

KENNAMETAL, INC.

Kennametal, Inc. and United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC. Cases 01-CA-046293 and 01-CA-046294

June 26, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On April 12, 2011, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed a brief in support of the judge's decision and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.³

I. INTRODUCTION

The judge found that the Respondent, Kennametal, Inc., violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a safety checklist requirement, failing to furnish information about the safety checklist requirement in response to the July 16, 2010 request by the Union,⁴ and unilaterally eliminating the use of progressive discipline for safety violations. We reverse the judge in part, finding that the Respondent's implementation of the safety checklist requirement did not violate the Act because the Union waived its right to bargain over the Respondent's implementation of safety policies. We affirm, for the reasons stated below, the judge's find-

¹ Member Hayes is recused and did not participate in the consideration of this matter.

² No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to respond to the Union's information requests sent on May 26 and June 2, 2010, or to his finding that the Respondent unreasonably delayed furnishing the information requested by the Union on April 5, 2010. Also, no exceptions were filed to the judge's rulings allowing the Acting General Counsel to amend the complaint, except insofar as the Respondent argues that the allegation relating to the 2009 safety corrective action policy (discussed herein) is barred by Sec. 10(b) of the Act.

³ We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

⁴ United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC.

ings of violations based on the information request and on the elimination of progressive discipline.⁵

II. FACTS

The Respondent, a large international metalworking company, operates a facility in Lyndonville, Vermont. Since 1957, production and maintenance employees at the Lyndonville facility have been covered by collective-bargaining agreements between the Union and the Respondent or its predecessors.

A. *The Safety Checklist Requirement*

Article 16 of the parties' collective-bargaining agreement contains two sections directly addressing the Respondent's authority to implement safety rules:

16.01 The Employer and the Union will cooperate in the continuing objective to eliminate accidents and health hazards. 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.

....

16.05 The Employer and the Union agree 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.

The parties had no consistent past practice with respect to negotiating over safety rules; sometimes they negotiated, and sometimes the Respondent (or its predecessor) implemented rules unilaterally without objection from the Union.

In February 2010, the Respondent began implementing a new corporatwide safety initiative, called Management-Based Safety (MBS), at Lyndonville. In July 2010, the Respondent, pursuant to MBS, unilaterally implemented a new safety procedure that required each employee to review a laminated safety checklist pertaining to the machinery with which the employee would be working that day and, thereafter, to memorialize that review of the checklist by initialing items on a whiteboard installed next to the checklist.⁶ If the employee agreed with a specific item on the laminated checklist, the employee was required to initial the corresponding

⁵ We adopt the judge's finding, for the reasons stated in his decision, that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally excluding the Union from participating in accident investigations.

⁶ Each checklist was customized for a specific piece of machinery, with items ranging from objective requirements, such as wearing safety glasses and checking whether the safety mechanisms on the machine work, to more subjective statements, such as whether the employee has been properly trained and whether the tasks cause the employee pain.

item on the whiteboard in green. If the employee did not agree with a particular item, the employee was required to initial in red and submit an explanation on an alert form so that his or her supervisor could correct the situation. The entire process took 5 to 10 minutes each day. At the end of the day, the Respondent erased the whiteboards without recording the initials, but retained the completed alert forms.

After the Respondent implemented this new procedure, employees were concerned that initialing the whiteboard could be used as evidence against them in discipline. At least one employee, John Eastman, was threatened with discipline after he repeatedly refused to initial the whiteboard.

B. The July 16 Information Request

On July 16, 2010, Carl Turner, a staff representative for the Union's parent international union, sent an email to the Respondent that read, in relevant part:

The USW [the international union] was just informed by Local 5518 of a new safety procedure that the company has implemented and I am requesting bargaining concerning this procedure and the effects it will have on the bargaining unit employees.

Please send me any and all information that you have pertaining to this by the end of next week.

The Respondent never responded to the Union's request.

C. Discipline for Safety Violations

From at least 2003 until February 2010, no employee at the Lyndonville facility received more than a warning for violating a safety rule, and no employee was terminated for any reason. By past practice, discipline for violating any rule was progressive and followed the following steps: oral warning, written warning one, written warning two, written reprimand, and then suspension or termination.

Occasionally, the Respondent would accelerate the discipline by skipping one step.

In February 2010, the same month that the Respondent began implementing MBS, the Respondent disciplined David Jenotte with a 1-day suspension for violating a safety rule; this discipline skipped the first four steps in the Respondent's progressive discipline practice, which was unprecedented. Thereafter, the Respondent continued to impose discipline inconsistent with its past practice. In September 2010, the Respondent suspended Doug Noyes for 1 day following a safety rule violation that resulted in his receiving a hand laceration, and, in January 2011, the Respondent terminated Kenneth Wil-

kins for a safety rule violation that resulted in his receiving severe hand injuries.

MBS did not specifically provide for a change to progressive discipline for safety violations. In February 2009, however, the Respondent created a new corporate-wide safety disciplinary policy known as the 2009 safety corrective action policy. That policy provides that a serious safety violation may be punishable by a 3-day suspension for the first offense and termination for the second offense and is therefore inconsistent with the Respondent's past practice at Lyndonville.

The Respondent never gave the Union direct notice of the 2009 safety corrective action policy, but rather posted the new policy on a bulletin board outside the human resources office at the Lyndonville facility in February 2009. At the time of the posting, however, the pertinent section describing the new levels of discipline was not included. At the hearing, there was conflicting testimony over whether the pertinent section was added to the posting afterwards. Two management witnesses testified that they saw some union members, whom they did not identify, read the posting in September 2009; no members or agents of the Union, however, testified to seeing it then, and the judge found that the managers' testimony did not establish that the disputed section was included at the time. Amy Morissette, the Respondent's safety coordinator, testified that she thought any policy posted on the human resources bulletin board was effective after 48 hours pursuant to article 19 of the parties' collective-bargaining agreement, which provides, "Shop rules established by the Employer will be posted on the bulletin boards forty-eight (48) hours before becoming effective." Richard Gammell, the former union president at the Lyndonville facility from 1973 to 1985 and 1988 to 2003, testified that the Respondent always notified the Union directly of any rule change in addition to posting. The judge discredited Morissette and found in any event that the collective-bargaining agreement required that actual notice of a change be given to the Union.

III. DISCUSSION

A. The Safety Checklist Requirement

The judge found that the safety checklist requirement was a mandatory subject of bargaining and, therefore, that the Respondent violated Section 8(a)(5) and (1) by implementing it without giving the Union an opportunity to bargain. Without addressing article 16 of the collective-bargaining agreement, the judge rejected the Respondent's argument that the Union waived bargaining over the safety checklist requirement.

