Quebecor World Mt. Morris II, LLC *and* Graphic Communications Conference/ International Brotherhood of Teamsters, Local 65-B. Case 33–CA–15319

September 8, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The issues before the Board in this case are whether the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally implementing a "Performance Improvement Plan" (PIP) procedure as part of its disciplinary system; (2) demoting employee Robert Gigous pursuant to a PIP; and (3) refusing to provide relevant information requested by the Union in the course of processing a grievance over the PIP procedure. The judge found that the Respondent committed all of these alleged unfair labor practices.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision, and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge that the Respondent unlawfully refused to provide requested information to the Union, and we will adopt his remedy for this violation.

However, we conclude that the judge erred in finding unlawful the unilateral implementation of the PIP procedure and its application to employee Gigous. We find, rather, that the Respondent and the Union properly extended their expiring collective-bargaining contract by oral agreement and that, under the contract's management-rights provision, the Union clearly and unmistakably waived its right to bargain over implementation of the PIP process. Accordingly, we will reverse the judge and dismiss the complaint allegations involving the PIP process and employee Gigous.[3]

A. Factual and Procedural Background

The Respondent prints newspaper supplements and mail-order catalogs.[4] Its facility involved here is located in Mt. Morris, Illinois. Different unions represent several bargaining units at the facility. The Union long has represented employees in the finishing department.

On or about March 31, 2006,[5] the date that the parties' most recent collective-bargaining agreement was set to expire, the chief negotiators for the Respondent and the Union orally agreed, without qualification, to extend the collective-bargaining agreement while they negotiated a successor contract.[6] It is undisputed that at all relevant times in this case, the parties understood that they were operating under the terms of the expired contract, as extended.[7]

On September 7, employee Gigous received his annual written performance review; at the same time, he received a PIP. The PIP called for an extended, close evaluation of Gigous' performance over 90 work shifts. At the end of that period, absent improvement, he would be subject to further discipline, including discharge or demotion. No unit employee had previously received a PIP, or had otherwise been disciplined in conjunction with receipt of his or her annual performance review.

On February 26, 2007, at the conclusion of the PIP's required 90 work shifts, Gigous was demoted to a lower-paying job in the finishing department.

Following the Union's filing of an unfair labor practice charge, the General Counsel issued a complaint alleging, among other things, that the Respondent unlawfully

[1] On November 8, 2007, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed both a brief in support of the judge's decision and limited cross-exceptions; the Charging Party Union filed both limited cross-exceptions and a brief opposing the Respondent's exceptions; and the Respondent filed a reply brief.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] In view of these dismissals, it is unnecessary for us to consider the General Counsel's and the Union's limited cross-exceptions.

[4] On February 6, 2008, the Respondent notified the Board that it had filed a petition for bankruptcy relief under Chapter 11 of the United States Code, and requested a stay of this proceeding under 11 U.S.C. Sec. 362. The request is denied. It is well established that the automatic stay provision of Chapter 11 does not apply to Board proceedings such as the present one. See, e.g., *NLRB v. P*I*E Nationwide, Inc.,* 923 F.2d 506, 512 (7th Cir. 1991).

[5] All subsequent dates are in 2006, unless stated otherwise.

[6] According to the unchallenged testimony of the General Counsel's witness, Local 65-B Vice President Daniel Strohecker:

Mr. McCarthy [the Respondent's chief negotiator] asked if we were going to sign a written extension. And—because he said that it was their intention to work under our current agreement. And Mr. Roberts [the Union's chief negotiator] said that we didn't see any need for a written extension. That it was our intention, too, to just work under the current agreement. And Mr. McCarthy said he was okay with that. And that was the extent of that conversation.

[7] A successor agreement had not been negotiated by the time of the hearing.

changed employment conditions by implementing the PIP process unilaterally and by applying it to Gigous.[8]

The judge rejected the Respondent's contention that implementation of the PIP process was permitted under the management-rights clause in the parties' expired collective-bargaining agreement. He concluded that because there was no "formal," i.e., written, extension of the agreement, it ceased to govern the parties' relationship as of expiration. Relying on the principle that management-rights provisions do not survive contract expiration (absent evidence of the parties' contrary intention),[9] the judge found that no waiver, contractual or otherwise, of the Union's right to bargain about mandatory matters such as the PIP was in effect at the time the process was implemented. Having concluded that the management-rights clause was not a relevant consideration, the judge proceeded to evaluate the unilateral-change allegations, and to find that the Respondent's conduct violated the Act.

B. Analysis

In its exceptions, the Respondent renews its contention that the management-rights clause continued in effect pursuant to the parties' oral extension of the collective-bargaining agreement, and that this contractual provision privileged the Respondent's unilateral implementation of the PIP process. We agree.

1. The oral extension of the parties' agreement

The judge's view that continued operation of the management-rights clause required a *written* extension of the collective-bargaining agreement is erroneous. It is established law that a collective-bargaining agreement need not be in writing to be enforceable. See, e.g., *Merk v. Jewel Food Stores,* 945 F.2d 889, 895 (7th Cir. 1991); *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355-356 (5th Cir. 1981); *Certified Corp. v. Hawaii Teamsters & Allied Worker, Local 996*, 597 F.2d 1269, 1272 (9th Cir. 1979). It is also well established that an expiring written collective-bargaining agreement may be orally extended, at least in the absence of a contractual prohibition on oral modifications. See, e.g., *Certified Corp. v. Hawaii Teamsters*, supra, 597 F.2d at 1271.[10] The collective-bargaining agreement in the present case does not prohibit oral modifications.

