United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

September 7, 2016

Mark J. Langer
Clerk of the Court
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Rm. 5423
Washington, DC 20001-2866

Re: *Graymont PA, Inc. v. NLRB*
D.C. Circuit Nos. 16-1249 and 16-1288
Board Case No. 06-CA-126251

Dear Mr. Langer:

I am transmitting the Certified List of the contents of the Agency Record in the above-captioned case.

Very truly yours,

Linda Dreeben
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Enclosure(s)

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRAYMONT PA, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 16-1249 and 16-1288
	)	
v.	)	Board Case No.
	)	06-CA-126251
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2016, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/Linda Dreeben
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Dated at Washington, D.C.
September 7, 2016

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Graymont PA, Inc. *and* Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, A Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 06–CA–126251

June 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On December 30, 2014, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions, the General Counsel filed limited cross-exceptions, and each filed a supporting brief, answering brief, and reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its work rules, absenteeism policy, and progressive discipline schedule on March 1, 2014. The judge also found, however, that the Respondent did not violate Section 8(a)(5) and (1) by its failure to timely inform the Union that requested information about these changes did not exist. Applying the Board's decision in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), and noting that the complaint did not mention the nonexistence of the requested information, the judge found that the 8(a)(5) violation could not be found.

As explained below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the changes at issue here. However, and also as explained below, we reverse the judge's finding that the Respondent did not violate the Act by failing to timely inform the Union that it did not possess the requested information. Specifically, we find that *Raley's Supermarkets* should be overruled to the extent that it precludes the Board from considering an unalleged failure to timely disclose that the requested information does not exist when, as here, the unalleged issue is closely connected to the subject matter of the complaint and has been fully litigated.

I. THE UNILATERAL CHANGE TO WORK RULES, ABSENTEEISM POLICY, AND PROGRESSIVE DISCIPLINE SCHEDULE

A. Facts

The Respondent mines lime and produces lime products at its Pleasant Gap and Bellefonte facilities in Pennsylvania. The Union has represented a unit of employees at both facilities since the 1960s.

The collective-bargaining agreement in effect from June 1, 2011, through May 31, 2014, contains a management-rights clause, which has remained unchanged since 2006. It states in relevant part that the Respondent:

> [R]etains the sole and exclusive rights to manage; to direct its employees; to evaluate performance, to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees

On February 14, 2014, the Respondent announced that it would implement changes to its work rules, absenteeism policy, and progressive discipline schedule on March 1.[2] These rules and policies are maintained in separate documents that are not part of the collective-bargaining agreement, and they had not been changed since February 14, 2005.[3] After the announcement, the Union informed the Respondent that it wished to discuss the changes. The parties agreed to meet on February 25 to discuss the matter.

In a letter dated February 17, 2014,[4] the Union requested that the Respondent furnish it with information relevant to the Respondent's decision to change the existing work rules, absenteeism policy, and progressive dis-

[1] We shall amend the judge's conclusions of law consistent with our findings herein, and modify the judge's recommended Order to conform to our findings and the Board's standard remedial language, and in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall substitute a new notice to conform to the Order as modified.

[2] The changes at issue here include a consolidation of the work rules and the absenteeism policy as one policy; a reduction in the number of absences that an employee may have before the Respondent issues discipline; a progressive discipline schedule that combines violations of different categories of rules instead of following separate schedules for each category; a reclassification of "sleeping on the job" and "failure to follow proper lock-out procedures" to a different category in the work rules; and a requirement that employees work 12 months without a rules violation before the Respondent removed previous violations from their progressive discipline records.

[3] In late 2006, the Respondent approached the Union about making changes to the work rules but abandoned the matter after the Union protested the change and demanded bargaining.

[4] All dates hereafter are in 2014.

cipline schedule.[5] Plant Manager Martin Turecky provided the Union a written response at the beginning of the February 25 meeting. The Respondent's letter stated in relevant part:

> Under our collective bargaining agreement, the Company retains the sole and exclusive right to manage, which expressly includes the right ". . . to adopt and enforce rules and regulations and policies and procedures . . ." Therefore, the Company has no obligation to bargain over any of the changes to which your request refers. Since there is no obligation to bargain over the decision to adopt the policies to which your [sic] refer, there is, likewise, no obligation to furnish any information regarding such decision.

Turecky also referenced "management rights" when he told the Union's representatives that, although the Respondent had no obligation to bargain over the upcoming changes or to provide the requested information, it was willing to listen to the Union's concerns about the changes. The Union's representatives expressed their desire to keep the current rules and policies, and shared a number of their specific concerns about the proposed changes. Based on the Union's comments, the Respondent made only a few revisions to the previously announced rule and policy changes. The parties did not meet again to discuss the changes before the Respondent implemented them on March 1.

B. The Judge's Decision[6]

Rejecting the Respondent's contention that the Union waived its right to bargain over the Respondent's changes to its work rules, absenteeism policy, and progressive discipline schedule, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the changes on March 1, 2014. The judge found that the contractual management-rights provisions—reserving the Respondent's right "to adopt and enforce rules and regulations and policies and procedures" and "to discipline and discharge for just cause"—did not waive the Union's right to bargain over the changes at issue. He found that the former provision was too vague to waive the Union's statutory right to bargain over any particular term of employment, and that the latter phrase authorized the Respondent to discipline employees under existing rules and policies but not to unilaterally change them. In addition, the judge found that these provisions, when read together, did not authorize the Respondent to act unilaterally.

We agree that the Union did not waive its right to bargain over these matters, and therefore the unilateral changes were unlawful.

C. Discussion

In evaluating an employer's claim that the collective-bargaining agreement permits it to make unilateral changes in terms and conditions of employment, the Board applies the long-established "clear and unmistakable waiver" standard. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). That standard—endorsed by the Supreme Court in *NLRB v. C & C Plywood*, 385 U.S. 421 (1967)—"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." *Provena*, supra at 811. In order to find a waiver based on contractual language, that language must be "sufficiently specific." *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989). Further, while "[w]aiver of a statutory right may be evidenced by bargaining history, [ ] the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter." Id. at 185. As the Board explained in *Provena*, supra:

> The waiver standard . . . effectively requires the parties to focus on particular subjects over which the employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won--in clear and unmistakable

[5] The Union requested "any memos, data of any kind, or any other Information or Materials which the company relied upon for making the decision to change the work rules, discipline policy, and why changes are being made to the absenteeism policy." The Union also requested "minutes of policy meeting[s] over the past five years in which these topics were discussed, and any decisions, or agreement that were arrived at, between the company, and the bargaining unit for Local D92 employees."

[6] The judge found, and we agree, that deferral to arbitration of the unilateral-change allegation is not warranted, as it is inextricably related to the allegation that the Respondent failed to timely furnish the Union with relevant requested information. See *Arvinmeritor, Inc.*, 340 NLRB 1035, 1035 fn. 1 (2003) (where "an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied" (quoting *American Commercial Lines*, 291 NLRB 1066, 1069 (1988)). Further, and contrary to the Respondent's contention, the judge's recommended dismissal of the related information-request allegation does not provide a basis for deferring the fully litigated unilateral-change allegation at this stage in the proceeding. See *Hospital San Cristobal*, 356 NLRB 699, 699 fn. 3 (2011) (fully litigated unilateral-change allegation not deferred to arbitration after a related information-request allegation was settled at the conclusion of the hearing).

> Language--the employer's right to take future unilateral action should be apparent to all concerned.

350 NLRB at 813.

Here, none of the contractual management-rights provisions specifically reference work rules, absenteeism, or progressive discipline.[7] Further, there is no evidence that the parties discussed these subjects during negotiations, let alone "fully discussed and consciously explored" them during bargaining over the current contract language. See, e.g., *Merillat Industries, Inc.*, 252 NLRB 784, 785 (1980) (union did not waive its right to bargain over new absentee rules where "neither the wording of the clause itself, nor any other evidence, suggest[ed] that by agreeing to the management rights clause the [u]nion waived its right to bargain" about the subject).[8] Accordingly, the Respondent has failed to establish a clear and unmistakable waiver of the right to bargain over these changes.

We find no merit in the contention of the Respondent and dissent that the contractual provision referencing the Respondent's right "to set and establish standards of performance for employees" clearly and unmistakably waives the Union's right to bargain over the changes at issue, especially when read together with the other provisions discussed above. Like the other provisions, this provision does not specifically reference the Respondent's extra-contractual work rules, absenteeism policy, or progressive discipline schedule. Further, there is no evidence that those subjects were fully discussed and consciously explored during negotiations over the contract language. Nor is there evidence indicating whether the contractual reference to "standards of performance" included the extra-contractual rules and policies at issue in this case, or only included standards relating to the quality of work performed.[9] Moreover, the Respondent's February 25 letter to the Union made no mention of this provision. Rather, the letter justified its waiver contention solely on the provision referencing the Respondent's right "to adopt and enforce rules and regulations and policies and procedures." Thus, the Respondent's subsequent reliance, in this proceeding, on additional provisions amounts to a post hoc rationalization for its conduct.[10] See generally *Youngstown Steel Door Co.*, 288 NLRB 949, 950 (1988) (rejecting respondent's contractual interpretation where there was "no contemporaneous reference to a contract interpretation" when it engaged in the conduct at issue).

