Ryder/Ate, Inc. *and* Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO. Cases 21–CA–32146 and 21–CA–32285

July 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 29, 1998, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

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

The Board has reviewed 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 Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ryder/ATE, Inc., Pomona, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Michelle Woods, Edwin Lear, and Maria Velasquez, and any other employee discharges, suspensions, disciplinary warnings, or other discipline notices or memoranda issued pursuant to the unlawful April 24, 1997 attendance policy, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, suspensions, warnings, or other discipline will not be used against them in any way."

2. Substitute the following for paragraph 2(d), delete paragraph 2(f), and reletter the subsequent paragraphs.

"(d) Within 14 days from the date of this Order, offer full reinstatement to Michelle Woods, Edwin Lear, Maria Velasquez, and all other employees discharged, suspended, or otherwise disciplined or denied work opportunities to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

MEMBER HURTGEN, concurring.

I agree with my colleagues that the Respondent violated Section 8(a)(1) and (5) by unilaterally implementing a new attendance policy without affording the Union an opportunity to bargain about the change and its effects on bargaining unit employees. I also agree with the findings that discipline administered to employees under that policy violated Section 8(a)(1) and (5).

I disagree with my colleagues in one respect. They adopt the administrative law judge's rationale that the management-rights clause in the expired 1996–1997 collective-bargaining agreement did not clearly and unmistakably waive the Union's right to bargain over "reasonable work rules and rules of conduct" and over "amend[ments to] these rules from time to time." In my view, such contractual language would clearly cover the attendance policy changes in dispute and would privilege those changes. Indeed, this language is almost identical to the management-rights language which I have found to privilege attendance policy revisions. See my dissent in *Dorsey Trailers,* 327 NLRB 835 (1999). I find, however, that, because the 1996–1997 contract had expired at the time the policy was implemented, the Respondent cannot rely on this language to privilege the changes in its policy. Accordingly, I join my colleagues in finding the implementation unlawful, as well as the discipline administered under the changed policy.[1]

[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.

General Manager Wayne Fritz testified in support of the Respondent's "economic exigencies" defense to the allegation that it unlawfully refused to bargain with the Union over its new attendance policy. Contrary to the judge, we acknowledge that Fritz' testimony amounted to a claim of more than hypothetical injury. Rather than testifying, as the judge found, that the Respondent theoretically could be subjected to penalties under the liquidated damages clause in its transportation services contract for each run it missed, Fritz testified that "[o]ur client Foothill Transit was imposing and threatening us with very significant liquidated damages, because we weren't covering all the trips." This testimony suggests that the Respondent was experiencing some economic repercussions, but as the judge correctly found, there is insufficient evidence to substantiate the claim of dire financial emergency. We do not pass on whether, if substantiated, it could immunize a failure to bargain before implementing any new attendance policy. As a bare assertion, it clearly does not bring the Respondent's conduct within the "economic exigencies" exception to the duty to bargain over employees' terms and conditions of employment. *RBE Electronics of S.D.,* 320 NLRB 80, 81 (1995). See also *L & L Wine & Liquor Corp.,* 323 NLRB 848, 851–852 (1997).

We also note that the judge correctly held that a management-rights clause does not survive contract expiration. *University of Pittsburgh Medical Center,* 325 NLRB 443 (1998), citing *Holiday Inn of Victorville,* 284 NLRB 916 (1987). Her observation that such a provision is not a mandatory subject of bargaining, however, is incorrect. See *American National Insurance Co.,* 343 U.S. 395, 408 (1952).

[1] Unlike my colleagues, however, I would not provide an affirmative bargaining order to remedy unilateral change violation.

Lisa E. McNeill, Esq. and *Ariel Sotolongo, Esq.,* for the General Counsel.

Thomas A. Secrest, Esq., of Cincinnati, Ohio, for the Respondent.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. This case was heard in Los Angeles, California, on June 24, 1998. The General Counsel alleges that on April 24, 1997,[1] Respondent Ryder/Ate, Inc., unilaterally implemented a new attendance policy without first providing notice and an opportunity to bargain to the Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO (the Union) regarding this change and the effect of this change on Respondent's drivers. The General Counsel further alleges that employees were thereafter discharged based upon the unlawfully instituted attendance policy.[2]

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses,[3] to introduce relevant evidence, and to argue the merits of their respective positions. On the entire record[4] and after considering the briefs of counsel for the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION, AND REPRESENTATIVE STATUS

Respondent is a Delaware corporation with offices and a facility located at 200 South East End Avenue, Pomona, California, where it operates an intrastate transit system. During the 12-month period ending June 30, Respondent derived gross revenues in excess of $250,000, performed services valued in excess for $50,000 for the Los Angeles County Metropolitan Transportation Authority, and purchased and received goods valued in excess of $50,000, which goods originated outside the State of California. Respondent 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.

