

Vincent Industrial Plastics, Inc. and International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO.
Cases 25-CA-23311, 25-CA-23647, 25-CA-23753, 25-CA-23864, 25-CA-23869, 25-CA-23878, and 25-CA-23892

April 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On March 15, 1996, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The General Counsel also 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,¹ and conclusions and to adopt the recommended Order² as modified and set forth in full below.

1. The judge found that the Respondent did not violate Section 8(a)(5) by unilaterally changing its attendance policy during contract negotiations on the basis that the situation was sufficiently urgent to warrant unilateral implementation of the attendance policy. We disagree.

In September 1993, the Union was certified as the collective-bargaining representative of the Respondent's employees. The Respondent and the Union commenced negotiations in January 1994.³ At the April bargaining session, the Respondent stated that it had attendance

problems and requested that the Union promptly approve as a side agreement a change in attendance policy to extend to all employees the more stringent attendance rules applicable to employees hired after August 1992. (Under the then current policy, absentee "occurrences" for employees hired after August 1992 remain on the record for a 360-day rolling period. In contrast, employees hired prior to August 1992 had their absentee "occurrence" record reset to zero at the end of the fiscal year.) The Respondent further stated that it would act soon, even without the Union's approval. During negotiations on May 18, the Respondent repeated its request for a change in attendance policy. The Respondent explained that in the previous 6 weeks 96 employees had been absent 8 hours and 69 had left early, and that this problem had resulted in additional weekend work. The Union's position throughout negotiations was that it would not agree to any changes in working conditions until the parties agreed to a complete collective-bargaining agreement. On June 15, the Respondent announced that it would implement its proposed change in attendance policy on July 1 because that date was the end of the Respondent's fiscal year. The Union continued to refuse to agree to the implementation of any changes outside the context of an agreed to collective-bargaining agreement. The Respondent implemented its new policy on July 1. Apparently because of the old policy, the Respondent started the employees hired prior to August 1992 at zero absentee "occurrences," as of July 1.

The Board has held that when, as here, parties are engaged in negotiations for a collective-bargaining agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line*, the Board recognized only two limited exceptions to that general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action." *Id.* at 374.

In *RBE Electronics of S.D.*, 320 NLRB 80 (1995), the Board noted that the Board in the past had limited the definition of such economic considerations to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987). However, in *RBE*, the Board found that there may also be other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exigency exception. The Board stated (320 NLRB at 82):

[W]here we find that an employer is confronted with an economic exigency compelling prompt action short of

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding, that the Respondent violated Sec. 8(a)(5) by unilaterally eliminating timeclocks for press operators, we find that *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976), is distinguishable. There, the Board found that the respondent did not violate Sec. 8(a)(5) by unilaterally initiating timeclocks since the modification was only a change in the mechanical procedure for recording the employees' time. Here, the switch to having supervisors instead of timeclocks record the press operators' time is more than a mechanical change. Supervisors were now directly involved in monitoring each employee's time. Further, employees were not in a position to check the accuracy of the records which leads to the possibility that there would be more corrections of errors or of disputes of the entries. We believe that the unilateral elimination of timeclocks to be a significant and substantial change in employees' terms and conditions of employment in violation of Sec. 8(a)(5).

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996); and *Excel Container, Inc.*, 325 NLRB 17 (1997).

³ All dates here refer to 1994, unless otherwise indicated.

the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line* exigency exception . . . that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain.

The Board then went on to state that (id.):

In defining the type of economic exigency susceptible to bargaining, however, we start from the premise . . . that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. [Footnotes omitted.]

Applying *Bottom Line* as modified by *RBE*, we find that the Respondent has failed to prove that its attendance problem constituted an economic exigency. First, the Respondent failed to show that the change needed to be implemented promptly. The proposed policy placed all employees under the system applicable to newer employees with the older employees starting at zero occurrences. The only arguable basis why it was necessary to implement such a policy on July 1 is that is the date when the Respondent's fiscal year begins and the Respondent "anticipated a rash of absenteeism" at the beginning of the fiscal year. The Respondent asserts this was the case because senior employees' "occurrence" records were reset to zero and they again had time to "burn." These factors are insufficient to compel prompt action. Nothing, for example, would have precluded the parties from negotiating a rolling system effective as of an agreed-to later date. Second, assuming arguendo that the attendance problem necessitated prompt action, the Respondent did not demonstrate that the attendance problem was caused by external events, was beyond the employer's control, or was either unforeseen or not reasonably foreseeable. The Respondent's absentee problem was strictly an internal matter and was not beyond the Respondent's control to correct. Nor was the issue unforeseen or not reasonably unforeseeable, as it had existed for a long period of time.

