

**United Steel Service, Inc., d/b/a Uniserv and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B.** Cases 8–CA–32711, 8–CA–32801, 8–CA–32939, 8–CA–33269, 8–CA–33915, and 8–CA–34872

December 31, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On September 22, 2006, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply 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,<sup>1</sup> and conclusions and

<sup>1</sup> 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.

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by refusing to provide the Union with requested relevant information.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(5) by unilaterally changing its substance abuse policy. The changes were of two kinds. First, the Respondent implemented a new set of incident "triggers" for conducting drug testing. Second, the Respondent implemented a "zero tolerance" policy, under which drug use results in "immediate termination without recourse." Prior to the latter unilateral change, the Respondent, in its discretion, permitted employees who tested positive for drugs to retain their jobs on condition that they participate in treatment or other rehabilitation.

Recently, in *Anheuser-Busch, Inc.*, 351 NLRB 645 (2007) (Member Liebman and Member Walsh, dissenting), the Board majority concluded that Sec. 10(c)'s prohibition of a make-whole remedy where discipline is "for cause" precluded a make-whole remedy on the facts of that case. There, the respondent employer's unlawful unilateral change was to its method for detecting drug use. There was no change in the discipline meted out for drug use; thus, drug use constituted "cause" for the discipline imposed. Here, by contrast, the Respondent unilaterally adopted a "zero tolerance" policy in place of its previous policy of reserving discretion to permit a drug user to retain employment if he or she agreed to undergo treatment. In these circumstances, it is not clear that the conduct of employees discharged under the "zero tolerance" policy would have constituted cause for discharge under the Respondent's previous discretionary policy. Accordingly, a make-whole remedy for these employees is warranted. As to any particular employee discharged for drug use under the "zero tolerance" policy, however, the Respondent is entitled to show, at compliance, that it would have discharged that employee under its preexisting discretionary policy, avoiding as to that employee any backpay and reinstatement obligation. See *Allied Aviation Fuel*, 347 NLRB 248, 248 fn. 3 (2006).

to adopt the recommended Order as modified<sup>2</sup> and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United Steel Service, Inc., d/b/a Uniserv, Brookfield, Ohio, its officers, agents, successors, and assigns, shall

Although the Respondent is required to expunge any record of its discharge of an employee under the "zero tolerance" policy, should the Respondent establish at compliance that it would have discharged the employee under its preexisting policy, it may maintain a record of the employee's failure to comply with such policy.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing its holiday and vacation policy, Member Liebman and Member Kirsanow observe that under the Respondent's former policy employees had the opportunity to request an additional day off when their vacation day fell on a holiday, and were sometimes granted that request. Under the new policy, there was no such opportunity, and thus the employees were foreclosed from ever receiving an additional day off.

Contrary to his colleagues, Member Schaumber would find that the Respondent did not violate Sec. 8(a)(5) and (1) when it exercised its discretion to eliminate additional time off due to manning requirements. Prior to the certification of the Union, the Respondent's holiday and vacation policy provided that employees would be paid for holidays that occurred while employees were on paid vacations. In addition to receiving holiday pay, employees could also take an additional unpaid day off from work, subject, however, to the Respondent's staffing needs. Specifically, the policy provided as follows:

If a holiday falls during an employee's vacation, the employee shall receive a full week's pay plus additional holiday pay. Additional time-off due to holiday's falling during vacation is subject to manning requirements.

After certification of the Union on April 4, 2001, the Respondent announced that the holiday and vacation policy would be modified as follows:

If a holiday falls during an employee's vacation, the employee shall receive a full pay plus holiday pay. Due to manning requirements, additional time-off due to a holiday has been eliminated.

The judge determined, and the majority agrees, that the change to the holiday and vacation policy was "clear and sufficiently significant" to warrant finding a violation. Member Schaumber disagrees. In his view there was no material change. Both before and after certification of the Union, an employee's ability to receive an additional day off was subject to "manning requirements,"—i.e., at the discretion of the Respondent. The Respondent simply determined that current manning requirements precluded additional days off. In his view, this was not a change, but merely an exercise of preexisting authority.

<sup>2</sup> We will modify the judge's recommended Order as noted above and to conform to the violations found and to the Board's standard remedial language. We will substitute a new notice to comport with these modifications.

The judge's remedy provides that employees adversely affected by the Respondent's unlawful unilateral changes be made whole in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). However, some of those changes did not result in employees being separated from employment. As to those, any make-whole remedy shall be in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). See, e.g., *Raven Government Services*, 336 NLRB 991, 992 (2001).

1. Cease and desist from

(a) Unilaterally changing employees' terms and conditions of employment, including their health care coverage and the attendance, holiday and vacation, substance abuse, and physical examination policies, without first giving the Union notice and an opportunity to bargain about such changes.

