

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**WARREN UNILUBE, INC.**

**and**

**Case 26-CA-23910**

**TEAMSTERS, LOCAL UNION NO. 667**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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**Dated: November 29, 2011**

## I. INTRODUCTION

This case concerns unilateral changes made by Respondent to its cell phone and radio usage policies on November 16, 2010, eleven days after an election won by the Charging Party. The Charging Party was elected by a majority of Respondent's employees in an election held on November 5, 2010 (GCEX 2)<sup>1</sup> and, on March 16, 2011, was certified by the Board as the certified bargaining representative for the unit employees of Respondent.<sup>2</sup>

The case was tried before Administrative Law Judge Robert Ringler on July 11, 2011. On September 30, 2011, the Judge issued his Decision and Recommended Order finding that Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally implementing changes to its cell phone usage policy and implementing a new radio usage policy without bargaining with the Charging Party as bargaining representative for the unit employees. Respondent filed exceptions to the Judge's decision on October 28, 2011.

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<sup>1</sup> Throughout this brief, references to the following will be as indicated here:

Judge's decision.....ALJD (followed by page and line numbers)

Respondent's Brief in Support.....R Brief (followed by page numbers)

Of Exceptions

Transcript.....Tr (followed by page and line numbers)

General Counsel Exhibits.....GCX (followed by exhibit number)

Respondent Exhibits.....RX (followed by exhibit number)

<sup>2</sup> Following certification by the Board in its decision in Case 26-RC-8616 (GCEX 3), the Charging Party made a request to bargain with Respondent, which refused the requests. In Case 26-CA-23999, following the Regional Director's issuance of a Complaint, Counsel for Acting General Counsel filed a motion for summary judgment with the Board. Respondent filed a response and opposition to the motion for summary judgment. On July 15, 2011, the Board issued a Decision and Order finding that the Charging Party is the certified bargaining representative for the unit employees and ordering Respondent to recognize and bargain with the Charging Party. *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011) Respondent has filed a request for review with United States Court of Appeals for the Eighth Circuit. Counsel for the Acting General Counsel has filed a cross petition for enforcement of the Board's Order.

## **II. ISSUES PRESENTED**

Respondent filed 23 exceptions to the ALJD. This brief will comprehensively address those exceptions by topic rather than by specific exception. The exceptions raise the following three issues:

1. Whether the record supports the Judge's findings of fact concerning the cell phone policies implemented and/or maintained by Respondent prior to November 16, 2010, when the unilateral change was implemented;
2. Whether the record supports the Judge's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented changes to its cell phone usage policy and a new radio usage policy on November 16, 2010; and
3. Whether the recommended Notice to Employees included by the Judge with the Decision is appropriate in light of Respondent's ongoing challenge to the certification of the Charging Party as the bargaining representative of unit employees.

## **III. THE JUDGE'S FINDINGS OF FACT ARE FULLY SUPPORTED BY THE RECORD**

### *Prior Cell Phone Usage Policies*

Prior to November 16, 2011, Respondent had at least three different cell phone policies in effect at its facility at various times, none of which were included in Respondent's employee handbook. (ALJD 2:30 & fn. 5; GCEX 8; Tr. 179:4-6) The first of these policies was a policy which read, "No cell phones are allowed in the plant they must be left in your cars," which was communicated to newly hired employees who would be assigned to perform production work. (ALJD 3:13-15; GCEX 9; Tr. 202:15 – 203:6) Documents show that this policy was included on a checklist for new employees

form used for production employees as early as July 2006. (GCEX 9) ISO/Quality Assurance Manager Aaron Black said that this policy was included in the checklist for new employees form when he started working for Respondent in January 2007 as the Jefferson Street production department supervisor and he opted to continue using this form for newly hired production employees. (ALJD 3:11-15; Tr. 202:15-17; 221:20-23)