Accordingly, inasmuch as the parties were admittedly not at impasse in their negotiations on July 1 and no economic exigencies compelling prompt action existed, we conclude that the Respondent violated Section 8(a)(5)

and (1) by unilaterally implementing a change its attendance policy.⁴

2. The Respondent excepts to the judge's finding that the decertification petition was tainted by the Respondent's prior unremedied unfair labor practices and, consequently, that the Respondent violated Section 8(a)(5) by withdrawing recognition and refusing to bargain with the Union. The Respondent's exceptions argue that the unfair labor practices were not of the type that would cause disaffection of the employees. We find the Respondent's exceptions lacking in merit for the following reasons.

Starting with the unilateral change in attendance policy in June, the Respondent committed a series of unfair labor practices leading up to the employees' February 16, 1995 decertification petition. We adopt the judge's finding that the Respondent violated Section 8(a)(5) in October by unilaterally relieving quality controllers of 25 percent of their work; in mid-November, unilaterally requiring quality controllers to start working 15 minutes overtime at the end of their shift; and in early December by unilaterally changing its timekeeping procedures. We further agree with the judge that the Respondent violated Section 8(a)(1) in December by interrogating an employee concerning support for a possible strike, and Section 8(a)(3) in January 1995 by issuing a disciplinary warning to union steward and negotiating committee member Gloria Chester because of her union activities, and, on February 14, 1995, terminating the president of the Union because of his union activities. Employees signed a decertification petition on February 15 and 16, 1995. The Respondent withdrew recognition and refused to bargain with the Union on February 16, 1995, after it received the decertification petition signed by a majority of the unit employees.

In our view, the February 16, 1995 decertification petition was tainted by the Respondent's antecedent unlawful conduct. In cases involving unfair labor practices other than a general refusal to recognize and bargain, the Board considers several factors to determine whether there is a causal relationship between unremedied unfair labor practices and the subsequent employee expression of disaffection with the incumbent union. These factors include:

- (1) The length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
- (3) any possible tendency to cause employee disaffection from the union; and
- (4) the effect of the unlaw-

⁴ The judge analyzed the unilateral change issue under *Bottom Line* and not *RBE Electronics*, which issued after the hearing but prior to the judge's decision in the instant case. The record, however, was sufficiently developed so that a remand is unnecessary.

ful conduct on employee morale, organizational activities, and membership in the union.⁵

Respecting the first factor, the unfair labor practices continued to occur until the day before the employees signed the decertification petition. As for the second and third factors, the unilateral changes as well as the disciplining of a union steward, and the termination of the Union's president constitute serious and flagrant unfair labor practices which would be likely to have a long lasting effect on the bargaining unit and to discourage employees from supporting the Union. The unilateral implementation of significant changes in terms and conditions of employment during negotiations has the tendency to undermine the employees' confidence in the effectiveness of their selected collective-bargaining representative. Further, the discipline and termination of the union steward and president, respectively, convey to employees the notion that any support for the Union may jeopardize their employment. Such conduct would reasonably tend to cause employee disaffection from the Union. With respect to the final factor, the employees started signing a decertification petition the day after the Union's president was unlawfully discharged. Consequently, we find it reasonable to infer that the Respondent's unfair labor practices, culminating in the termination of the union president, contributed to the disaffection from the Union.

Based on the foregoing, we find that causal relationship existed between the Respondent's unfair labor practices and the decertification petition received by the Respondent on February 16, 1995. We therefore find that the Respondent is precluded from relying on the decertification petition to assert a good-faith doubt of the Union's majority status. Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) by refusing on and after February 16, 1995, to recognize and bargain with the Union.

ORDER

The National Labor Relations Board orders that Vincent Industrial Plastics, Inc., Henderson, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to meet and bargain with the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and part-time production and maintenance employees employed by the Employer out of its 920 N. Adams Street and 1225 Pringle St., Henderson, Kentucky facilities; BUT EXCLUDING all office clerical

and professional employees and all guards and supervisors as defined in the Act.

(b) Coercively interrogating employees about their union sympathies, support, and activities.

(c) Discharging, issuing disciplinary warnings to, changing terms and conditions of employment, and otherwise discriminating against employees because of their sympathies, support, and activities for the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO or any other union.

(d) Subverting the collective-bargaining process and employee support for the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO by unilaterally, and without notice, changing terms and conditions of employment and by discharging, issuing disciplinary warnings to, and otherwise discriminating against employees because of their union sympathies, support, and activities.

(e) Failing to promptly comply with the March 13, 1995 union request for information relevant to its collective-bargaining responsibilities.