(b) Laying off unit employees without giving notice to the Union and affording it the opportunity to bargain.

(c) Failing and refusing in a timely manner to provide the Union with requested information relevant to its bargaining obligation.

(d) 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 of the Union, rescind the unlawful unilateral changes to unit employees' health care coverage and to the attendance, vacation and holiday, substance abuse, and physical examination policies.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Brookfield, Ohio facility, excluding all office clerical employees, shipping clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(c) To the extent that it has not been previously furnished, furnish the Union the information it requested by letter of May 22, 2002.

(d) Within 14 days from the date of this Order, offer those employees who were discharged as a result of the Respondent's unlawful unilateral changes (other than the "zero tolerance" policy) and who were laid off in September, November, and December 2002, and February 2004 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 unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful unilateral changes and layoffs in the manner set forth in the remedy section of the judge's decision as modified by the Board's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to discipline or discharge

resulting from the Respondent's unlawful unilateral changes, and within 3 days thereafter notify the affected employees in writing that this has been done and that the discipline or discharge will not be used against them in any way.

(g) As to employees discharged under the unilaterally implemented "zero tolerance" substance abuse policy, if any such employees would not have been discharged under the preexisting discretionary policy, take the following actions: offer those employees 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; make those employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful unilateral change in its substance abuse policy, in the manner set forth in the remedy section of the judge's decision as modified by the Board's decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Brookfield, Ohio, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 April 5, 2001.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

<sup>3</sup> 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."

sponsible 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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change your terms and conditions of employment, including your health care coverage and the attendance, holiday and vacation, substance abuse, and physical examination policies, without first giving notice and an opportunity to bargain about such changes to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B.

WE WILL NOT lay off unit employees without giving notice to the Union and affording it the opportunity to bargain.

WE WILL NOT fail and refuse in a timely manner to provide the Union with requested information relevant to its bargaining obligation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request of the Union, rescind our unilateral changes to your health care coverage and to the attendance, vacation and holiday, substance abuse, and physical examination policies.

WE WILL, before implementing any changes in unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time production and maintenance employees employed by us at our Brookfield, Ohio facility, excluding all office clerical employees, shipping clerical employees, and all profes-

sional employees, guards and supervisors as defined in the Act.

WE WILL, to the extent we have not previously done so, furnish the Union the information it requested by letter of May 22, 2002.

WE WILL, within 14 days from the date of the Board's Order, offer those employees who were discharged as a result of our unlawful unilateral changes (other than the "zero tolerance" substance abuse policy) and who were laid off in September, November, and December 2002, and February 2004, 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.

WE WILL make our unit employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes and layoffs.

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

WE WILL offer reinstatement to employees discharged under the unilaterally implemented "zero tolerance" substance abuse policy who would not have been discharged under the preexisting discretionary policy, and WE WILL make such employees whole for any loss of earnings and other benefits resulting from their discharge.

UNITED STEEL SERVICE, INC., D/B/A UNISERV

*Susan Fernandez, Esq.*, for the General Counsel.

*Peter Grinstein, Esq. (Nadler, Nadler & Burdman, Co., LPA)*, of Youngstown, Ohio, for the Employer.

*Fritz Neil, Esq. (Joyce Goldstein & Associates)*, of Cleveland, Ohio, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Cleveland, Ohio, on May 17 and 18, 2006, pursuant to an order consolidating cases, sixth amended consolidated complaint and notice of hearing issued on March 23, 2006, by the Regional Director for Region 8 of the National Labor Relations Board (the Board). The underlying charges were filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B (the Union). The complaint alleges that United Steel Service, Inc., d/b/a Uniserv (the Respondent or Uniserv) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to negotiate with the Union, by unilaterally changing its attendance policy, and its holiday or vacation policy, its health care coverage, its substance abuse

policy, its physical examination policy, by laying off employees at various times and by refusing to furnish the Union with relevant information in a timely manner. The Respondent filed a timely answer, admitting the jurisdictional allegations in the complaint and denying the commission of any unfair labor practices. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent Uniserv is an Ohio corporation, engaged in the processing and slitting of steel at its facility in Brookfield, Ohio, where it annually purchases and receives products valued in excess of \$50,000 directly from points located outside the State of Ohio. The 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

In December 2000, the production and maintenance employees of Uniserv decided that they wanted to be represented by the Union. An election was held on February 6, 2001, where the Union was elected as the employees' collective-bargaining representative by a wide margin. On April 4, 2001, the Board certified the Union as the exclusive collective-bargaining representative of the unit, described as follows (GC Exh. 2):

All full-time and regular part-time production and maintenance employees employed by the Employer at its Brookfield, Ohio facility; excluding all office clerical employees, shipping clerical employees, and receiving clerical employees, and all professional employees, guards, and supervisors as defined in the Act.