We agree with the judge that the safety checklist requirement was a material, substantial, and significant

change to the terms and conditions of employment. Nevertheless, we find, contrary to the judge, that article 16 of the collective-bargaining agreement is a clear and unmistakable waiver of the Union's right to bargain over the decision to implement the safety checklist requirement. Section 16.01 provides that the Respondent "shall continue to make reasonable provisions for the safety and health of its employees." Section 16.05 refers to "such reasonable safety and health rules as may from time to time be established by the Employer." Read together, these two provisions are sufficiently specific to constitute a waiver of the Union's right to bargain over safety rules. See *United Technologies Corp.*, 287 NLRB 198, 198 (1987), *enfd.* 884 F.2d 1569 (2d Cir. 1989) (finding clear and unmistakable waiver of the union's right to bargain over a change to progressive discipline for absenteeism because the collective-bargaining agreement provided that the employer had "the right to make and apply rules and regulations for production, discipline, efficiency, and safety"). We further find the safety checklist requirement to be a safety rule with the apparent goal of improving safety awareness before employees operate dangerous equipment. Accordingly, we reverse the judge and find that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally implementing the safety checklist requirement.

B. The July 16 Information Request

The judge found that, because the safety checklist requirement was a mandatory subject of bargaining, the information the Union requested in the July 16 email was presumptively relevant. Because the Respondent offered no valid excuse or explanation for its failure to respond, the judge found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with the requested information. We agree with the judge that the July 16 request sought information about the safety checklist requirement.⁷ We further agree with the judge that the Respondent violated the Act by not responding to the request, but we do so for the following reasons.

Ordinarily, information concerning unit employees' terms and conditions of employment "is presumptively relevant and must be provided on request." *Iron Workers*

⁷ The Respondent argues that the request sought information about MBS generally—not simply about the checklist requirement—and that, because MBS as a whole was not a mandatory subject of bargaining, the Respondent was not required to respond to the request. We disagree. The Union's request was made only about 2 weeks after the safety checklist requirement was implemented and sought information about "a new safety procedure." In this context, it is clear that the Union was referring to the checklist requirement. In any event, an employer is not free to simply ignore an ambiguous or overbroad information request. See *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990).

Local 207 (Steel Erecting Contractors), 319 NLRB 87, 90–91 (1995). When a union waives its right to bargain over a change to a term or condition of employment, however, it no longer is entitled to information requested for that purpose. See *American Stores Packing Co.*, 277 NLRB 1656, 1658–1659 (1986); *Emery Industries, Inc.*, 268 NLRB 824, 824–825 (1984). Instead, the union is entitled to the information only if the union gives the employer actual or constructive notice of "another legitimate basis for requesting the information." *Emery*, *supra* at 825. In this case, the Union fulfilled that requirement by expressly requesting the information, not only for decisional bargaining, but for bargaining over "the effects [the safety procedure] will have on the bargaining unit employees." It is settled that a union's waiver of the right to bargain over a change does not waive its right to bargain over the effects of that change. See, e.g., *Good Samaritan Hospital*, 335 NLRB 901, 902 (2001). For that reason, we find that the Respondent violated Section 8(a)(5) and (1) by not responding to the Union's July 16 information request.

C. Discipline for Safety Violations

The judge found that the Respondent also violated Section 8(a)(5) and (1) by what amounted to the unilateral elimination of its past practice of progressive discipline, a mandatory subject of bargaining over which the Union had not waived bargaining. Furthermore, and contrary to the Respondent's contention, the judge found that Section 10(b) did not bar the allegation. He found that the Respondent's 2009 safety corrective action policy was not in fact implemented until sometime after July 2010—the month the unfair labor practice charge was filed—and that the Union did not receive clear and unequivocal notice of the change until January 2011. As stated above, the judge discredited testimony that the entire policy was posted in September 2009, and he found in any event that posting was insufficient under the parties' agreement to give notice to the Union.

We agree with the judge that the Respondent unilaterally eliminated progressive discipline for safety violations and that the Union did not waive bargaining. Although article 16 authorizes the Respondent to issue rules defining unsafe conduct, nothing in article 16 or elsewhere in the collective-bargaining agreement permits the Respondent to unilaterally change the disciplinary consequences for employees of engaging in that conduct. See *Windstream Corp.*, 355 NLRB 406 (2010), incorporating by reference 352 NLRB 44, 49–51 (2008).

We also agree that Section 10(b) does not bar finding a violation, but we do not rely on the judge's findings that the policy was not implemented until after July 2010 or that the complete policy was not posted in September

2009. Instead, we find that, even assuming the full policy was posted and implemented in September 2009, the Union did not receive notice of the change at that time.

For an allegation to be barred by Section 10(b), the respondent must prove that the charging party had clear and unequivocal notice of the violation more than 6 months before the charge was filed. *Allied Production Workers Local 12 (Northern Engraving Corp.)*, 331 NLRB 1, 2 (2000). Notice can be actual or constructive. *St. Barnabas Medical Center*, 343 NLRB 1125, 1126–1127 (2004). In the instant case, the Respondent failed to prove that the Union was on notice of the Respondent's unilateral elimination of progressive discipline more than 6 months before the Union filed the charge on July 30, 2010.

First, the only possible evidence of actual notice is that some union members may have seen the 2009 safety corrective action policy posted outside the human resources office. The knowledge of individual union members is not imputed to the union unless those members had a role in bargaining or other factual circumstances warrant imputing their knowledge. See *Brimar Corp.*, 334 NLRB 1035, 1035 fn. 1 (2001); *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995). Here, some unidentified union members may have seen the 2009 safety corrective action policy posted, but the Respondent failed to prove that those members were involved in bargaining or that any other circumstances would warrant imputing their knowledge to the Union.

Second, the Respondent failed to prove that the posting of the 2009 safety corrective action policy on one bulletin board outside the human resources office provided constructive notice to the Union. Article 19 of the parties' collective-bargaining agreement shows that the parties contemplated that such notices would be posted on more than one bulletin board. Moreover, it is clear that the Respondent had not previously relied on postings alone to alert the Union to rule changes; according to uncontroverted testimony, the long-established practice was that, regardless of any posting, the Respondent would notify the Union directly of any rule change.

Third, the Respondent failed to prove any other facts that would establish constructive notice. None of the Respondent's disciplinary actions for safety violations were inconsistent with progressive discipline until Jenotte's suspension in February 2010. Thus, there was no reason for the Union to suspect the change until February 2010 at the earliest, less than 6 months before the filing of the charge.

Because the allegation is not barred by Section 10(b), we conclude, as the judge did, that the Respondent vio-

lated Section 8(a)(5) and (1) by unilaterally eliminating progressive discipline for safety violations.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 1 and renumber the subsequent paragraphs.

ORDER

The National Labor Relations Board orders that the Respondent, Kennametal, Inc., Lyndonville, Vermont, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees, including, but not limited to, unilaterally implementing a new discipline policy for safety violations or more strictly enforcing its discipline policy for safety violations, without first notifying the Union and giving it an opportunity to bargain.