The Union is a labor organization within the meaning of Section 2(5) of the Act. The Union represents all full-time and regular part-time drivers employed by Respondent at its facility located at 200 South East End Avenue, Pomona, California, a unit of employees which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

II. BACKGROUND

In late 1996, Respondent was awarded a contract from Foothill Transit Services, Inc. to operate a portion of the Foothill bus transit system. Prior to Respondent's being awarded the contract, this service was performed by Laidlaw Transit Services, Inc. at a facility in Upland, California. The Union represented Laidlaw busdrivers pursuant to a collective-bargaining agreement effective by its terms from March 6, 1996, through March 31, 1997. In January 1997, upon commencing operations, Respondent hired a majority of Laidlaw unit employees. It retained the employees' prior wage rates and implemented its own operating rules including an attendance policy which required termination for 10 unexcused absences within a rolling 12-month period. The operation moved to Pomona, California.

Respondent agrees that it is a successor of Laidlaw and as such, voluntarily recognized the Union. By letter of February 19, the Union set forth its understanding that Respondent had agreed to assume the terms of the 1996–1997 Laidlaw collective-bargaining agreement. On February 28, Union President Rick Middleton provided Business Agent Gilbert Baltazar a facsimile transmission with a signature purporting to be that of Respondent's general manager, Dennis M. Costello, agreeing to Respondent's assumption of the terms of the Laidlaw 1996–1997 contract.[5]

III. UNFAIR LABOR PRACTICES

On March 1, Wayne Fritz took over as general manager of Respondent's Pomona facility. He learned that Foothill Transit was threatening to impose liquidated damages of $750 per missed trip pursuant to Respondent's contract to provide transportation services. According to Fritz, the inability to satisfy the customer's requirements was due to inordinate absenteeism. Fritz estimated that there were 60 to 80 absences per week in March. In approximately mid-March, he examined the current absentee policy and determined it was too lenient. Based upon his examination of the management-rights clause in the 1996–1997 collective-bargaining agreement, Fritz concluded that he could alter the absentee work rules. He therefore began drafting a new absentee policy.

The parties met on March 17 to commence negotiations for a collective-bargaining agreement. Present for the Union were Business Agents Gilbert Baltazar and Lou Ippolito as well as Shop Steward Michelle Woods. Respondent was represented by Fritz and Thomas Hock, attorney. All parties agree that there was no discussion regarding an attendance policy at this meet-

[1] All dates are in 1997 unless otherwise mentioned.

[2] The charge in Case 21–CA–32146 was filed by the Union on July 14. The charge in Case 21–CA–32285 was filed by the Union on September 19 and amended on December 9. The amended consolidated complaint issued June 10, 1998.

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor as well as the inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] The parties agree to correction of certain inaccuracies in the transcript. The General Counsel's motion to correct the transcript is granted to the extent of this agreement. With regard to the one area of disagreement, the motion is denied.

[5] Costello was no longer employed at the Pomona facility at the time of this hearing. Respondent acknowledged that the facsimile transmittal number on the document was that of Respondent's but refused to agree that the signature on that document was Costello's. Respondent also refused to agree that it assumed the Laidlaw 1996–1997 collective-bargaining agreement. Based upon the record as a whole, I find that Respondent adopted the 1996–1997 Laidlaw collective-bargaining agreement. Specifically, I note Baltazar's unrebutted testimony that Costello verbally agreed to assumption on behalf of Respondent and retained a business record to that effect. I further note Fritz' testimony that when he assumed responsibility for Respondent's facility and desired to change the attendance policy, he consulted the management-rights clause of the 1996–1997 Laidlaw collective-bargaining agreement to determine whether he could alter the existing policy. Finally, I note that when the Union and Respondent began bargaining for their new contract, they utilized the 1996–1997 Laidlaw collective-bargaining agreement for a guide.

ing. However, according to Fritz and Hock, when the meeting adjourned, Fritz gave a copy of his new attendance policy to Baltazar who said he would take a look at it. Baltazar denied that he was given the proposal until October. A second meeting was held on March 25. The parties used the 1996–1997 Laidlaw contract to discuss changes or agreements and went through the language of each article. All parties agree that there was no discussion about the attendance policy during these negotiations. The third meeting, held on March 26, continued this process. At no time was the attendance policy discussed. Neither Ippolito's nor Hock's notes of the negotiation sessions mention a proposed attendance policy. Hock explained that Fritz handed Baltazar the proposal after negotiations were completed on March 17 and he did not write this in his notes because he did not consider it to be a part of negotiations.

