Union-Tribune Publishing Co., a division of Copley Press, Inc. *and* Graphic Communications Conference, International Brotherhood of Teamsters, Local 432M, Graphic Communications International Union. Case 21–CA–37535

September 9, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 24, 2008, Administrative Law Judge Burton Litvack issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief. The General Counsel filed an answering brief to the Respondent's cross-exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified below.[3]

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

[2] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the drug-testing policies for the packaging unit and the pressroom unit, we emphasize that the Respondent failed to carry its burden to prove, as an affirmative defense, that its actions were consistent with an established past practice. See *Champion Home Builders*, 350 NLRB 788, 791 (2007); *Eugene Iovine, Inc.*, 328 NLRB 294, 295 fn. 2 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).

With respect to the packaging unit, we find it unnecessary to rely on the judge's finding that the Federal standard for OSHA-recordable hearing loss changed in December 2004. Regardless of the applicable standard, the Respondent concedes in its brief that before 2006, it did not have a consistent practice of sending employees with OSHA-recordable hearing loss to the company doctor. Furthermore, the Respondent's loss control manager, David Ferguson, conceded at the hearing that he was unable to locate any documentation that such employees were sent to the doctor and drug tested prior to 2006.

With respect to the pressroom unit, as the judge found, there is no evidence that the Union was aware that Ferguson had a practice of making the initial determination whether an employee's cumulative trauma disorder (CTD) claim was valid—and ordering drug testing if he found that it was not—before the company doctor diagnosed the employee. In these circumstances, we find that the Respondent failed to prove that Ferguson acted in accordance with an established past practice that had become an implied term or condition of employment. See *Riverside Cement Co.*, 296 NLRB 840, 841 (1989) ("a practice not included in a written contract can become an implied term and condition of employment *by mutual consent* of the parties") (emphasis supplied); *BASF Wyandotte Corp.*, 278 NLRB 173, 180 (1986) ("It is implicit in establishing a past practice that the party which is being asked to honor it be aware of its existence.").

We grant the Respondent's unopposed motion to correct the spelling of Pressroom Supervisor Lee Otineru's last name (misspelled in the transcript as "Ontinero").

[3] We shall modify the judge's conclusions of law and recommended Order and substitute a new notice to correct the unit description and to conform to the Board's standard remedial language.

The Respondent contends that a cease-and-desist provision and affirmative bargaining order are no longer appropriate with respect to the packaging unit because the Respondent withdrew recognition of that unit based on a petition that it received after the record closed. We leave that issue to the compliance stage of the proceedings, where the Respondent will have the opportunity to show that the Union no longer has the support of a majority of the packaging unit employees.

The judge applied *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), in denying reinstatement to discharged employees Michael Gurnett and Nathan Jennings. Member Liebman dissented in *Anheuser-Busch*, which is currently before the United States Court of Appeals for the District of Columbia Circuit on the charging party's petition for review. In her view, Board law prior to *Anheuser-Busch* clearly would have required that Gurnett and Jennings be reinstated and made whole. See *Tocco, Inc.*, 323 NLRB 480, 481, and 484 fn. 1 (1997); *Great Western Produce*, 299 NLRB 1004, 1006–1007 (1990). Nevertheless, Member Liebman recognizes that *Anheuser-Busch* overruled *Tocco* and *Great Western* on that issue, and that the majority view in *Anheuser-Busch* represents extant Board law. For institutional reasons, she affirms the judge's application of it here.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law 3 and 4.

"3. The Union is the representative for purposes of collective bargaining of the following appropriate unit of the Respondent's employees within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time Packaging Department employees, including packagers and operators, employed by the Respondent at its facility located at 350 Camino de la Reina, San Diego, California; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

"4. The Union is the representative for purposes of collective bargaining of the following appropriate unit of the Respondent's employees within the meaning of Section 9(a) of the Act:

> All employees engaged in the operation of its presses, paperhandlers and wipers employed by the Respondent at its facility located at 350

Camino de la Reina, San Diego, California; excluding all other employees, guards and supervisors as defined in the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Union-Tribune Publishing Co., a division of Copley Press, Inc., San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a), (b), and (c).

"(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate units:

> All employees engaged in the operation of its presses, paperhandlers and wipers employed by the Respondent at its facility located at 350 Camino de la Reina, San Diego, California; excluding all other employees, guards and supervisors as defined in the Act.
>
> All full-time and regular part-time Packaging Department employees, including packagers and operators, employed by the Respondent at its facility located at 350 Camino de la Reina, San Diego, California; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

"(b) Rescind the unlawful unilateral changes to the drug and alcohol testing policies applicable to employees in the units described above, and restore the policies that existed prior to the unlawful unilateral changes.

"(c) Within 14 days after service by the Region, post at its San Diego, California facility copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 19, 2006."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally, without notice to or affording the Graphic Communications Conference, International Brotherhood of Teamsters, Local 432M, Graphic Communications International Union an opportunity to bargain, change our drug and alcohol testing policy for our packaging employees' bargaining unit by compelling employees whose annual hearing tests reveal the occurrence of a standard threshold shift (STS) to submit to drug and alcohol testing.

WE WILL NOT unilaterally, without notice to or affording the Union an opportunity to bargain, change our drug and alcohol testing policy by compelling employees in our pressroom employees' bargaining unit who file workers' compensation claims for cumulative trauma disorder (CTD) hearing injuries to submit to drug and alcohol tests prior to examination by a company doctor.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Union

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

as the exclusive collective-bargaining representative of employees in the following appropriate units:

> All employees engaged in the operation of its presses, paperhandlers and wipers employed by the Respondent at its facility located at 350 Camino de la Reina, San Diego, California; excluding all other employees, guards and supervisors as defined in the Act.
>
> All full-time and regular part-time Packaging Department employees, including packagers and operators, employed by the Respondent at its facility located at 350 Camino de la Reina, San Diego, California; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL rescind the unlawful unilateral changes to the drug and alcohol testing policies applicable to employees in the units described above, and restore the policies that existed prior to the unlawful unilateral changes.

UNION-TRIBUNE PUBLISHING CO., A DIVISION OF COPLEY PRESS, INC.