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

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

(a) On request, recognize and bargain with the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, rescind all unilateral changes in terms and conditions of employment found unlawful as well as any other such changes effected after April 1, 1994.

(c) Promptly comply with the March 13, 1995 union request for information relevant to its collective-bargaining responsibilities.

(d) Within 14 days from the date of this Order, offer Michael Early and Wanda Nantz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Michael Early and Wanda Nantz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision and Order.

(f) Within 14 days from the date of this Order, remove from its files any reference to their unlawful discharges, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

⁵ *Williams Enterprises*, 312 NLRB 937, 939 (1993), *enfd.* 50 F.3d 1280 (4th Cir. 1995); *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

(g) Rescind disciplinary warnings issued to Gloria Chester and Wanda Nantz found discriminatory and unlawful and, within 14 days from the date of this Order, remove from its files any reference to those warnings and within 3 days thereafter notify them in writing that this has been done and that the warnings will not be used against them in any way.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Henderson, Kentucky, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 25, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1994.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from and refuse to meet and bargain with the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and part-time production and maintenance employees employed by us out of our 920 N. Adams Street and 1225 Pringle St., Henderson, Kentucky facilities; BUT EXCLUDING all office clerical and professional employees and all guards and supervisors as defined in the Act.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT discharge, issue disciplinary warnings, we will not change terms and conditions of employment, or otherwise discriminate against any of you for supporting the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union AFL-CIO, or any other union.

WE WILL NOT undermine the collective-bargaining process and employee support for the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union AFL-CIO by unilaterally, and without notice, changing terms and conditions of employment and by discharging, issuing disciplinary warnings to, and otherwise discriminating against employees because of their union sympathies, support, and activities.

WE WILL NOT fail to promptly comply with the March 13, 1995 union request for information relevant to its collective-bargaining responsibilities.

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

WE WILL, on request, recognize and bargain with the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

WE WILL, on request, rescind all unilateral changes in terms and conditions of employment found unlawful in this decision as well as any other such changes affected after April 1, 1994.

WE WILL promptly comply with the March 13, 1995 union request for information relevant to its collective-bargaining responsibilities.

⁶ 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."

WE WILL, within 14 days from the date of the Board's Order, offer Michael Early and Wanda Nantz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to their unlawful discharges, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind disciplinary warnings issued to Gloria Chester and Wanda Nantz found discriminatory and unlawful in this decision, and WE WILL, within 14 days from the date of the Board's Order, remove from their files any reference to those warnings and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the warnings will not be used against them in any way.

VINCENT INDUSTRIAL PLASTICS, INC

Walter Steele, Esq., for the General Counsel.
Arthur D. Rutkowski, Esq. (Bowers, Harrison, Kent & Miller),
of Evansville, Indiana, for Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Evansville, Indiana, on May 22-24 and on August 9-10, 1995. The original charge was filed on July 5, 1994,¹ and the complaint issued on September 23.

At issue is whether Respondent Vincent Industrial Plastics, Inc.: (1) interrogated employees in violation of Section 8(a)(1) of the National Labor Relations Act, (2) discharged or otherwise discriminated against employees in violation of Section 8(a)(3) of the Act, and (3) made unilateral changes in terms and conditions of employment, withdrew recognition from the International Chemical Workers Union Local 1032, a/w International Chemical Workers Union, AFL-CIO and failed to provide requested information to the Union in violation of Section 8(a)(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, produces customized molded plastic products at a plant in Henderson, Kentucky, at which it annually receives goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. It admits

and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As a result of an election held in February 1993, the Union was certified as the collective-bargaining representative of Respondent's employees in September 1993.

Contract negotiations began in January and continued through approximately 18 sessions until February 16, 1995, when Respondent withdrew recognition based on a decertification petition signed by a majority of its employees.

B. Unilateral Changes

Six changes in "terms and conditions of employment" were successively implemented by Respondent during an 8-month period extending from July 1 to February 25. Pertinent facts concerning them are as follows:

(1) At a bargaining session in April, Respondent urged the Union promptly to approve as a side agreement an immediate change in attendance policy because of an asserted chronic absentee-lateness/early departure problem. The change would apply to employees hired before August 1992 the more stringent attendance policy applicable to employees hired thereafter. At the April session and at several subsequent negotiation meetings, Respondent stated it would act "soon" with or without union approval. While the Union did not oppose the change, its consistent position throughout negotiations was that it would not agree to any changes in working conditions until the parties had agreed on all provisions of a collective-bargaining agreement. On June 15, Respondent announced that the changed absenteeism policy would be (and it was) implemented on July 1.