Board precedent also sheds light on the effect of an oral extension on waiver provisions which normally do not survive contract expiration. In *Granite Construction Corp*., 330 NLRB 205, 207–208 (1999), the Board dismissed 8(a)(3) allegations involving the discharge of strikers, finding that a contractual no-strike clause continued in effect after the employer and the union orally agreed to extend their expiring contract. Accord: *Kroger Co.*, 177 NLRB 769, 776 (1969), affirmed sub nom. *Silbaugh v. NLRB*, 429 F.2d 761 (D.C. Cir. 1970) (striking employees were lawfully discharged where a no-strike provision remained in effect after the parties orally agreed to extend their expiring contract).

No-strike clauses, like management-rights provisions, do not routinely survive contract expiration.[11] But, as the cases above establish, a no-strike clause will continue in effect when the parties orally agree to extend an expiring contract. Board decisions involving management-rights clauses are not to the contrary. See *University of Pittsburgh Medical Center,* 325 NLRB 443, 443 fn. 2 (1998) (interpreting *Lustrelon, Inc.,* 289 NLRB 378 (1988), as holding that provision in expired agreement authorized unilateral action by employer, where parties had reached oral understanding to abide by agreement until new contract was reached). In light of this Board precedent, we hold that a management-rights clause, like a no-strike clause, remains in effect when the contracting parties orally agree to extend their agreement.

There is no significant dispute in this case that the Union and the Respondent orally agreed to extend their collective-bargaining agreement in its entirety on March 31, and that it continued to govern unit employees' employment conditions at all relevant times. Accordingly, the contract's management-rights provision was in effect when the Respondent implemented the PIP process.[12]

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[8] The General Counsel also alleged that the Respondent refused to provide requested information concerning the PIP process. As stated above, we agree with the judge that the Respondent violated the Act in this regard.

[9] See, e.g., *Long Island Head Start Child Development Center,* 345 NLRB 973, 973 (2005), enf. denied on other grounds 460 F.3d 254 (2d Cir. 2006).

[10] The *Certified* court found legally valid the employer's alternate theories that (a) parties may orally agree on a new collective-bargaining agreement identical to their expiring written one, and (b) an expiring written collective-bargaining agreement may be orally extended. Compare *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263, 1267–1268 (D.C. Cir. 1992) (generally agreeing with the court in *Certified*, at least in the absence of a contractual requirement for written modifications).

[11] See, e.g., *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 199 (1991).

[12] The Respondent has relied on *Castle-Pierce Printing Co*., 251 NLRB 1293, 1303–1304 (1980), affd. sub nom. *Tri-Cities Local 382, Graphic Arts Union v. NLRB*, 659 F.2d 253 (D.C. Cir. 1981) (table) to support its contention that the management-rights clause remained in effect. In an alternative analysis in *Castle-Pierce,* the judge found that a management-rights provision remained in effect pursuant to an orally-extended collective-bargaining agreement, and therefore privileged the employer's unilateral change. The Board, however, in adopting the judge's decision, chose not to rely on this analysis. Id., supra at 1293 fn. 2. Accordingly, *Castle-Pierce* has no relevant precedential value in the present case.

2. The management-rights clause and the Union's waiver

Because the management-rights clause was operative, we must determine whether relevant language in the clause constituted a "clear and unmistakable" waiver of the Union's right to bargain about implementation of the PIP process. *Provena St. Joseph Medical Center,* 350 808, 811–812 (2007) ("The clear-and-unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."). The Board in *Provena* reversed the judge's finding that the employer's unilateral implementation of a new disciplinary policy concerning attendance and tardiness violated Section 8(a)(5). The Board concluded that "several provisions of the management-rights clause, taken together" clearly and unmistakably constituted a waiver of the union's right to bargain over the policy. The relevant "combination of provisions" was the right to "'change reporting practices and procedures and/or to introduce new or improved ones,' 'to make and enforce rules of conduct,' and 'to suspend, discipline, and discharge employees.'" Id., at 816.

In its entirety, article IV "Management Rights" of the parties' extended contract states as follows:

> Except as limited by the express provisions of this Agreement, the Company shall have the exclusive right to manage the plant and to direct the working forces including, but not limited to, the right to direct, plan and control plant operations; to assign employees; to establish and change work schedules; to hire, recall, transfer, promote, demote, suspend, discipline or discharge for cause; to lay off employees because of lack of work or other legitimate reasons; to establish and apply reasonable standards of performance and rules of conduct; to determine quality standards and production schedules; to determine whether to contract out or subcontract work or services; to determine the number and location of its plants; and to decide products to be manufactured; all of which functions shall be executed in a manner consistent with the terms of this contract.

In light of *Provena,* it is apparent in the present case that, on the face of the management-rights clause, the Union clearly and unmistakably waived its right to bargain over implementation of the PIP procedure. Specifically, the Respondent's "exclusive right" to "demote, suspend, discipline or discharge for cause," in combination with its exclusive right to "establish and apply reasonable standards of performance and rules of conduct," plainly authorize the unilateral establishment and application of disciplinary procedures for work-performance issues. The PIP is such a procedure. We therefore find that the Union clearly and unmistakably waived its right to bargain over implementation of the PIP process.