(b) Unilaterally implementing its management based safety program in a manner that excludes union participation in accident investigations.

(c) Failing or refusing to bargain with the Union by failing and refusing to furnish it, or by unreasonably delaying in furnishing it, with requested information that is necessary and relevant to its role as the exclusive collective-bargaining representative of production and maintenance employees at its Lyndonville, Vermont facility.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kenneth Wilkins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Kenneth Wilkins and Doug Noyes whole for any loss of earnings and other benefits suffered as a result of the disciplinary actions taken against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Kenneth Wilkins' unlawful discharge, or other discipline imposed related to his October 27, 2010 accident, and Doug Noyes' unlawful suspension and within 3 days thereafter notify both of them in writing that this has been done and that these adverse personnel actions will not be used against them in any way.

(d) At the request of the Union, rescind any unilateral changes to its disciplinary policy for safety violations and/or the enforcement of that policy.

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

All production and maintenance employees employed at the Respondent's Lyndonville, Vermont plant, and excluding all supervisors as defined under the National Labor Relations Act.

(f) Furnish to the Union in a timely manner the information that it requested on May 26, June 2, and July 16, 2010, if not previously provided.

(g) Reinstigate an accident investigation process that provides the Union the opportunity to meaningfully participate in such investigations, consistent with the parties' 2005–2010 collective-bargaining agreement.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Lyndonville, Vermont facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2010.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(j) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT implement changes in your wages, hours, or terms and conditions of employment, including but not limited to our disciplinary policies for safety violations, without providing adequate notice to United Steelworkers Local 5518 and offering the Union an opportunity to bargain over any proposed changes.

WE WILL NOT exclude the Union from participating in the investigation of accidents.

WE WILL NOT fail or refuse to bargain with the Union by failing and refusing to furnish it, or by unreasonably delaying in furnishing it, with requested information that is necessary and relevant to its role as the exclusive collective-bargaining representative of our production and maintenance employees at Lyndonville, Vermont.

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

WE WILL, within 14 days from the date of the Board's Order, offer Kenneth Wilkins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth Wilkins and Doug Noyes whole for any loss of earnings and other benefits suffered as a result of the disciplinary actions taken against them,

less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Kenneth Wilkins, or other discipline relating to Kenneth Wilkins' October 27, 2010 accident and the unlawful suspension of Doug Noyes, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and suspension will not be used against them in any way.

WE WILL, at the request of the Union, rescind any unilateral changes in our disciplinary policy for safety violations and/or the enforcement of that policy.

WE WILL reinstitute an accident investigation procedure that provides the Union with the opportunity to meaningfully participate in such investigations as set forth in our 2005–2010 collective-bargaining agreement.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All production and maintenance employees employed at our Lyndonville, Vermont plant, and excluding all supervisors as defined under the National Labor Relations Act.

WE WILL furnish to the Union in a timely manner the information that it requested on May 26, June 2, and July 16, 2010, if not previously provided.

KENNAMETAL, INC.

Jo Anne Howlett, Esq., for the General Counsel.
Charles P. Roberts III, Esq. (Constangy, Brooks & Smith), of
Winston Salem, North Carolina, for the Respondent.
Carl Turner, Staff Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Greenfield, Massachusetts, on February 8–10, 2011. United Steelworkers Local 5518 filed the charges in this case on July 30, 2010. The General Counsel issued the complaint on December 28, 2010.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ Tr. 42, L. 17: “players” should be “employers.” Tr. 525, L. 18: “minimum” should be “recognized.”

FINDINGS OF FACT

I. JURISDICTION

Respondent, Kennametal, Inc., is a large international company with 26 facilities in the United States and 48 facilities worldwide, including the facility in this case, which is located in Lyndonville, Vermont.² One of the products produced at Lyndonville is taps. A tap is a tool used to cut an internal screw thread. At the Lyndonville plant, Respondent derives gross revenue in excess of \$500,000 and sells and ships goods valued in excess of \$50,000 to points outside of Vermont. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the United Steelworkers of America, Local 5518, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union has represented all production and maintenance employees at Respondent's Lyndonville, Vermont facility since 1957. Respondent Kennametal acquired this facility in approximately 1997. There have a series of collective-bargaining agreements between the owners of this facility and the Union. The agreement governing this case between Kennametal and Local 5518 was in effect from October 1, 2005, through October 2, 2010. Apparently, the parties currently operate under a subsequent agreement, which is not in this record, or are still negotiating a successor agreement.

The primary issue in this case is whether Respondent violated Section 8(a)(5) and (1) of the Act in refusing to bargain about the implementation of its corporatewide “Management Based Safety Program” (MBS) at the Lyndonville facility. Respondent announced implementation of the program on February 2, 2010. The Union requested that Respondent bargain over the implementation of MBS the next day. Respondent declined to do so, asserting that it was not a mandatory subject of bargaining.

At the commencement of this hearing, the General Counsel moved to amend the remedy sought for this alleged violation to require rescission of the reprimand and 1-day suspension issued to employee Doug Noyes on September 2, 2010, and the suspension and subsequent termination of employee Kenneth Wilkins on January 11, 2011. I granted this amendment mid-way through the hearing. The amendment pertains to another major issue in this case, the relationship, if any, of MBS to Respondent's *Procedure for Corrective Actions for Safety Violations* and *Work Instructions for Corrective Actions*. The General Counsel and the Charging Party contend that these instructions, used in disciplining Noyes and Wilkins, are part and parcel of MBS, or at least sufficiently related to MBS to require negotiation with the Union about the implementation of MBS.

Alternatively, the General Counsel contends, as stated in its posthearing motion to further amend the complaint, that Respondent violated Section 8(a)(5) in implementing the *Proce-*

² This case initially also concerned alleged unfair labor practices at Respondent's Greenfield, Massachusetts facility, but those were resolved.

procedure for Corrective Action in September 2009. The General Counsel may amend the complaint at any point in the proceedings, including upon the filing of his post hearing brief. Regardless of whether the complaint is amended or not, whether or not consideration of the *Procedure for Corrective Action* is appropriate depends upon whether it is closely related to matters contained in the complaint and was fully and fairly litigated, *Williams Pipeline*, 315 NLRB 630 (1994). I find that there is a close relationship between the allegations of the complaint and whether Respondent violated Section 8(a)(5) and (1) in implementing the *Procedure for Correct Action*. Moreover, I find that the issue was fully and fairly litigated and grant the General Counsel's motion to amend the complaint.

Respondent contends there is no relationship between MBS and the Procedure and Work Instructions for Corrective Actions.³ Nevertheless (GC Exh. 42), particularly paragraph 7.4 and in discussing "People Factors" on the second to last page, establishes that counseling or disciplining employees is one of the ways Kennametal intends to improve its safety record through MBS (also see Tr. 572–76).

