

American Cyanamid Company and International Chemical Workers Local No. 120, affiliated with the International Chemical Workers Union, AFL-CIO. Case 9-CA-5369

October 10, 1970

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING
AND JENKINS

On June 9, 1970, Trial Examiner David S. Davidson issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Party filed separate exceptions to the Trial Examiner's Decision and supporting briefs.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Trial Examiner's Recommended Order, and orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Trial Examiner. Pursuant to a charge filed on October 13, 1969, by International Chemical Workers Local No. 120, affiliated with the International Chemical Workers Union, AFL-CIO, hereinafter referred to as the Union, a complaint issued on November 28, 1969, alleging that Respondent violated Section 8(a) (1)

and (5) of the Act by unilaterally instituting new work schedules, with consequent changes in other conditions of employment, and refusing to bargain with the Union with respect to these changes and their effects on employees. The complaint also alleges that Respondent further violated the Act by disciplining a union committeeman and threatening that Respondent would no longer be lenient in the application of its contract with the Union because of the Union's protest and opposition to the changes instituted by Respondent. In its answer, Respondent denies the commission of any unfair labor practices.

A hearing was held before me on March 25 and 26, 1970, at Marietta, Ohio. At the close of the hearing, oral argument was waived and the parties were given leave to file briefs. Briefs have been received from the General Counsel and Respondent.

Upon the entire record in this case including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent, a Maine corporation, is engaged in the manufacture of chemical products at a number of locations, including a plant at Marietta, Ohio, involved herein. During the 12-month period preceding issuance of the complaint, a representative period, Respondent sold and shipped products valued in excess of \$50,000 from its Marietta plant to customers located outside the State of Ohio. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Respondent has operated the Marietta, Ohio, plant for more than 20 years. It describes the plant as a job shop at which it makes approximately 65 different products. For a number of years, depending upon demand, the plant has operated 5, 6, or 7 days a week, with frequent changes in operating schedules affecting part or all of the plant. Over the years work schedules for production employees have varied with the operating schedules for their departments. For approximately 10 years before the events at issue herein, when a department operated on a 5-day schedule, employees were scheduled to work a simple 5-day week, followed by 2 days off. This work schedule was referred to in this proceeding as a 5-2 schedule, and provided for no scheduled overtime. During the same period, when

a department operated on a 6-or 7-day schedule, the affected employees were scheduled to work 6 consecutive days followed by 2 days off. This schedule, referred to herein as a 6-2 work schedule, provided for a certain amount of scheduled overtime for employees. It also required employees to work a number of consecutive weekends.¹ The changes in operating schedules between 5, 6, and 7 days were based on production needs and determined unilaterally by Respondent. In conjunction with operating schedule changes, Respondent posted either 5-2 or 6-2 work schedules for employees without advance discussion of the work schedule changes with the Union.

The dispute at issue in this proceeding arose in October 1969 when Respondent announced that it was shifting to a new work schedule, referred to as a 7-day schedule (not to be confused with a 7-day operating schedule). The principal questions herein are whether Respondent was obligated to bargain with the Union over the institution of the new work schedule and, if so, whether Respondent failed to satisfy its bargaining obligation.

2. The bargaining history and pertinent contract provisions

The Union has represented the employees at the Marietta plant for substantially the entire period of Respondent's ownership of the plant. The Union entered into its first agreement with Respondent in 1947, and has entered into a number of succeeding agreements, the most recent of which was executed May 23, 1969, and by its terms expires on May 21, 1971, in the absence of automatic renewal. It is undisputed that the Union at all times material hereto has been the exclusive bargaining representative of the employees in the following unit.

All hourly paid production and maintenance employees employed by Respondent at its Marietta, Ohio, operations, excluding all office and clerical employees, all guards, watchmen, professional employees, cafeteria workers, chemists, laboratory technicians and all supervisors as defined in the Act.