(2) Another change was made effective in October. It entailed relieving quality controllers of weighing and labeling functions that regularly occupied about 25 percent of their worktime. Respondent did not proffer any contract proposal on this subject, nor did it inform the Union of the change or afford it an opportunity to bargain. Respondent simply told the Union that the change was made in order to "reemphasize" the importance of the quality control function.

(3) A third change entailed the hiring later in October of three new employees as quality controllers, allegedly without any posting for bids in accordance with past practice. I am not persuaded that there was no posting. Supervisor Carolyn Jarboe claims to have seen it, and to have interviewed and rejected the one employee who made a bid, and her testimony is not contradicted by other employee witnesses who, while "believing" there was no posting, concede that it might have occurred and that subsequent openings for quality control jobs were posted. Accordingly, the allegations of discrimination and unilateral action in this regard (pars. 6(b) and 8(c) of the complaint) will be dismissed.

(4) In mid-November Respondent, without notice to the Union, admittedly implemented a shift extension proposal made during bargaining sessions whereby quality controllers were required to work 15 minutes' overtime at the end of their daily shifts so that they could communicate with incoming replace-

¹ All dates begin in 1994 and extend sequentially into 1995.

ment employees regarding mechanical or other problems. Employees received overtime pay for the additional period. Respondent views the change as simply an extension of its option to require overtime.

(5) On December 9, without discussing the matter with the Union or giving it prior notice, Respondent changed timekeeping procedure. Timeclocks were eliminated for press operators. Instead, team leaders maintained the timecards, making entries on forms used to record incidents of lateness, absence, and overtime. Employees were required to sign the forms at the end of each week, at which time they had an opportunity to note any entries. The change ostensibly was made to obviate problems caused by lost timecards, the administrative “nightmare” of having “to subtract at the beginning between when they punched in, minus their lunch, punch back in, minus the time they go home,” and abuses such as when employees clocked in early and, after spending time in the lunchroom, arrived at work stations late.

[On February 16, 1995, Respondent received a petition signed by a majority of employees stating they no longer wanted to be represented by the Union; and in a letter to the Union dated that day it withdrew recognition and advised that “it would not participate in any further collective-bargaining negotiations.”]

(6) On February 25, Respondent’s employees were given hourly wage increases ranging from 35 to 50 cents; on and after February 27, they were required to be at their work stations 6 minutes before shift starting times; and on April 1 they were accorded the benefit of a 401(K) plan. These actions admittedly were taken without giving the Union prior notice or opportunity to bargain because, in Respondent’s view, it no longer had a bargaining obligation. For the same reason, it declined to comply with a union request made on March 13 for a seniority roster and addresses of all bargaining unit employees.

Admittedly, the items in paragraphs (1), (2), (4), and (5) above involve mandatory subjects of bargaining and were unilaterally implemented by Respondent during ongoing collective-bargaining negotiations. Absent special circumstances, this would be in derogation of an employer’s bargaining obligation and violate Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 US 736 (1962). As stated in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991):

[W]hen . . . the parties are engaged in negotiations, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse is reached on bargaining for the agreement as a whole.² The Board has recognized two limited exceptions to this general rule: “[W]hen a union in response to an employer’s diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining” [citing *M & M Contractors*, 262 NLRB 1472 (1982), and *AAA Motor Lines*, 215 NLRB 793 (1974)] and when economic exigencies compel prompt action [citing *Winn-Dixie*, 243 NLRB 972 fn. 9 (1979), and *Katz*, supra at 748.]

Situations justifying unilateral action during ongoing negotiations for a collective-bargaining agreement were found where a union ignored an employer’s concern about impending loss of

employee benefits under an expiring contract (*AAA*, supra) and when an employer began to give employees polygraph tests in an effort to combat rampant vandalism of plant property when the union offered no alternative for dealing with the crisis. In both instances the union had sufficient notice and opportunity to bargain about the matter and the employer’s actions were tailored to meet the immediate need (*Austin-Berryhill, Inc.*, 246 NLRB 1139).

Here, according to undisputed and credited testimony, Respondent advised union negotiators at a bargaining session in April, and repeatedly thereafter, that it needed to extend to all employees the more stringent attendance rules then applicable to later hired employees, explaining that absenteeism impacted severely on its ability to meet production goals.³ While acknowledging that attendance was a big problem, the Union declined to respond other than in the context of an overall agreement; and it maintained that position when, on June 15, Respondent gave notice that the rule change would become effective on July 1.⁴ I find the situation sufficiently urgent to warrant unilateral implementation on that date. In this instance the Union had opportunity to bargain but opted, at its peril, to defer addressing the matter.

