

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

California Offset Printers, Inc. and Graphic Communications Union, Local 404 M, International Brotherhood of Teamsters. Cases 31–CA–27673 and 31–CA–27679

April 12, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On June 23, 2006, Administrative Law Judge Lana H. Parke issued the attached decision. The General Counsel filed partial exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.¹

The issue before the Board is whether the Respondent violated Section 8(a)(5) and (1) of the Act on January 7, 2006,² by unilaterally establishing a new condition of continued employment and grounds for discipline: requiring that employees be reachable and responsive to being called back to work on their time off, 24 hours a day, 7 days a week, and that they have specified telephonic messaging devices in order to be reachable. The judge found that the terms of the parties' collective-bargaining agreement privileged the Respondent to issue the directive without bargaining. For the reasons stated below, we reverse.

I. FACTS

A. Background

The Respondent and the Union have been parties to successive collective-bargaining agreements since at least 1990. The most recent agreement expired by its own terms in 2001, and was extended by mutual agreement until February 13, 2003. The parties stipulated that, until that time, they had "jointly executed" successive agreements, but that "[t]he current contract, effective by

¹ In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the Union with requested information concerning reinstatement agreements and/or any documents that employees Linda Ponds and Rebecca Chavira were asked to sign or to submit as a requirement of their returning to work with the Respondent.

² All dates are in 2006 unless otherwise noted.

its terms from July 1, 2003, through June 30, 2008, was implemented by Respondent on July 1, 2003."

*B. The Current Agreement*³

The implemented Current Agreement describes rights reserved to management (sec. 3.1) and employment terms in part as follows:

(Management Rights) 3.1: . . . The management of the Employer's business and the direction of its working force, including but not necessarily limited to the right to . . . maintain discipline and efficiency of all employees, the right to establish and enforce shop rules not in conflict with the specific terms of this Agreement, to establish work schedules and to make changes therein essential to the efficient operation of the Company, are the normal rights of the Company.

....

5.1 (Temporary Workforce): Prior to hiring or using temporary employees the Employer shall attempt to telephonically contact employees covered by this Agreement to determine if they are available to work . . . a message shall be left if the call is unanswered. The employee must return the call not more than four (4) hours after the message is left . . . The first employee who accepts an assignment shall be given the work.

....

11.11: [Shift] schedules will be posted outside of the manager's office. The Employer may make changes in the posted schedules on account of factors beyond its control . . . Even if an employee's name is not on the posted schedule, the employee is deemed available and may be called into work unless the employee has previously made a request for the day off and the Employer has approved the request.

....

15.2: The employee's seniority and employment shall be terminated in any of the following instances:
a) Justifiable discharge (shall be deemed to include, but not be limited to, incompetence, inefficiency, absenteeism, refusal to fulfill reasonable instructions of a super-

³ In their stipulation, the parties referred to the agreement as the "Implemented Contract." The judge refers to it as the "Current Agreement," and we use the judge's term. There is no evidence of the circumstances surrounding the Respondent's implementation of the Current Agreement, nor is there any indication that the Union challenged the Respondent's implementation of the Current Agreement.

visor, negligence, insubordination, possession, sale, or working under the influence of drugs or alcohol, violation of this agreement and failure to comply with the company's work and/or safety rules, which shall be conspicuously posted);

....

g) Absence without notification to the Company in excess of three (3) days except in proven cases of inability to report.

....

15.5: The Employer shall have the right to discharge or discipline any employee for cause.

C. The January 7 directive

On January 7, 2-1/2 years after implementing the Current Agreement, the Respondent posted a memo at the facility from Production Manager Frank Leanos to "All Bindery and Mailing Employees" regarding "Scheduled Times," stating in pertinent part:

[A]s a contingent of your continued employment, you are required to be reachable on your time off for schedule changes beyond our control. You either need a message machine on your phone, a beeper, or a cell phone. Unless you have a "Request for Time Off" sheet approved, you are required to respond to our phone call.

I will be diligent in enforcing these policies. Standard disciplinary action will be taken against anyone not complying with them.

The Respondent did not discuss the contents of the memo with the Union prior to posting. There is no evidence that the Respondent has ever disciplined employees for not being reachable on their days off.

II. THE JUDGE'S DECISION

The judge, noting that the Respondent did not deny that it changed the terms and conditions of its scheduling procedure, assumed for the purpose of her analysis that the Respondent changed work terms without offering to bargain with the Union. She found that, notwithstanding the contract's silence on how employees are to make themselves accessible for callback work or the disciplinary consequences of noncompliance, the contract "spells out Respondent's general authority." Thus, according to the judge, by reserving to the Respondent "the right to maintain discipline and efficiency of all employees, the right to establish and enforce shop rules not in

conflict with the specific terms of [the] Agreement, to establish work schedules and to make changes therein," the parties

clearly and unmistakably contemplated that Respondent would have comprehensive discretion in those areas. It follows that Respondent's requirement that employees arrange some means of consistently receiving call-backs under threat of discipline is not an unwarranted extension of its contractually mandated discretion.

Thus, under either the Board's "clear and unmistakable waiver" analysis or a "contract coverage" analysis, the judge concluded that the parties' Current Agreement privileged the Respondent's January 7 directive.

III. DISCUSSION

A. Applicable Legal Principles

Through its January 7 directive, without offering the Union notice and opportunity to bargain, the Respondent concededly established a new condition of continued employment and new grounds for discipline. The question before us is whether the judge correctly found that the parties' Current Agreement privileges that new condition.

It is well established that rules governing the imposition of employee discipline are mandatory subjects of bargaining.⁴ "It is equally well settled that 'work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining.'"⁵ Thus, establishment of a new condition of continued employment and new grounds for discipline are mandatory bargaining subjects. Under long-settled law, an employer may make unilateral changes to such mandatory bargaining subjects only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).⁶

⁴ See, e.g., *United Cerebral Palsy of New York City*, 347 NLRB No. 60, slip op. at 5 (2006).

⁵ *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (quoting *Cotter & Co.*, 331 NLRB 787, 796 (2000)). Under the plain terms of Sec. 8(d), hours of work are also mandatory bargaining subjects. *Control Services*, 303 NLRB 481, 484 (1991), enf. mem. 961 F.2d 1568 and 975 F.2d 1551 (3d Cir. 1992).

