Allied-Signal, Inc., Kansas City Division *and* District 71, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 17–CA–14800

May 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 28, 1990, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally changing its smoking policy to prohibit smoking everywhere in the plant,[1] because the Union waived its right to bargain over workplace smoking issues. He also found that the Respondent did not engage in unlawful direct dealing by forming and consulting with a smoking policy task force, composed of hourly and salaried employees, prior to implementing the smoking ban.[2] We agree with the judge's finding that the Union waived its right to bargain over the change to the smoking policy, but we find, in disagreement with the judge, that the Respondent violated Section 8(a)(5) and (1) in bypassing the Union and dealing directly with the employee smoking policy task force.

A. *The Allegation that the Respondent Unlawfully and Unilaterally Changed Smoking Policy*

The judge held that employee smoking was a mandatory subject of bargaining, and that this change in the Respondent's policy was a ''manifestly significant revision'' over which the Respondent was required to offer to bargain, unless the Union in some way had waived its right to do so. He found that the Union had in fact waived its right to bargain over changes in the smoking policy by agreeing to the safety and health clause and the duration (zipper) clause in its collective-bargaining agreement with the Respondent.

The clauses at issue read as follows (in pertinent part):

XXI. SAFETY, HEALTH AND GOOD HOUSEKEEPING

A. Safety and Health

The Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. An employee shall draw safety hazards to the attention of the immediate supervisor who shall review the hazard with the Safety Department. If the job is considered safe by the supervisor and the Safety Department, the employee shall be required to perform it. Where a Safety representative is not available on the second and third shifts, the safety hazard will be reviewed by the shift superintendent and a committeeperson if the foregoing conditions have been satisfied and the circumstances warrant review. However, the matter may be the subject of an immediate grievance. The Company, as it deems necessary, may have the Medical Department make such physical examinations of its employees as considered advisable to determine the physical fitness of employees for their jobs and to determine any health hazards. The Company will continue to provide necessary protective equipment for the use of employees. The chair-persons of the aerospace and skilled grievance committees will act as the Union's advisory committee to promote and assist the Company in maintaining a safe and healthy place to work. This committee will bring to the attention of the Company any unsafe or unhealthy conditions in the plant.

XXXIII. DURATION

B. During the term of this Agreement neither party shall demand any change in this Agreement, nor shall either party be required to bargain with respect to this Agreement, nor shall a change in or addition to this Agreement be an objective of or be stated as reason for any strike or lockout or other exercise of economic force or threat thereof by the Union or the Company.

. . . .

D. The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject

[1] With the exception of a designated area in the cafeteria during the lunch hour.

[2] Some of the employees on the task force were unit employees.

> or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

As to the safety and health clause, which provides that the Respondent will ''continue to make reasonable provisions for the safety and health of its employees during the hours of their employment,'' the judge found that the wording of the clause, as well as its ''historical usage'' suggested that the Union consciously waived its right to notice and bargaining prior to the Respondent's implementation of new policies affecting employee health and safety. He concluded that the Respondent's smoking ban was motivated by concern for its employees' health as buttressed by available scientific evidence as to the hazards of secondhand smoke, and that the safety and health clause clearly required the Respondent to safeguard the health of its employees while inside the plant.

Regarding the history of the parties' dealings on the subject, the judge found that in the past the Respondent had unilaterally changed safety and health-related rules and policies without objection or demands for bargaining from the Union. The judge reasoned as follows:

> [T]he Union's failure, over a 19-year period, to ever file a grievance, contesting Respondent's contractual basis for unilaterally implementing the various smoking restrictions over that time period suggests that the Union shared Respondent's understanding of the meaning of the provision and supports my conclusion that both contracting parties recognized that the contractual safety and health provision was intended to authorize Respondent to unilaterally implement ''reasonable provisions'' for the safety and health of the bargaining unit employees, notwithstanding any impact upon their terms and conditions of employment.

In affirming the judge's finding of waiver, we need not decide whether the language of the contractual safety and health clause, by itself, constitutes a waiver. That language, when construed in light of the historical practice of the parties under that clause of permitting the Respondent to make unilateral changes in its smoking policy, does constitute a waiver. We note that the clause contemplates that the Respondent has the responsibility to act unilaterally to ensure workplace safety and health and that the Union's role is advisory, not participatory. The clause expressly provides that the Union and employees will bring safety and health problems to the Respondent's attention, but that the decision on what action to take is left to the Respondent. Thus, the clause provides that

> The chair-persons of the aerospace and skilled grievance committees will act as the Union's advisory committee to promote and assist the Company in maintaining a safe and healthy place to work.

We rely on the contractual zipper clause only to the extent that it confirms the historical and contractual status quo of permitting the Respondent to act unilaterally with respect to its smoking policy.

B. *The Allegation that the Respondent Engaged in Unlawful Direct Dealing By Consulting with the Employee Smoking Policy Task Force*

The Respondent commissioned an employee task force to make recommendations concerning the limits of management's proposed smoking ban and any penalties that might be imposed for violation of such a ban. The Union did not even know of the existence of the task force until the ban had been imposed. The complaint alleged that the Respondent violated Section 8(a)(5) and (1) through bypassing the Union and dealing directly with the employees on the task force. The judge dismissed the allegation solely on the basis of his contractual waiver finding.[3]

In addition to excepting to the waiver finding, the General Counsel also argues that even if the Board were to adopt the judge's conclusion on contractual waiver, the Respondent's actions in connection with the task force would still constitute unlawful direct dealing with its employees. In responding to the General Counsel's exceptions, the Respondent relies not only on the judge's waiver finding but also on its own contention that the task force merely offered suggestions and that the interchange between the task force and the Respondent's management did not constitute direct dealing. We find merit in the General Counsel's position.

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1).[4] Direct dealing need not take the form of actual bargaining. As the Board made clear in *Modern Merchandising*, 284 NLRB 1377, 1379 (1987), the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode ''the Union's position as exclusive representative.'' See also

[3] JD fn. 18.

[4] See, e.g., *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

Alexander Linn Hospital Assn., 288 NLRB 103, 106 (1988), enfd. sub nom. *NLRB v. Walkill Valley General Hospital*, 866 F.2d 632, 636 (3d Cir. 1989); *Obie Pacific, Inc.*, 196 NLRB 458, 458–459 (1972).[5] Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions—particularly one as controversial as a workplace smoking policy—plainly erodes the position of the designated representative.

Our conclusion that the Union had contractually waived its bargaining rights so as to permit unilateral action by the Respondent respecting the smoking policy does not extend to a finding that the Union also agreed that the Respondent could deal with employees as if the Respondent's work force had no bargaining representative. Direct dealing with employees goes beyond mere unilateral employer action. While a bargaining representative could waive its right to object to such conduct by an employer, nothing in the language of the collective-bargaining agreement or the record of contract administration remotely suggests that the Union waived that right here.

