

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VERIZON NORTH, INC.

and

Case 6-CA-35379

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1637,
AFL-CIO, CLC, AS A CONSTITUENT
MEMBER OF THE COLLECTIVE-BARGAINING
REPRESENTATIVE INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
LOCALS 1451, 1635, AND 1637, AFL-CIO, CLC

Gerald McKinney, Esq.,

for the General Counsel.

James Urban, Esq. (Jones Day),

for the Respondent.

*Marianne Oliver, Esq. (Gilardi Cooper &
Lomupo),* for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. The complaint stems from unfair labor practice (ULP) charges that International Brotherhood of Electrical Workers, Local 1637, AFL-CIO, CLC, as a constituent member of the collective-bargaining representative International Brotherhood of Electrical Workers, Locals 1451, 1635, and 1637, AFL-CIO, CLC (the Unions) filed against Verizon North, Inc. (the Company or Respondent), alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Erie, Pennsylvania, on May 17, 2007, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. All parties filed helpful posthearing briefs that I have duly considered.

Issues

(1) In June 2005, Respondent admittedly changed the way it treated employees who opted to take paid vacation or personal holiday leave in lieu of unpaid leave under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. Did this violate Section 8(a)(5) and (1) because Respondent made the change without first affording the Union notice and an opportunity to bargain? Or, as Respondent contends, was it privileged to implement the new policy by virtue of statutory language and because of the parties' negotiated agreement on the subject?

(2) If it was a violation, did Respondent further violate Section 8(a)(5) and (1) by admittedly disciplining employee Amy Stewart in October and November 2006 because she no longer had available family medical leave (FML) under the new policy?

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I note that the Union has a pending grievance on Stewart’s discipline. The parties attended a mediation session on May 9, 2007,¹ and as of the time of the trial, the Union had not decided whether to take the grievance to arbitration. However, Respondent did not affirmatively assert either before or during trial that the allegations pertaining to Stewart should be deferred pursuant to the Board’s policy in *Collyer Insulated Wire*, 192 NLRB 837 (1971). Accordingly, deferral is not an issue. See *Master Mechanical Insulation*, 320 NLRB 1134, 1135 fn. 2 (1996); *15th Avenue Iron Works*, 301 NLRB 878, 879 (1991).

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Witnesses and Credibility

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Witnesses for the General Counsel were Stewart and union officers/company employees Carl Crone, Donald Klaus, and Robin Pirrello. Respondent called its admitted agents Kristie Chorney and Maura West.

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This case presents few factual disputes between the parties, and the testimony of the witnesses for the opposing parties was generally quite similar. Accordingly, deciding the issues does not hinge on credibility resolution.

Facts

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Based on the entire record, including witness testimony, documents, and the parties’ stipulations, I find the following facts.

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Respondent, a Wisconsin corporation with a principal place of business in Fort Wayne, Indiana, has at all times material maintained an office and place of business in Erie, Pennsylvania, called the “Verizon LiveSource Center” (the facility). The facility is engaged in the business of providing directory assistance information to the public. Jurisdiction has been admitted, and I so find.

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For over 50 years, going back to when Respondent’s predecessors operated the facility, the Unions have represented a bargaining unit consisting of various classifications of the facility’s nonsupervisory employees, including telephone operators. These classifications are set out in Appendix A of the current collective-bargaining agreement, effective March 27, 2005 through February 27, 2010,² which was negotiated on behalf of the locals by their “systems council,” an umbrella organization. The number of unit employees, approximately 75 percent of whom are telephone operators, fluctuates between 700 and 800 each month.

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In 1993, the FMLA was enacted. For purposes of this case, the statute requires that the Company afford qualifying employee 12 weeks or 60 days of leave, which may be unpaid, in a 12-month period, for documented medical conditions of the employee or his or her immediate family members. Pursuant to the law, the parties first negotiated an agreement on FML in 1995.

¹ The parties disagreed as to the admissibility of statements that Respondent’s agents allegedly made directly to the Union during the mediation session, but I need not rely on anything purportedly said there to decide the allegations before me.