Accordingly, we dismiss the allegation that implementation of the PIP process violated Section 8(a)(5).[13] Because the allegation that Gigous was unlawfully demoted is based on the argument that implementation of the PIP process was unlawful, we dismiss that claim as well.[14]

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, Quebecor World Mt. Morris II, LLC, Mt. Morris, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Graphic Communications Conference/International Brotherhood of Teamsters, Local 65-B, by failing and refusing to provide requested information that is relevant and necessary to the Union as the collective-bargaining representative of employees in the following appropriate unit:

> All employees employed in the Finishing Department at the Company's existing plant at Mt. Morris, Illinois, but excluding all office and plant clerical employees, janitorial, quality control, administrative and professional employees, guards, and supervisors as defined in the National Labor Relations Act, and all employees employed in other departments.

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[13] Chairman Schaumber previously has rejected the clear-and-unmistakable waiver standard in favor of a "contract coverage" analysis in evaluating relevant contract provisions. See *California Offset Printers*, 349 NLRB 732 (2007) (dissenting opinion). However, he recognizes that *Provena* is current Board law, and he applies it in the present case for institutional reasons. Moreover, he concludes that application of the contract-coverage test here would lead to the same result. See *Baptist Hospital of East Tennessee,* 351 NLRB 71, 72 (2007).

[14] The judge suggested that art. XII of the collective-bargaining agreement establishes a seniority limitation on the Respondent's right to demote under the management-rights clause. Art. XII is a provision entitled "Seniority." In general, it establishes various types of seniority within the bargaining unit. Sec. 12.8 of art. XII, on which the judge specifically relied, sets out two ways to reduce the number of employees in a job classification: by temporary transfer, and by removal of employees with the least classification seniority to the next lower job classification. Sec. 12.9 identifies the preceding sec. 12.8 as a "layoff procedure." On review of art. XII, we conclude that it applies to layoffs, and does not impose restrictions on the Respondent's management right to demote an individual employee for disciplinary purposes. In this regard, we also observe that the Respondent's 2005 demotion of unit employee Rachel Pieper for disciplinary reasons, which the Union did not challenge, contradicts the judge's analysis of art. XII.

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

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

(a) Provide the information requested by the Union in its letters dated September 8, 2006, and November 14, 2006, as set forth in the remedy section of the judge's decision.

(b) Within 14 days after service by the Subregion, post at its facility in Mt. Morris, Illinois, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Subregion 33, 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 September 8, 2006.

(c) Within 21 days after service by the Subregion, file with the Regional Director a sworn certification of a responsible official on a form provided by the Subregion 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 refuse to bargain collectively with Graphic Communications Conference/International Brotherhood of Teamsters, Local 65-B, by failing and refusing to provide requested information that is relevant and necessary to that Union as the collective-bargaining representative of employees in the following appropriate unit:

All employees employed in the Finishing Department at the Company's existing plant at Mt. Morris, Illinois, but excluding all office and plant clerical employees, janitorial, quality control, administrative and professional employees, guards, and supervisors as defined in the National Labor Relations Act, and all employees employed in other departments.

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

WE WILL provide to the Union the information it requested in its letters dated September 8, 2006, and November 14, 2006.

QUEBECOR WORLD MT. MORRIS II, LLC

Debra L. Stefanik, Esq., for the General Counsel.
Steven L. Hamann, Esq., for the Respondent.
Thomas D. Allison, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Peoria, Illinois, on September 17, 2007, pursuant to a complaint that issued on May 31, 2007.[1] The complaint alleges that the Respondent unilaterally changed the working conditions of employees by implementing a "90 Shift Performance Improvement Plan" in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, demoted an employee pursuant to that unilateral change, and failed and refused to provide requested information relating to the change in violation of Section 8(a)(1) and (5) of the Act. The Respondent's answer denies any violation of the Act. I find that the Respondent violated the Act as alleged in the complaint.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Quebecor World Mt. Morris II, LLC, the Company, a Delaware corporation, is engaged in the business of printing at its facility in Mt. Morris, Illinois, at which it an-

[15] 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."

[1] All dates are in 2006, unless otherwise indicated. The charge was filed on March 1, 2007, and was amended on May 30, 2007.

nually derives gross revenues in excess of $500,000 and annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Graphic Communications Conference/International Brotherhood of Teamsters, Local 65-B, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company, headquartered in Quebec, Canada, at its Mt. Morris, Illinois facility is engaged in volume printing including Sunday newspaper supplements and catalogs for various mail order companies. Approximately 650 employees work at the Mt. Morris facility and there are several bargaining units represented by different local unions, including a unit of press employees. This case relates to the approximately 250 finishing employees who are represented by the Union in the following appropriate unit:

> All employees employed in the Finishing Department at the Company's existing plant at Mt. Morris, Illinois, but excluding all office and plant clerical employees, janitorial, quality control, administrative and professional employees, guards, and supervisors as defined in the National Labor Relations Act, and all employees employed in other departments.

The collective-bargaining history of the unit of finishing employees dates from 1918. The prior collective-bargaining agreement expired on March 31, 2006. At the time of the hearing the parties had been unable to agree upon a successor agreement. Undisputed testimony establishes that, at a bargaining session shortly before the expiration of the prior agreement, Company spokesperson David McCarthy asked if the Union was going "to sign a written extension." Union spokesperson Phil Roberts replied that he did not "see any need for a written extension," that it was the Union's intention to continue to "work under the current agreement." McCarthy replied that he was "okay with that." There was no written extension of the collective-bargaining agreement.

