American Oil Company, Mandan Refinery *and* Oil, Chemical and Atomic Workers International Union, Local No. 6-10, AFL-CIO. Case 18-CA-5487

September 22, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On June 30, 1978, Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the Administrative Law Judge's Decision and in opposition to the Respondent's exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, American Oil Company, Mandan Refinery, Mandan, North Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Administrative Law Judge found that one of the effects of the Respondent's unilateral implementation of a schedule change in the Oil Movements Division was to eliminate 1 week of day shift work (8 a.m. to 4 p.m.) every 9 weeks from the schedule of full-time employees. Our examination of G.C. Exhs. 2 and 3 reveals that prior to the implementation of the new schedule a full-time employee worked 102 days per year on the day shift, while after the introduction of the new schedule a full-time employee worked 91 days on the day shift. This discrepancy does not warrant our reaching a conclusion different than that of the Administrative Law Judge. In our view, the loss of even 11 days of day-shift work has a substantial and material effect on conditions of employment and, therefore, the Respondent was obligated to bargain with the Union prior to instituting such a change. Accordingly, we find, in agreement with the Administrative Law Judge, that by failing to discuss the new schedule with the Union the Respondent violated Sec. 8(a)(5) of the Act.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge: This case was heard in Bismarck, North Dakota, on March 16, 1978, upon a complaint issued January 31, 1978, charging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The charge, filed August 15, 1977, by the Oil, Chemical and Atomic Workers International Union, Local No. 6-10, stated that the Employer had refused to bargain collectively on matters affecting the employees' wages and working conditions.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs of counsel, I make the following findings of fact and conclusions of law with emphasis on the main issue in this case: whether Respondent was obligated to bargain with the Union over certain unilateral changes in the work schedule of eight or nine employees.

FINDINGS OF FACT

Respondent, American Oil Company, Mandan Refinery (Amoco), a Maryland corporation, with offices and a place of business in Mandan, North Dakota, is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Charging Party, Oil, Chemical and Atomic Workers International Union, Local No. 6-10, AFL-CIO, is admittedly a labor organization within the meaning of Section 2(5) of the Act. It represents a bargaining unit of approximately 180 operating and maintenance employees at Amoco pursuant to a collective-bargaining agreement, which became effective January 8, 1977. The bargaining relationship between Amoco and the Union goes back to 1955.

The refinery is divided into five divisions. One of them is the oil movements division for which the Company decided to revise its work schedule because of an employee's voluntary transfer to another division. This schedule change affected eight of the bargaining unit's members in that division. Amoco failed to bargain with the Union before making the changes in the schedule.

More specifically, Amoco operated three shifts in the oil movements division, with the following eight hour periods: 8 a.m.-4 p.m., 4 p.m.-midnight, and midnight-8 a.m. The shifts from midnight to 8 a.m. and 4 p.m. to midnight were manned by two workers, while the 8 a.m. to 4 p.m. shift had three workers. Two shifts were considered "premium pay" shifts, since article VI of the current agreement provides for a 50 cents additional hourly rate on the 4 p.m. to midnight shift and for an additional 90 cents per hour on the midnight to 8 a.m. shift.

There were full-and part-time employees assigned to the oil movements division. Full-time employees ordinarily worked 40 hours per week in the division and part-time employees worked less than 40 hours per week in the oil movements division,but worked in other divisions of the refinery as well. The division's full- and part-time employees rotated from shift to shift, pursuant to work schedules prepared each week in advance. These weekly schedules were used to notify the employees of their worktimes for the following week and were posted in accordance with the following contractual provisions dealing with hours of work:

ARTICLE III

Hours of Work

Section 1. The workweek will fall within a period of seven consecutive calendar days beginning on Monday 12:01 a.m.

Section 2. A normal workday will be eight hours and a basic workweek will be forty hours. Most regular day workers will work from 8:00 a.m. to 4:30 p.m. with one-half hour for lunch.

Schedule for hourly employees other than regular day workers will be posted weekly. Ordinarily they [sic] will be five eight-hour shifts per week with two consecutive days off. Circumstances may require some employees to work other hours but irregular schedules will be followed only when efficient operations require it.

The other provision in the contract which relates to scheduling is article IV, section 3:

> When an employee's work period is changed by reason of fluctuations in the workload and not by reason of union activities the overtime rate shall be paid for the hours worked outside the normal work period for the first eight hours of such change, unless the employee is notified of the change at or before the end of the last day he was scheduled to work in the preceding workweek . . . .

