

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

**COMAU, INC.**

**Respondent**

**and**

**Case 07-CA-073073**

**WISNE AUTOMATION EMPLOYEES  
ASSOCIATION**

**Charging Union**

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

Darlene Haas Awada, Esq.  
Patricia A. Fedewa, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Seventh Region  
477 Michigan Ave., Room 300  
Detroit, MI 48226  
(313)226-3212  
(313)226-3236

**TABLE OF CONTENTS**

**ARGUMENT.....1**

**I. The ALJ correctly found that Respondent had a past practice of WAEA-represented employees carrying their home plant contract and rules with them when temporarily assigned to another Respondent facility.....1**

**A. The Evidence supports the ALJ’s finding that Respondent applied the WAEA’s contract to WAEA-represented employees at facilities other than their home plant.....3**

**B. Respondent’s argument that rules and certain contract provisions were “jurisdictional” and specific to each facility is without merit.....4**

**C. The WAEA contract supports a finding that it applies to its bargaining unit regardless of at which facility the employees are working.....10**

**D. Respondent’s arguments regarding overtime are unsupported by the record.....12**

**II. The ALJ correctly applied the “clear and unmistakable” statutory waiver standard to determine the Union did not waive the right to bargain about work rules.....16**

**A. Respondent’s contract coverage theory is inconsistent with Supreme Court precedent and is not monetarily or practically feasible.....16**

**B. The Union did not waive its right to bargain about the rules.....18**

**C. The ALJ correctly concluded that Respondent violated its duty to bargain with the WAEA over the new Novi and Royal Oak work rules.....23**

**III. The ALJ correctly concluded that Respondent violated Section 8(d) of the Act.....25**

**A. The contract terms are specific.....25**

**B. Respondent does not have a sound arguable basis for changing the terms and conditions of employment as evidenced by its past practice.....26**

**IV. The ALJ correctly concluded that Respondent failed to bargain over the effects of the temporary closing of the Comau Automation facility in December 2011.....28**

**V. The ALJ correctly concluded that Respondent coercively interrogated and threatened WAEA employees regarding discussions of union matters; unlawfully told WAEA members that their union no longer existed; and unlawfully informed the WAEA that they did not wish to work under the new rules they could opt under their contract to be laid off.....32**

**CONCLUSION.....34**

**TABLE OF AUTHORITIES**

*Allied Aviation Fueling of Dallas*, 347 NLRB 248 (2006)..... 26

*Alpha Biochemical Corp.*, 293 NLRB 753 (1989)..... 20

*Bath Iron Works*, 345 NLRB 499 (2005), affd. 475 F.3d. 14 (1<sup>st</sup> Cir. 2007) ..... 29

*Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001)..... 23

*Ciba Geigy Pharmaceutical Division*, 264 NLRB 1013 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) ..... 19, 33

*Conoco, Inc.*, 318 NLRB 60 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996)..... 29

*Dearborn Country Club*, 298 NLRB 915 (1990)..... 26

*Dodge of Naperville, Inc.*, 357 NLRB No. 183 (2012) ..... 31

*Dynatron/Bondo Corp.*, 324 NLRB 572 (1997)..... 26

*Eby-Brown Co.*, 328 NLRB 496 (1999) ..... 33

*Emhart Industries*, 297 NLRB 215 (1989) ..... 19

*First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) ..... 31, 34

*Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6<sup>th</sup> Cir. 1995) ..... 34

*Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390 (5<sup>th</sup> Cir. 1983)..... 20, 34

*Holly Farms Corp.*, 311 NLRB 273 (1993)..... 32

*IBEW Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir 1986) ..... 29

*International Automated Machines*, 285 NLRB 1122 (1987) ..... 3, 10, 30

*Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986)..... 20

*Jaydon, Inc.*, 273 NLRB 1594 (1985) ..... 33

<i>Johnson-Bateman Co.</i> , 295 NLRB 180 (1989).....	24
<i>KIRO, Inc.</i> , 317 NLRB 1325 (1995) .....	34
<i>Mercy Health Partners</i> , 358 NLRB 1 (2012).....	31
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	23
<i>Metropolitan Teletronics</i> , 279 NLRB 957 (1986), enfd mem. 819 F.2d 1130 (2d Cir. 1987).....	32
<i>Mining Specialists</i> , 314 NLRB 268 (1994) .....	29
<i>Morco Industries, Inc.</i> , 279 NLRB 762 (1986).....	32
<i>National Car Rental System</i> , 252 NLRB 159 (1980).....	34
<i>New York Mirror</i> , 151 NLRB 834 (1965).....	23
<i>NLRB v. C &amp; C Plywood Corp.</i> , 385 U.S. 421 (1967) .....	17
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962) .....	25
<i>Ohio Power Co.</i> , 317 NLRB 135 (1995) .....	26
<i>Owens-Corning Fiberglas Corp.</i> , 282 NLRB 609 (1987) .....	26
<i>Penntech Papers, Inc. v. NLRB</i> , 706 F.2d 18 (1 <sup>st</sup> Cir. 1983) .....	32
<i>Pontiac Osteopathic Hospital</i> , 336 NLRB 1021 (2001) .....	20
<i>Provena St. Joseph Medical Center</i> , 350 NLRB 808 (2007).....	22, 23
<i>Radio Electric Service Co.</i> , 278 NLRB 531 (1986) .....	27
<i>RBE Electronics of S.D.</i> , 320 NLRB 80 (1995).....	33
<i>Ready Mixed Concrete Company</i> , 317 NLRB 1140 (1995) .....	3, 10, 30
<i>Robbins Door &amp; Sash Co.</i> , 260 NLRB 659 (1982).....	26
<i>Rockford Manor Care Facility</i> , 279 NLRB 1170 (1986) .....	23

<i>S &amp; I Transportation, Inc.</i> , 311 NLRB 1388 (1993) .....	21
<i>Safeway Stores, Inc.</i> , 256 NLRB 918 (1981) .....	11
<i>Sea Jet Trucking Corp.</i> , 327 NLRB 540 (1999) .....	32
<i>Standard Drywall Products</i> , 91 NLRB 455 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) .....	2, 35
<i>Toledo Blade Co.</i> , 343 NLRB 385 (2004) .....	25, 26
<i>United Cerebral Palsy of New York City</i> , 347 NLRB 603 (2006) .....	25

Counsel for the Acting General Counsel (sometimes also referred to as “the Acting GC”), pursuant to Section 102.46 of the Board’s Rules and Regulations, respectfully submits this Answering Brief to Respondent’s Exceptions to the Administrative Law Judge’s Decision.<sup>1</sup>

## ARGUMENT

**I. The ALJ correctly found that Respondent had a past practice of WAEA-represented employees carrying their home plant contract and rules with them when temporarily assigned to another Respondent facility.**

The ALJ correctly found and concluded that Respondent has an established policy of applying the WAEA contract to employees represented by the WAEA working at the Novi and Royal Oak facilities. (ALJD, p. 22, lines 43-45) Respondent argues that the Acting General Counsel did not prove that there was a past practice of the contract applying to employees at locations other than their home plant Comau Automation,<sup>2</sup> claiming it was unaware of the practice, that it could not differentiate which contract it was applying to WAEA-represented employees working outside of Comau Automation, and that, if it did apply the WAEA contract, it did not occur regularly.

