JD(SF)-11-11
Tulsa, OK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SPARTAN AVIATION INDUSTRIES, INC. d/b/a
SPARTAN COLLEGE OF AERONAUTICS
AND TECHNOLOGY

and Case 17-CA-24965

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, UAW, LOCAL 286, affiliated with the
UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW

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for the General Counsel.
Gerald L. Dorf, Esq.
(Dorf & Dorf), of Rahway, New Jersey,
for the Respondent.
Kathy Coleman and Rex Baldwin, in pro se
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Gerald M. Etchingham, Administrative Law Judge. This case was tried in Tulsa, Oklahoma, on March 9, 2011. The charge was filed by the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 286, (the Charging Party or the Union) on September 15, 2010, and the complaint was issued December 28, 2010.[1] Thereafter, on April 13, 2011, the General Counsel and Respondent filed posthearing briefs (GC Br. and R Br., respectively).

The complaint alleges that Spartan Aviation Industries, Inc. d/b/a Spartan College of Aeronautics and Technology (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by implementing a new timeclock system applicable to unit employees,

[1] All dates are in 2010 unless otherwise indicated.

an alleged mandatory subject of bargaining, without affording the Union an opportunity to bargain.

The General Counsel argues that the imposition of the new timeclock system on August 30 was a mandatory subject of bargaining and that Respondent provided insufficient notice to the Union until August 27 and, at that time, the Union properly demanded bargaining over the issue. Respondent, on the other hand, argues that implementing the new timeclock system is not a material or significant change in wages, hours, or terms and conditions of employment and that, even if it was, the Union received clear and explicit notice of the proposed changed work rules and waived its right to bargain by virtue of its agreement to a broad management-right clause.

On the entire record[2], including my observation of the demeanor of the witnesses, and the briefs filed by the General Counsel and Respondent, I find that Respondent did not violate the Act as alleged based on the following

FINDINGS OF FACT

I. Jurisdiction

Respondent, a corporation, provides aeronautical education, training, and related services including flight training, maintenance, and testing from its facilities in and around Tulsa, Oklahoma, where it annually purchases and receives goods valued in excess of $50,000 from points outside the State of Oklahoma. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. GC Exh. 1F at 1-2.

II. Alleged Unfair Labor Practices

A. The Union and Its Contract with Respondent

There are 16 unit instructors on Respondent's South campus and approximately 25 unit instructors on north campus for a total of 41 unit employees and all are instructors except one. Tr. 80, 100–101. The following employees of Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[2] I hereby correct the transcript as follows: Tr. 23, line 13: "about" should be "above"; and Tr. 199, line 13: "other time" should be "overtime."

> All full-time North and South Main Campus instructors and the non-academic counselor, placement coordinator (flight) and student employment coordinator, but excluding all on-call instructors, flight instructors, laboratory assistants, managers, maintenance employees, janitors, guards, supervisors and all other employees of the College.

GC Exh. 1F, pp. 1–4.

There are over 100 total employees at the north and south campuses, the majority being nonexempt, nonunion employees. Tr. 101.

On June 2, 1999, the International Union was certified as the exclusive collective-bargaining representative of the unit. Since on or about that time, and at all material times, the Union and its affiliate the International Union have been the designated and recognized by Respondent as exclusive collective- bargaining representatives of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 1, 2007 through April 30, 2012 (the Contract). Jt. Exh.1.

The Contract contains article IIIA.9–10, a management-rights section that, among other things, provides that:

> A. The College [Respondent] retains and reserves unto itself without limitation all powers, authority, rights and functions of ownership or management vested in it prior to signing of this Agreement, including … the following:
>
> 1. The right to manage the College [Respondent].
> 2. To direct the working force….
> 6. To discipline, demote, suspend or discharge employees for cause….
> 9. To promulgate rules and regulations relating to the conduct of its employees as it considers necessary or advisable and to require employees to observe such rules and regulations.
> 10. To determine all schedules, policies, procedures and methods necessary or advisable for the safe, efficient and orderly performance of its business, including those related to training, evaluation, and attendance….
>
> B. The exercise of the powers, authority, rights and functions of the College [Respondent] includes the adoption of rules and regulations relating to the conduct of its employees as the College [Respondent] considers necessary or advisable and to require employees to observe such rules and regulations….
>
> D. Prior to the implementation of new policies, rules and procedures or changes in such policies, rules and procedures, the Committeeperson will be furnished with a draft copy in advance of implementation. At the Committeeperson's request, the College [Respondent] will discuss the content and implementation of the policies, rules and procedures.

> E. The rights and functions of the College [Respondent], including the adoption of such rules, regulations, policies and practices and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and then only to the extent that such specific and express terms are in conformance with applicable law.

Jt. Exh. 1 at 6–7.

In sum, the management-rights provisions in the current Contract allow Respondent to retain the right to promulgate rules and procedures and determine all schedules, policies, procedures and methods including those related to attendance. Jt. Exh.1 at 6. There is no specific language in the Contract concerning unit employees' use of a timeclock system.

Respondent's president, chief executive officer, and co-owner, Jeremy Gibson (President Gibson) negotiated the Contract and testified at trial along with Respondent's director of personnel, Connie Corbin (Corbin). The Union was represented at negotiations by Kathy Coleman (Coleman) and Rex Baldwin (Baldwin) who also testified at trial. Coleman and Baldwin are also union's committeepersons under the Contract and the designated union representatives. Dr. Frank Pendergrass (Dr. Pendergrass) is Coleman's supervisor or manager but did not testify at trial.

Article XV of the Contract provides that the normal scheduled workday at Respondent is from 7:15 a.m. and through 3:55 p.m. Tr. 31, 90. For the 15 years Coleman's been at Respondent, instructors were always allowed to go home at the end of the school day when class ended at 2:30 p.m. and take work home with them, grade papers or projects or prepare tests, or curricula for present or future classes. Tr. 32. The Union negotiated section XVC. of the Contract because Respondent wanted instructors to get permission from their supervisors to go home and work at the end of the school day. Tr. 32.