The second policy restricting the use of cell phones went into effect about July 13, 2007. (ALJD 2:36-37) About this date, Respondent posted a policy prepared by then-President Dale Wells which read, “Effective IMMEDIATELY, cell phones WILL NOT be used while operating ANY type of company equipment,” which included forklifts and production lines. (ALJD 2:39-3:2; GCEX 5) (emphasis in document) Supervisors were instructed to hold meetings with employees to inform them of the policy and the policy was posted at the facility. (ALJD 3:6-7; Tr. 161:24 – 162:6; Tr. 163:17 – 164:9; 207:9-21) Employee Annie Morris testified that this was the language of the notice she recalled being posted at the facility prior to November 16, 2010. (ALJD 3:27-28; Tr. 44:14 – 45:11) Employee Roshel Howard testified that she understood that Respondent’s policy prohibited the use of cell phones while operating company equipment. (ALJD 4:1-5; Tr. 96:22 – 97:2; 117:23 – 118:1)

The third policy concerning the use of cell phones provides that the use of cell phones at any time other than breaks or lunch is prohibited. Black testified that this policy was communicated to the production employees in periodic staff meetings. (ALJD 3:15-17 & fn. 6; GCEX 9; Tr. 228:4-9) Respondent did not present evidence that this policy was specifically communicated to employees in departments other than production and employees Morris and Howard, who worked in shipping, testified that

they were only aware of the policy prohibiting use of cell phones while operating equipment. (ALJD 3:27-8 & 4:3-5; Tr. 45:12-17; 96:25 – 97:2)

Respondent asserts that, in 2007, following the posting of the July 13, 2007 policy prohibiting the use of cell phones while operating equipment, it posted signs throughout the facilities which read, “unauthorized use of cell phones is prohibited...[y]ou may use your phones [only] at breaks and lunch time.” (ALJD 5:8-11; REX 5(a) & (b); R Brief 4) Respondent further asserts that Morris, in her testimony, supported its claim that the policy facility-wide prior to November 2010 was that the use of cell phones was prohibited unless the employee was on break or lunch. (R Brief 4-5) However, as noted by the Judge, Respondent failed to present any documentation, beyond a photograph of a notice taken on the day prior to the hearing, to support its claim that the cell phone usage policy was amended facility-wide to prohibit the use of cell phones at times other than lunch or breaks. (ALJD 5:13-15) As Judge Ringler states, “It’s inexplicable that [Respondent] would fully document its implementation of the original facility-wide CR policy in 2007 (See GC Exhs. 5-6) and yet wholly fail to document its alleged preelection implementation of the amended facility-wide CR policy.” (ALJD 5:25-28) The Judge further notes that it was unlikely that Respondent would issue the amended policy prohibiting the use of cell phones except during breaks or lunch within months of issuing the less-stringent facility-wide policy prohibiting only the use of cell phones while operating company equipment. (ALJD 5:30-33) Lastly, the Judge discredited the testimony of Brown and Vice-President of Operations Gary Johanyak while crediting the

testimony of Morris and Howard on these issues. (ALJD 3:36-43; 4:1-9; 5:36:17-20 & 36-40)<sup>3</sup>

*Enforcement of the Prior Cell Phone Usage Policies*

Prior to November 16, 2010, Respondent had only issued discipline for cell phone related infractions on five occasions. (ALJD 3:17-19; GCEX 11, 13, 15, 16, & 18). The employees who received the discipline were all classified as production employees working in departments overseen by Production Manager Black. (ALJD 3:17-19; Tr. 186:19-20; 187:10-13; 188:14-16; 189:10-13) Contrary to Respondent's assertion that one of the employees disciplined, who worked in the Blow Molding department, was a non-production employee (See R Brief 6), Plant Manager Rusty Brown specifically acknowledged that the employee in question worked on a production line. (TR 190:4-13). Respondent did not present any evidence to show that a non-production employee had been disciplined for violation of any of Respondent's cell phone policies. (ALJD 3:20-21)

Both Annie Morris and Roshel Howard presented undisputed testimony that they had been observed using their cell phones during work time by their immediate supervisor James Mengarelli without being disciplined or counseled for any alleged violation.<sup>4</sup> Morris testified that, approximately a year prior to the hearing, Mengarelli observed her on the Auto Zone dock using her cell phone during work time. (ALJD 3:31-

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<sup>3</sup> In making findings of fact regarding whether Respondent engaged in unlawful conduct as alleged in the consolidated complaint, the Judge made certain credibility determinations. Respondent excepts to some of these findings. However, a careful examination of the record reveals no basis for reversing the Judge's credibility findings and consistent with *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951), which provides the Board should not overrule the Judge's credibility resolutions since they comport with the record as a whole. In this regard, the record establishes that the Judge based his credibility findings on witness demeanor, testimony that was mutually corroborative or supported by documentary evidence, apparent probability, and whether testimony was inherently incredible and unworthy of belief.