The changes detailed above under paragraphs (2), (4), and (5), however, were made under significantly different circumstances. Although Respondent offers cogent economic reasons for effecting the changes, it is clear that permanently changing one quarter of the regular work assignment of quality controllers,⁵ increasing their daily work schedules by 15 minutes,⁶ and altering the method by which worktime is determined for use in computing pay and imposing discipline for lateness and absenteeism⁷ are actions that materially alter “terms and conditions of employment” and, therefore, are mandatory subjects of bargaining. But, unlike the absentee problem considered immediately above, these changes are not within the limited justification for unilateral action taken prior to bargaining an overall agreement. First, there is no showing of immediacy or need for prompt action; and, second, the changes were successively implemented without prior notice to the Union. Accordingly, I conclude that Respondent violated its bargaining obligations and Section 8(a)(5) of the Act in choosing unilaterally to effect those changes.

Since the unfair labor practices were unremedied on February 16, 1995, when Respondent withdrew recognition from the Union, that action as well as the subsequent unilateral pay raise, shift extension and introduction of the 401(K) plan between February 25 and April 1, and its refusal, on March 13, to comply with the Union’s data requests are likewise in violation of Section 8(a)(5).⁸ In this respect, I find that the bona fides of the

³ At a session on May 18, Respondent presented data showing that during the previous 6 weeks 96 employees had been absent 8 hours and 69 had left early.

⁴ Respondent’s fiscal year began on July 1 and it anticipated a rash absenteeism because senior employees’ “occurrence” records were reset to zero and they again had time to “burn.” That problem did not arise with new hires because each of their occurrences remained on record for a full 360-day period.

⁵ *Storer Communications*, 295 NLRB 72 (1989) enf. sub nom. *Stage Employees IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990).

⁶ *Georgia Pacific Corp.*, 275 NLRB 67, 69 (1985), citing *Meat Cutters Local 189 v. Jewell Tea Co.*, 381 U.S. 676, 691 (1965).

⁷ *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561 (1979).

⁸ *St. John Trucking*, 303 NLRB 723 fn. 6 (1991), citing *Impressions, Inc.*, 221 NLRB 389, 403 (1975).

² Contra: *NLRB v. Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964).

decertification petition and Respondent's reliance thereon are irreparably tainted by the close proximity of the signing to the unlawful unilateral actions and by the antiunion animus shown on the record as a whole.⁹

C. Interrogations

According to undisputed and credited testimony: in December, after unilateral changes had been made and before withdrawal of recognition, press operator Michael Early was in the breakroom with Supervisor Mark Coomes early in the morning just prior to a shift change. Early had been elected president of the Local 1032 and, as a member of the Union's negotiating team, had attended all bargaining sessions. When Coomes opined that the last session was "hairy," Early agreed, stating "it got kind of wild in there at times" and then volunteered that "we were probably going to have to look into taking a strike vote after the first of the year."

Later that day, Coomes called material handler Robert Ferguson away from his work station and asked, "Have you heard anything about the Union going on strike?" Ferguson answered, "I don't know." Later that day he told Early about the inquiry.¹⁰ Ferguson had not worn a union button or otherwise revealed his stance vis a vis the Union to anyone in management.

I find the inquiry by Coomes (who admittedly held supervisory status) unreasonably tended to interfere with employee Ferguson's right guaranteed under Section 7 of the Act to keep private his sentiments as to the Union and his knowledge of its affairs. Since Ferguson had refrained from publicly identifying with the Union, Coomes compromised that right by forcing him to tell the truth or dissemble. The questioning was not casual or innocuous. Coomes deliberately called Ferguson away from his work area during working time; and, having earlier that day been advised by employee-negotiator Early, a union officer, that a strike vote might be taken early because of the state of negotiations, Coomes' purpose in approaching Ferguson is clear. He wanted to test the strength of employee support for a strike.¹¹ The inquiry violates Section 8(a)(1), as alleged.

D. Disciplinary Warning

Gloria Chester received a disciplinary warning in January 12, 1995. She was a press operator with 9 year's seniority earning \$5.55 an hour and had been an open and active supporter of the Union, having been its designated observer at the election in 1993 and its plant steward until October when she became a member of the union negotiating team.

In December, Chester was visited at her machine by Plant Manager John Domsic. Observing her union T-shirt adorned with a union button bearing the legend: "United We Bargain, Divided We Beg," he commented, "We're not divided [and] beg? We're not begging," and he asked if she would accept and wear a company shirt. Without waiting for an answer, he complained heatedly about not being able to deal directly with employees and having to attend a negotiating session that evening

and hear union representatives "argue across the table . . . [while] it was costing the company a lot of time and money." Chester shrugged and told him to talk about it to Union President Early.¹²

Pertinent facts concerning issuance of the warning are as follows: Her press having been shut down for retooling around midday on January 10, Chester opted to return an item (a "sample board") to the quality control office located at the far end of the plant floor. Having accomplished that task, she walked down the main aisle toward her press area. Halfway there she was hailed by another operator (Sue Scott) whose press was running "on automatic." It was not unusual for an operator to stop and chat briefly with another; and Scott, in particular, was popular because she always had a supply of candy on hand.