B. Implementation of the New TimeClock System

Respondent, a private school, was founded in 1928 and trains pilots, aviation maintenance technicians, avionics technicians, quality control technicians and other students from certificate programs all the way to a bachelor's degree program. Tr. 205. Specifically, Respondent teaches airplane mechanic training, avionics training, quality control, nondestructive testing training, flight training at the flight campus, and it also offers an associate degree program and a bachelor's degree program. Tr. 20.

Respondent concedes that prior to August 30, the unit employees were not required to clock in or clock out when they arrived at work, went to or returned from lunch, or left work for the day. Tr. 33, 152–153, 168. Instead, Respondent's management filled out and completed timesheets for the exempt unit employees. Also, it is undisputed that prior to August 30, the nonexempt nonunion Respondent employees themselves filled out and punched in and out of work and lunch using a timeclock several times a day. Tr. 168.

President Gibson made the decision in 2010 to implement a new timeclock system at Respondent beginning August 30. Tr. 207. He opined that this new hand-scan system would be the least intrusive for Respondent employees and could be implemented painlessly and quickly; it also precluded fraud because it is a biometric system. Tr. 208–209; R Exh. 2.

On August 30, Respondent instituted a new system of keeping time records-it began using the timeclock system produced by a company called Timeforce. Tr. 170–171. The system works electronically and has done away with Respondent's prior use of punched time cards. Tr. 171–172. Beginning on August 30, all Respondent employees, including the unit instructors, were required to go to a timeclock, scan their hands at 7:15 a.m. to clock in. Tr. 33, 87, 116. Unit instructors were also required to scan out for lunch, then 40 minutes later scan back in, go back to class, and then scan out at the end of the day. Tr. 33. Corbin, however, confirmed that Respondent did not actually rely on the new timeclock system for its payroll until February 2011. Tr. 197; GCExh. 9.

One of the advantages of the new timeclock system was that it was computerized and replaced written records for ease of access. Tr. 172. Corbin further testified that there is added efficiency with the computerized system especially if someone needs to go back in time to analyze payroll and they can access that on the computer rather than having to sift through boxes of paper records. Tr. 188–189.

C. Changed Work Rules from the New TimeClock System After August 30

There was confusion when the new timeclocks were first installed concerning the seven minutes before and after the official start and stop times. Tr. 53. Coleman testified that Dr. Pendergrass conducted a meeting with South campus instructors where they discussed the 7-minute window. Tr. 53. The meeting took place approximately a month after they started using the new timeclocks. Tr. 53. All South campus instructors attended the meeting. Tr. 53. During the meeting, Dr. Pendergrass congratulated the instructors and stated that there have been two instructors who had done their clocking in and out with no mistakes and everybody else had messed up a few times. Tr. 54. One of the instructors asked him, "why are we doing this?" Tr. 54. He responded "well, you are hourly workers." Tr. 54. Then someone asked them that if they clock in a few minutes late or out a few minutes early would they be docked pay? He responded, "well, you might be." Tr. 54.

Since August 30, Dr. Pendergrass approached the South campus instructors with a copy of the hand-scanned timeclock report for each of them and asked them to sign it which indicated that they agreed with the time that he was submitting for them. Tr. 56, 101–102. Coleman did not believe that this was optional on the part of the instructors but, instead, Dr. Pendergrass told them to look at it, see if they agreed with the time that was being submitted, and if they agreed, sign it and if they did not agree, tell them what the problem was so it could be corrected. Tr. 56. Coleman is also aware of Dr. Pendergrass' new practice of policing instructors' clocking in and out at Respondent after August 30. Tr. 62. To Coleman, these are changes in how things were before August 30. Tr. 56.

Coleman testified that the new timeclock system affects her prep time because in the middle of morning prep time, an instructor needs to remember to go clock in at 7:15 a.m. by running over to the timeclock located in a different building and then go back to the classroom and work. Tr. 58. In addition, Coleman testified that it was not unusual to assist a student during her lunchbreak who might have questions or need some information. Coleman would not let the timeclock interfere with her helping a student because at 2:30 p.m., most of Respondent's students leave and go to work so her lunchbreak may be the only time she can assist a student.

Tr. 59. She further described that at no time before August 30, when Coleman decided to take lunch was she required to clock in or out. Tr. 55.

Coleman testified that she teaches in building 10 and she described how she parks in staff parking which is next to building 8. She further testified that she goes in the door of building 8 and into the prep room and does some prep work which is also where the new timeclock is currently located. Tr. 60; GCExh. 8. Some prep work, however, occurs in the classroom such as setting up the PowerPoint presentation. Tr. 60.

Coleman uses the time clock in Building 8 as that is the closest building to her classroom with a time clock. Tr. 98. She also testified that she has to go outside when leaving her classroom to get to the time clock in Building 8. Tr. 61. This raises concerns for Coleman because sometimes when it rains there is excessive flooding between these buildings so she and other instructors literally have waded in water up to their ankles and have gone to clock in and come back with wet feet for the rest of the day. Tr. 61. In good weather, Coleman opined that it takes two or three minutes each way from her classroom to the time clock or four to six minutes round-trip. Tr. 62, 102. She further testified that inclement weather adds to that amount of time. Tr. 62.

Baldwin testified that due to his right leg condition, it takes him longer than the average instructor to get from his class to the new timeclock. Tr. 119. Baldwin estimates that it takes him about four or four and a half minutes to punch out. Tr. 119. Baldwin further testified that the new time clock affects the timing of his workday because he is entitled to a 40 minute lunch period but that it takes so long for him to get down to the time clock and back that he loses approximately 10 minutes. Tr. 120. Due to his ongoing right leg condition, Baldwin usually brings his lunch from home into school now. Tr. 131. However, if he forgets to pack a lunch, he lives too far to go home for lunch and before the timeclock he could go out and grab a sandwich during his lunchbreak. Tr. 120. He can no longer do that because he has to clock out and then go to his car while before implementation of the new timeclock system he could just cut to his car and go somewhere to grab a sandwich and get back in time before being late for classes. Tr. 120. Baldwin can no longer do that after implementation of the new timeclock system,. Tr. 120.