Because Fritz had heard nothing further from the Union regarding the revised attendance policy, he decided to implement it. He did not speak with the Union and advise them that the plan would be implemented. Unit members were notified on April 21 that a new attendance policy would be implemented on April 24. On April 23, Shop Steward Michelle Woods called Baltazar to ask about the new policy. Baltazar, in turn, called Fritz and left a voice mail message. Fritz returned the call to Baltazar later that afternoon. In response to Baltazar's questions, Fritz stated that Respondent was in the process of adopting a new attendance policy because the prior policy was too lenient. Fritz stressed, according to Baltazar, that the problem was so severe, "that he had to do something right away." Baltazar protested that the subject should be discussed at their next meeting. Fritz countered that he had to put the new policy into place immediately. There is no dispute that the new attendance policy is stricter. For instance, tardiness is assessed points under the new plan. An automatic discharge occurs when an employee is assessed 20 points within any 12-month period or 10 points within any 90-day period. Accordingly, I find that the changes were material, substantial and significant.

Although the parties finalized language for the new contract on May 19, there was no discussion at that time about the new attendance policy. The parties agreed to defer negotiation on economic aspects of the new contract until after a decertification election was held.

On May 29, Shop Steward Michelle Woods was terminated pursuant to the April 21 attendance policy. Baltazar filed a grievance regarding the discharge. Grievances were also filed regarding other terminations under the attendance policy. Approximately 30 employees have been discharged pursuant to the policy.

On June 20 the decertification election was held. The Union was certified as the exclusive bargaining representative of unit employees on June 30. On July 22, the negotiators met. Business Agent Ippolito presented Fritz with an alternate attendance policy and asked him to consider it. Fritz agreed to do so. On August 28, the negotiators met and Fritz rejected the Union's proposed attendance plan stating that Respondent would, "stick with the one they implemented." The Union continues to object to that policy as unilaterally implemented. A contract, effective from November 1, 1997, through October 31, 2000, was executed on October 22, 1997.

According to Fritz, at the October meeting when the contract was finalized, he gave all union representatives copies of the new attendance program and explained its operation. Fritz testified that none of the union representatives requested bargaining at that time.

Both the 1996–1997 contract and the 1997–2000 contract contain the following identical management-rights clause:

> The Company retains, solely and exclusively, all the rights, powers and authority that it exercised or possessed prior to the execution of this Agreement, except as specifically amended by an express provision of this Agreement. Without limiting the generality of the foregoing, the rights, powers and authority retained solely and exclusively by the Company and not amended by this Agreement include, but are not limited to the following: to manage, direct and maintain the efficiency of its business and personnel; to manage and control its facilities, equipment and operations, to create, change, combine or eliminate jobs and operations in whole or in part; to discontinue and/or to subcontract work for economic or other reasons; to direct the work force; to increase or decrease the work force and determine the number of employees needed; to hire, transfer, promote, demote, suspend, discharge and maintain the discipline and efficiency of its employees; to layoff employees; to establish operating standards, schedule of operations and work load; to specify or assign work requirements and require overtime; to assign work and decide which employees are qualified to perform work; to adopt reasonable work rules and rules of conduct, appearance and safety and penalties for violation thereof, and to amend these rules from time to time; to determine the type and scope of work to be performed and the services to be provided; to determine the methods, processes, means and places of providing services; to adapt, install or operate new equipment and operations; to determine the location and relocation of operations and to effect technological changes. Nothing contained in this Agreement is intended or shall be construed as a waiver of any of the usual inherent and fundamental rights of management whether the same has been exercised heretofore or not.