Additionally, MBS cut the Union out of the process of accident investigation, contrary to the provisions of the collective-bargaining agreement. By changing this process, Respondent diminished the possibility that factors such as production quotas would be considered in assessing the cause of an accident. Therefore, MBS in making it more probable that an injured employee would be found at fault for an industrial accident had a clear relationship to disciplinary measures taken as the result of an accident. Thus, I reject Respondent's argument that MBS

³ Respondent contends that consideration of its disciplinary policy regarding safety violations is barred by Sec. 10(b) of the Act. I reject this contention. The 6-month limitations period prescribed by Sec. 10(b) begins to run only when a party has clear and unequivocal notice of a violation of the Act. See, e.g., *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). The requisite notice may be actual or constructive. In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992). Constructive notice will not be found where a "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct." *A & L Underground*, 302 NLRB 467, 469 (1991). Respondent did not provide the Union clear and unequivocal notice of this policy until January 2011.

Moreover, there is no credible evidence that Respondent implemented the disciplinary policy reflected in its *Work Instructions for Corrective Action* until July 2010 at the earliest when Eric Huttenlocker assumed day-to-day responsibility for labor relations at the Lyndonville facility. Respondent at trial relied largely on Amy Morissette, its Environmental, Health and Safety lead to establish that this disciplinary policy was in force in 2009. However, this record establishes that Morissette was "out of the loop" with regard to discipline policy, human resource matters and labor relations at all times material to this case. She testified that she understood that a new disciplinary policy was effective immediately after participating in a March 2009 conference call, but offered no explanation as to why nothing relevant to this policy surfaced at the Lyndonville plant until June. Nor did Morissette offer any explanation as to why Respondent's then human resource manager, Ginger Noyes, did not post anything about the disciplinary scheme inherent in the new policy until September. As stated herein, I discredit Morissette's testimony regarding the September posting.

has nothing to do with Respondent's discharge and discipline policies.

The case also involves three allegations that Respondent violated Section 8(a)(5) in refusing or failing to provide information requested by the Union and one instance in which Respondent allegedly unreasonably delayed providing information.

Respondent's Procedure for Corrective Actions for Safety Violations and Work Instructions for Corrective Actions.

Lack of Sufficient Notice to the Union

In February 2009, Respondent's global headquarters generated documents entitled "*Procedure for Corrective Action for Safety Violations*," and "*Work Instructions for Corrective Actions*." All or part of these documents appear in three different exhibits (GC Exh. 16, GC Exh. 32; and R. Exh. 21). There are differences in these exhibits, which may go to the heart of this case. This is so because Respondent asserts that the Union had notice of the contents of at least part of these documents by virtue of their being posted on a bulletin board in 2009.

Sean Jewell, Respondent's day-shift supervisor, testified that in the late summer of 2009 he saw part of General Counsel's Exhibit 32 posted on a bulletin board by the human resources office (Tr. 609–610). He testified that only part of the document was posted. He stated, "I don't believe this appendix A was posted with the first three pages." However, General Counsel's Exhibit 32, without appendix A is not a three page document; it is five pages. It is on the fourth and fifth pages of the document that Respondent states that any serious safety violation may be grounds for a 3-day suspension and that a second serious violation may be grounds for termination. Respondent's Exhibit 21 is likewise a sixth-page document on which the paragraphs also appear on pages 4 and 5.

These statements regarding the imposition of discipline appear on the first page of General Counsel's Exhibit 16. Based on the testimony of Jewell, Union President Leon Garfield, and Grievance Committee Chairman John Eastman, I find that Respondent did not post those portions of the work instructions pertaining to suspension and termination for safety violations and that the Union did not receive any notice of this change in disciplinary policy until January 2011.⁴ I would note that not a single witness, including Amy Morissette (Tr. 416–417), testi-

⁴ Respondent claims to have applied this policy in September 2009 to employee Robert Gordon when he cut his finger. I do not credit this testimony. Moreover, even if this were so, Respondent never told the Union it was applying the decision tree in the work instructions to Gordon. Indeed, it is in part because Respondent did not inform the Union that it was applying the decision tree to Gordon that I discredit its testimony in this regard.

Morissette's testimony is also inconsistent with the Respondent's issuance of a written warning 2 to Chad Tibbets on February 12, 2010, GC Exh. 39. Tibbets' failure to follow proper lockout/tagout procedures is a serious violation pursuant to the Procedure for Corrective Action and should have resulted in a 3-day suspension pursuant to the work instructions. The failure to suspend Tibbets strongly suggests that Respondent was not applying the new safety discipline policy until September 2010 when it suspended Noyes.

fied to seeing a document posted that stated that a serious safety violation would lead to 3-day suspension and that a second such violation would result in an employee's termination.⁵

I discredit the testimony of Amy Morissette, Respondent's environmental health and safety coordinator to the contrary. Morissette testified that in July 2009, Ginger Noyes, then Respondent's human resources manager, posted the procedure for corrective action but not the work instructions, which contains the new discipline and discharge policy. Morissette testified that she noticed in September that the work instructions were not posted and emailed Noyes to post them as well. Morissette then testified that she went back to the bulletin board several days later and saw that the entire policy minus the decision tree had been posted. There is no corroboration for the testimony that anything other than three pages were ever posted and since supervisor Jewell only saw three pages, I find that *the Procedure for Corrective Action* was the only document ever posted on the bulletin board.

I would also note that Respondent's contention that it provided adequate notice of the change in disciplinary policy to the Union is inconsistent with the essence of article 20 of the collective-bargaining agreement. That article provides that "any notice communication shall be conclusively deemed for all purposes hereunder to be effective given if sent by certified or registered mail, postage prepaid, addressed to the Union to: United Steelworkers, 100 Medway Suite, #403 Milford, MA 01757-2923 and in the case of the Employer to: Kennametal Inc., 378 Main Street, Lyndonville, VT 05851."⁶ Moreover, even if unit members were aware of the new disciplinary policy, their knowledge is not imputable to the Union, see *Brimar Corp.*, 334 NLRB 1035 fn. 1 (2001).

Finally, Morissette's testified at Transcript 414 that so far as Respondent was concerned, the new enhanced disciplinary policy was already in effect when she went to look at the bulletin board in September 2009.

⁵ Second-Shift Supervisor Tim Morissette's response to his counsel's question as to whether he had seen all of R. Exh. 21, except for the decision tree, was an equivocal, "I believe I've seen most of it, yes," Tr. 600. Tim Morissette's testified he discussed the policy with unit employees sometime after the July plant shutdown, Tr. 601. According to his wife, Amy Morissette, the critical parts of the document were not posted until September, so he could not have discussed the suspension/termination policy with unit employees. Like Jewell, Morissette did not testify that he saw the suspension/termination policy on the bulletin board, which is another reason I conclude it was never posted.