Uniserv filed objections to the election. On April 4, 2001, the Board overruled the objections and issued its Decision and Certification of Representative, certifying the Union as the unit's exclusive bargaining representative (GC Exh. 2). By letter of April, 25, 2001, the Union requested the Respondent to meet and commence bargaining. The Respondent failed to respond not only to the Union's written requests but also to the Union's subsequent telephone calls. By letter of July 27, 2001, Uniserv's counsel notified the Union that the Board's certification of the Union was "illegal, arbitrary, capricious" and not supported by evidence (GC Exh. 26). The Union filed an unfair labor practice charge accusing the Respondent of refusing to bargain in good faith. In *Uniserv*, 340 NLRB 199 (2003), the Board found that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith since April 25, 2001, and thereafter (GC Exh. 3). The Board issued a cease-and-desist order and a bargaining order requiring Uniserv to bargain with the UAW. *Id.* The Board filed an application for enforcement of the bargaining order in the Sixth Circuit Court of Appeals. On August 19, 2005, the court granted the Board's application for enforcement (GC Exh. 4).

In the meantime, the Respondent made certain changes in its employment policies. The complaint alleges that Uniserv has made multiple unilateral changes relating to wages, hours, and other terms and conditions of employment that are mandatory subjects for purposes of collective bargaining. These changes were made in attendance policy and holiday/vacation policy, health care coverage, the implementation of a substance abuse policy, the implementation of a physical examination policy, as well as employee layoffs on September 20, on November 15, on December 6, 2002, and finally employee layoffs on February 8, 2004. By this conduct, Uniserv is accused of having interfered, restrained, or coerced employees in the exercise of their Section 7 rights and in violation of Section 8(a)(1) of the Act. Furthermore, Uniserv has failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(1) and (5). The Respondent has engaged in similar violations since May 22, 2001, by failing to respond to the Union's request for information, and by refusing to furnish the Union with relevant information.

Uniserv denies that it unilaterally changed policies, or that it had a duty to bargain with the Union with respect to the layoff of employees, especially the probationary employees. The Respondent maintains that it had no duty to bargain with the Union until its certification was resolved by the decision of the Sixth Circuit Court of Appeals.

##### III. CHANGES IN ATTENDANCE POLICY

On June 26, 2001, Uniserv posted its "Attendance Policy" effective July 1, 2001 (GC Exh. 6). Dennis Menold, an employee, noticed the attendance policy posted on the Respondent's in-plant bulletin board in the summer of 2001. Robert Baker, also an employee, testified that he received the policy along with his paycheck in the summer of 2001. Randy Kawczynsky, the Company's president, testified that this policy, effective July 1, 2001, is the policy now in effect at the plant and that it is contained in the "United Steel Service, Inc. Employee Handbook" (GC Exh. 5; R. Exh. 7). Kawczynsky also admitted that employees have been disciplined in accordance with the policy which not only provides for certain sanctions for unexcused absences but also for late arrivals or early departures. The policy provides *inter alia*:

- 3 days off—Employee warning notice issued with counseling on attendance policy.
- 4 days off—Employee warning notice issued with counseling on attendance policy, and 3 days off without pay.
- 5 days off—Employee warning notice issued with counseling on attendance policy, and 5 days off without pay and subject to termination.
- 6 days off—Employment terminated.

This policy superseded the attendance policy which the Respondent had in effect prior to the Union's certification on April 4, 2001. Although the Respondent argues that there was no change in policies, the record is clear that Uniserv had instituted a policy on attendance, effective January 1, 2001, which

was posted as a notice and which provides as follows (GC Exh. 7; R. Exh. 6):

- Due to current absenteeism issues, United Steel Service, Inc. will address its attendance policy.
- Effective January 1, 2001 the new policy will be determined on the basis of each individual's attendance and tardiness record.
- Management will monitor each employee's attendance.
- All disciplinary action will be reviewed and handled by the plant supervisor.
- Tardiness and leaving early will also be monitored and addressed as necessary.
- Plant Supervisor decisions are final.

Charles Pitts, production supervisor, testified that this attendance policy did not dictate a finite number of days that would initiate disciplinary proceedings, and that it was up to management's discretion. Pitts also clarified that this policy, which lasted for 6 months from January 1, 2001, to the end of June 2001, was the only existing policy governing employee attendance until it was replaced by the policy posted on June 26, 2001.