The complaint allegations relate to the placing of employee Robert Gigous upon a performance improvement plan on September 7, his demotion on February 26, 2007, and requests of the Union for information relating to the foregoing. Determination of the merit of those allegations involves consideration of the terms of the collective-bargaining agreement, the past practice of the parties, and applicable Board precedent.

B. Facts

Two witnesses testified: Human Resources Manager Ron Slade and Union Vice President and Steward Daniel Strohecker. Documentary evidence establishes various relevant communications between the parties. The material facts are virtually undisputed.

Employee Robert Gigous, a third-shift finishing employee, received his annual performance review on September 7, and on that same day he was placed on a "90 Shift Performance Improvement Plan." Thus, Gigous had to work 90 shifts under the plan, a time period exceeding 3 months. No unit employee in the finishing department unit had previously been placed upon any performance improvement plan.

Article IV, management rights, of the expired contract provided, in pertinent part:

> Except as limited by the express provisions of this Agreement, the Company shall have the exclusive right to manage the plant and to direct the working forces including but not limited to the right to direct, plan and control plant operations; to assign employees; to establish and change work schedules; to hire, recall, transfer, promote, demote, suspend, discipline or discharge for cause; . . . to establish and apply reasonable standards of performance and rules of conduct . . . all of which functions shall be executed in a manner consistent with the terms of this contract.

Prior to September 7, derelictions in performance by finishing department unit employees had been addressed by a "Corrective Action Notice" that sets out a list of offenses: excessive absenteeism, misconduct, insubordination, unsafe work practice, work performance and "Other," and the level of punishment being administered, beginning with a verbal warning and continuing with a written warning, administrative suspension, suspension, "Immediate Suspension/Investigation," and discharge. The Union understood that discipline that was more than a year old would not trigger a higher level of discipline, and Human Resources Manager Slade agreed that "under normal circumstances," that was correct. Gigous had been verbally warned in 1995. In March of 1997, he was verbally warned again, and he was suspended for 5 days on August 12, 1997. Some 7 years later, on August 24, 2004, he was verbally warned, and on February 2, 2005, he received a written warning. That warning, more than a year old in September 2006, was the most recent discipline in his file.

The management-rights clause in the expired agreement makes no mention of discipline for receipt of a substandard performance review. There is no reference to performance improvement plans in the clause.

Human Resources Manager Slade testified that four press employees, in a different unit represented by a different local union, had been placed upon performance improvement plans, but those documents were not placed into evidence. Whether these were imposed with annual performance reviews or were 90 shift plans is not established. There is no evidence that the Union was aware of these actions in a different unit represented by a different local union.

Prior to September 7, no finishing unit employee had been placed upon a performance improvement plan or been disciplined in conjunction with an annual performance review. Human Resources Manager Slade testified that the Company considered the performance improvement plan to have constituted discipline, but "[a] lighter form of discipline."

Article V, grievance and arbitration, provides that "any dispute or difference . . . as to the meaning and application of any provision of this agreement . . . shall be settled through the following steps of the grievance procedure . . . ." Step 1 pro-

vides that the "aggrieved employee," with his steward if desired, "may present the grievance orally to his immediate supervisor." Although a grievance is to be presented within 5 workdays after the cause of the grievance "or after notice thereof to the Union," in no event [may a grievance be presented] more than fourteen (14) working days after the cause of the grievance occurs." Grievances at step 1 are presented orally. "If the parties cannot satisfactorily adjust the matter within two (2) working days," then the grievance must be reduced to writing and submitted at step 2 within the next 5 working days.

At step 2, the grievance having been reduced to writing is submitted to "the area Superintendent or his designee." Human Resources Supervisor Jim Adams is the designee for step 2 grievances. At step 3 the grievance is submitted to Human Resources Manager Slade.

Article XII, seniority, section 1(c), defines "Classification Seniority" as an "employee's length of continuous service since his permanent transfer to the classification." Section 8(a) of article XII grants the Company the right to reduce the number of employees in a classification by (a) temporary transfer "not to exceed two (2) shifts" or (b) removal of "[e]mployees with the least classification seniority."

There is no provision in the collective-bargaining agreement relating to information requests. Union Vice President Strohecker testified without contradiction that he makes most of his information requests to Human Resources Manager Slade. Slade agreed that information requests unrelated to grievances are made directly to him, but that when a grievance was pending, he would refer any request "to the property [sic] level," the first line supervisor at the first step, Human Resources Supervisor Adams at the second step.

On September 8, Vice President Strohecker, having learned that employee Gigous had been placed upon a performance improvement plan, addressed his immediate supervisor, Brian Riesselman, regarding "what was up" with Gigous and "what was going on with this performance improvement plan." Riesselman replied that "he didn't really know" because it was done on the third shift. Strohecker asked what the intentions of the Company were, and Riesselman replied that "he wasn't involved with it." Thus, the parties did not, relative to step 1 of the grievance procedure, "satisfactorily adjust the matter." Strohecker stated that the Union "would be filing a grievance against the plan," and, on September 11, he filed a written grievance stating: "Union objection to unilateral change in condition of employment—Implementation of 90 shift performance improvement plan." Although the Company argues that the first step should have involved the supervisors of Gigous, the grievance protests a unilateral change. It does not name Gigous.