IV. ARGUMENTS

Not surprisingly, all parties rely to some extent upon *NLRB v. Katz,* 369 U.S. 736, 743 (1962), in which the Court held that an employer's unilateral changes in mandatory subjects of bargaining are per se refusals to bargain:

> A refusal to negotiate *in fact* as to any subject which is within §8(d), and about which the union seeks to negotiate, violates §8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.

In *Katz,* the employer made unilateral changes to sick leave, merit pay, and wages without negotiating with the union. The Court found this unilateral action violated the Act without regard to the employer's good faith. However, the Court noted that there might be some circumstances, which would justify unilateral action. Narrow exceptions dealing with impasse, necessity, and waiver have developed to that end.

Counsel for the General Counsel argues that Baltazar, Ippolito, and Woods should be credited and that, based upon their testimony, the record establishes that no notice, timely or otherwise, was afforded the Union with regard to modification of the attendance program. Rather, according to counsel for the General Counsel, the Union learned of the modification and implementation of the new policy only when it was a fait ac-

compli. Thus, no waiver of the right to notice and opportunity to engage in meaningful bargaining could possibly have occurred. Counsel for the General Counsel also notes an absence of evidence to support an argument that economic exigencies or business justifications warranted unilateral action. Finally, counsel for the General Counsel contends that reliance on the management-rights clause of the 1996–1997 contract is misplaced not only because that contract had expired at the time of the unilateral action but also because there is no clear and unmistakable waiver contained in the 1996–1997 management-rights clause.

Respondent argues that it provided the Union with timely notice of its intent to modify the attendance policy when on March 17, Fritz gave Baltazar a copy of the new attendance policy and told Baltazar he wanted to implement the new policy. According to Fritz, Baltazar responded that he would take a look at it. Hearing nothing from the Union, on April 21, all employees were notified of a meeting on April 23 and implementation of the attendance policy on April 24. Accordingly, Respondent urges that if Fritz is credited, the Union was given appropriate notice and simply never asked to bargain thereafter. In this regard, Respondent notes that because the attendance policy was not a part of the 1996–1997 collective-bargaining agreement or a subject of the 1997 negotiations, it was free to make the policy change during negotiations regardless of whether an impasse had been reached on the issue.

Respondent's second argument focuses on economic circumstances, which it claims permitted unilateral implementation of the new attendance policy. Respondent relies specifically on the worsening of employees' attendance which it claims caused it to suffer thousands of dollars a day in fines.

Finally, Respondent claims clear and unmistakable waiver for two reasons: First, the Union failed to request bargaining after Fritz provided Baltazar with a copy of the proposal on March 17. Second, Respondent argues that, assuming that it was bound by the 1996–1997 Laidlaw agreement, the management-rights clause of that agreement allowed it to adopt reasonable work rules and amend these rules from time to time.

V. CREDIBILITY

On balance, after consideration of the record as a whole, I credit the testimony of Baltazar, Ippolito, and Woods and find that no notice was given to the Union at any time prior to implementation of the modified attendance policy. This finding is based upon several factors including the relative demeanor of the witnesses and various inherent probability factors. Baltazar, Ippolito, and Woods appeared to be truthful witnesses. Moreover, they corroborated one another's testimony that they did not receive notice regarding the modified attendance policy and were not given a copy of a proposed modification after negotiations on March 17.

Although Fritz was a somewhat straightforward witness, I am unable to find that he gave Baltazar the modified attendance prolicy on March 17, as he claimed, because his demeanor belied this assertion. Moreover, there are simply too many inherent improbabilities in this assertion. First, I note that Fritz had only begun serving as terminal manager on March 1 and did not examine the attendance policy until March 14. Fritz initially stated, and I do find this believable, that he simply examined the management-rights clause of the expired 1996–1997 contract and determined that he had the authority to change work rules as necessary. As an afterthought, he added that he gave a copy of his proposed change in the policy to the Union.[6] Second, Respondent's position throughout this litigation is that it was not bound by the 1996–1997 contract. Accordingly, Fritz' reliance on the management-rights clause of that contract appears incongruous and was not explained. Similarly, if the Union had been given a copy of the proposed modification on March 17, it is inexplicable that the parties did not discuss it before, after or during their meetings on March 25 or 26. It is further unexplained why, suddenly, on April 21, Respondent determined to implement without first calling the Union and asking whether they had had a chance to examine the proposal given to them on March 17. Finally, I note that at one point, Fritz stated that he drafted the revised policy "towards the end of April." These factors lead me to conclude that the Union was never given a draft proposed modification prior to implementation of the new attendance policy.