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² GC Exh. 4. The reference on p. 9 to “Exhibit A” was a clerical error.

The prior collective-bargaining agreement, effective October 28, 2001, through October 22, 2004, contained a memorandum of agreement (MOA) on FMLA.³ Largely tracking the requirements of the FMLA, it said nothing about the substitution of paid vacation or personal holiday leave for unpaid FMLA. Para. 17 provided that the provisions of the MOA were not subject to the agreement's grievance-arbitration procedure.

In 2004 and 2005, the parties negotiated the current contract, with the provisions of the 2001 – 2004 agreement continuing past its expiration until the new agreement was reached. There were approximately 28 or 30 or so negotiations sessions. FMLA came up in the context of how it should be administered, whether the 12 weeks of leave should be based on a calendar year or a 12-month period, and the treatment of domestic partners who both worked for the Company.⁴

The specific topic of substitution of paid vacation or personal holiday pay for unpaid FMLA was not raised during these negotiations. However, at the September 20, 2004, session, Kristie Chorney, the Company's chief negotiator, presented the Union with a bargaining proposal that made several changes to the existing MOA, including addition of the following language to Para. 3: "Any leave of absence provided for in the Collective Bargaining Agreement (CBA), whether paid or without pay, that is qualified under the Family and Medical Leave Act, shall run concurrently with the Family and Medical Leave of Absence under the Family and Medical Leave Act of 1993 (FMLA)."⁵ She stated that this proposed change to Para. 3 was merely a clarification of existing practice.⁶

The current contract was executed on March 27, 2005, and made effective from that date through February 27, 2010. Its FMLA MOA is identical to that in the prior agreement in all pertinent respects, except that the above proposed new language in Para. 3 was added.⁷

In May 2006, Respondent notified the Union that it was proposing to make certain changes relating to FMLA administration, and such changes went into effect on November 6, 2006.⁸

Substitution of Paid Leave for FMLA and Stacking

Employees at all times germane have had paid vacation time, depending on length of service, plus 7 paid personal holidays ("float days").⁹ In November of each year, employees submit their requested vacation leave for the following year, in order of their seniority. After this is done, employees in November and December submit their requested float days in the same manner.

Prior to June 2005, the following practice was in effect at all times after Respondent was required to comply with the FMLA. When an employee called in to resource management with a request for FMLA, the latter would sometimes offer the employee the option of using a paid

³ GC Exh. 3, pp. 94 – 96. Local 1944 was also signatory to this agreement, but the International Union subsequently transferred it to a different jurisdiction.

⁴ See GC Exhs 8 – 9; R Exh. 1.

⁵ GC Exhs. 9 & 14.

⁶ Consistent testimony of Pirrello (Tr. 151) and Chorney (Tr. 243).

⁷ GC Exh. 4, pp. 91 – 93.

⁸ See GC Exhs. 10 – 13.

⁹ See GC Exh. 4, Section 10, pp. 25 et seq.

vacation or float day in lieu of unpaid FML, provided the Company had a sufficient number of other employees available. If the employee said yes, and staffing needs were met, the FML was converted to a vacation or float day, and the employee was not charged for FML leave time. This “stacking” of leave meant that the employee who exercised the option kept all of his or her bank of FML.

Maura West, coach/employee relations at the facility, came to the conclusion in June 2005 that the above practice gave employees a benefit to which they were not entitled under the provisions of the FMLA and the collective-bargaining agreement. Rather, when employees opted to take paid vacation or float day leave, Respondent could charge them for both FML and paid leave time. She checked this position with another labor relations representative and with Chorney, who agreed with her. West was not a participant in the 2004 – 05 negotiations.

Starting in June 2005, Respondent implemented this policy, admittedly without first notifying the Union or giving it an opportunity to bargain. In sum, the change resulted in no difference in the amount of paid leave employees received, or a reduction in the 12 weeks of FML that they were afforded. The change was in their total number of days of leave, combined paid and unpaid. Under the new system, vacation or float day leave substituted for FML also reduced the FML leave available to the employee, so that paid leave and unpaid leave time were simultaneously reduced.