Coleman opined that after the new timeclock went into effect, unit instructors will potentially suffer penalties such as disciplinary actions and docking of pay that they were not exposed to prior to the use of the new timeclock system. Tr. 103.

Baldwin was asked about Respondent's employee handbook dated August 1, 2004, section 4.01 entitled, "Time clock", and whether Respondent's policy, about not altering, falsifying or tampering with time records or recording time on another employee's time record resulting in disciplinary action including termination, had changed from 2004 through 2011. Tr. 132–135; R. Exh. 1. While he agreed that the handbook language had not changed, Baldwin disagreed as to its application to unit employees as before implementation of the new timeclock system, he and fellow unit instructors would have had no way of tampering with any time records or to record time for other employees. Tr. 134–135. Baldwin opined that section 4.01 of the 2004 Respondent's handbook entitled, "Time keeping" did not apply to unit employees before August 30 because it specifically states that *nonexempt* employees should accurately record the time they began and end their work. Tr. 152. Baldwin also found inapplicable later

portions of section 4.01 which state, "They should also record the beginning and ending of time of any split shift or departure from work for personal reasons" and that "it is the employee's responsibility to sign their time records to certify the accuracy of all time recorded." Tr. 152. Baldwin confirmed that there were no time records that he had to personally deal with prior to August 30. Tr. 153, 198–199. Beginning in February 2011, however, unit instructors had to actually sign their timesheets at the end of each pay period. Tr. 197-98, 202; GC 9; RX 5.

ANALYSIS AND CONCLUSIONS

A. Bargaining Requirements

Since *NLRB v. Katz*, 369 U.S. 736 (1962), it has been unlawful under Section 8(a)(5) for an employer to circumvent its bargaining obligation with the 9(a) representative of its employees by making unilateral changes in their wages, hours, and terms and conditions of employment. The Supreme Court reiterated that rule in *Litton Financial Printing Division. v. NLRB*, 501 U.S. 190, 198 (1991), where the Court quoted itself to say, "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."

Initially, there is always the question of whether a change has actually occurred. Therefore, one must first find a benchmark, the place from which the new status must be measured. Second, the rule is not without exceptions. For example, the rule does not apply in cases of waiver. (*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)) or insignificance (*Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976)).

The benchmark here is the terms and conditions established by the Contract to which the parties were bound and Respondent's past practice not requiring that its unit employees record their time in and out of work. See Jt. Exh. 1. The Contract refers to unit employees as exempt salaried employees. Jt. Exh. 1 at 53, 56, 59, and 65–66. Coleman confirms that unit employees were treated as salaried employees "exempt" from coverage of the Fair Labors Standard Act (FLSA) and the timekeeping procedures applicable to nonunion nonexempt Respondent employees before August 30. While irrelevant for bargaining purposes, this label is relevant to the "waiver" discussion that follows. In addition, although the Respondent's policy handbook references "Timekeeping" procedure for its "nonexempt" nonunion employees, Baldwin convincingly testified that prior to August 30, that policy applied only to the "nonexempt" nonunion Respondent workers and not to the unit employees as stated in the policy. Tr. 152–53, 198–199; R. Exh. 1 at 5. Before August 30, unit employees had not previously been subject to any manner of time recording, other than for overtime purposes, though there is no specific evidence identifying any unit employee who has received overtime pay.

Also, the Contract contains a management-rights section which reserves for Respondent the right to promulgate rules and determine an attendance policy as long Respondent's management furnishes its unit representatives, Baldwin or Coleman, a draft copy of the proposed changed policy in advance of the implementation. See Jt. Exh. 1 at 6-7, 43.

B. Implementing a New Time Clock System in this Case Is a Material and Significant Change and a Mandatory Subject of Bargaining

The General Counsel relies on the case *Nathan Littauer Hospital Assn.*, 229 NLRB 1122, 1124–125 (1977), to argue that the imposition of the new timeclock system here, including the scan in/scan out requirement at each workday's beginning and end and twice during regular lunches, is a "material and substantial unlawful change in the terms and conditions of employment at Respondent for its unit employees. In *Littauer*, a hospital implemented a requirement during initial collective-bargaining negotiations that full-time registered nurses record their regular time by punching a timeclock. These nurses had not previously been subject to any manner of time recording, other than for overtime purposes.

Respondent relies instead on *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), to support its position that Respondent's changing its timekeeping procedures was within management's prerogative and not a change in terms or conditions of employment that is a mandatory subject of bargaining. Such reliance is misplaced, however. *Rust Craft* simply instituted a "change to the mechanical procedure for recording working time," installing timeclocks to replace its former system of requiring union employees to record their time manually by marking their own printed timecards. *Id*. at 327. The Board in that case found that company's actions did not impose any new disciplinary or physical burdens on its employees.

Here, implementing the new hand-scan timeclock system is more than a unilateral initiation of a more modern method of obtaining employees' time in and out as argued by Respondent. See, for example, *Goren Printing*, 280 NLRB 1120 (1986) (Change from oral communication to written note inconsequential and mere change in method). The underlying rule in this case -- not requiring unit employees to record their time at all -- was unilaterally changed as they must now scan in/out four times daily.[3] Tr. 56.

