California Portland Cement Co. d/b/a Catalina Pacific Concrete Co. *and* International Union of Operating Engineers, Local 12, AFL–CIO. Cases 21–CA–31978 and 21–CA–32027

November 26, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On August 17, 1998, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Union filed answering briefs. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

1. We affirm the judge's conclusion that the Respondent's April 1996 unilateral changes in the terms and conditions of employment of its batch plant operators and its contemporaneous removal of these employees from the bargaining unit represented by the Union violated Section 8(a)(5) and (1) of the Act.[2] We agree with the judge that Section 10(b) does not bar litigation of the April 1997 charges alleging that the Respondent's 1996 conduct was unlawful. The judge found that the Respondent failed to prove its 10(b) defense that the Union received notice of the Respondent's unilateral changes outside the 6-month limitations period preceding the filing of the charges. In so finding, the judge articulated several reasons for rejecting the Respondent's claim that the Union gained actual or constructive knowledge of the unilateral changes through batch operator John Davis in April 1996. We rely only on those reasons, and supporting evidence, establishing that the Respondent had no reasonable basis for believing that Davis, who had been the Union's steward since 1991, had the authority to act as the Union's agent with respect to the receipt of notice of proposed unilateral changes.[3] In this regard, the judge correctly found that there was no contractual basis for attributing such authority to Davis, nor did the Union hold him out as possessing such authority. In addition, we note that the Respondent's senior vice president and general manager Robert West testified that he considered Davis to be a statutory supervisor "sometime after August 1995" and possibly before April 1996. Regardless of Davis' nominal status as a steward, the Respondent could hardly have reasonably believed that notice of unilateral changes to someone it was claiming as one of its supervisor was an acceptable method of communicating with the Union about those changes. We therefore find that the Respondent has failed to meet its burden of proving that the Union received actual or constructive notice of the unilateral changes through Davis.

2. We also affirm the judge's conclusion that the Respondent violated Section 8(a)(5) when it refused to bargain and withdrew recognition from the Union in April 1997. We agree with the judge that the Respondent could not in good faith rely on evidence allegedly supporting a claimed doubt of the Union's continuing majority status because the claim was not raised in a context free of employer unfair labor practices. We specifically find that there is a sufficient causal relationship between the Respondent's unfair labor practices and the Union's alleged loss of support. The Board has recognized that the unilateral implementation of substantial changes in terms and conditions of employment has the tendency to undermine employees' confidence in the effectiveness of their selected collective-bargaining representative. *Pirelli Cable Corp.*, 323 NLRB 1009, 1010 fn. 11 (1997), enf. denied on other grounds 141 F.3d 503 (4th Cir. 1998); *Powell Electrical Mfg. Co.*, 287 NLRB 969 (1987), enfd. as modified on other grounds 906 F.2d 1007 (5th Cir. 1990). In this case, we have found that the Respondent implemented significant changes in the terms and conditions of employment of batch plant operators, who comprise approximately three-fourths of the bargaining unit, and removed them from the unit without notice to or bargaining with the Union. In these circumstances, it is reasonable to infer that the Respondent's unfair labor practices contributed to the alleged employee disaffection with the Union. Accordingly, we agree with the judge that it is unnecessary to reach the issue of whether the manifestations of antiunion sentiment adduced by the Respondent constitute sufficient objective considerations to warrant a good-faith doubt of the Union's continued majority status.

[1] We shall modify the judge's recommended Order to conform with our decision in *Indian Hills Care Center,* 321 NLRB 144 (1997).

The judge inadvertently failed to include language in the notice stating affirmatively that the Respondent will bargain with the Union. We shall modify the notice to reflect this correction.

[2] We do not, however, rely on the reasons given by the judge for his failure to consider the Respondent's contention that the batch operators became supervisors in 1992 and, consequently, that its duty to bargain about them expired when the parties' 1991–1994 contract expired. We find instead that the Respondent has failed to meet its burden of showing that any of the additional duties assigned to these employees involved the use of independent judgment in the exercise of any of the indicia of supervisory authority enumerated in Sec. 2(11).

[3] We therefore do not rely on those reasons cited by the judge in support of his view that there was an adversity of interests between Davis and the Union. Further, we reject the notion that notice to Davis was untimely for 10(b) purposes because it was untimely for purposes of bargaining in advance of the proposed changes.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, California Portland Cement Co. d/b/a Catalina Pacific Concrete Co., Glendora, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(c)–(e).

"(c) Preserve and, within 14 days of a 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.