Our dissenting colleague, like the Respondent, contends that the management-rights language in the parties' collective-bargaining agreement, especially the provision referencing the Respondent's right to "adopt and enforce rules and regulations and policies and procedures," establishes a clear and unmistakable waiver. He states that this language is "strikingly similar" to the contract language at issue in *United Technologies Corp.*, 287 NLRB 198, 198 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989), where the Board found a waiver of the union's right to bargain over changes to the employer's progressive discipline procedure. Like the judge, we disagree.[11]

In *United Technologies*, the Board found that, by agreeing to contract provisions stating that the respondent had "the sole right and responsibility to direct the operations of the company and in this connection to select, hire, and demote employees, *including the right to make and apply rules and regulations for* production, *discipline*, efficiency, and safety[,]" the union waived its right to bargain over the employer's change in its pro-

[7] Although the management-rights clause broadly states that the Respondent has the right to adopt and enforce rules, as discussed below, it lacks the required specificity to cover the types of work rules at issue here. See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (management-rights clause, which made no reference to rules on absences or tardiness, did not establish a waiver of the union's right to bargain over the employer's implementation of an attendance control procedure), enfd. 722 F.2d 1120 (3d Cir. 1983); *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970) (collective-bargaining agreement, which made no mention of absentee rules or progressive discipline, did not establish a waiver of the union's right to bargain over those subjects), enfd. 454 F.2d 303 (7th Cir. 1971).

[8] See also *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 568 (1979) (contractual provision stating that the employer may "make, continue and change" rules and regulations in the conduct of its business did not waive union's right to bargain over changes affecting employment and rates of pay, where such matters were neither reflected in the terms of the parties' contract nor discussed during contract negotiations), enf. granted in part, denied in part on other grounds 751 F.2d 1571 (11th Cir. 1985).

[9] See generally *Johnson-Bateman Co.*, supra at 186–187 (declining to infer that the union intended to waive its right to bargain over changes to an extra-contractual policy regarding drug and alcohol testing, where the record lacked evidence that the parties fully discussed and consciously explored the meaning and potential implications of a management-rights clause which included only a general reference to the employer's right "to issue, enforce and change company rules").

[10] Our dissenting colleague also relies on contractual management-rights provisions that reserve to the Respondent the right "to direct its employees" and "to evaluate performance." This too is a post hoc rationalization for the Respondent's conduct, and one raised solely by the dissent, and not by the Respondent in support of its waiver defense.

[11] We similarly disagree with the Respondent and the dissent that the Union waived its right to bargain over the Respondent's changes to its rules and policies under the "contract coverage" standard. This alternative theory, first raised by the Respondent on exception, is untimely. See, e.g., *United States Service Industries, Inc.*, 315 NLRB 285, 285 (1994) (finding that a respondent's defense not raised to, and thus not considered by, the judge was untimely raised on exception), enfd. mem. 72 F.3d 920 (D.C. Cir. 1995). Moreover, even had it been timely raised, we reject it and adhere to Board's long-established "clear and unmistakable waiver" standard, for the reasons set forth in *Provena*, 350 NLRB at 812–815.

gressive discipline procedure. *United Technologies*, supra at 198 (emphasis in original). Here, the parties' collective-bargaining agreement includes a management-rights provision reserving to the Respondent the right to "adopt and enforce rules and regulations and policies and procedures," but, unlike *United Technologies*, that provision does not specifically reference "discipline." Nor does it specify any other type of rule that the Respondent is authorized to unilaterally adopt and enforce. Without such an unequivocal and specific expression of the parties' mutual intent to permit unilateral employer action concerning the matter at issue, there is no basis for finding waiver. See *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999) (management-rights clause referencing "reasonable rules, not in conflict with this agreement" was too vague to waive union's right to bargain over changes to attendance policy), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000).[12]

Our colleague's reliance on *Provena*, supra, is similarly misplaced. In *Provena*, the management-rights clause in the parties' collective-bargaining agreement included provisions giving the respondent the right to "change reporting practices and procedures and/or to introduce new or improved ones"; "to make and enforce rules of conduct"; and "to suspend, discipline, and discharge employees." Id. at 815. The Board concluded that "[b]y agreeing to that combination of provisions, the [u]nion relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements." Id. Here, the management-rights clause does not include language specifically referencing the matters at issue. For example, it lacks language pertaining to attendance, like the provision in *Provena* reserving to management the right to "change reporting practices and procedures," or language authorizing the Respondent to unilaterally set forth the consequences for failing to report to work as scheduled. Thus, contrary to our dissenting colleague's suggestion, the contract provisions here, even when read together, lack the specificity that the Board found sufficient in *Provena*.[13]

In sum, the judge correctly found that the Union did not clearly and unmistakably waive its right to bargain over changes to the Respondent's work rules, absenteeism policy, and progressive discipline schedule.[14] Accordingly, we adopt his finding that the Respondent violated Section 8(a)(5) and (1) by its unilateral implementation of changes to those rules and policies on March 1, 2014.

II. THE UNION'S REQUEST FOR INFORMATION

A. Facts

On February 25, 2014, the Respondent, invoking the management-rights clause in the parties' collective-bargaining agreement, refused to furnish the Union with requested information about its decision to change its work rules, absenteeism policy, and progressive discipline schedule. The complaint, issued June 27, alleges that the Respondent, "by Martin Turecky, in writing, has failed and refused to furnish the Union with the information" it requested on February 17. The Respondent filed an answer to the complaint on July 11, and an amended answer on August 26. In response to the in-

[12] See also *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 3–4 (2014) (management-rights clause referencing employer's right "to make and alter from time to time reasonable rules and regulations . . . to be observed by employees" was too vague to waive union's right to bargain over new requirement that employees sign notes of administrative interviews to attest to the notes' veracity); *Windstream Corp.*, 352 NLRB 44, 50 (2008), affd. and incorporated by reference 355 NLRB 406 (2010) (management-rights clause referencing employer's right "to establish reasonable rules and regulations" did not amount to a waiver of the union's right to bargain over changes in the level of discipline the employer could impose for work rule violations); *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) (management-rights clause referencing employer's right to make, change, and enforce reasonable rules lacked the requisite specificity to constitute a waiver of the union's right to bargain over the employer's implementation of a no-tobacco rule), enfd. per curiam 25 F.3d 1044 (5th Cir. 1994).

[13] Our dissenting colleague's reliance on *Continental Telephone Co.*, 274 NLRB 1452, 1452–1453 (1985), enfd. 786 F.2d 1174 (9th Cir. 1986), and *Emery Industries, Inc.*, 268 NLRB 824, 824 (1984), is similarly misplaced. In each case, the Board found that a union waived its right to bargain over a particular term of employment based on the language in the parties' contract and the union's repeated acquiescence to the employer's action pursuant to its interpretation of that language. See *Continental Telephone*, supra at 1453 (finding "[u]nion's acquiescence in numerous unilateral changes, coupled with the language of the contract's management-rights section, establishes that the parties agreed that management had the right unilaterally to revise work rules such as the attendance policy"); *Emery Industries*, supra at 824 (union waived right to bargain over changes to employer's absenteeism policy by agreeing to a contract provision reserving the employer's right to discipline employees for "neglect of duty" and acquiescing to the respondent's numerous revisions to that policy). Conversely, there is no evidence here that the Union previously acquiesced to any rule or policy change that the Respondent implemented pursuant to any provision in the management-rights clause. On the contrary, as found by the judge, the Union demanded bargaining over the changes at issue here. Moreover, as noted above, in 2006 the Respondent abandoned a proposed change to its work rules after the Union protested and demanded bargaining over the matter.

[14] The dissent concedes that his interpretation of the Board's "clear and unmistakable waiver" standard in the context of management rights provisions is contrary to Board precedent, but argues that generalized management rights provisions should suffice to meet this high standard. We disagree. As management rights provisions involve the consensual surrender of a fundamental statutory bargaining right, it is imperative that the parties "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena*, 350 NLRB at 811.

formation-request allegation, and in a separate affirmative-defense paragraph, the amended answer asserts that the Respondent has no information responsive to the Union's request. Also in late August, the Respondent notified the Union that the Respondent had no information responsive to the Union's request.