The record evidence of the practice of the WAEA contract applying to WAEA-represented employees at Respondent’s facilities other than their home plant, and of Respondent’s knowledge of the contract’s application and other practices which

---

<sup>1</sup> "Tr." refers to the transcript of the administrative hearing; "JX," "GCX," and "RX" refer to joint exhibits, the Acting General Counsel’s exhibits, and Respondent’s exhibits, respectively. "ALJ" refers to Administrative Law Judge Mark Carissimi. "ALJD" refers to the ALJ’s decision, dated December 26, 2012.

<sup>2</sup> Comau Automation is also referred to as the “Wisne facility.”

developed to accommodate competing contractual interests among the three unions<sup>3</sup> representing employees at Respondent, however, is un rebutted. While Respondent challenges the ALJ's reliance upon the testimony of Counsel for the Acting General Counsel's witnesses in finding that a past practice existed where the WAEA contract applied to WAEA-represented employees outside of their home plant, Respondent explicitly states (Respondent Exceptions Brief<sup>4</sup> p. 30) that it is not raising issues of credibility. Even if it were raising issues of credibility, there is no basis for overturning the ALJ's credibility determinations. See *Standard Drywall Products*, 91 NLRB 455 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Notably, Respondent failed to call any witnesses with actual knowledge of the day-to-day practices on the shop floor. Indeed, Respondent's only witness, David McKee, testified only generally about what he thought the practices were, and admitted a lack of actual knowledge of how practices occurred on the shop floor. (Tr. 464, 465). The fact that Respondent failed to call witnesses with actual knowledge of events and practices does not establish, as Respondent argues in its Brief (pp. 25-29), that Respondent did not have knowledge of the practice of the WAEA-contract applying to employees at locations other than Comau Automation. Rather, it warrants an adverse inference that, if called, the witnesses' testimony would have been adverse to

---

<sup>3</sup> Throughout this brief, the unions representing employees of Respondent will be referred to as follows: "WAEA" refers to the Charging Union; "NIEA" refers to the Novi Industries Employees Association; and "CEA" refers to the Comau Employees Association.

<sup>4</sup> Hereafter, Brief. All references to Respondent's Brief are to its Brief in Support of Exceptions to the ALJD, dated February 22, 2013.

Respondent's case. *Ready Mixed Concrete Company*, 317 NLRB 1140, 1142 (1995); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

**A. The Evidence supports the ALJ's finding that Respondent applied the WAEA's contract to WAEA-represented employees at facilities other than their home plant**

The undisputed evidence establishes that the WAEA contract historically applied to the WAEA-represented employees when those employees were temporarily transferred to other facilities. The WAEA CBA itself provides for temporary transfers. (JX 6, Article 4.04(c)) Thus, a WAEA-represented employee's wages, classification, health insurance, life insurance, disability insurance, method of accruing vacation pay, overtime provisions, and seniority applied to him whether he was at his home plant of Comau Automation, or at any other Respondent facility. In addition, his attendance policy and work rules continued to apply to him. He continued to pay dues to his union under the union security clause in his CBA, and he maintained his WAEA seniority. (Tr. 84, 146-48, 275-76)

The record establishes that the WAEA-represented employees maintain their distinct identity as a bargaining unit, regardless of the Respondent facility at which they work. It is undisputed that the wages, benefits, classifications, and separate seniority of the WAEA-represented employees remain constant no matter to what Respondent facility they are temporarily transferred, that the WAEA CBA union security clause continues to apply, and that Respondent continues to process grievances filed by the WAEA on behalf

of WAEA-represented employees working at Respondent facilities other than Comau Automation.

Respondent admits that certain terms of the WAEA CBA applied to WAEA represented employees when they worked at Respondent facilities other than Comau Automation. However, Respondent takes the position that only some of the terms applied. (Brief p. 32; Tr. 463; GCX 43, p. 7) This is an artificial distinction without any basis in fact or law. Thus, Respondent's assertions that only "earned benefits" in a collective bargaining agreement, which Respondent identifies as wages, vacation, paid holidays/bonus days, healthcare benefits, life and disability insurance benefits, and retirement benefits, apply when WAEA-represented employees work at Respondent facilities other than their home plant are without merit. (JX 3, GCX 43, p. 7) Indeed, the record is devoid of evidence that Respondent ever negotiated with the WAEA that only certain WAEA CBA provisions would apply when WAEA-represented employees worked at Respondent facilities other than their home plant, or that this was ever the understanding between the parties. (Tr. 450-451) The unrebutted testimony of employees was that, prior to January 24, 2012, Respondent never told them that their WAEA CBA did not apply to them when they worked at Respondent facilities other than their home plant. (Tr. 249)

**B. Respondent's argument that rules and certain contract provisions were "jurisdictional" and specific to each facility is without merit**

Respondent asserts that its "principal argument" (Brief, p. 3) is that it could not have violated Section 8(a)(5) and 8(d) of the Act because the "uniformity of rules from

plant to plant at all times” prior to January 2012 precludes a finding that a past practice of applying an employee’s contract to him when he worked outside of his home plant.

Respondent also asserts throughout its Brief that a past practice of the WAEA contract applying to employees outside of their home plant could not exist because Respondent was not aware of which contract it was applying to the WAEA-represented employees due to uniformity in rules. However, there was not a “uniformity” of rules from plant to plant. Indeed, the Royal Oak facility had no work rules, as Respondent acknowledges (Brief, p. 43). Similarly, Respondent’s repeated claims that, prior to January 2012, the WAEA and NIEA were subject to the same work rules or that the rules were “identical in all material respects” (Brief, p. 6) is simply false.

**1. The only terms and conditions of employment Respondent could lawfully apply to WAEA-represented employees working at Royal Oak were contained in the WAEA collective bargaining agreement**

Respondent’s spurious argument that it could not know which contract was being applied to WAEA-represented employees while they were working at Respondent facilities other than their home plant is negated by the unrebutted testimony of employees who worked at Royal Oak prior to the implementation of the Royal Oak Rules. Thus, Larry LaForest testified that he was able to use his personal days and vacation days as set forth in the WAEA CBA when he worked at Royal Oak. (Tr. 149, 151; GCX 44; JX 5, Articles 5.02 and 8.04) Similarly, when Steve Brooks worked at Royal Oak in February and March 2011, he was able to use his contractual personal days. (Tr. 249; JX 5, Article 5.02) As Respondent admits (Brief, p. 43), there were no work rules in place at Royal Oak during those times; therefore, the only contract Respondent could be applying

lawfully to LaForest and Brooks in granting their personal and vacation days would be the WAEA contract. Accordingly, Respondent's argument that it could not know which contract applied prior to the January 2012 is disingenuous and without merit.