Moreover, I credit Baltazar and Woods' testimony regarding their telephone conversation on April 23 and I find that this was the first time that Baltazar knew of any changes to the existing attendance policy.

VI. ANALYSIS

Section 8(d) of the Act requires that parties bargain in good faith regarding mandatory terms and conditions of employment including wages and hours. It is not disputed among the litigants that the attendance policy is a mandatory subject of bargaining.[7] Thus, before implementing changes to the attendance policy, the employer is obligated to provide notice and opportunity to bargain absent waiver by the Union, economic exigencies justifying unilateral action, or impasse in bargaining.

Based upon my credibility resolution, I find that no notice was given to the Union by Respondent and, in fact, the Union was unaware of the proposed change until the change was announced. Under these circumstances, the Union's failure to request bargaining after learning from Union Steward Woods on April 23 that the changes were to go into effect on April 24 does not constitute a waiver of the right to bargain.[8] Moreover, as a factual matter, I note that when Baltazar and Fritz discussed the newly announced absence control plan during the afternoon of April 23, Baltazar protested immediate implementation and requested that the matter be made a subject of bargaining at the next negotiation session. Fritz told Baltazar he had to implement the new policy immediately. Accordingly, I conclude that the Union was presented with a "fait accompli" and that no waiver occurred.

In addition, I reject Respondent's argument that because the attendance policy was not a contract proposal or a subject of

[6] Fritz was asked what his next step was after drafting a modified attendance plan. He stated, "I looked at the [1996–1997] labor agreement . . . in the management-rights section it is indicated that we had the right to change work rules and rules of conduct, and so I went forth in the implementation, and gave the—gave Gill Baltazar a copy of the—." Here, Fritz was interrupted by his counsel who asked when this occurred and then asked what Fritz did when he gave Baltazar the copy of the revised policy.

[7] See, e.g., *Columbian Chemical Co.,* 307 NLRB 592 (1992).

[8] In *Mercy Hospital of Buffalo,* 311 NLRB 869, 872 (1993), the Board held that "[i]n the absence of clear notice of the intended change, there is no basis on which to find that the Union waived its right to bargain." The Board also noted that it would not find a waiver when a change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the employer will not bargain.

negotiation, it was free to alter the attendance policy absent an impasse in negotiations. As noted above, I find that even when the Union was presented with a "fait accompli," Baltazar called Fritz and unsuccessfully sought negotiation.

Respondent's second argument is that extreme economic circumstances warranted quick, unilateral action. As Respondent correctly notes, economic exigencies, which require prompt action sometimes, excuse the duty to bargain. *RBE Electronics of S.D.,* 320 NLRB 80 (1995), citing *NLRB v. Katz,* supra, and subsequent Board decisions. However, as noted in *RBE Electronics,* the economic exigencies exception to the duty to bargain has been limited to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" 320 NLRB at 81. The Board also noted in *RBE Electronics* that absent a dire financial emergency, loss of significant accounts or contracts are not circumstances satisfying the economic exigency exception. Id. citing *Farina Corp.,* 310 NLRB 318, 321 (1993), and *Angelica Healthcare Services,* 284 NLRB 844, 852–853 (1987).

In support of its economic exigency argument, Respondent relies on the testimony of Fritz regarding Respondent's contract to provide transportation services. According to Fritz, this contract contains a liquidated damages clause pursuant to which the customer may impose $750 for each run that is missed by Respondent. Fritz testified that damages could be thousands of dollars a day in response to a hypothetical question, "If a significant number of drivers were absent and we had no replacement drivers to cover, if a trip was missed there would be a fine imposed of—." This evidence is insufficient to substantiate a dire financial emergency. Moreover, there is no evidence that the customer had actually imposed fines or that the contract was seriously threatened due to the absentee problems experienced by Respondent.

