

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

KENNAMETAL, INC.,)	
)	
Respondent,)	
)	
And)	1-CA-46293
)	1-CA-46294
)	
)	
UNITED STEELWORKERS, LOCAL 5518,)	
Affiliated with UNITED STEELWORKERS)	
OF AMERICA, AFL-CIO, CLC)	
)	
Charging Party.)	

**RESPONDENT'S BRIEF IN SUPPORT OF
EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE**

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NOW COMES Kennametal, Inc., Respondent herein (“Kennametal” or “the Company”), and files its Brief in Support of Exceptions to Decision of Administrative Law Judge as follows:

STATEMENT OF CASE

A. Proceedings Below

This consolidated case arises out of Kennametal’s adoption of a “Management-Based Safety” program (“MBS”), disciplinary action taken against two bargaining unit employees for violations of a separate safety disciplinary policy, and alleged failures to provide information to the Union, all at Respondent’s Lyndonville, Vermont facility. The hourly production employees at the Lyndonville facility are represented by the United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC (“the Union”). The Union filed charges, and the Regional Director issued a complaint alleging that Kennametal violated sections 8(a)(1)

and 8(a)(5) of the National Labor Relations Act (“NLRA”). The case was heard by Administrative Law Judge Arthur Amchan on February 8-10, 2011, in Greenfield, Massachusetts.

On April 12, 2011, ALJ Amchan issued his recommended decision finding that Respondent had violated the Act in the following respects:

- (1) “failing and refusing to bargain with the Union over the implementation of the Management Based Safety Program insofar as it required employees to take such actions as initialing agreement or disagreement with the safety check list on its white boards upon pain of discipline.”
- (2) “Excluding the Union from accident investigations.”
- (3) “unilaterally implementing and/or more strictly enforcing its disciplinary policies for safety violations.”
- (4) “suspending Doug Noyes and terminating Kenneth Wilkins.”
- (5) “By failing and/or delaying the furnishing to the Union of information it requested that is necessary for and relevant to the Union’s duties as collective bargaining representative of Respondent’s employees.”

(JD 15: 30-40).¹

Respondent now files its exceptions to the ALJ’s recommended decision and this supporting brief.

B. Statement Of Facts

Kennametal is headquartered in Latrobe, Pennsylvania, and operates a number of manufacturing facilities in the United States and worldwide, including the Lyndonville facility. Several of its facilities in the United States are unionized, including a facility in Greenfield,

¹ References to the ALJ’s decision are designated as “JD” followed by the appropriate page number(s). References to the transcript are designated as “Tr.” followed by the appropriate page number(s). References to the exhibits are designated either as “GC” or “R” followed by the appropriate exhibit number(s).

Massachusetts, and facilities in Irwin, Pennsylvania, and Chilhowie, Virginia. The Lyndonville facility manufactures taps and dies that are the components for making screws and bolts, and the bargaining unit has approximately 100 employees.

At all relevant times, Kennametal and the Union were parties to a collective bargaining agreement, which contained a detailed “Safety and Health” article. As relevant to this case, Article 16 provided as follows:

16.01 The Employer and the Union will cooperate in the continuing objective to eliminate accidents and health hazards. *The Employer shall continue to make reasonable provisions for the safety and health of its employees at the Plant during the hours of their employment.*

....

16.04 An employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazards inherent in the operation in question shall bring the condition to the attention of the Safety Committee *who will refer it to the Employer for preferred handling.*

16.05 The Employer and the Union agree to cooperate in *the maintenance of the Employer’s safety program* and in the enforcement of such reasonable safety and health rules *as may from time to time be established by the Employer.* To this end a Joint Safety Committee shall be selected composed of two (2) members and one (1) alternate appointed by the Employer and two (2) members and one (1) alternate appointed by the Union whose sole function shall be to make regular inspection tours of the plant once a month which shall be followed by a regular monthly meeting of said Committee for the purpose of reviewing safety, housekeeping, and health conditions, and *making recommendations* to the Employer. The Staff Representative and the President of the local Union, and a member of top management will attend these meetings no less than four (4) times yearly to ensure an up-to-date, on going safety program. Plant tours will be held on Tuesdays before the Union meetings when possible.

....

16.07 *The function of the Safety Committee shall be to advise the Employer concerning safety and health, but not to handle grievances.* Its function shall be to analyze existing safety practices and rules, *make recommendations* for improvement, and *make recommendations* for the adoption of new practices and rules, *review* proposed new safety programs developed by the Employer and *review* disabling injuries which have occurred in the plant and *make recommendations* to prevent further occurrences. The Safety Committee shall

receive prompt notice of all incidents. All OSHA recordable accidents requiring medical attention with the potential for lost time will be investigated by no less than two (2) members (one each from Union and Company) of the Safety Committee and the Department Supervisor. Minor accidents will be investigated by the Supervisor and one (1) Union member of the committee.

16.08 It is intended that consistent with the foregoing function of the Safety and Health Committee, *the International Union, Local Union, Union Safety Committee and its officers, employees and agents shall not be liable for any work-connected injuries, disabilities or diseases which may be incurred by the employees.*

(GC-4) (emphasis added).

1. MBS Program

In 2009 and early 2010 Respondent sought to roll out the Management-Based Safety program at all locations. As the title of the program implies, the MBS program is aimed at management, not bargaining unit employees. (GC-2, 3, 7; R- 23, 24, 25, 26; Tr. 26-48, 440-464). The program focuses on how *managers* can “better manage” safety, “demonstrat[e] leadership,” and “demonstrate that safety has a high value to the organization . . . through personal involvement, demonstrated commitment and accountability.” (R-26, pp. 6-7) (ellipsis in original). According to the training materials, “An effective structure to manage safety must be *led by senior management and cascade throughout the organization* to create ownership and involvement.” (R-26, p. 7) (italics in original). Another slide says, “The behaviors of workers relative to safety performance . . . *is usually a direct reflection of effort being exerted by supervisors and managers.*” (R-26, p. 10) (ellipsis and italics in original). Although the program envisions that management will make safety a higher priority and will become more proactive in emphasizing safety with rank-and-file employees, the MBS program contains no disciplinary provisions and no substantive safety rules for production employees. Indeed, the only discernable

impact on employees is the requirement that they conduct a “pre-flight checklist” before they begin work. This checklist takes less than five minutes to complete. (Tr. 223-224).