33; Tr. 50:7-9) Morris had stopped her forklift and remained sitting on it while speaking on her cell phone when Mengarelli approached her and waited patiently about 3-4 feet away for Morris to finish her phone call before speaking with Morris. (ALJD 3:31-33; Tr. 50:13-25) Following the call, Mengarelli did not inform Morris that she was not allowed to use her cell phone on the work floor during work time or that she had to wait until break or lunch to use her cell phone. (Tr. 52:3-9) Morris was not disciplined as a result of this incident. (Tr. 53:3-5)

Howard testified that, on an unknown date prior to the election on November 5, 2010, Mengarelli observed her using her cell phone during work time while Howard was in the office where she performs the majority of her work. Howard said that she was standing near her work area on her cell phone when Mengarelli walked in the office, stood about 3-4 feet away from her and looked directly at her while she was speaking on her cell phone. (ALJD 4:4-6; Tr. 102:11-15) Mengarelli did not tell Howard that she was not allowed to use her cell phone during work time or to wait until her break or lunch to use her cell phone. (Tr. 103:12-16) Howard was not disciplined as a result of this incident. (Tr. 103:7-19)

*Respondent's Prior Radio Usage Policy*

Prior to November 16, 2010, Respondent did not have a policy concerning the use of radios or stereos at its facility. (ALJD 2:fn. 5, 3:5-6 & 19-20) Plant Manager Brown, ISO/QA Manager Black and VP of Operations Johanyak all admitted that Respondent did not have a policy concerning the use of radios by employees prior to that date. (Tr. 183:21 – 184:15; 232:17- 233:7; 243:14-22) Morris and Howard testified that employees used large stereos, sometimes called “boom boxes,” in their work area to listen to music

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<sup>4</sup> Supervisor Mengarelli did not testify at the hearing.

during the work day. (ALJD 3:33-34 & 4:6-8; Tr. 54:1-22; 88:7-14; 104:7 – 105:2) Respondent's witnesses also admitted that employees used stereos at the facility prior to November 16, 2010. (Tr. 184:2-5; 233:8-11; 243:17 – 244:20) Furthermore, no employees had ever been disciplined for playing stereos during the work day prior to November 16, 2010.

*November 16, 2010 Policy*

On November 16, 2010, eleven days after the election, VP of Operations Johanyak sent a memo by email to all of Respondent's supervisors. This memo contained cell phone and radio policies which supervisors were instructed to discuss with employees at meetings as soon as possible. (ALJD 4:13-16; GCEX 4). The memo specified that "the use of cell phones, iphones, blackberry, ipad or any other communicative devices at the workplace except at designated break times and lunch is strictly prohibited." (ALJD 4:32-4; GCEX 4) (emphasis in document) Further, the memo states that "the wearing of any type of ear phones, ear buds or any other device used for listening to radios, iphones, ipods, mp3 players, cell phones, blue tooth devices, or any other device capable of producing sound is not allowed. This also includes the use of radios or so called boom boxes." (ALJD 21-4; GCEX 4) (emphasis in document) The memo reads that the rules are "effective immediately" and violations will result in disciplinary action against employees. (ALJD 4:40; GCEX 4) Johanyak testified that, prior to the announcement and implementation of the November 16, 2010 policy, he did not attempt to contact any official of the Charging Party to inform it of Respondent's intention to implement the November 16, 2010 policy, despite his knowledge that the

Charging Party had been selected by Respondent's employees as their bargaining representative. (ALJD 4:14-16; Tr. 247:1-17)

Since the implementation of the November 16, 2010 cell phone policy, no employee has received any written discipline for violation of the policy. Additionally, Respondent did not present any specific evidence that employees have been verbally counseled without any documentation for alleged violations of the policy. Morris and Howard testified that, following November 16, 2010, they refrained from using their cell phones for a period of time but have resumed use of their cell phones during work time when they are not operating equipment but not openly. (ALJD 5:1-3 & fn. 7; Tr. 60:1-18; Tr. 109:20 – 110:6) In addition, employees throughout the facility stopped using their stereos during the work day. (ALJD 5:1-3; Tr. 60:19 – 61:4; 109:1-15) There is no evidence that employees have been disciplined since November 16, 2010 for violation of the radio usage policy.