In a letter from Vice President Strohecker to Human Resources Manager Slade dated September 8, but personally delivered on September 12, the subject of which was "Union objection to unilateral change in conditions of employment—Implementation of 90 Shift Performance Improvement plan," the Union explained its concerns and requested information. The letter, in pertinent part, states:

> This is to advise you that . . . [the Union] has learned that you have a new policy [a]ffecting conditions of employment for our members in the Mt. Morris plant. . . . The Union hereby objects to the implementation of this new policy and would hereby request that you cease any further efforts to enforce this policy and that you stay the disciplinary action against Robert Gigous until the Union representatives have the opportunity to review the possible impact of such a policy on the bargaining unit employees.
>
> The Union would request a meeting with you so that you can provide information regarding the policy and all information you may possess that will subsequently permit the Union to assess the potential impact on employees. Please provide us with a copy of the company's policy and the process for determination of employee discipline.

The letter was given to Slade following a meeting regarding a different matter. Immediately prior to handing the foregoing letter to Slade, with copies for Human Resources Supervisor Jim Adams and Superintendent John Cheever, who had been in the meeting, Strohecker asked "what was going on" with regard to Gigous. Adams replied that "they were trying to help people. It was not their intention to downgrade or terminate anybody." Strohecker replied that the Company held "all the cards," that "they could move an operator every day and have a dramatic effect on his performance," because the "machines are different," each having "little quirks to them." He stated that he did not consider the plan to be fair "because there's no guidelines to it . . . [w]e don't even really know what's expected of him." Adams referred to a list and that they were "starting" with Gigous. Strohecker asked about the list but received no reply. Slade stated that the Union could address the issue "at the end of it," referring to the 90 shifts. Strohecker stated that "the Union wanted them to stop immediately." Adams did not testify, and Slade did not deny the foregoing conversation.

On September 14, Slade wrote Strohecker acknowledging his receipt of the letter on September 12, and noting that he had been informed that a grievance had been filed. The letter continues stating:

> This being the case, it would not be appropriate to have a separate discussion while this is in the grievance process. After the Union has followed the process as outlined in Article V of our labor agreement, I would certainly be available to discuss this issue or any other reasonable topic of concern.

None of the information sought in the Union's letter dated September 8, was provided.

On November 14, Strohecker wrote Slade again, protesting the implementation of the new policy, noting that the Union had requested a meeting and had also asked that it be provided "a copy of the company's policy and the process for determination of employee discipline." The letter continues, stating:

> Your response to this dated September 14, 2006, stated that you felt it would not be "appropriate to have a separate discussion while this is in the grievance process." To date the Union has not received any of the information at all that was requested and no grievance meetings have occurred, and at

> this time we are expanding our information request to include the previously requested information, as well as the following:
>
> All records of performance reviews for Robert Gigous, as well as all other Bindery Machine Operators. All records of machine performance for Robert Gigous, as well as all other Bindery Machine Operators. All records of discipline for work performance for Robert Gigous, as well as all other Bindery Machine Operators. All other records, correspondence, interview notes, investigative reports, supervisor's notes, and any other documents or factual information relied upon by the company in their decision to implement this Performance Improvement Plan.

On November 21, Strohecker sent an e-mail to Slade to confirm that he had received his letter dated November 14. Slade responded by e-mail and referred Strohecker to his response of September 14. On November 22, Strohecker acknowledged that he had received that letter but pointed out that "we have not received anything at all in the way of information or any meetings." He pointed out that the information request was expanded "so we have data for comparison and evaluation."

On the afternoon of November 22, Slade replied by e-mail that he "had no idea you were expecting anything from me at this time on this issue." He cited his letter of September 14, referring to the grievance procedure and closed by asking, "Has the grievance process been followed?"

The next communication, following the Thanksgiving holiday is from Strohecker to Slade. It states that the Union has "followed the grievance procedure, as always." It then states:

> We have been waiting for the requested information, and saw a need to expand that request to try and better understand and evaluate the impact of this situation on our members. As previously stated, when we receive the requested information, and have had time to review it, we will contact [y]ou (or Jim Adams) to schedule a meeting and proceed with the grievance. We have just been waiting to receive the information we have requested.

On November 29, Slade responded, referring to his letter of September 14, and his e-mail of November 22. He repeated, in response to the request for a meeting, that he had informed Strohecker "to follow the grievance process." The e-mail then states, "I have no knowledge of the status of the first step meeting but according to Jim [Adams] there has been no request for a second step meeting."

On December 10, Strohecker sent an e-mail stating that he "thought when the grievance was reduced to writing, it was a request for a second step meeting." He then pointed out that "the Union needs the information we have requested so as we can properly prepare for a second step meeting. That is what we have been waiting for."

Slade responded to the foregoing e-mail stating that he realized that "the grievance was documented," i.e., reduced to writing, but that, to his knowledge, "a grievance was never presented to the proper people. . . . [T]he grievance procedure . . . starts with the first step."

On December 26, Strohecker sent an e-mail to Slade noting that the grievance procedure was followed in that he, Strohecker, spoke with his immediate supervisor before filing the grievance and that his supervisor denied any knowledge of the plan which constituted "an unsatisfactory adjustment from the Union's standpoint." The December 26 e-mail states the Union's belief that it is "entitled to the information we have requested" and should have the opportunity "to review the information before a meeting is scheduled for the second step."