Moreover, Respondent's unilateral action had the effect of imposing other new burdens and changed work rules: unit employees have become subject to closer scrutiny and discipline after using the new timeclock system if they do not obtain supervisor approval to be late for class

[3] *Nathan Littauer* was distinguished by the Board in *Bureau of National Affairs, Inc*. (*BNA*), 235 NLRB 8, 10 fn. 10 (1978), a case with a contrary result and another case relied on by Respondent. In the *BNA* case, unlike *Nathan Littauer*, union employees had always been required to record their total daily time by manually filling out printed timecards themselves, signing them, and turning them in to their supervisors at the end of the week: only the method of recording their time (a timeclock) had changed. I find the instant matter to be more similar and controlled by *Nathen Littauer* over the *BNA* case. Also like *Nathan Littauer,* there is no need to consider or rely on any distinction which may be drawn between "professional" and "nonprofessional" employees. Nor need I pass upon whether or not the union employees qualify as exempt employees under the Fair Labor Standards Act (FLSA). Instead, I predicate my decision on the fact that Respondent implemented a new requirement governing the recording of time and established threats of discipline designed to enforce said requirement, without bargaining with the Union. In this case, Respondent's conduct amounted to a refusal to bargain about material, substantial, and significant changes in rules and practices which vitally affects employment conditions and employee tenure. *See also Murphy Diesel Company*, 184 NLRB 757 (1970)(New rule involving tardiness and absenteeism demonstrated substantial impact of unilateral change in attendance policy).

as little as 8 minutes. Tr. 53–-54, 62, 96–97, 103; GC Exh. 4 at 2–3.[4] There is also a new written acknowledgement requirement. Tr. 56, 197–198. Thus, before August 30 there was no condition of employment requiring unit employees affirmatively to acknowledge (either orally or in writing) that they were aware of what specific times that they arrived and left work at the beginning and end of the day or for their lunchbreak. Instead, Contract article XVB., entitled, "Work Day", simply provides that "[t]he normally scheduled workday will consist of an eight (8) hour work schedule, exclusive of a forty (40) minute unpaid meal period" and "[f]or those Instructors regularly scheduled to work forty (40) hours per week, the workweek shall consist of five (5) consecutive eight hour and 40 minutes (8 hour, 40 minute) days (including a forty (40) minute unpaid meal period)." Jt Exh. 1 at 20. The new timeclock system requires stricter accounting of unit employees' comings and goings despite being exempt salaried employees. Also, the newly required signed document would be readily available for use in Respondent disciplinary proceedings.

As a result, Respondent unilaterally imposed new substantive conditions of employment on the unit employees: (1) they were now subject to stricter disciplinary practices including potential docked pay and reprimand for being 8 minutes tardy; and (2) they were required to sign off on their weekly attendance summary.[5] Both actions were in derogation of the obligation to deal with the Union about terms and conditions of employment. Respondent's supervisor, Pendergrass, warned that unit employees could have their pay docked if they did not comply with the new timeclock system rules of clocking in/out within eight minutes of the designated regular times. Tr. 53–54, 62, 96–97, 103; GC Exh.. 4 at 2-3. This is sufficient to show that Respondent considered the issue to be significant and that the unit employees would think likewise knowing that infractions of the new tardiness rule could place their employment status in jeopardy. *See Flambeau Airmold Corp*., 334 NLRB 165, 166 (2001) (Respondent threatened discipline on employees who breached the new sick leave benefits policy significant and sufficient to trigger duty to bargain). Contrary to Respondent's argument that there was no evidence of changed discipline associated with the new timeclock system, Coleman credibly explained that unit employees had been disciplined, reprimanded, and counseled due to the changed work rules from the new time lock system. This represents the kind of potential impact on working conditions sufficient to have triggered Respondent's duty to collectively bargain with the Union. See *NLRB v. Roll & Hold Warehouse & Dist. Corp,* 162 F.3d 513, 517 (7th Cir. 1998)(New attendance policy with stricter disciplinary impact on union employees triggered the duty to bargain); *see also Ciba-Geigy Pharmaceuticals v. NLRB*, 722 F.2d 1120, 1126-27 (3d

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[4] Respondent's closing brief inaccurately states that there is no evidence of discipline having been imposed as a result of the implementation of the new timeclock system. R. Br. at 16. Instead, Coleman testified that since August 30, union employees have been disciplined, reprimanded and counseled. Tr. 97.

[5] In addition, General Counsel argues that the new timeclock system also significantly impacted most unit employees by diminishing their overall lunch breaks by as much as 10–15 percent for travel time to clock in and out. GC Br., pp. 15, 27. There is little evidence provided that a significant number of unit employees experienced the same percentage of diminished lunchbreaks as Coleman and Baldwin. I further find that the implementation of the new timeclock system which also records unit employee lunchbreaks, while in some cases may lead to a 10-15 percent reduction in the time unit employees spend on their lunchbreak, does not have a material, substantial, and significant effect on specific bargaining rights contained in the Contract. *See Litton Systems*, 300 NLRB 324, 331–332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991) (Installation of a new buzzer system for regulating breaktime led, in some cases, to a 20 percent reduction in the time employees spent on their breaks and held not to have a material, substantial, and significant effect on unit employees' specific bargaining rights in the collective-bargaining agreement).

Cir. 1983) (New absentee control policy triggered the duty to bargain); *Ferguson Enterprises*, 349 NLRB 617–618 (2007)(a "threat of discipline for a breach of a unilaterally implemented policy is sufficient to establish that the policy constituted a material change in working conditions").

The change requiring unit employees to sign-off on their new pay records is not simply procedural. *See Brimar Corp.*, 334 NLRB 1035, 1036 fn. 2 (2001) (Unlawful unilateral implementation found where new requirement that employees sign that they were aware of the expected number of units to be produced per hour); *see also Central Cartage, Inc*., 236 NLRB 1232, 1237–1239, 1258 (1978), enfd. *mem*. 607 F.2d 1007 (7th Cir. 1979) (Unlawful unilateral implementation found where requirement that employees sign revised job descriptions and affirmatively acknowledge that they understood their duties and responsibilities).

Consequently, I find that Respondent's implementation of the new timeclock system resulted in adoption of new work rules for unit employees which required them, for the first time, to record their time and resulted in new disciplinary provisions designed to enforce said requirement without bargaining. Thus, following the Board's reasoning in the *Nathan Littauer Hospital Assn.* case referenced above, I find the unilateral implementation of the new timeclock system without bargaining to be material and unlawful.