#### **IV. LEGAL STANDARD**

An employer has a statutory duty to bargain in good faith with the duly chosen representative of its employees regarding the latter's wages, hours and other terms and conditions of employment, commonly referred to as "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Absent a clear and unmistakable waiver, an employer violates the Act if it unilaterally alters or changes a term or condition of employment without first giving its employees' representative prior notice, and an opportunity to bargain over, said change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in

terms and conditions of employment, commences not on the date of certification, but as of the date of the election. *San Miguel Hospital Corp.*, 357 NLRB No. 36 (2011); *Overnite Transportation Company*, 335 NLRB 372 (2001); *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974) enf. denied on other grounds, 515 F.2d 684 (8<sup>th</sup> Cir. 1975).

Based on the date the bargaining obligation attaches, the Board stated in *Mike O'Connor Chevrolet* that:

The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.

*Id.* at 703 (footnotes deleted); see also *San Miguel Hospital Corp.*, *supra*; *Overnite Transportation*, *supra*. Thus, the Board has held that, irrespective of whether the unilateral changes were unlawfully motivated, an employer violates Section 8(a)(1) and (5) of the Act where it makes changes in terms and conditions of employment during the pendency of objections to an election which later results in the certification of the Union. *Mike O'Connor Chevrolet* at 704.

## V. ANALYSIS

In this case, the Judge found that Respondent's implementation of the cell phone and radio usage policies constituted unlawful unilateral changes as the changes were substantial and material in nature, the Respondent's obligation to bargain with the

Charging Party (which was later certified as the bargaining representative of the unit employees) had accrued as of the date of announcement and implementation, and Respondent failed to give the Charging Party prior notice of the changes or an opportunity to bargain over the changes. Furthermore, The Judge found that Respondent was not privileged to make the changes to the cell phone and radio usage policies because of governmental regulation or mandate.

A. *The Judge Correctly Determined That Respondent Violated Its Duty to Bargain with the Charging Party by Implementing the November 16, 2010 Rules Without Notice to or Prior Bargaining with the Charging Party*

As noted previously, VP of Operations Johanyak, who drafted and distributed the November 16, 2010 memo to supervisors to inform employees about its contents, admitted that he did not provide written or verbal notice to the Charging Party about the cell phone and radio rules prior to the rules being implemented. (ALJD 4:14-16; Tr. 247:1-17) Furthermore, while Respondent had filed objections to the election, the Board later certified the Charging Party as the certified bargaining representative for the unit employees. *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011). Respondent did not present any evidence to show that it had, as discussed by the Board in *Mike O'Connor Chevrolet*, “compelling economic considerations” for making the changes in the cell phone and radio policies. Thus, the Judge was correct in determining the facts of this case establish that Respondent violated the Act by implementing the changes in the cell phone and radio policies without prior notice to or bargaining with the Charging Party. See *Mike O'Connor Chevrolet*, *supra*; *Overnite Transportation*, *supra*.

Respondent argues that it had no obligation to bargain with the Charging Party because the Charging Party had not yet made a request for bargaining as of the date it implemented the November 16, 2010 policy. In support of its position, Respondent cites

*Wal-Mart Stores, Inc.*, 348 NLRB 274 (2006), for the proposition that in order to create a duty to bargain, a union “must first obtain the support of a majority of employees in a unit appropriate for collective bargaining ... [and] after obtaining such majority status ... make a demand to bargain.” *Id.* at 290. This section of dicta by the Judge in that case merely details the point at which an employer is obligated to engage in bargaining with a union concerning a collective bargaining agreement. This explanation, however, fails to address situations, such as in this case, where Respondent makes unilateral changes soon after an election which, after the filing of objections, led to the certification of the union. The Board, since its decision in *Mike O’Connor Chevrolet*, has held that, if an employer makes unilateral changes following an election when objections to the election are pending, it does so at its own peril of violating the Act if the union is later certified.