Beginning at around this time, West advised employees of this new policy on a one-on-one basis, when they wished to use paid leave (vacation or float day) in lieu of FML.

Of approximately 60 grievances filed annually, about 6 relate to FML. Some 30 or so employees (who opted for paid leave instead of unpaid FML) have been affected by the change since June 2005, but there is nothing in the record to suggest that any of them complained to the Union about this prior to October 2006. The Union’s swift and strong reaction when Stewart brought the matter to its attention leads me to believe that October 2006 was when it received actual notice of the change. I find nothing in the record to suggest that the Union was on earlier constructive notice. I note that although Respondent’s answer included a 10(b) defense, its brief does not.

The Discipline of Amy Stewart

It is undisputed that, but for the change in Respondent’s policy in June 2005, Stewart would not have received discipline in October and November 2006. Respondent does not contest her eligibility for FML.

In early October 2006, Kim Graham, coordinator, customer service, called Stewart and told her that she had exhausted her FML leave. Stewart responded that she did not think so. She reviewed her leave records¹⁰ with Graham and discovered that 5 vacation or float days she had substituted for FML days earlier in the year had been charged both to her vacation/float days and to her FML days. She asked Graham when the policy had been changed, and the latter responded June 2005. She then asked when employees had been told of this. Graham answered that West had notified employees on a face-to-face basis.

¹⁰ GC Exh. 16.

Subsequently, Stewart received the following, for running out of authorized leave:¹¹

(1) A “Written Warning—Absence,” for “excessive absence,” dated October 6, 2006.

5 (2) A 1–day unpaid suspension on October 26, 2006.

(3) An “Attendance Discipline/Letter in Lieu of Suspension/FINAL CHANCE,” dated November 22, 2006, stating that her absenteeism had put her job “in serious jeopardy” and that this action constituted the equivalent of a 3-day suspension.

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Shortly after receiving the October 6 warning, Stewart notified the Union, and union officer Donald Klaus met with West soon thereafter. Klaus stated that it appeared that Stewart had mistakenly been changed FML on the same days that she had moved vacation or float days to cover the leave. West responded that it was no error; an employee who did so was charged both. Saying that the Company could do this, she produced “The FMLA Handbook” by Schwartz © 1996.¹² Klaus said he would compare that booklet with the one in the Union’s possession. West did not allude to any specific provisions in the FML MOA.

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The following day, Klaus again met with West. He brought the second edition of Schwartz’ Handbook, © 2001.¹³ He asked when she had changed the policy, and she said June 2005. He then asked if she had notified the Union, and she replied no, that she did not feel she had to. Klaus referred to the provision in the second edition (at p. 37) stating that an employer is required under the FMLA and the bargaining laws of most states to give a union prior notice and an opportunity to bargain before adopting policies that affect workers. He said she might have committed a violation of the law, and she replied, “I very well may have.”¹⁴

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Pursuant to the contractual grievance-arbitration procedure,¹⁵ the Union filed a grievance over the disciplinary actions Respondent took against Stewart. As I stated earlier, it remains pending.

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Analysis and Conclusions

Change in “Stacking” Practice

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Normally, an employer violates Section 8(a)(5) and (1) of the Act when, during the term of a collective-bargaining agreement, it unilaterally makes material or substantial changes on subjects of mandatory bargaining; to wit, employees’ wages, hours, or other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB No. 60 slip op. 6 (2006). Respondent does not deny that in June 2005, it implemented a change in the treatment of employees who opted to take paid vacation or float day leave when they were eligible for unpaid FLM leave, without first affording the Union notice and an opportunity to bargain.

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¹¹ GC Exh. 15(a), (b), & (c).

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¹² GC Exh. 5. On p. 88, it states that employees must be allowed to use accrued vacation or personal leave during any FMLA absence. On p. 89, citing a statutory provision, it further states that when an employee goes on paid leave for a reason which qualifies as FMLA leave, an employer can designate the absence under FMLA.