## **2. The work rules were not "uniform"**

Throughout its brief, Respondent argues that the terms and conditions of the WAEA contract and the old NIEA contract were the same, and thus, the terms of the NIEA contract applied to them whenever they worked there. This is simply not true.

First, the WAEA and previous NIEA contracts contained different provisions with regard to drug testing. The NIEA contract contained provisions for testing both new employees and current employees, while the WAEA CBA did not and does not contain provisions for drug testing.<sup>5</sup> In addition, the WAEA contract's only provision regarding drug use is contained within the "Shop Rules" Article and contemplates application outside of the Comau Automation facility. It penalizes: "[p]hysical possession (on your person) of or under the influence of narcotics or liquor or any alcoholic beverage on company property or customer's property at any time." (JX 5, Article 22: "Shop Rules," #16; JX 6, Article 25, #16). Although the NIEA CBA in effect at the time required employees to undergo a drug screening after returning from an absence of more than thirty days (JX 1, Article 37.09), WAEA-represented Steve Brooks was not given a drug test when he reported to Novi Industries on January 3, 2012, from a medical leave of over 60 days. (Tr. 240-41)

---

<sup>5</sup> The "Shop Rules" in the current and preceding WAEA contracts provide for testing for alcohol consumption. (JX 5, Article 22: "Shop Rules," #16; JX 6, Article 25: "Shop Rules", #16)

There are also differences in the sick pay provisions (Compare JX 5 Article 5.03/JX 6 Article 6.03 with JX 1, Article 7.03) The prior NIEA CBA (JX 1) did not allow NIEA-represented employees to take sick time in less than one day increments, while the WAEA CBAs (current and prior) do not have this restriction. (JX 5 and 6) WAEA-represented employees' sick leave provisions applied to them working at facilities other than their home plant. (Tr. 146)

Further, if it was Respondent's practice for employees to follow the rules of whatever building they were working in, Durocher's speeches about the upcoming changes in the Novi rules would not have occurred. David McKee was present for the discussions on January 21, 2012, and cannot now claim that he does not know about them. As McKee admitted, when the Novi Rules and the Royal Oak Rules were implemented at those facilities, the WAEA-represented employees experienced a change to their working conditions. (Tr. 451-452)

Indeed, Respondent states (Brief, pp. 2-3) that when the NIEA contract was negotiated, the NIEA "insisted on contract language requiring that all Comau employees who were temporarily assigned to their facility 'be obligated to follow the established protocol and rules as set forth in [the NIEA] agreement for all purposes while they are working within the NIEA bargaining unit.'" Respondent states (Brief, p. 2) that the NIEA was concerned about criticism from their membership if employees represented by other unions would be given more lenient treatment at the Novi facilities. Clearly, the addition of the language attempting to obligate employees represented by other unions to be subject to the rules in the NIEA contract and the NIEA's concerns about criticism due to

“lenient treatment” would be unwarranted if work rules were specific to individual facilities prior to Respondent’s unilateral implementation of the Novi Rules.

Respondent also argues (Brief, p. 33) that the 2009 agreement giving WAEA employees a separate work space at the Novi facility, does not show the practice of carrying the contract from Comau Automation to the Novi facility. However, in 2009, Respondent shut down Comau Automation. The facility reopened in January 2011. (Tr. 188, 208) Pursuant to WAEA CBA’s Article 4.18, Respondent and the WAEA negotiated an agreement by which the WAEA-represented employees, and the work they were performing at the time of the shut down, would temporarily be moved into a bay at Novi Industries and exclusively occupy that bay. (Tr. 188-189; RX 1, GCX 39) Respondent negotiated a tripartite agreement with NIEA and the WAEA outlining the parameters of temporary occupancy and its impact on the NIEA employees. (Tr. 209-211; RX 1)

Throughout the time the WAEA-represented employees were working in a bay at Novi Industries, the WAEA contract and Comau Automation seniority continued to apply to them. (Tr. 227-228) While the WAEA contract continued to apply, it was not pursuant to the Letter of Understanding between the WAEA, the NIEA, and Respondent, which made no mention of any collective bargaining agreement. (RX 1)

**3. Respondent’s argument that any application of the WAEA-contract was an anomaly is without merit**

Respondent argues (Brief, p. 21, 32-33) that the ALJ erred by relying upon the fact that WAEA-represented employee Steve Brooks returned to Novi prior to the

implementation of the Novi Rules after an extended medical leave and was not given a drug test as required by then-expired NIEA contract<sup>6</sup> to find that the WAEA contract, which does not contain a drug testing provision, applied. (ALJD p. 11, 20; Tr. 240-41; JX 1 and 5) Respondent appears to incorrectly assert that, in order to establish a past practice of the WAEA contract applying to WAEA-represented employees at all Respondent facilities, the Acting GC needed to establish a past practice of each contractual provision applying, and this one instance was insufficient to do so. However, the record is replete with specific instances establishing the “regular and longstanding” practice that the contract as a whole applied. Thus, as the ALJ found (ALJD p. 20-21), in addition to the fact that, consistent with the WAEA contract, Brooks was not given a drug test at Novi, the undisputed evidence establishes that employees took personal days, vacation days, and sick time consistent with the WAEA contract. (Tr. 149, 151, 249; GCX 44; JX 5, Articles 5.02 and 8.04)

The un rebutted testimony of all employee witnesses was that, prior to January 2012, the terms of the WAEA collective bargaining agreement (“CBA”) applied to employees represented by the WAEA when they worked at Respondent’s facilities other than their home plant. (Tr. 79, 84, 146-149, 248-250, 272-275) This meant that their contractually negotiated wages, health insurance, vacation accrual, classifications,

---

<sup>6</sup> The NIEA contract (JX 1, Article 37.09) provided in pertinent part: “All current employees, including management and clerical staff, will be drug screened under the following conditions: 1. Upon returning from an absence of thirty (30) days or more. 2. Upon being injured, at management discretion, depending on the severity and cause of injury.” The contract also stated: “Testing of current employees under this section will include any contractors or non-Comau, Inc. employees working at Novi Industries or AutoTech.”

personal days, sick days, 401(k) plan, paid holidays, bonus days,<sup>7</sup> life insurance, disability insurance, and “shop rules” continued to apply when they worked at facilities other than their home plant of Comau Automation.<sup>8</sup> (Tr. 79, 86-87, 146, 275, 461, 463). They also maintained their separate WAEA seniority when they worked at facilities other than their home plant. (Tr. 79, 81, 168, 148, 268; GCX 24)

Respondent did present any evidence of any witness who actually worked or enforced the rules and practices on the shop floor, warranting an adverse inference that, if called, the witnesses’ testimony would have been adverse to Respondent’s case. *Ready Mixed Concrete Company*, supra at 1142; *International Automated Machines*, supra at 1123. Instead of calling witnesses with actual knowledge, McKee testified using conclusory language about what he thought occurred at Respondent. Under these circumstances, the undisputed evidence overwhelming establishes the “regular and long-standing” practice of the WAEA contract as a whole applying to WAEA-represented employees working at Respondent’s facilities other than their home plant.