According to the Respondent, prior to January 1, 2001, Uniserv had yet another policy in effect since at least 1980 (R. Exh. 30). This policy allowed up to eight unexcused absences before incurring any discipline. More specifically, Uniserv had maintained the following policy:

- 8 days—verbal warning from Plant Manager
- 9 days—employee is given 3 days off without pay
- 10 days—employee is given 5 days off without pay
- 11 days—employee is dismissed as an employee of United Steel Service, Inc.

Menold explained that Uniserv had this attendance policy in effect since he began work at the plant about 25 years ago. The Respondent admitted that this written policy, in existence prior to January 2001, permitted up to eight unexcused absences, although the subsequent policy left it all up to management's discretion. The Respondent further admitted that this “[l]ast absenteeism policy [i.e., the one commencing in January 2001] was changed once again.”

Nevertheless, the Respondent maintains that the allegation that the Respondent unilaterally changed its attendance policy “is false and untrue.” The record is clear, however, that on April 4, 2001, the Board issued its certification of the Union as the exclusive bargaining representative of the Company's employees. On June 26, 2001, Uniserv management admittedly posted its latest attendance policy to go in effect on July 1, 2001, which Kawczynski, company president, identified as Uniserv's current policy. According to this posting, an employee with three unexcused absences will be issued a warning and will be subject to counseling on attendance policies. Subsequent absences trigger further disciplinary actions. After 5 days off a warning notice is issued with counseling on attendance policy, as well as a 5-day suspension without pay. The employee is also subject to termination. A total of six absences results in the termination of the employee. Menold testified

that management never held a meeting to explain this policy, and that this was the first time that employees were ever told that they would be subject to disciplinary action after only three unexcused absences. Over 40 employees have been disciplined under the new attendance policy (GC Exh. 8). Pitts testified that employees have been disciplined for accumulating four and five unexcused absences, and that one employee has been terminated as a result of the new policy.

The policy also imposes penalties for late arriving and early departing employees. It provides that if an employee is 1 minute late, the employee will be docked a half an hour of pay. Employee Robert Baker testified that under previous policies a worker who was less than 3 minutes late would not have received any reduction in pay, and that an employee would have to be more than 3 minutes late before he or she would be docked. Pitts testified that under the previous policy a penalty could be imposed for late arrivals and early departures, but it was at the discretion of management.

The Respondent's claim that these policies were all the same, that the Respondent made no changes in policies, or that the previous policy was “just reduced to writing and made more refined” by the June policy is clearly wrong. Indeed, the Respondent's assertions in its brief are contradictory and inconsistent, making statements such as, the last absenteeism policy was changed once again, and this last policy was more lenient, and the last policy was entirely discretionary. I also reject the argument that the changes were minor.

Robert Baker notified David Fascia, the union representative, about the new attendance policy. By letter of September 14, 2001, Fascia addressed his written request to Jeffrey Bayman, company president, that the Company bargain over the attendance policy and other alleged unilateral changes (GC Exh. 27). Fascia testified that the Company did not give prior notice to the Union or provide it with an opportunity to bargain over the new attendance policy. The Company did not respond to the letter.

#### IV. CHANGES IN THE HOLIDAY AND VACATION POLICY

Until May 22, 2001, Uniserv maintained a holiday and vacation policy which permitted an employee who took a vacation which included a holiday, to receive pay for that holiday in addition to the vacation days. Subject to manning requirements, the employee could also take an additional unpaid day off work. In short, employees were given additional time if a holiday falls during the employee's vacation time. The policy provided as follows (GC Exh. 9; R. Exh. 8):

If a holiday falls during an employee's vacation, the employee shall receive a full week's pay plus additional holiday pay. Additional time-off due to holiday's falling during vacation is subject to manning requirements.

After the certification of the Union on April 4, 2001, the policy was changed. By memo, dated May 23, 200, Uniserv notified the employees as follows (GC Exh. 9; R. Exh. 9):

If a holiday falls during an employee's vacation, the employee shall receive a full pay plus holiday pay. Due to manning requirements, additional time-off due to a holiday has been eliminated.

Pitts testified that in the past there were times when employees were granted an additional day off because a holiday fell during their vacation but that manning requirements no longer permitted it, because the “work force got leaner and leaner,” and Uniserv did not have the people to cover all the extra days off.

On September 14, 2001, David Fascia wrote President Bayman, requesting that Uniserv bargain over the change in holiday and vacation policy, as well as other unilateral policy changes Uniserv had made since the Union’s certification (GC Exh. 27). The Company did not respond to the letter.

#### V. CHANGES IN HEALTH CARE COVERAGE

Following the Union’s certification, the Respondent implemented another change in the employees’ working conditions. On November 1, 2001, Uniserv informed the employees by a posting that two changes were made in the medical insurance coverage of bargaining unit employees. First, a new preventative routine annual diabetic eye exam policy was implemented and second, the copay for an emergency room visit increased from \$50 to \$75 (GC Exh. 10; R. Exhs. 10, 11).

