

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

In the Matter of

KENNAMETAL, INC.

and

UNITED STEELWORKERS, LOCAL 5518, affiliated  
with UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC

CASES 1-CA-46293  
1-CA-46294

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT  
OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted by

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## **I. SUMMARY OF THE CASE**

These matters were heard in Greenfield, Massachusetts, on February 8-10, 2011, before Administrative Law Judge Arthur Amchan. On March 12, 2011, Judge Amchan issued his Decision in the above cases, in which he made certain findings and conclusions of law. This brief is filed in support of Judge Amchan's decision.

Respondent in this case is a large multi-national corporation operating dozens of facilities and employing thousands of employees worldwide. These proceedings involve Respondent's facility in Lyndonville, Vermont, where approximately 100 unit employees are represented by the Charging Party, USW Local 5518 (herein the Union). The undisputed record evidence establishes that between February and August of 2010, Respondent unilaterally implemented (in stages) a new program called "Management Based Safety" (herein "MBS"), a comprehensive set of safety training, education, and enforcement policies designed to achieve the laudable goal of "100%" safe. MBS completely supplanted the agreed upon procedures directing Union involvement in the for investigation of all OSHA recordable accidents at Respondent's facility; materially and significantly changed the existing procedure of progressive discipline for safety violations; and required employees to certify their agreement with a comprehensive assessment of the safety of the their work environment, under threat of discipline, regardless of whether or not they felt they could truthfully affirm these statements. The ALJ properly found that these changes were all mandatory subjects of bargaining, and the record evidence is largely undisputed that the MBS program was implemented without providing an opportunity for the Union to bargain over it, or its effects. As neither the language of the existing contract, nor the bargaining history or past practice

establishes that the Union waived its right to bargain over these subjects, the ALJ properly found that their unilateral implementation violated 8(a)(5) of the Act.

Additionally, a critical component in achieving the “100% Safe” goal was the requirement that facilities, including the Lyndonville facility, consistently and strictly address violations of safety policies using specific “Procedures for Corrective Action For Safety Violations.” The record evidence establishes that the Union did not have actual knowledge of these new “Procedures” being implemented until January of 2011, and the earliest that the Union could arguably have had constructive knowledge of these Procedures was August 2010. Because the Procedures are a mandatory subject of bargaining, and the Union was not given an opportunity to bargain over these disciplinary procedures, or the effects of these procedures, either separate from, or as a component of MBS, the ALJ properly found that their unilateral implementation represents an alternative independent violation of the Act.

Additionally, because the evidence clearly establishes that MBS and/or the Procedures for Corrective Action in Safety Violations were a factor in the suspensions of Doug Noyes and Ken Wilkins, as well as the subsequent termination of Ken Wilkins, the ALJ properly concluded that the remedy in this case includes a make-whole remedy for those impacted employees.<sup>1</sup>

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<sup>1</sup> The Administrative Law Judge granted a motion by the undersigned to amend the complaint to seek, as part of the remedy for unilateral implementation of the MBS Program alleged in Paragraph 14A, an order requiring that Respondent rescind the September 2, 2010 reprimand and suspension of Doug Noyes and the January 11, 2011 suspension and subsequent termination of Ken Wilkins, and that these employees be made whole for any loss of earnings or other benefits they suffered as a result of the actions taken against them. (Tr. 128). Such an amendment was properly granted.

Finally, between April 5 and July 16, 2010,<sup>2</sup> the Union made four requests for information that were relevant and necessary to the Union's role as bargaining representative of the unit employees. Record evidence and testimony clearly establish that Respondent openly refused to provide the requested information, provided only some of the information without explanation as to the remainder, or unreasonably delayed in providing the requested information, so as to undermine the Union's ability to effectively use the information on behalf of represented employees. The ALJ properly concluded that by such actions Respondent separately violated Section 8(a)(5) of the Act.

## **II. FACTS**

### **A. Background and Historical Practices**

#### **1. Background and Plant Hierarchy**

Respondent operates 48 facilities worldwide, only five of which are covered by collective-bargaining agreements. (Tr. 23, Brighenti).<sup>3</sup> Rick Brighenti has been the Plant Manager at Lyndonville only since April 2009. Prior to becoming Lyndonville's direct plant manager, he had begun oversight of the facility in April 2008, while acting as Plant Manager at Respondent's Greenfield, Massachusetts facility. Brighenti had not worked for Respondent prior to April 2006, when he became Plant Manager in Greenfield.

In December 2009, Ginger Noyes, long-time Human Resource Manager at Lyndonville, resigned. Shortly thereafter, the HR Manager at Respondent's Greenfield

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<sup>2</sup> All dates are in 2010 unless specified otherwise.

<sup>3</sup> In this brief, Tr. designates the transcript page; GC designates Acting General Counsel Exhibits; R designates Respondent Exhibits.

plant, Taryn Blair, assumed responsibility for the Lyndonville plant as well. Also in December 2009, Eric Huttenlocher, who had been Manager of Human Resources Field Services for Kennametal since late 2009, briefly assumed oversight responsibility for the Lyndonville facilities, but his assignment was limited, aimed largely at assisting in the transition between Noyes and Blair. On, July 31, 2010, Blair resigned and Huttenlocher was asked to take over responsibility for the day-to-day operations of both the Greenfield and Lyndonville facilities. Huttenlocher was involved in the contract negotiations that had taken place prior to October 2010, when the new contract was executed. (Tr. 612-613, 614-615 Huttenlocher). Amy Morissette, who has been the Environmental Health and Safety (EHS) Coordinator at Lyndonville since 2003, has had almost no involvement in the labor relations aspect of Respondent's operations. (TR. 516-520).

## **2. The Relevant Articles from the Applicable Collective-Bargaining Agreement**

Respondent and the Charging Party were parties to a collective-bargaining agreement effective October 2005-October 2009, and later extended until October 1, 2010. (GC 4; Tr. 54, Brighenti). Among the relevant articles from that agreement are Article One (Recognition), Article Five (Management Rights), Article Six (Discipline and Discharge), Article Seven (Grievance Procedure), Article Sixteen, (Safety and Health), Article Nineteen (Shop Rules), and Article 20.03 (General).<sup>4</sup>

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<sup>4</sup> The full agreement is included in the record at GC 4.

**3. The Bargaining History and Past Practice Under Article 16 Was to Involve the Safety Committee In Investigations of Accidents.**

Witnesses for the Counsel for the Acting General Counsel included several with decades of tenure at the facility, including significant involvement in the parties' labor relations. Leon Garfield, employed by Respondent since 1995, was a Grievance Committee member since 2002 (Tr. 279, Garfield), became Grievance Committee Chair in 2003 (Tr. 280, Garfield), and has been Union President from 2009 to the present. Richard Gammell, who was employed at Respondent's facility from 1959 to 2003, served on the Grievance Committee in 1971, and, was the Union President from 1973 to 1985, and 1988 to 2003. (Tr. 129-131, Gammell).

In his role as either Grievance Committee member or Union President, Gammell helped to negotiate every collective-bargaining agreement between the Union and Respondent or its predecessor from 1971 to 2003, with the exception of the 1986 agreement. (Tr. 130). Language providing for some sort of a Safety Committee has been in existence since at least 1974. (Tr. 132, GC 21). In 1989, the Union sought and gained a change to the Safety Committee Article, by adding language specifying that:

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

This language was retained in the applicable 2005-2010 agreement. Gammell's undisputed testimony establishes that the Union sought the inclusion of this language "to make sure that there was a union person who investigated the accidents, if one happened," and that "we want to make sure that it was a fair assessment of what

happened, whether it was a machine fault, or the person on the job. You know, the write up of the accident was what actually what happened.” (GC 22; Tr. 135). Gammell’s testimony, as well as that of John Eastman, Grievance Committee Chair and Safety Committee member, also establishes that following the addition of that language, Union Safety Committee members were promptly notified when OSHA recordable accidents occurred, received copies of accident reports, assisted in filling them out, and performed an accident investigation. (Tr. 136, Gammell; Tr. 153-154, Eastman). As described more fully below, that participation changed, however, at the time that MBS was implemented.

John Eastman has worked for Respondent since 1995. He has been on the Grievance Committee since 2007, acting as Chair since about the end of 2007, and has been a member of the Safety Committee since 2003. (Tr. 148-149, Eastman). As a Union-side Safety Committee member, Eastman historically handled safety related issues brought to his attention by employees, including problems with the machines, and things of that nature. When an issue came up that he couldn’t resolve, he, as a Safety Committee member, would put in a work order to have someone in maintenance make the necessary repair. (Tr. 156-157; GC 30). As prescribed by Article 16.05 of the parties’ Agreement, Eastman also participated in the periodic tours of the plant, in which the Safety Committee members would evaluate the shop for safety issues, and then take those issues back to the ensuing Safety Committee meeting for discussion. (Tr. 151-152).