More importantly, our national labor policy prefers employers and employees to bargain collectively over terms and conditions of employment, rather than to take unilateral action that can lead to industrial strife. Under that labor policy, the presumption is in favor of a duty to bargain, and against an exception to that duty on the ground that the unilateral action is allegedly *de minimus*. *NLRB v. Beverly Enterpises-Massachusettes, Inc*., 174 F.3d 13, 37 (1st Cir. 1999). I find that the implementation of the new timeclock system at issue was "substantial and material" and thus violates the Act.

C. Respondent's Notice Defenses

Respondent argues that if implementing the new timeclock system must be bargained, the Union, nonetheless, waived its right to bargain the changed policy by sitting idly by until it was too late to raise the issue. Respondent contends that the Union was given adequate and explicit notice of its plan to implement the new timeclock system with its added burdens discussed above through distribution of the March 25 and June 11 memos to unit employees as well as President Gibson's meeting with north campus instructors in late May/early June. I reject these arguments. Respondent also argues that the management-rights provisions cover the implemented change to waive any right to bargain. For the reasons that follow, I agree and adopt this argument and dismiss the complaint.

1. General waiver and notice requirements and Respondent's past practices

Once the General Counsel establishes a prima facie violation of Section 8(a)(5), as here, the burden is then on Respondent to show that the unilateral change was in some way privileged. *See Trading Port, Inc*., 224 NLRB 980 (1976). In general, the Board has long held that an employer's bargaining obligation requires that it give notice to a union before imposing changes in working conditions that are mandatory subjects of bargaining. *Defiance Hospital*, 330 NLRB 492, 293 (2000). The notice must be clear and explicit and will not be implied. *See Provena St.*

Joseph Medical. Center, 350 NLRB 808 (2007); *Sykel Enterprises*, 324 NLRB 1123 (1997) (In the absence of clear notice of an intended change, there is no basis to find that the union waived its right to bargain over the change).

Moreover, a union only waives its right to bargain if its intent is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).[6] The failure to demand bargaining in the past, without more, does not waive the bargaining right forever. *See Ciba-Geigy Pharmaceuticals*, 722 F.2d at 1127. On the contrary, "each time [a] bargaining incident occurs – each time new rules are issued – [t]he [union] has the election of requesting negotiations or not." *NLRB v. Miller Brewing Co*., 408 F.2d 12, 15 (9th Cir. 1969). Where the issue is over the union's claimed waiver of its rights to bargain, however, the employer's prior conduct clearly matters.

2. The March 25 memo did not provide clear and explicit notice to the union about the new time clock system

Respondent argues that the March 25 memo provided adequate notice of its plan to implement the new timeclock system with the added burdens to unit employees associated with this change in policy. R. Br. at 21–22.

The March 25 memo was addressed to "All Employees on North and South Campus" regarding "Record and Timekeeping" wherein President Gibson disclosed that Respondent was upgrading the payroll system's technology by implementing in May a new timekeeping tool:

> for all of our hourly and salary non-exempt employees. This tool will allow each of you to do away with the process of filling out time cards for payroll….Therefore, we must continue with paper timecards for everyone that's a salary non-exempt employee and hourly or go to a solution like this. We will keep you posted on our implementation and have formal training for each supervisor on how to administer the software.

GC Exh. 2.

The March 25 memo was addressed to all employees on north and south campus from Respondent President Gibson regarding record and time keeping. 34. In addition to the unit instructors, employee Coleman explained that there are a number of nonunion employees on the north and south campus. Tr. 35. For example, there are clerical workers in the administrative building, financial aid people, cashiers, bookstore workers, managers, secretaries or administrative assistants, and there may be some lab helpers who are also not in the Union. Tr. 35.

Coleman further explained that the March 25 memo was directed to Respondent hourly and salary nonexempt and nonbargaining employees who fill out timecards for payroll. GC Exh. 2. Since the unit employees have never filled out their own timecards and are "exempt" employees, Coleman concluded that the March 25 memo did not apply to unit employees.

[6] Respondent does not argue that the less strict "contract coverage" analysis should apply here in place of the "clear and unmistakable" waiver standard that I apply. *See Provena St. Joseph Med. Center*, 350 NLRB 808, 811–815 (2007).

Tr. 35–36, 76, 83. Moreover, she further explained that the March 25 memo also states that the expected change to a state-of-the-art timeclock tool in May will replace "the paper time cards for everyone that's a salary nonexempt employee and hourly." She further explained that unit employees never filled out paper timecards. Tr. 36. Finally, Coleman did not think the March 25 memo applied to unit employees or to anyone because no new time keeping tool was implemented at Respondent in May. Tr. 36. President Gibson and Corbin explained that a new internet router connection was needed on north campus which delayed implementation of the new timeclock system in May due to technical problems. Tr. 172, 210. Coleman did not recall any meetings conducted by Respondent on the subject of implementing a new timeclock system for unit employees in the spring of 2010. Tr. 37.

I find unit representative and committeeperson Coleman's testimony credible that the March 25 memo applied only to the salary nonexempt, nonunion timecard-using employees at Respondent rather than unit employees given the specific language of the memo. Tr. 35–36, 78, 83; Jxh Exh. 1 at 53, 65-66. Her explanation was reasonable as to why she did not believe the memo was directed specifically to Respondent's unit employees.

I conclude that Respondent's notice to unit employees of its intent to implement a new timeclock system was inadequate as communicated in the March 25 memo. Consequently, there was no "clear and explicit" notice to Union of its right to bargain implementation of the new timeclock system derived from the March 25 memo.

3. The late May/early June meetings with unit employees at north and south campuses did not provide clear and explicit notice to the Union about the new timeclock system

Respondent further argues that a late May/early June meeting between President Gibson and unit instructors at north campus provided adequate notice of its plan to implement the new timeclock system with the added burdens to unit employees associated with this change in policy. R Br. at 23.