⁶ Respondent suggests that it provided adequate notice pursuant to art. 19, which states that "shop rules" established by the employer will be posted on the bulletin boards 48 hours before becoming effective. While the term "shop rules" is not defined in the collective bargaining agreement, I conclude it does not include a policy which does not govern employee conduct, but which rather imposes new draconian consequences for employee conduct. Moreover, art. 19 appears to contemplate posting of "shop rules" on a number of different bulletin boards. There is no evidence that the Procedure and Work Instructions regarding safety violations was posted on any bulletin board other than one near the human resources office. There is at least one other bulletin board, which is provided to the Union pursuant to art. 18 of the collective-bargaining agreement, GC Exh. 4 p. 29; Tr. 397. Thus, Respondent cannot rely on art. 19 even if it did post the material portions of the procedure and work instructions.

tin board in September 2009. If this were so, the corrective action policy was a "fait accompli" by the time Respondent let the Union know of the new policy, for which there can be no waiver of the Union's bargaining rights, *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1023 (2001).⁷

Contents of the Procedure for Corrective Action

By way of background, the procedure emphasizes Respondent's commitment to safety. As to scope, the document states it applies to all employees working in any Kennametal facility worldwide, but that "with the approval of the EHS Steering Committee or its designee, the scope of this procedure may vary from facility to facility, based on applicable labor laws."

As to responsibility, the procedure states that the highest ranking employee at any site is responsible for environmental, health and safety compliance and that the facility management is responsible for ensuring all employees are in total compliance with all safety procedures/standards/norms. The burden placed on management at each facility is very similar to the stated purposed of the MBS, which Respondent implemented at Lyndonville in February 2010.

The procedure document goes on to state that facility management and human resource representatives will assist the facility management in ensuring that appropriate and consistent, progressive corrective action is taken against every employee who violates applicable safety procedure/standards/norms.

The document distinguishes between serious violations and other violations. This is similar to the distinctions made in Section 17 of the Federal Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 666.⁸ Respondent's Procedure defines a serious violation as one that is likely to result in a severe disabling injury such as amputation, spinal injury, broken finger or

⁷ R. Exh. 22 contains an email exchange between Morissette and Ginger Noyes, who was Respondent's human resource manager until December 31, 2009. In that exchange Morissette advises that an employee, Robert Gordon, should be disciplined according to the Corrective Action Policy but must be disciplined under the previous safety discipline policy due to the fact that Respondent had not posted the entire policy. First of all, from these emails it is clear that the corrective action policy, i.e., the first three pages of GC Exh. 32 had not been posted prior to September 2009. Moreover, Noyes' response is that she will post the Procedure for Corrective Action for Safety Violations. Her response does not mention the work instructions which contain the requirements for a 3-day suspension for a first time serious violation and termination for a second serious violation within 24 months. I find the work instructions were not posted and in force at Lyndonville until sometime after July 2010. I discredit the testimony of Rich Brighenti to the contrary at Tr. 652. None of the disciplinary actions taken prior to the termination of Ken Wilkins appear to follow the discipline policy set forth in the work instructions. The Accident Investigation Policy referred to by Noyes may be a different document.

⁸ Sec. 17 of the OSH Act provides that, "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

limb, unconsciousness or death. It then gives examples, “which warrant corrective action” including two relevant to the disciplines at issue in this case, “bypassing safety devices or machine guards,” and “improper use of equipment or using inappropriate equipment for the task which is likely to result in a significant injury.”

The procedure defines other violations as those that are not likely to result in a severe disabling injury such as an amputation. . . . One of the examples given is “failure to use required personal protective equipment, such as gloves.” and “improper use of equipment or using wrong equipment for the task.”

The document mandates that, in the discretion of facility management, for a first time serious violation, an employee is to be suspended for 3 days and for a second serious violation, the employee is to be terminated. The implementation of the new discipline policy for safety violations was also a significant departure from Respondent’s longstanding progressive discipline policy (Tr. 529). This was a material change in Respondent’s past practice regarding a mandatory subject of bargaining, which Respondent was not privileged to change unilaterally, *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

An employer’s practices, even if not required by a collective-bargaining agreement, which are regular and longstanding, rather than a random or intermittent, become terms and conditions of unit employees’ employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change, *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding, *Locomotive Firemen & Enginemen*, 168 NLRB 677, 679–680 (1967). Respondent’s unilateral abandonment of the past practice of progressive discipline for safety violations violated Section 8(a)(5) and (1).

I also note that article 6 of the collective-bargaining agreement in force (GC Exh. 4) provides that the employer has the right to discharge, suspend or otherwise discipline employees, but that no such action shall be taken without just cause. Respondent’s Procedure for Corrective Action, as implemented at Lyndonville, converted virtually any significant safety violation or injury into just cause for discipline or discharge. In so doing, it materially modified the parties’ contract and was done so without providing the Union with notice of this change and an opportunity to bargain about it.

The Management Based Safety Program

Lyndonville Plant Manager Richard Brighenti and EHS Coordinator Amy Morissette attended training on the MBS Program at Respondent’s headquarters in Latrobe, Pennsylvania, in December 2009.

Respondent’s Management Based Safety Program was presented to unit employees at Lyndonville via a power point presentation on February 2, 2010. The next day, the Union requested that Respondent bargain with it over implementation of the program. Respondent refused, asserting that MBS was

not a mandatory subject of bargaining. The Union then filed a grievance. Respondent reasserted this position in a meeting attended by USWA staff representative Carl Turner on March 19, 2010.

In July 2010, as part of the MBS, Respondent installed laminated white boards in every production area of the plant. Next to these boards were laminated check lists for each production operation. There are about 40 to 50 checklists in the Lyndonville facility. The Union was not consulted and was not given the opportunity to have an input regarding the content of the check lists.

Each employee was required beginning in July to review the check list pertaining to his work each day and then initial each item on the white board corresponding to a requirement on the safety checklist. If the employee initialed the item in green it signified that the employee agreed with the statement on the check list. The employee was to initial in red if he or she disagreed with any statement and was to complete an EHS (environmental, health and safety) alert.

The objective requirements of the safety checklists were not new. Thus, if an employee was, for example, required to wear hearing protection after MBS, that was also the case prior to the implementation of MBS. Similarly, an employee’s duty to comply with Respondent’s jewelry policy did not change with the implementation of MBS.

If the operator disagrees with the statement on the checklist, they are required to initial the laminated white board in red and fill out an EHS alert. Then the operator’s supervisor is supposed to determine what if anything needs to be done to make the operation safe.

For example, General Counsel’s Exhibit 8 is a safety checklist for hand chamfer grinders.⁹ Among the approximately 20 items that the operator must attest to are:

That he or she has been properly trained to operate the machine safely;¹⁰

That he or she checked the grinding wheel and determined that it is in good condition and free from defects.