Uniserv denies responsibility for implementing the changes to the health care policy, taking the position that changes in health care policy were directed by the insurance carrier, Blue Cross and Blue Shield. Pitts wasn’t sure if the Company had an option to change insurance carriers, although he acknowledged that the Company had done so in the past. These changes affected everyone at the Company including the employees in the bargaining unit. In any case, the Respondent could have but failed to notify the Union of the changes.

On December 7, 2001, Fascia wrote to Kawczynski, company president, requesting to bargain over these unilateral changes, but the Respondent did not respond to the request.

#### VI. CHANGES IN THE SUBSTANCE ABUSE AND PHYSICAL EXAM POLICIES

##### A. Substance Abuse

By memorandum dated, March 14, 2002, Mark Jones, safety director, announced to employees’ the Company’s substance abuse and physical exam policies (GC Exh. 15). Baker testified that he received a copy of this substance abuse policy in his paycheck. Fascia received this memo from employees along with copies of the substance abuse and physical exam policies. The substance abuse policy jeopardizes continuing employment with the Company after a violation (GC Exh. 13; R. 13). The *Corrective Action* section of this policy reads that “Uniserv has adopted a zero-tolerance for employees who violate any provisions of the policy and/or who refuse to comply with the policy. In such cases employees will be subject to immediate termination without recourse.”

Eleven particular incidents are specified when an employee must be drug tested.

a. Unacceptable absenteeism, which may include an unacceptable tardiness record, continuous unavailability. Or frequency of unacceptable occurrence.

b. A poor work-related accident record when reviewed with regard to the type of accident, frequency of accident, or severity of accident.

c. Involvement in work-related accident, which there is a reason to believe, might be caused by human error.

d. Display of abnormal behavior on the job as observed by a supervisor, manager, or co-workers.

e. Inability to perform usual/routine tasks.

f. Poor overall employment record, including attendance records, disciplinary actions, performance reviews or accident records.

g. Involvement in the use or unauthorized delivery of drug without authenticated medical explanation.

h. Information made available to Uniserv from an outside source or from other Uniserv personnel, which, upon review and investigation, is considered by Uniserv to be a reasonable basis to require a drug or alcohol-screening test.

i. Involvement in the use, unauthorized possession, misappropriation, or unauthorized delivery of a drug or alcohol while on duty or on Uniserv property.

j. Arrest on criminal charges of possession, use or delivery of a drug.

k. All work-related incidents, accidents and injuries require medical evaluation with drug testing and blood alcohol when detected.

Pitts testified that the substance abuse policy that went into effect in April 2002, merely incorporated the policy that was unwritten up until that point. He also testified that the Company always had a substance abuse policy. This policy included preemployment testing, return-to-work testing, testing for illnesses and accidents, suspicion testing, and postaccident testing. An articulation of the Company’s substance abuse policy could be found in the employee handbook (GC Exh. 14). According to that policy, employees were prohibited from engaging in the use of unlawful or unauthorized drugs as well as reporting for duty with alcohol in their system. Employees were also prohibited from the unauthorized manufacture, distribution, sale or possession of drugs or alcohol in the workplace. Any employee who violated this policy was subject to termination, but would be permitted, at management’s discretion, to participate in appropriate treatment, counseling, or rehabilitation as a condition of continued employment. Pitt’s testimony declaring that the prior policy was equally subject to zero tolerance is therefore not credible. He also could not cite to any instances where the Respondent had exercised such a deterrent.

The record shows that under the former policy, the Respondent made no announcements and did not inform employees under what circumstance they would be subject to drug testing. Kawczynski confirmed that the specific incidents which triggered testing under the new policy were not mandated prior to the implementation of the policy. For example, in December 2000, when Baker cut his finger at work, he was taken to the hospital, but he was not subjected to a drug test. Similarly some time in 1990, when he broke a finger and was examined by a doctor, he was not tested for drugs. Menold was injured at work in the mid-1980s and likewise did not receive a drug test.

However, under the current substance abuse policy these injuries would mandate a drug test, which means, according to Kawczynski, that an employee would be suspended for 5 days, pending the results of the drug test.

Furthermore, if an employee requested help for a substance problem, he would receive help under the prior policy. For example, Baker testified that employee, Tom Stewart, admitted an abuse problem. Not only was he treated, but he returned to work. Baker testified that he was not fired, but suspended for 3 days in 1980 for an alcohol violation. Pitts' testimony that the current zero tolerance approach does not represent a change from the previous policy is belied by the record. Since the policy went into effect, five employees have been terminated as a result of the Company's new policy.