In the original 1947 agreement between the parties, the following provisions appeared:

Article VIII

Hours of Work

Section 1

The regular work day shall be eight (8) consecutive hours excluding one-half hour lunch period except that in the case of shift workers, a paid one-half

¹ Overtime was based on hours in excess of 40 worked during each workweek which consisted of the 7-day period starting each Monday at 7 a.m. During an 8-week cycle on this work schedule, assuming 7-day operation and disregarding the effects of shift rotation which also accompanied this schedule, an employee would work 6 days during 2 workweeks and 5 days during the remaining workweeks. During such an 8-week cycle it also appears that employees were scheduled to work both Saturday and Sunday for 5 consecutive weeks.

hour lunch period shall be within their eight (8) regular hours. The regular work week shall commence on Monday at 7:00 a.m.

Section 2.

Shift schedules for all employees working on shifts, will be posted and will be adhered to insofar as production requirements and plant conditions will permit.

Section 2 of this article has appeared without change in all succeeding agreements and appears as section 8.3 in the current agreement between the parties.²

In 1948, because there had been numerous schedule changes during the preceding year, the Union proposed an amendment to Article VIII, Section 2, to provide further that all shift workers would work a 5-day rotating schedule, but the requested change was not agreed upon. Since then neither party has sought to change this provision of the agreement.

In the most recent contract negotiations in the spring of 1969 the Union raised a question as to what was meant by a contract provision dealing with unreasonable absences. No change was made in the provision, but in discussion company negotiators pointed out that Respondent was having a serious problem retaining employees. They expressed the view that younger employees did not want to stay with Respondent because too much overtime was required, and they attributed much of the problem to scheduled Saturday or weekend work. They also stated that younger employees were refusing to perform Saturday work. However, there was no discussion of any possible change in work schedules at this time.

3. The alleged refusal to bargain

a. *The announcement to the Union of the impending work schedule change and its implementation*

At a grievance meeting on September 2, 1969, Respondent's representatives indicated to the Union that a change in work schedules was under consideration.³ Present for Respondent were Plant Manager R. E. Leach, Production Superintendent H. C. Gaffney, Industrial Engineer C. William Miller, and Maintenance Supervisor Perry Smith. Present for the Union were President Russell Binegar, Vice President Roger Nicholson, Recording Secretary Earl Rush, and other members of its committee. At the end of the meeting, Leach mentioned that Respondent was considering a change in the work schedules because of employees'

² Section 1 of the original article has been modified slightly, but the modification is not material to the issues herein.

³ The Union's representatives testified that the meeting was held on July 28 while Respondent's representatives placed it on September 2. Although it appears that there may have been meetings on both dates, the witnesses were in general agreement that the schedule change was mentioned at only one of these meetings. I find the testimony of the company representatives more likely to be accurate in this regard, in view of the timing of the actual change in relation to this meeting as well as a reference to the September 2 meeting date in the Union's answer to the second step reply of Respondent to a grievance filed over the schedule change. The testimony otherwise was not in conflict as to the content of the first discussion of the schedule change.

refusals to work scheduled overtime and their griping about it Leach told them that the new schedule, which was still being developed, would be designed to overcome these problems by providing for longer or different type breaks, and that it would also result in the creation of three new jobs for relief men which would save three men from an impending layoff and result in higher classifications for those assigned to the new jobs Leach asked Miller if he could supply the Union with further details, but Miller replied that he could not because he had not completed work on the new schedule. Leach told the Union representatives that Respondent would contact the Union and that they would get together again as soon as work on the schedule was completed. The union representatives made no response to this information and made no request to bargain over the schedule change at this time.

On September 26, 1969, Respondent notified the Union's officers and committee members of a meeting to be held on September 30. The meeting was held as scheduled Except for Plant Manager Leach, Union President Binegar, and another union committee member, who were absent, the participants were the same as those at the earlier meeting Gaffney announced that there was going to be a work schedule change on October 6 and that they were going to discuss it He stated that the reason for the change was to create three additional production jobs and to give the employees better breaks. Gaffney asked Miller to explain the new schedule. Miller showed the Union representatives a copy of the schedule and explained it in some detail Unlike previous schedules, it provided for employees to work varying numbers of consecutive days between breaks during a complete multiweek cycle of the schedule. At one point during a cycle, it required employees to work 7 consecutive days However, it was structured so that employees would not work more than 5 days within any Monday to Monday workweek and provided for no scheduled overtime⁴ The schedule also provided for three new classifications for relief or breakermen to work on a rotating basis to provide continuity of operations during employee break periods

