

**Priority One Services, Inc. and Michael F. O'Connor,
Petitioner and Industrial Technical & Profes-
sional Employees Union, AFL-CIO.** Case 11-
RD-598

August 30, 2000

ORDER AFFIRMING DISMISSAL
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Petitioner's request for review of the Regional Director's administrative dismissal of the instant petition. The request for review raises no substantial issues warranting reversal of the Regional Director's action.¹ Accordingly, the dismissal is affirmed. See *Supershuttle of Orange County*, 330 NLRB 1016 (2000).

In affirming the dismissal, we emphasize that "[a] unilateral change not only violates the plain requirement that the parties bargain over 'wages, hours, and other terms and conditions,' but also injures the process of collective bargaining itself." *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992). "It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees." *Page Litho, Inc.*, 311 NLRB 881 (1993) (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967)). This is so because unilateral action by an employer "detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless." *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979) (citing *NLRB v. General Electric Co.*, 418 F.2d 736, 748 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970)).

Here, the specific unilateral changes—a 9.5-percent increase in employee health insurance premiums and a change in the method of refunding excess employee health and welfare benefits—were serious enough to undercut the union's ability to function as the employees' bargaining representative and interfere with employee free choice in an election. Thus, the unilateral changes substantially affect all unit employees and directly impact employee compensation, one of the fundamental subjects concerning which employers must bargain pursuant to Section 8(d) of the Act. See *Brannan Sand &*

Gravel Co., 314 NLRB 282 (1994) (finding that employer's unilateral changes in deductions, copayments, and employee contributions in the employee health insurance plan constituted an 8(a)(5) violation); *Circuit-Wise, Inc.*, 308 NLRB 1091 (1992) (finding that employer's act of unilaterally increasing employee contributions to a health insurance plan, even if the increases were merely passed along from the insurance carrier, constituted an 8(a)(5) violation). Further, the likely taint that these changes had on the decertification effort is demonstrated by the fact that the petition at issue was filed only slightly more than 2 months after the unilateral changes made by the Employer.

Accordingly, these unilateral changes are not simply benign technical changes, but are precisely the type of changes that would tend to undermine the Union's perceived authority as the bargaining representative of the employees and to interfere with the employees' free choice in an election.² As such, the alleged unfair labor practices are of such a nature that they would, if proven, preclude the existence of a question concerning representation. See *Big Three Industries, Inc.*, 201 NLRB 197 (1973).

MEMBER HURTGEN, dissenting.

In accordance with my dissent in *Supershuttle of Orange County, Inc.*, 330 NLRB 1016 (2000), I would grant the Petitioner's request for review. In addition, even accepting *Supershuttle* as valid, I question whether the alleged 8(a)(5) violations here are of such a nature as to preclude a question concerning representation. See *Liberty Fabrics*, 327 NLRB 38 fn. 3 (1998).

In this latter regard, my colleagues recite at length the evils of 8(a)(5) conduct. However, the issue is whether there is a causal nexus between 8(a)(5) conduct and employee disaffection from the Union. In this regard, the Board cases draw a distinction between (1) a complete refusal to recognize the union and (2) other kinds of 8(a)(5) conduct. In regard to the former, there is a rebuttable presumption of a causal relationship. In regard to the latter, "there must be specific proof of a causal relationship."¹ The instant case does not involve a complete refusal to recognize and bargain with the Union.² And

² Thus, we conclude that a hearing is unnecessary because the nature of these particular changes has convinced us that they had the inherent tendency to undercut the Union's support and preclude a question concerning representation. Contrary to our dissenting colleague, therefore, we have not established a conclusive presumption that unilateral changes in terms and conditions of employment would cause employee disaffection. If the changes had been less serious, such as, e.g., a change in the payday from Sunday to Monday, we might reach a different conclusion. In the circumstances of this case, however, we find that the unilateral changes instituted by the Employer were inherently likely to affect employee support for the Union, and thus a hearing is unnecessary to establish the "causal nexus."

¹ *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996).

² Compare *Big Three Industries*, 201 NLRB 197 (1973), where employer never bargained in good faith after the certification.

¹ The decertification petition was filed on July 8, 1999. On August 31, 1999, Region 11 issued a complaint based upon unfair labor practice charges filed by the Union alleging unilateral changes by the Employer that predated the filing of the petition. Subsequently, the parties reached agreement on a collective-bargaining agreement, which resolved the outstanding unfair labor practice charges. The Regional Director thereafter dismissed the decertification petition on the basis of the parties' negotiation of the collective-bargaining agreement and concomitant settlement of the unfair labor practice charges.

yet, my colleagues presume a causal nexus between the alleged 8(a)(5) conduct and the employee disaffection from the Union. Worse, they conclusively presume a causal nexus. That is, they will not even permit a hearing on the factual issue of whether there is a causal nexus between the alleged 8(a)(5) conduct and the employee disaffection from the Union. That is the difference between myself and my colleagues in this case. I would permit a hearing on the factual issue, and they would not do so. And, by not doing so, they stifle the Section 7

rights of the decertification petitioner and those employees who wish to have an election.

My colleagues respond that they are not establishing a conclusive presumption. They say that the conduct was “inherently likely” to cause employees to disaffect from the Union. The distinction escapes me. The bottom line is that the Employer is denied an opportunity to present counter-evidence on a critical issue.

In sum, my colleagues, without a hearing on a factual issue, preclude an election. I would not do this. I therefore dissent.