Accordingly, we find that the Respondent violated the Act as alleged in the direct dealing paragraph of the complaint.[6]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in 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 representing the unit of:

> All production and maintenance employees, including interior and outside transportation employees, chauffeurs, timekeepers and counters, but EXCLUDING all salaried office, engineering, research, plant protection, medical, safety, time study, and supervisory or other employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

3. By bypassing the Union and dealing directly with its bargaining unit employees in forming and consulting with a smoking policy task force, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Allied-Signal, Inc., Kansas City Division, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with District 71, International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive representative of an appropriate unit of the Respondent's employees, by bypassing it and dealing directly with bargaining unit employees.

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

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

(a) Post at its Kansas City plant copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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[5] There is no 8(a)(2) allegation, so it is irrelevant whether the task force constituted a ''labor organization'' or whether the Respondent dominated, supported, or interfered with it.

[6] Contrary to our dissenting colleague, we find that the Respondent's direct dealing did not make unlawful its otherwise unilateral implementation of a new no-smoking policy. These are severable bargaining issues. See *Kansas Education Assn.*, 275 NLRB 638 (1985) (employer's unilateral transfer of employee Lopes was lawful due to union's waiver, but employer's prior direct dealing with Lopes about the transfer was unlawful).

Our colleague's effort to distinguish *Kansas Education* is unsuccessful. Concededly in that case, the employer's action was considered privileged by virtue of the union's inaction; in the instant case, the Respondent's action was considered privileged by virtue of a contract clause construed in the light of past practice. But the significant point is that the Board in *Kansas Education*, having found the employer's action privileged, did not find that it became unlawful by virtue of the antecedent unlawful direct dealings. Further, while it is true that in *Kansas Education* the Union knew of proposed terms of the transfer prior to its implementation, here the union was fully aware of the numerous prior unilateral changes in the smoking policy. This prior knowledge, coupled with the contract's safety and health clause, constitued a waiver of the Union's right to bargain. Accordingly, as in *Kansas Education*, the Union consented to the particular change at issue. Thus, the mere fact that the Respondent here did not announce in advance the particular change under review we find to be a distinction without a difference. Hence, we rely on *Kansas Education*. We also note that our colleague cites no case in support of his conclusion.

[7] 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.''

CHAIRMAN STEPHENS, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) by going behind the back of its exclusive bargaining representative to form an employee committee and seek its input on a proposed change in the workplace smoking policy. Even assuming arguendo that the Union had waived its right to bargain over this mandatory subject, the Respondent is not free to bypass the union and set up its own bargaining mechanism to accomplish its goals. Unlike the majority, however, I would hold that such unlawful direct dealing tainted the implementation of the policy and that therefore the implementation must also be found unlawful. Once the Respondent engaged in direct dealing with its employee committee, the subsequent implementation of the smoking policy change could not properly be characterized as the mere exercise of a contractually authorized right to make unilateral changes in this term and condition of employment. Because the employee committees were an integral part of the process for determining the new policy, the Respondent's direct dealing with them was inextricably tied to the announcement and implementation of the change.

This is not to say that unlawful direct dealing on a subject would, in every case, render unlawful an employer's exercise of a contractually privileged right of unilateral action. Thus, assuming—as my colleagues have found—that the Union has waived its right to bargain over a change in the plantwide smoking policy,[1] and that the Respondent simply announced and implemented such a change, any *subsequent* direct dealing by the Respondent on that subject (e.g. dealing over the effects of the change or possible modifications of the policy) would not retroactively make the unilateral action unlawful. But with events occurring as they did here—essentially the development of a new policy through a process that unlawfully undermined the Union and that clearly exceeded the scope of any contractual waiver—I would find violations as to both of the Respondent's actions. They are essentially inseparable.[2]

[1] Because I would find that the direct dealing necessarily rendered the Respondent's implementation of the smoking policy unlawful, I do not find it necessary to pass on whether the Union waived its right to bargain over the smoking policy.

[2] I agree with my colleagues that *Kansas Education Assn.*, 275 NLRB 638 (1985), treated unilateral action and direct dealing as severable matters, but I regard that case as distinguishable. There the union was informed of the proposed transfer prior to the time at which the decision was finally made and effectuated. Under these circumstances the Board concluded that the Union was ''estopped'' by ''its actions'' from asserting its right to bargain over the matter. The Board did not confront the issue whether a contractual clause permitting unilateral action would have privileged such action when accomplished through direct dealing with no advance notice to the union. I do not regard the Union's knowledge of prior unilateral changes in the smoking policy as equivalent to notice of this particular change. See, e.g., *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983); *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with District 71, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of our employees, by bypassing it and dealing directly with bargaining unit employees.

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

ALLIED-SIGNAL, INC. KANSAS CITY DIVISION

Mary Taves, Esq., for the General Counsel.
David A. Sosinski, Esq. and *Jim A. Welland, Esq.*, of Kansas City, Missouri, for the Respondent.
Wayne E. Coin, of Bridgeton, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by District Lodge 71, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union), on January 12, 1990. Based on the charge, the Regional Director of Region 17 of the National Labor Relations Board, on February 26, 1990, issued a complaint, alleging that Allied-Signal, Inc., Kansas City Division (Respondent) had engaged in unfair labor practices violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).[1] Respondent timely filed answers to the complaint allegations, essentially denying the commission of any unfair labor practices. Pursuant to a notice of hearing, the trial, in this matter, was held before the below-named administrative law judge on May 15 and 16, 1990, in Mission, Kansas. At said trial, all parties were afforded the opportunity to examine and cross-examine all witnesses, to offer any relevant evidence into the record, to argue their respective legal positions orally, and to file posthearing briefs. The latter documents were filed by both counsel for the General Counsel and counsel for Respondent,

[1] On April 25, 1990, the above Regional Director issued an amendment to the complaint, adding an additional alleged violation of Sec. 8(a)(1) and (5) of the Act.

and each brief has been carefully considered by the undersigned. Accordingly, based upon the entire record herein, including my observation of the testimonial demeanor of the several witnesses and the post-hearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business located in Kansas City, Missouri. At all times material, at the facility, Respondent has been engaged in the manufacture of electrical, electronic, rubber, and plastic products for nuclear weapons for the United States Department of Energy. During the 12-month period immediately preceding the issuance of the instant complaint, in the normal course and conduct of its aforesaid business operations, Respondent sold and shipped from its above facility products, goods, and materials, valued in excess of $50,000, directly to points located outside the State of Missouri. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. ISSUES

