Utility Vault Company, a division of Oldcastle Precast, Inc. *and* Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848 International Brotherhood of Teamsters.[1] Case 31–CA–26812

August 22, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 5, 2005, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

ORDER

The Respondent, Utility Vault Company, a division of Oldcastle Precast, Inc., Fontana, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, as the exclusive bargaining representative for the appropriate unit of employees by unilaterally implementing changes in terms and conditions of employment.

(b) Requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, to the extent that such waivers apply to the filing of Board charges.

(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) On request, meet and bargain with the Union as the exclusive representative of the employees in the following appropriate unit regarding terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All production and maintenance workers and truck drivers employed as employees by the Respondent only with respect to its facilities at 10650 Hemlock [certified by the NLRB in Case 31–RC–5222] and 10774 Poplar Street, Fontana, California.
>
> Excluded: Office clerical employees, confidential employees, technical employees, managerial employees, professional employees, all other employees, guards and supervisors as defined in the Act.

(b) Rescind the unlawfully implemented Dispute Resolution Process agreement and reinstate the terms and conditions of employment in these areas that existed before the Respondent's unlawful unilateral changes.

(c) Within 14 days from the date of this Order, remove from its files all unlawful waivers of the right to take legal action executed by its employees, and within 3 days thereafter, notify in writing each present or former employee who executed such waiver that this has been done and that the waiver will not be used in any way.

(d) Within 14 days after service by the Region, post at its facility in Fontana, California, copies of the attached notice marked "Appendix."[4] 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 cus-

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] We agree with the judge that the Respondent was obligated to bargain with the Union over the implementation of the Dispute Resolution Process (DRP) agreement, which requires that employees arbitrate claims involving their terms and conditions of employment, including wrongful termination and the failure to pay wages and benefits. Because the arbitration of such claims is a mandatory subject of bargaining, the Respondent's unilateral implementation of the DRP agreement violated Sec. 8(a)(5) and (1). See *Communication Workers (C & P Telephone),* 280 NLRB 78, 81 (1986), enfd. mem. 818 F.2d 29 (4th Cir. 1987). Further, by requiring individual employees to sign the agreement as a condition of employment, the Respondent engaged in direct dealing and undermined the Union's position as the employees' exclusive bargaining representative. See *Dayton Newspapers,* 339 NLRB 650, 653 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005).

Chairman Battista agrees with his colleagues that the Respondent violated Sec. 8(a)(5), and violated Sec. 8(a)(1) derivatively, by unilaterally requiring new employees to sign the DRP agreement as a condition of employment without bargaining with the Union, and by bypassing the Union. Chairman Battista notes that the judge, affirmed by the Board, also finds an 8(a)(1) violation based on the asserted requirement to forgo access to the Board. Chairman Battista finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(1) on this basis because such a finding would have no material effect on the remedy.

[3] We have modified the judge's recommended Order and notice to more closely conform to the violations found.

[4] 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."

tomarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2004.

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

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 bargain with Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, as the exclusive representative of the employees in the bargaining unit by unilaterally implementing terms and conditions of employment.

WE WILL NOT require bargaining unit employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, to the extent that such waivers apply to the filing of Board charges.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the appropriate bargaining unit:

Included: All production and maintenance workers and truck drivers employed as employees by us only with respect to our facilities at 10650 Hemlock [certified by the NLRB in Case 31–RC–5222] and 10774 Poplar Street, Fontana, California.

Excluded: Office clerical employees, confidential employees, technical employees, managerial employees, professional employees, all other employees, guards and supervisors as defined in the Act.

WE WILL rescind the unlawfully implemented Dispute Resolution Process agreement and reinstate the terms and conditions of employment in these areas that existed before we made the unlawful unilateral changes.

WE WILL, within 14 days from the date of this Order, remove from our files all unlawful waivers of the right to take legal action executed by our employees, and within 3 days thereafter, notify in writing each present or former employee who executed such waiver that this has been done and that the waiver will not be used in any way.