**C. The WAEA contract supports a finding that it applies to its bargaining unit regardless of at which facility the employees are working**

Respondent argues that the parties’ contract language defeats the past practice. Actually, contract language in the WAEA contract supports a finding that the home plant contract applies to each employee at all of Respondent’s facilities.

---

<sup>7</sup> The current and preceding WAEA contract identifies “bonus days” for which employees receive double time. (JX 1, 5, and 6)

<sup>8</sup> McKee admitted that there were significant differences in the benefits contained within the WAEA and NIEA contracts. (Tr. 403-404)

The WAEA CBA itself provides for temporary transfers. (JX 6, Article 4.04(c)) Thus, a WAEA-represented employee's wages, classification, health insurance, life insurance, disability insurance, method of accruing vacation pay, overtime provisions, and seniority applied to him whether he was at his home plant of Comau Automation, or at any other Respondent facility. He continued to pay dues to his union under the union security clause in his CBA, and he maintained his WAEA seniority. (Tr. 84, 146-48, 275-76)

The addition of the language in the NIEA CBA which states that Respondent's employees are obligated to follow the established protocol and rules as set forth in this agreement for all purposes while they are working *within the NIEA bargaining unit* (emphasis added), treats WAEA-represented employees as accreted to the bargaining unit while they are temporarily working at the Novi Industries facilities. The Board will find a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted. *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981). This has not been established here, where it is undisputed that provisions of the WAEA CBA continued to apply, the WAEA unit's seniority was maintained on a separate seniority list, and Respondent continued to honor grievances filed by the WAEA on behalf of WAEA-represented employees working at Novi Industries.

Respondent also argues (Brief, p.37) that having multiple home plant employees working together with different rules would leave "chaotic uncertainty," and it is not

reasonable to construe contracts in this way. However, having employees working out of different locations with separate terms and conditions of employment has been the practice at Respondent. The ALJ explained how these issues are lawfully worked out throughout his decision.

Respondent appears to believe that one union can bargain on behalf of employees it does not represent. On page 37 of its Brief it states without citation, that the “Novi employees contractually agreed to make significant changes in their rules only because they would apply to everyone working with them at their home plant.” Not only is this statement unsupported by the record, but it is an admission of a violation of Section 8(a)(2) of the Act. The record clearly establishes that the NIEA has no authority to bargain on behalf of the WAEA-represented employees (Tr. 449), but Respondent is claiming that is exactly what it did. Although not alleged in the Complaint, Respondent’s asserted negotiations with the NIEA on behalf of the WAEA-represented employees violated Section 8(a)(2) of the Act, in that the NIEA is not the lawful bargaining representative of the WAEA bargaining unit.

**D. Respondent’s arguments regarding overtime are unsupported by the record**

Respondent’s claim (Brief, p. 34) that the ALJ incorrectly relied upon the procedure for assigning overtime as evidence that WAEA-represented employees’ contract applied to them when they worked at Respondent facilities other than Comau Automation is without merit. The record establishes that, in situations where there might be competing priorities among the contracts, such as in the assignment of overtime, long-

standing practices evolved between Respondent and the three unions which attempted to harmonize the three agreements. Thus, when overtime was assigned on a project, the home plant was usually given priority, followed by Respondent employees represented by the other unions, and, finally, non-Respondent employee contractors were given the lowest priority.<sup>9</sup> (Tr. 120, 272, 394) McKee admitted that, because each union's collective bargaining agreement contained language giving priority to its unit members in assignment of overtime, when employees from more than one union were working at the same non-home plant facility, management would attempt to allocate overtime equitably among the bargaining units. (Tr. 463) It is self-evident that this would not have been necessary unless management was applying employees' respective contracts to them as they worked outside of their home plants.

Respondent also asserts (Brief, p. 34) that the record establishes that WAEA members were never assigned overtime with their WAEA seniority while at Novi. Actually, the opposite is true. The current and prior WAEA contracts expressly provide that after the employees assigned to a project on which overtime is needed are offered overtime, then overtime will be assigned in the needed classification by seniority. (JX 5 and JX 6, Article 4.17) The un rebutted testimony was that seniority was considered. (Tr.

---

<sup>9</sup> Respondent General Counsel David McKee testified that in August 2011, the WAEA raised objections about using the NIEA's contractual language giving priority for overtime to NIEA employees over *contractors* to justify not giving WAEA employees priority for overtime over contractors in some instances. (Tr. 379; JX 1, RX4) However, employees testified that they were generally given priority over contractors when overtime was assigned when they were working outside of their home plant, including Novi, and McKee admitted that he had no involvement in the actual assignment of overtime. (Tr. 120, 271-272, 465) In addition, McKee testified that generally the practice is to give the home plant priority in assignment of overtime, yet the preceding WAEA contract did not have language giving priority for overtime assignment to WAEA bargaining unit members. Nonetheless, the current WAEA collective bargaining agreement added language giving priority to the WAEA bargaining unit in assignment of overtime (Compare JX 5, Article 4.17 with JX 6, Article 4.17). This addition makes sense in context only if the WAEA contract would be applied at facilities other than the home plant, since the undisputed practice was already to give the home plant union priority, if possible. (Tr. 120, 394)

80) Respondent's only witness, McKee, admitted that he had no personal involvement in assigning overtime and had no personal knowledge of whether it was taken into account. (Tr. 464-465) No witnesses of Respondent actually involved in assigning overtime testified.

In addition, Respondent's claim (Brief, p. 34) that its practice regarding assignment of overtime has not changed is puzzling. As stated above, Respondent admits that the practice **was** for the home plant usually to be given priority, followed by Respondent employees represented by the other unions, and, finally, non-Respondent employee contractors were given the lowest priority. The Novi Rules altered both this past practice and other overtime provisions in the WAEA CBA when WAEA bargaining unit employees work at Novi Industries. The Novi Rules eliminate priority given to non-home plant employees of Respondent over contractors in assigning overtime. (Tr. 120, 272, 394; JX 3, p. 2, JX 6, Article 4.17)

The Novi Rules also require mandatory overtime, stating that employees may be required to work up to a maximum of 58 hours per week, and "employees must work all scheduled hours," unless the employee receives pre-approved time off as defined in the Novi Rules. (JX 3, p. 1) The WAEA CBA expressly states that Respondent "will not insist" on employees working overtime. (JX 6, Article 6.06)

The Novi Rules explicitly state there are no seniority rights for purposes of overtime (JX 3, p.1), altering the provision of the WAEA CBA stating that if overtime is needed on a project, and the employees assigned to the project refuse or more employees are needed, overtime will be assigned in the needed classification by seniority. (JX 6,

Article 4.17) The Novi Rules do not schedule employees to work weekend overtime if they schedule a vacation day on the preceding Friday or following Monday. There is no similar restriction in the WAEA CBA. (JX 6)