By letter of April 2, 2002, to President Kawczynski, Fascia requested to bargain over the changes in the substance abuse policy (GC Exh. 29). But the Union was not given notice or an opportunity to bargain over the changes.

#### B. Physical Examination

The Respondent's physical examination policy was similarly distributed to the employees and went into effect on April 1, 2002, the same day as the substance abuse policy. According to Kawczynski, the policies are interrelated, so that drug testing may or may not entail a complete physical examination. Kawczynski was not able to identify a similar policy in force prior to this date. The policy specifies which classifications of employees are affected and under what circumstances they will be required to undergo a physical examination (GC Exh. 11; R. Exh. 14).

Circumstances requiring physical examination of present employees and new hires are listed as follows:

1. All employees:
  - A. All new hires prior to employment.
  - B. Following any absence from work, for reasons other than illness, injury or vacation exceeding 30 calendar days.
  - C. As required for mobile equipment and crane operators, and drivers of company provided vehicles as prescribed by Uniserv equipment examination policy.
  - D. Following absence from work due to illness or injury requiring the below listed conditions.
    - 1) Requiring confinement in a hospital, excluding hospitalization for tests only.
    - 2) Absence of more than seven (7) consecutive calendar days due to illness or injury.
    - 3) Any illness or injury occurring while at work resulting in the employee leaving work to receive treatment. In the event that the employee is unable to undergo a urinalysis drug screen and/or breathe alcohol test due to their medical condition, Uniserv does authorize the use of a blood test to achieve the same results. (Once medically clear, the employee will be permitted to return to work pending the results of the urine analysis test.)

E. All work related incidents or accidents and following absences from work of one (1) turn or more due to compensable injury.

F. As required for employee affected by Uniserv policy dealing with specific hazardous occupation.

G. Cases and incidents that fall within the guidelines of the "Drug Free Workplace Policy."

Uniserv denies that there has been a change in the Company's physical examination policy. However, according to the new policy an employee is required to undergo a physical examination for an "absence from work, for reason other than illness, injury or vacation exceeding 30 calendar days." Menold, however, testified that he was not required to take a drug test after he came back from a 7- or 8-week layoff in 2001. Of the 12 employees who came back to work after the layoff lasting more than 30 days, Menold was only aware of one employee who was required to submit to a physical examination under the old system. Baker corroborated Menold's recollection of the scenario. The record is clear that that the newly adopted policy was not merely a written version of an existing policy.

The April 2, 2002 letter from the Union to Company President Kawczynski was a request to bargain over both policy changes (GC Exh. 29). The Union did not receive a response to the letter.

#### VII. UNILATERAL EMPLOYEE LAYOFFS

The Respondent laid off bargaining employees on four separate occasions allegedly because of business considerations. The record shows and the Respondent does not deny that the employees were informed by memorandum that 12 employees were placed on "layoff status" effective Friday, September 20, 2002 (GC Exh. 18; R. Exh. 15). Three more employees were notified of their layoff effective Friday, November 15, 2002 (GC Exh. 19; R. Exh. 16). One of the employees, Terry Paskel, was an employee of the receiving department and therefore not a member of the bargaining unit. Six additional bargaining unit employees were laid off effective Friday, December 6, 2002 (GC Exh. 20; R. Exh. 17). And effective February 8, 2004, six more employees were laid off (GC Exh. 32; R. Exh. 18). The employees who were on layoff, with the exception of the one in November 2002, were members of the bargaining unit. And in each instance the Company stated in the respective memorandum that the Company's action was due to "slow business conditions." Pitts testified that seniority was not followed in the past when selecting employees for layoffs.

The Respondent justifies its unilateral actions, arguing that in each instance the affected employees were given 1 week advance notice of the impending layoffs in several meetings with the employees, and that notices were posted on the Thursday prior to the Monday layoff. The Respondent also argues that compelling business reasons and economic necessity justified the Company's actions, citing a drop in the tonnage of steel.

That Uniserv unilaterally laid off the employees without providing notice or opportunity to bargain is supported by the testimony of Fascia and Pitts who admitted that he did not attempt to contact the Union at any time prior to the four layoffs. Fascia testified that an employee informed him about the three

layoffs in December 2002, and that he obtained the written layoff notices from the same employee. Fascia also testified that Kawczynski did not respond to his written requests to bargain.