On February 2, 2010, all Lyndonville employees (including the four members of the Union bargaining committee) were trained regarding the MBS program. (R-1). On February 3, 2010, the Company reviewed the MBS program with the Joint Safety Committee during a regular meeting. (R-3, Tr. 464-469). That same day, Union Safety Committee member John Eastman (“Eastman”) e-mailed a grievance regarding the MBS program to then-Human Resource Manager Taryn Blair (“Blair”). In his e-mail, Eastman requested bargaining regarding the MBS program. On February 4, Blair e-mailed a response to Eastman stating that the Respondent was in compliance with the contract and did not believe that the issue was negotiable, but that “we will discuss this with you and we respect and appreciate your support.” Blair requested that Eastman let her know if the Union wished to meet on the subject. (GC-5). No response was forthcoming from the Union, and the Respondent began implementing the MBS program on February 8, 2010. Full implementation took place over a period of several months. (Tr. 56-62).

On March 2, 2010, Respondent met with the Union to discuss Eastman’s grievance, and the parties agreed that they would meet on March 19, 2010, to discuss the MBS program. Accordingly, on March 5, 2010, Blair sent Eastman an e-mail indicating that Kennametal viewed the grievance as being resolved. (R-2). At the March 19 meeting, which included the Union’s International Staff Representative Carl Turner (“Turner”), Respondent provided additional information on the MBS program. Turner stated that if the Company would sit down with the Joint Safety Committee to review the program and if the latter was “OK” with it, then the Union would be “OK” with it. (GC-35, p. 3). At the next Joint Safety Committee meeting, on June 7,

2010, the Company reviewed the MBS program with the Committee. (R-3). The Union expressed no concerns and offered no recommendations. Nor did the Union ever make any effort to pursue the Eastman grievance further. However, despite these prior discussions, on July 16, 2010, Turner sent Blair an e-mail stating that the “USW was just informed by Local 5518 of a new safety procedure that the company has implemented and I am requesting bargaining concerning the procedure and the effects it will have on the bargaining unit employees.” The MBS program was discussed at one additional Joint Safety Committee meeting after Turner’s July 16 email, on September 7, 2010. (Tr. 466-488, R-3).

2. Historical Practice

Consistent with the language in Article 16 of the Collective Bargaining Agreement, the Respondent has a consistent history of adopting safety policies, programs, and procedures at the Lyndonville facility without bargaining. (Tr. 365-410). The Kennametal Occupational Health & Safety Manual (R-8) that Respondent implemented after acquiring the Lyndonville facility addressed specific safe practices in the workplace and contained a list of safety-related “shop rules.” (R-8, p. 28; Tr. 365-67). In 2005, the Lyndonville facility adopted a list of forklift driving rules (R-9) without negotiating or discussing the rules with the Union. (Tr. 368-69) The Safety Tag Program – Lyndonville (R-10), which addresses the manner in which machines shut down for safety-related repairs are to be tagged, was adopted in 2005 without bargaining. (Tr. 369-71).

In 2006 during a voluntary inspection of the Lyndonville facility by the Vermont Occupational Safety and Health Administration (“VOSHA”), an employee was observed violating the lockout/tagout policy. (Tr. 372-77). In discussions about the incident, the Company told the VOSHA assistance officer that it did not have a standalone safety-disciplinary policy by which it could bypass the progressive disciplinary steps. The VOSHA officer recommended that

such a policy be adopted. Accordingly, in early 2007, the facility adopted a Safety Bypass Discipline Policy (“the Bypass Policy”). The Bypass Policy was adopted merely by being posted on an employee bulletin board for 48 hours and without negotiation with the Union. This allowed the Company to discipline employees appropriately for serious safety violations without having to follow the progressive steps that applied to most rules. (R- 11; Tr. 373-374).

The Lockout/Tagout policy (R-13) was revised several times between 2003 and 2007 without bargaining. (Tr. 384-99). A number of safety procedures developed by the engineering department were adopted without bargaining. (R-14; Tr. 399-401).

In 2007, Respondent rolled out to the Lyndonville employees a program called SAFESTART. The purpose of SAFESTART was to prevent accidents in the workplace by teaching root causes of accidents, defining simple patterns of behavior, and raising awareness. (R-16, p. 5). SAFESTART prescribed safe behavior for all employees, including “Know[ing] where your hands and feet are at all times”; “Us[ing] screens, guards and personal protective equipment whenever you can,” and “Think[ing] about what might be coming at you before you move into an area.” (R-18, p. 10). The Union was notified about SAFESTART before it was introduced to employees, but there was no bargaining over it. (Tr. 408-11).

3. 2009 Corrective Action Policy

In early 2009, Respondent’s corporate office issued to its manufacturing facilities, including the Lyndonville facility, a Procedure for Corrective Action for Safety Violations (“the 2009 Corrective Action Policy”). (R-21). The policy lists examples of “Serious Violations” and “Other Violations.” A section called “Work Instructions for Corrective Actions” provides for a four-step progressive disciplinary process when an employee is found to have committed an “Other Violation.” In the event of a “Serious Violation,” the employee receives a three-day

suspension on the first offense and is terminated on the second offense. The Work Instructions also authorize management to “use its discretion to accelerate corrective action.” This may include termination on first offense if the violation “demonstrated disregard for the health, safety and well-being of employees, customers, vendors, or other visitors to the facility, or [for] actions which amount to such serious disregard for human life that continued employment poses an unacceptable safety risk to the employee and/or others.” A third section is a two-page decision tree for management to follow in determining what penalty (if any) is appropriate for a given safety violation. The 2009 Corrective Action Policy was not bargained with the Union. (Tr. 411-418).