Robert MacKay, Esq., for the General Counsel.
Howard M. Kastrinsky and *James Fessenden, Esqs. (King & Ballow),* of Nashville, Tennessee, and *Patrick Marinnan, Esq.* of San Diego, California, for the Respondent.
Richard D. Prochazka, Esq. (Richard D. Prochazka & Associates, APC), of San Diego, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by the Graphic Communications Conference, International Brotherhood of Teamsters, Local 432M, Graphic Communications International Union (the Union), on November 3, 2006.[1] After completing the investigation of the unfair labor practice charge, on February 28, 2007, the Regional Director of Region 21 of the National Labor Relations Board (the Board), issued a complaint, alleging that the Union-Tribune Publishing Co., a Division of Copley Press, Inc. (the Respondent), engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. Pursuant to a notice of hearing, on October 1 and 2, 2007, a trial on the merits of the above-described unfair labor practice allegations was held before the above-named administrative law judge in San Diego, California.[2] At the hearing, all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record any relevant documentary evidence, to argue legal positions orally, and to file posthearing briefs. Subsequent to the closure of the hearing, counsel for the General Counsel, counsel for the Union, and counsel for Respondent each filed a posthearing brief and said documents have been carefully considered by me. Accordingly, based upon the entire record herein, including my observation of the testimonial demeanor of each of the witnesses and the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a State of Illinois corporation, with a facility located at 350 Camino de la Reina, San Diego, California, has been engaged in the business of publishing a daily newspaper in San Diego, California. Annually, in conducting its business operations, Respondent derives gross revenues in excess of $200,000, advertises nationally sold products, and purchases and receives at its San Diego, California facility goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

A. The Issues

In the instant complaint, as amended, the General Counsel alleges that, beginning in or about July 2006, Respondent engaged in activities, violative of Section 8(a)(1) and (5) of the Act, by changing its drug and alcohol testing policy by compelling its packaging department employees, whose annual hearing examination results reveal the occurrence of STSs, to undergo drug and alcohol testing and by compelling its pressroom department employees, who allege continuous trauma or cumulative trauma hearing loss, to undergo drug and alcohol testing without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to its alleged acts and the effects of said acts. The General Counsel further alleges that, as a consequence of its above-described unlawful unilateral changes and in violation of Section 8(a)(1) and (5) of the Act, on or about July 29, 2006, Respondent discharged packaging department employee Michael Gurnett and, on or about October 20, 2006, Respondent discharged pressroom employee Nathan Jennings. Respondent denies that the alleged unlawful unilateral changes were, in

[1] Unless otherwise stated, all events occurred during calender year 2006.

[2] At the hearing, over the objections of counsel for Respondent, counsel for the General Counsel was permitted to amend portions of the instant complaint.

Counsel for the General Counsel's motion to correct the transcript is granted.

fact, changes from its existing practices and contends that the said employees were lawfully terminated for failing drug and alcohol tests.

B. The Alleged Unfair Labor Practices

1. The facts

Respondent, which employs approximately 1600 individuals, publishes a daily newspaper, the San Diego Union-Tribune, in San Diego, California, and operates a production facility, consisting of two buildings, separated by a driveway and connected by two bridges and an underground passageway, located in the Mission Valley area of San Diego. Respondent's editorial departments and administrative and executive offices are housed in one of the buildings, and its production departments, consisting of its pressroom, packaging, production, maintenance, engineering, and building maintenance employees, are located in the adjacent building. The pressroom is located on the first, second, and third floors of the production building, and Respondent employs approximately 150 pressmen, who operate the printing presses which print the newspaper. At least since the late 1980s, said employees have been represented by the Union in a bargaining unit, consisting of all employees engaged in the operation of the printing presses, paperhandlers, and wipers employed by Respondent, and covered by successive collective-bargaining agreements, between Respondent and the Union, the most recent of which was effective by its terms from August 1, 2002, through July 31, 2005.[3] The packaging department is located on the first and second floors of the production building, and Respondent employs approximately 160 packaging department employees,[4] who are responsible for inserting advertising and other materials and then bundling and stacking the newspapers. On June 20, 2005, the Union was certified, by the Board, as the representative for purposes of collective bargaining in a unit consisting of Respondent's full-time and regular part-time packaging department employees, including packagers and operators, and, since September 2005, the parties have been engaged in negotiations for a collective-bargaining agreement covering said employees.

Respondent maintains drug and alcohol testing policies for all of its represented and unrepresented employees. With regard to the pressroom employees, while, except for the statement in Exhibit B that failure to comply with the company's policy constitutes a cause for discharge, there is no description or mention of a drug and alcohol policy in the expired collective-bargaining agreement which covers said employees, there is no dispute that Respondent's "policy on alcohol and drugs," General Counsel's Exhibit 4, has been applicable to the pressroom bargaining unit employees at all times material herein since, at least, September 19, 1986. Said policy, in part states,

> The Union-Tribune Publishing Co. is committed to provide a safe and healthful work environment for all employees. In turn, employees are expected to report to work as scheduled, free from the influence of alcohol or drugs.

When on the job accidents occur or when there is reason to believe that an employee is under the influence of drugs or alcohol, the employee may be required to submit to medical tests for drugs and alcohol. . . .

Employees generally are required to submit to drug/alcohol testing where:

> (1) Employee is involved in an on-the-job accident and suffers injury requiring medical evaluation and or treatment. (Diagnosed CTDs are excepted.)
> (2) Employee is involved in an on-the-job injury accident involving equipment, machinery or a motorized vehicle (car, truck, fork lift, etc.).
> (3) Employee's conduct (including speech, smell, coordination, work performance, etc.) raises a belief he/she may have ingested drugs or alcohol.

Further, prior to reissuing its drug and alcohol policy, on July 15, 1991, Respondent's then employee relations director, Oliver B. Peter, wrote a letter to the Union, stating that the company had decided not to compel employees who have suffered "certifiable" cumulative trauma injuries to take drug and alcohol tests. According to Peter, by the use of the term certifiable, ". . . the Company means an injury which is categorized as a cumulative trauma injury by a Company physician." David M. Ferguson, Respondent's loss control manager, who is responsible for all safety, workers' compensation, and disability management issues, described a cumulative trauma injury or disorder (CTD) as a repetitive injury to a body part occurring "over a long period of time." There is no dispute that the practice, set forth in Peter's letter, has remained in effect at all times material herein, and, according to George Huber, the secretary/treasurer of the Union, there are no documents, which change or modify any aspect of Peter's letter, in Respondent's files.

As to the packaging department bargaining unit employees, the record establishes that Respondent's applicable drug and alcohol policy is that which has been in effect at all times material herein for its unrepresented employees. Said policy, General Counsel's Exhibit 5, in part, states:

> The Union-Tribune Publishing Co. is committed to providing a safe and healthful work environment for all employees. In turn, employees are expected to report to work as scheduled, free from impairment by alcohol or drugs . . . .
>
> Employees may be required to submit to tests for alcohol and/or drugs under the following circumstances:
>
> > When there is reasonable suspicion that the employee may be impaired by alcohol and/or drugs.

[3] According to Michael Huggins, an international representative of the Union, since August 2005, the parties have been engaged in bargaining for a successor collective-bargaining agreement and have had approximately 35 bargaining sessions.

[4] Prior to 1997, the packaging department employees were represented for purposes of collective bargaining by the Communications Workers of America (the CWA). In 1997, the CWA was decertified as their bargaining representative, and, from then until 2005, the packaging department employees were not represented by any labor organization. Accordingly, during said time period, Respondent applied the same terms and conditions of employment to its packaging department employees as it did to all of its other unrepresented employees.

> When an on-the-job accident occurs and there is reasonable suspicion the employee caused the accident and either:
>
> 1. The accident caused injury requiring more than first aid, or
> 2. The accident resulted in property damage of $1,000 or more.[5]

Michael Huggins testified that, since 2005, he has been the chief negotiator for the Union for both the pressroom department employees and the packaging department employees bargaining units during contract negotiations with Respondent and that neither of the above-described drug and alcohol policies have been subjects of bargaining during the negotiations.