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by, unilaterally and without affording the Union, as the exclusive representative of certain of its employees for the purposes of collective bargaining, an opportunity to negotiate and bargain, implementing a revised smoking policy, prohibiting smoking throughout Respondent's plant except in designated areas of the two employee cafeterias and by bypassing the Union and dealing directly with a committee, including employees in the unit represented by the Union, with regard to the establishment of the revised smoking policy. In denying the commission of any unfair labor practices, Respondent argues that the revised smoking policy did not constitute a term and condition of employment; that, in light of certain provisions of the parties' existing collective-bargaining agreement, the Union had waived its right to demand bargaining over the subject of smoking; that, by failing to demand bargaining over past restrictions on employee smoking, the Union had waived its right to demand bargaining over the instant restriction, and that, by soliciting the views and opinions of its employees, it did not engage in bargaining with them in contravention of its duty to bargain with the Union.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record establishes that Respondent is a management and operating contractor for the United States Department of Energy with its business operations, consisting of the manufacture of electrical, electronic, rubber, and plastic products for nuclear weapons, housed in 126 acres of a 300-acre Kansas City, Missouri facility, which is owned by the aforementioned Department of Energy. Until March 31, 1990, Jack Knuth was Respondent's president; since April 1, Lou Smith has been Respondent's president; and, at all times material, Charles Miller has been Respondent's director of employee relations, Charles Kircher has been the environmental, safety, and health director, and Robert Schmidt has been the director of facilities, engineering, tooling, and test equipment. The record further establishes that Respondent employs approximately 6200 individuals at the above facility; that, since 1950, its production and maintenance employees have been represented by the Union for the purpose of collective bargaining; that Respondent and the Union have been parties to successive contracts, covering the employees; and that the most recent of these was effective until October 14, 1990.

The issues herein revolve around the matter of employee smoking inside the facility. In this regard, the record reveals, until 1962, Respondent permitted smoking everywhere in the facility, including all work areas, offices, lobbies, the cafeteria, hallways, break areas, conference rooms, restrooms, and provided vending machines from which employees could purchase cigarettes. Commencing in 1962 and continuing through 1989, Respondent implemented no fewer than 34 changes in the above policy, the effect of which was the gradual restriction of locations inside the facility where smoking was permitted. Thus, over these 27 years, smoking was prohibited in approximately 22 departments in which there existed a danger of potential product contamination from cigarette smoke and where hazardous chemicals were utilized. Also, no smoking rules were instituted for the facility's technical information center, sections of the employee cafeterias, conference rooms, restrooms, lobbies, and new-hire processing and interview rooms. Further, disciplinary rules and regulations were implemented for the violation of the above prohibitions, and, finally, in 1987, Respondent removed the cigarette vending machines from the plant. Of significance here are the facts that Respondent implemented the foregoing changes in its smoking policy unilaterally and without affording the Union, as the collective-bargaining representative of its production and maintenance employees, an opportunity to bargain about them and that, on becoming aware of said changes, the Union never either demanded to bargain or protested their implementation,[2] through the filing of contractual grievances.

In the spring of 1989, Respondent decided to prohibit smoking anywhere inside the Kansas City facility. According to Lou Smith and Charles Miller, this decision was reached by a management team consisting of themselves, Jack Knuth,

[2] As to why the Union failed to protest Respondent's unilateral changes, Danny Daniels, the directing business representative for the Union, testified that the restrictions on smoking in work areas affected relatively few workers (those working in ''clean rooms''). Asked about the prohibitions against smoking in restrooms and conference rooms, Daniels opined that prohibiting smoking in the former was ''reasonable'' given their small size and the fact that smoking was permitted in hallways and at most work stations. As to the conference rooms, Daniels said that the Union believed such would have a ''minimal'' impact as employees did not use such rooms on a regular basis. Queried as to why the Union did not demand bargaining over the removal of the cigarette vending machines, Daniels replied that Respondent charged ''outrageously high prices'' and that ''very few of our members uses your cigarette machines.'' Finally, notwithstanding the Union's silence whenever smoking policy changes were implemented, Daniels maintained the the Union never said it was waiving its right to demand bargaining.

and the directors of the various management departments. Smith testified that the ''primary'' factor for the revised smoking policy ''was that we were concerned with the health and safety of our employees.'' He added that ''equally important'' as a factor was that the Department of Energy ''specifically requested that we implement a smoke free working place for the [plant].'' He added that the Secretary of the above government agency mandated that environmental safety and health should be the ''number one priority'' of any contractor who managed a Department of Energy facility. Smith further testified that Respondent's concern for the health of its employees was heightened by compelling studies which established that secondary tobacco smoke from cigarettes was a significant health danger. An ancillary concern, he noted, was that an unhealthy workplace environment would potentially result in sickness and absenteeism.[3] Respondent's tentative plan was to prohibit smoking throughout the plant except in breakrooms, designated smoking areas of the cafeterias, completely enclosed offices, and major plant aisleways. Having received an opinion from its legal department that bargaining with the Union was not required prior to implementing the foregoing policy revision[4] but, apparently, desirous of employee reaction before instituting the revised policy, Respondent decided to obtain this through the formation of a task force,[5] comprised of hourly and salaried employees, both smokers and nonsmokers.

Accordingly, late in August 1989, Charles Miller approached Michael Garcia, who works for Respondent as a job classification and benefit specialist in the employee relations department,[6] and informed the latter that he and Don Fitzpatrick, a safety engineer, had been appointed as cochairman of a task force, which would meet with management and ''discuss'' management's ''thoughts'' on smoking in the plant. Miller gave Garcia two documents. The first (Jt. Exh. 5) set forth the ''charter'' of the task force, which was to ''review management's revised smoking policy . . . and provide comments and suggestions regarding changes and implementation'' and to ''recommend 'next steps,' including implementation plan and timetable.'' The second document (Jt. Exh. 6) contained the facets of the revised smoking policy. Finally, according to Garcia, Miller told him that it would be the purpose of the task force ''to solicit input from other employees in the company'' for management and to comply with its charter. At some point, Miller gave Garcia a list of 16 other employees (7 hourly and 9 salaried) who would comprise the task force and instructed him to contact each and to arrange a meeting. Subsequently, the 16 task force employees met with Miller, Charles Kircher, and Robert Schmidt, and Miller told the employees that Respondent wanted to respond to a Department of Energy request for a more restrictive smoking policy; that management believed smoking was a health hazard; and that their fellow employees were complaining about smoking inside the plant. He added that the task force was to be used as a ''tool'' for management to arrive at a revised smoking policy.

At the next meeting of the task force, with none of the three directors present, the members gave themselves a 2-or 3-week period in which to discuss management's suggested revisions of the smoking policy with other employees. Also, according to Garcia, the employees decided to meet again, categorize what they learned, and discuss what would be given to management. As a result of the discussions with other employees and amongst themselves, the members of the task force drafted a memorandum (Jt. Exh. 7) and submitted it to Charles Miller. The task force recommended to Miller that smoking be limited to breakrooms and designated smoking areas in the cafeterias; that to allow smoking in offices would be discriminatory; that to permit smoking in aisleways would be difficult to police and ''inappropriate''; that Respondent should be specific regarding the reasons for the revised policy; and that employees must be given an effective date for the revised policy. Also, included in the memorandum were ''concerns'' of the task force members and matters, including a total ban on smoking and a more restrictive policy, upon which the members could not arrive at a consensus.