The record reflects that a number of employees, both inside and outside the bargaining unit, had been disciplined over the years for safety violations. David Jennotte received a first written warning on April 30, 2007, for a lockout/tagout violation. (R-22, p. 1). Ross Fields, a supervisor, received a first written warning on August 22, 2007, for shipping an overweight package to the Greenfield facility. (R-22, p. 2). Rick Kittredge received an oral warning on October 23, 2007, for “blowing [an] air hose off making loud noise.” (R-22, p. 3). Tom Dupont received an oral warning for “slotting a wheel without wearing [a] face shield.” (R-22, p. 4). Scott Cady received an oral warning on February 21, 2008, for not wearing proper slip-resistant shoes. (R-22, p. 5).

In September 2009, Bob Gordon, a bargaining unit employee, committed a safety violation (putting his hand into a machine while it was cycling) and was due to be disciplined under the 2009 Corrective Action Policy. (Tr. 421-22). However, before carrying out the discipline, Amy Morissette, who at the time was the Environmental Health and Safety (“EHS”) Coordinator for the Lyndonville and Greenfield, Massachusetts facilities, discovered that only

the “Procedure” section of the 2009 Policy had been posted and not the “Work Instructions” section, which set forth the penalties for violations. (R-21, p. 6; Tr. 414-15). Accordingly, the Company chose to discipline Gordon under the predecessor Bypass Policy, rather than the 2009 Corrective Action Policy. (Tr. 421-23). Meanwhile, the Procedure and Work Instructions sections of the 2009 Corrective Action Policy were posted on or about September 18, 2009. According to past practice, the new policy became effective after being posted for 48 hours. The Union never grieved the 2009 Corrective Action Policy or objected to its adoption. (R-22, Tr. 423-425).

On February 12, 2010, pursuant to the 2009 Corrective Action Policy, David Jennotte was suspended for one day because of failure to properly follow the lockout/tagout procedure (R-22, p. 9); Chad Tibbitts was disciplined on the same day for a similar offense (R-22, p. 10) (Tibbitts was initially issued a second written warning, which was downgraded to a first written warning because he contended that the procedure was not on the machine); Ray Therrien received a first written warning on February 16, 2010, for timing out and leaving without notifying the shop supervisor (R-22, p. 15) (Therrien filed a grievance); Dave Brousseau was disciplined on April 12, 2010, for failure to train one of his employees on “safety production procedure” (R-22, p. 11) (Brousseau was initially issued a second written warning, which was downgraded to a first written warning); Jim Fox received an oral warning on April 12, 2010, for “leaving an unsecured ladder on shop floor, violation of ladder safety” (R-22, pp. 12-13); and Sean Jewell, a supervisor, was disciplined on April 19, 2010, for resetting a personal computer in a power cabinet without wearing proper personal protective equipment (R-22, p. 14).

On August 24, 2010, Doug Noyes was injured when the web between his thumb and forefinger was sliced by a piece of sheet metal. (GC-11; Tr. 435-37, 626-28). The Company's investigation of the accident revealed that Noyes had been drilling a piece of sheet metal into a block of wood. Instead of securing the sheet metal to the block of wood using a vise, Noyes held the sheet metal in place with his hand and did not wear the recommended leather gloves. After drilling, Noyes pulled the drill up, and the metal spiraled up with the drill, slicing into his bare hand. Noyes had to be taken to the emergency room and had to get stitches. The investigation revealed that the accident could have been avoided if Noyes had either used a vise, or worn leather gloves to protect his hands. Noyes had injured his hand several times before because he had not worn personal protective equipment. (GC-12; Tr. 436, 628-29). After following the decision tree attached to the 2009 Corrective Action Policy, and determining that Noyes had been properly trained in how to safely perform this function, the Company initially intended to apply the "three-day suspension for first offense" penalty set forth in the 2009 Policy. However, because the leather gloves were only recommended and not required, the decision was made to issue Noyes a one-day suspension. (Tr. 630-31). The MBS program had no impact on Noyes's discipline; rather, his discipline was nothing more than a "mitigated" version of the discipline for a serious safety violation called for under the 2009 Policy. (Tr. 341, 625-31).

On October 27, 2010, bargaining unit employee Ken Wilkins ("Wilkins") was injured after his hand was caught in a grinding wheel. (GC-13). The investigation revealed that he was trying to retrieve a jammed part from a square grinder. (GC-14). The proper procedure in such situations is to "1. Shut wheel off wait for wheel to stop. 2. Turn feeder block switch [from manual] to auto. 3. open center and retrieve part." (GC-14). Instead of following this procedure, Wilkins:

1. Shut wheel off but did not wait for wheel to stop. 2. Did not make sure that feeder block switch was in auto position, in fact it was in the 'in' [sic] position. 3. When opening the centers to retrieve the part the feeder block came forward because the feeder block switch was set incorrect. [sic] This caused the feeder block to push Ken's hand into the moving wheel causing multiple lacerations [sic] on 3 or more fingers.

(GC-14).

The investigation also revealed that Wilkins had been trained on the proper procedures as recently as July 2010. (GC-15, p. 1; Tr. 631-34). At the conclusion of Wilkins's medical leave, he was informed that he was receiving a five-day suspension pending termination. (GC-15, p. 2). This was an "acceleration" of the discipline called for in the 2009 Corrective Action Policy for a serious safety violation. (Tr. 633-34). Wilkins filed a grievance, and resolution was pending as of the date of the hearing. (Tr. 634).² As with Noyes, the MBS program had no impact on the action taken. (Tr. 341, 632-34).