The alleged unlawful unilateral changes to the above-described policies involve Respondent's actions, in July 2006, compelling employees, who suffered possible injuries to their hearing, to submit to drug and alcohol testing and, in this regard, pursuant to Cal/OSHA regulations, which mandate annual hearing tests for employees, who are exposed to established sound level thresholds, Respondent provides free annual hearing examinations, consisting of an audiometric test, supervised by a licensed audiologist, for employees in five departments, including those in both the packaging and pressroom departments, in order to determine whether they have suffered hearing losses as a result of exposure to the noise levels in their work areas. For the conduct of its so-called hearing conservation program, which is administered by loss control manager, Ferguson, Respondent contracts with Safe Hearing America, and the latter brings its "hearing van" to Respondent's Mission Valley facility in order to perform the hearing examinations, which are supervised by a hearing test administrator. Employees are instructed to report to the location of the van and, in groups of four, enter the van, sit at testing stations, place headphones over their ears, and respond to beeps or tones in each ear at different frequency levels by clicking or pressing down on a button.[6] The administrator compares each employee's hearing examination in each ear to his or her baseline audiogram[7] to determine if a standard threshold shift (STS) has occurred[8] in either or both ears, and, after the employee has exited the van, the administrator provides him or her with the print-out result of the test.[9] According to Respondent's hearing program guidelines, if the supervising audiologist determines that an STS has occurred in either or both ears,[10] he must inform the employee, in writing, within 21 days that he or she should have his or her hearing retested. David Ferguson testified that, since, at least 1994, in practice, if any follow-up is required, the hearing van technician immediately gives the employee a letter, stating that the latter should make an appointment with his or her own doctor in order for an examination to establish the cause of the indicated hearing loss, and "we expected to hear something back from [the employee] . . . ."[11] As to this, while, during cross-examination, Ferguson asserted that Respondent is mandated by law to ". . . make sure that these people who have problem tests be followed by a doctor," the State of California regulations make retesting discretionary.[12] Also, according to Ferguson, employees may suffer from a CTD hearing loss, resulting from repetitive exposure to certain sound or noise levels which, over a long period of time, cause a gradual decline in hearing capability; such differs from a "sudden hearing loss," which might result from an abnormally loud noise such as a firearm discharge or from "any number of ototoxic type drugs," including several antibiotic drugs. Finally, there is nothing in Respondent's annual hearing examination policy (GC Exh. No. 7) establishing that, depending upon the result of his or her annual hearing examination, an employee might be subject to drug and alcohol testing.[13]

[5] According to the policy, "failure to comply with this company policy will subject an employee to disciplinary action up to and including termination of employment."

[6] The frequency levels are 500, 1000, 2000, 3000, 4000, 6000, and 8000 hertz (Hz).

[7] Upon being hired by Respondent, each employee is given a hearing examination in both ears, and this initial test is considered the baseline for his or her hearing capacity in both ears.

[8] Under State of California statutory law, an STS is defined as ". . . a change in hearing threshold relative to the baseline audiogram of an average of 10 [decibels (dB)] or more at 2000, 3000 and 4000 Hz in either ear."

[9] Respondent has been testing its employees for possible STSs since 1983.

[10] The record establishes that certain job-related injuries must be recorded with the State of California Department of Industrial Relations. These so-called Cal/OSHA "recordable" injuries are, according to Ferguson, of a more serious nature than "first aid type" injuries and might require a forced absence from work or a modified or changed duty assignment. Pursuant to Cal/OSHA requirements, whenever an employee's audiogram reveals a work-related STS in one or both ears and the employee's total hearing level in either ear is 25 decibels or more above his or her baseline measurements, said result must be recorded. According to the State of California code of regulations for industrial relations, an employer may record this incidence of hearing loss after the initial test or after a retest.

Although not reflected in the State of California OSHA code provisions, effective December 30, 2004, Sec. 1904.10 of the United States Department of Labor Occupational Safety and Health Administration record-keeping provisions was amended, making an STS an OSHA recordable injury.

[11] Ferguson testified that, from his own personal experience, besides giving a letter to an employee, he knows that the technician would instruct the employee to inform Respondent of the result of the employee's doctor's follow-up examination of his or her hearing. During cross-examination, he stated that said procedure has been the norm, at least, since he began working for Respondent in 1994.

[12] However, Respondent's own hearing conservation program requires it to retest employees within 30 days of an annual hearing examination, which discloses an STS. There is no mention of what Respondent must/may do if the annual hearing examination discloses the occurrence of a Cal/OSHA recordable hearing loss.

[13] In this regard, loss control manager, Ferguson, asserted that, based upon his own decision, at least since 2002, all employees, including those represented by a labor organization, who suffer first-aid type injuries or Cal/OSHA recordable injuries, are sent to a company doctor and all such employees are compelled to submit to an alcohol and drug test. While George Huber agreed that all employees, who suffer from "physical" injuries, are "automatically" tested for alcohol and drugs, he denied that the Union was ever made aware that said policy had ever

With regard to the employees in Respondent's packaging employees bargaining unit, the alleged unlawful unilateral change involves compelling said employees, whose annual hearing examination reflected an STS, to undergo drug and alcohol testing. In this regard, there exists no record evidence that, prior to 2006, Respondent compelled any bargaining unit employee, whose annual hearing examination disclosed an STS and who was instructed to see his or her own doctor for a follow-up hearing examination or retesting, to submit to an alcohol and drug test.[14] For example, Lynn Huffman, who was employed by Respondent as a packaging department employee from 1996 through 2007, testified that, after his annual hearing examination in 2004, the technician informed him that he had "failed one part of it"; that, shortly thereafter, he received a letter from Respondent, informing him that he was required to undergo a retest by a company doctor at a medical facility in Kearney Mesa; and that, at the time of the retest, he was not compelled to submit to a drug and alcohol test. Also, Steven Olkowski, a shop steward in the packaging department, testified that, prior to 2006, he was aware of employees, who had failed their annual hearing examinations and who had been sent, by Respondent, to a company doctor for retests and that none of said employees had been compelled to submit to a drug and alcohol test. Further, Michael Huggins, the Union's chief negotiator, testified that, during bargaining, Respondent never informed the Union that packaging department employees, who suffered from hearing loss, would be subject to drug testing.[15] Finally, on this point, David Ferguson conceded that Respondent possessed no documentary evidence, establishing that, prior to 2006, any packaging department employee, who had been sent to a company doctor for a hearing retest after his or her annual hearing examination had disclosed sufficient hearing loss to constitute a Cal/OSHA recordable event, had ever submitted to drug and alcohol testing.