Prior to the implementation of MBS, if there was an accident, consistent with the language of 16.07, either Eastman as a Safety Committee Member or another Union

member of the Safety Committee would promptly be given the partially completed copy of the form used to investigate accidents, known as an "Accident/Occupational Illness Report" (herein "accident report"). At the point the accident report was received by the Union Safety Committee member, it would typically include the initial observations made by the Supervisor. (Tr. 88, Brighenti; Tr. 154, Eastman; GC 17).<sup>5</sup> At that point, Eastman or another Union/Employee Safety Committee member would do their own investigation, often adding the findings of the employee Safety Committee member to the comments or observations made by the Supervisor. (Tr. 154-155; GC 17, 45-48, 50). The form of the accident report, until MBS, had been in use since at least 1997, and included on it a place for the "Safety Team Member" signature. (Tr. 180-181, Eastman). The practice was to have a Union-side safety committee member, after performing his or her investigation, sign at this designation. (Tr. 92-93, Brighenti). At that point, the completed form would be turned in to management, with copies distributed to the Union, and the Safety Committee members.<sup>6</sup> This process was consistent with the intent of Article 16.07, which, as Gammell's testimony reflects, was intended to ensure that the write up of what happened was "fair" and that a Union person was involved.

**4. The Past Practice of the Parties' Demonstrated that the Parties Bargained over Safety Related Rules and Procedures.**

Although the parties have a long bargaining history, and the language primarily at issue in these proceedings spans several decades, Respondent did not present any

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<sup>5</sup> GC 17 is an accident report involving Bob Gordon. It was also used as an example of the accident report form generally.

<sup>6</sup> This practice is also reflected at the bottom of the form, where the "distribution" lists both the "Safety Cte," and "Union" as recipients.

witnesses with any historical or institutional knowledge of how the Safety Committee language at issue has operated between the parties from a labor relations perspective.<sup>7</sup> Similarly, there is no evidence that Plant Manager Brighenti or the functioning Regional Human Resource Manager, Eric Huttenlocher, ever consulted with anyone having institutional knowledge regarding such history and practice between the parties. (Tr. 635, Huttenlocher).

The record evidence establishes that the Grievance Committee, as opposed to the Safety Committee, is the Union body that holds authority. As such, the Grievance Committee acts as the negotiating committee, and is involved in all grievances. (Tr. 130, 132, Gammell; Tr. 281, Garfield; GC 4, Art. 7). The Safety Committee is authorized to review and make recommendations to the company regarding safety related issues, but the Grievance Committee is the empowering body of the Union. The language of Section 16 stating that the function of the Safety Committee is “not to handle grievances” clarifies this point. Thus, that language does not operate to preclude the filing of grievances over safety related matters; it merely affirms that safety related grievances are handled, like all grievances, by the Grievance Committee. (Tr. 132, Gammell; Tr. 281, Garfield).

Additionally, the testimony of these long-time employees establishes that, notwithstanding existing language in Article 16 which states that “The Employer shall continue to make reasonable provisions for the safety and health of its employees at the Plant during the hours of their employment,” the Union has sought to bargain, filed

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<sup>7</sup> The EHS Coordinator, Amy Morisette, had been employed at Respondent’s facility since 2003, and has been an Employer member of the Safety Committee since 2003. However, she admitted that she had no role in labor relations between the parties. (Tr. 516-520). Moreover, by her testimony, it was clear that she had only a passing familiarity with any collective-bargaining agreements between the parties.

grievances, and the parties have bargained over various safety related rules and policies over the years.

The record includes several examples demonstrating this history. Bargaining occurred with respect to a safety-related policy that allowed for substance-abuse testing. As Mr. Gammell explained, prior to negotiating the 1994 collective-bargaining agreement, Respondent approached the Union mid-contract, seeking to bargain over such a proposal. Through bargaining, the parties agreed to a "Memorandum of Understanding" which addressed Respondent's objective "to establish and maintain a drug and alcohol free environment in the interest of the safety and productivity of the individual employee, as well as the safety and well-being of others." (GC 23; Tr. 138, Gammell). This Memorandum was subsequently brought forward, and appears for the first time in the 1994 collective-bargaining agreement between the parties.

The parties also bargained over the smoking policy. There was a time during Gammell's tenure as president, prior to when a law was passed prohibiting smoking indoors at the facility, that Respondent approached the Union about implementing a no-smoking policy. Through bargaining, the parties agreed that there would be no smoking in some, but not all areas of the plant. (Tr. 142, Gammell).

Garfield testified that the parties have bargained over five or six different safety-related issues or policies, including a jewelry policy, a policy regarding eating while on the production floor, and several different safety programs. One of the safety related programs bargained between the parties was something known as a "Safety Jackpot." The proposal for this was introduced through former Plant Manager Vince Carbone before he left in about 2007, by the accepted practice of bringing it to the Grievance

Committee. (GC 36).<sup>8</sup> The idea was to give employees “game points” and if an employee received a certain number of game points, they could select prizes from a catalog. The Union would not agree to the program, and it was not implemented as a result. (Tr. 282-283, Garfield).

The Company proposed a safety related rule to prohibit the practice of eating while on the production floor. The Union filed a grievance, and the parties met several times. An agreement was reached whereby the no-eating policy would be implemented, with Respondent providing additional microwaves and refrigerators in the cafeteria. (Tr. 284-285, Garfield).

In 2007, Respondent proposed implementing a “Safety Recognition Program.” (GC 37; Tr. 286). Consistent with the accepted practice, the Employer provided advance notice of its intentions by bringing the proposal the Grievance Committee. The Union grieved the program on two grounds: it violated the Recognition Article, and it violated Article 16, including the obligation to work with the Safety Committee on safety related programs. (Tr. 286, 301; GC 40). As Garfield explained, the Union opposes programs where not everyone gets a prize if someone gets hurt. The grievance was resolved when the parties bargained to agreement on a program that did not offer “high dollar” prizes that would inspire someone not to disclose an accident. (Tr. 286-287).

More recently, the Employer first advised the Union of its intention to change the type of shoes required to be worn by unit employees. The Grievance Committee met with Union representatives (Tr. 288-289; GC 38). The Union opposed the change, and

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<sup>8</sup> Although the record could be clearer on this point, it's apparent that this would have been a 'mid-contract' proposal, as opposed to part of negotiating a new contract.

filed a grievance over it. (GC 38). Additionally, as discussed in more detail below, the Union made a request for information.

Importantly, the Union does not oppose every new safety rule, because, as Garfield testified, "some of them we believe are a good thing." (Tr. 286). Additionally, Gammell and Garfield testified that the past practice of the Employer was to advise the Grievance Committee and offer to bargain and once agreement was reached the new shop rule would be posted.

#### **5. The Past Practice of the Parties Concerning Discipline.**

As will be discussed in detail below, applied MBS tools significantly changed the disciplinary practices with respect to safety violations. Accordingly, it is necessary to understand the disciplinary practices that were in place before MBS. The Agreement between the parties provides no specifics with respect to discipline aside from the requirement that it be just. (GC 4). However, Respondent witness EHS Coordinator Amy Morisette corroborated Garfield's testimony in acknowledging that Respondent has long adhered to a system of progressive discipline, the steps of which are 1) Oral Warning; 2) First Written Warning; 3) Second Written Warning; 4) Written Reprimand; and 5) Reprimand with Further Disciplinary Action. (Tr. 290, Garfield; GC 43).

The record establishes that from at least 2003, when Garfield became Grievance Chair, to the implementation of MBS, progressive discipline was assigned "one step at a time" except for "Lock Out/Tag Out" violations, which were sometimes accelerated by

one step. Garfield tracked the level of discipline using his electronic spreadsheet.<sup>9</sup> In situations where the Union believed Respondent advanced beyond the appropriate step progression, the parties would typically share information, and an adjustment would be made, at times in response to a grievance, although generally, the process used to be very cooperative. (Tr. 290-295, Garfield; GC 39). Moreover, Morissette admitted that, prior to 2010, “there were a number of times when people should have been issued warnings [for safety violations] where warnings were not issued.” (Tr. 424, Morissette). Notably, prior to February 2010, not a single employee was ever suspended, or terminated for violating a safety rule. (Tr. 296; GC 39). Perhaps most significantly, in no instance prior to MBS had any employee been disciplined as a direct result of having an accident, including accidents where it was acknowledged that the injury was, at least in part, caused by actions of the employee. (See GC 17, 39, 44, 45, 46, and 48).<sup>10</sup> (Tr. 297-298 Garfield).

A pointed example of Respondent’s policy with respect to safety violations occurred in November 2009, with an incident involving Bob Gordon in which his right index finger was lacerated and he was sent to the hospital. (Tr. 423; GC 17). Gordon was injured when “he went to clear a tool from a machine and he got injured because the machine was still in motion.” The accident report form includes the designation “yes” under the question “could the injured have prevented this type of accident or

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<sup>9</sup> This is corroborated both by GC 39 (Garfield’s discipline spreadsheet), and R 22, records of prior discipline entered by Respondent. Rick Kittredge received an oral warning for “blowing air hose off making loud noises.” Tim Dupont received an oral warning for “slotting a wheel without wearing a face shield” on 12/7/07. Scott Cady received an oral warning for “not wearing proper PPE slip resistant shoes” on 2/21/08. However, per Garfield, this warning was “backed out” based on Union’s investigation that his fall was related to a rug, and not his shoes. (Tr. 312-313; GC 39).

<sup>10</sup> In all of these pre MBS accident reports, it was acknowledged that the injured could have prevented the accident or injury from happening, by a box checked, and additional comments.

illness?" An additional comment notes "should not put finger in machine while cycling. Should have removed tap before cycling machine." Although Morisette suggested that Gordon be disciplined for his safety violation, that suggestion was disregarded and Gordon received no discipline whatsoever for this violation of a safety rule. (Tr. 422-424, Morisette; R 22).