4. Union Request for Information Regarding MBS³

Although the MBS program was not a mandatory subject of bargaining, Respondent did share information with the Union about the program on numerous occasions. The record reflects that the members of the Joint Safety Committee underwent training in the MBS program on February 2, 2010, and that the Company discussed the substance of the MBS program with the Union on February 3, 2010; March 19, 2010; June 7, 2010; and September 7, 2010. Thus, by the time Turner sent to Blair on July 16, 2010, his request to bargain and request for information, **Complaint, ¶10(d)**, the Union had already received substantive information about the MBS

² Although not in the record, Wilkins was reinstated subsequent to a the hearing with a three-day suspension. This issue is still pending arbitration.

³ Respondent does not except to the ALJ's findings regarding the information request issues, except with respect to his finding that Respondent failed to furnish information regarding the MBS program in response to Carl Turner's July 16 request.

program on four separate occasions. Even so, the Company met with the Union one additional time after Turner's request, on September 7, 2010, and discussed the program a fifth time. It is not clear what additional information the Union sought.

STATEMENT OF ISSUES

1. Whether Respondent unlawfully failed to bargain regarding any aspect of the MBS?
2. Whether Respondent unlawfully excluded the joint safety committee from investigating accidents?
3. Whether Respondent violated sections 8(a)(5) and (1) by implementing a new safety corrective action policy and suspending Doug Noyes and terminating Ken Wilkins?
3. Whether Respondent unlawfully refused to provide information to the Union about the MBS program?

ARGUMENT

I. RESPONDENT DID NOT UNLAWFULLY REFUSE TO BARGAIN OVER THE COMPREHENSIVE MBS PROGRAM. [EXCEPTIONS 1, 21, 22, 23, 26, 33, 34, 35, 36, 37, 38]

Although paragraphs 13 and 14 of the General Counsel's complaint alleged broadly that Respondent failed to bargain over the entire MBS program, the only specific element of the MBS program that the ALJ found Respondent failed to bargain over was insofar as it "required employees to take such actions as initialing agreement or disagreement with the safety check list on its white boards upon pain of discipline." Thus, it seems clear that the ALJ found no violation in the general implementation of the comprehensive MBS program. Nevertheless, paragraph 2 (d) of the ALJ's proposed order directs Respondent to "[a]t the request of the Union, rescind any unilateral changes that affect the wages, hours and/or terms and conditions employment of unit employees," (JD 17) and one paragraph of the proposed Notice states: "WE WILL at the request

of Local Union No. 5518, rescind any other part of the Management Based Safety Program that affects the wages, hours and working conditions of bargaining unit Employees” (JD 19). These provisions are overly broad, clearly erroneous, and purport to leave open the possibility that there are other changes not found by the ALJ that would have to be rescinded upon request of the Union. Not only did the ALJ not make specific findings that would support these provisions, but as shown below, it is clear that Respondent had no legal obligation to bargain over the MBS program.

Section 8(d) of the Act limits the duty to bargain “to wages, hours, and other terms and conditions of employment.” As Justice Stewart noted in his oft-quoted concurrence in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964):

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining.

Id. at 220.

Justice Stewart’s position was later adopted by the Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981): “Nonetheless, in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place.”

Further, the bargaining obligation “extends only to the ‘terms and conditions of employment’ of the employer's ‘employees’ in the ‘unit appropriate for such purposes’ that the union represents.” *Allied Chemical & Alkali Workers of America, Local Union 1 v. Pittsburgh*

Plate Glass Co., 404 U.S. 157, 164 (1971). “Although normally matters involving individuals outside the employment relationship do not fall within that category, they are not wholly excluded.” *Id.* at 178. But to be included within an employer’s bargaining obligation, these matters impacting the employment of non-represented employees must “vitally affect” the terms and conditions of employment of the represented employees. *Id.* at 179.

Just as the employer in *Pittsburgh Plate Glass* had no obligation to bargain over current retirees, “an employer has no obligation to bargain with respect to the terms and conditions of supervisors.” *Buffalo Newspaper Guild, Local 26*, 265 NLRB 382, 397 (1982). Here, it is readily apparent from a review of the overall MBS program that its primary focus was on making “management” responsible for safety. In fact, safety became the number one job requirement for all managers. In her opening statement, Counsel for General Counsel essentially conceded that the MBS program is primarily about making management accountable for safety:

The Management Based Safety Program is a comprehensive change that was driven from a corporate wide stance, which would basically bring about a complete change in the way that safety was dealt with. The idea of the program is to encourage awareness of safety, to encourage training of safety, to set up programs and procedures by which safety would be made aware to all employees and, significantly by which safety would become something that managers and supervisors were held accountable for.

(Tr. 13).

Thus, the overall program was not a mandatory subject of bargaining. Further, although the ALJ failed to specifically address Respondent’s argument regarding the impact of Article 16 of the CBA, it is clear that the CBA gave management the exclusive right—indeed the obligation—to take all reasonable steps to ensure the safety of all employees.

For many years, the Board and some courts, most notably the United States Court of Appeals for the D.C. Circuit, have disagreed over the appropriate standard to apply when a

collective bargaining agreement covers a particular topic. Although the Board has steadfastly applied the clear and unmistakable waiver standard, *see Rochester Gas & Electric Corp.*, 355 NLRB No. 86 (2010), the D.C. Circuit has applied a “contract coverage” standard:

If the parties have agreed to a contractual provision that limits their rights with regard to a term or condition of employment, we will give full effect to the plain meaning of such provision. Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has “waived” its statutory right to bargain; rather, the contract will control and the “clear and unmistakable” intent standard is irrelevant.