Based upon Respondent's counsel's position statement to the Board, dated January 3, 2007,[16] it appears that, commencing in or about July 2006, Respondent, without notice to the Union or affording it an opportunity to bargain,[17] did, in fact, change its past practice by requiring its packaging department bargaining unit employees, whose annual hearing test reflected the occurrence of an STS, to undergo hearing retesting by its own doctor and, at the same time, to submit to a drug and alcohol test. For example, on or about June 22, 2006, Michael Gurnett, who, after his 2005 annual hearing test, was told, by the Safe Hearing America technician he had an STS in his left ear and instructed him to have a follow-up hearing examination by his personal physician and who was not retested by Respondent or required to submit to a drug and alcohol test, was given his annual hearing test by a Safe Hearing America technician and, immediately after the test, "I was told I had an STS this time in my right ear." The hearing test technician also gave Gurnett the print-out result of his hearing test[18] on which Gurnett was advised that he should "consult with" his own doctor[19] and that he would be contacted with regard to having a hearing retest. Thereafter, on or about July 19, Gurnett's supervisor informed him that Respondent had scheduled a retest of his hearing for that afternoon, and, later in the day, in the company van, an individual, who he knew to be Respondent's head of safety, drove Gurnett and another packaging department employee to a medical facility in La Jolla. On the way, the driver turned to the two employees and said ". . . there might be an alcohol and/or urinalysis taken. . . . It was explained that [Respondent considered] this an on-the-job accident and OSHA needed to be notified and, therefore, this test has to be taken. Then, at the medical facility, Gurnett had his hearing tested by a Dr. Jurkowski and was required to submit to a drug and alcohol test.[20]

Approximately 8 days later, on or about July 27, in the mail, Gurnett received a letter, dated the previous day and executed

been extended to employees, who are diagnosed with any type of STS during their annual hearing examinations.

[14] For example, in 2005, the annual hearing examinations for employees in the packaging department bargaining unit disclosed STSs for 10 of the said employees. Each was instructed to make an appointment with his or her own doctor for followup testing and, according to Ferguson, to report the result of the followup examination to Respondent. Apparently, none did so. Ferguson added that he received the Safe Hearing America hearing test printouts for each of the ten employees and that he did not require any of them to have a hearing retest by a company doctor. Patrick Marrinan, Respondent's labor relations manager conceded that, subsequent to their annual hearing test, none of these 10 employees was compelled to undergo a drug and alcohol test.

Michael Gurnett, who worked in Respondent's packaging department from 1990 through July 2006, and who was one of the above-mentioned employees, testified that, immediately after his 2005 annual hearing examination, the technician told him he had an STS in his left ear and, and while saying he should have it "looked at" by his own physician, said nothing about informing Respondent of the result of said follow-up examination. Gurnett did, in fact, have his hearing examined by his own doctor, and he conceded not giving the result of this examination to Respondent. Also, according to Gurnett, subsequently, Respondent never requested that he have his hearing retested by a company doctor or that he submit to a drug and alcohol test.

[15] Conversely, according to Huggins, Respondent never told the Union that employees, who suffered an STS or a Cal/OSHA recordable hearing loss would not be subject to drug testing.

[16] In the said position statement, Respondent's counsel noted that, effective December 30, 2004, the United States Department of Labor amended its OSHA regulations to make an annual hearing test finding of an STS a recordable injury and stated that, in accord with said rule, notwithstanding that such had not been done in the previous year, in 2006, Respondent sent seven employees, including Michael Gurnett, whose annual hearing tests revealed an STS, to a company doctor for retesting and a drug and alcohol test.

[17] Respondent's counsel contends that notice was not required because it could not predict that ". . . the change in the STS standard would result in more potentially recordable injuries which, in turn, would lead to more followup tests, which would include drug/alcohol tests."

[18] The print-out shows an STS in Gurnett's right ear.

[19] Subsequently, Gurnett had his test result and his ears examined by a doctor, who informed him his hearing was normal for a man of his age.

According to Gurnett, he received the same type of print-out after his 2005 hearing test.

[20] According to R. Exh. No. 24, Gurnett's June 22 hearing test, which showed an STS in his right ear, revealed a Cal/OSHA recordable injury. However, the retest on July 19 failed to confirm the existence of such a hearing injury.

by Michael Conner, Respondent's packaging manager, advising him that he had been tested for alcohol and drugs; that his test result showed a "positive result" for marijuana in excess of the test threshold level; that he was being suspended for five work shifts; that, before he would be permitted to return to work, he would be retested for alcohol and drugs; and that, if a positive result was indicated, such had to be lower than the previous result or ". . . your employment will be terminated." On that same day, shop steward Olkowski met with Patrick Marrinan in the latter's office and asked what programs Respondent had for employees who failed a drug and alcohol test, and Marrinan replied that there were no such programs. Then, Olkowski asked why packaging department employees, who failed a hearing test, were being required to take a drug and alcohol test, :and Marrinan said it's always been the practice that they require a drug test if you have a Cal/OSHA recordable injury and that failing a hearing test is a Cal/OSHA recordable injury. And I said that I know people that have failed the hearing test before and that they didn't have to take a drug test. He said if they didn't have to take a drug [sic], then it wasn't a Cal/OSHA recordable injury and that [what has changed] . . . is that Cal/OSHA lowered the bar on what was recordable for hearing tests."[21] Also, on July 27, Gurnett submitted to another drug and alcohol test, and, he subsequently received a letter, dated July 31, from Connor, who wrote that the former's second drug and alcohol test ". . . showed a positive result for [marijuana] in excess of the positive results you obtained on July 19, 2006," and ". . . your employment with [Respondent] is terminated." Further, with regard to the discharge of Gurnett, Patrick Marrinan, who failed to deny the testimony of Olkowski regarding their July 27 conversation, testified that ". . . when we let an employee return to work after failing a drug test, he must test clean and . . . the decision was made [for Gurnett] to let him return to work if he tested clean or . . . lower than the first test and then tested clean." According to Marrinan, "we terminated his employment consistent with the letter we'd given [him] on July 26, 2006.

As to whether, by compelling Gurnett to take the initial drug and alcohol test on July 19 after his June 22 annual hearing test had revealed an STS, Respondent changed its drug and alcohol testing policy without first informing the Union and offering it an opportunity to bargain, David Ferguson testified that he is Respondent's management official responsible for determining whether an injured employee should be sent to Respondent's doctor and whether the injury is such as to require a drug and alcohol test for the employee; that hearing loss of a sufficient magnitude became Cal/OSHA recordable injuries sometime "in 1983"; and that, as set forth above, since, at least 2002, all employees, who suffer on-the-job injuries, both first-aid type and Cal/OSHA recordable, are sent to a company doctor for treatment and, with the exception those suffering from CTD-type injuries,[22] for drug and alcohol tests. However, Respondent's counsel conceded that the latter is not a written policy, and Ferguson admitted he was unable to locate any company records, establishing that, prior to 2006, any employee, whose annual hearing examination revealed a Cal/OSHA recordable STS, had been sent to a company doctor for both examination and a drug and alcohol test. Further, later during his testimony, Ferguson appeared to contradict himself, stating that, prior to 2006, regarding retesting employees, whose annual hearing tests revealed STSs, "I had relied on employees to do that in good faith." Thus, in 2005, as he had done every year since being hired by Respondent in 1994, he relied upon the Safe Hearing America technician to inform the 10 employees, whose annual hearing tests revealed STSs, to go to their own doctors for followup hearing examinations, and, despite receiving the Safe Hearing America hearing test results for each employee, Ferguson did not require any to be retested by a company doctor or to submit to a drug and alcohol test. In July 2006, the annual hearing tests revealed that seven employees, including Gurnett and another packing department employee, had suffered Cal/OSHA reportable STSs.[23] According to Ferguson, as he had recently "discovered" that a Cal/OSHA recordable hearing loss meant "a sudden hearing loss without the cumulative trauma,"[24] as none of the 10 employees, whose 2005 annual hearing tests had disclosed STSs, had reported back the results of follow-up medical examinations,[25] and as he now felt "an obligation" to perform follow-up examinations, he decided to send the above seven employees, including Gurnett, to the company's doctor for hearing retests and, in accord with his asserted practice since 2002, drug and alcohol testing.[26] Finally, Ferguson denied that, in 2006, by sending the seven employees to a company doctor for hearing retests and accompanying drug and alcohol tests, Respondent had engaged in any change from its past practice as to packaging bargaining unit employees, whose annual hearing examinations revealed STSs.[27]

[21] There is nothing in Respondent's drug and alcohol testing policy for packaging department employees that mandates such testing for a Cal/OSHA recordable injury, and Olkowski denied ever being informed by Respondent of such a practice. Further, Olkowski denied ever being informed by Respondent that packaging department employees, who were sent to its doctor for a hearing retest, would be subjected to drug and alcohol testing.