President Gibson testified that there were meetings with all middle and senior level managers and supervisors to explain the new hand scan timeclock system at Respondent, how it would work, how it would benefit them, and the implementation process. Tr. 210. He further testified that he personally held a meeting in the north campus with his unionized work force. Tr. 210-211. He testified that the meeting took place at the end of May to the beginning of June when Baldwin was out on medical leave and which alternate steward Richard Keith was present. Tr. 211. President Gibson believed that word had gotten out that the school was putting in a time system or a timeclock system applicable to all employees. Tr. 211. He further explained that through different individuals at the school, it had come to his attention that some of the instructors were upset about the new time clock system. Tr. 211. He stated that he wanted to make sure that he presented it to them "exactly how it was, what it was, what we [the school] was doing, take questions, answer questions." Tr. 211. He further testified:

> I went in front of those instructors and explained the position of the company [Respondent], why we're doing it, how we're doing it, invited questions, had no questions, and ended the meeting there. Tr. 211.

Dr. Pendergrass did not testify to either confirm or embellish President Gibson's testimony or refresh Coleman's recollection. I draw an adverse inference from Respondent's unexplained failure to rebut their testimonies with supervisor, Dr. Pendergrass, or other witnesses. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference … regarding any factual question on which the witness is likely to have knowledge"). Nevertheless, I further find that Respondent's notice to unit employees of its intent to implement a new timeclock system was inadequate as communicated by President Gibson at a late May or early June north campus meeting for a couple of reasons.

First of all, President Gibson's description of the notice he gave at the meeting is conclusory and no reliable evidence was put forth that unit employees were ever given notice of the specific requirements applicable to them once the new timeclock system was implemented such as the scan in/scan out burdens four times a day just the same as the nonexempt nonunion Respondent employees using timecards and a timeclock before them. In addition, there is no evidence that President Gibson or Dr. Pendergrass gave clear and explicit notice to unit employees that the new timeclock system would also impose new rules subjecting unit employees to potential discipline or "docked pay" for tardiness of as little as 8 minutes or the requirement that they must review the hand-scan timecard and sign off on it on a weekly basis.

Secondly, I reject Respondent's position that it could discharge its duty of notification by informing a shop-level steward of its intentions, assuming arguendo that President Gibson's conclusory version of notice is adequate to provide reliable notice.[7] The vague report communicated to shop steward Richard Keith in Baldwin's absence, coupled with the Union's inaction, is not "clear and explicit" notice to the Union of its right to bargain the proposed change. The Contract listed Coleman and Baldwin as committeepersons for bargaining purposes and recent history showed that Respondent's custom and practice was for its management to bargain matters with these union representatives and Bollinger before implementing a new rule or policy. *See* Tr. 29-30; Jt. Exh. 1 at 7 and 43. Similarly, President Gibson explained that he did not consider copying union representative Matt Bollinger with copies of the March 25 or June 11 memoranda because his custom and practice in all of his dealings with any union matters would be dealt with by his committee chairperson at the campus or his chief unit representatives, Coleman or Baldwin. Tr. 222-223. President Gibson further stated that he would go to one or both of those two individuals, not necessarily Bollinger despite being aware that Bollinger is the Union's international representative and a member of the collective- bargaining agreement team for the Union. Id.

Consequently, I find that there was no "clear and explicit" notice to the Union of its right to bargain implementation of the new time clock system derived from the late May/early June meetings.

[7] If this issue is dispositive upon review, I find that President Gibson spoke to unit employees only at the north campus in late May/early June but in general, conclusory terms only that make up his testimony at trial. That is, President Gibson notified the north campus unit employees that a new timeclock system would be installed at Respondent applicable to all employees. I further find that there is no evidence that President Gibson alerted these unit employees that the new timeclock system would have the potential effects of docked pay and a threat of discipline should a unit employee be tardy as little as 8 minutes to work. Thus, I cannot find that the Union waived its right to bargain the effects of the new timeclock system by not requesting to negotiate prior to August 27.

4. The June 11 memo also did not provide clear and explicit notice to the union about the new timeclock system

Respondent further argues that the June 11 memo provided adequate notice of its plan to implement the new timeclock system with the added burdens to unit employees associated with this change in policy. R. Br. at 23.

The June 11 memo was addressed to "All Respondent Employees" regarding "Timeforce Timekeeping System" wherein President Gibson disclosed that Respondent had installed a new Timeforce timekeeping system with timekeeping clocks located on all three campuses which would become "the official basis for recording hours worked for all employees." He also wrote that the new timekeeping system "will replace the paper timecards and timesheets." All employees and supervisors were asked to enroll by hand scan into the master timeclock system located in Respondent's main building at specific times over 3 days in June at the different campus locations.
GC Exh. 3.

Once again, I find unit representative and committeeperson Coleman's testimony credible and reasonable that the June 11 memo did not require unit employees to clock-in and out like nonexempt and nonunion Respondent employees.

I conclude that Respondent's notice to unit employees of its intent to implement a new timeclock system was inadequate as communicated in the June 11 memo because the memo is vague and ambiguous as to the applicability of the new timeclock system due to the confusing reference about how it will replace timecards which were inapplicable to unit employees before August 30. In addition, the June 11 memo also called for unit employees to get their hands scanned the same as "exempt" supervisors which misled unit employees to believe that they would continue to be excluded from a timekeeping system just like supervisors. It is also reasonable to believe that unit employees and supervisors were required to have their hands scanned for security purposes so Respondent would know who was physically present on campus without the timekeeping requirements that nonexempt nonunion employees were subjected to before the implementation of the new time clock system. Finally, the March 25 and June 11 memos were addressed to all employees and not specifically to the Union and its representatives and made no reference to the increased disciplinary burdens tied to unit workers' future tardiness. Consequently, there was no "clear and explicit" notice to the Union of its right to bargain implementation of the new timeclock system derived from the June 11 memo.