Local 47, IBEW v. NLRB, 927 F.2d 635, 641 (D.C. Cir. 1991); *see also Mead Corp. v. NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983).

Respondent contends that the Board should adopt the “contract coverage” standard. As a practical matter, however, it is clear that under either standard, no violation of the Act has occurred. Under the contract coverage analysis, the CBA contains detailed provisions regulating the issue of safety. Article 16 is comprehensive in scope, and the bargaining issue with regard to safety has been exhaustively covered. But even under the waiver standard, the complaint allegation fails. “The Board finds a waiver of the statutory right to bargain based on language contained in the contract if the contract language is specific regarding the waiver of the right to bargain regarding the particular subject at issue. Thus, the Board looks at the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (finding contractual waiver of right to bargain over subcontracting).

In *Allied Signal, Inc.*, 307 NLRB 752 (1992), where the Board concluded that the Union had waived its right to bargain over a new smoking policy, the Board focused on contractual language very similar to the language at issue in this case, which gave the Employer the right to

develop safety programs and policies. As is the case here, the contract in *Allied Signal* provided that the “Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment.” The contract further provided that the “Company will continue to provide necessary protective equipment for the use of employees.” The role of the Union and its committees was to “promote and assist the Company in maintaining a safe and healthy place to work” and to “bring to the attention of the Company any unsafe or unhealthy conditions in the plant.” Although the Board also relied on a past practice of allowing the Company to implement and revise safety policies, the Board heavily emphasized the contractual language:

We note that the clause contemplates that the Respondent has the responsibility to act unilaterally to ensure workplace safety and health and that the Union's role is advisory, not participatory. The clause expressly provides that the Union and employees will bring safety and health problems to the Respondent's attention, but that the decision on what action to take is left to the Respondent.

Id. at 753.

The contractual language in this case is even clearer than that in *Allied Signal*. The entire structure of Article 16 is premised on the proposition that the Company is contractually and legally *responsible* for employee safety and that the role of the Union and employees is to *cooperate, advise, and make recommendations*. All decisions, however, rest exclusively with the Respondent. Thus, it is the Company who “shall continue to make reasonable provisions for the safety and health of its employees at the Plant during the hours of their employment.” Employees bring unsafe conditions “to the attention of the Safety Committee who will refer it to the Employer for preferred handling.” The Union cooperates “in the maintenance of the Employer’s safety program and in the enforcement of such reasonable safety and health rules as may from time to time be established by the Employer.” The Joint Safety Committee conducts “regular

inspection tours of the plant once a month which shall be followed by a regular monthly meeting of said Committee for the purpose of reviewing safety, housekeeping, and health conditions, and making recommendations to the Employer.” This Committee “advise[s] the Employer concerning safety and health,” “make[s] recommendations for improvement,” “make[s] recommendations for the adoption of new practices and rules,” “review[s] proposed new safety programs developed by the Employer,” and “review[s] disabling injuries which have occurred in the plant and make[s] recommendations to prevent further occurrences.” Finally, because the Union’s role is only advisory and it is the Company who bears the ultimate responsibility for employee safety, the Union “shall not be liable for any work-connected injuries, disabilities or diseases which may be incurred by the employees.”

Respondent contends that Article 16 is explicit and that, on its face, it waives any right the Union might otherwise have had to bargain over the MBS program. But even if this proposition is in doubt, the bargaining history (described in detail above) clearly shows that the Company’s longstanding practice has been to implement and revise safety rules and policies unilaterally. In combination, the contractual language coupled with the historical practice clearly constitutes a waiver of any right to bargain over this program. Thus, Respondent did not unlawfully refuse to bargain over the comprehensive MBS program. However, because the ALJ failed to make this explicitly clear, Respondent requests that the Board expressly find that Respondent lawfully implemented its overall MBS program except as specifically found otherwise. Respondent further requests that the ALJ’s proposed Order and Notice be revised to eliminate any suggestion that there are unidentified aspects of MBS that might need to be rescinded if requested by the Union.

II. RESPONDENT DID NOT UNLAWFULLY FAIL TO BARGAIN WITH REGARD TO THE SAFETY CHECKLISTS AND WHITE BOARDS. [EXCEPTIONS 21, 23, 26, 33, 34, 36]

With respect to the use of a safety checklist and white boards, the ALJ acknowledged:

The objective requirements of the safety check lists were not new. Thus, if an employee was, for example, required to wear hearing protection after MBS, that was also the case prior to the implementation of MBS. Similarly, an employee's duty to comply with Respondent's jewelry policy did not change with the implementation of MBS.

(JD 8: 5-10).

It follows for several reasons, and the ALJ did not find otherwise, that Respondent did not violate the Act by unilaterally implementing safety checklists. First, because the checklists did not themselves make any changes in employees' terms and conditions of employment, it cannot be said that the checklists were subject to bargaining. Most certainly, they did not constitute "a material, substantial, and a significant" change that would require bargaining. *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976). "The mere fact that an employee is 'disadvantaged' by the change, although perhaps relevant to the test, is not alone sufficient to satisfy the test." *Berkshire Nursing Home, LLC*, 345 LRB 220, 221 (2005) (change in employee parking areas not sufficiently substantial and material to require bargaining). For example, in *Murphy Oil Co.*, 286 NLRB 1039, 1041 (1987), the Board stated:

Several unilateral changes here are neither material, substantial, nor significant. That employees are no longer permitted to play cards in the maintenance shops and bay area, but are permitted to play in the lunchroom, is of little consequence. So, too, is the rule requiring employees to wait at their work stations prior to quitting time rather than roam around. The increased paperwork required to borrow tools from Respondent or to perform personal work in Respondent's facility appears to be so minimal that the employees ought to be barely inconvenienced.