The Union representatives indicated displeasure with the new schedule. Rush stated that the schedule was not new to him and that he had been able to figure out what was coming based on the earlier discussion. Nicholson said the Union would take whatever legal steps it could to stop it In response to a request to the Union to present the new schedule to its members, Rush stated that he wouldn't explain anything to the members that he didn't care for himself.⁵ Union Financial Secretary and Treasurer Taylor asked what choice the Union had in the matter, and Gaffney replied that the Union had no choice in the matter and that the new work schedule was not negotiable⁶

The union representatives said that they would check into the matter with the NLRB. They did not ask at that time for any further meeting over the change, but, as set forth below, filed a grievance a few days later

On October 2 and 3 Respondent held several informational meetings with groups of employees to explain the new schedule to them. One of these meetings was interrupted by Nicholson, leading to disciplinary action against him. That incident and the related disciplinary action are discussed separately below.

On October 6, 1969, the new schedule went into effect for production employees resulting in the creation of the three new jobs and the elimination of scheduled overtime. In most departments, the work schedule change was not accompanied by any change in departmental operating schedules

b *The grievance over the schedule change*

On October 3, 1969, Nicholson filed a grievance entitled "Relief Operators" alleging a violation of article I, section 1.1 of the agreement between Respondent and the Union based on the Respondent's statement of intent to institute the relief operator assignments on October 6 and the statement at the meeting by a company representative that the Union had no choice in the matter. In the grievance Nicholson also stated that the Union reserved the right to rely also on other sections of the agreement and past practice with respect to scheduling in support of its claim. As relief the Union requested that all employees affected by the change be compensated for any losses ensuing from the change, including lost overtime and shift premiums.

Article I, section 1.1, to which the Union referred, is the recognition clause of the agreement pursuant to which Respondent recognized the Union as exclusive representative of the employees in the appropriate unit "on all matter concerning wages, hours, and working conditions."

A meeting was held with respect to this grievance on or about October 3. At this meeting Gaffney repeated the reasons for the schedule change which had previously been stated to the Union and asked the Union to withdraw the grievance for a couple of weeks to give the new schedule a chance to work. The union representatives refused this request On October 6, Respondent furnished the Union with a written first step answer in which Respondent took issue with the Union's statement of facts in the grievance and denied that it had violated the agreement "in fact or in its presentation of schedule changes."

The grievance was processed through the remaining steps of the grievance procedure At each step, after discussion, the grievance was denied in a written answer In its final answer, dated November 11, 1969, Respondent reiterated its position that it had not violated the agreement and

⁴ The 7 consecutive days consisted of a Saturday and Sunday in one workweek and the next 5 days in the following workweek

⁵ According to Rush, Gaffney asked the committee to sell it to the members and not merely to explain it

⁶ Nicholson and Taylor testified to this effect although conceding that they could not remember the exact words used by Gaffney Rush testified that Gaffney said the schedule was nonnegotiable Miller testified that one of the union representatives asked if the schedule was negotiable although he also did not recall the exact words used He testified further

that Gaffney replied that the Company had the right under the contract to establish schedules and that "this right was not negotiable" Miller displayed considerable hesitancy in his testimony concerning this issue, and I do not credit his version that Gaffney rejected negotiation only of the "right" to make a change Although there remains some doubt as to the exact words used by Gaffney, who did not testify, I credit the witnesses for the General Counsel that Gaffney conveyed to them that they had no choice and that the change was not subject to negotiation

stated further that: "The Company will continue to review other types and kinds of work schedules to determine if a different schedule could be utilized that would accomplish the same result and at the same time be more palatable to the Union and the employees involved."

At each step of the procedure, in oral discussion Respondent repeated its reasons for the schedule change, and the Union sought a return to the former work schedule but proposed no other alternatives.