In addition, the facts in *Wal-Mart Stores* are distinguishable from the facts in this case. In *Wal-Mart Stores*, the employer announced that it intended to make changes to its meat cutting department at a later date, which would lead to the elimination of some unit positions. The union requested bargaining on two occasions but the employer refused to bargain with the union prior to implementation of the changes. The Judge in *Wal-Mart* found that the employer’s refusal to bargain prior to implementation was unlawful. However, this finding was reversed by the Board, not because the finding of an unlawful refusal to bargain was wrong, but because the refusal to bargain prior to implementation was not pled in the complaint. *Id.* at 274. In the instant case, Respondent announced and implemented the changes to the cell phone and radio policies simultaneously, and admitted that it did not provide any notice to the Charging Party before implementation.

Respondent further argues that the Board’s decision in *San Miguel Hospital Corp.*, 352 NLRB 809 (2008) supports its argument that it had no obligation to bargain with the Union as of November 16, 2010, when it implemented the cell phone and radio usage policy. However, Respondent fails to explain that this prior *San Miguel* decision dealt only with an employer’s refusal to bargain with the union in order to test the certification of the union. In the predecessor decision in *San Miguel Hospital Corp.*, 355 NLRB No. 43 (2010) concerning the alleged unilateral change, also cited by Respondent in its brief, the Judge, in a finding affirmed by the Board, states, “[A]n employer’s obligation to bargain attaches at the time the union wins the election, and the employer acts at its peril when it makes unilateral changes while postelection proceedings are pending.” *Id.* at 11 (citing *Food & Commercial Workers Local 1996*, 336 NLRB 421 (2001)).

Lastly, Respondent argues that the Board’s order in *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011) further supports its claim that a demand to bargain is required before any bargaining obligation attaches. Respondent states that the Board Order provides that it must recognize and bargain with the Union “on request.” However, this decision only addresses Respondent’s obligation to bargain with the Charging Party for a collective bargaining agreement, which commences with a union’s request to bargain. The Board’s order does not provide that Respondent may make unilateral changes without consequence.

B. *The Judge Correctly Found That the November 16, 2010 Policy Was a Change in Employee Terms and Conditions of Employment*

Respondent argues next that the implementation of the November 16, 2010 cell phone and radio usage policy was not a unilateral change but, instead, merely a

reiteration of existing policies. Respondent's argument is based on its assertion that the Judge made incorrect findings of fact with regard to Respondent's prior cell phone usage policies in that the prior policies were administered facility-wide and consistently applied. (R Brief 15-17) Respondent further argues that the radio policy was consistent with its handbook which provided that Respondent would "identify...potential hazards and establish...necessary protective measures," such as a prohibition against radios. (R Brief 17; GCEX 8). As noted in the section detailing the Judge's findings of fact, the Judge specifically rejected Respondent's assertions that the November 16, 2010 policy was consistent with its prior policies. As the Judge explains, the November 16, 2010 policy changed the existing policy by:

[T]ransitioning from previously permitted cell phone usage in nonproduction departments, when not operating equipment, to restricting all cell phone usage, outside of break or lunch periods; moving from a previously unregulated setting to commencing an almost complete ban on radios...in all departments; and changing from an environment of loose enforcement in nonproduction departments to expressly threatening "disciplinary action" for future violations. Contrary to [Respondent's] assertions, these changes were far-reaching, and ran far afield of the mere fine tuning of a constant policy.

(ALJD 7:21-28) This statement detailing the changes enacted by implementation of the November 16, 2010 policy is fully consistent with the Judge's findings of fact, which as noted earlier, are fully supported by the record testimony and evidence.

C. *The Judge Correctly Found That the Cell Phone and Radio Usage Policy Changes Were Substantial and Material*

Respondent goes on to argue that, even if the November 16, 2010 policy constituted a change in existing policy, the changes made were not sufficiently material or significant to require bargaining. Respondent cites the Board's decisions in *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005) and *Crittenton Hospital*, 342 NLRB 686 (2004) to support its argument that the changes were not material and significant. In

*Berkshire Hospital*, the Board held that a change in the location of an employee parking area did not constitute a material or significant change in employee terms and conditions of employment where the employees had previously used the newly assigned parking area and the change merely affected walking time and employee preference. *Id.* at 220-221. Similarly, in *Crittenton Hospital*, the Board held that a change in the employee dress code to prohibit the wearing of acrylic or artificial nails was not a material or significant change where the dress code policy already required short nails and strongly discouraged employees from wearing acrylic or artificial nails. *Id.* at 686.