Here, the only change affecting employees that occurred following the adoption of the MBS program was the "pre-flight checklist" that the employees must go through before they

begin work. (Tr. 223-224). This checklist takes less than five minutes to complete and does not constitute a substantial or material change that would require bargaining.

Second, even if the adoption of safety checklists could be said to materially affect employees' terms and conditions of employment, the collective bargaining agreement clearly and unmistakably gave Respondent the exclusive right to adopt such checklists. As discussed at length above, the CBA makes management *responsible* for the safety of all employees. It is beyond dispute that in implementing safety checklists and white boards that Respondent merely complied with its contractual obligation "to make reasonable provisions for the safety and health of its employees during the hours of their employment." Under either the contract coverage or the waiver theory, no violation occurred.

The ALJ's finding that there was a material effect because Respondent required employees to initial the white boards under threat of discipline if they fail to do so makes no sense at all. The purpose, as the ALJ noted, is as follows:

If the operator disagrees with the statement on the check list, they are required to initial the laminated white board in red and fill out an EHS alert. Then the operator's supervisor is supposed to determine what if anything needs to be done to make the operation safe.

(JD 8: 11-15).

How is management supposed to know if corrective action should be taken if the employee refuses to make the supervisor aware of any safety issues? Signing the white board is simply part and parcel of conducting the safety checklist. It certainly does not constitute a substantial and material change in terms and conditions of employment. The fact that the employee can be disciplined for refusing to initial the white board does not change the analysis. Such discipline, if it occurred, would be no different than the discipline that could be issued for any conscious refusal to carry out a directive or a job duty. (see Tr. 200-204; R-33).

Indeed, the directive to initial the whiteboard is simply a method of communicating safety problems to the supervisor. If instead the supervisor were to ask each employee if he or she had checked the area and if any safety problems had been found and the employee refused to answer, it is inconceivable that management could not discipline the employee. The obligation to comply with reasonable management directives is not new and does not constitute a unilateral change in terms and conditions of employment. Respondent requests that the ALJ's finding of a violation be reversed.

III. NEITHER MBS NOR RESPONDENT EXCLUDED THE JOINT SAFETY COMMITTEE FROM INVESTIGATING ACCIDENTS. [EXCEPTIONS 1, 15, 29, 33, 34, 36]

The ALJ found that “[u]pon implementation of MBS, the Union and its Safety Committee played no role in investigating accidents at the plant” and “[t]his was done unilaterally by Respondent.” (JD 8: 40-41). Based on this finding, the ALJ concluded that by “unilaterally cutting the Union out of the investigation of accidents in situations in which the investigation could lead to serious disciplinary consequences to the injured employee, Respondent violated Section 8(a)(5) and (1).” (JD 8: 44-45; 9: 5-7). Respondent contends that these findings are erroneous and should be reversed.

Although John Eastman testified that *he* did not actively participate in accident investigations in 2010, the record fails to contain substantial evidence showing that Eastman's lack of participation was a direct function of either the MBS program or *unilateral action* by Respondent. Nor does it show that the safety committee in general was excluded from accident investigations at all. Eastman testified:

Q Okay. Have you been denied the right to investigate, or is it just that management's now doing its own invest –

A They're doing their own thing.

Q Okay. Has anyone told you, you can't investigate these –

A Nobody's told me I could.

Q You're still part of the Joint Safety Committee, correct?

A For some reason, there's separation. I feel there's been separation. Normally, a supervisor would bring it to you and you'd be involved from day one. That is not happening.

Q Okay. So, one difference you've identified is that the supervisors are not initiating involvement -- your involvement or someone's involvement from the Joint Safety Committee.

A Right. Whether it's me or the three other guys that are on the safety team.

Q All right.

A I can speak for myself, but I can't speak for them.

Q But, no one -- In the presentations, no one said that Management Based Safety prevented the Joint Safety Committee from conducting investigations, did they?

A No. I don't believe anybody said that.

(Tr. 199) (Emphasis supplied).

Clearly, the MBS program itself did not by its terms exclude the joint safety committee from participating in accident investigations. And even Eastman's testimony confirms that management never affirmatively excluded him from participating in accident investigations. Significantly, Eastman admitted that he could not speak to whether other safety committee members were involved in accident investigations. In fact, other evidence in the record supports the conclusion that even after the introduction of MBS, the joint safety committee members continued to participate in accident investigations. Thus, the safety committee minutes for June 7, 2010, as well as Amy Morissette's testimony, indicate that the meeting was used to conduct

“accident/incident investigation training,” which consisted of a one-hour power point presentation and a sample accident scenario, and that such training had been completed for all “managers/supervisors and safety team members . . . with exception of 3 people that need a make up session scheduled.” (R-3; Tr. 474, 478).⁴ Conducting accident/incident investigation training for safety committee members would have been a useless exercise if the intent was to exclude them from such investigations.

Other evidence suggests that safety committee members continued to be involved in accident investigations. Thus, with respect to the accident involving Ken Wilkins, which is discussed in more detail below, the record reflects that Union Safety Committee Member Darryl Bouchard was the person who notified supervisor Tim Morissette of Wilkins’ injury. Morissette and Bouchard then drove Wilkins to the hospital. During this ride, Wilkins briefly described the accident, although he was in too much pain to give a full account at that time. While the record does not reflect the extent of Bouchard’s participation in the investigation following the trip to the hospital, there is no evidence at all that he was excluded from this investigation. (Tr. 602-605). Further, the record reflects that Terry Pray was a Union Safety Committee Member (Tr. 186) and that he was present on November 22, 2010 (after Wilkins returned to work) when Wilkins was interviewed in greater detail regarding the accident, and that Pray actually wrote out Wilkins’ statement for him. (GC 13; Tr. 603-604). The record also demonstrates that in 2010, the safety committee continued to review accident reports at their regular meetings. (R-3, Tr. 590-

⁴ The minutes indicate that John Eastman was not present for this meeting.