⁶ Our dissenting colleague would change Board law and apply the "contract coverage" standard favored by some of the circuit courts. See, e.g., *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (waiver standard inappropriate when the parties negotiated and reached agreement over the contract language and it covers the issue at hand), denying enf. 304 NLRB 495 (1991). Applying that standard, our colleague would find that the parties' Current Agreement privileged the Respondent's directive. As explained below, applying a contract-coverage analysis would not change the result in this case. Therefore,

Furthermore, as the Supreme Court stated in *Metropolitan Edison*, “we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.” *Id.* “To meet the ‘clear and unmistakable’ standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000). “[T]he Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver.” *Id.* Thus, in *Allison*, *supra*, the Board found that the union clearly and unmistakably waived its statutory right to bargain over the employer’s decision to subcontract work where the management-rights clause “specifically, precisely, and plainly” granted the employer the right to subcontract without restriction. In contrast, the Board has repeatedly held that generally worded management-rights clauses will not be construed as waivers of statutory bargaining rights. See, e.g., *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).

B. Analysis

As the judge found, the Current Agreement is silent on the subject of the directive—namely, how employees are to make themselves accessible for callback work and the disciplinary consequences of being unreachable or unresponsive when called back on their days off.⁷ The contract is also silent on the Respondent’s right to establish new conditions of continued employment or new grounds for discipline. Nor is there any evidence that these matters were consciously explored in bargaining. The Respondent offered no evidence that the parties ever discussed the subject of its memo and that the Union consciously yielded its interest in the matter.⁸ Nevertheless, the judge largely relied on general contractual provisions in the management-rights clause at section 3.1, quoted above, to reason that the parties clearly contem-

plated that the Respondent would have the discretion to make the changes set forth in the January 7 directive. The judge’s legal conclusion, in light of the contractual silence, is inconsistent with Board precedent.

Specifically, as explained below, we find no language in the Current Agreement supporting a finding that the Union clearly and unmistakably waived its right to bargain over the subject of the new directive.

Section 11.11, which concerns scheduling, establishes that an employee is “deemed available” and subject to being called back to work unless he or she has arranged for time off in advance. This language, simply stating that employees are deemed available, does not indicate that management has the authority to discharge or discipline employees who are not reachable or responsive 24 hours a day, 7 days a week, during their time off, or that employees must use specified telephonic messaging devices to comply. Moreover, there is no evidence that the parties have previously interpreted this provision as providing for discipline. Furthermore, the contract establishes the employer’s discharge rights for absences at section 15.2(g), which provides for discharge for “[a]bsence without notification to the Company in excess of three (3) days except in proven cases of inability to report.” The January 7 directive would lower that bar to provide for discipline or discharge for such things as the mere failure to return a phone call on a day off, failing to use one’s answering machine, or being out of cell-phone range. The directive signals a significant change in the way the Respondent would handle scheduling and discipline. Nothing in the above provisions indicates that the Union has waived its right to bargain over those changes or, under our dissenting colleague’s analysis, that the contract “covers” those changes. As to the general contractual provisions, the management-rights clause in section 3.1 of the Current Agreement allows the Respondent to “maintain” discipline and to establish and enforce “shop rules” not in conflict with the contract. We do not interpret the right to “maintain” discipline as encompassing the right to change the status quo or expand existing terms as to what conduct is actually subject to discipline. The right to maintain discipline allows the employer to function in accordance with existing contractually agreed-upon procedures, not to change them. Nor do we read “shop rules” as encompassing rules that set new grounds for discipline for being unreachable during time off. We read the qualifying term “shop” as pertaining to practice and procedure within the shop and relating to production, equipment, safety, and the like. In contrast, the January 7 directive addresses the conduct of employees during their time off, outside the shop. In short, the right to establish “shop rules” is not a grant of unfettered

we need not and do not reach the merits of the “contract coverage” versus “clear and unmistakable waiver” debate.

⁷ As to sec. 5.1 (temporary workforce), we agree with the judge that this provision merely describes the work opportunity procedure that the Respondent must follow before utilizing nonunit employees to meet temporary work demands. The provision neither establishes a requirement that employees possess electronic messaging devices to receive callbacks nor contemplates disciplinary consequences for nonresponsiveness.

⁸ In addition, there is no evidence that, prior to the January 7 directive, the Respondent disciplined employees for being nonresponsive to callbacks on their time off or told them that a nonresponse might result in discipline.

rulemaking authority. Absent some additional evidence, such as bargaining history, the “shop rules” provision and the right to “maintain discipline” do not indicate that the Union clearly and unmistakably waived its right to bargain over the directive at issue here. Even if we were to interpret the term “shop rules” more broadly, the term would then be a general contractual provision similar to a broadly worded management-rights clause, from which we will not infer clear and unmistakable waiver. Accordingly, the Respondent has not demonstrated that these provisions effect a waiver of the Union’s right to bargain over the directive. Nor do these provisions privilege the directive under a contract-coverage analysis, even assuming that the scope of the “shop rules” term is ambiguous. To the extent that there is ambiguity in the scope of any term, and absent past practice or extrinsic evidence to illuminate the parties’ intent, we construe such ambiguity against the drafter—in this case, the Respondent. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (construing work rules), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); *Inta-Roto, Inc.*, 252 NLRB 764, 770 (1980) (citing *Taft Broadcasting Co. v. NLRB*, 441 F.2d 1382, 1384 (8th Cir. 1971)) (construing contract provisions), enfd. mem. 661 F.2d 922 (4th Cir. 1981). Thus construed, “shop rules” is properly given the narrower reading stated above, i.e., as referring to practice and procedure within the Respondent’s shop, not to rules applicable to employees away from the shop on their off-duty time. Thus, under either the Board’s “clear and unmistakable waiver” standard or under the “contract coverage” standard applied by our dissenting colleague, we find that the management-rights clause does not privilege the directive here.

Our dissenting colleague observes that section 15.2(a) of the Current Agreement, establishing grounds for justifiable discharge, is not limited to the reasons enumerated. He would therefore find that the parties have reserved to the Respondent discharge rights that include the right to discharge an employee for not being available or responsive during time off. We disagree.

Section 15.2(a) introduces specific causes for justifiable discharge, stating that just cause shall “include, but not be limited to” those specifically enumerated causes.⁹ As stated above, we do not find waiver unless it is clear and unmistakable. *Metropolitan Edison*, supra. In addition, each of the enumerated causes for discharge implicates an egregious degree of incompetence, or refusal to work safely or as directed. In interpreting the “include, but not be limited to” language, we apply familiar canons

of construction and confine the scope of that language to causes that are similar to those specifically enumerated. See *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005), cert. denied 126 S.Ct. 478 (2005). Noting, in that case, that the statutory language “including, but not limited to” introduced a nonexhaustive list that sets out specific examples of a general principle, the D.C. Circuit limited the expansion of that list only to things that were “similar in nature to those enumerated.” Applying that principle, we do not find that being unreachable for some unstated portion of a day off is sufficiently similar to incompetence, insubordination, or other specifically enumerated and grave causes for discharge listed in 15.2(a) to be deemed included within the scope of that provision. Accordingly, we reject our colleague’s assertion that section 15.2(a) of the contract privileged the Respondent to issue the January 7 directive.