At the beginning of the hearing, the General Counsel argued that "the evidence will show that the [Respondent] refused to provide relevant and necessary information to the Union citing its lack of obligation to do so," and that "[a]t the 11th hour, the [Respondent] changed its assertion and indicated to the Union that it had no information in its possession responsive to the Union's request." The Respondent asserted in its opening statement that "the evidence will show that the [Respondent] does not have information responsive to the request that was made by the Union[.]"

After the hearing, in the absence of any opposition to the General Counsel's motion, the complaint was amended to allege that the Respondent unreasonably delayed in providing the Union with relevant information regarding the Respondent's decision to change its work rules, absenteeism policy, and progressive discipline schedule. The complaint did not specifically allege, nor was it amended to allege, that the Respondent violated the Act by its failure to inform the Union that it had no information responsive to its request.

B. The Judge's Decision

The judge observed that in *Raley's Supermarkets*, 349 NLRB 26, the Board declined to find that an employer violated Section 8(a)(5) and (1) by failing to inform the union that certain requested information did not exist because the complaint alleged only that the employer unlawfully failed and refused to furnish the information. Applying *Raley's Supermarkets*, the judge declined to find that the Respondent violated Section 8(a)(5) and (1) by its 6-month delay in informing the Union that the requested information did not exist, because the amended complaint alleged only that the Respondent unreasonably delayed furnishing the requested information. As explained below, we find that *Raley's Supermarkets* was wrongly decided, and that it should not preclude a finding of a violation in the circumstances of this case.

C. Discussion

i. Due Process and the Absence of a Specific Complaint Allegation

The issue here is one of procedural due process, the fundamental elements of which are "notice and an opportunity to be heard." *Earthgrains Co.*, 351 NLRB 733, 735 (2007). Sufficient notice is that which "afford[s] [the] respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990), enfg. 296 NLRB 333 (1989). As stated in *Sunshine Piping, Inc.*, 351 NLRB 1371, 1378 (2007), "[t]he precise procedural protections of due process vary, depending on the circumstances, because due process is a flexible concept unrestricted by any bright-line rules."

Section 102.15(b) of the Board's Rules and Regulations provides that the complaint shall contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." The complaint, however, is not the exclusive source of notice of the material issues to be addressed in a Board proceeding. Depending on the circumstances, notice may also be provided by the General Counsel's representations at the hearing,[15] or it might be evident from the respondent's conduct in the proceeding.[16] "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament*, 296 NLRB at 334. The determination whether a matter has been fully litigated "rests in part on 'whether the respondent would have altered the conduct of its case at the hearing, had the specific allegation been made.'" *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2345 (2012) (quoting *Pergament*, supra at 335).

In *Pergament*, the General Counsel issued a complaint alleging that the respondents violated Section 8(a)(3) and (1) by failing to hire certain individuals because they were members of a union. Id. at 333–334. The complaint did not allege that the respondents discriminated against those individuals for filing an unfair labor practice charge, but the Board nevertheless adopted the judge's finding that the respondents violated Section 8(a)(4) by failing to hire them for that reason. Id. at 333.

[15] See, e.g., *Victoria Packing Corp.*, 332 NLRB 597, 598 (2000) ("the General Counsel's opening statement at the hearing reasonably put the [r]espondent on notice that the denial of plant access to [the union's business agent] was being alleged as an unlawful breach of the contractual visitation clause").

[16] See generally *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938) (rejecting the respondent's contention that it was denied a full and adequate hearing where "the record show[ed] that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint," and that the respondent "understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory").

In doing so, the Board found that the unalleged violation was closely connected to the subject matter of the complaint's 8(a)(3) allegation, noting that both allegations focused on the same set of facts and the same ultimate issue, and "that no party objected to the introduction of any of the relevant evidence." Id. at 335. The Board further found that the unalleged issue was fully litigated, noting that witnesses for the General Counsel and the respondents had testified about the issue, and rejecting the respondents' contention that the absence of a specific allegation either precluded them from presenting exculpatory evidence or altered the conduct of their case at the hearing. Id. at 335 & fn. 8.

The Board has applied these *Pergament* principles in information-request cases. For example, in *Castle Hill Health Care Center*, 355 NLRB 1156, 1181–1182 (2010), the Board adopted the judge's finding of a violation where the judge found, under *Pergament*, that the respondent's "continued failure" to provide requested information was fully litigated and rejected the respondent's claim that the alleged violation was limited to the union's initial information requests. See also *Piggly Wiggly Midwest*, supra at 2344, 2356 (Board adopted the judge's finding, under *Pergament*, of an unalleged violation pertaining to the failure to furnish certain sales and franchise information);[17] *Gloversville Embossing, Corp.*, 314 NLRB 1258, 1263 (1994) (Board found the respondent failed to timely provide information and also failed to provide it in a complete manner, even though the complaint did not specifically allege the latter).

Notwithstanding the Board's broad application of the *Pergament* principles, in *Raley's Supermarkets*, 349 NLRB 26, the Board majority, without explanation, did not apply (or even reference) *Pergament* in declining to find an information request violation. There, the General Counsel issued a complaint alleging that the respondent failed and refused to provide the union with a copy of an investigator's report regarding specific allegations of inappropriate behavior. Id. at 28. The Board stated that the complaint "implicitly alleges that the report exists and that the [r]espondent refuses to furnish it," and that "it is an unreasonable stretch to convert this allegation into its opposite, i.e., that the report does *not* exist, and that the [r]espondent failed to inform the [u]nion of this fact." Id. Noting the absence of an amendment to the complaint regarding the failure to inform the union no such reports existed, the Board concluded that finding a violation for this conduct was not warranted. Id.

Thereafter, in *Albertson's, Inc.*, 351 NLRB 254 (2007), the Board applied *Raley's Supermarkets* and, again not referencing *Pergament*, held that the "General Counsel must specifically allege that the failure to inform the union that requested documents do not exist (or the delayed communication of that fact) was unlawful. The instant complaint, which does not even mention the nonexistence of the documents, plainly fails to satisfy this pleading requirement." Id. at 255. The Board accordingly declined to find a violation for the failure to inform the union of the nonexistence of certain requested documents.

The *Albertson's* decision demonstrates that *Raley's Supermarkets* precludes a finding of an unalleged violation pertaining to the "nonexistence of information," regardless of whether the issue is closely connected to the subject matter of the complaint and is fully litigated. The Board has not, however, articulated a rationale for implicitly carving out this exception to the *Pergament* test.

Having carefully considered this issue and the due process considerations that are implicated, we can find no reasonable basis for maintaining this exception to *Pergament* and mandating a strict pleading requirement solely for the failure to timely inform a union that there is no information responsive to its request. We find it inimical to the duty to bargain in good faith as required by the Act. Under the duty to bargain, "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). This obligation includes the duty "to timely disclose that requested information does not exist." *Endo Painting Service, Inc.*, 360 NLRB No. 61, slip op. at 2 (2014).[18] Contrary to *Raley's Supermarkets*, we find that the policies of the Act are best served by a single test applicable to all unalleged issues that may arise. Accordingly, we overrule *Raley's Supermarkets* and its progeny to the extent they hold, contrary to *Pergament*, that for issues involving a failure to timely disclose that requested information does not exist, a finding of a violation is necessarily precluded by the absence of a specific complaint allegation. Instead, we hold that the *Pergament* test is applicable to all such circumstances in determining whether an unalleged violation may be considered.

[17] With respect to another unalleged issue, regarding the union's request for information concerning employees' vacation and holiday pay, the Board found that the "fully litigated" prong of the *Pergament* test was not satisfied because the respondent was not on notice that this specific information request was at issue. Id. at 2345.

[18] When a respondent does not respond, or fully respond, to an information request, the requesting party would have no basis for knowing that the information does not exist.

ii. Application of *Pergament* and Consideration of the Merits

As we have explained, under *Pergament*, "the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament*, 296 NLRB at 334. Both prongs of this test are satisfied here.

First, the Respondent's failure to timely disclose that the Union requested information that did not exist is a fact "closely connected" to the amended complaint's allegation that the Respondent failed to timely furnish the Union with relevant requested information, as they both involve the same evidentiary facts (the Union's request for information and the Respondent's response to that request) and present the same ultimate issue: whether the Respondent, by its August 2014 response to the Union's February 17 request for information, satisfied its statutory obligation to bargain collectively and in good faith with the Union. Indeed, the Respondent demonstrated the close connection between these issues by stating, in its answer to the complaint and again in its opening statement, that it had no information responsive to the Union's request.