"(d) Within 14 days after service by the Region, post at all of its Los Angeles and Orange County facilities copies of the attached notice marked 'Appendix.'[9] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of 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 April 6, 1996.

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

2. 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

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with the Union regarding terms and conditions of employment of the employees in the unit set forth below by withdrawing recognition from the Union.

WE WILL NOT refuse to recognize and bargain in good faith with the Union regarding terms and conditions of employment of the employees in the unit set forth below by unilaterally changing the terms and conditions of employment of its employees without notifying the Union and affording it an opportunity to bargain.

WE WILL NOT refuse to recognize and bargain in good faith with the Union regarding terms and conditions of employment of the employees in the unit set forth below by unilaterally removing batch plant operators from the bargaining unit without notifying the Union and affording it an opportunity to bargain.

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 recognize and bargain with International Union of Operating Engineers, Local 12, AFL–CIO as the exclusive bargaining representative of our employees in the unit set forth below. The appropriate unit is:

> All employees in the Employer's operations in Los Angeles, Orange, Ventura, Santa Barbara, San Bernardino, and Riverside Counties as listed in the various classifications in Appendix "A" of the Agreement between the Employer and the Union, which was effective by its terms from September 15, 1991, through September 15, 1994; excluding all other employees, executives, superintendents, and other supervisory employees as defined in Section 2(11) of the National Labor Relations Act.

WE WILL, on request of the Union, rescind the unilateral changes in the unit employees' terms and conditions of employment implemented since April 1996.

WE WILL restore the status quo ante including the return of the batch plant operators to the bargaining unit.

CALIFORNIA PORTLAND CEMENT CO. D/B/A
CATALINA PACIFIC CONCRETE CO.

Jean C. Libby, Esq., for the General Counsel.

Gary F. Overstreet and *Michael R. Goldstein, Esqs. (Musick, Peeler & Garrett, L.L.P.)* and *(Elaine M. Smith*, on the brief), of Los Angeles, California, for the Respondent.

John R. Renninger, Esq., of Glendora, California, and *General Counsel* for the Respondent.

David P. Koppelman, Esq. (International Union of Operating Engineers, Local 12), of Pasadena, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles, California, on February 11, 1998,[1] pursuant to a consolidated complaint issued by the Regional Director for Region 21 of the National Labor Relations Board on July 25, 1997, and which is based on charges filed by International Union of Operating Engineers, Local 12, AFL–CIO (the Union) on April 2, 1997 (Case 21–CA–31978), on July 16, 1997 (amended charge) and on April 29, 1997 (Case 21–CA–32027). The complaint alleges that California Portland Cement Co. d/b/a Catalina Pacific Concrete Co. (Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

I. Whether Respondent violated the Act by making certain unilateral changes in the duties and responsibilities of bargaining unit employees (batch plant operators), by dealing directly with the bargaining unit employees, bypassing the Union in the process, and by purporting to remove the bargaining unit employees from the unit.

II. Whether Respondent also violated the Act by unlawfully withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit and subsequently refusing to bargain.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Charging Party Union, and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation engaged in the processing and sale of rock, sand, gravel, and related products and having an office located in Glendora, California. Respondent further admits that during the 12-month period ending May 30, 1997, in the course and conduct of its business, it has purchased and received at its California facilities goods and materials valued in excess of $50,000 directly from points outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Union of Operating Engineers, Local12, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Beginning in September 1991, or before, the Union and Respondent have maintained a collective-bargaining relationship for a bargaining unit described as "all employees in the Employer's operations in Los Angeles, Orange, Ventura, Santa Barbara, San Bernardino and Riverside Counties as listed in the various classifications in Appendix 'A' of [the collective-bargaining agreement] but excluding executives, superintendents, other supervisory employees, as defined in Sec. 2(11) of the National Labor Relations Act, and all other employees not covered by this agreement." (G.C. Exh. 2, art. II.) Included in Appendix "A" are the classifications which concern us in the instant case: batch plant operators and to a lesser extent, plant repairman.

Respondent owns and operates eight batch plants in Los Angeles and Orange Counties. The batch plants are part of the rock, sand and gravel industry that is led by industry giant, Cal-Mat. More specifically, the batch plant operators, as a core duty, mix ready-mix concrete product which, when ready, is loaded onto trucks and transported to customers in the southern California area. The plant repairmen maintain the equipment used in this process in good repair.

