scope of the February 1990 Memorandum of Understanding was too narrow to warrant a finding that the Union had therein waived its right to bargain about the general use of metatarsal guard shoes.

In the present matter, having undertaken to act unilaterally in this area with the issuance of the Rossi memorandum, the Respondent sought to justify its actions by further unilateral conduct after the fact. Accordingly, having previously announced the October 1 change making metatarsal guards mandatory in the July 7 Rossi memorandum, the Respondent, through Gonce, later ordered and received the July 18 Kellar report which assertedly listed the numbers of foot injuries occurring at Ashland and Middletown in 1992, 1993, and 1994 which, she concluded, could have been prevented or reduced in severity by the use of metatarsal guards. The bare numbers which comprised this report, unsupported by details of any sort, were prepared without the Union's participation or review. Whatever its validity, the Kellar report had not been prepared and, therefore, was not available to the Respondent when Rossi's memorandum was issued. Gonce's testimony that management informally had received unspecified data concerning such injuries before the Rossi memorandum came out was not tantamount to a report based on a systemized study, as Gonce recognized when he later asked Kellar to prepare one.

Having found that the Union has not expressly, clearly, unequivocally and unmistakably waived its statutory right to bargain about the Respondent's implemented work rule changing the use of metatarsal guard safety shoes from employee—optional to mandatory, I conclude that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally effectuating that changed rule without notice to or bargaining with the Union.

2. The Respondent's refusal to provide requested information

In *A-Plus Roofing, Inc.*,[26] cited by the General Counsel, the applicable principles were restated as follows:

> An employer, pursuant to Section 8(a)(5) of the Act, has an obligation to provide requested information needed by the bargaining representative of its employees for the effective performance of the Respondent's duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The employer's obligation includes the duty to supply information necessary to administer and police an existing collective-bargaining agreement (Id. at 435–438), and, if the requested information relates to an existing contract provision it thus is ''information that is demonstrably necessary to the union if it is to perform its duty to enforce the agreement . . . .'' *A. S. Abell Co.*, 230 NLRB 1112, 1113 (1977). Where the requested information concerns employees . . . within the bargaining unit covered by the agreement, this information is presumptively relevant and the employer has the burden of proving lack of relevance. With respect to such information, ''the union is not required to show the precise relevance of the requested information to particular bargaining unit issues.'' *Proctor & Gamble Mfg. Co.* [*v. NLRB*, 603 F.2d 1310 (8th Cir. 1979)] at 1315. Where the request is for information concerning employees outside the bargaining unit, the Union must show that the information is relevant. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965). In either situation, however, the standard for discovery is the same: ''a liberal discovery-type standard.'' *Loral Electronic Systems*, 253 NLRB 851, 853 (1980); *Acme Industrial*, supra at 432, 437. Th(i)s information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it. . . . [footnote omitted.]
>
> . . . .
>
> Once the initial showing of relevance has been made, ''the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information.'' *San Diego Newspaper Guild* [*Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977)] at 863, 867.

In *Keauhou Beach Hotel*,[27] the Board held that:

> even if the Union's request was ambiguous and/or intended to include information regarding nonunit employees when made, this would not excuse the Respondent's blanket refusal to comply. It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. [Footnote omitted.]

[26] 295 NLRB 967, 970 (1989).
[27] 298 NLRB 702 (1990).

Documentary information requested to enable the Union to assess whether the Respondent has violated the collective-bargaining agreement by its method of contracting out bargaining unit work and, accordingly, to assist the Union in deciding whether to resort to the contractual grievance procedure, is relevant to the Union's representative status and responsibilities.[28]

In the present matter, for purposes described, the Union requested two types of data—maintenance agreements and blanket orders. From Allen's unrefuted testimony that, while the Respondent did use computerized blanket orders in which the term ''maintenance agreement'' occasionally appeared, it did not have separate maintenance agreements, I find that the Respondent's obligation to furnish information in response to the Union's August 9 request centers solely upon whether it should be required to provide data associated with its blanket orders, including purchase releases dispatched therefrom.