On January 3, 2007, Slade responded stating that, at step 1, "the aggrieved employee should present the grievance to the supervisor involved in the dispute" and that "mentioning it to another supervisor . . . does not qualify as following the grievance process."

On January 9, 2007, Strohecker replied by e-mail to Slade explaining that "[w]hen a company implements a policy that is a unilateral change in conditions of employment, all employees are aggrieved," that he could himself be affected by the change, and that he did address the matter with his "immediate supervisor." Strohecker points out that he was not "directed to anyone else in regards to the first step," and notes that the Union continues "to await the information we have requested."

On the same day, Slade responded, pointing out that the "action [was] against Robert Gigous," asserting that it was not a "change in conditions of employment," and noting that there had been no discussion with the supervisors of Gigous. The response does not address the requests for information that had been specifically pointed out in Strohecker's e-mails of December 10 and 26, as well as the e-mail of January 9, 2007.

On January 15, 2007, Strohecker responded by e-mail stating that he had "inadvertently left Brian's name [Riesselman] off the [original grievance] form." He noted that a management official had "indicated that there was 'a list,'" and that the foregoing comment suggested "more than just impact on one of our members." As already noted, the initial grievance did not name Gigous but specifically addressed the unilateral change. The January 15, 2007 e-mail closes by stating that "[h]opefully now, the Union can get the information we have requested and move toward scheduling a second step meeting and get this matter resolved."

There is no evidence of any response by the Company to the foregoing e-mail. No requested information was provided. Although Slade initially testified that he would refer any information request "to the property [sic i.e., "proper"] level," he later contradicted that response and contended that the requested information was not provided "because the Union never made the request to the correct person." He admitted that he did not refer the request to the first line supervisor, and documentary evidence establishes that he never directed the Union to file the request, as opposed to the grievance, with the third-shift supervisors.

Slade admitted that the 90 shift performance improvement plan constituted discipline, but a "lesser form of discipline . . . not a verbal warning," that it was viewed by management "as a more positive step." He acknowledged that the only discipline ever administered in connection with an annual performance review was placement upon a performance improvement plan. It is undisputed that the first time this occurred with regard to a finishing unit employee was on September 7, when that occurred to Gigous. When asked whether a hypothetical employee

would agree that being placed under a microscope for 90 shifts was preferable to simply receiving a warning, Slade answered that he could not speak for the employee.

Gigous, after completing the 90 Shift Plan, was demoted on February 26, 2007. The Union amended the grievance to protest the demotion, and a date stamp confirms its receipt by the Company on March 10, 2007. The charge herein was filed on March 1, 2007. At the hearing, the Company stipulated that there was no claim that the grievance was untimely.

Prior to the demotion of Gigous, there had been two demotions of unit employees. Tom Goldie, who had been discharged, was reinstated to a job at a lower classification than he had previously held pursuant to a third-step grievance settlement on December 11, 2002. Employee Rachel Pieper had been urged to voluntarily downgrade on May 3, 2004, when the Company denied a grievance filed by the Union over her 5-day suspension "for poor job performance." It was recommended that she downgrade because she had put herself "in a position where the next step is termination." Relative to employee Pieper, when asked whether "demotion was part of the disciplinary process," Slade answered, "Not at that time." On June 29, 2005, Pieper received a corrective action notice after "she ran into another lift truck." On July 8, 2005, she was downgraded because the Company "could no longer take a chance with her safety record that she would hurt someone," and because the Company "would rather have her leave employment on her own schedule rather tha[n] being told to leave."

C. Analysis and Concluding Findings

1. The unilateral change

The complaint alleges that the implementation of the 90 shift performance improvement plan constituted an unlawful unilateral change. "[A]n employer is prohibited from making changes related to . . . terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). The Respondent gave no opportunity to the Union to bargain regarding its implementation of the 90 shift performance improvement plan. Prior to September 7, no finishing department unit employee had been disciplined as a result of a substandard annual performance review. Slade admitted that the performance improvement plan constituted discipline. A performance improvement plan was not a disciplinary measure enumerated upon the corrective action notice.

The Respondent argues that it was privileged to implement the plan based upon the language in the management-rights clause. I disagree. There was no formal extension of the collective-bargaining agreement. As the General Counsel and Charging Party point out, citing various cases, including *Clear Channel Outdoor, Inc.*, 346 NLRB 696 (2006), such clauses do not survive the expiration of the contract absent evidence to the contrary. As stated by the administrative law judge in *Clear Channel Outdoor, Inc.*:

> A management-rights clause in a collective-bargaining agreement and any waivers contained therein do not survive the expiration of the contract—absent some evidence of the parties' intentions to the contrary. Thus, any waiver of a union's bargaining rights that relies on a management rights clause . . . is limited to the time the contract is in force, *Furniture Rentors of America,* 311 NLRB 749, 751 (1993), enf. denied 36 F.3d 1240 (3d Cir. 1994); *Pan American Grain Co.,* 343 NLRB No. 47 [318] (2004). There is no evidence in this case that the parties intended that the waivers contained in the management rights provisions would survive the expiration of their collective-bargaining agreement . . . ."

The foregoing conclusion is confirmed in this proceeding by the absence of any reliance upon the management-rights clause by the Respondent during its September 12 conversation with the representatives of the Union or in its letters or e-mails.