Our colleague seeks to avoid the application of the foregoing canons of construction by relying on the provision of section 15.2(a) that makes “violation of this agreement” a justifiable cause for discharge. In his view, because section 11.11 of the Current Agreement provides that off-duty employees are “deemed available and may be called into work,” an employee who fails to be reachable by message machine, beeper, or cell phone has made him- or herself unavailable and thus violated the agreement. There is no indication, however, that the parties to the Current Agreement intended the meaning our colleague gives to section 11.11. There is no evidence that employees have ever been disciplined, let alone discharged, for being unreachable on their days off. In addition, the Current Agreement appears to assume that off-duty employees who have not received prior approval to be off may nonetheless be unavailable to work. Clearly, there would be no reason for the Respondent to telephone employees it had already approved to be off duty. In relevant part, however, section 5.1 states: “Prior to hiring or using temporary employees the Employer shall attempt to telephonically contact employees covered by this Agreement *to determine if they are available to work*” (emphasis added). Thus, reading section 11.11 in light of section 5.1, we disagree with our colleague’s suggestion that unavailability constitutes a violation of the Current Agreement. At minimum, section 5.1 renders the “deemed available” language in section 11.11 ambiguous; and that ambiguity must be construed against the Respondent as the drafter of the Current Agreement.¹⁰

⁹ Failure to be available or responsive during time off is not one of the enumerated causes.

¹⁰ In our colleague’s view, the language in sec. 5.1 that a unit employee “must return the [Respondent’s] call” within 4 hours supports his position that the contract requires employees to be reachable and to respond on their time off. However, sec. 5.1 goes on to state that “[t]he

In sum, the requirement set forth in the January 7 directive, establishing that an employee must respond to employer calls during time off or face discipline, imposes a significant new burden on the work force. We find no evidence that the Union clearly and unmistakably waived its right to bargain over such a requirement, nor that the parties even contemplated it when negotiating the Current Agreement. Moreover, for the reasons set forth above, even if we were to apply the contract-coverage standard espoused by our dissenting colleague, we would find that the Current Agreement does not privilege the directive here.

C. The Status of Unilaterally Implemented Management-Rights Clauses

In excepting to the judge's decision, the General Counsel argued that the judge improperly relied on the management-rights clause to find privilege. Specifically, the General Counsel argued, for the first time, that the Current Agreement was implemented after the parties reached impasse in bargaining, and that under Board law an employer may not act on a management-rights clause that has been unilaterally implemented rather than achieved through bargaining.¹¹

Although an employer may unilaterally implement the terms of its final offer once the parties have reached a lawful impasse over that offer in negotiations, the Board has established an exception for broad management-rights clauses that would allow an employer to make future unilateral changes in wages and other key terms and conditions of employment. See, e.g., *McClatchy Newspapers*, 321 NLRB 1386 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998). The General Counsel argues that, as a waiver of statutory rights must be clear and unmistakable, "impasse is no substitute for consent."¹² The status of the management-rights clause, however, does not affect our result in this case. Whether bargained for or unilaterally implemented, the clause does not privilege the content of the Respondent's directive.¹³

first employee who *accepts* an assignment shall be given the work" (emphasis supplied). In our view, in light of the overall purpose of sec. 5.1—which addresses the Respondent's obligation to offer unit employees the opportunity to work unscheduled hours before offering the work to temporary employees—a reasonable reading of the provision that employees "must return the call" within 4 hours is that employees who do not do so will simply be deemed to have relinquished their right to the work.

¹¹ See *Colorado-Ute Electric Assn.*, 295 NLRB 607, 609–610 (1989) (cited in *Control Services*, *supra*), *enfd.* denied 939 F.2d 1392 (10th Cir. 1991), *cert. denied* 504 U.S. 955 (1992).

¹² *Control Services*, *supra* at 484.

¹³ Accordingly, we find it unnecessary to address our dissenting colleague's distinguishing of *McClatchy*.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, California Offset Printers, Inc., Glendale, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide Graphics Communications Union, Local 404 M, International Brotherhood of Teamsters (the Union), with requested information relevant and necessary to its responsibilities as exclusive collective-bargaining representative of a unit of the Respondent's mailing, shipping, and offset operations employees (as described in "Section 1–Recognition" of the 2003–2008 agreement implemented by the Respondent), i.e., reinstatement agreements or any documents Linda Ponds and Rebecca Chavira were asked to sign as a requirement of returning to work.

(b) Establishing, as a condition of employment or a ground for discipline, the requirements that employees be reachable and responsive to being called back to work on their time off, and that they have telephonic messaging devices in order to be reachable (e.g., a telephonic message machine, a beeper, or a cell phone), without providing the Union notice and opportunity to bargain.

(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) Within 14 days from the date of this Order, provide the Union with the information the Union requested on December 22, 2005, and January 12 and 18, 2006, which is necessary and relevant to its status as the exclusive collective-bargaining representative of the employees in the unit described above.

(b) Rescind the requirements set forth in the memo dated January 7, 2006, and directed to "All Bindery and Mailing Employees."

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit described above.

(d) Reimburse all unit employees for costs associated with their attempts to comply with the memo dated January 7, 2006.

(e) Within 14 days after service by the Region, post at its facility in Glendale, California, copies of the attached

notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, 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 December 22, 2005.

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

Dated, Washington, D.C. April 12, 2007

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Unlike my colleagues, I would adopt the judge's finding that the Current Agreement privileged the Respondent to issue its January 7 directive. In my view, the Respondent has fulfilled its obligation to bargain over the subject of its directive and should not be required to bargain over the matter again. While I would find privilege under both the waiver and the contract coverage analysis, as did the judge, I would adopt the contract coverage analysis as applied in the D.C. Circuit and the Seventh Circuit Courts of Appeals.¹

Under a contract coverage analysis, if the subject at issue is "covered by" or "contained in" the collective-

bargaining agreement, through a substantive provision or the reservation of authority to the employer in a management-rights clause, then a party has exercised its statutory right to bargain over the subject, and the question to be answered is simply one of contract interpretation. Here, I would find that the Current Agreement clearly covers the subject of the Respondent's January 7 memo, and that several provisions, taken together, privilege the directive.