At the end of September 1989, Garcia and Fitzpatrick met with Miller, Kircher, and Schmidt. Garcia testified that ''we discussed [the memorandum] that had been made by the smoking policy task force committee. In addition, we voted amongst ourselves—or we went around the room, in essence, and discussed what we personally would like to see in the way of a smoking policy.'' General Counsel's Exhibit 4 is a summary of what was discussed and shows the support for each of the proposals.[7] Finally, on October 15, the three directors met again with the entire task force. Miller spoke, thanking the employees for their efforts, explaining what had occurred at the late September meeting, and stating that the task force's memorandum would be considered by management before any final decision was reached. Danny Daniels and Sherman Ragsdale each testified, and there is no dispute, that the Union was completely unaware of the formation of the smoking task force, its purpose, or its deliberations.

For the next 45 days, Respondent's management deliberated as to what form the revised smoking policy would take and, without notifying the Union or affording it an op-

[3] Without contradicting Smith, Charles Miller listed as the factors underlying Respondent's decision to revise its smoking policy (1) new information as to the ''ill-effects'' of secondary cigarette smoke; (2) potential legal liabilities; (3) ''myriad'' employee complaints as to other employees' smoking; and (4) Department of Energy inquiries as to Respondent's smoking policy.

[4] Lou Smith testified that Respondent believed that its existing collective-bargaining agreement with the Union ''specifically says that the company shall [provide] for the safety and health of its employees while they're on the premises. We felt also that the contract says we can establish rules of conduct.'' Moreover, Smith added, Respondent had ''gradually eliminated'' smoking from various plant areas since 1962 without objection from the Union.

[5] The record establishes that, at any given time, there are several employee committees, ''meeting on everything'' but usually on ways to increase productivity. These committees are under the umbrella of a ''continuous improvement steering committee,'' which, according to union president, Sherman Ragsdale, ''helps steer all of the other committees within the facility.'' He added that the above committees are not permitted to discuss or make changes in the collective-bargaining agreement.

[6] The parties stipulated that Garcia is an agent within the meaning of Sec. 2(13) of the Act.

[7] The participants considered four alternative smoking policy revisions: smoking limited to the cafeterias and effective January 1, 1990 (one vote); smoking limited to the cafeterias and effective March 1, 1990 (two votes), a total smoking ban effective January 1, 1990 (one vote); and the original management proposal effective January 1, 1990 (one vote).

portunity to bargain, in the employee newsletter, *Comments and Credits*, dated November 30, 1989, announced that ''the Kansas City Plant will become a smoke-free workplace on . . . February 14, 1990. Beginning that day, smoking will be prohibited throughout the plant—except in designated areas of the cafeterias during employees' assigned lunch periods.'' This announcement was followed by a letter, dated December 6, 1989, to all employees from Jack Knuth, explaining the rationale underlying the policy change, setting forth Respondent's history of restricting smoking inside the plant, and announcing smoking cessation classes and incentives for employees who stopped smoking. Subsequently, in the *Comments and Credits* issue, dated February 8, 1990, Respondent reminded employees that the revised smoking policy would become effective the following week and announced that a ''smoking ban enforcement policy,'' with discipline ranging from a written reprimand for the first noncompliance to termination for the fifth noncompliance, would become effective March 1, 1990.[8] As promised, the revised smoking policy prohibiting smoking anywhere inside the plant except for areas of the cafeterias became effective on February 14, 1990, and Respondent concedes that such was implemented unilaterally and without affording the Union an opportunity to bargain. Further, the attendant disciplinary procedure became effective on March 1, and the record establishes that employees have been disciplined for smoking inside the plant.[9] As with the revised smoking policy, Respondent concedes that implementation of the disciplinary procedure was done unilaterally, without affording the Union an opportunity to bargain.

Danny Daniels, who testified that the primary effect of the revised policy was that employees could no longer smoke at their work stations or, during break periods, elsewhere except in the cafeterias, stated that he initially became aware of any change in the smoking policy in early November 1989 when Charles Miller telephoned him and said ''that he was giving us a courtesy call that the company was going to put in a smoking policy and that they were going to announce it later that day or the next day.'' Daniels asked if Miller wanted to meet and discuss the plan, but Miller declined, saying ''this is our program, we're going to put it in and that's it.'' Subsequently, in early December, according to Daniels, he and Larry Ward, a business agent, met with Knuth and Miller to discuss the smoking policy change. Daniels asked whose idea the revision was because he felt it was a bad idea, and Knuth said it was his idea. Daniels said that implementation would create a ''monster'' in the plant and suggested talks to ''work something out.''[10] Knuth responded that Respondent had established a smoking task force ''sometime'' and it had come up with some ideas and recommendations. He added that Respondent had adopted ''most of the recommendations'' and would place them in effect. He concluded by saying that the policy revision would not be altered. Finally, regarding discussions with the Union about the revised policy, Lou Smith testified that the subject arose during a meeting with union representatives on either February 19 or 20, 1990. He recalled that several people were upset that the smoking policy change had been implemented without bargaining with the Union, ''and we had quite a discussion on that.'' He further recalled that someone raised the fact that salaried people could go outside to smoke while hourly employees could not do so. Smith averred that he saw merit to that complaint and that a week later the announced smoking policy revision was further changed to permit hourly employees to leave the plant in order to smoke. He added that there have been other, similar discussions, ''but I can't quote anything specifically.''

As stated by current president Smith, Respondent contends language in the existing collective-bargaining agreement with the Union not only constitutes a waiver by the latter of any asserted right to bargain with Respondent over the decision to implement or the actual implementation of the revised smoking policy but also specifically authorizes Respondent to implement prohibitions against smoking. In this regard, three provisions of the agreement are at issue: the so-called management's rights clause (art. VI) which makes ''the management of the Company and the direction of the working forces . . . the sole and exclusive rights and responsibilities of the Company,''[11] a so-called ''zipper clause'' (art. XXXIII(D)) in which the parties agreed that each had the opportunity to make proposals with respect to any subject area of collective bargaining and expressly waived the right to bargain over any subject or matter covered by or not specifically covered under the collective-bargaining agreement ''even though such subjects . . . may not have been within the knowledge or contemplation of either or both of the parties . . . ,'' and the safety and health provision (art. XXI), the first sentence of which reads, ''The company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment.'' With regard to the management's rights and zipper clause language, the record reveals that the provisions have been in the parties' successive agreements for many years and there is no record evidence as to the specifics of the bargaining for these provisions or as to their meaning or scope. Further, there is no dispute that the subject of smoking has never been raised by either party during collective bargaining for any of the successive contracts between them.