The Respondent contends that the management-rights clause did survive the expiration of the contract, citing *Castle-Pierce Printing Co.*, 251 NLRB 1293 (1980). That decision is inapposite. It holds only that "rights granted by an expired contract can be considered in evaluating whether a unilateral change has, in fact occurred, if the employer had exercised those management rights when the contract was in effect." Id. at 1298.

The Respondent herein had not, in the finishing department unit, altered the historical disciplinary system established by the past practice of the parties or sought to implement new forms of discipline that changed either the scope of discipline or the method for determining the level of discipline "when the contract was in effect." *Castle-Pierce Printing Co.*, ibid. Gigous was not cited for any specific dereliction that justified discipline for cause. If he had been, the Union could have grieved that action. The Respondent did not announce any change in its historical disciplinary procedure. It did not promulgate a rule providing that substandard annual performance reviews would result in discipline. It unilaterally took the unprecedented action of disciplining an employee in conjunction with his annual performance review.

The past practice of the parties establishes that failure to meet standards was dealt with by corrective action notices. The offenses listed on the corrective action notices, which include "unsafe work practice" and "poor performance," do not include receipt of a less than favorable annual performance review. Slade admitted that the only discipline that had ever been administered in conjunction with a performance review was placement upon a performance plan and that the only occasion upon which that occurred with regard to a finishing unit employee was on September 7, with regard to Gigious. The performance improvement plans affecting employees in a different unit who are represented by a different local union were not placed into evidence, and they have no relevance or materiality to the allegations of the complaint.

Gigous had previously received discipline pursuant to corrective action notices. Rather than citing a specific dereliction and disciplining Gigous for cause for any shortcoming in his performance, as it had in the past with regard to Gigous and all other finishing unit employees, the Respondent chose to implement a policy that effectively placed Gigous under scrutiny for 90 shifts without establishing any deficiency in his work that merited disciplinary action. The record herein does not establish an objective standard of performance that Gigous

failed to achieve. The plan refers to undefined "significant improvement to an acceptable performance level" and includes the unobjective requirements of a need to "demonstrate leadership" and "sense of urgency in your duties." Failure to accomplish specifics that are noted, such as the need "not be shown the same task multiple times" and "produce his work in accordance with published quality standards," assuming those shortcomings were established, could have, in accord with past practice, been appropriately dealt with pursuant to corrective actions. Although demoted in February, Gigous did not receive any corrective action notices when working under the 90 Shift Performance Improvement Plan.

The Board decision in *Golden Stevedoring Co.*, 335 NLRB 410 (2001), is instructive in this case. In that case, the respondent, following the election victory of a union, began issuing written rather than oral, warnings. The Board, affirming the administrative law judge, agreed that this constituted a "material, substantial and significant" change insofar as the change "could affect his [the employee's] job security." Id. at 415. In this case, the implementation of discipline for a substandard annual performance review could, and ultimately did, affect the job security of Gigous and resulted in a more than $3-an-hour decrease in his pay.

The unilateral implementation of the 90 shift performance improvement plan "changed both the scope of the discipline and the method for determining the level of discipline to be applied" to unit employees. *Toledo Blade Co.*, 343 NLRB 385, 388 (2004). Slade testified that he considered the unilaterally instituted performance improvement plan to be a "more positive step." I do not agree. No employee wants to work with someone looking over his or her shoulder every day. I suggest that any employee would prefer to receive a clear warning regarding a specific infraction rather than having his or her every action scrutinized for 90 shifts.

As the Charging Party correctly points out in its brief, "[t]he issue is not whether the Company has the right to demote employees for cause. The issue is whether the Company can unilaterally implement an all-new practice and policy for dealing with issues of work performance, by no longer treating them under the long-established progressive discipline policy, and instead treating them with a new unilaterally implemented . . . [90 shift performance improvement plan]." Prior to the implementation of the performance improvement plan, employees' poor work performance was addressed by specific disciplinary actions, each of which the Union could grieve.

Instituting the 90 shift performance improvement plan for a less than favorable annual performance review introduced a new form and level of discipline with undefined consequences. The Respondent, without notice to or bargaining with the Union, expanded the scope of discipline by issuing discipline for less than favorable annual performance reviews and instituted a level of discipline, performance improvement plans, that had previously not existed. *Toledo Blade Co.*, supra. By doing so, the Respondent violated Section 8(a)(5) of the Act.

2. The demotion

The complaint alleges, and the answer admits, that the Respondent "reassigned an employee in the Unit to a lower classification and position pursuant to a 90 Shift Performance Improvement Plan." The demotion of Gigous resulted from his failure, in the eyes of the Respondent, to successfully complete the 90 shift performance improvement plan imposed upon him. The implementation of that plan constituted a unilateral change affecting the terms and conditions of employment of unit employees. Notwithstanding the request of the Union that the Respondent stay its action, it proceeded with the plan and, pursuant to it, demoted Gigous.

Neither the management-rights clause of the expired contract nor the parties past practice permitted the action of the Respondent. Article XII of the expired contract provides that, once an employee assumes a permanent position, loss of that position may occur by (a) temporary transfer "not to exceed two (2) shifts" or (b) removal of "[e]mployees with the least classification seniority." The corrective action notices do not provide for demotion as punishment imposed under the disciplinary system. Slade acknowledged that demotion was not part of the disciplinary process when employee Pieper was urged to take a downgrade.