Robert West joined Respondent in 1992 and is currently senior vice president and general manager of Respondent's Redi-Mix Division. Before his employment with Respondent, West worked both for Cal Mat and Con/Rock, each for several years in the same general industry. West testified both as a witness for the General Counsel and for Respondent.

A collective-bargaining agreement between the parties, effective between September 15, 1991, and September 15, 1994, is in the record. (G.C. Exh. 2.) On September 6, 1994, union and employer officials gathered to begin negotiations for a new agreement. The union team included Darryl Clark, business agent for the Union and General Counsel witness at hearing. The employer team was led by John Gresock, Respondent's vice president for human resources. During the meeting the parties exchanged proposals and engaged in a general discussion of negotiations then occurring in the industry. The Union agreed to work day-to-day under the soon to expire existing contract, pending developments in industry negotiations. The Union also agreed that no work action would be taken until the next meeting or until after appropriate notice to the employer.

As matters turned out, the parties did not meet again until July 8, 1995, when both sides gathered at a Pasadena, California hotel. There, the employer tendered its last, best, and final offer (G.C. Exh. 12) and announced to the Union that at the end of 30 days, it intended to implement a 12-percent wage reduction and a $400 cap on health and welfare. As the Union reviewed the Employer's last, best, and final offer, it noted that article II had been omitted. As noted above, in the expired agreement, article II contained both section 1, having to do with union recognition and section 2, which reads as follows:

> *Supervisor's Work*. Employees excluded from this Agreement as supervisory employees should not perform work customarily performed by employees covered by this Agreement except when life or property is in imminent danger or in case of critical emergency breakdown. (G.C. Exh. 2 p. 1.)

According to Clark, the meeting was short and did not involve discussion of the missing article II. Clark explained that the Union was waiting for developments in outside negotiations involving the so-called "Big 4," the major producers in the industry which included Cal Mat.

[1] All dates herein refer to 1996 unless otherwise indicated.

Apparently the lack of progress in the instant case mirrored the lack of progress in the industry because on or about July 26, 1995, the Union began an industrywide strike of producers, including Respondent. Sometime prior to August 5, 1997, the Union reached agreement with one or more of the "Big 4" producers (not including Cal Mat). This agreement led, on August 5, 1997, to an unconditional offer by the Union to return to work at Respondent. (G.C. Exh. 6.)

During the almost 2-year strike a series of developments occurred, some of which appear to be of only marginal relevance to this case. For example, a batch plant operator named Pollard resigned from the Union, crossed the picket line, and filed a decertification petition with the Board. No action was immediately taken on this petition pending investigation of certain union unfair labor practice charges also filed with the Board. These charges were found to be lacking in merit and in February 1997, they were dismissed. (G.C. Exhs. 9, 10, and 11.)[2] Shortly after this Pollard, who did not testify, withdrew his decertification petition.

Pollard was not the only batch plant operator to cross the picket line. In fact, most of the 15 in the bargaining unit crossed before the Union's offer to return to work. Unlike Pollard, however, the others did not resign from the Union. None of the five plant repairmen crossed the line. After the first 2 months of the strike, there was no significant picketing of any of Respondent's facilities.

Sometime during the strike, the Union learned from an NLRB agent that Respondent was contending that its batch plant operators were no longer bargaining unit employees, but had become statutory supervisors. This information led to a letter of April 9, 1997, from William Waggoner, the Union's business manager, to Respondent, alluding to the recent withdrawal of the decertification petition and requesting Respondent to resume negotiations. More specifically, Waggoner wrote,

> [P]lease let me know if you are prepared to negotiate for an agreement to cover all classifications covered by the most recent agreement, or if you are contending that some of these classifications (particularly Batch Plant Operators) are no longer part of the bargaining unit. [G.C. Exh. 3.]

The Union's letter was answered on April 9, 1997:

> William C. Waggoner
> Business Manager, I.U.O.E. Local
> Union No. 12 and General Vice President
> International Union of Operating Engineers
> 150 East Corson Street
> P.O. Box 7100
> Pasadena, California 91109
>
> Re: Response to Request for Negotiations
>
> Dear Mr. Waggoner:
>
> I am writing in response to your letter dated April 9, 1997, to John Clemente.
>
> The employer has a good faith doubt that your organization enjoys majority support of a bargaining unit of batch operators and repairmen, or a bargaining unit of batch operators only, or a bargaining unit of repairmen only, and therefore rejects your request for negotiations.
>
> Additionally, the employer rejects your request for negotiations regarding batch operators because the batch operators are supervisors.
>
> If you have any questions, please call.
>
> Very truly yours,
>
> /s/ Gary F. Overstreet
> for Musick, Peeler & Garrett LLP
>
> [G.C. Exh. 4.]