## **B. The Implementation of Management Based Safety**

### **1. The Announced Global Implementation of Management Based Safety**

By letter dated November 13, 2009, Phil Weihl, Respondent's Head of Manufacturing World Wide, announced the deployment of Management Based Safety (MBS) as a means of meeting the organization's commitment to "100% Safe-Zero Injuries." A schedule for the deployment was set under which site managers and EHS Coordinators, including Brighenti and Morisette, would receive the program tools and training for MBS, and then subsequently would roll out the program at their own facilities. Brighenti and Morisette were trained in the program during a week-long intensive training session in December 2009 at Respondent's Latrobe, Pennsylvania campus.<sup>11</sup>

The record evidence makes clear that MBS is a program designed to comprehensively "re-prioritize" safety as a measure of the effectiveness of Respondent's senior managers. The view of safety encompassed by MBS represented a significant departure from the traditional manner of viewing safety as a kind of "side" issue, where safety was a secondary component to meeting the more primary objective

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<sup>11</sup> Notably, the November 13, 2009 letter specifically advised site managers "do not deploy any of the tools until after you have attended your Region's training workshop." (R 23, p 2)(Emphasis in original).

of performance and production goals. Under MBS, the new culture would be one which raised everyone's awareness of safety issues by giving the issue more of managers' and supervisors' time, through daily and repetitive training about safe practices, and continuous evaluation and correction of unsafe practices and conditions. Most significantly, managers, supervisors, and employees would become accountable for safety, as safety moved to center stage as a primary measure of performance.

Although Respondent's witnesses took great pains to avoid acknowledging that a significant component of such reprioritization will necessarily involve stricter enforcement of work-place safety rules, the training documents that were used at the comprehensive December 2009 training clearly belie this obfuscation. For example, in the exercises that accompanied Module 1 of the training, participants were asked, among other questions, to **define the amount of safety rule/procedure infractions that the organization could accept annually.** (R 26, tab 8, p. 6).<sup>12</sup> The "learning points" for this exercise (GC 34, p. 1) reflects that **the only acceptable answer is "zero."** (Emphasis added). Other points in the materials reflect the interrelationship between the emphasis on managers' accountability for safety, and discipline for

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<sup>12</sup> The exercises are contained in the tabbed section "Course Information and Supplemental Information" for R 26. R 26 is a spiral-bound document that was not made part of the electronic case file – it is only available in hard copy as an exhibit.

employee behavior, and the materials are replete with statements that reflect this link.<sup>13</sup>

Additionally, the MBS documents themselves specifically direct the application of discipline following a safety "incident."<sup>14</sup>

**2. MBS' Implementation is Announced at Lyndonville February 2010, and the First Stages are Rolled Out; the Union Immediately Demands Bargaining, Respondent Claims "Not Negotiable."**

On February 2, 2010, the first phase of the roll out of MBS was announced to all employees at the plant, through a plant-wide meeting and power-point presentation lasting about an hour. (GC 3; R 1). Members of the Union Grievance Committee were first exposed to MBS at the February 2 meeting. The presentation described statistical information concerning workplace accidents, then outlined some concepts used by organizations that have excellent safety standards. At the level of the employee, the MBS power point stated that "[A]t its most basic level....*safety comes down to whether a person will make the proper decisions...when approaching a task or confronting an*

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<sup>13</sup> A few examples include "Employees don't come to work with the intention of getting hurt or killed....They do so because... Management didn't properly influence their behavior." "All occupational injuries and illnesses are preventable!" (R 26, Tab 1, p 4). "Changing a safety culture requires rewarding desired behaviors and deliberately challenging and addressing undesired behaviors.....**at all organizational levels.**" (Emphasis in original) (R 26, tab 1, p 6). "Excellent safety cultures are built on what is *tolerated* by senior managers." (R 26, tab 1, p. 7). "Management and employees....*must be held to high safety performance standards. Ineffective compliance resulting from ineffective enforcement are huge problems.*" "Three Functional Parts of Performance Standards: Rules...Consequences...Enforcement...What happens if we take **any one** away? All three must be functional." "The purpose of enforcing safety rules is not to fire employees...but to avoid firing them...and to prevent them from hurting themselves and others. Regulators require this!" (R 26, tab 2, p 4). "*People don't engage in a desired behavior...unless there is a meaningful reason to do so!* The same holds true for avoiding them!" (R 26, tab 2, p. 6). "Attaining safety excellence will require establishing *safety accountability at all levels...and demonstrating unbending expectations!*" (R 26, tab 2, p 8). (All emphasis in original.)

<sup>14</sup> See GC 42, documents EHS-HS-005-2000, especially "7.4 Post Incident Activities." (GC 42 is another document provided in response to a subpoena that does not include internal pagination. EHS-HS-005-200, contained therein is also particularly helpful as the "Process Flowchart" provides a comprehensive overview of the implementation of the new safety processes.)

issue.” (GC 3, p. 15). Employees viewed this presentation, but no materials were distributed.

The Union, through Grievance Committee Chair Eastman, immediately demanded to bargain over the proposed program via email to Human Resource Manager Taryn Blair (GC 5). Also on that day, the Union filed a grievance alleging a violation of Article 1.01, the Recognition Article, and requesting as a remedy that Respondent “Halt program until 1.01 is met.”<sup>15</sup> (GC 6). The following morning, Blair responded to Eastman’s email, stating Respondent’s belief that the issue was non-negotiable.

The Union persisted in its view that Respondent was obligated to bargain over MBS. The parties maintained their respective views as to the negotiability of MBS, including at a grievance meeting held on March 2. On March 5, Blair sent another email to Eastman, reiterating the parties’ positions, and acknowledging another meeting date of March 19. By email dated March 10, Eastman wrote to Blair, indicating the Union’s view that their grievance had not been resolved, that Respondent had violated Article 16 by not bringing MBS to the Safety Committee for consideration, and that MBS was a “condition of employment” that required negotiating. Eastman acknowledged the meeting date set for March 19 to “review the Company safety plan.” He added, “The Union reserves the right to hold this grievance in abeyance pending further discussions with the Company.” (R 6).

Several grievances were addressed at the meeting on March 19, which was attended by the Grievance Committee members Leon Garfield, Terry Pray, John

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<sup>15</sup>The Union subsequently abandoned pursuit of this grievance to arbitration, opting to file a ULP charge. Respondent did not agree to deferral of the charges under *Collyer Insulated Wire*.

Eastman, and Broussard. Also present was USW International Representative Carl Turner. Present for Respondent were Brighenti and Blair. Brighenti continued to adhere to the view that MBS was not negotiable. Brighenti gave a brief “overview” of MBS, including advising the Union that under MBS, every DART recordable event requires him to speak with Weihl, Respondent’s Head of Management World-wide and a Senior Executive. Brighenti advised Turner and the Grievance Committee that MBS did not have anything to do with the Union, that it was “just management dealing with safety” (Tr. 349-350, Turner). Brighenti reiterated his view that MBS was not negotiable, noting specifically that their meeting on March 19 was a “discussion” not negotiations, and that he would not bargain over MBS. (Tr. 350, Turner; GC 35). A one-page summary sheet was provided to the Union. (GC 7).<sup>16</sup>

Turner expressed his concerns that the program would impact bargaining unit employees, and also that Respondent had failed, in introducing MBS, to properly utilize the Safety Committee as required by Article 16.07.<sup>17</sup> Turner suggested that the issue could be resolved if Respondent were to “sit down” with the Safety Committee, and if they were “ok” with it, the Union would be too. “Otherwise,” Turner stated, “there would be a “Step 4” grievance.” However, Garfield clarified that the Safety Committee would also have to check with the Union.

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<sup>16</sup> The document describes the impact of MBS for supervisors and managers, summarizing: “Enhanced training program for supervisors and managers to help them effectively manage safety in the workplace,” and “Provide tools for supervisors and managers to use to help identify, control and provide feedback on safety performance.” The summary characterized the impact on employees “raising employee awareness as to training that was provided to supervisors and managers,” and lists “daily checklists, (similar to PMs),” and “employee coaching.” “PM” stands for “preventive maintenance.”

<sup>17</sup> Article 16.07 includes its function shall be to analyze existing safety practices and rules, make recommendations for improvement, and make recommendations for the adoption of new practices and rules, review proposed new safety programs developed by the Employer and review disabling injuries which have occurred in the plant and make recommendations to prevent further recurrences.

Taryn Blair followed up this meeting with an email. Her follow-up notes state, "Company does not feel that the roll out of Management Based Safety is negotiable, however, is willing to discuss with the Union Committee as well as the Safety Committee." (R 6).

Given Respondent's refusal to negotiate, the representations from Respondent that MBS only affected supervisors and managers, and the absence of information reflecting any direct impact on employees terms and conditions, the Union at that point opted not to pursue its grievance further. As there had been no injury accidents between implementation and March 19, the Union had no information to substantiate Turner's fears that MBS was a "blame the worker" program. However, as discussed in more detail below, Turner's view changed in July when Respondent started requiring employees to sign a "board" and take responsibility for their safety.