From the above authority, I conclude that, subject to modifications set forth below, the Union generally has stated a reasonable basis for seeking the blanket order information. While the blanket order data requested in order to enable the Union to determine whether employment opportunities were being lost to its bargaining unit at the Respondent's Ashland Works was presumptively relevant, the General Counsel and Union have made no showing as to why it would be appropriate to furnish corresponding data concerning the Respondent's blanket orders utilized solely in connection with facilities removed from the Union's Ashland bargaining unit. Accordingly, in partial agreement with the Respondent, it, at most, would be relevant and appropriate to supply only with blanket order/purchase release information which, in whole or in part, could affect the Ashland Works unit.

The Respondent contends that it should not be required to provide the requested information even for the Ashland unit alone because this would pose an unreasonable hardship in view of the volume of materials and the quantity of work entailed in retrieving same. At Ashland alone 400 blanket orders were used to produce 20–40,000 purchase releases a year. However, this argument concerning arduousness was not made until the hearing. Clark testified without contradiction that he never had received a written response to his August 9 information request and that the Company's only reply had come 1 to 2 weeks later when Gardner, one of his company counterparts on the contracting out committee, had orally informed him that he did not believe that this information could be available to the Union or to Gardner, himself. Gardner then had explained that his information was obtained from other departments. If those departments did not tell Gardner what they were doing, he would not know and could not advise the Union. At no time was Clark asked to clarify his information request or to make it more limited or specific. ''The fact that a union may ask an employer for a large volume of information does not, by itself, render that request 'overbroad' so as to relieve the employer from the duty to provide that information where, as here, the information is necessary and relevant to the Union's performance of its bargaining duties.[29] Also, if an employer declines to supply relevant information on the grounds that doing so would be unduly burdensome, the employer must not only seasonably raise this objection with the union but must substantiate its defense.''[30] As set forth in *Wells Fargo Armored Services Corp*.,[31] ''The cost and burden of compliance will not justify an initial refusal to supply relevant data.'' The Respondent has the task of establishing that the production of the requested information would be unduly burdensome and, if it satisfies this burden, it must offer to bargain about sharing these costs.[32] Here, although the Respondent did describe difficulties in providing the requested materials, it did not meet its obligation to seasonally protest the onerousness of complying since it never had complained about the burdens involved before the start of the hearing. The Respondent also never offered to share with the Union the costs of producing this data. While, as the Respondent argues, the Union's information request may have been ambiguous as to time period(s) for which the data was sought and as to whether the information also was being requested with respect to nonunit employees at other Respondent's facilities, this did not justify the Respondent's simple refusal to comply. The Respondent had a duty to request clarification and/or comply with the request to the extent that it encompassed necessary and relevant information.[33]

The Respondent's argument that the Union's information request should be disregarded because made in bad faith is not persuasive. If the Union's *only* reason for making the request had been to harass the Respondent, the Employer would not have been obligated to comply. While the request must be made in good faith, that good-faith requirement is met if at least one reason for the demand can be justified.[34] Here, it has been found that the Union, in policing its contract with the Respondent, had asked for the data for the relevant and reasonable purpose of helping it to decide whether the Respondent has been using the blanket orders with an effect of reducing the amount of work available to unit employees in ways not contemplated by the parties' collective-bargaining agreement. Since such information would help the Union determine whether to file grievances protesting such activities, I find that the Union's request had not been made to harass the Respondent but was made in good faith.

This conclusion is not affected by the Respondent's argument, confirmed by the minutes of the contracting out committee, that the Union had not asked for the information at issue during any of the joint meetings of that committee, when notice of planned contracting out events and related information customarily was given to the Union. From the Re-

[28] *Island Creek Coal Co*., 292 NLRB 480, 491 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990).

[29] *A-Plus Roofing*, supra at 972, quoting *J. I. Case Co. v. NLRB*, 253 F.2d 149, 154 (7th Cir. 1958). In *J. I. Case*, supra, the court of appeals noted that, if the Respondent in that matter had acted before the hearing to base its refusal to furnish the requested relevant information because unduly burdensome, ''some arrangement could have possibly been made to lessen such burden.''