I believe that, in his last comment to Olkowski, Marrinan's reference was to the United States Department of Labor's revised OSHA standard and not to Cal/OSHA.

[22] Ferguson testified that he is responsible for determining whether an employee's injury is a CTD type or one resulting from a sudden event.

[23] The record is unclear whether the hearing losses for the seven employees were at the previous Cal/OSHA recordable level of 25 decibels over the baseline test or at the new OSHA recordable 10 decibel level over the baseline test—a standard STS.

[24] Although not entirely clear, Ferguson, who is not an MD, determined on his own that Gurnett's STS was not the result of cumulative trauma.

[25] Asked why he failed to have any of the 10 employees, who had failed their annual hearing tests in 2005, retested by a company doctor and submit to drug and alcohol tests, Ferguson admitted to being lax—"I didn't think it was important at the time."

[26] Ferguson testified that he requested that the company doctor administer drug and alcohol tests to Gurnett and the other packaging department employee.

[27] Assuming arguendo Respondent's acts constituted a change of Respondent's drug and alcohol testing policy, there is no evidence that Respondent informed the Union of such a change and afforded it an opportunity to bargain prior to implementing the change.

With regard to the employees in Respondent's pressroom employee bargaining unit, the alleged unlawful unilateral change involves compelling said employees, who claim continuous trauma hearing loss injuries, to undergo drug and alcohol testing.[28] The General Counsel's evidence for this involves Respondent's treatment of employee Nathan Jennings. Jennings was hired by Respondent in January 1995, and worked as a pressman in the pressroom. In March 2000, he suffered an accident, catching a hand in the press machinery. He was sent to a company doctor for treatment and, pursuant to Respondent's policy, was required to submit to a drug and alcohol test. The result of the test showed a positive result for the presence of marijuana, and he was suspended for five shifts. By letter dated March 13, 2000, he was advised he would be required to submit to a second drug and alcohol test and would have to obtain a negative result before being allowed to return to work. He was also advised "if at any time in the future you are tested for any reason and obtain a positive result, your employment will be terminated." Jennings second drug test showed a negative result, and he was permitted to return to work.

In July 2006, prior to taking his annual hearing test, Jennings complained to his supervisor and the pressroom shift manager "about hearing loss and tinnitus" in both ears.[29] As a result of Jennings' complaint, his supervisor filled out an injury investigative report, noting the incident as "noise exposure" due to repetitive (5 days a week, 7 hours a day) activity. Approximately a week later, Jennings took his annual hearing test, and it failed to reveal the presence of an STS in either ear. Nevertheless, he continued to believe he was suffering a hearing problem, and, on October 13, he filed a workers' compensation claim, alleging continuous trauma to his hearing in both ears. On October 17, the pressroom supervisor approached Jennings and informed him that he was required to make an appointment with the company doctor, Dr. Jurkowski, for a hearing test. Later that day, Jennings left Respondent's facility, drove to the former's clinic in La Jolla. The doctor tested Jennings's hearing, and the medical assistant told him he would have to submit to a drug and alcohol test. Jennings reported for work the next day, and the pressroom manager informed him ". . . that my drug test results were inconclusive and that he had been instructed to not let me return to work until they had definite results" and instructed him to go home and wait for notification by Respondent. Thereafter, Jennings received a letter, dated October 20, from Respondent, advising him that his drug test result was positive for marijuana and that, in accord with Respondent's drug and alcohol policy, "[this date], your employment with the Union-Tribune is terminated."

Finally, as evidence supporting his allegation that Respondent had changed its existing practice with regard to the packaging bargaining unit employees, counsel for the General Counsel offered into evidence a position letter, dated February 20, 2007, from Respondent's counsel. Therein, the attorney responded to a request from the Board regarding an employee named Jerry Dick, who had filed a workers' compensation hearing loss claim. According to the position letter (GC Exh. 20), Dick, who had retired from Respondent as a pressroom employee on May 31, 1999, had filed the above hearing loss claim in June 1994 and again on March 23, 1995, and his hearing loss claim was diagnosed as a CTD. Apparently, Dick was not required to submit to a drug and alcohol test, and, this regard, Respondent's attorney wrote, "according to the pressroom policy in place at the time, he should not have been required to submit to a drug/alcohol screen."

Loss control manager, Ferguson, testified that, since being hired by Respondent, the latter's practice has been to send any employee, who suffers an on-the-job injury, which may be the subject of a workers' compensation claim, or who files a workers' compensation claim for an alleged work-related injury, to the company doctor, Dr. Jurkowski, for an examination and, except in the case of a CTD injury, for a drug and alcohol test. He further testified that he is Respondent's official responsible for determining whether a workers' compensation claim for a CTD injury is valid and, if not, for instructing the company's doctor, who is charged with examining the claimed injury, to administer a drug and alcohol test. According to Ferguson, who, as stated above, admitted he does not have a medical degree, just as he reviewed employee Dick's earlier workers' compensation claim, he reviewed Jennings' 2006 annual hearing test result, ".and it was obvious to me that there was no CT . . . ." Continuing, Ferguson testified that, while, in the event of a cumulative trauma hearing loss, an individual would gradually lose his hearing in one or both ears over a long period of time, "in the case of Mr. Jennings, his hearing gets better, worse, better, worse . . . changes which just don't fit in with a CT type of hearing loss." Accordingly, besides sending Jennings to the company doctor for a hearing examination, he instructed the doctor to administer a drug and alcohol test. As to the latter test, Ferguson stated that, if his analysis of the claimed injury showed Jennings had a CTD injury, ". . . we wouldn't test for drugs and I would have to make sure that we don't test when we're not supposed to test . . . ."[30] Finally, with regard to employee Dick, explaining the difference between Respondent's Exhibits 20 and 21, charts showing the annual hearing test results for both Dick and Jennings, Ferguson, who was uncontroverted, testified that Jennings' hearing test pattern "was very different" from that of Dick.

2. Legal analysis

As set forth above, the General Counsel alleges that, in violation of Section 8(a)(1) and (5) of the Act, Respondent unilaterally changed its drug and alcohol testing policy by compelling employees in its packaging department bargaining unit,

[28] Michael Huggins, the Union's chief negotiator, testified that, during contract bargaining with Respondent since August 2005, there has been no bargaining over Respondent's drug and alcohol testing policy and Respondent never informed the Union pressroom employees, who claimed long-term hearing loss, would be subject to drug and alcohol testing.