**3. The Rollout of Checklists, White Boards and New Processes under Threat of Discipline, with Continued Lack of Union Input, A New Request for Bargaining and a Request for Information.**

Between February and July, Respondent's supervisors and managers were continuing in their efforts to meet the target dates for implementing the later stages of MBS rollout, which included preparing the "Safety Checklists" for the processes that each supervised. The Safety Committee had no involvement in the preparation of these checklists. (GC 2; R 25; GC 8; Tr. 171, Eastman; Tr. 55, Brighenti).

The plant had a scheduled shutdown in July, and when employees returned, they learned that they would be expected to sign-off on "Safety Checklists" using a system of "white boards." Under this system, employees were expected to review the individualized checklist that corresponded to their work functions. If they were in

agreement with all of the statements listed on the checklist, they were to place their initials on the white board for that day. In essence, one's initials on the white board were a proxy for a signature on the checklist for that day. If the employee did not agree, they were required to submit an "EHS alert form" to indicate the "unsafe condition" that they felt existed. (GC 9).

An example of the Safety Checklist is included in the record as GC 8. Dozens of similar checklists were created, as there was one for each machine or function in the facility. Neither the Safety Committee, nor the Union had any role in the evaluation of tasks that was required for the creation of the checklists. (Tr. 55, Brighenti). Employee John Eastman took issue with several of the statements that he was being required to "agree with" on his safety checklist. For instance, he was expected to agree with the statement, "I have evaluated the tasks associated and currently, there are no tasks that cause me pain while performing this job." (Tr. 173; G 8). Eastman explained that he felt that such an acknowledgement might hold him liable, for instance, if he were to have an issue with carpal tunnel syndrome or something like that. His concern was that by signing-off, the blame would be placed on him. (Tr. 171-172, Eastman). Another statement that he had an issue with was, "I've been properly trained on the safe methods of operation for the [OD Grinder]m and will not take risks or shortcuts." His objection stemmed from the fact that he had no way of knowing whether he had been "properly trained in the 'safe methods.'" He also had no way of knowing whether or not he might get hurt on his machine in the future. (Tr. 173). As a member of the Safety Committee who handled accident investigations, Eastman at times made recommendations for enhancing the safety of the procedures for operating the

machines. As a result, he knew more than most that the methods could often be made safer, and were not absolute. (Tr. 163-164).

Based on his ambivalence respecting the statements on his checklist, Eastman objected to putting his initials on the white board, and opted to use a check mark, or his employee number instead. He was threatened with discipline for this by his supervisor Sean Jewel. (Tr. 200-205, Eastman; Tr. 622-624, Huttenlocher). Another grievance was filed.<sup>18</sup> Respondent then clarified the process by issuing GC 10, as a new "Shop Rule." This new rule required that employees were to place their initials on the white boards to indicate that they have completed their check lists. If the area was in order and there were no safety issues, their initials should be made in *green* on the white board. If there was a safety issue in the area, they were to place their initials in *red*.

In light of these newly implemented and un-negotiated changes, USW Representative Turner sent an email to Taryn Blair, on July 16, at 11:30 a.m., requesting to bargain over the new procedures, and their effects, and seeking information related to them. Turner explained that he renewed the demand to bargain over these procedures because Respondent had not followed through as represented in the discussions on March 19, and based on these new developments, he had come to see that that additional changes, which *did* affect employees, were occurring. Blair replied to Turner's email the same day, with a copy to Brighenti, advising that she would be on vacation the following week and that she was, therefore, forwarding it to Brighenti,

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<sup>18</sup> Note that while R 4 and R 5 were admitted into the record, the Exhibit copies mistakenly include the attached "Incident Report," even though that was not part of the grievance, and he had not seen it before. Accordingly, this page should be disregarded.

with whom Turner should communicate directly. (GC 20).<sup>19</sup> Shortly thereafter, Brighenti arranged to have a conference call between members of the Union Grievance Committee, Amy Morissette, and himself since he was not at Lyndonville at the time. Garfield reiterated the Union sought to bargain over MBS. Brighenti advised him that he would not bargain MBS, that he'd arranged the call because the Union wanted information on the program and to discuss MBS, and that's what the call was for. (Tr. 481-482). The call ended because they could not agree on its purpose, and no bargaining occurred. Additionally, no responsive information was provided.

#### **4. The Supplanting of Article 16.07 and the Cooperative Investigatory Process.**

With the implementation of MBS, the practice with respect to the investigation of accidents changed significantly. Union-side Safety Committee Members no longer received copies of accident reports, or any other forms used for the investigation of the incident. (Tr. 93-94, Brighenti; Tr. 158, 193-194, 199, Eastman). This stemmed from the fact that MBS provided Respondent's managers and supervisors with a comprehensive set of tools for assessing the "root cause" of safety related incidents, as such analysis would allow them to identify and eliminate such causes -- be they equipment, or employee behavior based.<sup>20</sup> Among the available tools was a new process for investigating accidents using an "Incident Investigation Form" (herein "Investigation

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<sup>19</sup> As it turned out, Blair never returned, having resigned by the end of July.

<sup>20</sup> See GC 42, "Incident Investigation Form, Revision 0" at p. 3, "Step 2: From the above list, choose which causal factor, if eliminated will permanently prevent this incident from ever occurring again?" and "Step 3: What corrective actions will be taken to permanently eliminate the incident causal factors and other contributing causal factors?" These steps are taken from the results of the associated "Incident Analyzer Form" which is another new tool under MBS. Note: this lengthy document is not internally paginated.

Form”), which replaced the prior process using accident reports, pursuant to Article 16.07. (Tr. 91, Brighenti; Tr. 198-199, Eastman).

The new Investigation Form incorporates by reference some of the other new tools available under MBS, including the “Root Cause Analysis,” a “Problem Solving Procedure,” and the “Incident Analyzer Tool.” (See also, GC 17, p. 3-4). The Union had no input into the creation or use of these new tools, and the Union Safety Committee Member was not permitted to cooperate or participate in their utilization while investigating OSHA-recordable accidents. The record establishes that since the implementation of MBS, there were a number of OSHA-recordable incidents. However, the established practice under Article 16.07 was not adhered to in any of them.<sup>21</sup>

The Union was not initially aware of the extent to which MBS impacted the investigation of accidents or the related disciplinary process until August of 2010, for two reasons. First, Respondent refused to provide any detailed information about MBS. Therefore, the Union had no way of knowing the extent to which MBS would impact existing terms and conditions, including the process for investigating accidents, or the enforcement of safety violations. Second, from what the Union or the Safety Committee knew, there had not been any safety related incidents that triggered the new practices.<sup>22</sup> That changed after August 24, when Doug Noyes had an OSHA-reportable injury while drilling a piece of sheet metal, causing a laceration to his hand, and sending him to the hospital for stitches.

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<sup>21</sup> See GC 24, reflecting “recordable” incidents/injuries with Rodney Brill on 8/11, Doug Noyes on 8/24, David Brousseau on 3/12, Thomas Keithan on 8/6/10, and Ken Wilkins on 10/27.

<sup>22</sup> Eastman of the Safety Committee testified the he did not receive any incident reports for recordable events until late August, after the Union filed a grievance over this issue, and made an information request.

Neither the Union nor the Safety Committee was provided any accident report or other investigatory document for Noyes, and at that point, was unaware that Respondent had discontinued the use of this form. (Tr. 159-160, 162, Eastman). Instead, both the Union and the Safety Committee first viewed an “Incident Report” concerning Noyes when it was posted at the facility, a few days after his accident. (GC 11; Tr. 160, Eastman). Moreover, this posted document announced that a “disciplinary suspension for failure to wear PPE is pending and will be executed on 8/30.” (GC 11). No Union Safety Committee member participated in the investigation of Noyes’ accident.

A second OSHA-recordable injury occurred on October 27, when unit employee Ken Wilkins lost a finger. In this case as well, no accident report was completed. Instead, Respondent utilized the new Investigation Form, which does not allow for participation of the Union Safety Committee in the investigation.<sup>23</sup> The Investigation Form calls for the employee to describe the incident by providing the “who, what, when, where, why and how, in their hand writing.” (GC 13, emphasis in original). Mr. Wilkins was unavailable to do this for several weeks due to the injury to his hand. Nonetheless, Wilkins’s Supervisor, Tim Morissette, completed the initial report, and initiated the “Root Cause Analysis” (herein RCA), using the Problem Solving Procedure on October 28. (GC 13).<sup>24</sup>

Supervisor Tim Morissette explained that he “briefly” discussed the accident with Mr. Wilkins on the way to the hospital, and, when he returned to the plant, participated

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<sup>23</sup> It does not appear that the Investigation Form was used for the accident involving Doug Noyes, as one was not provided to the Union, nor entered into the record by Respondent. Brighenti admitted in testimony that GC 13 may have been the first time that form was used.

<sup>24</sup> The RCA and Problem Solving Procedure are prescribed by the Investigation Form.

in the investigation that occurred. (Tr. 605). He was then part of the team that performed the RCA and “Problem Solving Procedure” as prescribed by the Investigation Form. (Tr. 605; GC 13). As Morissette explained, he was part of the team and “did a good share of the typing” as the process is done electronically, with the team members responding to a number of prompted questions. The listed team members were Tim Morissette, Rick Brighenti, Mike Oliver, and Mike Vallieres, none of whom are on the Safety Committee.<sup>25</sup> Morissette testified that he has participated in several RCAs “during the last year” --- but none before then. (Tr. 607).