However, Respondent does not cite any case where the Board has held that a change in cell phone usage policies would not constitute a material or significant change in employees terms and conditions of employment. The Board has previously considered this issue. In *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016 (2005), the employer, starting in December 2001, furnished cell phones to employees and paid for specified number of minutes for each phone. The employer had a policy that employees would be responsible for paying any charge caused by usage exceeding the allotted number of minutes. *Id.* at 1017. However, despite employees regularly exceeding their allotted minutes, the employer did not start charging employees for exceeding the allotted minutes for at least one year. The Board held that, even though the employer's written policy did not change, the change from lax enforcement of the policy to more strict enforcement is a matter that is subject to bargaining and thus violated Section 8(a)(5) of the Act. *Id.* citing *Hyatt Regency Memphis*, 296 NLRB 259, 263-264 (1989) enfd. sub nom. in relevant part *Hyatt Corp. v. NLRB*, 939 F.2d 361 (6<sup>th</sup> Cir. 1991).

In *Pan American Grain Co., Inc.*, 343 NLRB 205 (2004), the employer implemented a cell phone policy prohibiting the use of cell phones in the facility and prohibiting unauthorized persons from having cell phones inside the plant. The rule was posted and implemented without any notice to or bargaining with the union and came three days after a union steward was verbally counseled about using his cell phone in the plant following a meeting with management. *Id.* at 212-213. Prior to implementation, the employer had no policy concerning the possession or use of cell phones in the plant. *Id.* at 213-214. The Board affirmed the decision of the Judge when he found that the use of cell phones in the facility by employees was a common and accepted practice prior to implementation of the rule and the use of cell phones was a mandatory subject of bargaining which the employer was not privileged to change without providing the union notice and an opportunity to bargain prior to implementation. *Id.* at 214-215.

The record in this case establishes that, between 2007 and November 16, 2010, Respondent had three different cell phone usage policies in effect at its facility. While new employees in the production departments were informed of a policy that cell phones were not permitted in the facility, there is no evidence that this policy was ever enforced. Respondent also had a policy that employees were only permitted to use cell phones during breaks and lunch time but the evidence only shows that this policy was specifically communicated to and enforced against production employees. Finally, Respondent had a policy which prohibited employees from using cell phones while operating equipment. This policy, when it was put in place in July 2007, was specifically directed at all employees, including the warehouse/shipping and maintenance employees. The record shows that, in the shipping department, this was the rule enforced considering

that supervisor Mengarelli did not discipline or even speak to employees Annie Morris and Roshel Howard when they were observed by him using their cell phones in a work area during work time, as neither employee was operating company equipment while using their cell phones. Thus, the November 16, 2010 memo, which was intended to create a plant-wide rule prohibiting the use of cell phones except during breaks and lunch time constitutes a substantial change in the terms and conditions of employment for the warehouse/shipping and maintenance employees.

Concerning the radio policy, the record establishes that, prior to November 16, 2010, Respondent did not have any policy concerning the use of radios by employees and allowed employees to use stereos and “boom boxes” to listen to music during their work day. However, after November 16, 2010, the use of these stereos was specifically banned except for employees who work in enclosed offices. The Board has held that the “promulgation of a rule banning the use of all personal radios is not within the realm of intrinsic management authority so as to exempt it automatically from the category of mandatory subjects of bargaining.” *Murphy Oil USA, Inc.*, 286 NLRB 1039 (1987). Just as in that case, Respondent’s implementation of a rule banning the use of radios was a broad and sweeping withdrawal of work-related privileges and such changes cannot be made without bargaining with the Charging Party prior to implementation.