[29] Tinnitus is a type of hearing loss accompanied by a ringing in the ears.

[30] Assuming arguendo that Ferguson's acts constituted a change in Respondent's drug and alcohol policy testing policy, there is no evidence that Respondent informed the Union of said change and afforded the Union an opportunity to bargain prior to implementation.

whose annual hearing tests revealed an STS, to submit to drug and alcohol tests and compelling employees in its pressroom bargaining unit, who alleged cumulative trauma hearing loss, to submit to drug and alcohol testing without prior notice to the Union and affording it an opportunity to bargain regarding said changes and by discharging its employees Michael Gurnett and Nathan Jennings as a result of said unilateral changes. At the outset, it is, of course, longstanding Board law that an employer violates said section 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.[31] *NLRB v. Katz*, 369 U.S. 736 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). Moreover, such notice must be given sufficiently in advance of the change to allow the labor organization a reasonable opportunity to present counterarguments or proposals; otherwise, any demand for productive bargaining would be futile, and the "notice is nothing more than informing the labor organization of a *fait accompli.*" *Intersystems Design Corp.*, 278 NLRB 759, 759–780 (1986); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1014 (1982). However, it is clear that not all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices; to be found unlawful, the unilaterally imposed change must be "material, substantial, and . . . significant" and must have a "real impact" upon or be "a significant detriment to" the employees or their working conditions. *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992); *UNC Nuclear Industries*, 268 NLRB 841, 847 (1984). Finally, where, as herein, the parties are engaged in contract negotiations, "[The] employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all unless and until an overall impasse has been reached in bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Further, it is well settled that a drug and alcohol testing requirement is a mandatory subject of bargaining and that an employer violates Section 8(a)(1) and (5) of the Act by imposing such a program without first giving notice to a labor organization, which represents its employees, and affording it an opportunity to bargain. *Tocco Inc.*, 323 NLRB 480 (1997), revd. on other grounds in *Anheuser Busch, Inc.*, 351 NLRB 644 (2007); *Johnson-Bateman Co.*, supra.

Regarding the allegations concerning the packaging department bargaining unit employees, who selected the Union as their exclusive representative for purposes of collective bargaining on June 20, 2005, in agreement with counsel for the General Counsel, I think a finding is warranted that Respondent changed its drug and alcohol testing policy in 2006, and note that Respondent does not contend it gave notice of its intent to implement such a change to the Union or afforded it an opportunity to bargain regarding it. Initially, there exists no provision in Respondent's drug and alcohol testing policy, applicable to said employees, which provides that they shall be subject to drug testing based upon the results of their annual hearing examinations or if said hearing examinations reveal the existence of an STS. Further, according to the uncontroverted testimony of Michael Huggins, the Union's chief negotiator, whom I credit, during bargaining for the parties initial collective-bargaining agreement, Respondent's drug and alcohol testing policy has not been a subject of the negotiations, and Respondent has never informed the Union that employees, who suffer from hearing loss, would be subject to drug testing. Based upon the entire record, including what occurred in 2005, I find that, prior to 2006, the Safe Hearing America technicians customarily instructed packaging department employees, whose annual hearing examinations revealed the occurrence of an STS in one or both ears, to see their own personal physicians for follow-up examinations and that said employees were rarely compelled to be examined by a doctor, under contract to or employed by Respondent. In this latter regard, former employee Huffman and shop steward Olkowski were uncontroverted that, while, in the past, some bargaining unit employees, who failed their annual hearing examinations, had been sent to a company doctor for follow-up hearing examinations, none had ever been compelled to submit to a drug and alcohol test. Moreover, I note that, while David Ferguson asserted, since 2002, Respondent's practice, concededly not in writing, was to send any employee, who suffered a first-aid type injury or a Cal/OSHA recordable injury, including a Cal/OSHA recordable hearing loss, with the exception of a CTD injury, to a company doctor for treatment and a drug and alcohol test, Respondent produced no record evidence corroborating Ferguson's dubitable testimony, and the Union's secretary/treasurer, George Huber, who, I believe, was a significantly more credible witness on this subject than Ferguson, stated that Respondent's practice, described by Ferguson, was limited to "physical injuries" to employees.

In 2006, in direct contrast to its past practice,[32] Respondent required the seven employees, including Gurnett and another packaging department employee, whose annual hearing tests revealed the occurrence of an STS, to undergo retesting by a company physician and, at the same time, to submit to drug and alcohol tests. There can be no doubt that such represented a

[31] These are the so-called mandatory subjects of bargaining, and, in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Supreme Court defined the mandatory subjects of bargaining as those matters which are "plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" Normally, the mandatory subjects of bargaining concern anything having to do with bargaining unit employees' wages, hours, or other terms and conditions of employment. *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992), enf. denied 22 F.2d 1493, 1496–1498 (10th Cir. 1994); *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989).

[32] Ferguson's admission that, but for laxity on his part, he would have sent the 10 employees, whose 2005 annual hearing tests disclosed the occurrence of STSs, to the company doctor for retests and drug and alcohol tests, is hardly dispositive of Respondent's obligation to bargain in 2006. Thus, Respondent's obligation to give notice to the Union and to afford it an opportunity to bargain over changes in the bargaining unit employees' terms and conditions of employment attached immediately after the June 20 election. *Lawrence Textile Shrinking Co.*, 235 NLRB 1178 (1978).

change in Respondent's drug and alcohol testing policy. Thus, based upon the uncontroverted testimony of shop steward Olkowski, whom I credit, after Gurnett failed his drug test, and, upon failing a retest, was terminated, on July 27, Respondent's manager of labor relations Marrinan informed him that, in the past, if Respondent had not required employees, who failed their annual hearing examinations to submit to drug and alcohol tests, these were not Cal/OSHA recordable hearing losses and that what had changed in 2006 was "[OSHA] lowered the bar on what was reportable for hearing tests." Likewise, I believe that, in his position statement dated January 3, 2007, Respondent's counsel essentially corroborated Marrinan's admission, stating that, as the United States Department of Labor had lowered its OSHA standard for recordable hearing loss to the 10 decibel STS level in late 2004, and as it felt obligated to do so, Respondent altered its procedure in 2006 by sending employees, including Gurnett, whose annual hearing tests revealed the occurrence of an STS, to its own doctor for hearing retests and, as said STSs were now OSHA recordable, for drug and alcohol testing.[33]

In his posthearing brief, contrary to my finding, Respondent asserts that, at no time, did his client ever change its drug and alcohol testing policy as alleged. Counsel initially argues that, while packaging bargaining unit employees, including Gurnett, did submit to drug and alcohol tests in 2006, Respondent did not compel them to do so. In support, counsel for Respondent points to the dictionary definition for the word "compel" and contends that his client did not "force" any employee, with an STS, to take a drug and alcohol test. This is a specious argument, for Respondent's drug and alcohol policy, effective for the packaging department employees bargaining unit, is a term and condition of employment, on its face, said policy warns that failure to comply "will subject an employee to discipline up to and including termination," and, according to Gurnett, who was uncontroverted, while driving to the company doctor's medical facility, the director of safety told him the drug and alcohol test "has to be done." I believe a refusal by Gurnett to submit to a drug and alcohol test would have been tantamount to him refusing to perform a work assignment and, in these circumstances, Gurnett clearly was compelled to submit to the drug and alcohol test, which was administered to him.