#### VIII. REQUEST FOR INFORMATION

Following the Union's certification on April 4, 2001, the Union sent a letter, dated May 22, 2001, to Robert Hutchison, vice president of operations, requesting relevant information for collective-bargaining purposes (GC Exh. 25). The information requested is as follows:

- 1) A list of current employees, including date of hire, job classifications, and rate of pay address, telephone number, and current employment status.
- 2) Copy of all current company personnel policies, practices or procedures.
- 3) Copies of all current classifications, job descriptions, and wage or salary plans.
- 4) Copy of employment manuals or other documents showing all company fringe benefit plans, including pension, profit sharing, severance, vacation, health care, apprentice program, training programs, or any other plans applicable to bargaining unit employees.
- 5) Copies of all disciplinary policies, attendance policies, records or warning of disciplinary notices or any other personnel actions in effect.
- 6) Copies of any employee entitlements such as stock incentives, 401K plans, pension vesting, benefits credits or optional plans.
- 7) Copy of company health and safety policies.

Fascia testified that he sent the request for information along with a request to bargain. Fascia also attempted to contact Hutchison for 3 consecutive days in June, but was unable to speak with him; nor did Hutchison return Fascia's calls. The Union did not receive any information in response to the May 22, 2001 letter. However, Fascia received a letter from the Company's attorney stating that the Respondent refused to recognize the Union and Fascia abandoned any further efforts to obtain information.

More than 4 years later, after the Respondent had exhausted all appeals and the Sixth Circuit had ordered enforcement, the Union made a second request for information in the fall of 2005. In October 2005, Fascia received much of the information that he requested, although he testified that it was "not in its entirety." Uniserv maintains that it furnished the Union with all the information requested.

#### Analysis

This Employer has avoided its obligation under the Act for more than 4 years by refusing to bargain in good faith with the Union and unilaterally making significant changes in the employees' working conditions without notifying the Union or affording it the opportunity to negotiate about the changes. This conduct has long been held to violate the Act. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). Moreover, it is also well settled that an employer acts at its peril if it defies its bargaining obligations while pursuing a good-faith challenge to the Union's certification. *Lauren Mfg. Co.*, 270 NLRB 1307, 1308

(1984); *General Motors Acceptance Corp.*, 196 NLRB 137, enfd. 476 F2d 850 (1st Cir. 1973). As stated above, shortly after its certification the Union repeatedly requested the Respondent to negotiate but the Respondent ignored the Union's repeated attempts to bargain about the changes in the employees' working conditions, i.e., employee attendance, holidays or vacations, medical insurance coverage, substance abuse, physical examination of employees, and layoffs of employees. In addition, the Company did not, in a timely fashion, comply with the Union's information request.

The Union was certified on April 4, 2001. Thereafter, on July 1, 2001, the Respondent changed its policy dealing with employee attendance and employee tardiness. As explained above, the changes were substantial and significantly affected the unit employees. As a result employees were disciplined. Any suggestion that the policies were merely a continuation of past policies is misleading and unrealistic, particularly in the light of the Respondent's own witnesses who explained the obvious differences between the current policy and the old. The Respondent's actions in effectuating the new policy, clearly a mandatory subject of bargaining, without notice to the Union and without it the opportunity to bargain constitutes a violation of Section 8(a)(1) and (5) of the Act. *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

By memorandum to the employees, the Respondent announced a change in its holiday and vacation policy effective May 23, 2001. The change was made without notice to the Union and without bargaining with the Union. Issues pertaining to vacations and holidays relate to the employees' working conditions and are considered mandatory subjects under the Act. *Waxie Sanitary Supply*, 337 NLRB 303 (2001). The changes were clear and sufficiently significant for the Respondent to notify the employees in a written posting. I reject the Respondent's suggestion that "there was no real change in policy," and find that the Respondent violated the Act.

On November 1, 2001, the Respondent also changed the unit employees' health care coverage by increasing the employees' copayments and by adding vision coverage. Again the changes were made after the certification of the Union and without notice to or bargaining with the Union. Contrary to the suggestion of the Respondent, such changes were not insignificant. *Beverly Manor Nursing Home*, 325 NLRB 598 (1998). As alleged in the complaint, the Respondent violated the Act.

By memorandum of March 14, 2002, the Respondent announced to the employees updated substance abuse and physical examination policies effective April 1, 2001. The Respondent implemented the policies without notice to the Union and without affording it the opportunity to bargain. I reject the Respondent's argument that the Company's action merely codified an existing policy. As explained above, the prior policy was vague and not uniformly enforced. The new policies contained a zero tolerance aspect to which the Respondent strictly adhered, resulting in the termination of all unit employees who had tested positive. Moreover, the two policies were interrelated, requiring, for example, testing for illegal substances if an employee was injured at work. Employers are obligated to bargain in good faith with respect to substance abuse policies, which are considered mandatory subjects of bargaining. *John-*

*son-Bateman Co.*, 295 NLRB 180 (1989). I accordingly find the Respondent to be in violation of the Act. *Colgate-Palmolive Co.*, 323 NLRB 515, 515 (1997).