UTILITY VAULT CO., A DIVISION OF OLDCASTLE PRECAST, INC.

Ernesto J. Fong, Esq., for the General Counsel.
Dian S. Rubanoff, Esq. (Williams, Zografos & Peck), Lake Oswego, Oregon, for Respondent.
Rachael Aguirre, Esq. (Wohlner, Kaplon, Phillips, Young & Cutler), Sherman Oaks, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. On May 12, 2004, Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO (the Union) filed the charge in this case against Utility Vault Company, a division of Oldcastle Precast, Inc. (Respondent or the Employer). On December 16, 2004, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to bargain with the Union and by requiring new employees, as a condition of employment, to sign an arbitration agreement, without notice to, or bargaining with, the Union. The Respondent filed a timely answer in which it denied that it had violated the Act. On February 10, 2005, before the scheduled hearing in this case commenced, the parties jointly waived a hearing and agreed to have the case decided on the basis of a stipulated record.

Based on the stipulated record submitted by the parties, and after considering the briefs, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material, Respondent has been an assumed business name of Oldcastle Precast, Inc., a Washington corporation, operating in the State of California and engaged in the manu-

facturing of concrete products, with a principal place of business in Auburn, Washington. Respondent operates various plants in the State of California, including the two facilities in Fontana, California, at issue in this case.

Respondent, in conducting its business operations described above, during the past calendar year, purchased and received goods at various facilities in California valued in excess of $50,000 directly from sources outside the State of California. Further, during the same time period, Respondent derived gross revenues in excess of $50,000. Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

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

II. FACTS

Since at least 1991, the Union has been the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees in Fontana, California. The most recent collective-bargaining agreement between the parties is effective by its terms from April 10, 2003, through March 31, 2006. The bargaining unit covered by the agreement is:

> Included: All production and maintenance workers and truck drivers employed as employees by the Respondent only with respect to its facilities at 10650 Hemlock (certified by the NLRB in Case 31–RC–5222) and 10774 Poplar Street, Fontana, California.[1]
>
> Excluded: Office clerical employees, confidential employees, technical employees, managerial employees, professional employees, all other employees, guards and supervisors as defined in the Act.

From January through April 2003, Respondent and the Union engaged in collective bargaining. The negotiations concluded with the ratification of the parties' current collective-bargaining agreement, which covers the period from April 10, 2003, through March 31, 2006. The final collective-bargaining agreement did not include a provision for Dispute Resolution Process (DRP). The parties stipulated that the "Respondent's last and final offer for a collective-bargaining agreement did not include a DRP proposal."

On April 26, 2004, the Union obtained a copy of a memorandum that Respondent was providing to new employees entitled "DRP of Oldcastle Precast, Inc." That memorandum required new hires to sign, as a condition of employment, a "fair and final arbitration" agreement. Under the arbitration agreement a new employee agrees "that all disputes between [the employee and Oldcastle] will be resolved in a fair and final arbitration before an abitrator, and that [the employee is] giving up [his or her] rights to have those disputes resolved in court by a jury." The Union learned in May 2004 that Respondent had implemented the DRP in July or August 2003. However, Respondent had not hired any new employees at its Fontana facilities until 2004. In May 2004, the Union and Respondent met and conferred regarding the DRP. At this meeting Respondent made it clear that the DRP only applied to new employees and "that it did not give notice to the Union about the implementation of the DRP because it did not occur to Respondent." The Union replied that the implementation of the DRP violated the rights of newly hired bargaining unit employees. Thereafter, on May 12, 2004, the Union filed the instant unfair labor practice charge.

The parties stipulated that as of the filing of the charge, Respondent had required at least seven newly hired bargaining unit employees to sign an arbitration agreement under the DRP. The parties stated the legal issues as follows:

> Whether Respondent's unilateral implementation of the DRP (arbitration agreement) in this case violates Section 8(a)(1) and (5) of Act; and whether the individual arbitration agreement involved in this case independently violates Section 8(a)(1) of the Act.