Second, the issue was fully litigated. From the outset, the General Counsel asserted that, by its response to the Union's information request, the Respondent violated Section 8(a)(5) of the Act. The Respondent asserted, as an affirmative defense to the complaint allegation, that it had no information responsive to the Union's request. Notably, each party called a witness to testify that the Respondent delayed its disclosure that it lacked responsive information.[19] These circumstances demonstrate that (a) the absence of the specific allegation did not preclude the Respondent from presenting exculpatory evidence, and (b) the Respondent would not have altered the conduct of its case at the hearing had the more specific allegation been made. See *Pergament*, supra at 335.

In sum, we find that the issue of the Respondent's 6-month delay in disclosing that the requested information does not exist is closely connected to the complaint allegations and was fully litigated. Accordingly, we find that the Respondent was afforded due process, that it was not prejudiced by the absence of a complaint allegation pertaining to the "nonexistence of information," and that it is appropriate for the Board to reach the merits of the issue.

Turning to the merits, we find that the record evidence establishes the violation. In a letter dated February 17, 2014, the Union requested that the Respondent furnish information relevant to its decision to change its work rules, absenteeism policy, and progressive discipline schedule. The Respondent initially stated that the Union had waived its right to the requested information, and waited until August to disclose that the information did not exist. Plainly, the delay of this disclosure was unlawful, as it is well established that the Respondent was "obligat[ed] to timely disclose that requested information does not exist" as part of the duty to timely provide information. *Endo Painting Service*, 360 NLRB No. 61, slip op. at 2. See also *Dover Hospitality Services*, 359 NLRB No. 126 (2013) (respondent unlawfully waited 13 months to provide the union with certain requested information and to tell the union that the remainder of the requested information did not exist), affd. and incorporated by reference 361 NLRB No. 90 (2014), enfd. 636 Fed. Appx. 826 (2d Cir. 2016); *Tennessee Steel Processors*, 287 NLRB 1132, 1132–1133 (1988) (respondent unlawfully waited 6 months to inform the union that certain requested information did not exist). Therefore, assuming that it is proper to apply our decision to the foregoing conduct retroactively, we find that the Respondent violated Section 8(a)(5) and (1) by failing to disclose in a timely manner that it had no information responsive to the Union's request for information regarding the Respondent's decision to change its work rules, absenteeism policy, and progressive discipline schedule. For the reasons set out in the following section, we find it appropriate to apply our decision retroactively.

iii. Retroactive Application

"The Board's usual practice is to apply new policies and standards 'to all pending cases in whatever stage.'" *Aramark School Services, Inc.*, 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). "[T]he propriety of

[19] The Respondent contends in its answering brief that it had no reason to question witnesses about the cause of its delayed response because "it had no reason to know that the failure to notify the Union of the nonexistence of information would be alleged as a separate violation of the Act." The Respondent, however, demonstrated its understanding that the "nonexistence of information" was an issue in this case by raising it as an affirmative defense. The Respondent, therefore, cannot argue that it was denied due process because it realizes now that its evidence might establish a violation of the Act. See generally *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. at 350; *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028–1029 (7th Cir. 1990) (finding no violation of due process where the Board found an unfair labor practice based on evidence that was "a principal component of [the employer's] defense in the administrative proceedings"), enfg. 295 NLRB 113 (1989). Moreover, there is no factual dispute pertaining to the information request or the Respondent's response to that request, and the Respondent does not assert that additional testimony on this subject would warrant dismissal of the information-request allegation. See, e.g., *Park 'N Fly, Inc.*, 349 NLRB 132, 133–134 (2007) (unalleged issue fully and fairly litigated where there was no objection to relevant testimony and the respondent chose not to take the opportunity to question its own witness about the issue).

retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Thus, the Board applies new rules and standards retroactively to the parties in a case in which the rules and standards are announced, unless retroactive application would work a "manifest injustice." *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993). In determining whether retroactive application of a Board decision will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purpose of the Act; and (3) any particular injustice arising from retroactive application. Id.

We find that retroactive application of the standard announced today is warranted here. With respect to the first factor, reliance on existing law, there is no evidence that the Respondent relied on *Raley's Supermarkets*, either in deciding how to respond to the Union's information request, or in preparing for this proceeding. Regarding the second factor, retroactivity aids in accomplishing the Act's purpose of "encouraging the practice and procedure of collective bargaining"[20] by allowing the Board to apply the *Pergament* test to determine whether due process considerations preclude us from addressing the Respondent's failure to timely inform the Union that it had no information responsive to its request. In our view, no statutory purpose is served by declining to consider the issue if it is determined that such consideration would not be a denial of due process. Regarding the third factor, no particular injustice would arise from retroactive application here, because the *Pergament* test ensures that due process principles are considered and satisfied. Accordingly, we find all three factors weigh in favor of retroactive application of the new standard in this case.

AMENDED CONCLUSIONS OF LAW

Insert the following paragraph after the judge's Conclusions of Law 4 and renumber the subsequent paragraph.

"5. By failing to disclose in a timely manner that it had no information responsive to the Union's request for information regarding the Respondent's decision to change its work rules, absenteeism policy, and progressive discipline schedule, the Respondent violated Section 8(a)(5) and (1) of the Act."

[20] Sec. 1 of the National Labor Relations Act.

ORDER

The National Labor Relations Board orders that the Respondent, Graymont PA, Inc., Pleasant Gap and Bellefonte, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, by failing to disclose in a timely manner that it has no information responsive to the Union's request for information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Unilaterally changing the terms and conditions of employment of its unit employees.

(c) 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) 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 full-time and regular part-time production and maintenance employees employed by Respondent at its North Thomas Street, Bellefonte, Pennsylvania plant and its Airport Road, Pleasant Gap, Pennsylvania facility, excluding salaried foremen, office employees, guards, managers, and supervisors as defined in the Act.

(b) Rescind the changes to the work rules, absenteeism policy, and progressive discipline schedule that were unilaterally implemented on March 1, 2014.

(c) Remove from its files any references to discipline issued pursuant to the Respondent's changes to the work rules, absenteeism policy, and progressive discipline schedule that the Respondent unilaterally implemented March 1, 2014, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

(d) Offer any unit employees who were discharged pursuant to the changes to the work rules, absenteeism policy, and progressive discipline schedule full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions,

without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make whole all employees in the bargaining unit who were disciplined under the work rules, absenteeism policy, and progressive discipline schedule that the Respondent unilaterally implemented March 1, 2014, in the manner set forth in the remedy section of the judge's decision.

(f) Compensate the unit employees for the adverse income tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(g) 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.

(h) Within 14 days after service by the Region, post at its Pleasant Gap and Bellefonte, Pennsylvania facilities, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 6, 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, 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 17, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

Dated, Washington, D.C. June 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

My colleagues find that Respondent Graymont PA, Inc. (Graymont or the Respondent) violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its work rules, absenteeism policy, and progressive discipline policy and by failing to disclose in a timely manner that it had nothing responsive to the Union's request for information regarding those changes. I respectfully disagree with both of these findings.

I believe the management-rights clause of the parties' collective-bargaining agreement (CBA) clearly and unambiguously granted Graymont the right to make the changes at issue here unilaterally, i.e., without giving the Union notice and an opportunity to bargain concerning the planned changes. Alternatively, under the "contract coverage" standard applied by the D.C. and Seventh Circuits, I believe that same management-rights language demonstrates that the parties had *already* bargained and had agreed that Graymont had the right to make the changes at issue here unilaterally. In addition, because Graymont had the right to make these changes without bargaining over them, it had no obligation to provide the Union with requested information relating to its decision to implement the changes.[1] Accordingly, unlike my col-

[21] 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."

[1] Because I would find that the Respondent had no duty to furnish any information related to the changes at issue, I would also find that it had no duty to timely inform the Union that no such information existed. Accordingly, I do not reach or pass on whether *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), should be overruled to the limited extent my colleagues overrule that decision today.

leagues, I believe the Board should dismiss the complaint in its entirety.

Facts

For more than 20 years, Graymont and the Union have been parties to successive collective-bargaining agreements, including the CBA, which was effective June 1, 2011, through May 31, 2014. The CBA contained a management-rights clause, which stated in relevant part as follows:

> The Employer retains the *sole and exclusive rights* to manage; to direct its employees; *to evaluate performance,* to discipline and discharge for just cause, *to adopt and enforce rules and regulations and policies and procedures*; [and] *to set and establish standards of performance* for employees.

(Emphasis added.)