[30] Id.

[31] 322 NLRB 616, 629 (1996).

[32] Ibid.

[33] *Keauhou Beach Hotel*, supra.

[34] *Island Creek Coal Co*., supra, 292 NLRB at 489. As also was noted in *Island Creek Coal Co*., supra at 489 fn. 14, bad faith is an affirmative defense which must be pleaded and proved by the Respondent. Here, the Respondent did not raise the issue of bad faith in its answer. As in *Island Creek*, the question of whether the Respondent's failure to plead this defense would preclude a finding of bad faith is an issue that need not be decided because the record does not support that finding.

spondent's undisputed response to the information request and its consistent position thereafter, it is clear that such a request, even if made at a committee meeting, would have been futile. Since it is the Respondent's current practice to electronically arrange for the purchasing, leasing, and servicing of goods and equipment which might otherwise have been made and serviced in the Respondent's shop by its own employees, the Union no longer can meaningfully examine company documents and records in the traditional paper formats as primary information sources for the Respondent's conduct in these areas. For the Union to be informationally limited to such data as might voluntarily be furnished by the Respondent's contracting out committee representatives at their regular meetings with Clark would reduce the Union to dependency upon secondary information and the Respondent's good will. The Respondent's position, if sustained, would cause the Union to become deprived of all access to the primary data sources, the blanket orders/purchase releases, when seeking to perform the traditional function of protecting jobs and work within the bargaining unit. To reduce the Union to such dependency would be a risky proposition in view of the findings in this decision concerning the Respondent's readiness to variously bargain in good faith.

Contrary to the Respondent, the Union's request for information is not appropriately deferrable to arbitration. As stated in *WXRK*,[35] ''. . . matters arising from an employer's refusal to furnish information necessary for a union to verify compliance with a collective-bargaining agreement are not properly deferrable to arbitration [citations omitted].''

Finally, the Respondent's argument under *Nickles Bakery of Indiana*,[36] that the Board lacks jurisdiction of this issue because the underlying unfair labor practice charge filed in Case 9–CA–33261, consolidated herein, does not correspond to and support the allegations of the complaint relating to the failure to furnish the requested information, is without merit. The assertions in that charge literally paraphrased the Union's August 9, 1995 information request. Accordingly, the type of bargaining violation alleged in the charge and in the complaint in this area—the Employer's failure/refusal to furnish this necessary information—are the same in the charge and complaint. Such conformity is not overcome by the Respondent's argument that the General Counsel's theory of the case recasted the Union's purpose, specified in the charge, for seeking this data. The underlying charge alleged that the data was sought to enable the Union to process grievances while the General Counsel, according to the Respondent, ''posited'' that the information was requested to enable the Union to ''police'' the contract. ''Policing the contract'' is another term for enabling a party to a collective-bargaining agreement to determine whether the contract has been violated and, so, to decide whether to resort to the grievance/arbitration process. While the charge in this matter may have stated the purpose for the data request in more succinct form, the reasons stated by the Union in its charge, and by General Counsel thereafter, for seeking the relevant details essentially were the same. In any event, the several factors identified by the Board in *Nickles Bakery*, supra, in determining whether charge and complaint allegations are closely related: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the Respondent would raise similar defenses to both allegations, all are satisfied here. The allegations involve the same section of the Act—Section 8(a)(5); arise from the same factual circumstances—the Respondent's failure/refusal to furnish the Union with certain requested information necessary to the Union's performance as bargaining representative; and share a common principal defense—the burdensomeness of complying with the information request.[37]

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with the blanket orders and related purchase releases which, in whole or in part, were utilized in connection with its Ashland Works. Because the Union has not shown why it should be entitled to obtain such data with respect to other Respondent's employees employed outside of the bargaining unit it represents, the Union should be entitled to only such information as, in whole or in part, may affect its unit employees at the Ashland Works.[38]

Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been the exclusive bargaining representative for the following unit:

> All hourly paid production and maintenance employees and hourly rate mill clerks employed by the Respondent at its Ashland, Kentucky plant, but excluding all foremen, assistant foremen, watchmen, office and salaried employees, employees in the first aid and medical department, salaried employees in the metallurgical department and shop checkers, professional employees, guards and supervisors, as defined in the Act.