On November 22, several weeks after the accident, Wilkins, having been out of work due to the severity of the accident, provided his account of the incident for Respondent. As he was unable to write, his version of events was scribed by Union Grievance Committee member Terry Prey. (Tr. 603-604, Morissette).

#### **5. The Suspensions and Termination of Noyes and Wilkins for Safety Violations Under MBS and “Procedures for Corrective Action For Safety Violations”.**

On January 11, 2011, Brighenti issued a letter setting forth a decision to suspend Wilkins for five days, pending termination “effective immediately.” (GC 15). The letter begins by stating “the purpose of this memo is to recap the incident and subsequent investigation of your injury on October 27, 2010.” The letter goes on to describe the incident that occurred, training that Wilkins had received, the fact that Wilkins had been “wearing all required PPE,” and that “an RCA was initiated by Tom Morissette” and others on October 28, 2010. The letter makes clear that Respondent determined that

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<sup>25</sup> Morissette’s first recorded sentence in describing the incident was to state that “Ken while operating the square grinder had a jammed part and while retrieving the jammed part with his hand did not follow proper procedure.”

the injury occurred as a result of Wilkins alleged failure to comply with “training steps and requirements,” and was a “blatant disregard for safety procedures” Significantly, Respondent’s letter references **“the posted EHS policy/procedure when addressing corrective actions”** in finding that Wilkins injury was a “serious incident,” and advising that Wilkins would be suspended for five days pending termination. (GC 15). (Emphasis added).

After receiving this letter, on January 12, 2011, the Union requested, among other things, to receive “a copy of the EHS Procedure/Policy mentioned in Respondent’s letter (GC 15) provided at the suspension meeting.” (GC 41). In response, Respondent provided the Union with GC 16, a five-page document that none of the Grievance Committee had ever seen or been aware of prior to that date. Entitled “Work Instructions for Corrective Actions,” the last two pages of which are a “Discipline Decision Tree for Safety Violations.” (Tr. 299, 648, 650, Garfield).<sup>26</sup> A more complete version of the document was later introduced into the record as GC 32, and is entitled “Procedures for Corrective Action for Safety Violations” (herein, “Procedures”) (The last five pages of GC 32 are the same as GC 16).<sup>27</sup>

Notably, the Procedures document includes a “definitions” section, which defines a “Serious Violation[s]” as “one that is likely to result in a severe disabling injury such as amputation, spinal injury, broken finger or limb, unconsciousness or death.” A number of examples of “serious violations that warrant corrective action” follow. The listed examples include “bypassing safety devices or machine guards,” “Improper use of

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<sup>26</sup> It appears that what the Union should have been provided was GC 32, which represents the complete document, and includes “Procedures for Corrective Action and Safety Violations.”

<sup>27</sup> The Union did not receive the complete GC 32 in response to their information request, GC 41.

equipment or using inappropriate equipment for the task which is likely to result in serious injury,” and “Working under elevated loads.” Also defined are “Other Violations.” These are “those that are not likely to result in severe disabling injury such as amputation, spinal injury, broken finger or limb, unconsciousness or death.” Listed examples include “Poor housekeeping creating a trip, fall or other hazard,” “Improper use of equipment or using wrong equipment for the task,” and “Using tools or equipment known to be in disrepair.”

The “Appendix” to Procedures is a “decision tree” which sets forth a flowchart that Respondent is to use in determining the appropriate corrective action to take against an employee for a safety violation, ranging from verbal warning to termination, depending on whether the violation is “serious” or “other” and, other criteria, including whether the employee has received a “serious” or “other” violation within the past year. In cases where an employee has two serious violations within the past year, the tree calls for termination. Notably, the range of discipline options varies from the established progressive discipline system previously in place at the facility, in that the progression is: 1) Verbal Warning; 2) Written Warning; 3) 3 day suspension without pay; and 4) Termination. The “Work Instructions” portion of the “Procedures” document includes a separate decision tree. Brighenti admitted that the procedures for discipline outlined in GC 32 supplemented those previously in place. (Tr. 265).

Eric Huttenlocher’s explained the basis for the decisions to suspend Noyes and to suspend and ultimately terminate Wilkins, making clear in both cases that he relied on the process mandated by the Procedures memo. His explanation illustrates some striking ways in which the existing disciplinary procedure for alleged safety violations

was altered under MBS. For instance, Huttenlocher explained that, as part of the decision making process, he looked at Noyes' medical personnel records dating back three to four years and *determined that Noyes had had multiple prior hand injuries.* (Tr. 628, Huttenlocher).<sup>28</sup> He further explained that "the process" called for him to look at whether the person was trained to do the operation they were involved in, and whether they were following established procedures or protocols. If the employee failed to use the established procedure, Huttenlocher applied the decision making tree, which guides on what steps of discipline to take". (Tr. 629; GC 32; R 21).

Under this "decision making tree", Huttenlocher explained that the first step is to "go through the decision tree for safety violations." In so doing, he determined that Noyes had violated safety protocol by not wearing PPE which was "recommended," but not required. Huttenlocher explained that he considered "training documents" that Wilkins had signed off on. He further explained that "the investigation indicated that he failed to put a switch from an auto into a manual position, which is part of the requirements from going into the area to remove a jammed tap." Relying on the decision tree, Huttenlocher determined that Wilkins had engaged in a safety violation that met the definition of "serious," which gave Respondent the option, depending on its severity, to escalate it, and it was escalated to a termination at that point.<sup>29</sup> (Tr. 630-632; GC 32). Huttenlocher explained that he relied in particular on Wilkins training, the fact that others had operated the machine safely for a long period of time, and "his decision to reach in and remove that tap without shutting it down and making sure it was safe

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<sup>28</sup> He admitted on cross that none of the hand injuries had resulted in discipline. (Tr. 642).

<sup>29</sup> Huttenlocher relied on the reservation of "Managerial Discretion" which he explained allows management to suspend an employee for a first time offense, or terminate, "for first time serious safety violations should circumstances warrant."

before doing so, really was his decision to disregard the requirements to move through the process” (Tr. 634; GC 15). Huttenlocher acknowledged that a VOSHA inspector made a finding that the label on the auto switch at issue was “worn,” and that VOSHA was intending to issue a citation against the company based on poor guarding, and Lock Out Tag Out. (Tr. 640). Brighenti was aware of these findings as well. Huttenlocher explained that these findings were not considered, because the decision to discipline was made before the inspector had visited the plant.<sup>30</sup>

It is undisputed that the “Procedures” memo relied on in determining the appropriate level of discipline for Noyes and Wilkins was never negotiated with the Union. Moreover, there is no evidence that these Procedures were ever used to determine the appropriate level of discipline prior to the implementation of MBS in 2010. (GC 32; R 21). As noted, the Union had never seen any part of GC 32 prior to about two weeks before the hearing, when Huttenlocher responded to an information request. (Tr. 299, Garfield).<sup>31</sup>

Several Respondent witnesses testified that some portions of GC 32 had been posted on the bulletin board outside Human Resources back in July and or September of 2009. However, none of the Grievance Committee was aware of that posting, and the Union was not otherwise made aware that it was there. Supervisor Tim Morissette testified that he believed he seen some parts of it posted at the bulletin board, excluding

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<sup>30</sup> GC 15, the termination letter, is dated January 11, 2011.

<sup>31</sup> Strikingly, GC 16, the “Work Instructions” section of the Corrective Procedures that includes a decision tree, states in the first paragraph of the document “The following Work Instructions on Corrective Action should be used as applicable and necessary on a location-by-location basis. **These procedures are subject to bargaining unit and Worker’s Council negotiations, so long as they supplement, or replace, existing corrective action for Safety Violations.**” (Emphasis added). Brighenti admitted that these policies supplement the existing policies. (Tr. 264-266). Neither Brighenti, Morissette, nor Huttenlocher had any explanation why the Union was not given the opportunity to negotiate them.

the flow chart (Tr. 601). Morisette claimed that a Union steward, Kevin McLeod, was present at that Lead Board meeting. No evidence was presented that the Union steward actually read the partial posting, stewards are not part of the negotiating committee. (Tr. 601).

Supervisor Sean Jewel testified that he observed some part of the policy posted on the Human Resource bulletin board, which is located between Human Resource and what used to be the supervisor's office. Like Morisette, he did not recall seeing the "flow chart" portions of the procedure posted. (Tr. 610).

### **C. The Information Requests**

#### **1. The April 5, 2010 Request for Shipping Department Information**

Huttenlocher acknowledged that after Blair resigned, he learned that the information request concerning employees transferred to the shipping department made by the Union on April 5, 2010 had not been fulfilled. He provided that information to Eastman on August 24, 2010. The information sought was relevant to a Memorandum of Agreement between the parties (GC 26), in which it was agreed that Respondent would supplement overtime hours in the Shipping Room with temporary help from outside the Shipping Room, on an as needed basis, and that if "in any continuous ninety (90) day period, the cumulative hours of the transferred employees is equal to or greater than 40 hours each week, then a regular full-time position would be opened."<sup>32</sup>

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<sup>32</sup> GC 38, p 7 reflects an email exchange between Garfield and Blair, in which Garfield states that "Also Rick had answered that he was not going to fill any jobs in the shipping room. At this time employees are still being transferred there....We are once again asking for the filling of the appropriate amount of jobs in that classification per memo of agreement." See also GC 38, last page. By the time the information was received, the parties were in the midst of negotiating a new bargaining agreement, and by the terms of that agreement, the issue has become moot.