Thus, Respondent failed to give clear and unambiguous notice of the new timeclock system applicable to unit employees with its corresponding disciplinary exposure and signing compliance requirements directly to the unit representatives themselves before August 26. Alternatively, President Gibson's admitted "rejection" of the Union's request to bargain the implementation of the new timeclock system in late August before actual implementation was a clear signal that Respondent management wrongly believed that the implementation of the new timeclock system was a non-negotiable item under the Contract. Thus, the Union could reasonably conclude that Respondent had made up its mind and that it would be futile to object to the implementation of the new timeclock system. *See Burrows Paper Corp.*, 332 NLRB 82, 83 (2000).

5. The August 26 memo provided the union with adequate notice of the new work rules and on August 27 the Union properly demanded bargaining of the changed timeclock system

On August 25, an email from Respondent payroll was sent to supervisors and announced that there was going to be a meeting of the supervisors on August 26 to discuss the new timeclock system. Attached to the email was an August 26 memo describing the new clock-in/clock-out hand-scan timeclock system which was not intended to go to employees but was intended to apply to all employees - union and nonunion. Instead, it was given to supervisors for a discussion at the meeting. Tr. 43; GC Exh. 4. It represents a draft copy of the proposed changed timekeeping policy in advance of the implementation. GC Exh. 4 at 2-3; .Jt. Exh. 1 at 6-7, 43. The draft policy contains rules and requirements the employees must follow in order for the new time system to work. Tr. 43-44; GC Exh. 4 at 2-3. Specifically, the draft policy provides notice to the Union through Baldwin that the new timeclock system "will become the official basis for recording hours worked for all employees … and will replace the paper timecards and time sheets." All employees must "Clock-in" and "Clock-out" at the beginning of a shift, at lunch, and at the end of a work shift. GC Exh. 4 at 2. It also provides that "Employees shall not clock in earlier than 7 minutes before their scheduled starting time and no later than 7 minutes after their scheduled starting time" and "Note: Any time after the 7 minutes scheduled starting time will be recorded as tardy." Id. In addition, "All early arrival and late arrival must be approved by [a] Supervisor." Id. "Employees leaving for non-work related reasons during the day must clock out and clock in upon return." Id.

Baldwin also recalled receiving the August 26 memo in his mailbox and credibly testified that it was the first time that he noticed that the time clock system was going to apply to him at the end of August. Tr. 123--24, 128; GC Exh. 4. Baldwin believes that he called Coleman when he received that August 26 memo and asked her about it. Tr. 123-124.

On Thursday, August 26, Coleman also first learned that the new time clock system was intended to go into effect and apply to unit employees on August 30, the following Monday. Tr. 33, 40, 42; GC Exh. 4. Coleman believably recalled that late in the day on August 26, she was in the prep room near Dr. Pendergrass' office and she overheard talk involving Dr. Pendergrass or his administrative assistant, Samantha Burr, that the new timeclock system was being implemented the following Monday, August 30. Tr. 40-41, 45, 83. Coleman then went in and Dr. Pendergrass about it. Tr. 41-42. Coleman next asked Dr. Pendergrass "are we going to be required to clock in and out?" Tr. 42. He responded that she was going to be required to clock in and out even at lunchtime just as nonbargaining unit, nonexempt employees had done previously with timeclocks and punch clocks. Tr. 42. Coleman next testified that she was shocked by Dr. Pendergrass' response - that the new time clock system applied to the unit instructors - but answered "okay." Tr. 42.

On Friday, August 27, Coleman sent a memo to President Gibson advising him that the Union objected to the unilateral change in working conditions by implementing the new time clock system applicable to unit employees. Tr.45, 84; GC Exh. 5. Coleman did not receive any response from President Gibson on August 27. Tr. 46. President Gibson confirmed that he was very busy that day with prearranged meetings and he was unable to break away from his

meetings to talk with Coleman. Tr. 213. He was aware, however, that Coleman had come upstairs and tried to see him after she had been to his office. Tr. 213.

Respondent further stipulated and concedes that the unit instructors gave notice to Respondent's management on Friday, August 27 that they objected to the August 30 implementation of the new timeclock system for unit employees and that they also communicated to management on August 27 that they requested that Respondent meet and discuss it, and negotiate or bargain the proposed change. Tr.159-160. I conclude that the Union first received adequate and explicit notice of the implementation of the new timeclock system and its resulting effects on August 26 and properly requested bargaining of the new timeclock system on August 27.

6. Respondent refused to bargain with the union its implementation of the new timeclock system

On or about August 29, President Gibson consulted with Respondent's legal counsel and together they rendered a decision or opinion that the matter regarding implementation of the new hand scan timeclock system was a non-negotiable item under the Contract and President Gibson was advised to reject the Union's request to negotiate the issue. Tr. 214, 216, 220.

On August 30, the new timeclock system went into effect at Respondent and all the bargaining unit employees and nonbargaining unit, nonexempt employees were required to use the system. Tr. 47, 201-202. Only Respondent's president, vice presidents, directors, and outside recruiters were not required to use the new timeclock system. Tr. 201, 208.

Other concerns Coleman had as of August 30 were concerns about disciplinary actions if the employee clocks in or out late. Tr. 57. In other words, Coleman was concerned as to the ramifications for the situation where an instructor chooses to stay and work past 3:55 p.m. that they normally do not expect to be paid for or they are working past the appointed stop time performing work. Tr. 57. She also mentioned that there could be, according to something she has read, disciplinary action for that. She was concerned about having her pay docked or decreased. Tr. 57.

On September 1, Coleman sent another memo to President Gibson. Tr. 49; GC Exh. 6. The September 1 memo is entitled, "Unilateral Change in Working Conditions." Tr. 50; GC Exh. 6. She personally delivered it to his office but she was unable to see him. Tr. 49-50, 90. Later that day, Coleman returned to her office and while unsure whether she left the secretary her September 1 memo for President Gibson, she sent President Gibson an email of the same September 1 memo attachment later. Tr. 51, 89-90.

Finally, late on September 1, Coleman received President Gibson's response comprised of his hand-written "rejected" answer and he also signed his name to the September 1 memo as the official Respondent management position. Tr. 52, 214; GC Exh. 6. Also on September 1 at 5:19 p.m., President Gibson officially replied to Coleman September 1 memo by emailing his simple response saying that "Management rejects this." Tr. 52; GC Exh. 7. After receiving one or both of Coleman's memos of August 27 or September 1, President Gibson had not considered bargaining at that point with respect implementing the new timeclock system. Tr. 224.