¹³ GC Exh. 6.

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¹⁴ Klaus’ un rebutted and credited testimony at Tr. 49.

¹⁵ GC 4, pp. 47 et seq.

5 One of Respondent's defenses is that express language in the FMLA clearly permitted it to make the change. Respondent points to the 12-week maximum period provided in the statute, and the language at 29 U.S.C. § 2612(d)(2)(A) that "an eligible employee may elect, or an employer make require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for [FMLA] leave." However, I find nothing on the face of these provisions that specifically goes to the issue of double-charging employees for paid leave and for FML time. Indeed, until June 2005, Respondent interpreted FMLA to allow employees to take paid leave in lieu of unpaid FML leave and not be charged for the latter.

10 Further, the FLMA specifically provides that nothing it contains "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights than the rights established under this Act. . . ." 29 U.S.C. § 2652(a). See *Brotherhood of Maintenance Way Employees v. CSX Transportation Inc.*, 478 F.3d 814, 817 (7th Cir. 2007) (provisions in the FMLA do not allow employers to violate labor agreements under the Railway Labor Act). Here, Respondent had for 10 years applied negotiated contractual language to permit employees to save their FLM time when they chose instead to use paid leave, and it was not privileged to unilaterally determine in June 2005 that it no longer had to abide by this practice because FMLA permitted it to do otherwise.

25 Respondent also contends that the Union waived the right to bargain over the change made in June 2005 by its agreement to the FML MOA in the current contract, particularly the 12 weeks' maximum FML, and the added provision in Para. 3 that "Any leave of absence provided for in the Collective Bargaining Agreement (CBA), whether paid or without pay, that is qualified under the Family and Medical Leave Act, shall run concurrently with the Family and Medical Leave of Absence under the Family and Medical Leave Act of 1993 (FMLA)."

30 An employer asserting waiver bears the high burden of demonstrating that the union has clearly and unequivocally relinquished such right. *Bath Iron Works Corp.*, 345 NLRB No. 33 slip op. 4 (2005), enfd. 475 F.3d 14 (1st Cir. 2007); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993) ("[A] union must clearly intend, express, and manifest a conscious relinquishment"); *TCl of New York*, 301 NLRB 822, 824 (1991).

35 I fail to see how the Union's agreement to 12 weeks' maximum FML constituted a waiver of its objection to the change in June 2005, particularly when the practice at the time of negotiations in 2004 and 2005 was that employees who opted for paid leave on days they were eligible for FML were not charged for both FML and vacation or float day leave.

40 As to Respondent's second argument for waiver, the above-quoted language in Para. 3 can be read as providing that employees be double-charged for both paid leave and FML unpaid leave. However, that is not unequivocally and expressly stated, and Chorney specifically said at the time she presented Respondent's proposal in September 2004, that the proposed change was merely a clarification of existing practice. Essentially the Union was told that the proposed change would result in no change in the status quo, which at that time was that employees were not doubly charged when they opted for paid leave in lieu of FML unpaid leave time. Nothing in the record reflects that Respondent's negotiators ever later said anything to the contrary. In these circumstances, I cannot conclude that by agreeing to the language, the Union "clearly and unmistakably" acquiesced in advance to Respondent's change in policy in June 50 2005.

Respondent's argument of union waiver at bargaining is undermined by the fact that Respondent did not change the policy at the time the current contract went into effect, March 27, 2005. In fact, the change had nothing to do with what its negotiators proposed during the course of bargaining sessions. Instead, West, who did not attend negotiations, sua sponte
 5 determined approximately 2–3 months after March 27, 2005, that the existing policy, in effect for about 10 years, was overly generous to employees. Had Respondent indeed intended in September 2004 to alter the existing policy by its proposed new language, it is unlikely that Respondent would have taken no steps to implement such changes when the new contract that included such language became effective.

10 Finally, regardless of what Respondent might have intended during negotiations, Chorney's assurance that the FMLA changes Respondent was proposing merely clarified existing policies would have led the Union to reasonably believe that its agreement to such changes would have no negative impact on the employees it represented. I conclude,
 15 therefore, that Respondent is estopped in any event from claiming the Union's agreement to the proposed changes in Para. 3 of the MOA constituted a waiver.