## **2. The May 26 Request for Information Regarding Slip Resistant Shoes**

Huttenlocher acknowledged that he learned the information request alleged in paragraph 10(b) of the Complaint had been unfulfilled as well. (Tr. 620). The request, made May 26, 2010, asked the basis for Respondent's position that the tread design for slip-resistant shoes that Respondent sought to implement was better than the VOSHA approved design that had been in place to that point. The Union also sought to know the names of all individuals that Respondent was allowing to deviate from the newly proposed and implemented policy. On June 9, Blair sent an email to Eastman reiterating Respondent's view that the policy was not a negotiable item. Although it was not stated, implicitly Respondent seemed to be offering this as a reason why they did not have to provide the requested information.

Huttenlocher acknowledges that Respondent finally provided some of the requested names to Union President Garfield in about November 2010. (Tr. 621, Huttenlocher).

## **3. The June 2 Request for the Ergonomic Report on the Hand Chamfer Position.**

In its Answer, Respondent admits that on about June 2, 2010, it received the written request for "A copy of the documented ergonomic restrictions for the Hand Chamfer job."<sup>33</sup> The request adds "we keep hearing max four hours per day per operator."<sup>34</sup> Eastman never received a copy of the hand chamfer report. (Tr. 166-167,

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<sup>33</sup> A copy of the request is attached as Exhibit C to GC 1(v) – the Order Consolidating Cases Consolidated Complaint And Notice of Hearing.

<sup>34</sup> Notably, GC 8, the Safety Checklist for the Hand Chamfer, includes the four hours per shift limitation.

Eastman; GC 28).<sup>35</sup> Amy Morisette confirmed that she was not to handle or accept these requests, and that she was not the conveyor of information between Respondent and Union with respect to the contract and things of that nature. (Tr. 519-520).

#### **4. The July 16 Request for Information Related to the MBS Program.**

As described above, this request for information accompanied Turner's request to bargain over the changes to the safety procedure made via email to Blair on July 16. This request is in the record as GC 20, and Respondent acknowledged its receipt. The record reflects that although significant documents responsive to this request exist, Respondent's only effort to respond was made via a teleconference with Brighenti, the Grievance Committee, and Morisette that occurred shortly after the request was made.<sup>36</sup> No new information was provided, however, in that call.

### **III. ARGUMENT**

#### **A. Summary of Argument**

Respondent's February 2, 2010 announcement of the MBS program and subsequent implementation of its various components violated Section 8(a)(5) of the Act. MBS is comprehensive set of components impacting several significant terms and conditions of unit employees' employment and as such, was a mandatory subject of bargaining. The program was announced by Respondent as a *fait accompli*, as Respondent took the position from the outset that it was not obligated to negotiate any

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<sup>35</sup> The cover memo to the Chamfer report and the fax date on the report itself, reflect that the report was sent (or potentially resent) to Respondent on September 20, 2010 (four months after the request was made), and that the initial jobsite evaluation occurred in 2005. The date of the report, which was presumably provided to Respondent at the time of the service, is dated March 15, 2005.

<sup>36</sup> A precise date was not given for the teleconference, but the record reflects that it was after the "checklists" had been implemented, and it was that implementation that prompted the request made in GC 20.

part of the MBS program or its effects on unit employees. As such, its offers to “discuss” the program were insufficient in meeting the obligation to bargain. Moreover, Respondent cannot prove its affirmative defense that the Union “contractually waived” the right to bargain over MBS, or the effects of the various components of MBS, by virtue of the management’s rights clause, the language of Article 16 of the applicable collective-bargaining agreement, the past practice, or bargaining history between the parties. Under applicable Board precedent, the language of the Articles standing alone fails to provide the requisite specific and unequivocal waiver. Moreover, the bargaining history and past practice reflect that there was not a mutual agreement to allow Respondent to unilaterally implement the unilateral actions contemplated by the various components of MBS. Accordingly, the waiver standard has not been met and Respondent’s affirmative defense fails.

Additionally, although the “Procedures for Corrective Action in Safety Violations” was not specifically identified among the newly created documents and processes that made up MBS,<sup>37</sup> the record reflects that Respondent’s first application of the Procedures memo occurred after the implementation of MBS, and that a component of MBS was stricter, consistent enforcement of safety violations, *using* the Procedures memo. Inescapable evidence of this occurs in the training materials, and the learning point that the only acceptable amount of safety rule/procedure infractions that the organization could accept annually was “zero.”<sup>38</sup> Moreover, Respondent had not previously given the Union notice or the opportunity to bargain this memo at the time it

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<sup>37</sup> A comprehensive set of the documents and procedures that make up MBS are in the record as GC 42.

<sup>38</sup> See also the additional examples from n.13, *supra*.

was first “rolled out” from corporate to Lyndonville via a conference call in mid-March 2009, or before it was assertedly “implemented” by posting it on a Human Resource bulletin board in September 2009. Under such circumstances, the implementation of these Procedures is a separate, independent violation of the Act.

Any claim that a separate allegation regarding the unilateral implementation of the Procedures memo is time barred must fail, because the Union did not have actual or constructive knowledge of the new policy until January 2011. Moreover, as this alternative theory of violation represents a motion to further amend the complaint, such a motion for amendment is properly granted, as all issues related to the allegation that the Procedures memo was unilaterally implemented without notice or an opportunity to bargain the procedures or its effects are closely related to the subject matter of the complaint, and all issues were fully litigated by the parties at hearing. As such, the amendment is proper under *Williams Pipeline*, 315 NLRB 630 (1994), and cases cited therein.

Finally, Respondent separately violated Section 8(a)(5) by failing to adequately respond to information requests made on April 5, May 26, June 2, and July 16, 2010. The information sought by the Union was presumptively relevant, as it concerned terms and conditions of employment for unit employees. Respondent failed to provide the requested information, without providing any timely and legitimate justification for such refusal or delay. Under well established Board and Court precedent, such conduct represents separate violations of Section 8(a)(5) of the Act.

**B. MBS is a Comprehensive set of Components Impacting Several Significant Terms and Conditions of Unit Employees' Employment, and as Such, was a Mandatory Subject of Bargaining.**

Section 8(a)(5) of the Act, considered along with Section 8(d), essentially mandate employers to bargain in good faith over wages, hours, and other terms and conditions of employment. Generally, it is an unfair labor practice for an employer whose employees are represented for collective-bargaining purposes to make changes in mandatory subjects of bargaining without first providing the collective-bargaining representative with an opportunity to bargain with the employer about such proposed changes. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

The Board has long held that the circumstances in which discipline will be imposed for violations of employer policies is a mandatory subject of bargaining. See *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904 (2000). Similarly, changes made to a system of progressive discipline are mandatory subjects of bargaining. See *Toledo Blade Co.*, 343 NLRB 385, 387 (2004); see also, *Migali Industries*, 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); *Electri-Flex Co.*, 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining).

The Board has also long held that a change in the method by which an employer investigates suspected employee misconduct is a change in terms and conditions of employment, and therefore a mandatory subject of bargaining. See *Medicenter*, 221 NLRB 670 (1975) (imposition of new technology to assist the employer in determining the cause of a sharp rise in work place accidents, mandatory subject); *Johnson Bateman*, 295 NLRB 180 (1989) (employer's requirement of drug/alcohol testing due to

increasingly high number of workplace accidents and increased costs, mandatory subject); see also, *Windstream*, 352 NLRB 44, (2008), aff'd on remand 355 NLRB No. 74, 2010 (employer's implementation of "zero tolerance" ethics and integrity policy mandatory subject). In finding such changes to be mandatory subjects of bargaining, the Board considers that the new processes vary the mode of investigation, and the character of proof on which an employee's job security might depend. *Johnson Batemen*, supra at 183. Moreover, an Employer cannot alter an agreed upon term of an existing collective-bargaining agreement without the union's consent, as such a change represents a violation under 8(d).

Here, the record evidence clearly establishes that various components of MBS substantially impacted employees' terms and conditions of employment. The two most dramatic ways that this occurred were interrelated -- the investigation of accidents, and the enforcement of safety rules. Additionally, the evidence is undisputed that under MBS, employees, like Eastman, were obligated to indicate their assent to statements that they did not necessarily agree with, under threat of discipline.