Overtime provisions and practices were impacted by the implementation of the Royal Oak Rules as well. The Royal Oak Rules give Royal Oak management “sole discretion” to determine “the proper allocation of overtime” among employees, and expressly state that “no employee has overtime priority rights within the Royal Oak facility.” (JX 4, p.2) Thus, the Royal Oak Rules eliminate the priority given to non-home plant employees of Respondent over contractors in assigning overtime. (Tr. 120, 272, 394; JX 3, p. 2, JX 6, Article 4.17) The Royal Oak Rules make overtime mandatory (JX 4, p.2), nullifying the WAEA CBA’s express state provision that Respondent “will not insist” on employees working overtime. (JX 6, Article 6.06) The Royal Oak Rules also do not permit employees to work weekend overtime if they schedule a vacation day on the preceding Friday or following Monday. There is no similar restriction in the WAEA CBA. (JX 6)

Respondent’s assertion (Brief, p. 34) that no WAEA bargaining unit members were denied overtime is premature. The establishment of damages resulting from an unfair labor practice is a matter for the compliance phase of proceedings. Board’s Rules and Regulations, Sections 102.52, 102.55(a). In addition, The Novi Rules and Royal Oak Rules also, by eliminating WAEA contractual personal days and sick days, nullify the WAEA CBA provisions applying personal and sick leave days towards attendance credit and overtime calculations. (JX 6, Articles 6.02, 6.03, 6.04, 12.02) To the extent WAEA-

represented employees lost overtime opportunities and credit toward overtime wage calculations, the employees' vacation pay was also negatively impacted. The WAEA CBA provides that vacation pay be awarded based on a percentage of an employee's gross earnings for the year. (Tr. 320; JX 6, Article 8.04)

**II. The ALJ correctly applied the “clear and unmistakable” statutory waiver standard to determine the Union did not waive the right to bargain about work rules**

The ALJ correctly concluded that the “clear and unmistakable waiver” standard applies to the instant facts. (ALJD, p. 18, lines 26-29) The WAEA did not waive its right to bargain about the implementation of the Novi and Royal Oak rules, and thus, their implementation was a violation of Section 8(a)(5) and (1).

**A. Respondent's contract coverage theory is inconsistent with Supreme Court precedent and is not monetarily or practically feasible**

Respondent argues that the theory of “contract coverage” applies to the 8(a)(5) unilateral change allegations. Respondent argues that since these allegations concern a contract provision, they are “covered by the contract” and thus, are not subject to interpretation by the NLRB. A few pages later in its Brief at pages 41 and 42, Respondent argues that the ALJ relied upon past practice to determine if Section 8(d) was violated. The changes that Respondent is speaking of are the same regardless of which provision has been violated. Yet, Respondent is arguing that the contract covers these issues, and that they are past practice and thus, the Union has waived its right to seek NLRB review. Respondent cannot have it both ways. As is described below, Respondent changed its

practice of an employee's contract applying outside of its home plant, and through this practice, Respondent has repudiated portions of its contract.

Respondent argues that the NLRB cannot decide these issues because it is the role of arbitrators and the courts to interpret contracts.<sup>10</sup> This is illogical for several reasons. First, the Supreme Court rejected an argument similar to the "contract coverage" argument. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). As described in its decision, the reasons for disregarding this argument are just as valid today as when the decision was issued. In *C & C Plywood*, the Court held that the Board must construe contracts in order to decide unfair labor practices. *Id.* at 428. As the Court in *C & C Plywood* stated, if the Board had "no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtain vindication of their statutory rights." *Id.* at 428. As here, the parties in *C & C Plywood* were not subject to an arbitration clause. The Court noted that it would take years to get the Court ruling and then to bring it back to the Board to get a ruling regarding whether Section 8(a)(5) had been violated. *Id.* at 429-430. The Court described the "real injury" is to the union's status as a bargaining representative. *Id.* at 430, fn. 15.

In addition to the time it would take to obtain relief in district court, the expense would be astronomical to obtain relief for violations of the law. Without access to the Board to decide violations of Section 8(a)(5), if the parties were not able to reach agreement in the grievance process, the WAEA would have to decide whether the

---

<sup>10</sup> Given that the parties do not have an arbitration provision in their collective bargaining agreement, it is unclear why Respondent is suggesting that arbitration is a method for deciding contractual disputes between the parties.

exorbitant resources of money and time required to remedy violations of the Act were worth it. This would also be an unconscionable expense for Respondent. At times, the WAEA would undoubtedly choose not to enforce its own collective bargaining agreement, and as a result, its usefulness as a collective bargaining representative would diminish. As the Court described in *C & C Plywood*, the Board needs to interpret contracts in order to enforce the Act.

As the Court noted in *C & C Plywood*, supra., the Board is not reviewing contractual terms in order to determine if Respondent properly discharged an employee under a just cause provision or whether Respondent otherwise abused its discretion to grant a leave of absence. Rather, the Board is seeking to determine if the Act has been violated, and as such, the WAEA and other unions should have direct access to the Board for redress. If the Board does not have its limited ability to interpret contracts, employees subject to collective bargaining agreements will not be protected from violations of Section 8(a)(5) of the Act.

**B. The Union did not waive its right to bargain about the rules**

**1. Respondent failed to give timely notice and an opportunity to bargain to the WAEA regarding the Novi Rules and the Royal Oak Rules**

Respondent argues that the Charging Union waived its right to bargain over the implementation of the Novi Rules and the Royal Oak Rules, by not requesting bargaining, by the existence in the WAEA CBA of a “catch-all” provision (JX 6, Article 25, #36), or by the language of the management rights clause (JX 6, Article 11). None of these arguments have merit.

The Board has long recognized that “where a union has received timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. “What constitutes sufficient notice . . . depends on all the circumstances of a case.” *Emhart Industries*, 297 NLRB 215, 216 (1989), enfd. den 907 F.2d 372 (2<sup>nd</sup> Cir. 1990).

If the notice is provided close in time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli. *Ciba Geigy Pharmaceutical Division*, 264 NLRB 1013, 1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). Further, “it is . . . well established that a union cannot be held to have waived bargaining over a change that has been presented as a fait accompli. . . . An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals. . . . Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.” *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5<sup>th</sup> Cir. 1983).

Here, Respondent did not give the WAEA notice and a reasonable opportunity to bargain. Respondent did not even provide the WAEA with the Novi Rules and the Royal Oak Rules until after they were implemented. (Tr. 108-09) The Board has held that when a union learns of an employer's decision regarding a mandatory subject after its

implementation, it will not find that the union's failure to request bargaining over that action constitutes a clear and unmistakable waiver of its right to bargain. *Alpha Biochemical Corp.*, 293 NLRB 753, fn.1 (1989); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1024 (2001). (and cases cited therein)(“[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals.”) Accordingly, the WAEA did not waive its right to bargain over the implementation of the Novi Rules and the Royal Oak Rules.