The DPR at issue herein contains the following language regarding coverage of the Agreement:

> You and Oldcastle expressly agree to arbitrate any past, present or future legal claims between you, except for the claims expressly excluded below. *The legal claims that must be arbitrated under this Agreement expressly include, but are not limited to, claims for:*
>
> - Breach of a contract, agreement, or promise (except a union contract);
> - Failure to pay wages, or to provide compensation or benefits;
> - Unlawful discrimination or harassment, including discrimination or harassment based on age, sex, race, national origin, marital status, sexual orientation, physical or mental disability, or on-the-job injury;
> - Retaliation for complaining or testifying about unlawful practices;
> - Wrongful termination of employment;
> - Violation of laws governing medical leave or other employment-related rights;
> - Negligence, misrepresentation, infliction of emotional distress, or) other tortuous conduct; and
> - A right to attorney fees, penalties or punitive damages.
>
> *By signing this Agreement, you and Oldcastle expressly agree that such claims shall not be filed or pursued in court, and that you are forever giving up the right to have those claims decided by a jury.* If a covered claim is filed in court by you or Oldcastle, the other party shall be entitled to have that action dismissed by the court.
>
> This agreement does not apply to:
>
> - Claims for workers' compensation benefits:
> - Claims for unemployment compensation benefits; or
> - Claims that are subject to a union contract.

Further, the DRP provides, "Note: If you have filed a complaint with the EEOC or the Oregon Bureau of Labor, you and Old-

[1] The 10774 Poplar Street location, which is part of the bargaining unit, was first included in the unit on or about 2000.

castle may mutually agree to wait and submit the request for arbitration after the agency has completed its investigation."

The 2003-2006 collective-bargaining agreement does contain a grievance procedure. The final stage of the contract grievance procedure provides for arbitration. The DRP excludes claims for breach of a union contract. Under the collective-bargaining agreement:

> Grievances shall be limited to matters concerning the provisions of this Agreement. A "grievance" as that term is used in this Agreement means a claim by the employee or employees that the terms of this agreement have been violated, or a question concerning the proper application or interpretation of the Agreement. Neither the Union nor an employee shall use or attempt to use the Grievance Procedure as a means of changing, amending, modifying, supplementing or otherwise altering in any respect whatsoever this Agreement or any part thereof.

III. CONCLUSIONS

1. The independent 8(a)(1) violation

Employer attempts to limit or bar the exercise of statutory rights, particularly those of individual employees as distinguished from those of their agents, have been held unlawful. See *Athey Products Corp*., 303 NLRB 92, 96 (1991); *Isla Verde Hotel Corp.,* 259 NLRB 496 (1981), enfd. 702 F.2d 268 (1st Cir. 1981); and *Reichhold Chemicals*, 288 NLRB 69 (1988). The Board has regularly held that an employer violates the Act when it insists that employees waive their statutory right to file charges with the Board or to invoke their contractual grievance-arbitration procedure. *Athey Products*, supra; see *Kinder-Care Learning Centers,* 299 NLRB 1171, 1172 (1990); and *Retlaw Broadcasting Co.*, 310 NLRB 984 (1993). Respondent's mandatory arbitration provision covers all disputes relating to or arising out of an employee's employment with Respondent. Claims covered include wrongful termination, employment discrimination and claims recognized by federal laws or regulations. Further, claims "for retaliation for complaining or testifying about unlawful practices" must be arbitrated. The agreement does not provide an exception for the employees' statutory right to file charges with the Board. Thus, I find that this policy reasonably tends to inhibit employees from filing charges with the Board, and, therefore, restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection.

Respondent contends that the DRP was not intended to restrict the rights of employees to file charges. However, there is no evidence of bargaining or the intent of the "parties." The agreement was imposed on employees as a condition of employment. While the DPR notes that employees may file complaints with the EEOC or the Oregon Bureau of Labor, there is no similar note or exception for the filing of charges with the NLRB. The fact that three exceptions are stated and the ability to file with the EEOC is clarified would lead to an inference that there are no other exceptions to the DRP. Thus, a reasonable inference exists that NLRB charges are covered by this DPR agreement. Respondent could easily cure this problem by including the right to file charges in the listed exceptions to the DRP or including a notice that an employee has not waived his right to file charges with the NLRB.