In addition to the weekly schedules, the Respondent, since 1956, has also given employees copies of their "simplified" schedule, which is a yearly schedule. The simplified schedule showed the work schedule for each permanent employee for a full year. Generally, it served as a tool to prepare the weekly schedules. On occasions, the weekly schedule differed slightly from the simplified schedule as a result of overtime or the trading of work assignments by employees, but such occasions were infrequent.

In 1970, the oil movements division had a simplified schedule based on a 10-person rotation system (G.C. Exh. 4). This schedule was adopted after negotiations between the Union and Respondent. Effective 1971, this schedule was changed to a nine-person rotation system. This schedule, along with several others in the refinery, was discussed by the Respondent and the Union in the context of a grievance which was filed over the "combination unit schedule." Minutes of these meetings concerning these schedules and the decision to institute a nine-person rotation system in the oil movements division are contained in the record (G.C. Exhs. 10, 11, 12, and 13; Resp. Exh. 3). They show that the Union was consulted and had considerable input in the adoption of the schedules. The nine-person rotation system remained in effect from 1971 until August 1977 (G.C. Exhs. 2, 5, 6, 7, 8, and 9). The record also contains these yearly or simplified schedules for the years 1971 to 1977. According to the nine-person schedules, a part-time employee was assigned to work on the following shifts and on the following days: 4 p.m. to midnight—Tuesday; and 8 a.m. to 4 p.m.—Thursday and Saturday.

For example, the simplified schedule for 1977, effective August 1977, indicates, by the numbers 1 through 9, that there were nine permanent operators in the oil movements division (G.C. Exh. 2). The dashes in the schedule stand for open shifts which were filled by part-time, backup or relief operators. These "part-time operators" were actually full-time employees of Respondent, but they worked less than full-time in the oil movements division. They were scheduled weekly for work assignments in that division and did not have the advantage of the nine permanent operators of being able to determine when and where they would be working a year in advance.

On August 10, 1977, James Gerl, the president of the Union at that time, heard that the simplified schedule in oil movements would be changed. He contacted Alan Symonais, manager of employee relations and accounting services, who told him he had not seen any new schedule. Nevertheless, Gerl informed him that a proposed change would be subject to bargaining and requested that no change be put into effect until the Union had been given an opportunity to bargain over it.

On August 11, 1977, Gerl obtained a copy of the new simplified schedule for 1978 for the oil movements division from an employee. The new schedule was based on an eight-person rotation system (G.C. Exh. 3), since the Respondent decided not to hire an additional employee as a replacement for one of the nine permanent workers who had voluntarily transferred out of the oil movements division. The new schedule was implemented on August 15, 1977, without prior notification of the Union and without bargaining with the Union.

The division's manpower requirements remained the same after the employee left; therefore, this new schedule provided for a greater use of part-time employees. Thus, part-time work was scheduled for the following shifts and on the following days: 8 a.m. to 4 p.m.—Monday through Saturday; 4 p.m. to midnight—Tuesday; and midnight to 8 a.m.—Saturday.

The overall effect of the change in schedule with respect to the use of part-time employees was to create an additional slot in the midnight to 8 a.m. shift and to create four additional spaces in the 8 a.m. to 4 p.m. shift for part-time workers. Part-time employees were assigned more frequently to the three-worker shift (8 a.m. to 4 p.m.) than to the two-worker shifts in order to minimize the loss of the more skilled and experienced full-time employee. Hence, one of the slots in the 8 a.m. to 4 p.m. shift no longer rotated and, instead, was filled by more part-time operators than under the previous schedule, as indicated by the dashes for that shift (G.C. Exh. 3). The effect of this change on the bargaining unit in the oil movements division was to eliminate 1 week of the daylight (8 a.m. to 4 p.m.) shift every 9 weeks from their schedule. The 8 a.m. to 4 p.m. shift was generally preferred by the operators. The permanent operators also had fewer consecutive days off on Saturday and Sunday. The frequency of the lost weekends under the new schedule was disputed. Employee Holbein testified that he lost one Saturday-Sunday weekend each 9-week cycle. Superintendent Ebbesen testified that according to his calculations, the employees were losing only about one weekend per year. This conflict apparently arose from the fact that Ebbesen counted either Saturday or Sunday off as half a weekend, whereas Holbein only considered a full Saturday and Sunday off as a weekend. Finally, a part-time op-

erator had lost the opportunity to become a permanent full-time operator, a considerable disadvantage for the part-time employees.