4. By unilaterally, without bargaining with the Union, discontinuing the practice under which its employees in the above bargaining unit were permitted to use metatarsal guard safety shoes at their option and by requiring instead that all unit employees must wear such equipment while at work, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By refusing to supply the Union with requested blanket orders and related data utilized, in whole or in part, in connection with the Respondent's Ashland Works, such information being necessary for, and relevant to, the Union's ability to administer the parties' collective-bargaining agreement and to enable it to determine whether to take action to protect jobs within the bargaining unit, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. The unfair labor practices found above affect interstate commerce within the meaning 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

[35] 300 NLRB 633, 636 (1990).

[36] 296 NLRB 927 (1989).

[37] *Keauhou Beach Hotel*, supra at 702 fn. 4.

[38] This request will be further modified below in the remedy section of this decision.

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing the practice under which the use of metatarsal guard safety shoes by employees in the relevant bargaining unit was optional to mandating a requirement that all such employees must wear such equipment while at work, the Respondent, upon request by the Union, should be required to rescind this unilateral change and to bargain in good faith with the Union on all aspects of that issue until agreement or impasse is reached. Any understanding reached on this matter should be embodied in a signed agreement.

Having further found that the Respondent has violated Section 8(a)(5) and (1) of the Act by its failure/refusal to furnish the Union with the requested blanket orders and associated purchase releases for the Ashland Works, I shall recommend that the Respondent, at the Union's request, be required to provide that labor organization with such information. However, since, as the Respondent has validly indicated, the Union's information request did not specify the chronological period(s) for which such data was being sought, it would be appropriate to limit the Respondent's obligation to furnish information to a reasonable timeframe consistent with the cognizable 6-month limitations period for this proceeding, as defined in Section 10(b) of the Act. Accordingly, the Respondent should be required to furnish the requested data, to the extent found herein to be warranted, from a date commencing 6 months prior to the filing of the Union's September 15, 1995 charge in Case 9–CA–33261, and continuing to the date when such information is furnished to the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, AK Steel Corporation, Ashland, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notice to or bargaining with United Steelworkers of America, Local 1865, AFL–CIO, CLC, changing its prior practice of permitting its employees in the unit set forth below to use metatarsal guard safety shoes at their option by requiring, instead, that all unit employees must wear such equipment while at work. The appropriate unit is:

> All hourly paid production and maintenance employees and hourly rate mill clerks employed by the Respondent at its Ashland, Kentucky plant, but excluding all foremen, assistant foremen, watchmen, office and salaried employees, employees in the first aid and medical department, salaried employees in the metallurgical department and shop checkers, professional employees, guards and supervisors, as defined in the Act.

(b) Refusing to supply the above-named Union, upon request, with information necessary for, and relevant to, the Union's ability to properly administer its collective-bargaining agreement with the Respondent, including blanket orders and related data utilized, in whole or in part, in connection with the Respondent's Ashland Works.

(c) 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, bargain with the above-named Union as the exclusive representative of the employees in the above-described appropriate unit concerning their terms and conditions of employment; in particular any changes to the unit employees' optional use of metatarsal guard safety shoes while at work, until agreement is reached and, if there is an understanding, embody it in a signed agreement.

(b) At the Union's request, rescind the unilateral change requiring that unit employees must wear metatarsal guard safety shoes at work until the Respondent bargains in good faith with the Union or until reaching agreement or impasse.

(c) Upon request, furnish the Union with the blanket orders and related data sought by the Union in its August 9, 1995 letter insofar as the request encompasses information which, in whole or in part, may affect employees who are within the above-described Ashland Works unit for the time period set forth in the remedy section of this decision.

(d) Within 14 days after service by the Region, post at its Ashland, Kentucky facility copies of the attached notice marked ''Appendix.''[40] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed 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 September 15, 1995.

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

[39] 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.

[40] 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.''