On November 21, the Union notified Respondent of its desire to take the grievance to arbitration. Thereafter on January 8, 1970, the Union withdrew the grievance from arbitration. According to Union officials they did so because the matter was pending before the Board and they decided to rely on this proceeding to remedy their complaint.⁷ According to Leach, Respondent construed the withdrawal as acceptance of Respondent's fourth step answer in accord with past practice.

Following withdrawal of the grievance from arbitration and issuance of the complaint, Respondent made three further proposals with respect to the schedule change. The first of these proposed a new 5-day schedule. The other two proposals offered a return to the old 6-2 schedule subject to certain conditions. The last of the proposals was offered as a proposed basis for settling this case. All three proposals were rejected by the Union.

4. The disciplinary action against Roger Nicholson

On October 2, Union Vice President Nicholson, who was a maintenance employee not directly affected by the schedule change, heard that Respondent was holding informational meetings with production employees in the lunchroom. Nicholson went to the lunchroom where Miller was speaking to a group of employees. As Nicholson entered he asked Miller "what the hell he thought he was doing." Miller replied that he was explaining the new schedule. Nicholson asked if he was explaining it or trying to sell it. Miller repeated that he was explaining it. Nicholson said the Union was going to file an unfair labor practice charge and accused Miller of trying to sell something to the members about which he would not deal with the union committee. Miller asked Nicholson to leave, and he left. As Nicholson testified, he went to the lunchroom "to try to break up the meeting" because he viewed it as a captive audience meeting to which no union representative had been invited. Nicholson conceded that nothing in the contract gave him the right to break up the meeting and that the contract in fact prohibited his conduct.

Later that afternoon, Nicholson was asked to report to Leach's office. By agreement, the visit was postponed until October 6. On October 6 Nicholson went with Binegar to Leach's office where Leach reprimanded Nicholson for his conduct and told him he would be discharged if his conduct were repeated.

Leach told Nicholson he was being disciplined because he had been insubordinate in interfering with plant opera-

tions. Nicholson told Leach he understood what he was talking about, and Nicholson did not protest the discipline. According to Nicholson, he accepted the reprimand and thought it was partially justified. Nicholson conceded that he did not file a grievance over the reprimand, explaining that he thought it was a matter for the NLRB.

According to Nicholson, at some point during the meeting in Leach's office, Leach said "if we were going to have to follow one point of the contract we were going to have to follow it all, follow the whole contract." Nicholson testified that Leach did not give a reason for this statement, but mentioned a few paragraphs of the contract for them to review, and Binegar replied that he thought they were following the contract. Binegar's version of the quoted remark was that Leach said that "from now on he was going to go, word for word, and be more strict for every word in the contract." Leach denied that he stated that he would no longer be lenient but would adhere strictly to the contract because a grievance had been filed over the work schedule change.

Either at or shortly after this meeting, Nicholson was given a copy of the following written reprimand which was placed on file

In a meeting with you this morning at 8:30 A.M. you were advised in the presence of a shop steward (R. Binegar) and another member of management (H. Gaffney) as to the incorrectness of your insubordinate action Friday, October 3, when you interrupted a meeting scheduled by management of this plant and questioned the speaker's right to hold it.

You were further advised that any further action of this kind would result in more severe disciplinary measures.

B. Conclusions

1. The alleged refusal to bargain over the change in work schedules

The issues presented by the complaint are fairly narrow. There is no contention that Respondent was barred from changing work schedules until consent of the Union was obtained. Rather, the questions are whether or not Respondent was free to make the change without first bargaining over the change with the Union, and, if not, whether Respondent in fact failed to bargain with the Union over the change.

Work schedules relate directly to hours and conditions of employment. Here the changed work schedules affected the hours worked by employees, their days off, the number of consecutive days they worked, and the amount of overtime they were scheduled to work. There can be little doubt that work schedules are mandatory subjects of bargaining at the time of negotiation of a new contract and indeed during a contract term, unless the provisions of the contract or other circumstances operate to remove the subject from the bargaining arena during the term of the contract.⁸

⁷ As set forth above, the charge in this case was filed on October 13, 1968, and the complaint issued on November 28, 1969, a week after the Union's notice of its desire to arbitrate.