The Current Agreement gives the Respondent broad authority to establish and make changes in work schedules. Section 11.11 states: "Even if an employee's name is not on the posted schedule, the employee is deemed available and may be called into work" unless he or she has previously been approved for time off. Section 15.2(a) of the agreement gives the Respondent discharge rights for justifiable cause without limiting language, including the right to discharge an employee for refusing to follow "reasonable instructions of a supervisor." Additionally, the management-rights clause (sec. 3.1) reserves to the Respondent the right to maintain discipline and efficiency and to "establish and enforce shop rules not in conflict with the specific terms of the agreement."

In light of the scheduling provision of section 11.11 noted above, as well as other provisions that provide how employees called and put to work shall be paid, the judge found it "reasonable to infer that the parties anticipated employees would generally be accessible when called back to work." Accessibility is necessary if the scheduling and callback requirement described in section 11.11 is to have any effect; an employee obviously cannot be available and inaccessible at the same time. Similarly, the contract here specifically grants the Respondent the right to call employees in to work, and that right would be meaningless if employees have the simultaneous and contradictory right to fail to respond to such a call or to otherwise undermine the Respondent's callback rights by avoiding calls. Thus, an employee who makes himself or herself unavailable by not responding to calls violates the terms of the agreement, and, under section 15.2(a), violation of the agreement is a specifically enumerated ground for discharge. Clearly, then, the agreement privileges the directive's statement that, as "a contingent of your continued employment," employees are to be reachable on their time off and must respond to the employer's phone calls.² Even under a waiver analysis, I would find that

¹⁴ 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."

¹ *Dept. of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *NLRB v. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993), denying enf. 306 NLRB 640 (1992); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992), denying enf. 304 NLRB 495 (1991).

² I do not agree with the majority's contention that sec. 5.1 of the contract renders the "deemed available" language at sec. 11.11 ambiguous. I agree with the judge that sec. 5.1, titled "Temporary Workforce," merely describes the work opportunity procedure that the Respondent must follow before utilizing nonunit employees to meet temporary work demands. As such, I do not find that it is relevant when

section 11.11 clearly contemplates that employees must be reachable and responsive to employer callbacks during their time off; hence, the Union waived its right to bargain further over the matter.

In addition, the management-rights clause of the agreement specifically privileges the Respondent to maintain discipline and to establish and enforce “shop rules.” The majority would essentially limit the term “shop rules” to rules pertaining to production-related matters within the shop. I disagree for two reasons. First, I would find that the term encompasses rules designed to ensure adequate staffing, which is fundamental to production and the basic functioning of the shop. Secondly, I would find that the term encompasses rules designed to ensure that employees comply with their *existing* obligations under the agreement, which is all that the directive does here. As to having telephonic messaging devices, the requirement that employees be available on days off is a de facto requirement that they receive and return telephone messages. I would not find that this requirement, as articulated in the directive, changes employment terms such that the Respondent must bargain over it.

As to disciplinary authority, section 15.5 of the agreement permits discipline and/or discharge for justifiable cause without other limiting language. Notwithstanding the majority’s attempt to confine the definition of justifiable cause, the provision specifically permits discharge for violation of the agreement.³ As noted above, an em-

read out of its specifically stated context. Nevertheless, the majority deems sec. 5.1 relevant, and sec. 5.1 explicitly provides that, when the Respondent leaves messages for employees prior to hiring temporary workers, “[t]he employee *must return the call* not more than four (4) hours after the message is left” (emphasis added). This provision further supports the view that the contract requires employees to be reachable and responsive on their time off.

³ Sec. 15.2 of the agreement also permits discharge for refusal to fulfill reasonable instructions of a supervisor. If, for example, an employee failed to respond to the Respondent’s attempts to call him or her into work, the Respondent would be within its rights to point out the call-back requirement in sec. 11.11 and to instruct the employee to be reachable and responsive by using a telephone messaging device. This would be a reasonable instruction as it seeks to ensure compliance with existing obligations. Here, the Respondent has promulgated a general memo setting out this instruction, which, again, merely ensures that employees adhere to existing requirements. The fact that it was issued in the memo form to all bindery employees should not render the instruction unlawful, where, in my view, it would clearly fall within the four corners of the agreement had it taken the form of a verbal instruction from a supervisor to an individual employee.

The majority characterizes the causes for discharge that are enumerated in sec. 15.2(a) as “egregious” or “grave.” Having made that characterization, the majority argues that just cause for discharge must be limited to other such grave causes. Those enumerated causes, however, include such broadly-worded reasons as “inefficiency,” refusal to fulfill reasonable instructions of a supervisor, and negligence. These terms may encompass a very wide range of conduct or inadvertence, and thus I would not limit the just causes for discharge as the majority does here.

ployee’s failure to be available for callback work is a violation of the agreement. Thus, I would find that the Union clearly and unmistakably waived its right to bargain over the Respondent’s right to discharge or otherwise discipline employees who violate their obligations by failing to make themselves available for work.

In sum, the Current Agreement requires employees to be reachable and responsive on days off and specifically permits the Respondent to discharge employees for non-compliance with the agreement. In this respect, even under the extant waiver analysis, I would find that the Union waived its right to bargain over the subject of the memo. I would further find that the right to establish “shop rules” encompasses a rule that, as here, merely ensures adequate staffing as set forth in the agreement, and addresses obligations already existing under the agreement. Not only do I find that the contract covers the requirement that employees be responsive to callbacks and possess the necessary messaging devices, but I would find that the Union clearly waived its right to bargain further over this requirement.

Like the judge, I rely, in part, on the Current Agreement’s management-rights clause in finding the Respondent’s conduct privileged. As my colleagues note, the General Counsel contends for the first time before us that the Current Agreement was unilaterally implemented at impasse, and therefore cannot privilege unilateral action under the Board’s decision in *McClatchy Newspapers*.⁴ I disagree. Assuming the General Counsel’s argument is properly before us, and assuming the validity of the *McClatchy* decision,⁵ I find that case distinguishable. The management-rights clause at issue in *McClatchy* reserved to the respondent sole unfettered discretion to make “recurring, unilateral decisions” to change wages. *McClatchy*, supra at 1388.⁶ In contrast, the Respondent’s application of the management-rights clause here does not involve unfettered discretion to make recurrent changes to contractual wages or benefits. Rather, the Respondent’s January 7 directive adhered to the Current Agreement by seeking to effectuate existing provisions and protect rights already reserved to the Respondent. Where the Board in *McClatchy* considered a manage-

⁴ 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

⁵ See Member Cohen’s compelling dissent in *McClatchy*, 321 NLRB at 1393.