Respondent argues that significant concessions were made by management during bargaining regarding the rules. This is false. First, Respondent never provided a copy of the Royal Oak or Novi rules to the WAEA until after they were implemented. It is all but impossible to bargain if a union does not know what is being proposed. Second, all of the alleged bargaining meetings occurred after their implementation was announced to the impacted employees. Thus, they were not bargaining sessions about the future implementation of the rules. Third, what Respondent appears to refer to as concessions was in response to a grievance that was filed after the rules were implemented. It is well established that an employer may not defend against a unilateral change allegation by asserting that it was still willing to meet to discuss the change after it had been implemented. Board law is clear that a union cannot be forced to bargain up from this weakened position. See, e.g., *S & I Transportation, Inc.*, 311 NLRB 1388, 1390 (1993).

Similarly, Respondent is incorrect in stating that it is undisputed that no WAEA members were adversely affected when they were working at the Novi facility. To begin, the establishment of damages resulting from an unfair labor practice is a matter for the

compliance phase of proceedings. In addition, Ciaramitaro received a write-up for violating the attendance policy under the new rules. (GCX 8) Other employees including Rodney Mitchell, Csaba Lasztozci, Hermon Gray and Don Hautau were also disciplined under the new rules, up to and including discharge. (GCX 7, 9-13, 17, 18) Respondent claims without citation that none of these individuals lost pay as a result of the implementation of the rules, and thus, they were not adversely affected. This interpretation of adverse effect is contrary to legions of Board law and Respondent's disciplinary processes, which ultimately may result in discharge.

In addition, the Novi Rules also alter the WAEA CBA's overtime provisions and past practices when WAEA bargaining unit employees work at Novi Industries. To the extent WAEA-represented employees lost overtime opportunities and credit toward overtime wage calculations, the employees' vacation pay was also negatively impacted. The WAEA CBA provides that vacation pay be awarded based on a percentage of an employee's gross earnings for the year. This loss of vacation pay would also apply to WAEA-represented employees working under the Royal Oak Rules. (Tr. 320; JX 6, Article 8.04)

**2. The WAEA CBA does not waive the WAEA's right to bargain over the implementation of the Novi Rules or the Royal Oak Rules**

Respondent asserts that the WAEA CBA waives the WAEA's right to bargain over the Novi Rules and the Royal Oak Rules. In *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007), the Board reaffirmed its application of the "clear and unmistakable" waiver standard to evaluate an employer's claim that it has the right to

unilaterally change bargaining unit employees' terms and conditions of employment based on contract language. A waiver of bargaining rights by a union is not to be lightly inferred, but must be demonstrated by the union's clear and explicit expression.

*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983). See also *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001); *Rockford Manor Care Facility*, 279 NLRB 1170, 1172 (1986).

In interpreting the parties' agreement in order to determine whether a union has waived its right to bargain, the factors considered include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past practice; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue. *Provena*, supra at 815. Further, in determining waiver, the Board is "not restricted to the contract provisions themselves but may properly evaluate them against the elucidating background of their bargaining history." *New York Mirror*, 151 NLRB 834, 840 (1965).

Respondent argues that the so-called "catch-all" provision of the WAEA CBA waives the WAEA's right to consent or bargain over the imposition on the WAEA unit of the Novi Rules and Royal Oak Rules. The provision is contained as a rule in Article 25's shop rules, and states: "Violations of Company policies or Procedures [sic] or other rules not specifically stated," and assesses a three point penalty. (JX 6, Article 25, #36).

When the catch-all provision is viewed in light of other WAEA CBA provisions which are directly at odds with aspects of the Novi Rules and the Royal Oak Rules, as described

above, there is no clear intent to waive bargaining on those issues. Moreover, as discussed above, the WAEA rejected Respondent's proposals on issues such as a drug testing policy and changes to attendance policy, the "50-hour rule," and shop rules during negotiations for the most recent WAEA CBA (Tr. 445-446; JX 6) Under these circumstances, there is no "clear and unmistakable" waiver of bargaining.

Likewise, the WAEA CBA's generally worded management rights clause (Article 11) does not waive the WAEA's right to bargain over the implementation of the Novi Rules and the Royal Oak Rules. The Board has held that, before a waiver can be found: a contract clause must specifically include the subject at issue; bargaining history must show that the matter was fully discussed during negotiations; and the Union consciously yielded its interest in the subject. *Johnson-Bateman Co.*, 295 NLRB 180, 184-188 (1989). Here, Respondent proposed some of the changes contained in the Novi Rules and the Royal Oak Rules to the WAEA during their most recent contract negotiations, including implementing a drug testing policy and changes to attendance policy, the "50-hour rule," and shop rules. The WAEA rejected Respondent's proposals. (Tr. 445-446; JX 6) Thus, the evidence establishes that the WAEA did not yield its interest on the working conditions altered by the Novi Rules and the Royal Oak Rules.

**C. The ALJ correctly concluded that Respondent violated its duty to bargain with the WAEA over the new Novi and Royal Oak work rules**

It is longstanding Board law that an employer violates Section 8(a)(5) of the Act by unilaterally imposing new and different wages, hours, and other terms and conditions of employment upon bargaining unit employees without first providing their collective-

bargaining representative with notice and a meaningful opportunity to bargain regarding the said change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). To be found unlawful, the unilaterally imposed change must be “material, substantial, and significant” and impact the employees or their working conditions. *Toledo Blade Co.*, 343 NLRB 385, 388 (2004).

It is well settled that an employer has an obligation to give notice and an opportunity to bargain with a union over changes regarding work rules, especially those that involve the imposition of discipline. *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006); *Toledo Blade Co.*, supra; *Behnke, Inc.*, 313 NLRB 1132, 1139 (1994); *Robbins Door & Sash Co.*, 260 NLRB 659 (1982). In addition, an employer is obligated to give notice and opportunity to bargain with the union regarding changes in the assignment of overtime, *Dearborn Country Club*, 298 NLRB 915 (1990), absenteeism and tardiness policies, *Dynatron/Bondo Corp.*, 324 NLRB 572, 574 (1997), and drug testing policies, *Allied Aviation Fueling of Dallas*, 347 NLRB 248, 248 fn.2 (2006).

The Board has held that an employer has an obligation to bargain over such changes whether the affected policies are contained in the parties’ collective bargaining agreement, or whether they are extra-contractual past practices. See, e.g., *Dearborn Country Club*, supra. (obligation to bargain about discontinuance of extra-contractual practice of offering overtime to full-time servers before offering it to others); *Ohio Power Co.*, 317 NLRB 135 (1995) (obligation to bargain about termination of extra-contractual practice of allowing workmen’s compensation officers time off without pay to attend

workmen's compensation hearings); *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987) (obligation to bargain about modification to extra-contractual employee purchase plan); and *Radio Electric Service Co.*, 278 NLRB 531 (1986) (obligation to bargain about discontinuance of extra-contractual Christmas bonus).