2. The unilateral implementation

Section 8(a)(5) and (d) require an employer to bargain in good faith with its employees' representative concerning wages, hours, and other terms and conditions of employment of bargaining unit employees. It is well settled that unilateral action by an employer without prior discussion with the union amounts to a refusal to negotiate about the effected conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). It is well settled that unilateral action by an employer without prior discussion with the union amounts to a refusal to negotiate about the effected conditions of employment. *Katz,* supra, 369 U.S. 736. Moreover, a showing of subjective bad faith on the employer's part is unnecessary to establish a violation. Id. at 747.

An employer wishing to change terms and conditions of employment not embodied in a collective-bargaining agreement is required to notify the bargaining representative in advance of implementing the change, to provide the opportunity to bargain over the change, if the union has not waived its right to bargain. Thus, in the absence of a union's waiver of the right to bargain, an employer's failure to notify the union or afford it the opportunity to bargain before changing unit employees' terms and conditions of employment violates Section 8(a)(5). *Postal Service,* 308 NLRB 1305 (1992). However, this rule is applicable only when the contemplated change involves the terms and conditions of employment of bargaining unit employees. Thus, when an employer makes decisions involving the interests of individuals outside the bargaining unit, the Board will not find an 8(a)(5) violation if the employer fails to notify the union in advance of implementation unless the "third-party concern . . . vitally affects the ' terms and conditions' of [bargaining unit employees'] employment." *Star Tribune,* 295 NLRB 543 (1989). Similarly, an employer's changes in hiring practices generally fall into the class of business decisions affecting individuals outside the bargaining unit over which an employer is not obligated to bargain with the union. Id.

In *Star Tribune*, supra, the Board held that the employer did not need to bargain with the union about implementing a one-time drug test for applicants for bargaining unit positions. The Board held that the policies of the Act were adequately served by allowing employers to choose their nondiscriminatory hiring practices subject to a bargaining obligation, if the union demands bargaining over aspects of the practices that the union has an objective basis for believing may discriminate against protected groups, or otherwise vitally affect unit employees' terms and conditions of employment. Thus, the Board in *Star Tribune,* acknowledged that some decisions respecting hiring policies could "vitally affect" the terms and conditions of employment of unit employees. In the instant case, the DRP agreement was not a one-time process for applicants. First, by the conditions imposed by Respondent, an employee would be discharged if the employee did not sign a DRP agreement by his third day of employment. Thus, the DRP by its terms applies to newly hired employees already on the payroll. More importantly, the DRP agreement continued to apply to employees throughout their employment with Respondent and even

after severance of their employment. The DRP agreement applies to an employee's past, present, and future claims. Accordingly, I find that the instant DRP does vitally affect the terms and conditions of bargaining unit employees who have been required to execute such an agreement.

A unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Register-Guard,* 339 NLRB 353 (2003); *Flambeau Airmold Corp.,* 334 NLRB 165 (2001), modified on other grounds 337 NLRB 1025 (2002) (quoting *Alamo Cement Co.,* 281 NLRB 737, 738 (1986)). I find the DRP meets this standard because Respondent has unilaterally, and without notice to, or bargaining with the Union, waived the employees' right to file charges with the Board. Further, the arbitration provisions of the DRP are broader than the arbitration provision agreed to by the Union.

In this case, there has been unilateral action by Respondent without prior discussion with the Union, which amounts to a refusal to bargain about the effected conditions of employment. In such cases, the Board looks to whether a change has been implemented in conditions of employment. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement and condemns the conduct if it has. *Daily News of Los Angeles,* 315 NLRB 1236 (1994), remanded 979 F.2d 1571 (D.C. Cir. 1992), decision supplemented 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (1996), cert. denied 519 U.S. 1090 (1997).