⁶ See also *Mail Contractors of America*, 347 NLRB No. 88 fn. 2 (2006) (sole discretion to unilaterally set truckdrivers’ relay points, directly affecting wages and hours); *KSM Industries*, 336 NLRB 133, 134 (1998) (sole discretion to unilaterally change health insurance provider, plan design, level of benefits, and plan administrator at any time during life of agreement). Each involved an open-ended right to change employment terms on a recurring basis.

ment-rights clause that appeared to grant the respondent unfettered discretion, the only discretion at issue here is the right to implement a callback procedure that is consistent with specific provisions of the Current Agreement. Hence, *McClatchy* is not controlling, and the General Counsel's belated assertions to the contrary lack merit.

Dated, Washington, D.C. April 12, 2007

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide your Union, Graphics Communications Union, Local 404 M, International Brotherhood of Teamsters, with requested information relevant and necessary to its responsibilities as exclusive collective-bargaining representative of a unit of our mailing, shipping, and offset operations employees (as described in "Section 1—Recognition" of the 2003–2008 agreement implemented by us), i.e., reinstatement agreements or any documents employees were asked to sign as a requirement of returning to work.

WE WILL NOT establish, as a condition of employment or a ground for discipline, the requirement that you be reachable and responsive to being called back to work on your time off, or the requirement that you have telephonic messaging devices in order to be reachable (e.g., a telephonic message machine, a beeper, or a cell phone), without providing the Union notice and opportunity to bargain.

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

WE WILL, within 14 days from the date of this Order, provide the Union with the information the Union requested on December 22, 2005, and January 12 and 18, 2006, which is necessary and relevant to its status as the exclusive collective-bargaining representative of the employees in the unit described above.

WE WILL rescind the memo dated January 7, 2006, and directed to "All Bindery and Mailing Employees," and the requirements set forth therein.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit described above.

WE WILL reimburse all unit employees for costs associated with your attempts to comply with the memo dated January 7, 2006.

CALIFORNIA OFFSET PRINTERS, INC.

Katherine Mankin, Esq., for the General Counsel.
Andrew B. Kaplan, Esq. (Silver & Freedman), of Los Angeles, California, for the Respondent.
Jeffrey Boxer, Esq. (Levy, Stern & Ford), of Los Angeles, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on May 8, 2006, upon a consolidated complaint and notice of hearing (the complaint) issued March 29, 2006,¹ by the Regional Director of Region 31 of the National Labor Relations Board (the Board) based on charges filed by Graphic Communications Union, Local 404 M, International Brotherhood of Teamsters (the Union or the Charging Party). The complaint alleges that California Offset Printers, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Whether Respondent violated Section 8(a)(5) and (1) of the Act on and following December 22, January 12 and 18, by failing and refusing to furnish the Union with the following requested information: reinstatement agreements or any documents that employees Linda Ponds and Rebecca Chavira had been asked to sign or submit as a prerequisite to their reinstatement to employment with Respondent.

¹ Dates occurring in October, November, and December are in 2005; dates occurring in January are in 2006.

2. Whether Respondent violated Section 8(a)(5) and (1) of the Act on January 7, by unilaterally imposing as a condition of employment the requirements that employees be reachable and responsive 24 hours a day, 7 days a week, and that they have the necessary telecommunications equipment to be reachable.

III. JURISDICTION

At all relevant times, Respondent, a California corporation, with its principal place of business, offices, and a facility in Glendale, California (the facility), has been engaged in the business of commercial printing. During the past calendar year, a representative 12-month period, Respondent derived gross revenues from its business in excess of \$1 million and purchased and received at the facility goods, supplies, and materials valued in excess of \$50,000 directly from enterprises located outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.²

III. FINDINGS OF FACT

A. Respondent and the Union's Collective-Bargaining Relationship

The Union has been the exclusive collective-bargaining representative of Respondent's employees in its mailing, shipping, and offset operations (the unit) since at least 1990.³ Respondent and the Union have been parties to successive collective-bargaining agreements, the penultimate of which expired by its own terms on June 30, 2001, and was extended by mutual agreement of the parties until February 13, 2003. Respondent and the Union are currently parties to a collective-bargaining agreement effective by its terms from July 1, 2003, through June 30, 2008 (the Current Agreement).

B. The Union's Requests for Information

On October 10, Respondent discharged Linda Ponds (Ponds) and Rebecca Chavira (Chavira), both of whom had been employed in the unit. On October 19, the Union filed grievances for Ponds and Chavira, respectively, alleging "wrongful termination" and seeking a make-whole remedy.⁴ By separate letters dated October 25, Respondent denied each of the grievances.

Sometime in late November, William Rittwage, Respondent's CEO, told Lisa Quintanilla (Quintanilla), his assistant

² Where not otherwise explained, findings of fact are based on party admissions, stipulations, and uncontroverted testimony. The bulk of the evidence was presented pursuant to the parties' partial stipulation of facts. Douglas Brown, vice president of the Union, gave brief testimony for the General Counsel. Lisa Quintanilla, assistant to Respondent's CEO/human resources manager gave brief testimony for Respondent.

³ Specific equipment operations and work functions within the Union's representation purview are set forth at "Section I-Recognition" in the current collective-bargaining agreement between the Union and Respondent. The employees thereof constitute a unit appropriate for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

⁴ Ponds and Chavira each signed her respective grievance.

and human resources manager, that Ponds and Chavira had contacted him and requested reinstatement. Thereafter, Respondent asked its attorney to prepare reinstatement agreements for the two employees (respectively, the Ponds Release and the Chavira Release, described later in pertinent part). Respondent then scheduled separate meetings with the employees for November 30. Ponds and Chavira asked Douglas Brown (Brown), the Union's vice president, to be involved in the meetings.⁵ On November 30, Brown met separately at the facility with Ponds and Chavira in preparation for their meetings with management. The meetings did not, however, take place. According to Brown, prior to each of the meetings, Quintanilla informed Brown and the respective employee that the instant meeting was canceled because of Brown's uninvited presence. According to Quintanilla, because of unrelated issues including an upcoming AQMD inspection, she informed Brown that Respondent could not meet that day. As there is no complaint allegation regarding the cancellation of Respondent's November 30 meetings with Ponds and Chavira, I find it unnecessary to determine which of the two witnesses' accounts is more credible. I do find, however, that Brown's uncontradicted testimony establishes that both Ponds and Chavira asked him to be present at the meetings.

Thereafter, the following sequence of events occurred in resolution of the discharges:

December 6: Ms. Ponds signed the following declaration in the presence of Ms. Quintanilla:

I Linda Ponds call Lisa for a meeting for 12-6-05 to get my job back. I can start 12-7-05 to same position my same seniority, C.P. Add this letter to my file. Receive pension cont. [sic]. I am not asking for back paid.