⁸ *Witlock Supply Company*, 171 NLRB No 33, *Cello-Foil Products, Inc.*, 178 NLRB No 103

Here, there are two principal reasons advanced in support of the contention that Respondent was relieved of the obligation to bargain over the change in work schedules during the term of the 1969 agreement. One is that the terms of the agreement gave the right to change work schedules to Respondent. The other is that the right to make such changes is established by the past practices of the parties.

As set forth above, the agreement provides that, "Shift schedules, for all employees working on shifts, will be posted and will be adhered to insofar as production requirements and plant conditions will permit." While the agreement fails to provide who is to compile and post the work schedules, it is clear that these functions rest with Respondent, as is the usual case, and indeed was the practice in this case. However, also not specifically provided and less easy to infer is whether the parties intended for the Union to have an opportunity to bargain over a change in work schedules which involved a departure from work schedules which had been previously utilized in the plant. The quoted provision simply does not reveal whether the parties intended Respondent's discretion to be absolute or subject to a duty to bargain with the Union at the Union's request, and that intent is not revealed by other provisions of the agreement. Article XVII of the agreement provides that Respondent has complete freedom, among other things, in the increase and decrease of the working force and that it has sole discretion to diminish or discontinue operations in whole or in part. This article clearly gives Respondent the right to adjust its production schedules to its needs without bargaining with the Union and to determine how many employees it will utilize to man its operations. But those rights do not carry with them a comparable discretion to set working schedules for its employees without bargaining with the Union once the production schedules and employee complement have been determined.

Nor does the history of bargaining revealed by the record establish that right. The provision relating to work schedules dates back to the first agreement between the parties entered into in 1947. There is no evidence of the negotiations which led to agreement to this provision. In negotiations the next year the Union sought to add a requirement that employees be placed on a 5-day schedule. The Union's proposal was rejected and the provision was readopted without change. It was Leach's recollection that in resisting the union proposal, Respondent asserted that it needed the right to schedule employees and the times they worked in order to operate efficiently. But there is no evidence that the parties considered whether that right was to be subject to bargaining or absolute. Insofar as appears the issue was whether Respondent should be restricted to utilization of 5-day schedules rather than free to alter schedules with or without bargaining.

What must be determined here is whether by its agreement the Union waived its statutory right to bargain with respect to changes in work schedules. The Board has held that such a waiver must be "clear and unmistakable" from the terms of an agreement, and that where an alleged waiver is based on negotiations, the evidence must be clear

that the Union consciously yielded its statutory right.⁹ I find no such evidence of waiver on the record before me.

Turning to the practice under the agreements, there is evidence that over the years there have been numerous changes in work schedules in conjunction with production schedule changes as to which Respondent has given the Union no advance notice and there has been no bargaining. Thus, for approximately 10 years, as Respondent has changed production schedules, it has simply posted corresponding changes of work schedules for employees. However, during this period, the work schedules posted have regularly been those associated with the production schedules in effect and have not involved the introduction of any work schedule which employees had not previously worked in conjunction with a particular production schedule. Although there is evidence that work schedule changes have occurred since Respondent has owned the plant, the evidence as to the period more than 10 years ago does not establish the extent, if any, to which changes involved institution of work schedules which had never previously been utilized, nor is it clear that if such changes occurred, they occurred without bargaining. Thus, Leach in his testimony as to this period did not distinguish between kinds of work schedule changes. While he testified that Respondent never negotiated its "right to change" a work schedule at a particular time, it is not clear from his testimony that Respondent never negotiated with respect to a particular change. Rather Leach testified that over the years a process of communication with the Union evolved so that at the time of a drastic change, such as a layoff, Respondent met with the Union to inform it of the anticipated change and to ask for suggestions.

I conclude that the evidence as to practice establishes only that it was the practice to post work schedule changes without notice to the Union and an opportunity to bargain where the newly posted schedule represented a return to a work schedule previously utilized and pursuant to which employees had previously worked. But there is insufficient evidence to establish any similar practice with respect to introduction of a new kind of schedule not associated with a production schedule change and not previously utilized in conjunction with the production schedule in effect, such as occurred on October 6, 1969.