Respondent contends that the DPR is not a mandatory subject of employment. In *Borden, Inc*., 279 NLRB 396 (1986), the Board held that whether a release used to waive employees' rights to sue was a mandatory subject of bargaining depended on whether the release, exhibited independence with mandatory subjects of bargaining. In that case, the employer insisted on a general release of all future claims by employees during bargaining over severance pay during shut down negotiations. The Board concluded that there was not a sufficient nexus or interdependence between severance pay and the general release, given that the release was not part of the employer's initial severance pay proposal and that it was not added as a quid pro quo for any union concession. Thus, the Board held that the nonmandatory subject of the release and mandatory subject of severance pay were not "inextricably intertwined," and therefore the release was not a mandatory subject of bargaining.

More recently, in *Regal Cinemas, Inc*., 334 NLRB 304 (2001),[2] the Board found that a release linked to claims arising out of permanent layoffs was proposed as a quid pro quo for severance pay, and was therefore so intertwined with the mandatory subject of severance pay that the release became a mandatory subject of bargaining. The Board distinguished the general release of all claims in *Borden,* supra, concluding, "In this situation, bargaining over such a specific release and bargaining over severance go hand in hand."

The guiding principle is that a mandatory subject and nonmandatory subject can become so intertwined that there is an obligation to bargain over the ostensibly nonmandatory subject. Id. at 305. The DRP in this case is much broader than the arbitration agreement in the collective-bargaining agreement. The grievance and arbitration provisions of the collective-bargaining agreement are limited to claims that the terms of bargaining agreement were violated, or questions concerning the proper application or interpretation of the bargaining agreement. However, the DRP covers all claims arising out of the employment relationship including claims that are not covered by the collective-bargaining agreement's grievance and arbitration procedure.[3] The DRP covers failure to pay wages or benefits, negligence, tort claims, and wrongful termination, all of which are mandatory subjects of bargaining. Whether these mandatory subjects should be resolved by arbitration is a matter for collective bargaining. However, Respondent did not propose the DRP in its collective bargaining with the Union.

Moreover, an employee who does not sign the DRP within three days of hire is subject to termination. It is well established that work rules that can be grounds for discipline are mandatory subjects of bargaining. *King Soopers, Inc.,* 340 NLRB 628 (2003); *Praxair, Inc.,* 317 NLRB 435, 436 (1995). Respondent did not bargain over this condition of employment; treating it as a condition of hire. However, the discharge of newly hired employees is a mandatory subject of bargaining.[4] Finally, as found above Respondent unilaterally imposed an implied waiver of employees' rights to file charges with the Board.

Accordingly, I find that the dispute resolution process policy (DRP) vitally affected the terms and conditions of employment of certain bargaining unit employees and that the Union did not waive its right to bargain over this policy. Accordingly, it follows that the Respondent's implementation of these changes in employment conditions without giving the Union prior notice and an opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

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. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act, by unilaterally implementing changes in terms and conditions of employment.
4. By requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, and thereby requiring a waiver of the right to file NLRB charges, Respondent violated Section 8(a)(1) of the Act.

[2] Enfd. 317 F.3d 300 (D.C. Cir. 2003).

[3] Moreover, the grievance and arbitration procedure agreed to by the Union is for the term of the contract. However, the DRP imposed on employees survives the collective-bargaining agreement and is effective perpetually.

[4] See *Lockheed Shipbuilding Co.,* 273 NLRB 171 (1984) (the Board found that an employer violated Sec. 8(a)(5) by unilaterally implementing new medical screening tests "for the purpose of terminating new employees or refusing to hire applicants for employment").

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease-and-desist, to meet and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. Further, Respondent shall, if requested to do so by the Union, rescind the unlawful unilateral change, and to reinstate the terms and conditions of employment that existed before the unilateral change.

Respondent must remove from its files all unlawful DRP agreements executed by bargaining unit employees of Respondent and notify, in writing, each present or former employee who executed such waiver that this has been done and that the waiver would not be used in any way.

[Recommended Order omitted from publication.]