Scott complained to Chester that she had just been told by her supervisor (team leader Becky Basham) to clean up the area around other operators' machines and she asked, "What should I do?" Chester replied, "If it was me I'd tell Becky to kiss my ass." Then she proceeded on to her own press not aware that Basham had come up and was standing behind her and heard the remark. Basham claims she approached intending to break up the conversation by telling Chester to get back to work. Instead, she allowed Chester to continue on her way and then asked Scott what brought on Chester's remark. Scott volunteered she had been telling Chester how "I got a problem about cleaning up these presses."

Basham promptly located Chester's team leader (Jeff Zimmerman) and told him what happened. Then she proceeded to Plant Manager Domsic's office and told him. Shortly thereafter Chester was instructed to report to the office conference room and, with Basham, Domsic and Human Resource Manager Tina Bradford present, she was given her first written warning under Respondent's progressive disciplinary program. The warning cited her for insubordination and, at Domsic's suggestion, Bradford added "and disrespect to supervisor."

Having in mind that Chester was a longtime union activist and a member of the union negotiating team, that she received the discipline at a time when Respondent had bypassed the Union by taking several unlawful unilateral actions and what I regard as significant aberrant circumstances surrounding issuance of the warning, I am persuaded that it would not have been issued but for her union involvement.

There is ample credible evidence that use of "street talk" was prevalent on the plant floor. As such talk goes, the phrase "kiss my ass" is relatively mild. Although it was used in reference to a supervisor, it was not directed to her and I accept Chester's uncontradicted testimony that she was unaware of Basham's approach to within hearing distance. Inexplicably, Basham made no attempt to address Chester and she appears to have been unconcerned that Adams was not doing—and indeed had a "problem" with—the work assignment Basham had given her a short time earlier.

While Respondent witnesses testified that other employees previously had been given written warnings in similar situations, no documents were offered to support that assertion.¹³

⁹ Compare *Purolator Products*, 289 NLRB 986 (1988).

¹⁰ Early quotes Ferguson as saying "Coomes asked if I was going out on strike after the first of the year with the rest of the Union?" Having credited Ferguson's account, I do not accept Early's further testimony that Coomes asked another employee (Rebecca Teague, who did not appear as a witness), "Are you going to go out on strike with the rest of them?"

¹¹ *Hedaya Bros.*, 277 NLRB 942 (1985).

¹² While not alleged to be unlawful, the incident is relevant to an understanding of Respondent's stance with respect to negotiations and indeed to the Union itself.

¹³ A document received in evidence as R. Exh. 3 shows that employee Eric Blanford received a written warning in circumstances virtually identical to those involving Chester. However, that warning was issued on April 5—long after Chester's—and 2 weeks after instant case was

Further, while the warning cites Chester for “insubordination and disrespect to supervisor” and Domsic explains that “insubordination” means being away from her press, neither he nor anyone else in management, including team leader Basham, appear ever to have asked Chester why she had left her press area.¹⁴

I find issuance of the warning was discriminatory in violation of Section 8(a)(1) and (3).

E. Discharges

(1) Michael Early

Early’s employment was terminated on February 14, 1995, 2 days before Respondent received the decertification petition and withdrew recognition of the Union. He had been a press operator for over 4 years and, as noted above, he was president of Local 1032 and a member of the union negotiating team. Despite Respondent’s chronic absentee problem, he was in good standing attendance-wise and there is no indication on this record that work performance had anything to do with his termination. The circumstances of the termination are as follows:

At work on Monday, February 6, Early told Plant Manager Domsic he had to appear in court on Wednesday on a charge of driving under the influence, with a probability (based on a prior record) of receiving a 32-day sentence; and he explained that he would be able to continue to work his 6:30 a.m. to 2:30 p.m. shift while in jail if the company agreed in writing to his participation in a work-release program and would so advise the court. Domsic said he would get back to him.