The crux of counsel for Respondent's argument is that Gurnett and six other employees were sent to the company doctor for hearing retests as each had an OSHA recordable hearing loss and were given drug and alcohol tests because since, at least, 2002, Respondent's practice has been that "all employees who visit the company doctor, except those with CTDs, are drug and alcohol tested."[34] Inasmuch as this "matter of fact" argument ignores the change in the recordable hearing loss standard, which precipitated and resulted in the drug and alcohol testing, at issue herein, and is directly at odds with the credible and uncontroverted record evidence regarding the asserted quotidian nature of such testing by the company doctor, I find it to be without merit. At the outset, I note that there exists no language in Respondent's drug and alcohol policy, effective for the said bargaining unit employees, mandating a drug and alcohol test for any employee, whose annual hearing test discloses the existence of an STS, a Cal/OSHA recordable hearing loss, or an OSHA recordable hearing loss, and that the new OSHA recordable hearing loss level is that of a standard STS—10 decibels over the baseline level, which is lower than the existing Cal/OSHA recordable standard. Next, former employee Huffman and shop steward Olkowski were uncontroverted that, prior to 2006, no bargaining unit employee, who had failed an annual hearing test and had been sent to the company doctor for retesting, had ever been compelled to submit to a drug and alcohol test, and, at no point during collective bargaining, has Respondent informed the Union of any change in its drug and alcohol testing policy. Further, Respondent offered no company records, corroborating Ferguson's assertion that, since, at least, 2002, all employees, who incurred first-aid type injuries or Cal/OSHA recordable injuries, including hearing loss injuries, except CTDs, and who have been sent to the company doctor for treatment, have been given drug and alcohol tests, and I specifically credited George Huber that Respondent's policy pertained to "physical injuries" to employees and not to the results of employees' annual hearing tests. Moreover, Respondent's counsel's assertions, as to the inevitability of drug and alcohol testing, were directly contradicted by Marrinan's uncontroverted admissions to Olkowski that, if in the past, bargaining unit employees, who were sent to the company doctor after failing annual hearing tests, had not been drug and alcohol tested, it was because their hearing losses were not Cal/OSHA recordable and that Gurnett and the other employees, who were sent to the company doctor after their 2006 annual hearing tests, were subjected to drug and alcohol testing as "[OSHA] lowered the bar on what was reportable for hearing tests." Of course, Marrinan's latter admission was corroborated by Respondent's attorney in his January 3, 2007 position statement. Based upon the foregoing and the record as a whole, contrary to Respondent, I believe that Respondent did change its drug and alcohol policy in 2006 by implementing a new precipitating event and thereafter compelling employees in its packaging department bargaining unit, whose annual hearing tests revealed the occurrence of an STS, to submit to drug and alcohol testing, which heretofore had not been a routine consequence of being sent to the company doctor, and, accordingly, that its defense, in this regard, is patently fallacious. Finally, as there exists no record evidence that Respondent ever gave notice to the Union of its intent to change the terms and conditions of its drug and alcohol policy or afforded it an opportunity to bargain over said change, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act. *Tocco, Inc.*, supra.

Turning to the validity of the complaint allegations pertaining to Respondent's pressroom employees bargaining unit and its alleged unlawful unilateral change of the drug and alcohol

[33] I believe that, in his posthearing brief, counsel incorrectly states Respondent's duty as notifying the Union of the change in the OSHA hearing loss standard. Rather, I believe the issue concerns Respondent's obligation to inform the Union of its new criteria for drug and alcohol testing.

[34] Respondent's counsel argues that, in accord with his client's past practice, "the purpose for [the employees] visit to the Company doctor . . . is irrelevant. The employees would have been drug and alcohol tested regardless of the reason for their visit."

policy, effective for said employees, I agree with counsel for the General Counsel that Respondent effectively changed said policy in October 2006. At the outset, I think it's clear that, for purposes of mandatory drug and alcohol testing, Respondent's aforementioned policy differentiates between employees, who suffer from discrete on-the-job accidents, and those, who incur cumulative trauma disorders, and that, in case of the latter type of injury, upon examination and certification by a company doctor, pressroom employees are specifically excepted from having to submit to drug and alcohol tests for their injuries. In this regard, by letter, dated July 15, 1991, Respondent informed the Union that it would not compel employees, who suffer from "certifiable" CTDs, to submit to drug and alcohol tests; that "by use of the term 'certifiable,' [Respondent] means an injury which is categorized as a cumulative trauma injury *by a company physician* (emphasis added); and that hearing loss over time resulting from repetitive exposure to noise is an example of a CTD. Further, there is no record evidence, prior to 2006, of Respondent requiring any employee, who suffered from cumulative hearing loss, to submit to a drug and alcohol test; and that, in regard to the latter point, in 1995, another bargaining unit employee, Jerry Dick, filed a workers' compensation claim for cumulative trauma hearing loss and was not required to submit to drug and alcohol testing; and, at no point during the contract bargaining since August 2005 between Respondent and the Union, has the former given notice of any change from this past practice. Then, in October 2006, employee Nathan Jennings filed a workers' compensation claim, alleging cumulative trauma hearing loss, and, contrary to the terms of the aforementioned July 15, 1991 letter, rather than waiting for a company doctor's diagnosis that Jennings' injury resulted from a discrete on-the-job incident instead of from repetitive exposure to noise (a CTD), loss control manager Ferguson, who does not possess a medical degree, decided that Jennings' injury should not be classified as a cumulative trauma injury and directed the company doctor to administer a drug and alcohol test to the employee. Concerning what occurred, there is no record evidence that Respondent gave notice to the Union prior to implementing this change in its drug and alcohol testing policy or afforded the Union an opportunity to bargain over it.