593). Although the accident/incident reports changed in style and formatting⁵ in 2010, the fact remains that the joint safety committee continued to review these reports on a regular basis.

Clearly, the ALJ's finding that Respondent unilaterally cut the joint safety committee out of accident investigations cannot be sustained. In fact, the record demonstrates the exact opposite. Respondent requests that the Board reverse the ALJ's finding of a violation in this regard.

IV. THE MBS PROGRAM HAS NO DISCIPLINARY ELEMENT AND WAS NOT RELIED UPON IN DISCIPLINING NOYES AND WILKINS. [EXCEPTIONS 1, 16, 17, 18, 19, 22, 23, 33, 34, 36]

The ALJ found that "MBS in making it more probable that an injured employee would be found at fault for an industrial accident had a clear relationship to disciplinary measures taken as the result of an accident," and "I reject Respondent's argument that MBS has nothing to do with Respondent's discharge and discipline policies." (JD 3: 10-18). He further found that "in the context of this case to consider the disciplinary policy for safety violations as a totally separate and distinct matter from MBS would elevate form over substance," and that "MBS and the discipline policy are part of the same corporate initiative to improve Respondent's safety record, particularly at Lyndonville." (JD 12: 26-32). At various other places in his decision, he states or suggests that the safety disciplinary policy was effectively one and the same with MBS. These findings are clearly erroneous and should be reversed.

While MBS and the 2009 Safety Corrective Action Policy both related to safety and both stemmed from a desire to make safety number one, the two were wholly unrelated programs that addressed different aspects of safety and that originated from Respondent's corporate

⁵ Although the revised form did not include a specific line for the signature of a union safety committee member, the fact remains that the safety committee continued to participate in accident investigations. The change in the form did not have a material impact on the role of the safety committee. *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976).

headquarters at different times. The 2009 Safety Corrective Action Policy was generated on February 2, 2009 and was intended to address employee accountability for failing to follow established safety rules and practices. (R-21). The MBS program was rolled out to management on November 13, 2009 and was focused on making management accountable for safety. (R-23). That the Human Resource Manager at Lyndonville failed to post the Safety Corrective Action Policy in a timely fashion does not alter the fact that the two programs are related only in general topic. This relationship is not sufficient to say, as the judge does, that MBS made it more probable that an injured employee would be found at fault and thus was effectively part and parcel of the disciplinary policy. Respondent requests that the Board reject these findings.

V. RESPONDENT DID NOT VIOLATE THE ACT BY IMPLEMENTING A NEW SAFETY CORRECTIVE ACTION POLICY OR BY ITS DISCIPLINARY ACTIONS AGAINST EMPLOYEES NOYES AND WILKINS. [EXCEPTIONS 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 22, 23, 24, 25, 30, 31, 33, 34, 36]

There is no question that the disciplinary actions taken against Doug Noyes and Ken Wilkins were pursuant to the 2009 Safety Corrective Action Policy (R-21) and that this policy was more detailed than the 2007 Safety Bypass Policy (R-11). There also is no question that Respondent implemented the 2009 policy—as it had the 2007 policy—unilaterally. Nevertheless, the judge erred in finding a violation for three reasons. One, the 2009 policy created no new safety rules or procedures and did not alter the contract’s “just cause” provision, but merely guided management in making such just cause determinations. Two, the CBA and established past practice gave Respondent the right to implement the 2009 policy and thus the Union waived its right to bargain. Three, these allegations are barred by section 10(b) of the Act.⁶

⁶ Respondent has not excepted to the ALJ’s findings that this issue was fully litigated and that the General Counsel could amend the complaint in her post-hearing brief.

A. No Change In Rules Or Contract

The CBA (GC-4) does not contain any specific safety rules, and the 2009 Safety Corrective Action Policy created none. Rather, safety rules and procedures had been established over a long history. (R-8, 9, 10, 11, 13). Nothing in the 2009 Safety Corrective Action Policy changed these rules. And the unsafe practices for which Respondent disciplined Noyes and Wilkins were long-standing in nature. Thus, no changes occurred at all with the type of conduct that would subject employees to discipline.

The CBA also does not contain a specific progressive discipline procedure. Rather, Article Six provides:

6.01 The right to discharge, suspend or otherwise discipline employees shall continue in the Employer, provided, however, that no such action shall be taken without just cause. The Employer agrees promptly upon the discipline, suspension or discharge of any employee to give written notice thereof to a Local Union official designated by the Union for that purpose.

6.02 In the event that any employee shall be discharged, suspended or otherwise disciplined by the Employer and such employee believes that he has been dealt with unjustly, the question whether such discharge, suspension, or other disciplinary action was for just cause shall constitute a grievance and shall be settled in accordance with the grievance and arbitration provisions outlined elsewhere in this Agreement.

Nothing in the 2009 Safety Corrective Action Policy purported to change the “just cause” standard or limit an arbitrator’s right to assess just cause. Rather, this policy does nothing more than guide management’s judgment in making disciplinary decisions. These decisions, however, remain subject to the very same just cause standard that has always existed. In the case of Noyes and Wilkins, both filed grievances that have been processed through the grievance procedure and are subject to arbitration. In these circumstances, the General Counsel has failed to establish any material change in terms and conditions of employment.