What evidence was adduced at the trial concerns the scope and coverage of the health and safety provision. As to this, Respondent argues, generally, that the matter of in-plant smoking is a health issue and, specifically, that not only does the express language of the health and safety provision require it to implement rules, such as the past smoking restrictions and the instant smoking policy revisions, designed to protect the health of its employees but also the historical usage of this contract clause suggests that Respondent's right to unilaterally establish such rules and policies, even if im-

[8] As with the decision to implement the no-smoking policy, there is no dispute that Respondent's decision to accompany it with a disciplinary procedure was reached unilaterally and without affording the Union an opportunity to bargain.

[9] Counsel for the General Counsel offered into the record three instances of employees receiving verbal reprimands for smoking in violation of the revised smoking policy.

[10] During cross-examination, asked what the Union would have sought through bargaining, Daniels said, ''as good a benefits'' as possible, such as more accommodations for smokers.

[11] Among the rights reserved to the management of Respondent are the scheduling of production, hours, and shifts; the establishment of production standards; hiring and firing; discipline and discharge; the establishment of rules and conduct; and the maintenance of the efficiency of employees.

pacting on the working conditions of bargaining unit employees, has been recognized and accepted by the Union. With regard to the latter contention, Charles McKay, who was the manager of the plant's environmental services department, now termed the environmental, safety, and health department, until he retired in 1989, testified that, besides Federal, state, and local health and safety rules and regulations, Respondent has implemented numerous plantwide policies, relating to environmental and safety matters, without consultation with or the involvement of the Union. As examples, McKay mentioned a recent restriction on the use of in-plant motor vehicles by bargaining unit employees[12] and an employee dress code.[13] As to changes in Respondent's health and safety rules and procedures, Union Grievance Committeeman Tom Wackerly conceded that in matters involving compliance with legal requirements Respondent implements changes in the plant's health and safety rules and procedures without involving the Union and without objection from the latter and that Respondent has implemented health and safety practice and procedure changes about which the Union was unaware prior to implementation. Wackerly further stated that whenever the Union believes Respondent has breached the collective-bargaining agreement, the ''practice'' is to file a grievance.

Notwithstanding the foregoing, the record discloses that Respondent has, in fact, bargained with the Union over two concededly safety-related issues. Thus, there is no dispute that in 1989 the parties discussed Respondent's decision, mandated by an outside safety audit, to require certain bargaining unit employees, who had not previously been so required, to wear safety shoes. According to Tom Wackerly, Respondent accepted the recommendation of the outside safety team, decided that it would assume $60 of the purchase price of new safety shoes for the affected employees, and approached the Union with regard to discussing the vendor of the shoes. Further, according to Wackerly, the parties' discussions involved additional departments in which the safety shoes would be required and whether employees would be reimbursed for purchasing such shoes from vendors of their own choosing. Also, there is no dispute that the parties engaged in extensive bargaining prior to Respondent's implementation of a mandatory employee drug testing policy in November 1989. Although the details of the policy were not disclosed during the instant hearing, it appears that it mandates a sophisticated testing procedure and discipline for violations. While conceding that employee drug use is as much a health and safety issue as smoking, Lou Smith averred that the former is a much more ''complex issue,'' involving matters such as employee privacy and due process. He added that, unlike smoking, drug use directly affects an individual's security clearance for employment with Respondent. Finally, justifying the failure to bargain with the Union over the revised smoking policy while bargaining over the issue of drug testing, Charles Miller termed the former ''evolutionary'' and the latter ''revolutionary.''

Finally, buttressing Respondent's position that the instant revision of its smoking policy was a health issue about which it was not required to bargain with the Union prior to implementation is the testimony of two expert witnesses who testified to the danger of nonsmoking employees caused by the tobacco smoke emanating from the lighted cigarettes of smoking employees. Thus, James Repace, who has conducted numerous studies regarding indoor air pollution from tobacco smoke, testified on the effects of ''environmental tobacco smoke,'' defining this as ''the smoke exhaled by the smoker and also the smoke from the burning end of the cigarette . . . that is released into the atmosphere'' and stating that the pollutants in cigarette smoke are both solid particles and gasses. Further defining a ''carcinogen'' as any chemical or biological substance which is capable of inducing cancer in human beings, Repace stated that there are 43 proven carcinogens in tobacco smoke and ''probably 15 or 20 more that are suspected carcinogens.'' Differentiating between tobacco smoke in the air and that which enters the lungs of smokers, he testified that, within the former cigarette smoke, one would discover higher concentrations of carcinogens and other toxic substances because what smoke enters the lungs of a smoker has been filtered through the cigarette's body, comprised of unsmoked tobacco and, perhaps, a filter. Therefore, according to Repace, it would be far more dangerous for a smoker to inhale from the burning end of a cigarette than from the tip. As to its effect upon the air surrounding smokers, tobacco smoke is generally warmer and rapidly diffuses throughout the atmosphere in the room, and the contaminates from the smoke are continually mixed with the room air by fresh air which is forced into the room by air-conditioning or heating units. He added that, in a normal room, there is usually one complete change of air per hour and that it usually takes approximately 3 hours to 95 percent

[12] According to McKay, whose testimony on this was uncontroverted, due to the large area, encompassed by the Kansas City facility, employees were accustomed to using electric scooters and carts to move from area to area. ''It was getting to the point that the population of vehicles was too large. It was becoming a hazard for the pedestrian employees.'' Therefore, without consulting with the Union, Respondent implemented rules, restricting the use of the above vehicles. Terming the foregoing, a ''significant change,'' McKay stated that, notwithstanding that it made many bargaining unit employees, who had been using these vehicles, ''unhappy,'' the change was implemented without seeking the involvement of the Union. During cross-examination, McKay identified users of motor vehicles as maintenance, mailroom, and security employees, with only the former being in the bargaining unit.

[13] Although the record is not entirely clear on this point, it appears that, in the late 1970's, two female bargaining unit employees filed a grievance regarding a prohibition against the wearing of slacks while working. The grievance alleged discrimination inasmuch as salaried women were allowed to wear such garments while working. During the processing of the grievance, union officials discussed the matter with Respondent, and, as a result, the latter agreed to permit bargaining unit female employees to wear culottes but not ankle length slacks or dresses. Another grievance at about the same time was filed over the required wearing of safety shoes. As with the dress grievance, a union grievance committee met with management, and they established ''a permissive dress code on shoes in the . . . manufacturing areas, not for the whole plant.'' Subsequently, in 1987, according to Charles Miller, the director of employee relations, the employee dress code was again revised to permit certain kinds of skirts to be worn by female employees. Miller testified that the dress code changes were implemented with the assistance of an employee committee and without any input from or bargaining with the Union. That such, indeed, seems to have been the case is clear from the testimony of Union President Sherman Ragsdale, who admitted that a new bargaining unit employee dress code was implemented in 1987; that, to his knowledge, the Union was not involved in formulating the revised code; and that he would have known if the Union had been involved.

to clear the effects of a single lighted cigarette. However, if cigarettes are burning constantly during the day, notwithstanding the ventilation system in the room, there would be a ''relatively steady concentration of smoke in the room.'' Finally, Repace testified, there exits now a large body of scientific literature, concluding that the ''passive'' inhaling of tobacco smoke is a cause of lung cancer, heart disease, and other illnesses; the current estimate is there are approximately 5000 lung cancer deaths annually caused by environmental tobacco smoke; this mortality is ''roughly 60 times as great'' as the total from all other outdoor air carcinogens; and, based on a study of the air flow in Respondent's facility and a calculation of the density of tobacco smoke in any particular area, ''there would be anywhere from two to seven hundred times the acceptable risk level for carcinogens in air based on smoking in those particular areas'' for nonsmokers. During cross-examination, Repace admitted that Respondent did not contact him until 5 or 6 weeks prior to the instant hearing and that his analysis of Respondent's plant air flow was done at that time.