The installation of the white boards and the initialing procedure was implemented unilaterally by Respondent. John Eastman, the chair of the union grievance committee and member of the employer-union safety committee, refused to initial the white boards on the grounds that Respondent was shifting the blame for any accident to the machine operator. Eastman put a check or his clock number on the white board instead of his initials until Respondent threatened to discipline him.

⁹ The dictionary definition of chamfer is a flat surface made by cutting off the edge or corner of something. I assume the hand chamfer is the equipment by which this is accomplished.

¹⁰ The discipline imposed on Ken Wilkins establishes the potential impact of initialing off on this item. Eric Huttenlocker’s conclusion that Wilkins had been adequately trained and documents indicating that he had been adequately trained were relied upon by Respondent in deciding to terminate Wilkins, Tr. 632.

Changes in the Way Accidents are Investigated Since the Implementation of MBS

Prior to the implementation of MBS, the union safety committee was actively involved in investigating accidents at the Lyndonville plant. This included participation in the Accident Report. An example of the report is in this record as General Counsel's Exhibit 17. Employer and union safety committee members worked jointly in addressing issues concerning the accident. Among these were whether or not the injured employee was properly instructed and whether he or she was performing the operation consistent with those instructions. If the task was not being done in accordance with the operator's instructions, the committee members addressed the issue of whether the employer and/or the injured employee could have prevented the accident.

Upon implementation of MBS, the Union and its safety committee played no role in investigating accidents at the plant. This was done unilaterally by Respondent. A change in an employer's investigatory method, which as in this case, substantially alters the mode of investigation and character of evidence on which an employee's continued job security might hinge, is a bargainable change in the terms and conditions of his or her employment. By unilaterally cutting the Union out of the investigation of accidents in situations in which the investigation could lead to serious disciplinary consequences to the injured employee, Respondent violated Section 8(a)(5) and (1), *Medicenter, Mid-South Hospital*, 221 NLRB 670, 675 (1975).

The Union filed a grievance regarding its exclusion from accident investigations on January 14, 2011. The grievance alleged that Respondent is violating section 16.07 of the collective-bargaining agreement, which requires an investigation of by a union member of the joint safety committee and an employer representative.

Discipline Imposed Before and After the Implementation of MBS

On August 24, 2010, Doug Noyes, a former union president, was drilling a hole in a piece of metal, when the metal stuck on the drill bit and spiraled up cutting Noyes' left hand. Noyes was not wearing protective gloves while performing this operation, although the use of such gloves is not required by Respondent, but merely recommended. Noyes received five stitches in his left hand and was placed on restrictive duty, i.e., painting instead of fabricating metal.

Respondent suspended Noyes for 1 day on September 2, 2010. The General Counsel alleges that Noyes' suspension is part of or at least related to the implementation of MBS. Respondent contends the suspension has nothing to do with MBS. I find the Respondent's escalation of discipline was part and parcel of the MBS and thus its enhanced disciplinary policy was implemented in violation of Section 8(a)(5) and (1).¹¹

¹¹ I would note that the 1-day suspension appears inconsistent with the Procedure for Corrective Action. Failure to use required personal protective equipment such as gloves, is classified as an "other" violation for which a suspension was not warranted under the work instructions. Moreover, Noyes did not fail to use required personal protective

What this record clearly demonstrates is that Respondent escalated its disciplinary punishments for safety violations and accidents at virtually the same time that it introduced MBS at Lyndonville. Between July 2003 and February 12, 2010, Respondent took very few disciplinary actions for safety violations. Moreover, it had never imposed more than an oral warning for a safety violation or accident (GC Exh. 39).¹²

On February 12, 2010, Respondent suspended David Jenotte for 1 day for failing to follow Respondent's lockout/tagout policy. A 1-day suspension is not consistent with the Procedure for Corrective Action/ Work Instructions. A lockout/tagout is classified as a serious violation for which at least a 3-day suspension would be imposed. Thus, in February 2010, although while Respondent had escalated in its disciplinary policy shortly after the implementation of MBS, it had not implemented the Correction Action/Work Instructions as policy at Lyndonville.¹³

On February 12, Respondent also issued an unprecedented second written warning to employee Chad Tibbetts for failing to lock out a belt sander. This was reduced to a first written warning apparently because there was no notice regarding lock out/tag out on the machine. I infer from its timing that the escalation to a written warning 2 was associated with the increased pressure placed on management by the implementation of MBS and the involvement of Eric Huttenlocker in the management of labor relations at the Lyndonville facility beginning in December 2009.

On April 12, 2010, Respondent initially issued a written warning 2 to employee David Brousseau for a safety violation. This was reduced to a written warning 1 and then rescinded pursuant to a grievance settlement. On April 19, Respondent issued a written warning 2 to First-Shift Production Supervisor Sean Jewell. Jewell went into a power supply cabinet without the proper protective equipment, exposing him to the hazard of being burned. Since this would appear to serious violation, Jewell's discipline appears inconsistent with the work instructions for corrective actions. This is additional evidence that the disciplinary policy utilized to suspend Noyes and terminate Kenneth Wilkins had not been fully implemented as of April 2010.¹⁴

equipment; gloves were merely recommended for the operation in which Noyes cut his hand.

¹² In April 2007, Respondent initially proposed issuing a first written warning to employee David Jenotte for a lock out/tag out violation, but on its own accord, without any apparent intervention of the Union, reduced Jenotte's discipline to an oral warning, GC Exh. 39, p. 10.

¹³ Amy Morissette testified about the suspension of Jenotte at Tr. 425-426. I discredit that testimony. First of all, I find that Morissette had no first-hand knowledge of the process by which Jenotte was suspended for 1 day; her testimony in this regard is pure hearsay. Moreover, as stated before, a 1-day suspension for failing to lockout/tagout is inconsistent with the work instructions.

¹⁴ The new disciplinary policy applies to management employees as well as bargaining unit employees, Tr. 434. Although failure to use protective equipment may often or usually be another violation, it would appear to be a serious violation when the likely result of an accident if it would to occur would be burns. Under the OSH Act, for example, it is the likelihood of serious physical harm or death arising from the violative condition if an accident occurs, rather than the likelihood of the accident occurring, which is considered in determining

The next safety discipline was the suspension given to Noyes. I infer that this ratcheting up on the discipline scheme was also related to MBS since it followed closely the installation of the white boards and Respondent's August 24, 2010 memo insisting the employees initial the white boards. It was also the result of the resignation of Taryn Blair as human resources director at Lyndonville and the assumption of her day-to-day responsibilities by Eric Huttenlocker.¹⁵ Indeed, I find that Huttenlocker implemented the new disciplinary policy without providing notice to the Union between July and early September.