The Respondent laid off unit employees on four separate occasions, in September, November, and December 2002, as well as in February 2004, resulting in 26 layoffs. Contrary to the Respondent's argument, the record shows that the Respondent's decisions were made without notice to the Union and without affording it the opportunity to bargain. The notion that the postings on the Company's bulletin board listing the employees for layoff constituted notice to the Union is not acceptable, particularly under the present circumstances, where the Respondent's counsel had formally rejected the Union's request to bargain and informed the Union in writing that it would pursue a certification challenge in the courts. The Respondent also moved to dismiss the allegations relating to the layoff in September 2002, arguing that it was time barred according to the 6-month time limit of Section 10(b) of the Act. According to the General Counsel, the Respondent's motion is not well taken. First, the original charge was filed on January 8, 2003, approximately 4 months after the layoff. The charge on this issue was then added to the second charge. Second, it is clear that the charges are closely related to the subsequent layoffs, making it unreasonable to examine the one layoff in isolation and to ignore the same issues arising under similar circumstances and involving the same parties. *Redd-I, Inc.*, 209 NLRB 1115 (1988). The Respondent further argues that the layoffs were business related by a drop in orders. To support its contention the Respondent relies on a chart purporting to show a drop in tonnage (R. Exh. 21). However, it is well settled that a drop in business does not rise to the level of an economic exigency or compelling economic circumstances. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). Moreover, considering that the decisions to lay off employees are considered mandatory subjects of bargaining, it is clear that the Respondent's failure to notify the Union and offer to bargain over the decisions to lay off and the effects of these layoffs, constitutes a violation of Section 8(a)(1) and (5) of the Act. *Odebrecht Contractors of California*, 324 NLRB 396 (1997).

Finally, the record shows that by letter of May 22, 2001, the Union requested the Respondent to provide certain relevant information (GC Exh. 25). The Respondent admitted that it failed "to furnish such information during the period it was testing certification." Following the Union's repeated request after the Sixth Circuit decision, the Respondent supplied the material by letter of October 14, 2005 (R. Exh. 1). An employer's duty to furnish the union in a timely manner with information relevant to its role as the collective-bargaining representative is well settled. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The failure to produce the material in a timely manner violated the Act, for an unreasonable delay in furnishing requested information is as much a violation as an out-and-out refusal. *Bundy Corp.*, 292 NLRB 671 (1989); *Teamsters Local 921 (San Francisco Newspapers)*, 309 NLRB 901 (1992).

#### CONCLUSIONS OF LAW

1. United Steel Service, Inc., d/b/a/ Uniserv is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. As of April 4, 2001, the Union has been the exclusive-bargaining representative of the following unit of employees:

All full-time and regular part-time production employees employed by the Employer at its Brookfield, Ohio facility, excluding all office clerical employees, shipping clerical employees, and receiving clerical employees, and all professional employees, guards and supervisors as defined in the Act.

4. By unilaterally changing or implementing the *following* company policies and working conditions, found to be mandatory subjects of bargaining, the Respondent violated Section 8(a)(1) and (5) of the Act: (a) attendance policy; (b) holiday and vacation policies; (c) health care coverage; (d) substance abuse policy; and (e) physical examination policy.

5. By unilaterally laying off unit employees on about September 20, November 15, and December 6, 2002, and February 8, 2004, a subject which relates to terms and conditions of employment, without notice to the Union and without bargaining with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By failing and refusing to furnish the Union in a timely manner with certain information, the Respondent violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of 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. The Respondent having failed and refused to bargain with the Union must be ordered to bargain in good faith concerning the working conditions of its unit employees. Having found that the Respondent violated Section 8(a)(1) and (5) of the Act by laying off employees in September, November, and December 2002, as well as in February 2004, without notice to and bargaining with the Union, the Respondent must be ordered to cease and desist from the unlawful conduct and to offer the affected employees reinstatement and to make them whole for any loss of earnings and other benefits computed on a quarterly basis from the date of the layoff to date of proper offer of reinstatement, less any 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).

Having further found that the Respondent unilaterally changed and implemented policies and working conditions for unit employees, the Respondent must be ordered to rescind those policies and to make the employees adversely affected whole. Employees who lost their jobs pursuant to the change in the attendance policy must be reinstated. They and those who were suspended should be made whole, as provided above.

Similarly, employees who lost their jobs as a result of the new drug and physical examination policies must be reinstated and made whole, as provided above. Employees who were adversely affected as a result of the changed health care policies must be made whole, as provided above. Finally, the Respondent must be ordered to provide the Union with the requested

information relevant to its bargaining obligations in a timely fashion. Nothing in this Order shall be construed as requiring the Respondent to cancel any benefits previously granted unless the Union so requests.

[Recommended Order omitted from publication.]