Dr. David Burns, the senior scientific editor of the United States Surgeon General's reports on smoking and health from 1980 through 1986, including the report on involuntary or environmental tobacco smoke exposure, testified with regard to the conclusions of these reports regarding exposure to secondary tobacco smoke. The record establishes that the 1986 report of the Surgeon General concerns chronic lung disease and cancer in the workplace, and, according to Dr. Burns, three conclusions were drawn from the accumulated data: that environmental tobacco is a cause of disease, including lung cancer in healthy nonsmokers; that secondary tobacco smoke affects lung growth in youth; and separation of nonsmokers from smokers reduces but does not eliminate exposure to secondary tobacco smoke. The witness continued, stating that a comparison of individuals who have had a significant exposure to environmental tobacco smoke to individuals who have had less exposure revealed that the former group had a demonstrable ''increased risk'' of developing lung cancer. Dr. Burns testified further that smoking restrictions in the workplace are ''essential'' inasmuch as 40 to 60 percent of an individual's exposure to tobacco smoke occurs in that environment and as one is more able to limit one's exposure in the home by having the spouse and others smoke outside. This must be contrasted with the workplace where the individual does not have the ability to control his exposure and where all employees share the same ventilation system. Asked how one might eliminate the health threat posed by secondary tobacco smoke in the workplace, Dr. Burns replied, ''The only achievable current mechanism for reducing that exposure to a level that we know to be safe is to eliminate the exposure completely.'' Dr. Burns also testified that the Surgeon General's reports have no regulatory effect on federal government facilities; however, they represent the most recent scientific analysis of the subject at issue and, in this respect, form the basis for public opinion on the health threat posed by secondary tobacco smoke. Based on the scientific evidence, according to Dr. Burns, many private industries are instituting smoke-free environments and the trend over the decade of the 1980's was, initially, to separate smokers from nonsmokers and, more recently, to provide for completely smoke-free facilities. Finally, while conceding that there are no current Federal regulations mandating establishing standards for environmental tobacco smoke in the workplace, Dr. Burns stated that, in terms of the health risks which are currently subject to regulation, ''the exposure that is currently occurring due to environmental tobacco smoke results in a risk that is from ten to a thousandfold greater than the level . . . that is set currently for regulating other agents in the work site.''

B. *Analysis*

There is no dispute that Respondent, unilaterally, and without affording the Union, as the collective-bargaining representative of its production and maintenance employees, the opportunity to bargain, in February 1980, implemented a manifestly significant revision of its smoking policy, prohibiting said conduct in all areas of the plant except for designated areas of the two employee cafeterias. The complaint alleged that Respondent's conduct was violative of Section 8(a)(1) and (5) of the Act, and the law, in this regard, is, of course, both longstanding and clear. Thus, the foregoing statutory provision, in conjunction with Section 8(d) of the Act, essentially requires that employers and designated collective-bargaining representatives bargain in good faith with each other as to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958); *Johnson-Bateman Co*., 295 NLRB 133 (1989). In most circumstances, an employer engages in unfair labor practices by unilaterally making changes in the above mandatory subjects of bargaining without first providing its employees' collective-bargaining representative a meaningful opportunity to bargain about those changes. *NLRB v. Katz*, 369 U.S. 736 (1962); *Associated Services for the Blind*, 299 NLRB 1150 (1990). Here, contrary to Respondent's contention that employee smoking is not a term and condition of employment, I find that such, indeed, constitutes a mandatory subject of bargaining.

In this regard, I note, at the outset, that while the Board has long held that ''the concept of 'terms and conditions of employment' is itself a broad one'' (*Peerless Publications*, 283 NLRB 334, 335 (1987)), as Justice Stewart recognized in his oft-quoted concurring opinion in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 218 (1964), this concept is not unlimited in scope). Thus, subsequent to issuing *Fibreboard Paper Products* and quoting Justice Stewart, the Supreme Court described terms and conditions of employment as those matter which ''are plainly germane to the 'working environment''' and are ''not among those 'managerial decisions, which lie at the core of entrepreneurial control.''' *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979); *Johnson-Bateman Co*., supra. As to the first factor, germane to the work environment, while it is true that employee smoking does not affect the hours they work or the amount they will earn for their work or alter their job descriptions, Respondent had always permitted its bargaining unit employees to smoke in most work areas, breakrooms, and hallways, and one may justifiably presume that those employees, who did smoke, did so in order to help pass the time while working or to relax during break periods. In these circumstances, the employees' right to smoke was nothing less than a work-related privilege, and the Board has long held that such noncontractual, longstanding practices, as permitting employees to converse with union officials in production areas, employee purchase programs, the displaying of posters, cal-

endars, and pictures on the walls of work areas, and the use of personal radios while working, are ''characteristics'' of the employment relationship so as to be terms and conditions of employment and, therefore, mandatory subjects of bargaining. *Fibreboard Paper Products* (Stewart, J. concurring), supra at 222; *Murphy Oil USA, Inc*., 286 NLRB 1039 (1987); *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Peerless Food Products*, 236 NLRB 161 (1978). Counsel for Respondent correctly argues that, if evidence of past practice is nonexistent, an employment practice may not rise to the level of a work related privilege but incorrectly characterizes Respondent's historical smoking policy as permitting such only where allowed by management. Thus, insofar as the record establishes, until 1962, Respondent's bargaining unit employees could smoke anywhere inside the Kansas City facility without restriction, and, commencing with that date, Respondent began restricting the areas in which smoking was permitted. Accordingly, the proper historical characterization is that employees have been permitted to smoke everywhere inside the facility except where specifically prohibited by Respondent.