B. Contract Coverage And Waiver

As discussed above, Respondent contends that the Board should adopt the “contract coverage” theory rather than the “waiver” theory. But under either theory, Respondent had no obligation to bargain over the 2009 policy. As discussed above at length, the CBA gives management total responsibility for safety. It “contemplates that the Respondent has the responsibility to act unilaterally to ensure workplace safety and health and that the Union's role is advisory, not participatory.” *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992). This right is sufficiently broad to include the right to develop safety disciplinary policies. Indeed, it is clear that at least since Respondent acquired the Lyndonville facility, it has always acted unilaterally with regard to establishing such policies.

And of course, the Occupational Safety and Health Act of 1970 (OSHA) places the responsibility for employee safety squarely on the shoulders of the employer. Thus, section 5(a), known as the general duty clause, provides that each employer “(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act.” 29 U.S.C. 654. The MBS program merely recognizes what OSHA makes clear: the employer is responsible for the safety and health of his employees and may not delegate away this duty.

C. Section 10(b)

Further, it is clear that any allegation premised on this policy is barred by 10(b) of the Act. Section 10(b) of the Act provides that “no complaint shall issue based on upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.” This “period

begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.” *Courier Journal*, 342 NLRB 1093, 1103 (2004).

“The concept of constructive knowledge incorporates the notion of ‘due diligence, i.e., a party is on notice not only of facts actually known to it but also facts that with ‘reasonable diligence’ it would necessarily have discovered.” *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

“A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence.” *St.*

Barnabas Medical Center, 343 NLRB 1125, 126-1127 (2004). The 10(b) period begins to run with the actual unilateral change and is not resurrected merely by the continued application within the 10(b) period of the prior unilateral change. *Arrow Line, Inc./Coach USA*, 340 NLRB 1, n. 1 (2003).

Here, contrary to the ALJ’s finding the safety disciplinary policy was fully posted at the facility in September 2009, and the Union officers had ample opportunity to review it. Indeed, the record reflects that employees gathered around the board to review the policy and commented on the policy to supervisors. (Tr. 600-601, 609-610). The Judge’s reasons for discrediting Morissette were not based on demeanor. Rather, they were based on an inaccurate assessment of the record. For example, the ALJ found that “Respondent claims to have applied this policy in September 2009 to employee Robert Gordon when he cut his finger.” (JD 4: n. 4). Morissette’s testimony, however, was the exact opposite. She looked at the bulletin board to check the policy and discovered that it was not posted in its entirety. As a result, the decision was made to discipline Gordon under the prior 2007 Safety Bypass Policy. (Tr. 414-423). Similarly, the ALJ incorrectly found that “Morissette’s testified at Tr. 414 that so far as Respondent was concerned, the new enhanced disciplinary policy was already in effect when she

went to look at the bulletin board in September 2009,” which would mean that “the corrective action policy was a ‘fait accompli’” (JD 5: 26-31). In fact, it is clear from Morissette’s testimony that although the policy should have been in effect, because Ginger Noyes had failed to post the entire policy it was deemed not to be in effect.

The ALJ also relied upon his view that prior to the Ken Wilkins’ incident, Respondent did not apply the 2009 Corrective Action Policy to the letter. But the policy reflects that management has discretion to deviate from the specified discipline as deemed appropriate. Thus, Respondent examines all of the circumstances. Further, the record reflects that on many occasions, discipline was reduced through the grievance process. This merely establishes that Respondent continued to apply “just cause” and does not indicate in any fashion that the policy had not been implemented.

Morissette’s testimony clearly establishes that the entire policy was posted in September 2009 and that the Union had actual (or at least constructive) notice as of September 2009. Since the charge was not filed until July 30, 2010, any allegation based on the application of the disciplinary policy is barred by section 10(b).

Respondent requests that the Board reverse the ALJ’s findings of violations regarding Ken Wilkins, Doug Noyes, and the 2009 Safety Corrective Action Policy.

VI. RESPONDENT DID NOT UNLAWFULLY REFUSE TO FURNISH INFORMATION REGARDING MBS. [EXCEPTIONS 20, 27, 32, 33, 34, 37]

Because Respondent was not obligated to bargain over the MBS program, it was not obligated to provide the Union with the requested information (whatever that might have been, considering that the request was not made until after the Company had already gone over the program with the Union three times). It is clear that the July request by Turner was linked to his request to bargain over the MBS system. Where a union has no right to bargain over a particular

issue, the employer has no obligation to furnish information relevant to that decision, at least where the purpose of the request is to facilitate bargaining. *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004); *California Pacific Medical Center*, 337 NLRB 910, 914 (2002).

In any event, the evidence at the hearing was clear that the Union *was* given information about the MBS program and that it discussed the program with the Respondent to the extent that it desired. The Union was notified before implementation about the MBS program, both through the employee training program on February 2 and at the meeting on February 3. When the Union initially requested bargaining (through the Eastman grievance filed on February 3), the Company responded that it did not view the program as negotiable, but that it would meet and discuss the program with the Union. The Union failed to follow up on this offer in a timely fashion, and the Respondent put the program into place. Thereafter, however, the Respondent discussed the program with the Union on three occasions after February 3 (total of five separate occasions), including the March 19 meeting that resolved the Eastman grievance.

As for Turner's request of July 16, 2010, this request does not make reference to the safety checklist or the whiteboards, but refers broadly to a new safety program. Thus, the ALJ's finding that Turner requested information on the whiteboards and safety checklists is unsupported. Further, in September, Respondent met again with the Safety Committee and specifically discussed the whiteboards and the checklists. It is not at all apparent what information the Union sought, but was denied.

Thus, Respondent did not unlawfully refuse to provide information about the MBS program. Respondent requests that the Board reverse the ALJ's finding of a violation.

CONCLUSION

For all of the reasons set forth above, Respondent respectfully requests that the ALJ be reversed in the manner and for the reasons discussed herein.

Respectfully submitted this 10th day of May, 2011.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS by electronic mail on the following parties:

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This the 10th day of May, 2011.

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