Prior to March 2014, when it implemented the changes in dispute here, Graymont maintained three "groups" of work rules and progressive discipline policies linked to two of the three groups. For violations of Group A rules,[2] Graymont applied a four-step progressive discipline policy: written warning, one-day suspension, two-day suspension, and discharge. For violations of Group B rules,[3] a three-step progressive discipline policy applied: 2-day suspension, 4-day suspension, and discharge. No progressive discipline policy applied to violations of Group C rules;[4] rather, a single violation of a Group C rule warranted discharge. When imposing progressive discipline, Graymont did not combine work rule infractions from different groups, and a rolling 12-month "reset period" was observed—i.e., each infraction was removed from the record after 12 months. Graymont also maintained an absenteeism policy. Under that policy, after six "incidents"—i.e., unexcused absences—within a rolling year, the employee was required to attend a meeting with management and the Union, where the employee received a verbal warning; a seventh incident within a rolling year resulted in a written warning; an eighth incident within a rolling year resulted in 2 days off without pay; and a ninth incident within a rolling year resulted in 1 week off without pay and a "last chance" notice.

On February 14, 2014,[5] Graymont announced its intent to implement the following changes to its work rules and its attendance and progressive discipline policies:

- Eliminate the Group A rule prohibiting "continued tardiness";
- Replace it with a more specific "Policy on Tardiness," under which more than three instances of tardiness in any 12-month period will be deemed a violation of the Group A rule prohibiting "poor work habits";
- Classify absenteeism as a Group A rule, thus reducing from six to one the number of unexcused absences an employee may have before the Respondent first issues discipline;
- Reclassify two Group C rules as Group B rules ("sleeping on the job" and "failure to follow proper lock-out procedures");
- Establish a new "pyramiding" matrix, under which Group A and B rule violations are combined for purposes of progressive discipline; and
- Change the "reset period" from a rolling 12-month system to one where violations remain on an employee's progressive discipline record until the employee has worked a full year without any violations.

Initially, the Union greeted the February 14 announcement by stating it would file a grievance. Later that day, however, the Union retracted its threat to file a grievance and asked to discuss the planned changes. Graymont agreed to meet with the Union. On February 17, the Union requested "any memos, data of any kind or any other [i]information or [m]aterials which the company relied upon for making the decision to change the work rules, discipline policy, and why changes are being made to the absenteeism policy." The Union also requested any minutes of "policy meetings" between itself and Graymont "over the past five years in which these topics were discussed" as well as any decisions or agreements that were reached. The parties met on February 25. Graymont began by handing the Union a written response to the February 17 information request. This letter stated that "[u]nder our collective-bargaining agreement, the Company retains the sole and exclusive right to manage, which includes the right ' to adopt and enforce rules and regulations and policies and proce-

[2] Group A rules prohibited, among other things, carelessness or recklessness, continued tardiness, poor work habits, loafing, infractions of Federal and State rules, and failing to follow instructions.

[3] Group B rules prohibited, among other things, verbal abuse of customers and employees, carelessness or recklessness resulting in injuries to persons or damage to equipment, and punching a timeclock for another employee.

[4] Group C rules prohibited, among other things, deliberate disobedience and insubordination, willful falsification of Company records, intoxication on the job, sleeping on the job, fighting on Company premises, theft, possession of firearms on Company property, threats or threatening behavior, and failing to follow lockout procedures.

[5] All dates are in 2014 unless otherwise specified.

dures . .'" The letter further stated that Graymont had "no obligation to bargain over any of the changes to which your request refers" or to furnish any information regarding its decision to make those changes. Orally, Graymont stated that it had no obligation to bargain over the changes to the work rules, but it was willing to talk to the Union and listen to its concerns.[6] The Union raised a number of concerns, and Graymont modified its planned changes in a few respects. Graymont implemented the changes on March 1.

Discussion

It is well established that work rules and attendance and disciplinary policies are among the terms and conditions of employment that constitute mandatory subjects of bargaining. Thus, absent a meritorious defense, an employer violates Section 8(a)(5) of the National Labor Relations Act (NLRA or the Act) if it unilaterally changes its work rules, attendance policy or disciplinary policy covering represented employees without giving the union that represents them reasonable notice and an opportunity to bargain concerning those changes. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). However, the union may waive its right to bargain, and the Board has found a "clear and unmistakable waiver" of that right where "bargaining partners 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." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). A waiver of bargaining rights may also be inferred from the parties' past practice or from a combination of the express provisions of the collective-bargaining agreement and the parties' past practice. *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992).[7]

Some courts of appeals have disagreed with the Board's use of a waiver analysis when the collective-bargaining agreement contains language covering the matter in dispute that reveals the parties have already bargained over it. As the D.C. Circuit reasoned in *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992), "[a] waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but *where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right* and the question of waiver is irrelevant" (emphasis in original). See also *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993) (same); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992) ("[W]e wonder what the exact force of the 'clear and unmistakable' principle can be when the parties have an express written contract and the issue is what it means . . ."). This alternative approach is often referred to as a "contract coverage" analysis.

In this case, the Respondent adopted rules regarding matters that were among the Respondent's "sole and exclusive rights" under the CBA. As noted above, these "sole and exclusive rights" expressly included the right to "manage" and "direct" employees, "evaluate performance," "adopt and enforce rules and regulations and policies and procedures," and "set and establish standards of performance." In these circumstances, I believe the Board cannot fairly conclude that the Respondent violated Section 8(a)(5) of the Act when it implemented the changes at issue. I believe such a conclusion is unsupported by the record, regardless of whether we apply a "clear and unmistakable waiver" analysis or a "contract coverage" analysis.[8] Viewed under the "clear and unmistakable waiver" standard, the management-rights language, and especially the provision granting the Respondent the sole and exclusive right to "adopt and enforce rules and regulations and policies and procedures," plainly expressed a "mutual intention . . . to permit unilateral employer action" regarding work rules and attendance and progressive discipline policies. *Provena*, 350 NLRB at 811. Alternatively, applying a "contract coverage" analysis, the same language demonstrated that the Union had "exercised its bargaining right" and agreed that Graymont had the sole and exclusive right to "set and establish standards of performance for employees,"

[6] The judge cited Union Representative Ralph Houser's testimony that Plant Manager Turecky specifically told the Union "that referring to the management rights . . . he didn't have to give us any information and he had no obligation to bargain over it."

[7] Additionally, a bargaining waiver may result from a union's failure to request bargaining after receiving notice or learning of a particular change or proposal. See, e.g., *Finch, Pruyn & Co.*, 349 NLRB 270 (2007) (finding that union waived its right to bargain by failing to request bargaining over poststrike continuation of subcontracting), enfd. mem. 296 Fed. Appx. 83 (D.C. Cir. 2008) (per curiam); *AT & T Corp.*, 337 NLRB 689, 692–693 (2002) (finding that union waived bargaining over closure of employer's Tucson facility, despite initially discussing closure with employer, when it "'dropped the ball' by failing to pursue the matter"). A bargaining waiver may also result from bargaining conduct itself. See *U.S. Lingerie Corp.*, 170 NLRB 750, 751–752 (1968) (finding that union waived bargaining over shutdown of New York plant when it insisted on holding employer to results of multiemployer bargaining then underway, where employer had lawfully withdrawn from multiemployer association).

[8] Because I would dismiss the "unilateral change" allegation under the "clear and unmistakable waiver" standard, I find it unnecessary to pass on whether the Board should continue applying that standard or instead adopt the "contract coverage" standard embraced by the D.C. Circuit and at least one other court.

to "discipline and discharge for just cause," and to "adopt and enforce rules and regulations and policies and procedures"—including work rules and attendance and progressive discipline policies.

Board precedent supports this analysis. In *United Technologies Corp.*, a management-rights clause gave the employer "the sole right and responsibility to direct the operations of the company and in this connection to select, hire, and demote employees, *including the right to make and apply rules and regulations for* production, *discipline*, efficiency, and safety." 287 NLRB 198, 198 (1987) (emphasis in original), enfd. 884 F.2d 1569 (2d Cir. 1989). The employer had an attendance policy under which it applied progressive discipline for poor attendance: verbal warning, written warning, suspension, and discharge. 287 NLRB at 205. The employer unilaterally eliminated suspension as the penultimate step in that progressive discipline policy. Id. The Board found that the Union had waived its right to bargain over this change, explaining that "the contract language plainly grant[ed] the [r]espondent the right to unilaterally make and apply rules for discipline" and that there was nothing in the parties' bargaining history to indicate that the language "was intended to mean something other than that which it plainly state[d]." Id. at 198. Here, the management-rights language in the parties' CBA—especially the language granting the Respondent sole and exclusive right to "adopt and enforce rules and regulations and policies and procedures"—is strikingly similar to the language the Board found dispositive in *United Technologies*. Indeed, the management-rights language in the parties' CBA presents an even stronger case for waiver than *United Technologies* because it includes a more specific reference to the matters at issue. In addition to granting the Respondent the sole and exclusive right to "discipline and discharge," the management-rights language also grants the Respondent the sole and exclusive right to "set and establish standards of performance." The Respondent's disputed changes—concerning tardiness, absenteeism, and progressive disciplinary procedures—involve the setting and establishing of standards of performance.[9]