This letter in turn was followed by a Union letter of April 28, 1997:

> Via FAX & U.S. Mail
> Gary F. Overstreet, Esq.
> Music [sic], Peeler & Garrett
> One Wilshire Boulevard
> Los Angeles, CA 90017-3383
>
> Re: California Portland Cement d/b/a Catalina Pacific Concrete
>
> Dear Mr. Overstreet:
>
> Receipt is acknowledged of your letter dated April 18, 1997 (received April 25) addressed to William C. Waggoner.
>
> The Batch Plant Operator position has been considered a bargaining unit position in successive collective bargaining agreements between Local 12 and California Portland Cement d/b/a Catalina Pacific Concrete. The Union does not consent to its removal from the bargaining unit. Consequently, it is demanded that the Company withdraw its insistence on removing this position from the bargaining unit.
>
> Further, although your letter does not so state explicitly, I am assuming that your client is unilaterally withdrawing recognition from I.U.O.E., Local 12 as exclusive bargaining representative of its employees in whatever unit is deemed appropriate for bargaining, based on a purported good faith doubt of majority status. Please advise immediately if this is incorrect in any respect.
>
> Very truly yours,
>
> /s/ David P. Koppelman, Counsel
> I.U.O.E. Local Union No. 12
>
> [G.C. Exh. 5.]

To better explain the pending issues, I look back to 1992 when, apparently without notice to or bargaining with the Union, the batch plant operators were assigned additional duties as dispatchers. According to West, testifying as a respondent witness, dispatcher duties involved decisions by the batch plant operators on a daily basis, as to how many trucks were needed and at what times in order to meet production requirements. In addition, batch plant operators could and did talk to customers on the telephone, quoting prices for product and arranging drivers' schedules for delivery. West explained that this change in job duties was merely a change back to what the batch plant operators had been doing years before. Sometime prior to 1992, Respondent reassigned the dispatcher duties to salaried

[2] There are no issues in this case involving Employer's bad-faith bargaining, implementation of proposals before impasse, nor refusal to reinstate unfair labor practice strikers.

persons who did only dispatcher work. This reassignment too was done without notice to or bargaining with the Union.

Moving now to April 4, I note a respondent interoffice memorandum of that date directed to "Record" from Bill Klawitter (respondent official) re "Additional Batchman Duties." The memo recited that on April 3 and 4, a series of meetings had been held to discuss the attached list of additional batchman duties. The memo goes on, "It was recognized by all in attendance that most of these duties have been performed by the batchmen in the past and that while not all batchmen will perform all of the duties mentioned, there will be a shared responsibility to perform them." [G.C. Exh. 13.] Appended to the memo was a second page entitled "Additional Batchman Duties." These duties are:

1. Interviews and approves mixer driver hires.
2. Participates in driver disciplinary process:
   (x) Authority to initiate driver discipline.
   (x) Signs all driver disciplinary documentation.
3. Takes and schedules concrete orders as required.
4. Dispatches drivers to jobsites as required.
5. Provides input into daily mixer truck driver manpower Requirements and starting times.
6. Determines daily driver ending times.
7. Clocks out drivers at the end of the workday.
8. Orders and schedules the receipt of aggregates.
9. Orders and schedules the receipt of cement.

Most of these duties were new, or substantially new, or a continuation of the batch plant operator's prior dispatch duties, with some embellishment.

West testified that additional new duties were assigned to batch plant operators at or about the same time:

> 1. Assignment to accident review boards as management representatives. Respondent's practice had been to review vehicle accidents for cause and future prevention by assigning three management and two bargaining unit representatives to each panel. Before the change, batch plant operators sat as bargaining-unit representatives.
>
> 2. Increased involvement in evaluation of capital projects and of proposed modifications of plant equipment.
>
> 3. In Orange County, assumption of duties from operations manager of selecting driver of the year.
>
> 4. In Orange County, attendance at annual retreat for management employees and at both Orange County and Los Angeles County, attendance at management training seminars.