December 9: Respondent and Ms. Ponds, sans union presence or representation, entered into an agreement whereby Respondent agreed to reinstate Ms. Chavira. Respondent and Ms. Ponds executed a written "RELEASE/RETURN TO WORK AGREEMENT." In pertinent part, the agreement stated that Ms. Ponds directly contacted Respondent and negotiated the agreement. The agreement also provided that its terms were to be kept "strictly confidential," excepting disclosure to family members, accountants, and attorneys, who were to be informed they could not disclose the terms to anyone else and that its terms would not be admissible in any proceeding including arbitration (the Ponds Release).

December 15: Ms. Chavira signed the following declaration in the presence of Ms. Quintanilla:

⁵ Neither Ponds nor Chavira testified. Brown testified that both employees told him that Connie Morton, payroll/HR support employee, called them to broker a reinstatement agreement, but he also testified that as of November 30, he did not know who initiated the contacts. All evidence as to who contacted whom about reinstatement is based on hearsay, and I have no way of determining its reliability. Accordingly, I make no finding as to whether Ponds and Chavira initially contacted Respondent about reinstatement or vice versa.

I Rebecca Chavira would like my job back with my seniority and pay and pension cont. I am not asking for back pay for time off of work. I called [Respondent] on my own asking for my job back. Respondent and Ms. Chavira, sans union presence or representation, entered into an agreement whereby Respondent reinstated Ms. Chavira. Respondent and Ms. Chavira executed a written "RELEASE/RETURN TO WORK AGREEMENT," (the Chavira Release), containing the same terms as the Ponds Release.

According to Quintanilla, at the time Ponds and Chavira executed the releases, "both ladies [said they] did not want the union involved."⁶ Following their respective executions of the Ponds and Chavira releases, Respondent reinstated Ponds and Chavira to their former jobs. Thereafter, neither Ponds nor Chavira was willing to give the Union information about their reinstatements. By e-mail dated December 22, and by letters dated January 12 and 18, respectively, the Union requested that Respondent furnish the Union with the following information: reinstatement agreements or any documents Ponds and Chavira had been asked to sign or to submit as a requirement to return to work. Since December 22, Respondent has refused to comply with the Union's requests.

C. Alleged Unilateral Imposition of Conditions of Employment

The Current Agreement contains the following description of the rights reserved to management at "Section 3-Management Rights," in pertinent part:

3.1 It is understood that the management of the Employer's business and the direction of its working force, including but not necessarily limited to the right to . . . maintain discipline and efficiency of all employees, the right to establish and enforce shop rules not in conflict with the specific terms of the Agreement, to establish work schedules and to make changes therein essential to the efficient operation of the Company, are the normal rights of the Company.

The Current Agreement also refers to calling unscheduled employees into work (referred to as callbacks) at "Section 5-Temporary Workforce." Pertinent provisions read as follows:

5.1 Prior to hiring or using temporary employees the Employer shall attempt to telephonically contact employees covered by this Agreement to determine if they are available to work . . . a message shall be left if the call is unanswered. The employee must return the call not more than four (4) hours after the message is left. . . . If the employee is called . . . less than twelve (12) hours before he is required to report to work, no message need be left. The first employee who accepts an assignment shall be given the work.

⁶ There is no evidence as to what discussion occurred between management personnel and the employees when the releases were signed and no evidence of the context in which the employees declined union involvement.

The Current Agreement contains further provisions relating to hours of employment and scheduling at "Section 11-Hours." Pertinent provisions read as follows:

11.2 The Employer shall make reasonable efforts to schedule employees for consecutive shifts. However, subject to factors beyond its control, including but not limited to customer demands, vendor delays, equipment malfunctions, and employee absences, the Employer may require employees to work non-consecutive shifts. Employer scheduling shall not be subject to the grievance and arbitration provisions of this Agreement.

11.4 through 11.6 [provide various categories of payment for employees who are "called and put to work"].

11.8 Any employee who is "called back [to work]" sooner than twenty (20) hours from the actual starting time of the previous shift worked, shall be paid the overtime rate until such time as such twenty (20) hours has elapsed.

11.11 . . . [Shift] schedules will be posted outside of the manager's office. The Employer may make changes in the posted schedules on account of factors beyond its control, including but not limited to customer demands, vendor delays, equipment malfunctions, and employee absences. The Employer need not repost a changed schedule. . . . Even if an employee's name is not on the posted schedule, the employee is deemed available and may be called in to work unless the employee has previously made a request for the day off and the Employer has approved the request.

On January 7, without prior discussion with any representative of the Union, Respondent posted a memorandum at the facility from Production Manager Frank Leanos, and directed to "All Bindery and Mailing Employees" regarding "Scheduled Times." The memorandum reads:

[A]s a contingent of your continued employment, you are required to be reachable on your time off for schedule changes beyond our control. You either need a message machine on your phone, a beeper, or a cell phone. Unless you have a "Request for Time Off" sheet approved, you are required to respond to our phone call.

I will be diligent in enforcing these policies. Standard disciplinary action will be taken against anyone not complying with them.

IV. DISCUSSION

A. The Union's Requests for Information

No party disputes the existence of a "general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). This obligation extends to information involving labor-management relations during the term of an existing collective-bargaining agreement and to information in furtherance of, or which would allow the union to decide whether to process, a grievance. *Id.* at 436; *Bickerstaff Clay Products*, 266 NLRB 983 (1983). The relevance standard is a liberal, "discovery-type standard." *NLRB v. Acme Industrial Co.*, *supra* at 437;

Southern California Gas Co., 346 NLRB No. 45 (2006); *Quality Building Contractors*, 342 NLRB 429, 431 (2004). Accordingly, information that is “potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees’ exclusive bargaining representative” must be produced. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991). The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. *Id.* at 1105. “An employer must furnish information that is of even probable or potential relevance to the union’s duties.” *Conrock Co.*, 263 NLRB 1293, 1294 (1982). Information pertaining to employees within the bargaining unit is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000). Mandatory subjects of bargaining are also presumptively relevant to a union’s representational duties. *Southern California Gas Co.*, 346 NLRB No. 45, slip op. 1 (2006). The Board has stated that termination of employment and reinstatement of employees are both mandatory subjects of bargaining. *Parker Transport, Inc.*, 332 NLRB 547, 551 (2000), citing *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209–210 (1964), and *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991).