The very case in which the Board reaffirmed the "clear and unmistakable waiver" standard—*Provena St. Joseph Medical Center*, supra—also supports my analysis here. In *Provena*, a management-rights clause gave the employer the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees," 350 NLRB at 808, and the parties' contract "contained no express provisions outside the management-rights clause regarding disciplinary processes," id. at 809. The employer unilaterally implemented a new disciplinary policy on attendance and tardiness. Id. The Board found that the above provisions, "taken together, explicitly authorized" the employer's unilateral action. Id. The Board explained that by "agreeing to that combination of provisions, the [u]nion relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements." Id. The management-rights language in the instant case makes at least as compelling a case for clear and unmistakable waiver as the language the Board relied on *Provena*.[10]

My colleagues cite a number of cases they say contradict a waiver finding here. To the extent this is so, I believe the fault lies in those cases because the insistence on more detailed language referencing a particular change fails to account for the reality that many provisions in collective-bargaining agreements "must be expressed in general and flexible terms" because "[o]ne cannot spell out every detail of life in an industrial establishment."[11] Management-rights language may be general and, at the same time, clear and unmistakable. Here, the parties agreed that Graymont reserved the right, without exception, "to adopt and enforce rules and regulations and policies and procedures." No reasonable person reading this language could conclude that Graymont's right of unilateral action extended to rules, regulations, policies and procedures concerning *some* matters but not others. The language reflects an agreement to

[9] Unlike my colleagues, I do not fault Graymont's February 25 letter to the Union for failing to explicitly reference the contractual right to "set and establish standards of performance," nor was Graymont's reliance on that provision in support of its waiver argument "a post hoc rationalization for its conduct," as my colleagues assert. In its February 25 letter, Graymont referred to its right to "manage" under "our collective-bargaining agreement," and in a subsequent oral communication with the Union, it again referred to "the management rights." In my view, these broad, contemporaneous references were sufficient to put the Union on notice that Graymont was relying on the management-rights clause as a whole and was not limiting its waiver argument to any one part of that clause. Moreover, the case my colleagues rely on is distinguishable. In *Youngstown Steel Door Co.*, the Board rejected an employer's contractually based waiver argument where it made "*no* contemporaneous reference to a contract interpretation" at the time it refused to bargain over a change. See 288 NLRB 949, 950 (1988) (emphasis added).

[10] My colleagues fault the management-rights clause for failing to explicitly state that the Respondent's right "to adopt and enforce rules and regulations and policies and procedures" included the right to adopt and enforce rules regarding discipline. Neither did the management-rights clause in *Provena*, yet the Board found a clear and unmistakable waiver of the right to bargain regarding a new disciplinary policy.

[11] Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491–1492 (1959).

reserve to Graymont the right "to adopt and enforce rules and regulations and policies and procedures" concerning *all* matters—including, as relevant here, punctuality, attendance, and discipline. And the Union's bargaining waiver is made even clearer by other provisions in the management-rights clause reserving to Graymont the right to "manage" and "direct" employees, "evaluate performance," and "set and establish standards of performance."

In sum, I believe the management-rights language in the parties' CBA plainly authorized Graymont to make the changes at issue here without giving the Union notice and an opportunity to bargain regarding those changes. By agreeing to that language, the Union clearly and unmistakably waived its right to bargain over the changes.[12] Alternatively, under a "contract coverage" standard, I would find that the Union had already bargained and agreed that Graymont had the right to make these changes unilaterally. Accordingly, I would dismiss the complaint allegation that the Respondent violated Section 8(a)(5) and (1) when it unilaterally implemented changes to its work rules and its attendance and progressive discipline policies.[13]

For similar reasons, I believe the Board should find that Graymont did not violate the Act by failing to provide or unreasonably delaying in providing the Union with requested information concerning its reasons for implementing the disputed changes, or by unreasonably delaying in informing the Union that it had no information responsive to its request. When bargaining is not required regarding a particular matter, either because the matter is a nonmandatory bargaining subject or because parties have waived any bargaining rights, the union has no right under Section 8(a)(5) to request and receive information regarding the matter. See *American Stores Packing Co.*, 277 NLRB 1656, 1658–1659 (1986); *Emery Industries,* 268 NLRB at 824–825; *Otis Elevator Co. (Otis II)*, 269 NLRB 891, 894 (1984), overruled on other grounds *Dubuque Packing Co.*, 303 NLRB 386, 390 fn. 8 (1991), enfd. sub. nom. *UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994).

Accordingly, for the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. June 29, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

[12] See also *Emery Industries, Inc.*, 268 NLRB 824, 824 (1984) (contract language under which employer retained the right to discipline employees for neglect of duty, coupled with union's past acquiescence in employer's unilateral changes to its policies, constituted waiver of the union's right to bargain over the employer's implementation of new absenteeism policy); *Continental Telephone Co.*, 274 NLRB 1452, 1452–1453 (1985) (clause granting employer the "right and power" to "promulgate and from time to change the rules and regulations governing the conduct of employees," coupled with union's past acquiescence in similar unilateral changes, constituted waiver of the union's right to bargain over employer's changes to attendance policy), enfd. mem. sub nom. *International Brotherhood of Electrical Workers, Local 543 v. NLRB*, 786 F.2d 1174 (9th Cir. 1986).

My colleagues note that there is no evidence concerning the extent to which the parties, during contract negotiations, "fully discussed and consciously explored" the issues here. That is correct but immaterial. The language of the contract itself demonstrates the Union's clear and unmistakable bargaining waiver, and that ends the analysis. See, e.g., *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998) (holding that *either* contract language must clearly demonstrate waiver *or* "the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter"), enfd. mem. 176 F.3d 494 (11th Cir. 1999).

[13] As noted above in the statement of facts, the Union requested to "discuss" the changes Graymont had announced, and I believe that in most circumstances, the word *discuss* would be intended to mean and understood as meaning "bargain." See *Champaign Builders Supply Co.*, 361 NLRB No. 153, slip op. at 1 fn. 1 (2014) (Member Miscimarra, concurring); see also *Armour & Co.*, 280 NLRB 824, 828 (1986). Graymont agreed to meet and discuss the planned changes, but it stated at the outset of the parties' February 25 meeting that it would not bargain. Moreover, in addition to alleging that Graymont violated Sec. 8(a)(5) by unilaterally implementing changes to its work rules and attendance and discipline policies, the complaint separately alleged that Graymont violated Sec. 8(a)(5) by failing and refusing to bargain with the Union on request. Even if, as is the case here, an employer has the right to act unilaterally to change a term or condition of employment that constitutes a mandatory subject of bargaining, it remains obligated to bargain *upon request*. See *Katz*, supra, 369 NLRB at 743 ("A refusal to negotiate in fact as to any [mandatory] subject . . . about which the union seeks to negotiate, violates section 8(a)(5) . . ."); *J. H. Allison & Co.*, 70 NLRB 377, 378 (1946) (employer violates the Act by refusing to engage in bargaining over a mandatory subject as to which the union requests bargaining), enfd. 165 F.2d 766 (6th Cir. 1948), cert. denied 335 U.S. 814 (1948). However, the judge did not address the separate "refusal to bargain on request" allegation, and no exceptions were filed to the judge's failure to do so. Accordingly, I do not reach or pass on whether—separate from whether or not Graymont violated the Act when it unilaterally implemented changes to its work rules and attendance and progressive discipline policies—Graymont may have unlawfully refused to bargain upon request.

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 refuse to bargain collectively with Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, by failing to disclose in a timely manner that the company has no information responsive to the Union's request for information that is relevant and necessary to the Union's performance of its functions as the bargaining representative of our unit employees.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

All full-time and regular part-time production and maintenance employees employed by Respondent at its North Thomas Street, Bellefonte, Pennsylvania plant and its Airport Road, Pleasant Gap, Pennsylvania facility, excluding salaried foremen, office employees, guards, managers, and supervisors as defined in the Act.

WE WILL rescind the changes to the work rules, absenteeism policy, and progressive discipline schedule that were unilaterally implemented on March 1, 2014.

WE WILL remove from our files any reference to discipline issued pursuant to the changes to our work rules, absenteeism policy, and progressive discipline schedule that the company unilaterally implemented on March 1, 2014, and WE WILL, within 3 days thereafter, notify affected employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

WE WILL offer any unit employees who were discharged pursuant to the changes to the work rules, absenteeism policy, or progressive discipline schedule full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole any unit employees who were disciplined under the changes to the work rules, absenteeism policy, and progressive discipline schedule that the company unilaterally implemented March 1, 2014.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

GRAYMONT PA, INC.