On October 27, 2010, employee Ken Wilkins received several cuts on his hand when he reached into a grinder to retrieve a jammed part. The feeder block of the grinder pushed Wilkins' hand into the moving grinding wheel. Respondent investigated this accident without input from any union members of the safety committee. Respondent determined that Wilkins was at fault because he did not wait for the grinding wheel to stop and did not insure that the feeder block switch was in the automatic position. Wilkins was off of work for several weeks as a result of his accident.

In December, Eric Huttenlocker made the decision to terminate Wilkins' employment. Respondent presented Wilkins with a termination letter on January 11, 2011. In January 2011, an inspector of the Vermont State OSHA plan conducted an inspection related to the Wilkins accident. He has informed Respondent that it is likely to be issued a citation because the guard on Wilkins' machine could be opened without automatically stopping the grinding wheel. The VOSHA inspector also recommended that the labeling of the switch on Wilkins' machine be replaced or enhanced to more clearly indicate whether or not it was in the automatic position.¹⁶

Union Information Requests: (GC Exh. 1(v),
Exhs. A–D; GC Exh. 20, Reverse Side)

Respondent and the Union signed a Memorandum of Agreement regarding the shipping room at Lyndonville in March 2002. That MOU provides that if, in any continuous 90-day period, the cumulative hours of employees temporarily transferred to work in the shipping room is equal or greater than 40 hours each week, a regular full-time position will be created. On April 5, 2010, the Union requested that Respondent provide it with a list of names of employees transferred to the shipping department during the prior 3 months and the number of hours each of them worked in the shipping department during this period. It asked for the information by April 12. Respondent provided a partial list in April but did not give the Union a complete list until August 20.

On April 21, 2010, Respondent posted a notice informing employees that effective June 1, 2010, all employees would be

whether a violation is serious. See *Dravo Corp.*, 7 BNA OSHC 2095, 2101 (No. 16317, 1980), pet. for review denied 639 F.2d 772 (3d Cir. 1980). An event that is not unexpected and thus likely to occur is not an accident.

¹⁵ Blair was Respondent's human resources director at Lyndonville from about January 1 to July 2010.

¹⁶ OSHA citations may be issued for a condition completely unrelated to an accident that leads to the inspection of a workplace.

required to wear the highest level of slip resistant shoes. The mandated shoes had a particular grid pattern on the sole and are available through a supplier named Shoes for Crews. The notice instructed employees with a medical condition that would not allow them to wear such shoes to discuss their problem with Taryn Blair, then Respondent's human resource manager.

On May 26, 2010, the Union requested proof and/or documentation as to the reasons that the tread design Respondent was proposing to require on safety shoes was superior to other slip resistant shoes approved by Federal OSHA and Vermont's OSH agency. The Union also requested a list of employees who had a deviation from Respondent's proposed shoe policy. The Union requested that this information be provided by June 3. In November 2010, Respondent provided Union with a list of employees who were exempt from its shoe policy. It did not give the Union the name of an employee who was allowed to wear different shoes for medical reasons, citing the privacy rules of the HIPAA (Health Insurance Portability and Accountability Act) statute. It has not provided the Union any documents regarding the superiority of the safety shoes it requires.

On June 2, 2010, the Union requested that Respondent provide it a copy of documented ergonomic restrictions for the hand chamfer job, by June 7. An ergonomic study was performed at Lyndonville in March 2005. The physical therapist performing the study advised Respondent in September 2010, that on the basis of his 2005 evaluation, he believed limiting an employee to 4 hours a day on the hand chamfer would alleviate the risk of ergonomic injury (e.g., carpal tunnel syndrome). Respondent did not provide the Union with a copy of either the 2005 analysis or the September 2010 note from the physical therapist.

On July 16, 2010, USWA Staff Representative Carl Turner requested Respondent provide him any information on what he understood was a new safety procedure at the plant and to bargain with the Union over its implementation. This referred to Respondent's posting of the white boards and the requirement that employees initial these boards. Respondent has not provided this information.

Analysis

Respondent Violated Section 8(a)(5) and (1) by Implementing New Policies Regarding Discipline and Discharge for Safety Violations

Board law is clear that disciplinary policies and procedures constitute mandatory subjects of bargaining. Further, work rules that could be grounds for discipline are mandatory subjects of bargaining, *Southern Mail, Inc.*, 345 NLRB 644, 646 (2005); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904 (2000), enfd. in relevant part 24 Fed. Appx. 104 (4th Cir. 2001); *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. 71 F.3d 1434 (9th Cir. 1995).

It is clear that the Union requested to bargain over the MBS and that Respondent refused. At least that part of the MBS requiring employees to initial the white boards is a mandatory subject of bargaining in that employees are subject to discipline if they refuse to do so. Thus, Respondent violated Section 8(a)(5) with regard to the MBS at least with respect to this requirement of the program.

Secondly, I find that Respondent violated Section 8(a)(5) and (1) with regard to the disciplinary policy reflected in the work instructions for corrective action regardless of whether it is deemed to be part of MBS or a totally separate policy. However, in the context of this case to consider the disciplinary policy for safety violations as a totally separate and distinct matter from MBS would elevate form over substance. MBS and the discipline policy are part of the same corporate initiative to improve Respondent's safety record, particularly at Lyndonville.

Regardless of what was posted on Respondent's bulletin board, it is clear that the safety policy was not implemented until July 2010.¹⁷ Moreover, even assuming that the policy was in effect earlier, Respondent's disciplinary policy for safety violations changed from virtual nonenforcement to strict enforcement after July 2010. I infer that the implementation or stricter enforcement of this safety policy is related to other initiatives that clearly were part of MBS, the erection of the white boards and the imposition of the requirement that employees certify the safety of their work environment.

Thus, the change in the safety policy, made without providing the Union an opportunity to bargain, is a violation of Section 8(a)(5), whether or not it is technically part of MBS, *Southern Mail*, supra. As stated, I find Respondent did not provide adequate notice of the policy itself until January 2011 and that for this reason, its 10(b) contention is without merit.

The Union did not Waive its Bargaining Rights Over MBS or Respondent's New Disciplinary Policy

To be effective, a waiver of statutory bargaining rights must be clear and unmistakable, *California Offset Printers*, 349 NLRB 732, 733 (2007). Waiver can occur in any of three ways, by express provision in a collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction) or by a combination of the two. Nothing in this record establishes a waiver of the Union's bargaining rights with regard to those parts of the MBS effecting the terms and conditions of unit members' employment or the discipline policy implemented by Respondent in 2010 for safety violations.

The mere fact that a union previously acquiesced in an employer's unilateral implementation of safety rules does not give an employer the right to make different changes in plant rules, or other terms and conditions of employment, if those changes are material and significant, *Bath Iron Works*, 302 NLRB 898, 900 (1991). Moreover, in the instant case, while the Union

previously acquiesced in some of Respondent's unilateral changes, it did not acquiesce in others and requested bargaining.