Respondent's final argument focuses on waiver by the Union of the duty to bargain.[9] Although Respondent disputes adoption of the 1996–1997 Laidlaw agreement, it argues that assuming arguendo that it did adopt the 1996–1997 Laidlaw agreement, the management-rights clause of that contract provides a clear and unmistakable waiver of the duty to bargain regarding "reasonable work rules and rules of conduct." The issue may be decided without determining whether, indeed, Respondent adopted the 1996–1997 Laidlaw contract. That contract expired March 31, 1997. Respondent implemented the new attendance policy on April 24; that is, after expiration of the contract. Management-rights clauses do not survive contract expiration because they are not a term and condition of employment. Rather, such clauses constitute a waiver of the union's right to bargain. However, even if the management-rights clause had been in effect and had been adopted by Respondent, there is no clear and unmistakable waiver of the right to bargain about revision of the existing absentee policy. Arguably, such a waiver might be inferred in the language which allows the employer to adopt reasonable work rules and rules of conduct. However, an inference is an insufficient basis upon which to find a waiver of the statutory right to bargain. A clear and unmistakable waiver is not present in the management-rights clause.[10]

[9] Respondent initially argued that the Union waived the bargaining obligation when Baltazar failed to request bargaining on March 25 when Fritz gave him the attendance proposal. Based upon my credibility resolutions, I find that Fritz did not give Baltazar a copy of the attendance proposal on March 25 and that when Baltazar became aware of the new attendance policy on April 23, even though it was essentially a fait accompli, he immediately called Fritz and requested that the matter be discussed in negotiations. Accordingly, I reject Respondent's argument.

CONCLUSIONS OF LAW

1. By changing the terms and conditions of employment of its bargaining unit employees by implementing a new attendance policy without prior notice to the Union and without affording the Union an opportunity to bargain about the change and the effect of that change on bargaining unit employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By discharging Michelle Woods, Edwin Lear, Maria Velasquez, and discharging, suspending, or disciplining other employees based on the terms of the unilaterally imposed attendance policy, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent must cease and desist implementing the new attendance policy, rescind the unilaterally implemented attendance policy, and cease disciplining employees pursuant to this policy. The Respondent shall also be ordered to make whole all employees discharged, suspended, or disciplined pursuant to the unilaterally implemented attendance policy. As to those employees discharged, Respondent shall be ordered to offer them immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority, or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Respondent shall also be required to remove from its files any and all references to the unlawful discharges, suspensions or discipline and to notify all employees so affected in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Ryder/ATE, Inc., Pomona, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from changing the terms and conditions of employment of its bargaining unit employees by implementing a new attendance policy without prior notice to the Union and without affording the Union an opportunity to bargain

[10] See *Metropolitan Edison v. NLRB,* 460 NLRB U.S. 693 (1983).

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

about the change and the effect of the change on bargaining unit employees and discharging Michelle Woods, Edwin Lear, Maria Velasquez, and discharging, suspending, or disciplining other employees based on the terms of the unilaterally imposed attendance policy and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain collectively with the Union as the exclusive representative of the bargaining unit employees concerning any material changes in the attendance policy.

(b) Rescind the April 24, 1997 attendance policy.

(c) Remove from the files of employees all disciplinary warnings, notices or memoranda issued pursuant to the April 24, 1997 attendance policy.

(d) Offer all employees discharged, suspended, or otherwise disciplined or denied work opportunities as a result of the institution of the April 24, 1997 attendance policy immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

(e) Make whole all employees who were discharged, suspended, or otherwise denied work opportunities as the result of institution of the April 24, 1997 attendance policy in the manner set forth in the remedy section of this decision.

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

(g) 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 backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Pomona, California, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 24, 1997.

(i) 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.

[12] If this Order is enforced by a judgment of the 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."

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 change the terms and conditions of employment of our full-time and regular part-time drivers by implementing a new attendance policy without prior notice to Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO and without affording the Union an opportunity to bargain about the change and the effect of this change on our full-time and regular part-time drivers.

WE WILL NOT discharge Michelle Woods, Edwin Lear, Maria Velasquez, or discharge, suspend, or otherwise discipline other employees based on the terms of the unilaterally imposed April 24, 1997 attendance policy.

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

WE WILL, on request, bargain with the Union as required by law.

WE WILL rescind the April 24, 1997 attendance policy.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Michelle Woods, Edwin Lear, Maria Velasquez, and any other employees discharged, suspended, or otherwise disciplined to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michelle Woods, Edwin Lear, Maria Velasquez, and any other employees discharged, suspended, or otherwise disciplined whole for any loss of earnings and other benefits resulting from their discharge, suspension, or other discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Michelle Woods, Edwin Lear, Maria Velasquez, and any other employees discharged, suspended, or otherwise disciplined pursuant to the April 24, 1997 attendance policy, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges, suspensions or other discipline will not be used against them in any way.

RYDER/ATE, INC.