The Board's decision can be found at http://www.nlrb.gov/case/06–CA–126251 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Dalia Belinkoff, Esq. (NLRB Region 6), for the General Counsel.

Eugene A. Boyle Esq. (Neal, Gerber & Eisenberg LLP) of Chicago, Illinois, for the Respondent.

DECISION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves an employer that changed its work rules during the term of the labor agreement it had entered into with the union representing its employees. The General Counsel of the National Labor Relations Board (Board) alleges that the employer had a duty to notify the union and provide an opportunity for collective bargaining before making the changes and that it violated the National Labor Relations Act (Act) by failing to do so. The General Counsel further alleges that the employer violated the Act by, in response to a union information request, delaying telling the union for 6 months that it possessed no

information requested by the union regarding the employer's decision to make these changes.

The employer disputes that it violated the Act in any manner. It contends that the unilateral implementation dispute should be deferred to arbitration pursuant to the parties' contractual dispute resolution mechanism. Alternatively, it contends that it was not required to bargain before implementing the changes for three independent reasons: because the changes were not material, because the union waived the opportunity to bargain when the employer announced its intent to make the changes, and, finally, because the union waived the right to bargain based on the management-rights clause in the parties' collective-bargaining agreement. As discussed herein, I reject each of the employer's contentions and find that by implementing the unilateral changes the employer violated the Act, as alleged.

As to the delay in providing information, I reject the employer's "derivative" argument that it had no duty to provide information about the changes because it had no duty to bargain about the changes. However, as discussed herein, I am constrained to dismiss this allegation. The information the employer delayed providing was notification that it had no information responsive to the request. Under the rule announced in *Raley's Supermarkets*, 349 NLRB 26 (2007), in order for a violation to be found in such circumstances the complaint allegation must specifically allege that the employer failed to provide or delayed in providing notification that it had no information responsive to the union's request. At least where the General Counsel is aware of the situation prior to trial, a complaint allegation, such as that here, of a general refusal to provide or delay in providing information, must be dismissed. This technical and unsatisfying rule is one I must follow unless and until it is overruled by the Board.

STATEMENT OF THE CASE

On April 9, 2014, the Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union) filed an unfair labor practice charge alleging violations of the Act by Graymont PA, Inc. (Graymont), docketed by Region 6 of the Board as Case 06–CA–126251. The Union filed an amended charge in the case on June 20, 2014. Based on an investigation into the charge, on June 27, 2014, the Board's General Counsel, by the Acting Regional Director for Region 6 of the Board, issued a complaint alleging that Graymont violated the Act. Graymont filed an answer, and then an amended answer denying all alleged violations of the Act.

A trial was conducted in this matter on September 16, 2014, in State College, Pennsylvania.[1]

Counsel for the General Counsel and counsel for Graymont filed posttrial briefs in support of their positions by October 21, 2014.[2] On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Graymont is and at all material times has been a corporation with offices and facilities in Pleasant Gap and Bellefonte, Pennsylvania, where it is engaged in the mining and production of lime and lime products. In conducting its operations during the 12-month period ending March 31, 2014, Graymont sold and shipped from these Pennsylvania facilities goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. Graymont is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is and at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Graymont mines limestone and produces lime products for industrial and environmental application at approximately 19 facilities across the United States and Canada. It operates two facilities—one in Pleasant Gap, Pennsylvania, and the other in Bellefonte, Pennsylvania—at which approximately 150 employees work under a collective-bargaining agreement between Graymont and the Union. The Union has represented employees in this bargaining unit for more than 20 years (the current plant manager testified that he had been told that the Union had represented employees at these facilities since the 1960s).

The current collective-bargaining agreement was effective June 1, 2014, and will continue in effect until at least May 31, 2017. The previous agreement was in effect from June 1, 2011, to May 31, 2014 (the 2011 Agreement). Before that there were successive labor agreements in 2001 and 2006.[3]

The management-rights clause of the labor agreements

The 2001 collective-bargaining agreement contained a short management-rights clause (Art. 1 para. 8) that stated:

> All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain in effect.

In the negotiations for the 2006 Agreement, Graymont pro-

[1] At the close of the hearing counsel for the General Counsel moved to amend the amended charge filed June 20, 2014, to state as the basis of the charge modifications in policy since on or about March 1, 2014, instead of, as stated in the amended charge (GC Exh. 1(c)), since on or about March 31, 2014. Counsel for the Respondent stated that he did not object (Tr. 131). I indicated a willingness to grant the amendment (Tr. 130) but never, in fact, did. I grant it now.

[2] On October 21, 2014, with the submission of her brief, counsel for the General Counsel moved to amend the complaint—essentially to change the allegation that the Respondent refused to provide the Union with requested information to an allegation that the Respondent unreasonably delayed providing the same requested information. The Respondent did not file an opposition to the motion to amend. I grant the amendment.

[3] The 2011 labor agreement contains the following provision, recognizing the Union as the bargaining agent for the following unit of employees:

> Employees in the Bellefonte Plant located on North Thomas Street and the Pleasant Gap plant located on Airport Road The term "employees" as used in this Agreement will not include salaried foreman and office employees.

posed a longer management-rights clause. The resulting 2006 Agreement contained the following management-rights clause at Art.1 par. 8 of the contract:

> The Employer retains the sole and exclusive rights to manage; direct its employees; to hire, to assign work, to transfer, to promote, to demote, to layoff, to recall, to evaluate performance, to determine qualifications, to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; to set and establish standards of performance for employees; to determine the number of employees, their duties and the hours and location of their work; to establish, change, or abolish positions; to create and implement training and development programs for employees; to implement drug and alcohol testing rules and procedures that are consistent with applicable law; to create any new processes; to make technological changes; to determine shifts; to install or remove any equipment. The rights expressly reserved by this Article are merely illustrations of and are not inclusive of all of the rights retained by the Employer. The rights expressly reserved by this Article are subject to the terms and conditions of the Agreement, and to the extent there is a conflict the terms and conditions of this Agreement shall prevail.
>
> All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain exclusively vested in the Company.

Graymont's office coordinator, Shawn Miller, who handles human resources' duties and was involved in negotiations for the 2006 Agreement, testified that there was significant discussion on the clause in 2006 negotiations. During her testimony she reviewed (and the Respondent offered into evidence) notes of an employer-maintained bargaining file from 2006, which corroborated (and informed) her testimony. Miller testified that in the 2006 negotiations the Union raised concerns about language in the Employer's original proposal regarding the use of outside contractors and about the Employer's ability to change shifts from 8 to 12 hours and back. According to Miller these items were removed by the Employer through the negotiating process. Based on her demeanor and the corroborating force of the notes, I credit Miller's testimony on this score.[4] Notably, neither the Union's President Dan Ripka, Miller, nor any other witness or evidence suggests that discipline or absenteeism and/or attendance were discussed in reference or regard to the management-rights clause.[5]

The foregoing management-rights clause, which was included in the 2006 Agreement, was retained unchanged in the successor 2011 Agreement, and the 2014 Agreement.

In June 2014, during negotiations for the 2014 Agreement, the Union proposed changes to the language of the management-rights clause that included placing the work rules in the labor agreement, and other proposed changes. None of these changes were adopted and the 2014 Agreement, which was effective June 1, 2014, retained the same management-rights provision as was in the 2006 and 2011 Agreements.

The Work Rules and Absenteeism Policy

Until the change in work rules on March 1, 2014 (during the term of the 2011 Agreement), that is the subject of the instant dispute, Graymont maintained the same work rules for over 20 years. The pre-March 1, 2014 work rules set forth three categories (Group A, B, and C) of infractions with penalties established for each category. Penalties for successive violations of Group A (which included the statement that "Continued tardiness will not be permitted") progressed from a first time warning to discharge upon the fourth violation within a year. Group B violations begin with a 2-day suspension for the first violation with discharge the prescribed penalty for a third violation within a year. The more serious infractions listed in Group C prescribed discharge for a first offense. For purposes of imposing progressive discipline, violations of different classifications (for instance, single violation of Group A and a single violation of Group B) were not combined.

The work rules also contained a Policy on Absenteeism that stated:

POLICY ON ABSENTEEISM

> When an[ ] employee is habitually absent from his/her job, the Company will notify the employee, in writing, with a copy to the Union that the employee's attendance is unsatisfactory and unacceptable.
>
> If attendance does not immediately improve to the full satisfaction of the Company, a strongly worded letter will be sent to the employee, with a copy to the Union, telling the employee he is on probation and if attendance does not improve immediately he is subject to discharge. At some point during this time period a meeting will be held between the affected employee, Union committeeman and Company Representative to impress upon the employee the seriousness of the situation and to warn the employee that he/she will be discharged the first time he/she is absent without good and sufficient reason within one year, or for continued habitual absence for any reason.