All batch plant operators, including a batch plant operator named John Davis, who, since September 25, 1991, had been a shop steward for the bargaining unit in question pursuant to a letter of that date from the Union to the Employer, were notified of these changes.[3] The duties of a job steward are set forth in the expired collective-bargaining agreement. (G.C. Exh. 2, article XIV, Grievance Procedure, sec. 6, p. 26) and which reads as follows:

> Section 6. *Steward*. The job Steward shall be a working employee selected by the Union. A Steward shall not be discriminated against by the Employer or his Agent because of, or on account of, his activities in presenting any adjustment or grievances or disputes. The Steward shall work with the Employer's designated Representative in an attempt to resolve disputes prior to the application of the grievance procedure. It is recognized by the Employer that it is desirable that the person appointed Steward shall remain in employment at his job location as long as there is work in the particular craft or trade of the Steward, so long as he performs his duties as an employee to the satisfaction of the Employer. The Steward shall be given a reasonable length of time during working hours to perform his activities as a Steward when such activities cannot be conducted on non-working time. The Steward shall be on the Safety Committee at the plant to which he is assigned.

Davis did not testify in this hearing, but was one of those who crossed the picket line to return to work without first resigning from the Union.[4] Davis, also on January 21, 1996, submitted a signed, written request "to terminate and cease deduction of supplemental union dues from my payroll check effective immediately." (G.C. Exh. 14.)

It is undisputed that except for such notice as went to the batch plant operators themselves, and to Davis in his role as shop steward, no other notice of the changes in batch plant operators' duties and responsibilities was given to the Union, prior to the effective date of such changes and the Union was afforded no opportunity to bargain over them. On direct examination West explained Respondent's thinking on this subject:

> A. I don't know that we felt it was pertinent, and number two, at that point, we really weren't thinking so much about the Union . . . nobody in our company had really heard from the Union for a year and a half or two years at that point, . . . and they really weren't uppermost in our thoughts, I guess. [Tr. 117.]

Based on the new duties and responsibilities unilaterally assigned to the batch plant operators, Respondent contends that they have become statutory supervisors under the Act and are no longer members of the bargaining unit. To give additional context to this claim, I note that as of April, when the new duties were assigned, the batch plant operators received no change in their pay or benefits. In January 1997, they received a pay increase of 25 cents per hour. Also, sometime after April, the batch plant operators were switched from union-sponsored health insurance to a company plan. In October 1997, Respondent unilaterally changed the titles of batch plant operators to plant supervisor I, II, or III. Then, just 2 or 3 months prior to this hearing, Respondent unilaterally converted a few of the now-titled "plant supervisors" to salaried status.

Finally, I note the chain of command for Respondent's organization. For Orange County, a vice president and general manager named Bill Klawitter is in charge and assisted by an operations manager. For Los Angeles County, Mike Parker is vice president and general manager and he is assisted by two operations managers. All of the former batch plant operators

[3] After the strike began and perhaps before April 1996, Davis was unilaterally assigned additional duties to hire, discipline, and evaluate plant repairmen. If it unclear how much, if any of his former batch plant operator duties he still performed.

[4] Attorney Koppelman, testifying as a General Counsel rebuttal witness, explained that pursuant to union policy, no member who crosses a picket line and returns to work is subject to union discipline until after the labor dispute has ended and the person is afforded an opportunity to justify or mitigate his cross-over status.

who supposedly are now plant supervisors report to the plant operations managers; the same persons to whom they reported when they were admitted to be in the bargaining unit. So far as I can tell, the only former batch plant operator who has any subordinates to supervise is John Davis, who, according to West, "takes the lead role in the repair of the batch plants." (Tr. 137.)

B. Analysis and Conclusions

1. No adverse inference

At page 6 of its brief, Respondent contends that it notified Union Steward John Davis in April of the change in duties of the batch plant operators. Davis was supposed to be a witness in the hearing but refused to appear after someone apparently threatened him if he testified. Respondent's attorney so represented to me and the General Counsel acknowledged that some sort of threat was made to Davis. (Tr. 163.) In light of this, I need not determine whether an adverse inference could be drawn and weighed against Respondent. Assuming I could draw such inference, in my discretion, I elect not to consider the matter further. See *Underwriters Laboratories v. NLRB*, 147 F.3d 1048 (9th Cir. 1998).

2. Batch plant operators' supervisory status as of 1992

Respondent argues in its brief, that the batch plant operators have been supervisors since 1992, because "employees who dispatch trucks are statutory supervisors." (Br. 7.) The short answer to this rather extravagant assertion may be found in the case of *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998), where the court explained that the distinction between supervisors and employees "is not always an easy distinction to draw, and a position as a dispatcher is one which falls on the line. Ultimately, the court affirmed the Board's finding that the dispatcher position in that case was not proven to be that of a statutory supervisor. See also *Carry Cos. of Illinois*, 311 NLRB 1058, 1060 fn. 12, 1064 (1993).