The Legality of Respondent's Disciplinary Policy for Safety Violations was Tried by Consent and Fully and Fairly Litigated

Assuming that the complaint allegations do not sufficiently address Respondents' disciplinary policy for safety violations, I conclude that the issue was tried by consent and fully and fairly litigated. It is well established that the Board may find and remedy an unfair labor practice not specifically alleged in the complaint, "if the issue is closely connected to the subject matter of the complaint and has been fully litigated," *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Gallup, Inc.*, 334 NLRB 336 (2001).

The Procedure for Corrective Action and Work Instructions and strict enforcement of the new disciplinary policies are closely connected to the allegation that Respondent violated the Act by unilaterally implementing the MBS in February 2010. First of all (GC Exh. 42), a document promulgated to MBS, references counseling and discipline as one of the tools that Respondent intended to utilize in improving its safety record and reducing the cost to it of workplace accidents. Secondly, I infer, in the absence of any contrary evidence, that strict enforcement of the discipline policies reflected in the work instructions are part of the same initiative as is MBS to render Kennametal's workplaces safer.

The complaint in this matter did not allege that Respondent violated Section 8(a)(5) by implementing new disciplinary policies for safety violations, until the filing of the posthearing briefs. However, that Respondent was on notice that the disciplinary policies were at issue in this case is established by its motion to amend its answer to include a 10(b) defense to any challenge to the Disciplinary Corrective Action Policy (Tr. 457) and the General Counsel's motion for the Board to remedy the discipline and discharge of employees Noyes and Wilkins. Moreover, Respondent in fact defended against any 8(a)(5) challenge to this policy by contending that it had been in force since at least September 2009, that the Union had notice of the policy by the posting of documents on a bulletin board and that the Union had waived its bargaining rights on this policy by remaining silent in the face of such notification. Respondent did not contend that it bargained with the Union regarding the markedly stricter discipline imposed on employees for safety violations beginning in February 2010 and then made even stricter starting with Doug Noyes' injury in August and clearly could not have done so.

Failure to Respond to Information Requests; Delay in Responding

Upon request, an employer has the legal duty to furnish its employees' bargaining agent with information relevant and necessary to the performance of its statutory duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The law deems information about the wages, hours, and other terms and conditions of employment of unit employees to be presumptively relevant. *Timken Roller Bearing Co.*, 138 NLRB 15 (1962).

¹⁷ At pp. 8-9 of its brief, Respondent suggests that employees were disciplined pursuant to the Corrective Action policy beginning in February 2010. It suggests that none were suspended because their violations "did not result in any actual harm." An accident or injury is irrelevant to whether a safety violation is classified as serious under Respondent's Procedure for Corrective Action for Safety Violations. Respondent's failure to discipline any employee with more than a warning, other than a 1-day suspension for Jenotte, until August 2010, demonstrates that the policy had not yet been implemented. Respondent's claim at p. 9 of its brief, that Noyes' accident was the first serious safety violation following the alleged adoption of the Corrective Action Policy in 2009, is simply inaccurate.

An employer's statutory obligation to furnish the union relevant information, on request, absent special circumstances, is not relieved merely because the union may have access to the requested information from other sources, *Postal Service*, 276 NLRB 1282, 1288 (1985); *New York Times Co.*, 265 NLRB 353 (1982); *Kroger Co.*, 226 NLRB 512 (1976). Thus, the extent to which the Union had access to information regarding the transfer of employees to the shipping room is irrelevant to Respondent's obligation to provide the information requested by the Union on this issue.

Respondent has offered no valid excuse or explanation for its failure to comply with the Union's other information requests: (1) information showing that the slip resistant shoes it proposed to require were superior to other types;¹⁸ (2) information about ergonomic restrictions for the hand chamfer,¹⁹ and (3) Carl Turner's request relating to the requirements for initiating the white boards. Thus, Respondent has violated Section 8(a)(5) and (1) in failing to provide this information.²⁰

Delay in Providing Names and Hours of Employees Transferred to the Shipping Room

An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature, Inc.*, 334 NLRB 880, 885 (2001).²¹

The Board recently summarized the standard that it employs in assessing a claim of unreasonable delay: In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retriev-

ing the information, *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enf. in pertinent part 349 F.3d 233 (4th Cir. 2005).

Applying this test to instant case, I find that Respondent violated Section 8(a)(5) and (1) in not providing the names and hours of work of employees transferred to shipping room for over 4 months. In *American Signature*, supra, the Board found a violation where the employer provided the information requested by the Union two and a half to three months after the request. In *Earthgrains Co.*, 349 NLRB 389, 400 (2007), the Board found a violation where the employer responded four months after the request without explaining the delay.

Respondent has offered no explanation as to why it took four months to provide the Union with the information it requested regarding these temporary transfers. Thus, I find a violation with respect to the delay in providing this information.

SUMMARY OF CONCLUSIONS OF LAW

Respondent Kennametal, Inc. violated Section 8(a)(5) and (1) by:

(1) failing and refusing to bargain with the Union over the implementation of the Management Based Safety Program insofar as it required employees to take such actions as initialing agreement or disagreement with the safety checklist on its white boards upon pain of discipline.

(2) Excluding the Union from accident investigations.

(3) By unilaterally implementing and/or more strictly enforcing its disciplinary policies for safety violations.

(4) By suspending Doug Noyes and terminating Kenneth Wilkins.

(5) By failing and/or delaying the furnishing to the Union of information it requested that is necessary for and relevant to the Union's duties as collective-bargaining representative of Respondent's employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having disciplined Kenneth Wilkins in violation of Section 8(a)(5) of the Act, it must offer Ken Wilkins reinstatement and make Wilkins whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). It must also make Doug Noyes whole for his 1-day suspension in a similar manner.

[Recommended Order omitted from publication.]

¹⁸ Respondent in its brief at p. 23 states it had no such information. If so, it was required to so inform the Union, *Days Hotel of Southfield*, 306 NLRB 949, 954 (1992). There is no evidence that Respondent replied to the Union's May 26, 2010 request, although Amy Morissette testified that she told the Union that OSHA had no such information sometime between April and September 2010, see Tr. 335, 491-492.

¹⁹ Respondent at page 23 also states that the Union was provided the ergonomic study regarding the hand chamfer in 2009, before it made its information request. The preponderance of the record evidence is to the contrary, Tr. 167, 120-121.

²⁰ I have no basis for determining whether Respondent's claim that it could not identify employees who were exempted from the shoe policy pursuant to HIPAA is legitimate or not and thus conclude that Respondent did not violate the Act in this regard.

²¹ This case has also been cited under the name of *Amersig Graphics, Inc.*