Turning to the second consideration, whether the matter lies at the core of entrepreneurial control, Justice Stewart wrote that what this concerns are matters pertaining to the commitment of investment capital, the basic scope of the enterprise, ''those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly on employment security.'' *Fibreboard Paper Products* (Stewart, J. concurring), supra at 223. Echoing Justice Stewart, according to the Board, a decision does not involve entrepreneurial control if ''it does not involve the commitment of investment capital and cannot otherwise be characterized as a decision taken with a view toward changing the scope or nature of the Respondent's enterprise.'' *Johnson-Bateman Co*., supra at 137. Here, Respondent asserts that what is involved is a matter of entrepreneurial control inasmuch as it is obliged to provide a safe workplace for its employees and as health-related decisions do involve economic factors. However, without trivializing Respondent's concerns, I do not believe that they are entrepreneurial in character. Thus, Respondent's decision to prohibit smoking in all areas of its plant, except designated portions of the employees' cafeterias, was neither fundamental to the basic direction of the business nor did it result in the commitment of any capital resources. Rather, as expressed by Respondent's management officials, the decision to prohibit smoking was motivated by health concerns for its employees, potential increases in sickness and absenteeism, Federal government pressure to limit smoking, and a fear of legal liability. Accordingly, while certainly compelling, important to the welfare of its employees, and economically justifiable, the foregoing represents ''a more limited decision'' than one taken with a view toward committing capital or changing the scope of the business. Id. at 137. Based on the record as a whole, the conclusion is mandated that Respondent's decision to fundamentally change its smoking policy to prohibit such in all areas of the plant, except the employee cafeterias, constituted a mandatory subject of bargaining.

Notwithstanding that the matter of smoking inside the Kansas City facility was a mandatory subject of bargaining, Respondent argues that, based on the management rights, ''zipper,'' and health and safety provisions of its existing collective-bargaining agreement with the Union, it was under no obligation, prior to implementing the revised policy, to bargain with the former regarding its decision to prohibit the practice. I find merit to Respondent's contentions at least with regard to the latter two contractual clauses. Initially, as to the health and safety provision, which requires Respondent to ''continue to make reasonable provisions for the safety and health of its employees during the hours of their employment,'' not only the wording of the clause but also its historical usage suggest that the Union consciously waived its right to notice and bargaining prior to Respondent's implementation of new policies and procedures, undertaken pursuant to said provision, even if the policies and procedures impinge on nominal terms and conditions of employment. At the outset, there can be no doubt that the matter of prohibiting smoking inside the plant was primarily a health issue, and the instant contractual provision clearly requires Respondent to protect the health of its employees while inside the plant. As explained by Respondent's president, Smith, and its director of employee relations, Miller, the decision to essentially eliminate smoking inside the facility was motivated by available scientific evidence relating to the health hazards of environmental tobacco smoke. Testifying on this point, Respondent's expert witnesses, James Repace and Dr. David Burns, gave compelling testimony relating to the health dangers inherent in tobacco smoke and the polluting effect upon the indoor environment of the materials emanating from the lighted end of a cigarette. Thus, according to the uncontroverted testimony of Repace, there are 43 known and approximately 20 suspected carcinogens in cigarette smoke; the unfiltered tobacco smoke coming from the lighted end of a cigarette is more of a health hazard than that which is inhaled by a smoker; tobacco smoke is warmer, rapidly diffuses throughout the atmosphere in a room, and the smoke contaminates are continually mixed with the room air by fresh air which is forced into the room by ventilation systems; and, if cigarettes are burning throughout the day, there would be a ''relatively steady concentration of smoke in the room.'' According to the similarly uncontroverted testimony of Dr. Burns, the Surgeon General of the United States has concluded that environmental tobacco smoke is a major cause of disease, including lung cancer. Burns added that studies have established that individuals who have more exposure to cigarette smoke than others have a demonstrable ''increased risk'' of developing the aforementioned disease and that smoking restrictions in the workplace are ''essential'' inasmuch as approximately 60 percent of an individual's exposure to tobacco smoke occurs in that environment and as one is far more able to limit his exposure at home.

With regard to the historical usage of the health and safety provision, the record conclusively establishes that, both as to matters mandated by local, state, or Federal laws and those initiated solely by management, Respondent has been able to unilaterally, and without initially bargaining with the Union, implement safety and health-related rules and policies and that the Union has routinely failed to request bargaining and never heretofore questioned Respondent's authority, pursuant to this contractual article, to so act. Thus, union grievance committee member Wackerly conceded that, as to matters involving compliance with legal requirements, Respondent implements changes in the plant's health and safety rules with-

out involving the Union and without objection from the Union. The identical practice, I believe, exists for safety and health-related policies which are initiated by management. Thus, it was undisputed that, without prior notice to or bargaining with the Union, Respondent recently implemented two new policies: one restricting employee usage of electric scooters and carts inside the plant and the other being a revised employee dress code, permitting certain types of skirts to be worn by female employees. Respondent argues that said changes were implemented pursuant to the safety and health article, and, notwithstanding that both unilateral changes arguably involved matters germane to the working environment (hence, terms and conditions of employment) there is no evidence that, having become aware of the changes, the Union ever demanded bargaining or challenged Respondent's authority to unilaterally implement such. The foregoing is of the utmost significance herein; for, given the collective-bargaining agreement between the parties, Respondent was, and remains, legally obligated to act in accord with the contract and one may rightly assume that the Union would protest, as it did here, if it believed that Respondent acted without contractual authorization to unilaterally impose certain safety and health practices. However, while Wackerly asserted that the Union's normal procedure, indeed, is to invoke the contractual grievance and arbitration procedure whenever it believes that Respondent has acted in breach of the parties' contract, apparently, no grievances were ever filed, protesting Respondent's asserted contractual authorization to restrict electric vehicle usage inside the plant or to change the employee dress code. Therefore, in my view, the Union's conduct in these instances supports Respondent's contention that, whenever it acts pursuant to the terms of the contractual safety and health provision, it may do so unilaterally and without notice to or bargaining with the Union.[14] That this conclusion is correct may best be illustrated by the Union's failure over a 19-year period ever to request bargaining or to protest Respondent's restrictions and limitations on smoking inside the plant.[15] There is no dispute that all prior smoking restrictions were implemented by Respondent without prior notice to or offering to bargain with the Union. Respondent's president, Smith, stated that the basis for the Company's unilateral implementation of all the smoking policy restrictions, including the instant one, has been the contractual safety and health provision. I believe that the Union's failure, over a 19-year period, to ever file a grievance, contesting Respondent's contractual basis for unilaterally implementing the various smoking restrictions over that time period suggests that the Union shared Respondent's understanding of the meaning of the provision and supports my conclusion that both contracting parties recognized that the contractual safety and health provision was intended to authorize Respondent to unilaterally implement ''reasonable provisions'' for the safety and health of the bargaining unit employees, notwithstanding any impact on their terms and conditions of employment.[16] *Continental Telephone Co*., 274 NLRB 1452, 1453 (1985); *Emery Industries*, 268 NLRB 824 (1984).