Little additional time need be spent on Respondent's claim. First, it is not supported by the strict notice requirements to the Union which the Board demands and which will be recited below. As I will further explain below, because Respondent failed to prove it met the notice requirements in 1992, any claim that the batch plant operators were converted to statutory supervisors must fail. Based on that legal bar, I decline to discuss the law of supervisory status and dispatchers.

However, even if it could be proven that the Union had proper prior notice in 1992 of the additional dispatching duties and, thereafter, the Union waived its right to demand bargaining, I find that such failure would have no effect on the April changes, which are the subject of this case. See *Owens-Corning Fiberglass*, 282 NLRB 609 (1987) (union's acquiescence in prior unilateral changes does not operate as a waiver of its right to bargain over such changes for all time). See also *Rockwell International Corp*., 260 NLRB 1346 fn. 6 (1992).

Finally, even if Respondent could overcome the hurdles described above—an impossible job in my view—it ends up marching in place. In *Gratiot Community Hospital*, 312 NLRB 1075 fn. 1 (1993), the Board assumed for the sake of argument that certain employees were statutory supervisors, and concluded that the unilateral changes regarding them would nevertheless be unlawful. The Board explained that when parties to a collective-bargaining relationship voluntarily agree to include supervisors in a unit (as is true under Respondent's theory here), the Board will order that application of the terms of the collective-bargaining agreement to those supervisors. (Citations omitted.) In sum, even if the batch plant operators were supervisors, to remove them from an agreed-on unit, Respondent would have had to give proper notice to and bargained with the Union.

3. Batch plant operators' supervisory status as of April 1996

I begin here with some basic law. An employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change to an existing term or condition of employment without bargaining with the union to impasse. *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991). Of course, the union could waive its right to bargain,[5] so the law requires that notice be given in a meaningful manner and at a meaningful time. *Metropolitan Teletronics*, 279 NLRB 957 (1986), enfd. 127 LRRM 2048 (2d Cir. 1987). See also *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990). Where this has not occurred, the question of union waiver of its rights is not implicated. *Mercy Hospital of Buffalo,* 311 NLRB 869, 873 (1993); *S & I Transportation,* 311 NLRB 1388, 1390 (1993.

In this case, it is undisputed that Respondent gave no formal notice to the Union when it purported to change the batch plant operators' duties and responsibilities. Instead, it merely announced a fait accomplis on April 6 to the batch plant operators, including the union steward, Davis. As the Union points out in its brief, page 11, the "notice" Respondent supplied was deficient for two reasons: First, the Company is required to notify the Union itself, not just the bargaining unit employees, and second, [such notice] must be "sufficiently in advance of actual implementation of the decision to allow reasonable scope for bargaining." *NLRB v. Walker Construction Co.*, 928 F.2d 695, 696–697 (5th Cir. 1991).

Respondent contends that one of the affected employees given notice was the shop steward, Davis. It is not necessary to determine whether proper notice to a shop steward could ever satisfy an employer's obligation under the Act.[6] In this case it did not. First, the notice was not timely. Second, Davis had crossed the picket line and was working while the strike continued. Third, by letter of January 21, Davis revoked his dues-authorization checkoff. Fourth, the collective-bargaining agreement defining the duties of the shop steward makes no mention of any intention by the parties to allow the shop steward to receive notice of any unilateral changes and fifth, there was no holding out of Davis by the Union as possessing apparent authority to become a general agent for it. For example, Davis did not attend either of the two bargaining sessions. I agree completely with the General Counsel, brief, page 19, that Davis' interests and the Union's were not only adverse, but were antagonistic to each other. There simply is no way that any notice to Davis or to any other employee satisfied Respondent's obligation.

4. Respondent's affirmative defenses

Respondent's asserted defenses are uniformly without merit. It first claims that the 6-month statute of limitations bars the instant case. To support this argument, Respondent inconsis-

[5] Any such waiver must be shown by clear and unmistakable evidence. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 902 (6th Cir. 1996).

[6] See *Aztec Bus Lines,* 289 NLRB 1021 1038 (1988). Cf. *Yellow Freight Systems,* 307 NLRB 1024 1028 (1992).

tently skips over its contention that the batch plant operators allegedly were supervisors since 1992 and, instead, bases its entire argument on the claim that the Union must be charted with whatever knowledge Davis had as of April.