After consulting with President James Vincent Sr., Human Relations Manager Tina Bradford, and Respondent’s chief negotiator (Arthur D. Rutkowski, Esq.), on the following day, Domsic told Early that “unfortunately we were not going to participate [because] . . . there was no precedent and we weren’t going to start one.” No other reason was given. Early then inquired if he could take personal leave and Domsic told him he would discuss the matter with Vincent.¹⁵

Early continued to work his regular schedule throughout the week, his trial date having been postponed until Monday, February 13. He did not work on that day. Instead he appeared in court and was sentenced to 32 days in jail to commence on Friday, February 17.¹⁶ Viewing his “options” as having been taken away, Early did not again report for work. He called in on Tuesday and asked Bradford to continue his health benefits under a “Cobra” plan. She told him the request was premature because he had not been terminated and would become a voluntary quit only if he chose to incur a third unexcused absence on the following day. When Early pressed the matter, she effected the necessary Cobra paperwork and deemed his request as tantamount to resignation on February 14.

assigned for trial. It is therefore not relevant to the question of Respondent’s practice prior to disciplining Chester.

¹⁴ Asked at trial (Tr. 74), “[W]as she supposed to be at her assigned press at that time?” Domsic answered, “I wouldn’t know, and it doesn’t matter . . . [because] you’re not supposed to interrupt or disturb other operators while they’re trying to work.” The latter constitutes a new and shifting reason for the discipline.

¹⁵ Although denied by Domsic, I find it likely that Early requested leave. He was well aware that under Respondent’s “no-fault” absentee policy (three unexcused absences within a 90-day period=termination) and that, his request for work release approval being denied, he could save his job only by obtaining approved leave.

¹⁶ Respondent had contemporaneous knowledge of that result (Tr. 867–868).

In these circumstances, and in light of other unlawful conduct found on this record, I find a prima facie showing that failure to approve Early’s work release and leave request was motivated at least in significant part by his protected activities as a negotiator and president of the Local. Accordingly, Respondent has the burden of establishing that those actions would have been taken even absent his union involvements.¹⁷

The sole reason given Early for Respondent’s not consenting to his participation in the work release program was plant manager Domsic’s cryptic statement that “there was no precedent and we weren’t going to start one.” At trial, he explained “I would be accepting responsibility for something or I would not be asked to sign a document.” Yet when asked, “What responsibility would you all have had other than to say he can come to work?” he responded, “I’m not certain” adding circularly “I don’t even want to get involved or set a precedent.” Later he offered a new reason “I don’t want to be in a position in the future to have to [spend time to] decide is a rapist allowed to stay, an alcoholic allowed to stay, whatever. Its got nothing to do with my job and what our company is there to be doing.” Having in mind that Early was a long-term skilled press operator and that there is not a scintilla of evidence that alcohol ever affected his job performance or that he posed any threat to others at the plant, I am not persuaded that the proffered reasons are anything other than inartful pretext.

As noted, Early alternatively asked Domsic for extended leave. Although tacitly denied, similar requests of other employees had been approved in the past for medical reasons, including a 27-day stay in a hospital for substance abuse. Indeed, in early 1993 an employee was granted a leave of nearly 2 month’s duration to “clear up a legal matter between her and her ex-husband.”

In these circumstances, I find that lack of consent to Early’s work release and leave requests, and consequent termination under Respondent’s absentee policy was discriminatory in violation of Section 8(a)(1) and (3).

(2) Wanda Nantz

Nantz was hired by Respondent as a press operator in April 1992 and worked continuously in that capacity until March 20, 1995, when she was discharged. She wore various union insignia (buttons, hats, and T-shirts) at the plant during the 1992–1993 election, campaign, and at the time of her severance she was treasurer of the Local having earlier been steward.

On arriving at work for her second shift assignment (2:30 to 10:30 p.m.) on March 20, Nantz was assigned to a semi-automatic press configured to produce small plastic items (“boots”) on a relatively fast cycle of 100 “shots” (mold openings for retrieval of completed items) every hour or one every 36 seconds, a cycle she had run only once before. When the mold opened, operators were expected to open a “gate,” extract the items produced, insert washers in the mold, close the gate to resume the cycle, trim the items, place them in a box and sign (initial) the box. In addition, every hour on the half hour they were to write down on a “production log” the cycle count recorded on the press at the beginning of the hour, its closing cycle count, make the subtraction showing the number of shots (items) produced each hour, e.g., 299785–299722=63, and initial that entry.

¹⁷ *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Nantz accomplished all of those tasks during the first 2 hours except for making the subtractions, choosing to defer doing so in favor of keeping up production by doing something (“staying on the gate”) “they always stressed.”

At about 4:45 p.m., Manager Domsic came by while Nantz was working the press. After examining the log, he called her attention to the omissions. Nantz explained that the press was running on a fast “boots” cycle and asked if he wanted her to make the subtractions right away. When he gave her the log, Nantz halted production long enough to make the entries.