In sum, the evidence as to practice establishes that among the conditions of employment under which employees worked were changes in work schedules, without bargaining, but following predictable lines to work schedules previously worked. When additional changes of that nature occurred, therefore, there was no basic change in their conditions of employment and no obligation for Respondent to bargain with respect to each of those changes.¹⁰ However, the evidence fails to establish that the conditions of employment similarly included changes in work schedules of the kind which occurred on October 6, 1969, without bargaining,

⁹ *Clifton Precision Products Division*, 156 NLRB 555, 562, *General Electric Company*, 173 NLRB No. 22, enfd. 414 F.2d 918 (C.A. 4)

¹⁰ See *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, *Superior Coach Corporation*, 151 NLRB 188

to a completely new work schedule not predictable on the basis of previous experience

Accordingly, I conclude that neither the contract nor past practice gave Respondent the right to make a unilateral change in work schedules similar to that made on October 6, 1969, without notice to the Union and an opportunity to bargain over the change.¹¹

It remains to be decided whether or not Respondent in fact failed to bargain over the October 6 work schedule change. In this case Respondent clearly gave the Union notice of the proposed change, and it is what happened thereafter which is in issue. On September 2, Respondent gave the Union general notice of its intent to establish new work schedules. Although the Union did not request bargaining at that time, I find no abandonment of its rights in that failure, as Respondent indicated that when work on the schedules was completed it would meet further with the Union. On September 30, Respondent kept its word and met again with the Union, presenting the new work schedule in detail. At that time, the union committee members expressed displeasure with the schedule and one of them asked if they had a choice. They were given a negative reply, accompanied by an assertion that the work schedules were not negotiable. Were this all that happened, the conclusion might well follow that Respondent denied the Union the opportunity to bargain after giving it notice of the proposed change. However, discussion of the work schedule did not end on September 30.

On October 3, Vice President Nicholson filed a grievance and the grievance was discussed at the first step on that day. A written answer was furnished on the day the schedule change took effect, and over the next several weeks the grievance was processed through the remaining steps of the grievance procedure short of arbitration. While the grievance was entitled "Relief Operator," it appeared to challenge the work schedule generally and through its reference to the recognition clause of the agreement appeared to challenge Respondent's refusal to negotiate at the September 30 meeting. Although Respondent denied that it violated the agreement, the evidence shows that Respondent discussed the reasons for the change at each of the grievance meetings, and there is no evidence that Respondent again took the position that the schedule change was not negotiable. Throughout the processing of the grievance the Union adhered to its position that Respondent should revert to the former work schedule. The Union made no other counterproposal, even though, at least at the last step of the procedure, Respondent indicated receptivity to consideration of other schedules which would achieve its objectives and be more satisfactory to the Union.

In *Shell Oil Company*, 149 NLRB 305, the Board considered whether an employer had satisfied its bargaining obligation with respect to an intracompany transfer of accounts from one terminal to another. There, as here, advance notice of the change was given. A few days before the transfer, the union met with the employer to express concern

over the transfer and its effects on drivers. The employer sought to assure the union that the transfer would not result in a change in the work schedule or a reduction in employment. The union continued to oppose the transfer and indicated its intention to file a grievance. Following the transfer, the union filed a grievance. Although the employer took the position that the transfer was not grievable and was a company prerogative, it again discussed the transfer with the union, explaining its reasons for the transfer and assuring the union that no employees would be harmed. The union continued to object, but made no specific proposals. The company did not rescind the transfer.

In its decision in *Shell*, the Board stated with respect to its decisions relating to unilateral subcontracting of unit work, which it found applicable:¹²

The principles of these earlier cases, however, are not meant to be hard and fast rules to be mechanically applied irrespective of the circumstances of the case. In applying these principles, we are mindful that the permissibility of unilateral subcontracting will be determined by a consideration of the setting of each case. Thus, the amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" may vary with the character of the subcontracting, the impact on employees, and the exigencies of the particular business situation involved. In short, the principles in this area are not, nor are they intended to be, inflexibly rigid in application.