Here, it is undisputed that Respondent failed to bargain with the WAEA prior to implementing the Novi Rules or the Royal Oak Rules. David McKee testified that Respondent did not believe it was required to discuss the Novi Rules or the Royal Oak Rules with the WAEA or the CEA. (Tr. 435) The taped conversation with Durocher, at which McKee was present, vividly illustrates this belief. (GCX 43) The WAEA had no input into the Novi Rules or the Royal Oak Rules prior to their implementation.<sup>11</sup> (Tr. 452-453) In fact, Respondent did not even show the Rules for either location to the WAEA before distributing them to WAEA members. (Tr. 108-09) Thus, as the ALJ correctly found and concluded, Respondent's failure to bargain over changing the working conditions of WAEA-represented employees by implementing the Novi Rules and the Royal Oak Rules, therefore, violated Section 8(a)(5) and (1) of the Act.

### **III. The ALJ correctly concluded that Respondent violated Section 8(d) of the Act**

Respondent argues that the ALJ did not consider specific contractual terms or consider whether Respondent had a "sound arguable basis" for changing the contract.

#### **A. The contract terms are specific**

---

<sup>11</sup> Respondent's claim that it satisfied its bargaining obligation by meeting with the WAEA to discuss grievances and the application of the Novi Rules after their implementation is unavailing, as the Rules were already in effect. Moreover, Respondent did not express a willingness to rescind the Novi or Royal Oak Rules at any point. (Tr. 453-454) In addition, although Respondent asserts it made changes to the Rules after they were implemented, Respondent admits that it never disseminated any changes to the WAEA-represented employees. (Tr. 454)

As the ALJ concluded, the WAEA did not agree to any changes to their overtime (JX 6, Article 12), seniority (JX 6, Article 4 and throughout), minimum working hours (JX 6, Article 24, #8), penalty increases to existing rules (JX 6, Article 25), and leave including vacation, personal and sick time usage (JX 6, Articles 6 and 13) set forth in their collective bargaining agreement. (ALJD, p. 23, lines 17-19) These are specific contract terms that were repudiated by the implementation of the Novi and Royal Oak rules.

**B. Respondent does not have a sound arguable basis for changing the terms and conditions of employment as evidenced by its past practice**

Respondent further argues that Respondent had a “sound arguable basis” for limiting the WAEA’s contract. Respondent argues that it acted according to its good faith belief that the contract only applies to employees at their home plants and that the ALJ did not address the issue.<sup>12</sup> In essence, Respondent is repeating its “contract coverage” argument under the name “sound arguable basis.” While the ALJ did not state this standard, he concluded when discussing the unilateral change and waiver analysis that Respondent changed the provisions. As described above, Respondent through Durocher and others admitted that it was indeed changing these provisions. The arguments described above also apply here.

If the Employer can establish a “sound arguable basis” for its interpretation of a contract provision, the Board will not find a violation of Section 8(d). *Bath Iron Works*, 345 NLRB 499, 502 (2005), affd. 475 F.3d. 14 (1<sup>st</sup> Cir. 2007). In determining whether

---

<sup>12</sup> We can speculate that one of the reasons that the ALJ likely did not directly address this standard in the decision is because Respondent did not argue in its brief to the ALJ that it met the standard in making these changes. In fact, Respondent did not refer to this standard in that brief at all.

there is a sound arguable basis, the Board applies traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996). In addition to the plain language of the agreement, the Board will consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Mining Specialists*, 314 NLRB 268, 269 (1994) The Board does not rely on “abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying th[at] context,” *C&C Plywood Corp.*, supra at 430. The Board reviews the meaning of a contract provision in the context of the “realities of labor relations and considerations of federal labor policy. . .” *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir 1986).

Applying these terms to the facts, the record is replete with evidence that Respondent completely changed the terms of the collective bargaining agreement for WAEA-represented employees at Novi and Royal Oak. This is particularly glaring at the Royal Oak facility where the only work rules in place were the employees’ respective collective bargaining agreements. At Royal Oak, there was no home bargaining unit, no home collective bargaining agreement, and, as Respondent admits (Brief, p. 43), no work rules specific to that facility. Employees were paid, received time off, worked overtime, and followed work rules consistent with their home collective bargaining agreements.

Similarly, when employees worked at the Novi facility, they still followed their WAEA collective bargaining agreement. The past practice explained **where** the terms applied, but the terms of the WAEA collective bargaining agreement were the terms under which the employees worked. As noted above, the terms of the WAEA collective

bargaining agreement do not exist in a vacuum. Respondent did not present any evidence or any witness who actually worked or enforced these rules, warranting an adverse inference that, if called, the witnesses' testimony would have been adverse to Respondent's case. *Ready Mixed Concrete Company*, supra at 1142; *International Automated Machines*, supra at 1123. Instead of calling witnesses with actual knowledge, McKee testified using conclusionary language about what he thought occurred at Respondent. The intent of the parties shows that by issuing the Novi and Royal Oak rules, Respondent violated 8(d) at those locations outside of its home plant.

Respondent implemented the Novi and Royal Oak rules without the consent of the WAEA. The WAEA never agreed to any of the changes to their rules effectuated by the new, unilaterally implemented Novi and Royal Oak rules. (Tr. 196-97, 200) In fact, Respondent never even sought the union's consent.

Respondent argues (Brief, pp. 41-42) that Respondent did not modify any of the contractual terms described by the ALJ, because there is no contractual term that requires Respondent to extend contractual terms from one of its facilities to another. However, the result of refusing to abide by the parties' past practice was the modification of contractual terms during the duration of the parties' contract. By refusing to abide by the contract at all applicable locations, Respondent has violated Section 8(d) of the Act as found by the ALJ.

**IV. The ALJ correctly concluded that Respondent failed to bargain over the effects of the temporary closing of the Comau Automation facility in December 2011**

The Board has held that an employer is required to bargain with the union over the effects of the closing of a facility. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Similarly, the Board has held that an employer is required to bargain over the effects of a temporary relocation of unit work. *Mercy Health Partners*, 358 NLRB 1, 1 (2012); *Dodge of Naperville, Inc.*, 357 NLRB No. 183 (2012). This obligation exists even where an employer does not have a duty to bargain over the decision itself. *Mercy Health Partners*, supra at 1; *Sea Jet Trucking Corp.*, 327 NLRB 540, 544 (1999); *Holly Farms Corp.*, 311 NLRB 273, 278 (1993); *Morco Industries, Inc.*, 279 NLRB 762, 762-63 (1986).

An employer is obligated to bargain in “a meaningful manner and at a meaningful time” with the union over the effects of a closure or relocation. *Id.* An element of “meaningful” bargaining is “timely notice to the union.” *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), enfd mem. 819 F.2d 1130 (2d Cir. 1987), quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1<sup>st</sup> Cir. 1983). Here, Respondent failed to give notice to the WAEA of the closing until it was a fait accompli, and, therefore, failed to satisfy its obligation to provide timely notice at a time when the WAEA retained a measure of bargaining power. See *Penntech Papers, Inc.*, 263 NLRB 264, 275 (1982), enfd., 706 F.2d 18 (1<sup>st</sup> Cir. 1983).