Domsic immediately located and informed Nantz’ supervisor (team leader Joe McLean) of the omissions. According to Domsic (Tr. 758): “I told him that she needed to be written up and we knew it was her last occurrence.”¹⁸ Domsic amplified later in his testimony (Tr. 812), stating: “I said [to McLean] she needs to be written up. And he reminded me that it’s her last time . . . because everybody knew that she was on the verge of being terminated over the smoking thing.” When McLean told him there was no readily available operator to take her spot, Domsic responded: “We will just wait until the end of the evening and then do it.”¹⁹

Nantz credibly testified that her next contact with a supervisor was at about 5:45 p.m. when a trainee team leader (Bill Light) came by, timed her press, and left without comment. At 6:30 p.m. she entered the cycle counts and made the subtraction. About 5 minutes earlier, McLean (accompanied by Light) examined the log, remained in the area for about 10 minutes, and then left without reexamining the log or saying anything to Nantz. Ten minutes later McLean returned with a relief operator, told her to get her things, escorted her an area near the back door, told her she was terminated and asked her to sign a warning notice in which she was cited for deficient work quality and insubordination. Nantz refused and walked out the door.²⁰

While there is no direct showing that Respondent knew Nantz had been steward and was treasurer of the Local, she had openly evinced pro union sympathies during the successful union organizing campaign and, perhaps more significantly, management was aware that she had not signed the February, 1995 decertification petition. Again, based on the whole record, I conclude that her citation and discharge were motivated at least in significant part by her perceived prounion stance.

Would those actions have been taken even apart from that circumstance? Here too Respondent fails to meet its burden of persuasion.

Manager Domsic explains that the two items listed on the citation (deficient work quality and insubordination) involve only

¹⁸ The latter comment related to an incident 1 month earlier when Domsic caught Nantz smoking in a work area. At that time he imposed a 3-day suspension and warned her that a subsequent dereliction of any kind would result in discharge. The smoking ban had been in force since September 13, 1994. There is no allegation that the suspension was unlawful.

¹⁹ McLean has a different recollection of this conversation. He claims Domsic simply told him to talk to Nantz about the omissions and that he promptly did so.

²⁰ McLean states (Tr. 931) that he examined the log “right at 6:30” and found no subtraction. Without mentioning the matter to Nantz, he went to the nearest phone and reported the omission to Domsic who was then at home. Assertedly, Domsic then told him to write her up. He denies having told her she was terminated. I find probable and conclude that McLean called to tell Domsic another operator was now available and that Domsic instructed him to give her the already prepared citation and tell her she was discharged.

one dereliction, i.e., after writing down opening and closing cycle counts on her production logs during each of her first two hours’ work on an unfamiliar fast operating press, Nantz failed also to make and insert subtractions (“shot counts”) showing the number of items produced each hour. Admittedly, he was concerned only about her failure to perform a required “control” function and not about possible malfunction of the press or slow production. Neither he nor her immediate supervisors called in a technician to check the press or alternatively told her to speed up; and quality control personnel were required to and did make hourly inspections of items she completed without noting any problem. Domsic also states that the written citation would not in itself have resulted in discharge apart from the earlier 3-day suspension for smoking near her press coupled with a warning that any further dereliction would result in immediate discharge.

The requirement for an hourly shot count calculation had been in effect nearly 5 months prior to the day Nantz was discharged and during that period no one, including Nantz, was cited for any omissions on the production log although omissions did occur. Indeed, Nantz testified without contradiction that there were three consecutive shot count omissions on her log for March 20, two for which she was responsible and one for the last hour of the shift preceding hers (Tr. 724). Further, there were numerous unpunished shot count omissions subsequent to her discharge and Domsic concedes that no one checks logs on a daily basis. They are simply turned in after the third shift for filing by the receptionist (Tr. 773–774).

I conclude that issuance of the citation to Nantz, and her consequent discharge, was discriminatory, pretextual, and meant to penalize her for supporting the Union and to deter other employees from doing so, in violation of Section 8(a)(1) and (3).

CONCLUSION OF LAW

Respondent violated the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7).

REMEDY

In addition to the customary cease-and-desist order and requirement for notice posting, my order, among other things, will require Respondent to: (1) on request of the Union, bargain, rescind unlawful unilateral changes and provide data relevant to its collective-bargaining responsibilities, (2) rescind disciplinary warnings issued to Gloria Chester and Wanda Nantz, and (3) offer Michael Early and Wanda Nantz immediate, permanent, and unconditional reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Also, and because the serious and egregious misconduct shown here, demonstrates a general disregard for fundamental rights guaranteed employees by Section 7 of the Act, I find it necessary to issue a broad order requiring Respondent to cease and desist from any further infringements of those rights.²¹

[Recommended Order omitted from publication.]

²¹ *Hickmont Foods*, 242 NLRB 1357 (1979).