In *Shell*, the Board found no violation because the employer gave notice of the transfer a few days before it occurred, did not refuse to confer with the union concerning the transfer, met and explained its reasons, and thereafter continued to disclose a willingness to meet although it believed it was under no obligation to do so. The Board also relied upon the fact that no employee was discharged, and concluded that although the employer might have given the union earlier notice, "in the light of all the circumstances present here—including the nature of the change, its limited effect on employees, and other factors indicated below—we cannot say that the short notice in this case is alone enough to establish Respondent's bad faith and refusal to bargain."

The "other factors" referred to by the Board were the meeting between the employer and the union a month after the transfer and the discussion at that meeting. The Board stated:

Although this meeting occurred after the transfer had been made effective, we nevertheless considered it of some significance in appraising the issue of whether Respondent was seeking to evade its bargaining obligations, particularly since it appears that the management decision herein involved was not of an irrevocable nature. As no third party interests had intervened, Respondent even at that time could have retransferred the work by a simple telephone call.

¹¹ Respondent was not required, however, to obtain agreement from the Union before it could make such a change. See *Dixie Ohio Express Company*, 167 NLRB No. 72, enforcement denied 409 F.2d 10 (C.A. 6).

¹² 149 NLRB at 307, referring to *Town & Country Manufacturing Co., Inc.*, 136 NLRB 1022, enf'd 316 F.2d 846 (C.A. 5), and *Fibreboard Paper Products Corp.*, 138 NLRB 550, enf'd 322 F.2d 411 (C.A.D.C.), 379 U.S. 203.

To be sure some differences immediately appear between the instant case and *Shell*. Here work schedules were changed, and the change was the subject of the dispute, rather than a transfer of work out of the unit. The impact of the change on employees was more substantial, resulting in a rearrangement of their working times and a loss of scheduled overtime work,¹³ although at the same time saving three employees from layoff. At the September 30 meeting, Respondent stated that the Union had no choice and the change was not negotiable.

Yet in other respects the cases are not dissimilar, and Respondent's discussions with the Union after September 30 were if anything more affirmative than in *Shell*. Thus, there is no indication that Respondent's change in work schedules was in any way motivated by animus against the Union. There is a long history of bargaining between the parties. Respondent made no effort to conceal the change in work schedules from the Union before it occurred, but to the contrary gave general notice of its intentions a month before the change occurred and specific notice of the change 6 days before it was to take effect. Although Respondent appeared to reject bargaining on September 30, it took no issue with the Union's right to grieve the change, met with the Union over the grievance even before the change occurred, continued to meet over the grievance thereafter, and responded fully to the position taken by the Union in the processing of the grievance. The change was not irreversible, no other interests intervened, and Respondent could have reverted to the former work schedule at any time. Although the Union made no proposal other than that Respondent revert to the former schedule, Respondent indicated its willingness to consider other work schedules which could satisfy its objectives and meet the Union's objections.

In *Shell*, the Board looked beyond the employer's assertion that the transfer was not grievable and a management prerogative to find that the employer by its overall conduct had not sought to evade its bargaining obligation but had met it. Here, likewise, one must look beyond Gaffney's statement at the September 30 meeting, and assess Respondent's conduct overall. In the light of the factors set forth in the paragraph immediately above, I am persuaded that the same conclusion must be reached in this case as in *Shell*. Accordingly, I shall recommend dismissal of the allegations of the complaint that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting new work schedules and refusing to bargain with respect thereto.¹⁴

2. The alleged violations based on the discipline of Nicholson

The complaint alleges that Nicholson was warned and threatened with further disciplinary measures because he orally protested and announced the Union's opposition to the schedule changes during an employee meeting. It alleges further that Leach threatened that Respondent would no longer be lenient because a grievance had been filed. It alleges both acts as violations of Section 8(a)(1) and (5) of the Act.

With respect to the discipline, the General Counsel contends that Nicholson went to the employee meeting as a union representative to protest Respondent's conduct in bypassing the union committee and taking the schedule change directly to the employees. Accordingly, the General Counsel argues that Nicholson was engaged in protected concerted activity for which Nicholson was improperly disciplined.