In its posthearing brief, Respondent asserts that the Union is entitled only to information needed for collective bargaining or for processing existing grievances and investigating potential ones.⁷ The information sought herein, Respondent argues, is not for use at the bargaining table, as the Current Agreement has 2 years to run, and is not relevant to the processing of a grievance inasmuch as Respondent’s reinstatements of Ponds and Chavira settled their grievances leaving “nothing left to process.” It is the Union, however, not Respondent who must assess the satisfactory adjustment of its grievances, and under the above-enunciated legal principles, the Union is presumptively entitled to inquire into discipline imposed and its resolution, as both pertain to bargaining unit employees and are mandatory subjects of bargaining. Respondent’s refusal to furnish the Union with the content of Ponds and Chavira’s reinstatement documents prevents the Union from doing just that and underscores the Union’s need of the information.

Respondent also asserts that it declined to comply with the Union’s request for information because Ponds and Chavira “expressly” told Quintanilla that they did not want the Union involved in their reinstatement; essentially, Respondent raises a confidentiality defense. Under Board law, a party may refuse to furnish confidential information to the other party in a collective-bargaining relationship if it shows a legitimate and substantial confidentiality interest in the information sought and if, upon balancing the union’s need for the information against any legitimate confidentiality interest, the balance tips in favor of

⁷ While Respondent’s assertion is technically accurate, it suggests a narrow conception of a union’s right to information, which neither the Board nor the courts endorse. See *Pan American Grain Co.*, 346 NLRB No. 21 (2005), and *NLRB v. Acme Industrial Co.*, supra at 435–436 (“There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. . . . Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.”)

the party asserting confidentiality. The party asserting the confidentiality defense has the burden of proof, as well as a duty to seek an accommodation that “would allow the requester to obtain the information it needs while protecting the party’s interest in confidentiality.” *Northern Indiana Public Service Co.*, 347 NLRB No. 17, slip op. at 2 (2006), citing *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004); *River Oak Center for Children, Inc.*, 345 NLRB No. 113 (2005).

Respondent apparently bases its confidentiality defense on Ponds and Chavira’s declination of union involvement in their reinstatement meetings. As noted earlier, however, the evidence fails to show the motivation or scope of the employees’ pronouncements or even whether they or someone else proposed union exclusion. Ponds and Chavira’s statements that “they did not want the union involved” cannot, therefore, provide Respondent with a legitimate and substantial confidentiality basis for refusing to provide the information. Respondent may also base its defense on the declination language in the Ponds and Chavira Releases that provided the terms were to be kept “strictly confidential.” In balancing the Union’s need for the information against the legitimacy of such a confidentiality interest, I note that the confidentiality restriction was propounded by Respondent. There is no evidence that Ponds or Chavira sought confidentiality, that they had any interest in confidentiality, or that Respondent discussed confidentiality with them. Rather, the evidence shows the releases were prepared by Respondent’s attorney prior to the meetings between management personnel and the two employees without, apparently, any prior discussion of confidentiality. Moreover, considering the two employees’ lack of sophistication as reflected by their handwritten declarations, it is unlikely they had any input into the confidentiality language of the releases, and there is no evidence Ponds or Chavira expressed any confidentiality concerns. Indeed, their previous filing of grievances—never withdrawn—and their requests to Brown that he be involved in their reinstatement discussions with management, militates against any such conclusion. Even assuming the employees sought confidentiality, Respondent has failed to show any legitimate need or purpose for it; there is, for example, no indication that the employees feared retaliation of any kind (such as that evidenced in *Northern Indiana Public Service Co.*, supra).⁸ It appears that the confidentiality restrictions redound solely to the benefit of the Company, which has an obvious, practical interest in preventing the reinstatements from achieving prece-

⁸ There is also no evidence that the information sought was of a type identified by the Board in *Northern Indiana Public Service*, supra at slip op. 2–3: “that which would reveal . . . highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits . . . ; the names and unlisted phone numbers of customers whose complaints led to an employee’s discharge; . . . an investigative report concerning an altercation between two employees . . . [or data] created under an express promise of confidentiality.”

dential status or being used in future arbitration proceedings.⁹ However, Respondent's interest does not attain collective-bargaining legitimacy merely because it serves a sound managerial purpose. I find that Respondent did not have a legitimate and substantial confidentiality interest in the information sought. Even assuming Respondent had such an interest, application of the Board-required balancing test does not favor Respondent. By Respondent's refusal to provide the requested reinstatement documents, it has clearly stymied the Union in its representational duty to process Ponds and Chavira's grievances, its duty to scrutinize disciplinary procedures, and its duty to vindicate employee rights and equities. Finally, Respondent has made no effort to seek an accommodation that would allow the Union to obtain the information it needs while protecting Respondent's interest in confidentiality. In these circumstances, I conclude that Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with the information requested regarding the reinstatement of Ponds and Chavira.

D. Alleged Unilateral Imposition of Conditions of Employment

Respondent does not dispute its duty to bargain with the Union over mandatory subjects, which include wages, hours, and other terms and conditions of employment. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981). Nor does Respondent disagree that where the duty to bargain exists, an employer violates Section 8(a)(5) and (1) of the Act by implementing material and substantial changes in mandatory subjects without bargaining with the union in the absence of a bargaining impasse. See *McClatchy Newspapers, Inc.*, 339 NLRB 1214 (2003), and cases cited therein.

In applying the above principles to this case, it should initially be determined whether any genuine changes in terms and conditions of employment have occurred. A tightening, fine tuning, or explication of an already existing term does not necessarily constitute a change, material or otherwise. See *Bath Iron Works Corp.*, 302 NLRB 898 at 901 (1991), wherein the Board cited with approval the finding of *Trading Port, Inc.*, 224 NLRB 980 (1976), that where the standards [of productivity/efficiency] and sanctions remained the same, the related "tightening of the application of existing disciplinary sanctions did not require bargaining with the union." Respondent has not, however, argued that it did not change the terms and conditions of its scheduling procedure by its January 7 directive that unit employees make themselves accessible for callback work under penalty of discipline, and I will assume for purposes of this analysis that Respondent did change work terms and did so without offering to bargain with the Union. The General Counsel establishes a prima facie violation of Section 8(a)(5) by showing that Respondent made a material and substantial change in a term of employment without negotiating with the union. The burden is then on Respondent to show that the unilateral change was in some way privileged. *Id.*

The changes at issue here concern employees' obligation to report to work when called back for otherwise unscheduled

hours with disciplinary consequences attendant on noncompliance. As the changes relate to hours of employment and potential discipline, they are clearly mandatory subjects of bargaining. The changes are also material and substantial, requiring employees to be readily accessible for callback work and to equip themselves with such electronic devices (telephonic message machine, beeper, or cell phone) as will ensure their response, or face disciplinary penalties. Accordingly, the January 7 directive constituted changes in employment terms and conditions relating to hours of work and discipline, and the changes were material and substantial. See *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (threat of discipline sufficient to show significance of a new rule). Consequently, the General Counsel has established a prima facie violation of Section 8(a)(5), and Respondent must show that the unilateral changes were in some way privileged.