The un rebutted evidence overwhelmingly establishes that Respondent presented the shutdown as a fait accompli. In its Answer, Respondent admits in its Answer that it gave notice to the WAEA of the decision to idle the plant “at or about the time this would

be occurring.” (GCX 1(i), Paragraph 12) Indeed, the unrebutted testimony established that trucks appeared at Comau Automation to begin moving the very equipment the WAEA-represented employees were the same day that the WAEA received notice of the shut down. Employees began reporting to other facilities two working days later.<sup>13</sup> (Tr. 280, 281)

Respondent argues that the WAEA failed to request bargaining over the effects of the closing, and therefore, waived effects bargaining. However, it is well-established that the waiver of a right to bargain based on a union’s failure to request bargaining will not be found where the union was not given advance notice of the change and/or the notice presented the change as a *fait accompli*. *Eby-Brown Co.*, 328 NLRB 496, 571-72 (1999); *Jaydon, Inc.*, 273 NLRB 1594, 1601 (1985); *Ciba-Geigy Pharmaceuticals Division*, supra at 1017-18; *National Car Rental System*, 252 NLRB 159, 163 (1980); *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1260 (6<sup>th</sup> Cir. 1995); *Gulf States Mfg. v. NLRB*, supra at 1397. Because, as shown above, Respondent failed to provide notice to the WAEA of the closing until it was a *fait accompli*, Respondent had an obligation to bargain over the effects, even absent a request from the WAEA.

---

<sup>13</sup> There has been no claim of “economic exigencies” which the Board has found might excuse an employer’s failure to provide timely notice to a union, nor does the record support that any existed. Rather, from July through November 29, 2011, Respondent was communicating with the WAEA that new work would be coming into Comau Automation. (GCX 26-34 ) Although the email notifying the WAEA of the shutdown states the decision to close Comau Automation was a “business decision” based on the delay of the Chrysler project, the record does not explain the substance of this alleged delay. (GCX 25) In addition, although McKee, who had no involvement in the decision to close Comau Automation, testified regarding the cost of utilities for the building, the record shows that Respondent moved some of the existing work to the then “temporary” Royal Oak facility, which was even larger than Comau Automation. (Tr. 398; RX5) The Board has noted that it has “consistently maintained a narrow view of the economic exigency exception” to “extraordinary events which are an unforeseen occurrence having a major economic effect requiring the employer to take immediate action.” *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (citations omitted). The record is devoid of evidence to support a finding that any such event occurred.

Respondent argues in footnote eight of its brief that the “contract coverage” theory requires that this allegation be dismissed. However, the express terms of the WAEA CBA *require* effects bargaining. (JX 6, Article 4.18) In the past when Respondent shut down Comau Automation in 2009, Respondent negotiated the effects of the temporary closing with the WAEA and the NIEA.<sup>14</sup>

Although Respondent met with the WAEA on December 2, the shutdown was already underway. The Board has held that effects bargaining must occur before the decision is implemented. See, e.g., ***KIRO, Inc.***, 317 NLRB 1325, 1327 (1995), citing ***First National Maintenance Corp. v. NLRB***, supra 681-82. Moreover, the December 2, 2011, meeting did not constitute effects bargaining. Despite the accommodation of a personal request for LaForest and Ciaramitaro to swap the facilities to which they would be transferred the following workday, the remainder of the meeting consisted of Durocher blaming the shut down on the “Italians.” The unrebutted testimony establishes that the December 2 meeting consisted of Durocher stating that the “Italians” were shutting them down, that Andriano was making the decisions, and “that’s just the way it was,” without any bargaining over effects. (Tr. 187-188, 283-285)

Respondent argues cavalierly that this allegation is meaningless because the issue is now moot and there were not any monetary losses. Unfortunately, this is often the case with issues before the Board where the remedy consists of a cease and desist order directing Respondent to “sin no more.” Independent 8(a)(1) allegations also fall into this

---

<sup>14</sup> The agreement reached was for the WAEA-represented employees to occupy exclusively a bay at the NIEA. (Tr. 208-212; RX1)

category. However, a cease and desist order and the posting of a Notice apprising employees of the violation will perhaps deter Respondent from committing similar violations in the future.

- V. The ALJ correctly concluded that Respondent coercively interrogated and threatened WAEA employees regarding discussions of union matters; unlawfully told WAEA members that their union no longer existed; and unlawfully informed the WAEA that they did not wish to work under the new rules they could opt under their contract to be laid off.**

The ALJ's conclusions with regard to Respondent's statements in violation of 8(a)(1) are supported by the evidence and the law. Respondent quibbles with the ALJ's logical findings and credibility determinations, to which the Board should defer.

*Standard Drywall Products*, supra.

With regard to Durocher's coercive interrogation of Jack Vargo and admonition from discussing union matters with other employees, Respondent restates the evidence and asserts that Vargo was not threatened. However, the Complaint does not allege that Durocher threatened employees. (GC 1(g), paragraph 8).

With respect to Mark Corich's statement to Ciarimitaro that his union no longer existed, Respondent argues that this statement was illogical and unreasonable, and too isolated and inconsequential to warrant finding a violation. However, the statements were made verbally and in writing and are consistent with Respondent's position that the WAEA-represented employees were now subject to the jurisdiction (and representation) of the NIEA. In addition, as the unrebutted testimony established and the ALJ found, supervisor Matt Parson had previously stated that "the WAEA contract was void" at Novi

(ALJD p. 8, lines 32-33), and director of manufacturing Marco Andriano had threatened to shut down Comau Automation permanently if LaForest and Ciaramitaro did not tell WAEA members not to talk about the NIEA contract. (ALJD p. 7, lines 21-32) During the January 17 meeting between the WAEA, Durocher, Cormier, and McKee, Durocher threatened the WAEA with layoffs, told them that he owed the WAEA nothing relative to the validity of their contract, and told them that they could become part of the NIEA. (ALJD p. 9; GCX 43) Corich's statements were far from isolated, nor were they illogical or unreasonable for an employee to believe, given the context. The statements are reasonable in context and further support a finding that Respondent recognized the NIEA as the representative of the WAEA employees in violation of Section 8(a)(2).

Respondent argues that Durocher's threat that employees accept the Novi Rule changes or be laid off are true. While this coercive statement may have been true, that does not address its illegality. Durocher's coercive threat to employees supports the finding that Respondent did not bargain in good faith with the WAEA about the Novi rules. The rules were discussed, but Durocher threatened the working representatives of the NIEA during the supposed bargaining session.

## CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondents' Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy, except as provided in Counsel for the Acting General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision.

Respectfully submitted this 22<sup>nd</sup> day of March, 2013.

/s/ Darlene Haas Awada  
Darlene Haas Awada

/s/Patricia Fedewa  
Patricia Fedewa  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Seventh Region  
Patrick V. McNamara Federal Building  
Room 300, 477 Michigan Avenue  
Detroit, Michigan 48226