The record shows that in the past the Company had discussed schedule changes with the Union. The Respondent bargained with the Union about the oil movements division's simplified schedule in the past (G.C. Exhs. 12 and 13). In addition, the testimony revealed that in several instances the Respondent has bargained about the simplified schedule in other divisions of the refinery. For example, in 1966 the Respondent notified the union representative that certain schedule changes in the ultraformer-alkylation units were necessary. By request of the Union, it and the Respondent met in a special meeting in November 1966. The Union objected to the revised schedule because it contained split days off. A compromise was reached during these meetings, which provided that one unit was left under the existing schedule and another unit went on a new schedule proposed by the Respondent on a trial basis (G.C. Exh. 14). Moreover, from 1955 to 1976 several reductions in manpower occurred in the laboratory. Following such reductions in force, the Respondent proposed a new schedule. The new schedule was discussed in each case, with the employees of the laboratory and their union representative prior to putting into effect any changes.

Indeed, the record indicates that Respondent had never made changes in the schedules without first notifying the Union and bargaining with them about proposed changes until the August 1977 change in the simplified schedule.

Analysis

Section 8 of the Act imposes a clear duty on an employer to bargain collectively with the properly elected bargaining representative of the employees. Unilateral changes in working conditions without first bargaining thereon constitute a violation of Section 8(a)(5) of the Act. The duty to bargain does not exist when the matter is specifically covered in a valid contract.

It is Respondent's position that section 2 of article III, and section 3 of article IV of the contract, which deal with hours of work during a regular day, the posting of schedules and overtime pay for differently scheduled working hours, were intended specifically and exclusively to cover the scheduling of working hours and shifts, so that there was no duty to bargain with the Union. This lack of an obligation to bargain was, according to Respondent, particularly evident since the changes were only made in the simplified schedule which served as a mere tool in devising the weekly schedules. Since the Respondent complied with all the provisions of the contract which did not specifically mention changes in the simplified schedule, Respondent argues that it violated the terms of neither the contract nor the Act. In support of its position, Respondent cites two cases[1] only one of which is analogous to the instant situation. In *Winn-Dixie*, the Respondent was found not to have violated the Act when it eliminated Sunday work because the contract expressly authorized the employer to change the daily and weekly working hours. The contract here does not have a similar provision. However, in *Borden*, the contract specified that deliveries would not be made before 7 a.m., and that 6 days would constitute the workweek. When the employer unilaterally eliminated Sunday deliveries, he was found not to have violated the Act, since the Company was free to schedule deliveries within the framework of the contractual provisions.

Although the instant situation resembles *Borden*, there is in addition a long history of bargaining over changes in schedules, including the adoption and revision of simplified schedules, as previously described. The law is clear that if the contract does not unequivocally express the right of management to change the working schedules, and if the Union has not "consciously yielded" its position as to the issue of schedule changes, the employer must bargain over such fundamental issues as working hours and schedules of work. The past history of the bargaining relationship between this Employer and this Union indicates further that schedule changes, including the simplified schedules, were considered appropriate subjects of negotiation.

This is the position of General Counsel, who contends that, absent specific contract provisions allowing the Employer to change shift schedules, this change must be bargained about since it affects employee working conditions within the meaning of Section 8(d) of the Act. The General Counsel cites *Long Lake Lumber Co.*, 160 NLRB 1475 (1966). In that case, the employer changed the schedule of one of its employees from a Monday through Friday to a Tuesday through Saturday workweek. The Board found a violation of Section 8(a)(5) of the Act. The contract in *Long Lake Lumber*, as in the case at bar, was silent on the scheduling issue. The Board stated (160 NLRB at 1479-80):

> The Respondent views the contract as tantamount to a lack of "restriction" upon it with respect to workweek variations for maintenance employees. But as the Board has found, parties have a continuous duty to bargain about the "unwritten terms" of a contract when those unwritten terms deal with wages, hours, and other conditions of labor. The situation here is not one where, as one court has said, the parties "have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice." The situation here concerns a contract silent on Respondent's right to change maintenance employees to a Tuesday to Saturday workweek in the context of an established practice of employing them on a Monday to Friday basis. Unilateral action of this sort—unless sanctioned by the bargaining contract—is in derogation of the Union's statutory right as collective-bargaining agent and may not be accomplished without consultation with the bargaining agent.

Smith Cabinet Manufacturing Company, Inc., 147 NLRB 1506 (1964), is another case dealing with schedule changes where the contract was silent on the issue. The Board held that the lack of a provision dealing with scheduling in the collective-bargaining agreement did not constitute a waiver of employee rights on that issue by the Union. The Board said (147 NLRB at 1508):

> The contract, as stated, contains no mention of a second shift, of premium shift rates, or of selection

[1] *The Borden Co., Maricopa Division*, 110 NLRB 802 (1954); *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976).