The record establishes two instances in which demotion occurred in a manner other than the contractual temporary transfer or removal of an employee with the least seniority from a permanent classification. Although the Respondent's brief asserts that those two demotions resulted from poor performance, the facts reveal otherwise. With regard to Goldie, who had been discharged, the Union negotiated his return in a lower job classification in settlement of a grievance. Pieper received a corrective action notice on June 29, 2005 after "she ran into another lift truck." Her demotion on July 8, 2005, occurred because of "her most recent safety related incident" in order to protect other employees. The Respondent was concerned "that she would hurt someone." So far as the record shows, no grievance was filed with regard to the corrective action notice or demotion. Gigous had no safety related offenses. His most recent discipline occurred more than a year before he was placed upon the performance improvement plan; thus, his next dereliction would have resulted in a verbal warning.

The vice is not what happened to Gigous; the vice, as explained by the Union in its letter of September 8, was the effect upon "the conditions of employment for our members." As further stated by Strohecker's e-mail of January 9, 2007 "[w]hen a company implements a policy that is a unilateral change in conditions of employment, all employees are aggrieved." The Respondent did not discipline Gigous in the historical manner consistent with the past practice of the parties. If the Respondent could have objectively documented any deficiency of Gigous, it could have disciplined him, in which case the Union could have grieved that action, and the Respondent would have had to justify its actions. The Respondent sought to avoid that procedure by unilaterally implementing a performance improvement plan.

The demotion of Gigous affected his terms and conditions of employment and directly resulted from the unilaterally imposed performance plan. "If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, the discipline or discharge violates Section 8(a)(5)." *Great Western Produce*, 299 NLRB 1004, 1005 (1990). The unilateral imple-

mentation of the performance improvement plan resulted in the demotion of Gigous. I find that the demotion of Robert Gigous violated Section 8(a)(5) of the Act.

3. The information requests

The complaint alleges that the Respondent failed and refused to provide the Union with relevant information requested in its letter of September 8, as expanded in its letter of November 14, and as rerequested in various e-mails. The information sought related to the terms and conditions of employment of unit employees and was presumptively relevant. The Union further explained its need for the information sought. Longstanding Board precedent, as recently summarized in *Postal Service*, 337 NLRB 820, 822 (2002), establishes that:

> The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.*, 272 NLRB 1128 (1984). The Board's standard, in determining which requests for information must be honored, is a liberal discovery-type standard. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979).

The contract contains no provision relating to information requests. Slade admitted that he handled requests for information unrelated to grievances. Although Slade initially testified that he would refer any information request "to the property [sic] level," he later contradicted that response and contended that the information requested by the Union herein was not provided "because the Union never made the request to the correct person." Insofar as the Respondent initially contended that the grievance regarding implementation of the performance plan was not properly filed with the supervisors of Gigous, the information request was, therefore, unrelated to a valid pending grievance and should, according to Slade, have been responded to by him as a generic request since it was unrelated to a valid pending grievance.

The Respondent's claim that the grievance was improperly filed has no bearing upon the information request and, furthermore, it is incorrect. As Strohecker explained in his e-mail of January 9, 2007 "[w]hen a company implements a policy that is a unilateral change in conditions of employment, all employees are aggrieved." Strohecker points out that he was not "directed to anyone else in regards to the first step," and notes that the Union continues "to await the information we have requested." The September 8 request, addressed to Slade, was given to Slade, with copies for Adams and Cheever, on September 12.

The Respondent's e-mails never addressed the Union's information requests. Even accepting some initial misunderstanding regarding the outstanding grievance, nothing could have been clearer than the Union's communication of January 9, 2007, stating that the Union continues "to await the information we have requested."

The Respondent never responded to the requests for information. Even if it be assumed that the grievance was not properly filed, a respondent may not refuse to provide requested relevant information pursuant to a contention "that the grievances are procedurally defective," because "the Board, in passing on an information request, is not concerned with the merits of the grievance." *Southeastern Brush Co.*, 306 NLRB 884 fn. 1 (1992). "[A]n employer must respond to a union's requests for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory. *Ellsworth Sheet Metal*, 232 NLRB 109 (1977)." *Columbia University*, 298 NLRB 941, 945 (1990).

The Respondent, by failing to respond the requests for information by the Union and by failing to provide the information requested in its letter of September 8, and as expanded in its letter of November 14, all of which was relevant to the Union in carrying out its obligation to represent finishing department unit employees, violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By unilaterally, without notice to or bargaining with Graphic Communications Conference/International Brotherhood of Teamsters, Local 65-B, implementing a 90 shift performance improvement plan, the 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 demoting employee Robert Gigous on February 26, 2007, pursuant to the unlawfully implemented 90 shift performance improvement plan, the 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.

3. By refusing to bargain collectively with the Union by failing and refusing to provide information requested by the Union in its letters of September 8 and November 14, that is relevant and necessary to that Union as the collective-bargaining representative of employees in the appropriate unit, the 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.

The Respondent having unilaterally implemented a 90 shift performance improvement plan, it must rescind the Plan and make whole Robert Gigous, who was demoted pursuant to that plan, for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must provide the information initially requested by the Union in its letter dated September 8, 2006, as well as the information sought in its expanded request in its letter dated November 14, 2006.

The Respondent must also post an appropriate notice.

[Recommended Order omitted from publication.]