Respondent argues that the management-rights provision of the Current Agreement privileges its January 7 directive. The Current Agreement reserves to Respondent the right to manage its business and direct its work force, to maintain discipline and efficiency, to establish and enforce shop rules not in conflict with the specific terms of the agreement, and to establish work schedules and make changes therein essential to operating efficiency. Further, the Current Agreement gives Respondent significant latitude in scheduling work hours, authorizes Respondent to alter work schedules as operational needs dictate, and states that employees are subject to being "called in to work" unless previous time off requests have been approved. While nothing in the Current Agreement specifies that employees must be reachable and responsive to schedule-change notifications, it is reasonable to infer that the parties anticipated employees would generally be accessible when called back to work.¹⁰ Applying either the Board's "clear and unmistakable" waiver standard¹¹ or a "contract coverage" analysis,¹² I find that the management-rights clause of the Current Agreement privileged Respondent's directive, at least to the extent that employees be required to be reachable on their time off for schedule changes beyond Respondent's control.

The conclusion that Respondent was privileged to require its unit employees to be reachable on their time off for schedule changes does not end the matter, however. Nothing in the Current Agreement addresses any employee obligation to possess an electronic device (e.g., a telephonic message machine, a beeper, or a cell phone) to ensure accessibility, and nothing addresses whether discipline may follow inaccessibility or non-response to callbacks. The question remains, therefore, whether those portions of the January 7 directive constituted unlawful, unilateral changes.¹³

¹⁰ Secs. 11.4 through 11.6 of the Current Agreement, for example, specify how employees "called and put to work" shall be paid, and sec. 11.8 provides for overtime pay for any employee "called back" sooner than 20 hours from the starting time of the previous shift.

¹¹ See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

¹² See *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), and *Brooklyn Hospital Center*, 344 NLRB No. 48 fn. 2 (2005).

¹³ Respondent argues that sec. 5.1 of the current agreement, at least implicitly, requires employees to have answering machines in order to receive Respondent's calls to return to work. Sec. 5.1, however, merely

⁹ In fact the Ponds and Chavira Releases specifically prohibit the terms of the reinstatements being admissible in any proceeding including arbitration.

Notwithstanding the Current Agreement's silence on how employees are to make themselves accessible for callback work or the disciplinary consequences of noncompliance, the Current Agreement spells out Respondent's general authority. By reserving to Respondent "the right to maintain discipline and efficiency of all employees, the right to establish and enforce shop rules not in conflict with the specific terms of [the] agreement, to establish work schedules and to make changes therein," the parties to the Current Agreement clearly and unmistakably contemplated that Respondent would have comprehensive discretion in those areas. It follows that Respondent's requirement that employees arrange some means of consistently receiving callbacks under threat of discipline is not an unwarranted extension of its contractually mandated discretion. See *Metropolitan Edison Co. v. NLRB*, supra (application of the Board's "clear and unmistakable" waiver analysis); *Enloe Medical Center*, 343 NLRB 470 (2004), enf. denied 433 F.3d 834 (D.C. Cir. 2005).

The General Counsel argues that Respondent's January 7 directive unlawfully imposes "a work schedule that restricts bargaining unit employees' autonomy during scheduled time off." However, long before Respondent issued its directive, the Current Agreement authorized Respondent to call employees back to work as needed. The callback procedure itself was not a change in employment terms and conditions at all, and the fact that the callback system may sometimes work a hardship on some employees is irrelevant. The question is not whether Respondent is authorized to have a callback system but whether Respondent may devise rules for and regulate its callback system without first bargaining with the Union. As explicated above, I have resolved that question in Respondent's favor.

The General Counsel also argues that even if the Current Agreement initially established Respondent's right to make the rules enunciated in its January 7 directive, the right lapsed due to nonenforcement during the 2-1/2 years since implementation of the Current Agreement, citing *Vanguard Fire & Supply Co.*, 345 NLRB No. 77, slip op. 3 (2005), as authority for that proposition. *Vanguard*, however, is inapposite to the instant issues, as it involves unilateral changes effected in the absence of a bargaining agreement. The General Counsel cites no authority for the proposition that a contractual term may lapse through disuse during the life of the contract. Moreover, no evidence was adduced as to frequency or circumstance of callbacks that would permit any finding as to whether Respondent had or had not regularly deployed its callback procedure. Accordingly, having found that Respondent was privileged by the language of the Current Agreement to issue its January 7 directive, I shall dismiss this allegation of the complaint.

describes the work opportunity procedure Respondent must follow before obtaining nonunit employees to meet temporary work demands and neither establishes a requirement that employees possess electronic message devices to receive callbacks nor contemplates disciplinary consequences for nonresponse.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 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. Respondent's mailing, shipping, and offset operations employees, as specifically described by equipment operation and work function set forth at "Section I—Recognition" in the current collective-bargaining agreement between the Union and Respondent, constitute an appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

4. The Union, at all relevant times, has been and is the exclusive bargaining representative of the employees in the unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the following relevant information: reinstatement agreements and/or any documents Ponds and Chavira were asked to sign or to submit as a requirement of returning to work.

6. Respondent's unlawful conduct described in paragraph 5 above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, California Offset Printers, Inc., Glendale, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide the Union with requested information relevant and necessary to its responsibilities as exclusive collective-bargaining representative of a unit of Respondent's mailing, shipping, and offset operations employees, i.e., reinstatement agreements or any documents Ponds and Chavira were asked to sign or to submit as a requirement of returning to work.

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

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

(a) Within 14 days from the date of this Order, provide the Union with the information the Union requested on December

¹⁴ 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.

22, 2005, and January 12 and 18, 2006, which is necessary and relevant to its status as the exclusive collective-bargaining representative of the mailing, shipping, and offset operations employees.

(b) Within 14 days after service by the Region, post at its facility in Glendale, California, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by 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 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 the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 22, 2005.

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

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

Dated, Washington, D.C. June 23, 2006

¹⁵ 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT refuse to provide your Union, Graphic Communications Union, Local 404 M, International Brotherhood of Teamsters, with requested information it needs to represent and to bargain for you, including reinstatement agreements or any documents employees have been asked to sign or to submit as a requirement of returning to work.

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 provide your union with the requested information it needs to represent and to bargain for you.

CALIFORNIA OFFSET PRINTING, INC.