> standards applicable to employee transfers or assignments to a second-shift operation—matters subject to the mandatory collective-bargaining requirements of the Act. The mere silence of the contract on the subject does not constitute a relinquishment on the part of the Union of its statutory right to bargain about employment conditions for employees on the second shift. Nor is there other persuasive evidence to support a finding that in negotiating the current collective-bargaining agreement, the Union intended to grant Respondent the right unilaterally to establish terms and conditions of employment for second-shift employees. We reject, therefore, Respondent's contention that its failure and refusal to bargain, as found above, was justified by the terms of the collective-bargaining agreement.

A number of Supreme Court cases support the General Counsel's argument that where the contract does not give the employer the right to make a change in working conditions, the Union does not thereby waive its bargaining rights. "Collective bargaining is a continuous process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems *not* covered by existing agreements, and the protection of employee rights already secured by contract." *Conley, et al.* v. *Gibson, et al.*, 355 U.S. 41, 46 (1957) (emphasis supplied). "[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967).

The second argument advanced by the Respondent is that the changes in the work schedules did not have a significant or material impact upon the terms and conditions of employment and, therefore, did not require bargaining. Respondent relies chiefly on *Seattle First National Bank*, 444 F.2d 30 (C.A. 9, 1971). In that case the employer discontinued its practice of allowing employees free use of investment services at the bank. The ninth circuit court denied enforcement of the Board order because only a small percentage of employees were affected by the change, and the aggregate dollar amount was small. The ninth circuit court cited Justice Stewart's concurrence in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 223 (1964):

> If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

The ninth circuit court went on to say: (444 F.2d at 33)

> A mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must *materially* or *significantly* affect the terms or conditions of employment.

Though the Board may recognize a *de minimus* principle, *Oneita Knitting Mills, Inc.*, 205 NLRB 500 (1973) (Changes in the cafeteria schedule), the changes in the case at bar are more substantial and bear a closer relationship to working conditions than the cafeteria schedule changes in *Oneita Knitting, supra.*

The Respondent points out that since the nondaylight shifts are premium pay shifts, the full-time operators will receive more wages under the new schedule. However, *Wellman Industries, Inc.*, 222 NLRB 204 (1976), teaches that the effect of changes on employees is not to be measured in economic terms alone. *Long Lake Lumber Co., supra*, held that a schedule change which deprived an employee of Saturday off, though the number of days worked remained the same, required bargaining. That case seems controlling here. The General Counsel's position that this was a material change is supported by past practice at the Respondent's plant, as in the past the Respondent had notified and bargained with the Union about scheduling changes.

CONCLUSIONS OF LAW

1. Respondent, American Oil Company, Mandan Refinery, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Charging Party, Oil, Chemical and Atomic Workers InternationalUnion, Local No. 6-10, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.
3. Without bargaining with the Union, the duly certified bargaining representative of the full-time employees in the oil movements division, and by unilaterally changing the simplified or yearly working schedule for the oil movements division, Respondent violated and continues to violate Section 8(a)(1) and (5) of the Act.
4. The aforesaid violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I recommend that Respondent be ordered to cease and desist from its unlawful conduct, and that Respondent be ordered to post an appropriate notice and take affirmative action in order to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[2]

Respondent American Oil Company, Mandan Refinery, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, including the oil movements division employees, with respect to any changes in the scheduling of working hours, including the simplified schedules.

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

(b) Instituting changes in the terms and conditions of employment in the appropriate unit, including the oil movements division employees, such as the scheduling of shifts, weekend work, part-time assistance, and related matters, without first consulting and bargaining with the Union.

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

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with the Union as the exclusive representative of the employees, including the permanent employees in the oil movements division, with respect to wages, hours and other terms and conditions of employment and, if requested by the Union to do so, rescind the unilateral changes made in the shift rotation system in the oil movements division.

(b) Post at its plant in Mandan, North Dakota, copies of the attached notice marked "Appendix."[3] Copies of the notice, to be furnished by the Regional Director for Region 18, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

[3] In the event that this Order is enforced by a judgment of the 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

We hereby notify our employees that the National Labor Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit, including the oil movements division employees, with respect to any changes in the scheduling of working hours, including the simplified schedules.

WE WILL NOT institute changes in the terms and conditions of employment in the appropriate unit, including the oil movements division employees, such as the scheduling of shifts, weekend work, part-time assistance and related matters, without first consulting and bargaining with the Union.

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

WE WILL, upon request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees, including those in the oil movements division, with respect to wages, hours and other terms and conditions of employment and, if requested by the Union to do so, rescind the unilateral changes made in the shift rotation system in the oil movements division.

AMERICAN OIL COMPANY, MANDAN REFINERY