D. The Contract's Management-Rights Clause Is Specific Enough to Constitute a Waiver of Respondent's Unilateral Action Here

Respondent argues that its article III management-rights clause in the Contract contains specific language to be construed as a waiver for its specific unilateral action of implementing the new timeclock system. R Br. at 9 and 17. The General Counsel counters by arguing that the language in the management-rights section is not specific enough to constitute a waiver. GC Br. at 26-28.

It is well settled that the Board generally scrutinizes a management-rights clause to assure that it properly and specifically can be construed as a waiver for specific unilateral action. A waiver will not be inferred lest the employer can demonstrate that the union "clearly and unmistakably" waived its right to bargain over a work rule, as for example an attendance policy. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 (1983). Management-rights clauses, which are couched in general terms and make no reference to the particular subject will not likely be considered as waivers of statutory bargaining rights. *Johnson-Bateman Co*., 295 NLRB 180, 185 (1989); *AK Steel Corp*., 324 NLRB 173 (1997). "To meet the 'clear and unmistakable' standard, the contract language must be specific …." *Allison Corp*., 330 NLRB 1363, 1365 (2000).

The Board interpreted language in a management-rights clause in *California Offset Printers, Inc. ("COP")*, 349 NLRB 1 (2007). There the Board also applied the "clear and unmistakable" waiver standard by analyzing the precise wording of the relevant management-rights provisions in the bargaining agreement. In *COP*, the Board took a plain meaning approach to contractual interpretation and was unwilling to read additional management discharge or discipline authority into the provisions without some explicit reference thereto.

Later in 2007, the Board's interpretation of management-rights clauses evolved further in *Provena St. Joseph's Medical Center*, 350 NLRB 808, 815-816 (2007). The Board in *Provena* found that, when applying the "clear and unmistakable" waiver standard, "several provisions of the management-rights clause, taken together, explicitly authorized the Respondent's unilateral action" to implement a disciplinary policy on attendance and tardiness. The relevant provisions gave the employer 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 815. The Board determined that because the union agreed to those combined provisions, it "relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements." The second two provisions deal with the employer's right to create rules of conduct and discipline, while the first provision deals specifically "reporting practices and procedures." Even though the actual unilateral change dealt with attendance and tardiness, the Board determined that the management-rights clause nevertheless acted as a union waiver to demand bargaining for those changes. It is telling that the management-rights clause in *Provena* did not specifically address "attendance" or "tardiness", but that those items are clearly within the umbrella of "reporting practices and procedures".

The management-rights clause at issue in this case contains several similar specific provisions, which go beyond a mere general proviso in at least two respects. First, the management-rights clause includes Respondent's specific right to determine all procedures and

methods for its business including those for employee *attendance*. In addition to Respondent's right to "discipline, demote, suspend or discharge employees for cause," the Contract also recognizes the right "[t]o promulgate rules and regulations relating to the conduct of its employees as it considers necessary or advisable and to require employees to observe such rules and regulations" and, as just stated, also "[t]o determine all schedules, policies, procedures and methods necessary or advisable for the safe, efficient and orderly performance of its business, *including those related to* training, evaluation and *attendance*." Jt. Exh. 1 at 6. (Emphasis added.)

Similar to the combination of provisions in *Provena*, the relevant management-rights provisions in the Contract here do not explicitly refer to timekeeping policies although "attendance" is specifically mentioned. In addition, Respondent's management-rights clause plainly provides it the right to promulgate and determine all attendance schedules, policies, procedures, and methods combined with its right to enact rules and regulations relating to the conduct of its employees. I find that the plain meaning of the term "attendance" equates to the term "tardiness" and Respondent plainly reserved its right to promulgate a new and more efficient recordkeeping method of the new timeclock system. By agreeing to that combination of provisions, I further find that the Union relinquished its right to demand bargaining over the implementation of the new timeclock system which determined a new method of recording attendance with tardiness requirements and the consequences for failing to adhere to those new procedure requirements.

In sum, I find the specific language in the Contract's management-rights clause here is similarly plain enough to privilege Respondent to impose its new time and attendance policy as the Board found in *Provena* also related to attendance and tardiness. While admittedly the Contract does not contain the identical words which provide that "Respondent can change how its unit employees record their time at work," its management-rights clause does specifically, precisely, and plainly grant Respondent the right to unilaterally promulgate new attendance methods such as its new and more efficient timeclock system.

As to General Counsel's argument that Respondent failed to abide by the procedure at Article III D. of the Contract requiring it to "discuss" the content and implementation of the new time clock system before implementation, I find that Union Committeepersons Baldwin and Coleman were apprised of the changes when they received the August 26 memo and Dr. Pendergrass, Coleman's manager, met with her and *discussed* the changed policies as the time clock system did not stand alone until February 2011. Tr. 33, 40, 42-44, 48, 53-54, 123-124, 128, 197; GC Exh. 9.

I specifically decline to find the words "discuss" and "bargain" to be synonymous in the Contract especially where the Contract, at article XXXII, contains the word "negotiate" to describe a bargaining obligation and the word "discuss", at article II D., to describe talks not contemplated to involve "negotiations." Jt. Exh. 1, p. 7, 42; *see also Ingham Regional Medical. Center.*, 342 NLRB 1259, 1262 (2004) (collective- bargaining agreement term "discuss" not synonymous with duty to "bargain" or "negotiate").

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

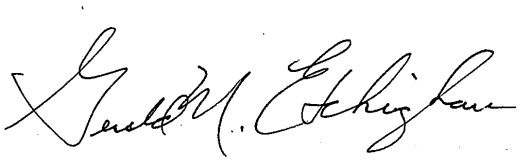
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 9, 2011



Gerald M. Etchingham
Administrative Law Judge

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