D. *The Judge Correctly Found Respondent Was Not Privileged to Implement the Changes to the Cell Phone and Radio Policies on the Basis of the OSHA General Duty Clause*

Lastly, Respondent argues that, pursuant to the OSHA General Duty Clause, it was obligated to implement the November 16, 2010 cell phone and radio usage policies because of its obligation to provide employees with a safe workplace. The OSHA General Duty Clause states that employers “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.” 29 U.S.C. §654, 5(a)(1). However, as noted by the Judge, the Board has held that, where governmental regulations, such as the OSHA General Duty Clause, provide employers with significant latitude and flexibility in implementing steps necessary for compliance, the manner or specific steps taken toward compliance are subject to bargaining with a certified bargaining representative. (ALJD 8:13-24)

In *Hanes Corp.*, 260 NLRB 557 (1982), the Board upheld the Judge’s finding that the employer had violated the Act when it unilaterally implemented a requirement that employees wear employer-chosen respirators while performing their work. The employer in that case argued that OSHA mandated that employees working in that industry wear respirators while working to avoid exposure to cotton dust. However, the OSHA regulations only required that respirators be worn and provided a list of more than one hundred approved respirators. The Board found that while the employer may unilaterally implement a requirement that employees wear respirators, the selection of the respirator to be worn is a matter subject to bargaining with the bargaining representative. *Id.* at 562-3.

The Board made a similar finding in *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994). In that case, OSHA mandated that the employer have designated “competent persons” perform daily inspections of worksites to ensure safety on the worksite. The employer in that case selected certain individuals, who were provided with new job descriptions and wage increases, to perform the “competent person” functions without prior consultation with the union. The Board held that the employer violated that Act by

its unilateral selection of the individuals to perform the “competent person” functions because, while the employer was required to have individuals to perform these duties, the selection of the specific individuals was discretionary and thus subject to bargaining with the bargaining representative. *Id.* at 942.

In this case, the Judge explains that Respondent had wide-ranging flexibility and discretion regarding the appropriate manner to address its safety concerns, including the list of prohibited items, applicable facility locations where a full ban would be put into effect, the affected positions, and the shifts to be affected by a full ban. (ALJD 8:16-23) Much like in *Hanes* and *Dickerson-Chapman*, where the governmental regulations do not mandate the specific acts or measures to be taken, the manner in which the employer complies with the regulation is subject to its bargaining obligation with the certified bargaining representative. Therefore, the Judge was correct in ruling that Respondent was required to engage in bargaining with the Charging Party before it implemented the November 16, 2010 cell phone and radio policies. (ALJD 8:23-24)

E. *Revisions to the Judge’s Recommend Order Are Unwarranted*

Respondent states that, if the Judge’s decision is not reversed, the recommend Notice to Employees should be amended to exclude the remedies requiring that Respondent “will not refuse to bargain with the Union,” and “will, upon request, bargain in good faith with [the Union] over changes to our cell phone, radio and portable listing [sic] device usage policies at the facility.” (ALJD Appendix) Respondent notes that it is presently challenging the Union’s certification as the collective bargaining representative by the Board in *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011), and that the parties stipulated that Respondent’s claim that it had no obligation to bargain with the Union

would not be addressed in this proceeding. Respondent asserts that the Judge's Notice and Order violates this stipulation.

Any revision of the Judge's Notice and Order is not warranted as the Judge made clear that the violations he found in this case "are contingent upon enforcement of the Board's Order in *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011)." (ALJD 6:fn. 9) Thus, the Judge has already acknowledged that enforcement of the Order in this case may not be implemented until the United States Court of Appeals for the Eight Circuit has determined that the Board's Order should be enforced.

## VI. CONCLUSION

A review of the record establishes that the Judge properly concluded that Respondent violated Section 8(a)(5) by unilaterally implementing changes to its cell phone usage policy and implementing a new radio usage policy without bargaining with the Charging Party as bargaining representative for the unit employees. Respondent presents no arguments or legal authority that would warrant reversing the Judge's findings and conclusions. Accordingly, the Board should affirm the Judge's findings and conclusions and should adopt his recommended Order.

Dated this 29<sup>th</sup> day of November, 2011

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was filed by e-filing with the Executive Secretary's Office on the Board's website.

I further certify that on November 29, 2011, a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was served by e-mail on the following:

Mr. Benjamin N. Thompson  
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