Before MBS, and in accordance with Article 16, a Union Safety Committee member was given immediate notice of an OSHA-reportable workplace injury, and was allowed meaningful participation and input into both the record of the accident, and the measures to correct the conditions that might have allowed it to occur. Notably, before MBS, these measures never included discipline as the record is undisputed that there had been a significant number of injury accidents over the years, yet no employee had ever been disciplined as a result of such an accident before MBS. (Tr. 297-298, Garfield; GC 17, 44, 45, 46, 48, 50). The documents and analytical processes that

supplanted the accident report process precluded involvement of the Union Safety Committee member. Notably, even if a Union-side Safety Committee member were to undertake their own investigation, those observations and records are not part of the official document that is used to identify and weigh the root causes of an accident, or the basis for the decision to institute applicable and appropriate corrective measures, which now *included discipline*. Moreover, under MBS, the fact of an accident's occurrence became *per se* evidence of a safety violation. Given that MBS called for zero tolerance of safety violations, when the new MBS tools ruled out equipment malfunction or training as the cause of an accident, discipline would issue. This is new. In supplanting the prior process of accident investigation, MBS also effectively changed the method by which Respondent investigated potential employee misconduct, since accidents are now evidence of safety violations. Given that under MBS, an employee's job security could now depend on having been involved in an accident, the exclusion of the Union Safety Committee member from the investigation became even more significant a change. Under applicable Board precedent, such change is clearly a mandatory subject of bargaining.<sup>39</sup>

In addition to change in the methods for investigating suspected employee misconduct, after MBS was implemented in 2010, enforcement practices for alleged

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<sup>39</sup> A stark example of this change is reflected in the contrasting treatment of Noyes, Wilkins and Gordon. Huttenlocher testified that the determination to discipline Noyes hinged heavily on "his decision to reach in and remove that tap without shutting it down and making sure it was safe before doing so." (Tr. 634). Wilkins termination letter reflects that his accident was "avoidable." In contrast, the accident report for Gordon reflected that he "could [have] prevented this type of accident or injury." Like Wilkins, he tried to remove a tap while the machine was still turning.

safety violations became significantly more aggressive.<sup>40</sup> As MBS relates to discipline, a practice of “100% safe” included “zero tolerance” of safety violations, and would necessarily require a change from the historically liberal treatment that safety violations had received at the plant. Instead of the long-standing system of progressive discipline, Respondent now relied on the “Procedures” memo, which compelled certain levels of discipline based on criteria and definitions never before considered. The “decision making tree” of the Procedures Memo does not even reference the process of progressive discipline that had been in place for years prior to MBS. Accordingly, the MBS investigatory tools, in combination with the Procedures memo, completely supplanted the existing disciplinary practices for safety violations.<sup>41</sup> Accordingly, under Board and Court precedent, MBS was a mandatory subject of bargaining based on this change as well.

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<sup>40</sup> The undisputed evidence establishes that prior to February 2010, Respondent *never* escalated the progressive disciplinary process more than one step for safety violations. (R 22; GC 39). Respondent’s own evidence of prior safety discipline, as well as Garfield’s electronic spreadsheet, and description of the process by which disciplinary issues were resolved, make clear that, prior to MBS, the criteria for determining the level of discipline in safety violations were simple and straightforward. They included an investigation into whether the person had any prior infractions in the prior year, and a determination as to which step the employee was at in the progression. Lock out/tag outs sometimes got a single extra step. Garfield and the Human Resource Director worked cooperatively in assessing these criteria. Prior to February 2010, to the extent that additional factors were considered, they were used to further excuse the violation, and tended to support “backing out” an otherwise valid discipline. It was a relatively straightforward system of progressive discipline, and its application to safety was fairly lenient. No matrices, no flow charts, no definitions.

<sup>41</sup> One need only consider the stark contrast between Respondent’s handling of the injury accident of Bob Gordon on 9/11/09, to that of Ken Wilkins for an illustration of the change. Both sought to remove a tap from their machine while it was still operating. Both had been trained on their machines. Both made a decision to do what they did. Both suffered hand lacerations, and went to the hospital. Gordon received no discipline whatsoever, Wilkins was suspended, then terminated.

**C. Respondent's Announcements Regarding MBS Were Only Informational and Did Not Suffice to Provide an Adequate Opportunity for Bargaining**

Before taking any unilateral action on a mandatory subject of bargaining, an employer is required to provide the Union with advance notice and an opportunity to bargain. *Ciga-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017. When notice is given to a union of a proposed change, and it is apparent that the employer has no intention of changing its mind, that notice is nothing more than a *fait accompli*. Such notice has been found to be merely informational and fails to satisfy the requirements of the Act. *Gannett Co.*, 333 NLRB 355 (2001) (citing *Ciba Geigy Pharmaceutical Division*, supra).

Here, the meetings held with unit employees on February 2 were merely an announcement of a *fait accompli*. The Union was not given advance notice of MBS. Rather, all employees were being notified of the its implementation at the same meeting. Grievance Committee members were simply included among them. The presentation was not offered as a "proposal;" it was merely informational. Indeed, the presentation was part of the program itself, since a primary aim of MBS was to raise employees' awareness of safety as a priority issue, and why. Furthermore, the Union immediately requested to bargain, and Respondent promptly responded that in their view, the issue was not negotiable. The Union was privileged to believe that Respondent meant what it said. Additionally, the record evidence established that Respondent had a fixed implementation schedule for the rollout of the MBS components, which is strong evidence favoring finding a *fait accompli*. See *Roll & Hold Warehouse*, 325 NLRB 41 (1997) at 42-43, enfd. 162 F.3d 1349 (7th Cir. 1998) (finding that union request to bargain would have been futile where employer's witness testified

at hearing that he believed employer had no obligation to bargain over changes); *S&I Transportation*, 311 NLRB at 1388-1389 (finding fait accompli where employer's testimony at hearing revealed employer's "fixed position to implement the changes as announced" because of its grave financial condition).

It is anticipated that Respondent will argue that the Union somehow waived its right to bargain by not promptly availing itself of Respondent's offer to "discuss" MBS. However, this can not operate as a defense, because in the same February email offering to discuss, Respondent advised the Union that it did not view the issue as negotiable. Moreover, Respondent *never* waived from this view. Under such circumstances, it is not a defense for Respondent to claim that the Union failed to pursue bargaining -- because Respondent made clear such pursuits would be futile -- it was not willing to bargain. Moreover, any time they did meet to "discuss" MBS, whether in person, or by phone, Brighenti reiterated that he was not negotiating. Thus, these meetings were not a legitimate "opportunity" to bargain at all.

**D. The Union Did Not Contractually Waive the Right to Bargain Over the Comprehensive Changes Brought About by the Management Based Safety Program.**

In *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board reaffirmed that the standard for determining whether an employer is privileged to take unilateral action on a mandatory subject during the life of a collective-bargaining agreement is "clear and unequivocal waiver." In that case, the Board summarized:

The clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. The standard reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working

conditions that might precipitate labor disputes. (*Provena*, at 811)

Pursuant to this standard, a previously negotiated contract provision will be found to constitute a waiver of the right to bargain over a unilateral change only if an express provision of the contract, or the parties' past practice and bargaining history, "unequivocally and specifically" reveals a mutual intention to permit the unilateral action. *Provena*, at 811. The language of a collective-bargaining agreement will effectuate a waiver only if it is 'clear and unmistakable' in waiving the statutory right. *Chesapeake & Potomac Telephone Co. v NLRB*, 687 F 2d. 633, 636 (2<sup>nd</sup> Cir. 1982). With respect to bargaining history, the Board has held that a union's past acquiescence in unilateral changes does not operate as a waiver of its right to bargain over such changes in the future. *Bath Iron Works*, 302 NLRB 898, 900-901 (1991) (and cases cited therein). See also, *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995).

Clearly, a contractual waiver will not be lightly inferred. It is an affirmative defense, and as such, it must be pled, and it is Respondent's burden to prove that it exists. *Allied Signal Inc.*, 330 NLRB 1216, 1228 (2000); *General Electric Co.*, 296 NLRB 844, 857 (1989). Consistent with this high burden, the Board has long adhered to the view that the language of a broad management's rights clause will not suffice to establish a waiver of the statutory right to bargain regarding a *particular* employment term. As the Board explained in *Provena*:

granting an employer the right to act unilaterally with respect to employment terms that are subject to bargaining under the Act is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. (Citing *C & C Plywood*, 148 NLRB 414, 417 (1964) (Internal citations omitted).

Here, the management rights clause is broad and general, granting management the right to “suspend and discharge,” but is limited by Article 6, which provides that no discipline or discharge be taken without just cause. Applying the precedent cited above, this broad language is insufficient to find the requisite waiver.

Unlike the broad managements right clause, the Safety and Health Article bears slightly more relevance to the employment terms about which unilateral action is claimed. In *Allied Signal*, 307 NLRB 752 (1992), the Board previously considered whether safety language quite similar to the contract language at issue here operated as a waiver. In *Allied*, the Employer asserted it was privileged to implement a change in the existing “no smoking policy.” The Board considered the following clauses from the *Allied* contract on the question of waiver:

## XXI. SAFETY, HEALTH AND GOOD HOUSEKEEPING

### A. Safety and Health

*The Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. An employee shall draw safety hazards to the attention of the immediate supervisor who shall review the hazard with the Safety Department. If the job is considered safe by the supervisor and the Safety Department, the employee shall be required to perform it. Where a Safety representative is not available on the second and third shifts, the safety hazard will be reviewed by the shift superintendent and a committeeperson if the foregoing conditions have been satisfied and the circumstances warrant review. However, the matter may be the subject of an immediate grievance. The Company, as it deems necessary, may have the Medical Department make such physical examinations of its employees as considered advisable to determine the physical fitness of employees for their jobs and to determine any health hazards. The Company will continue to provide necessary protective equipment for the use of employees. The chairpersons of the aerospace and skilled grievance committees will act as the Union's advisory committee to promote and assist the Company in maintaining a safe and healthy place to work. This committee will bring to the attention of the Company any unsafe or unhealthy conditions in the plant. (Identical language in italics).*

## XXXIII. DURATION

B. During the term of this Agreement neither party shall demand any change in this Agreement, nor shall either party be required to bargain with respect to this Agreement, nor shall a change in or addition to this Agreement be an objective of or be stated as reason for any strike or lockout or other exercise of economic force or threat thereof by the Union or the Company.