The basic question is whether Nicholson was engaged in protected concerted activity at the time of his actions for which he was disciplined. There is no doubt that Nicholson believed the employee meeting improper and that he was acting in his capacity as a union officer in going to the meeting. But these facts are not sufficient to give his conduct protection. Despite Nicholson's belief, there is little evidence to establish that Respondent called the meetings to bypass the union committee. It is true that the committee refused to explain the work schedule change to the membership, but that refusal did not render Respondent powerless to explain it. The evidence is clear that most of the employee meeting was taken up with an explanation by Miller of the operation of the new schedule. While Gaffney prefaced the meeting with a statement that the new schedule would be a good thing because it would give the employees better breaks and provide three additional jobs, the employees were not asked to agree to the new schedule or to express their sentiments otherwise. I do not find that Gaffney's remarks were sufficient to convert an otherwise informational meeting into an unlawful attempt to bypass the Union.

Nicholson had an unquestioned right to protest the meeting. But that right did not extend to all times and places. The meetings did not present the kind of an emergency situation which warranted disregard of the contractual grievance procedure. Nicholson admittedly went to the meeting not merely to provide union representation for anyone who might want it but to try to break up the meeting. In the light of the circumstances and Nicholson's testimony, I conclude that Nicholson's conduct for which he was reprimanded was not protected concerted activity, and that he was not insulated from discipline for it when Respondent viewed his conduct as insubordinate.

There remains for consideration the evidence as to Leach's alleged assertion that he would no longer be lenient in reading the contract. Leach's denial in this regard was in response to a leading question which tied the statement to its alleged motivation.¹⁵ While his denial meets the allega-

¹⁵ Q Mr. Leach, at any time have you ever stated to any employee at the Marietta plant, including union negotiating committeemen, or union officers I guess I should say, that because a union committeeman had filed a written

¹³ *Cities Service Oil Company*, 158 NLRB 1204, 1205-1206, 1222-1223

¹⁴ In this discussion, I have focused on the change in work schedule which was central to the dispute. An incident to that change was the establishment of the breakerman classification. It is not clear from the complaint or the General Counsel's brief whether the establishment of that classification is alleged as a separate violation of the Act or merely as one of the effects of the work schedule change. Even if it were urged as a separate violative unilateral act, I would reach the same conclusion. The Union was given notice of the new classification, and there is no indication that it sought to bargain over the new classification except as an incident of the schedule change.

tion of the complaint, it does not meet the testimony of Nicholson or Binegar and leaves it unclear whether Leach would also have denied their testimony to the effect that he said the Union was going to have to follow the contract without mentioning a reason. Nonetheless, assuming that Leach made some reference to following the contract, the differences in the testimony of Nicholson and Binegar, as well as indications otherwise that their recollections as to exact words spoken in conversations were uncertain, leave in doubt the tenor of Leach's remarks. Neither attributed to Leach any statement of the reason for his remark. While Binegar's version attributes to Leach a determination to substitute a stricter reading of the contract for a previously more lenient approach, Nicholson's version does not carry with it the connotation of change in approach, but rather can be construed simply as a reminder that the whole contract had to be followed and not merely those portions the Union was particularly interested in. Apart from the single statement attributed to Leach, there is no evidence of any other threat nor is there any evidence

grievance relative to your action, or the company's action, in changing work schedules, that the company, or you, would no longer be lenient but would adhere strictly to contract conditions, terms, and requirements as a change from your, or the company's prior policy? Have you ever made that statement?

A That is an untruth

Q Are you sure of that one?

A Yes, sir

that Respondent in any way became more strict or literal in its application of the contract. In these circumstances, I conclude that the evidence fails to establish that during the course of the October 6 meeting, Leach threatened a more restrictive reading of the union contract because of the Union's grievance over the change in work schedules.

Accordingly, in view of these findings as well as those above, I shall recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

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

2. International Chemical Workers Local No. 120, affiliated with the International Chemical Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the Board issue an order dismissing the complaint in its entirety.