The 10(b) period commences only when a party has clear and unequivocal notice that the Act has been violated, *Carrier Corp.*, 319 NLRB 184, 190 (1995; *Leach Corp.*, 312 NLRB 990, 991 (1993); or where a party in the exercise of reasonable diligence should have been aware that there has been a violation of the Act, (i.e., constructive notice); *Carrier,* supra; *Mine Workers District 12*, 315 NLRB 1052 (1994); The burden of showing such clear and unequivocal notice or lack of diligence is on the party raising the affirmative defense of Section 10(b); *Carrier,* supra*;* and *Leach,* supra*.* Based on my discussion of Davis and his questionable status as shop steward above, I find that no reasonable claim can be made that the Union is charged either with actual or constructive knowledge of whatever Davis knew as of April. See *Nursing Center at Vineland*, 318 NLRB 337, 338–339 (1995); *Randolph Children's Home*, 309 NLRB 341, 344 (1992). I find Respondent has failed to carry its burden to prove the 10(b) defense.

Respondent next argues (Br. 8) that the "common law of the shop" permitted Respondent to make the unilateral change at issue. Thus, argument is based on Respondent's apparent assignment of dispatching duties to the batch plant operators without notice to or bargaining with the Union in 1992. Since there was no proper notice to the Union, the Union never waived its right to bargain and clearly the Union never waived its right to bargain over future unlawful acts of a similar type. In any event, whatever happened in 1992 regarding assignment of dispatching duties can hardly be sufficient to establish a "past practice." See *Dow Jones & Co.*, 318 NLRB 574, 576 (1995).

Next, Respondent states (Br. 8) that the Union abandoned the bargaining unit. This theory is as untenable and unsupported by the evidence as Respondent's other defense. During the time between the last bargaining session in July 1995 and the almost 2-year industry strike, the Union was not in a state of repose. Rather, as the record shows, it was busy attempting to reach settlements with larger producers in the industry, and filing unfair labor practice charges against Respondent. That some of these charges lacked merit is beside the point. The Union's failure to bring charges against its members who crossed the picket line is an internal union matter of no concern to Respondent. Moreover, the Union's attorney, Koppelman, adequately explained in his testimony the Union's policy regarding picket line crossers and the underlying rationale for this policy. See *Albany Steel,* 309 NLRB 442 448–449 (1992).

Finally, Respondent contends that it has a good-faith doubt of the Union's majority support and directs my attention to the recent Supreme Court decision in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). *Allentown Mack* did not make new law but merely restated and clarified the law on good-faith doubt which had existed for some time. I begin with a statement of applicable law from I. P. Hardin, *The Developing Labor Law* 571 (3d ed. 1992*):*

> An employer may withdraw recognition from an incumbent union at any time when such withdrawal is not precluded by law if it can affirmatively establish either (1) that the union no longer enjoyed majority status when recognition was withdrawn, or (2) that the withdrawal was predicated on a reasonably grounded doubt as to the union's continued majority status, which doubt was asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. Furthermore, the employer must be aware of the objective facts upon which its doubt is based at the time it withdraws recognition. [Citations omitted.]

For two reasons, I decline to review the evidence presented by Respondent on this matter. First, it is not raised in a context free of unfair labor practices. See *Lee Lumber & Building Material Corp.,* 322 NLRB 175 (1996), affd. in part 117 F.3d 1454 (D.C. Cir. 1997).[7] More importantly, Respondent never claimed at the relevant time to have taken unilateral action nor to have withdrawn recognition based on a good-faith doubt. Instead, it gave a host of other reasons which have been considered in this decision. The good-faith doubt defense has been dredged up after the fact. In sum, I do not find that Respondent's alleged doubt was based on good faith and I do not find, for the reasons stated, that Respondent's claim needs to be considered on its merits.

5. Concluding findings

I find that the unilateral change in duties and responsibilities for batch plant operators were material, substantial, and significant changes in terms and conditions of employment, which are mandatory subjects of bargaining. *Rangeaire Co.*, 309 NLRB 1043 1045–1046 (1992). Compare, *Pittsburgh Metal Processing Co.,* 286 NLRB 734 fn. 2 (1987), where the Board explained that promotion of two bargaining unit employees to supervisory positions did not have a "substantial impact" on the bargaining unit and that the General Counsel failed to prove that the promotions resulted in the elimination of any unit classifications. Here, by contrast, approximately three-fourths of the bargaining unit was eliminated, as was the entire classification of batch plant operators. See *Kendall College*, 228 NLRB 1083, 1088 (1972).