Significantly, the Board in *Allied* declined to find that the language of the contractual Safety and Health clause, *by itself*, constituted a waiver. Instead, the Board ultimately affirmed that a waiver existed, based on the ALJ's finding that, over a 19-year period, the Union had failed "to ever file a grievance contesting Respondent's contractual basis for unilaterally implementing the various smoking restrictions over that time period." In sum, the finding of a waiver in that case, relied heavily on a construction of the language at issue in the context of a historical practice of permitting the Employer to make *precisely the type of changes that were at issue in the ulp case* – changes to the smoking policy.

Here, the language of Article 16 does not speak specifically to the employment terms that are impacted by MBS. The language permits Respondent to "continue to make reasonable provisions" for the safety and health of employees (16.01), and speaks of the parties "agree[ment] to cooperate in the *maintenance of the Employer's safety program* and in the enforcement of such reasonable safety and health rules as may from time to time be established by the Employer." (16.05) It lacks any specific reference to a progressive disciplinary system. Moreover, the language that the parties agree to cooperate "in the maintenance of the Employer's safety program" suggests that the program itself is fixed, and at most, a rule could be added "from time to time." Thus, this language is insufficient to find a waiver of the right to bargain over a comprehensive safety program that supplants existing contract language, and completely upends the

existing system of progressive discipline. This language makes no explicit reference to the system of discipline, or progressive discipline that is being used, and does not grant any explicit right to alter that system.

Article 16.07 is specific that “all OSHA recordable accidents requiring medical attention with the potential for lost time will be investigated by no less than two members (one each from the Union and Company) of the Safety Committee and the Department Supervisor.” Thus, while this language is quite specific, it begs the question of how Respondent could arguably contend that Article 16 authorizes it to eliminate the precise requirements therein, as the process under the MBS investigatory tools clearly do. In any event, this language certainly cannot be construed as authorizing Respondent to unilaterally eliminate this requirement. In short, the language of Article 16 alone does not provide the express waiver necessary for Respondent to meet its burden.

Additionally, the bargaining history and past practice does not “unequivocally and specifically” reveal an intention to authorize the unilateral actions.<sup>42</sup> To the contrary, Former President Gammell’s testimony regarding the added language of 16.07 makes

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<sup>42</sup> Respondent entered into the record a number of documents which it offered to show evidence of waiver. However, the fact that the Union may not have opposed every rule that Respondent proposed does not establish a waiver. As Garfield explained, “some of them [we] believed were a good thing.” (Tr. 286). Also, it was clear that Ms. Morissette, as EHS coordinator and the only witness offered by Respondent to testify regarding the alleged “past practices,” was not competent to testify about the labor relations of the parties, because she was not in the labor relations “loop.” She was not given copies of grievances, or cc:d on them, did not participate in grievance discussions, and it was specifically directed that she *not* be given information requests. Her only involvement with these issues was as Safety Committee Member for Respondent, but the agreement is clear that the Safety Committee *shall not handle grievances*. Thus, the evidence she offers was of very little probative value on the question of waiver, and should be given very little weight, particularly as compared to the undisputed evidence of past practice offered by the Acting General Counsel’s witnesses. Similarly, Morissette’s testimony regarding the “implementation” of R 11, the Safety Bypass Discipline Policy, reflects her lack of authority in the labor relations of the parties. If the policy really had any effect, they would have been able to issue discipline against Bob Gordon, regardless of the status of the “Procedures” memo. One suspects that she often drafted policies and placed them in the files to show VOSHA compliance, but there is no evidence that the policies had any real effect, or that she had any authority to enforce them.

clear that it was intended to protect the Union's right to fairly participate in accident investigations and reports. The testimony of Gammell, Garfield, and Eastman that grievances have been filed over safety rules and programs, and that such programs have been bargained, grieved, and effectively opposed by the Union negate any argument that the past practice reflects a "mutual intention" to allow the unilateral action. Clearly, the Union intended no such thing. Particularly relevant on this point is the evidence that the Union repeatedly opposed "safety programs" that rewarded some behaviors or penalized others. Thus, unlike the bargaining history and past practice in *Allied Signal*, the facts here clearly establish that the Union has actively opposed the unilateral implementation of safety programs and policies, and demanded and obtained bargaining of such programs. In light of this evidence, Respondent cannot meet its burden of proof, and no waiver can be found.

**E. The Procedures for Corrective Action in Safety Violations is a Mandatory Subject, The Union Did Not Have Notice or An Opportunity to Bargain, and this Alternate Theory of a Violation is Not Time Barred Under 10(b) of the Act.**

For all the reasons described above, the Procedures memo is a mandatory subject of bargaining. The record is undisputed that Respondent provided notice regarding these new procedures. Respondent raised 10(b) as a defense to the allegation that the Procedures for Corrective Action for Safety Violations were unilaterally implemented. The party raising Section 10(b) as an affirmative defense must establish that the filing party had actual knowledge or constructive knowledge of the unfair labor practice more than six months prior to the filing of the charge. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004). A demonstration of actual knowledge is self-evident, as it would require a showing that a union representative was

aware of the policy. Moreover, the Board will not impute a union steward's knowledge to the union for the purposes of triggering the 10(b) period where the steward had no role in matters relating to bargaining and employer had no reason to believe otherwise. *Brimar Corp.*, 334 NLRB 1035 (2001).

Respondent cannot show that the Union had actual knowledge of the "Procedures" memo, because there is no evidence that it was ever distributed to the Union, and the Union President credibly testified that no one from the Grievance Committee, which is the negotiating committee for the Union, ever saw the memo prior to when Respondent provided a *partial* copy of it in late January 2011.<sup>43</sup> Moreover, Plant Manager Brighenti conceded as much, in acknowledging just days before the hearing that "it was fair to say that the policy had never been implemented at Lyndonville."<sup>44</sup> Given that the Union did not have actual knowledge of this new policy, as a policy that was allegedly separate and distinct from MBS, until late January 2011, Respondent's cannot prove actual or constructive knowledge of the new corrective action policy, and the allegation is not time barred under 10(b).

**F. A Make Whole Remedy for Doug Noyes, Ken Wilkins and Anyone Else Disciplined Under MBS of the Procedures for Safety Violations is Properly Included in the Remedy.**

In *Great Western Produce*, 299 NLRB 1004, 1005 (1990), the Board held that where employees are suspended or disciplined as a result of an Employer's unlawfully implemented policy, an order requiring reinstatement and make whole is properly

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<sup>43</sup> In late January 2011, the Union was given a copy of GC 16. The complete document is GC 32.

<sup>44</sup> Brighenti was not a credible witness on any critical area. His testimony was often evasive, he often answered a question different than the one he was asked, in an obvious effort to avoid admitting critical facts. On critical inquiries, he would qualify by indicating a need to check his "precise notes." He is generally not to be believed on any critical point.

included as part of the remedy, unless the Employer can show that it would have similarly disciplined the affected employees even in the absence of the unilaterally implemented policy. Here, the issue has been fully litigated, and the evidence establishes clearly that prior to MBS, employees Noyes and Wilkins would not have been suspended, or, as in Wilkins case, discharged. Accordingly, it is unnecessary to defer a ruling on this issue until the compliance stage of the proceeding, and make whole and reinstatement are properly included as part of the remedy.

**G. Respondent Violated 8(a)(5) by Failing to Respond to the Union's Information Requests.**

It is well settled that an employer's duty to bargain in good faith with the bargaining representative of its employees includes the obligation to provide potentially relevant requested information that would be useful to the union in discharging its statutory responsibilities. *Washington Beef, Inc.*, 328 NLRB 612, 617-618 (1999); *Bacardi Corp.*, 296 NLRB 1220, 1222-1223 (1989) (monitoring compliance and effectively policing the collective-bargaining agreement); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967) (processing grievances). Moreover, the information must be provided in a timely fashion, and unreasonable delay is the same as a refusal to furnish it. *American Signature, Inc.*, 334 NLRB 880, 885 (2001).

Information pertaining to the terms and conditions of employment in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the Union to demonstrate its specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). In situations where the union seeks information related to the terms and conditions of unit employees, the employer bears the burden of showing a lack of

relevance. *AK Steel Co.*, 324 NLRB 172, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995).

The facts are undisputed that Respondent failed to timely provide the information as alleged in the Consolidated Complaint. Accordingly, applying the applicable principles, this failure violated the Act.

#### **IV. CONCLUSION AND REMEDY**

Based on the foregoing, it is respectfully submitted that record evidence and applicable legal precedent amply support the ALJ's findings of fact, conclusions of law, and recommended remedy.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the **Counsel for the Acting General Counsel's Brief in Support of the Decision of the Administrative Law Judge** on the parties listed below, by electronic and/or regular mail, on this 10th day of May, 2011.

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