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act in June 2005, when, without first affording the Union notice and an opportunity to bargain, it began
 20 charging employees FML leave time when they opted to use paid vacation or float day leave.

Discipline of Amy Stewart

25 Since Stewart's discipline was the direct result of the above unilateral change, such discipline ipso facto also violated Section 8(a)(5) and (1), and I so conclude.

Conclusions of Law

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

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

35 3. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) In June 2005, unilaterally implemented, without first having afforded the Union notice and an opportunity to bargain, a change in the way it treated employees who opted to take
 40 vacation or float day leave in lieu of FML leave, by charging them time for both.

(b) In October and November 2006, warned and suspended employee Amy Stewart because she had run out of FML under the new policy that Respondent unilaterally implemented
 in June 2005.

Remedy

45 Because Respondent has engaged in 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.

50 Since Respondent in June 2005 unilaterally began charging employees both FML and vacation or float day leave when they opted to take the latter, Respondent shall also be ordered to rescind this unlawful change and to restore to employees, including Stewart, any FML leave time they would have retained pursuant to the policy that was in effect prior to June 2005.

Respondent shall also rescind any disciplinary actions taken against employees, including Stewart, as a result of the unlawful change, and make them whole for any loss of pay they may have suffered as a result of that discipline, in the manner prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁶

ORDER

Respondent, Verizon North, Inc., Erie, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing employees' benefits under the FML provisions in the parties' 2005–2010 collective-bargaining agreement, without first affording the Union notice and an opportunity to bargain.

(b) Disciplining employees because they have run out of FML leave time as a result of its unilateral change in the treatment of their FML benefits.

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

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

(a) Restore the practice of not charging employees for both paid vacation or float day leave and for FML leave time, when they opt to receive the former, and make employees, including Amy Stewart, whole for any loss of pay or other benefits they have sustained as a result of the unlawful change made in June 2005, in the manner set out in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and 1-day suspension issued to Stewart in October and November 2006, and within 3 days thereafter notify her in writing that this has been done and that the warnings and suspension will not be used against her in any way.

(c) Preserve and, on request, make available to the Region for examination and copying, all payroll records, personnel records and reports, and all other records necessary to analyze the amount of backpay due to Stewart under this order.

¹⁶ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its facilities in Erie, Pennsylvania, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in
5 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
10 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 June 1, 2005.

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

15 Dated, Washington, D.C. July 13, 2007.

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Ira Sandron
Administrative Law Judge

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¹⁷ 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."

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

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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

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International Brotherhood of Electrical Workers, Locals 1451, 1635, and 1637, AFL-CIO, CLC (the Unions) are collectively the certified bargaining representative of employees described in our 2005-2010 collective-bargaining agreement with the Unions (the agreement).

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WE WILL NOT implement changes in your family medical leave (FML) benefits, as provided in the agreement, without first giving the Unions notice and an opportunity to bargain.

WE WILL NOT discipline you because you run out of FML leave because of changes that we have implemented without first having given the Unions notice and an opportunity to bargain.

25

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL restore the practice of not charging employees FML leave time, in addition to paid holiday or float day leave, when they opt to take paid leave in lieu of unpaid FML leave, as the policy existed prior to June 2005, and WE WILL restore to you any FML leave that you were charged as a result of our unlawful change in that practice in June 2005.

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WE WILL make employees, including Amy Stewart, whole for any loss of earnings and other benefits they have suffered as a result of that change, in the manner set forth in the remedy section of the decision.

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WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful warnings and 1-day suspension Stewart received, and within 3 days thereafter notify her in writing that this has been done and that the warnings and suspension will not be used against her in any way.

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VERIZON NORTH, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

112 Washington Place

Suite 510

Pittsburgh, Pennsylvania 15219-3458

Hours: 8:30 a.m. to 5 p.m.

412-395-4400.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.