Turning to the so-called ''zipper clause,'' at the outset, I recognize that the Board does not look favorably upon such provisions as affecting a contracting party's statutory duty to bargain before making changes involving terms and conditions of employment and that, in the view of the Board, the ''normal'' function of said clauses is to maintain the status quo and not to facilitate unilateral changes. *Associated Services for the Blind*, supra at 1151 fn. 8; *Murphy Oil USA, Inc*., supra. However, this is not to say that the Board will never find such clauses to constitute waivers of mandatory subjects of bargaining. Thus, in *Johnson-Bateman Co*., supra at 139, while finding no waiver, the Board stated that the type of zipper clause not to be construed as waiving bargaining rights is that which is ''generally worded.'' Further, in *Associated Services for the Blind*, supra, while also finding no waiver, the Board carefully noted that the zipper language only precluded ''bargaining about those matters already agreed to in the collective-bargaining agreement.'' Moreover, in a case involving a zipper clause strikingly similar to that which is at issue here, *Rockford Manor Intermediate Care Facility*, 279 NLRB 1170 (1986), the Board concluded that a union, by entering into an agreement which contained a ''highly detailed'' zipper clause, waived any right to bargain over unresolved issues which may have existed upon the effective date of the contract. Id. at 1173–1174. Like the instant zipper language, pursuant to which Respondent and the Union expressly waived the right to bargain over any subject covered or ''not specifically covered'' under the parties' agreement even though such subjects may not have been within the knowledge or contemplation of the parties, the zipper language, in *Rockford Manor Care Facility*, stated that each party ''waives the right to bargain collectively with respect to any subject or matter not specifically referred to in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated this Agreement.'' The Board, which adopted the conclusions of

[14] While the record establishes that Respondent and the Union bargained over the requirement that certain employees wear safety shoes while working and over the implementation of a new drug testing policy, these do not detract from my belief that the parties understood that the contractual health and safety provision permitted Respondent to make ''reasonable'' provisions for the safety and health of its employees without notice to or bargaining with the Union. Thus, requiring employees to wear safety shoes represented a significant cost factor for the affected employees inasmuch as Respondent's position was that it would pay only a share of the cost, and implementation of a mandatory drug testing policy, of course, provoked privacy, due process, and other legal concerns. While both involved the safety and health of employees, bargaining with the Union was clearly essential before implementation, and, as the Board has noted, ''parties can have many different reasons for agreeing . . . on some occasions to forgo exercising rights that are clearly theirs under a collective-bargaining agreement.'' *United Technologies Corp*., 287 NLRB 198, 198–199 (1987).

[15] I do not mean to suggest that, absent the terms of the safety and health provision at issue herein, the Union would have waived its right to demand bargaining over implementation of Respondent's revised smoking policy by any past failures to demand bargaining over less restrictive measures. Thus, ''a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'' *Owens-Corning Fiberglass Corp*., 282 NLRB 609 (1987); *NLRB v. Miller Brewing Co*., 408 F.2d 12 (9th Cir. 1969).

[16] There is no assertion here that Respondent's revised smoking policy was not reasonable within the meaning of the contractual safety and health provision.

the administrative law judge, found significant the fact that the zipper language applied to subjects *not* contained in the parties' agreement and concluded that, given the fact that the parties had negotiated a ''complete'' agreement, one which was specific in its ''assault'' on any bargaining responsibility during the term, the union had waived any ''interest'' in bargaining over the matter at issue, a subject not covered by the language of the agreement. Id. I believe the same result must be reached here. Thus, the contractual zipper language not only is as detailed as in *Rockford Manor Care Facility* but also its breadth encompasses subjects not contained in the agreement even if not within the contemplation of either Respondent or the Union at the effective date of document. In short, there can be no misunderstanding concerning the effect of the zipper language on the subject of smoking, a matter, all parties agree, which was neither a subject of negotiation nor one expressly covered by the terms of the existing agreement. Accordingly, I must conclude, notwithstanding the Board's reluctance to give effect to such contract clauses as constituting bargaining waivers, that, by the express terms of the instant contractual zipper language, the Union knowingly waived its interest in bargaining over the matter of smoking. *Rockford Manor Care Facility*, supra. Based on the foregoing,[17] the complaint shall be dismissed in its entirety.[18]

CONCLUSIONS OF LAW

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

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

3. Respondent did not violate Section 8(a)(1) and (5) of the Act by unilaterally instituting a smoking ban on February 14, 1990, at its Kansas City facility or by bypassing the Union and dealing directly with its employees with regard to this revised smoking policy.

[Recommended Order for dismissal omitted from publication.]

VI. *MANAGEMENT*

A. Except as specifically limited by this Agreement, the management of the Company and the direction of the working forces, including but not limited to the products to be manufactured, the location of plants, the schedules and fair standards of production, the schedules of hours and shifts, the methods, processes and means of manufacturing, the right to hire, promote, demote and transfer employees, to establish rules of conduct, to discharge or discipline for good and sufficient cause, and to maintain discipline and efficiency of employees, are the sole and exclusive rights and responsibilities of the Company.

XXI. *SAFETY, HEALTH AND GOOD HOUSEKEEPING*

A. *Safety and Health*

The Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. An employee shall draw safety hazards to the attention of the immediate supervisor who shall review the hazard with the Safety Department. If the job is considered safe by the supervisor and the Safety Department, the employee shall be required to perform it. Where a Safety representative is not available on the second and third shifts, the safety hazard will be reviewed by the shift superintendent and a committeeperson if the foregoing conditions have been satisfied and the circumstances warrant review. However, the matter may be the subject of an immediate grievance. The Company, as it deems necessary, may have the Medical Department make such physical examinations of its employees as considered advisable to determine the physical fitness of employees for their jobs and to determine any health hazards. The Company will continue to provide necessary protective equipment for the use of employees. The chairpersons of the aerospace and skilled grievance committee will act as the Union's advisory committee to promote and assist the Company in maintaining a safe and healthy place to work. This committee will bring to the attention of the Company any unsafe or unhealthy conditions in the plant.

XXXIII. *DURATION*

. . . .

B. During the term of this Agreement neither party shall demand any change in this Agreement, nor shall either party be required to bargain with respect to this Agreement, nor shall a change in or addition to this Agreement be an objective of or be stated as reason for any strike or lockout or other exercise of economic force or threaten thereof by the Union or the Company.

. . . .

D. The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

[17] I make no findings as to the meaning of the contractual management rights provision or as to Respondent's other contentions.

[18] With regard to the direct dealing allegation of the complaint, inasmuch as I do not believe that Respondent is contractually obligated to bargain with the Union prior to implementing reasonable rules pertaining to the safety and health of the bargaining unit employees, it follows that Respondent did not violate Sec. 8(a)(1) and (5) of the Act by consulting with the smoking task force, and not the Union, prior to implementing the revised smoking policy. Accordingly, I shall dismiss this allegation of the complaint.