Respondent argues, as above, that there is no evidence Jennings was compelled to submit to a drug and alcohol test and that there is no record evidence Respondent changed its past practice. In the latter regard, counsel for Respondent argues that his client has maintained a longstanding practice of sending employees, who claim workers' compensation injuries, to the company doctor; that, with the exception of those employees, who, it "has determined," suffer from CTDs, ". . . the company has . . . [a practice] . . . of drug and alcohol testing all employees who visit the company doctor"; that, as Ferguson determined he suffered from a CTD hearing loss, employee Jerry Dick was deemed to be exempt from, and not required to submit to, a drug and alcohol test; and that as Ferguson determined Jennings did not have a CTD hearing loss, the latter was drug tested. Initially, contrary to Respondent, as I have previously concluded that Michael Gurnett was compelled to submit to a drug test, I likewise believe that Jennings, who was subject to termination for not complying with Respondent's drug and alcohol testing policy, was compelled to submit to such a drug and alcohol test. Next, by its terms, I believe that Respondent's July 15 1991 letter to the Union became part of its drug and alcohol policy, effective for its pressroom employees bargaining unit, and, accordingly, an aspect of their terms and conditions of employment and that, thereafter, in order to avoid drug and alcohol testing after incurring a work-related injury, a bargaining unit employee must have a "certifiable" cumulative trauma injury, one "categorized as [such] by a company physician." There is no record evidence that Respondent ever informed the Union that this latter requirement had been changed or that it desired to change it. In these circumstances, by subsequently having its loss control manager, Ferguson, make determinations that bargaining unit employees' asserted workers' compensation CTD-type injuries were actually discrete on-the-job type injuries and then instruct the company doctor, who examined the employees, to administer drug and alcohol tests, Respondent effectively, unilaterally eviscerated a vital component of its drug and alcohol testing policy, effective for the pressroom department employees. This change, about which the Union apparently first became aware in 2006 after Respondent required Jennings to submit to a drug and alcohol test after he filed a workers' compensation claim for CTD hearing loss and which has never been a subject of the on-going collective bargaining between the parties, is particularly egregious, for Ferguson does not possess a medical degree, his so-called diagnosis is made prior to the company doctor's examination of the employee's claimed injury, and his requirement that the employee be drug and alcohol tested prior to the company doctor's final diagnosis renders the latter's conclusion irrelevant. Moreover, there is no record evidence that Respondent ever communicated to the Union that Ferguson, and not a company doctor, has been making the CTD determination decisions,[35] and, in these circumstances, the fact that Ferguson may have made the determination that Jerry Dick's claimed workers' compensation injury was a CTD injury does not militate against my conclusions or establishes that the complaint allegations as to Jennings are barred by Section 10(b) of the Act. Based upon the foregoing and the record as a whole, I believe that Respondent changed its drug and alcohol testing policy, effective for its pressroom bargaining unit employees, by requiring Nathan Jennings, who had filed a workers' compensation action, alleging a CTD hearing injury, to submit to a drug and alcohol test prior to a company doctor's determination as to the merits of the former's claim. Inasmuch as there is no contention or record evidence that Respondent informed the Union of this change in its drug and alcohol policy or that it afforded the Union an opportunity to bargain prior to implementation, I find that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act, with regard to its pressroom employees bargaining unit as alleged in the instant complaint.[36]

[35] Thus, whether, except for CTD injuries, Respondent may have commenced drug and alcohol testing all employees, who claimed injuries, in 2002 is irrelevant. In this regard, Respondent does not claim that Ferguson gave notice to the Union he was the individual who made the CTD diagnoses.

[36] Contrary to counsel for Respondent, I do not view *Gulf Coast Automotive Warehouse, Inc.*, 256 NLRB 486 (1981), as supporting a

Finally, the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by discharging packaging department employee Gurnett as a result of the above-described unlawful unilateral change of its drug and alcohol policy, effective for its packaging department employees bargaining unit, and by discharging pressroom employee Jennings as a result of the above-described unlawful unilateral change of its drug and alcohol policy, effective for its pressroom employees bargaining unit. In addition, the complaint seeks "traditional" reinstatement and make-whole remedies for said individuals. While taking a contrary position to that of counsel for Respondent at the hearing, in his posthearing brief, counsel for the General Counsel stated his agreement with the former that, pursuant to the Board's decision in *Anheuser-Busch, Inc.,* supra, reinstatement of Gurnett and Jennings is no longer a permissible or appropriate remedy. Thus, in *Anheuser-Busch*, which, as herein, involved discharges, for violations of company work rules, disclosed as a result of the employer's unlawful unilateral change, the Board considered the meaning of the term "for cause" in Section 10(c) of the Act, concluded that "cause, in the context of [said provision], effectively means the absence of a prohibited reason," one the Act forbids, and that "[the] meaning of the phrase . . . does not include an inquiry into the source of the employer's knowledge of its employees' misconduct, " and held '. . . we interpret Section 10(c) to preclude the Board from granting a make-whole remedy where the employees were disciplined for cause, even if the employer learns of the misconduct through unlawful means." Id. at 644-650. Herein, notwithstanding Respondent's clear unlawful unilateral changes, there is no dispute that Gurnett and Jennings was each discharged for violating Respondent's applicable drug and alcohol policy. While counsel for the Union insists that the correct opinion in *Anheuser-Busch* is the dissent, I am, of course, bound by the majority decision. Accordingly, inasmuch as both individuals apparently were discharged for cause, there can be no violation of the Act in either instance, and I shall recommend that paragraphs 9(d) and (e) be dismissed.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the representative for purposes of collective bargaining of the following appropriate unit of Respondent's employees within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time packaging department employees, including packagers and operators; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

4. The Union is the representative for purposes of collective bargaining of the following appropriate unit of Respondent's employees within the meaning of Section 9(a) of the Act:

> All employees engaged in the operation of the presses, paperhandlers and wipers; excluding all other employees, guards, and supervisors as defined in the Act.

5. By, in or about July 2006, unilaterally changing its drug and alcohol policy without notice to or affording the Union an opportunity to bargain by compelling employees in its packaging department bargaining unit, whose annual hearing examinations revealed the occurrence of an STS, to submit to drug and alcohol tests, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. By, in or about October 2006, unilaterally changing its drug and alcohol policy without notice to or affording the Union an opportunity to bargain by compelling employees in its pressroom bargaining unit, who file workers' compensation claims for cumulative trauma hearing injuries, to submit to drug and alcohol tests prior to examination by a company doctor, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

7. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent engaged in no other unfair labor practices.

REMEDY

Inasmuch as Respondent engaged in serious unfair labor practices affecting commerce, I shall recommend that it be ordered to cease and desist from engaging in said unlawful acts and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Thus, having found that Respondent has violated Section 8(a)(1) and (5) of the Act by making unlawful unilateral changes in its employees' terms and conditions of employment, I shall recommend that it be ordered to restore the status quo ante by rescinding those changes upon request by the Union and, upon request by the Union, bargain in good faith.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, Union-Tribune Publishing Co., a Division of Copley Press, Inc., San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notice to or affording the Union an opportunity to bargain, changing its drug and alcohol testing policy for its packaging employees bargaining unit by compelling employees, whose annual hearing tests reveal the occurrence of an STS, to submit to drug and alcohol testing.

(b) Unilaterally, without notice to or affording the Union an

conclusion that it engaged in no violation of the Act by compelling employees, who allege workers' compensation claims of cumulative trauma hearing loss, to submit to drug testing prior to a company doctor denying their claims. Thus, in the cited decision, the Board merely found that the employer had maintained a consistent past practice about which the Union was well aware. Herein, of course, Respondent changed its stated policy, and there is no evidence that the Union was aware of the change.

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

opportunity to bargain, changing its drug and alcohol policy by compelling employees in its pressroom employees bargaining unit, who file workers' compensation claims for cumulative trauma hearing injuries, to submit to drug and alcohol tests prior to examination by a company doctor.

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

2. Take the following affirmative actions necessary to effectuate the policies and purposes of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative for purposes of collective bargaining of Respondent's employees in the units described below:

> All full-time and regular part-time packaging department employees, including packagers and operators; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act
>
> All employees engaged in the operation of presses, paperhandlers and wipers; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Upon request, restore conditions to the status that existed before its unlawful, unilateral changes.

(c) Within 14 days after service by the Region, post at its facility, located in San Diego, California, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 2006.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that employees were discharged in violation of Section 8(a)(1) and (5) of the Act.

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[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."