I further find that Respondent also purported to change the scope of the unit which attempt was a permissive subject of bargaining in that it did not involve wages, hours, or other terms or conditions of employment. *Antelope Valley Press*, 311 NLRB 459, 460 (1993). See also *Taylor Warehouse Corp.*, 98 F.3d 892, 902 (6th Cir. 1996). Since the batch plant operators were not supervisors, Respondent's attempt to remove them from the unit violated Section. 8(a)(5) of the Act. *Spentonbush/Red Star Cos.*, 319 NLRB 988, 989 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997).

Finally, at pp. 10 and 11 of her brief, the General Counsel introduces portions of her arguments by referring to Respondent's alleged direct dealing with employees. Nowhere in the text of the relevant arguments is this contention developed. This omission is peculiar since the alleged violation is not self-evident. In *Allied-Signal, Inc.*, 307 NLRB 752, 753–754 (1992), in the context of unilateral changes, the Board discussed direct dealing with employees leading to erosion of the Union's position as exclusive representative. *In Allied-Signal,* supra at. 754, the Board stated that "Direct dealing with em-

[7] As to the nexus between the unremedied unfair labor practices and the alleged employee dissatisfaction, the question is simply whether the (employer's) actions could have contributed to employee dissatisfaction. Direct evidence of causation is not required. *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271 (5th Cir. 1997). I find the necessary nexus present here.

ployees goes beyond mere unilateral employer action." In light of General Counsel's failure to discuss this allegation in her brief, and my inability to find the elements of this allegation in the proof presented, I will recommend that it be dismissed.

Based on the above discussion, with the single exception relating to the direct dealing, I find that Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employee engaged in commerce and in a business affecting commerce within the meaning of Section (6) and (7) of the Act.

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

3. Respondent's assorted affirmative defenses have not been proven and are without merit.

4. Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of bargaining-unit employees and by unilaterally removing batch plant operators from the bargaining unit.

5. Under the facts and circumstances of this case, Respondent may not assert a good-faith doubt of the Union's majority status.

6. The appropriate unit is described as all employees in the Employer's operations:

> In Los Angeles, Orange, Ventura, Santa Barbara, San Bernardino, and Riverside Counties as listed in the various classifications in Appendix "A" of the Agreement [G.C. Exh. 2] but excluding executives, superintendents, other supervisory employees, as defined in Section 2 (11) of the National Labor Relations Act and all other employees not covered by this agreement.

THE REMEDY

Having found that California Portland Cement Co. d/b/a Catalina Pacific Concrete Co. engaged in certain unfair labor practices, I shall recommend that it be ordered to take certain affirmative action to effectuate the policies of the Act, including restoration of the status quo ante, except in such cases where the Respondent's unilateral changes involve the granting of a benefit to employees, in which case benefits should be rescinded only on the Union's demand

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, California Portland Cement Co. d/b/a Catalina Pacific Concrete Co., Glendora, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with the Union regarding terms and conditions of employment of the employees in the unit set forth below by withdrawing recognition from the Union.

(b) Refusing to recognize and bargain in good faith with the Union regarding terms and conditions of employment of the employees in the unit set forth below by unilaterally changing the terms and conditions of employment of its employees without notifying the Union and affording it an opportunity to bargain.

(c) Refusing to recognize and bargain in good faith with the Union regarding terms and conditions of employment of the employees in the unit set forth below by unilaterally removing batch plant operators from the bargaining unit without notifying the Union and affording it an opportunity to bargain. The appropriate unit is:

> All employees in Respondent's operations in Los Angeles, Orange, Ventura, Santa Barbara, San Bernardino, and Riverside Counties as listed in the various classifications in Appendix "A" of the agreement between Respondent and the Union, which was effective by its terms from September 15, 1991, through September 15, 1994; excluding all other employees, executives, superintendents, and other supervisory employees as defined in Section 2(11) of the National Labor Relations Act.

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

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

(a) On request, bargain with the Unions as the exclusive collective-bargaining representatives of the employees in the appropriate unit described above concerning wages, hours, working conditions and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of the Union, rescind the unilateral changes in the unit employees' terms and conditions of employment implemented since April 1966.

(c) Restore the status quo ante including the return of the batch plant operators to the bargaining unit.

(d) Preserve and, on 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 all of its Orange County and Los Angeles County facilities copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 21, 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, Respondent has gone out of business or closed its facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and for-

[8] 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.

[9] 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."

mer employees employed by Respondent at any time since April 6, 1996.

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