Ripka testified that as early as 2003, the Union requested that a new absenteeism policy be created that would provide more certainty and consistency about attendance expectations. For her part, Miller recalled that the matter was raised at the Employer's initiative, but in any event, she agreed that when Graymont talked to the Union it agreed "that we needed to do something about it."

The issue was discussed in "policy meetings"—meetings between the Union and Graymont that could be requested by either party to discuss ongoing issues or concerns. Typically, four to six people were present at the meetings for each side. After each policy meeting, Graymont's Miller would type up "minutes" of the meeting, which, more accurately, were notes

[4] The Union's President, Dan Ripka, testified that in 2006 the Union accepted Graymont's proposal as proposed, although he also testified that he did not remember whether the Union made proposals with regard to this clause or what discussion the parties had at the table. Ripka was generally a good witness, and, I believe, an honest one, but in this instance he was uncertain, did not have the same sharpness of memory as Miller on this issue, and had no notes to review. Accordingly, I credit Miller as to this issue.

[5] Throughout this decision I refer to attendance and absenteeism policy interchangeably, which is in accordance with the parties' understanding. See Tr. 7.

summarizing the discussions, and distribute copies to all meeting participants from both management and the union side.

A new absenteeism policy was discussed in a policy meeting on May 29, 2003, but no change was made to the absentee policy in 2003. The matter was raised again in 2004, and it was discussed by the parties in October and December 2004, and in January 2005. The Employer advanced new absenteeism proposals during these meetings. According to Miller, "[W]e wanted to put a little more teeth into the absenteeism policy."

On February 14, 2005, a new absenteeism policy was implemented. It stated:

> The Company and the Union Committee have agreed to the following terms:
>
> 1. Six (6) incidents within a rolling year will warrant:
> A. A letter from Shawn, which will include the date of the last incident
> B. Management and the union will meet with the employee which will be considered a Verbal warning and placed into the employee's file
>
> 2. Seventh (7th) incident within a rolling year will warrant:
> A. A Written Warning from Management which will be placed into the employee's file
>
> 3. Eighth (8th incident within a rolling year will warrant:
> A. Two days off without pay which will be noted in the employee's file
>
> 4. Ninth (91h) incident within a rolling year will warrant:
> A. One week off without pay which will be noted in the employee's file, plus
> B. Last Chance Notice, which will cover the next 24 months
>
> Note: A doctor's excuse will be considered an excused absence.

The foregoing absenteeism policy, and work rules generally, remained in effect from 2005 until March 1, 2014.

At one point in late 2006, Graymont approached the Union with a proposal to change the work rules and discipline to make them much stricter. The Union protested in letters sent to Graymont that "these are mandatory subjects of bargaining" and demanded that Graymont "suspend any plan[n]ed implementation of these new rules until after the union and the company ha[ve] had the opportunity to bargain over them," contending that "labor law forbids any implementation of a new policy until the bargaining process is complete." Ripka discussed the matter with then Plant Superintendent Rich Fenush, who explained some problems the Employer was having with employee conduct. Ripka suggested that the Employer's issues could be addressed and resolved by application of the current work rules. The new work rules were not implemented.

The February 14, 2014 announcement of intent to change the work rules and absenteeism policy

In February 2014, during the term of the 2011 Agreement, Miller informed the Union that Graymont had scheduled a policy meeting for February 14.

At the meeting, Plant Manager Martin Turecky began by discussing safety issues and then, according to Union President Ripka, "proceeded to tell us that they were changing the work rules," effective March 1. Miller passed out copies of new work rules, which included new rules on absenteeism and tardiness. This was the first mention to the Union of Graymont's interest in and intent to change the work rules.

The new work rules distributed at this meeting incorporated policies on absenteeism and tardiness at the conclusion of the work rules and read as follows:

> Work Rules
>
> The following is a set of work rules for the employees of Graymont (PA) Inc. This set of work rules is in no way conclusive. For example, the Code of Business Conduct and Ethics applies as well. In cases where infractions against the Company or its employees are not specifically listed, common sense will apply.
>
> Group A
>
> 1. Carelessness or recklessness, including horseplay, is not permitted.
> 2. When an employee is absent, for any reason, he must call the report off phone number assigned by his supervisor, prior to the start of his shift, stating the reason why he must be absent and, if possible, when he will return.
> 3. Every accident must be reported to your supervisor before the end of the shift upon which the accident occurs.
> 4. Employees must limit all lunch periods to the length of time specified.
> 5. No employee is permitted to leave the Company premises during working hours without permission,
> 6. Poor work habits will not be permitted.
> 7. Failure to promote efficient operation of the plant or equipment will not be permitted.
> 8. Infractions of Federal, state and general or specific departmental safety rules will not be permitted.
> 9. Hard hats, safety glasses and safety shoes must be worn in the plant area at all times.
> 10. Failure to follow instructions is not permitted.
> 11. Failure to cooperate with inspection or attempt to prevent inspection of tool boxes, lockers, parcels or other containers on or within Company property.
> 12. Unauthorized use of Company phone will not be permitted.
>
> The discipline progression will normally only be reset after an employee works twelve (12) consecutive months free of any work rule violations. The following are the penalties for infractions of Group A rules:
>
> First – Written warning
> Second – One (1) day off
> Third – Two (2) days off
> Fourth – Discharge
>
> NOTE: Group A and Group B violations will be combined in discipline progression. Please reference the chart in this document.

	First	Second	Third	Fourth
A A A A	Written Warning	One Day Off	Two Days Off	Discharge
AAAB	Written Warning	One Day Off	Two Days Off	Discharge
AABA	Written Warning	One Day Off	Four Days Off	Discharge
AABB	Written Warning	One Day Off	Four Days Off	Discharge
ABAA	Written Warning	Two Days Off	Four Days Off	Discharge
ABAB	Written Warning	Two Days Off	Four Days Off	Discharge
ABBA	Written Warning	Two Days Off	Four Days Off	Discharge
ABBB	Written Warning	Two Days Off	Four Days Off	Discharge
BAAA	Two Days Off	Two Days Off	Four Days Off	Discharge
BAAB	Two Days Off	Two Days Off	Four Days Off	Discharge
BABA	Two Days Off	Two Days Off	Four Days Off	Discharge
BABB	Two Days Off	Two Days Off	Four Days Off	Discharge
BBAA	Two Days Off	Four Days Off	Four Days Off	Discharge
BBAB	Two Days Off	Four Days Off	Four Days Off	Discharge

Group B

1. Verbal abuse of customers, truck drivers, suppliers, or any other outsiders who are conducting authorized business on Company property will not be permitted.
2. Carelessness, recklessness or failure to follow instructions which results in injuries to persons or damage to equipment or property will not be permitted.
3. Punching of time clock for any other person is not permitted.
4. Verbal abuse or harassment of other employees or any interference with Company operations will not be permitted.
5. Sleeping on the job is not permitted.
6. Failure to follow proper lock-out/tag-out procedures.

The discipline progression will normally only be reset after an employee works twelve (12) consecutive months free of any work rule violations. The following are the penalties for infractions of Group B rules:

First – Two (2) days off
Second – Four (4) days off
Third – Discharge

NOTE: Group A and Group B violations will be combined in discipline progression. Please reference the chart in this document.

Group C

1. Deliberate disobedience of supervisor's instructions, or any form of insubordination will not be permitted.
2. Willful falsification on any Company record will not be permitted.
3. Intoxication on the job and/or use of or possession of alcoholic beverages or illegal drug at work is prohibited. Possession includes having them in your vehicle on Company property.
4. Fighting, disorderly conduct, or any form of physical violence on Company premises is not permitted.
5. Stealing or deliberate damage to Company or employee's property is not permitted, and shall be prosecuted as prescribed by law.
6. An employee must not absent himself/herself from work for more than three (3) days without proper notice.
7. Possession of firearms, explosives or other weapons on Company property is prohibited.
8. Threats or threatening behavior against Company property, or anyone on Company property, or any Company employee, whether or not on Company property, is prohibited. All threats will be assumed to have been made with the intent to carry them out.

The following are the penalties for infractions of Group C rules:
DISCHARGE

Policy on Absenteeism
When, all personal days are used, each employee will be allowed one (1) unexcused absence. After that one (1) unexcused absence has been used, the employee will be considered in violation of Group A–6 (Poor work habits will not be permitted) with each proceeding unexcused absence.

NOTE: Supervisors will define the vacation scheduling policy for each department. For example, the supervisors will define how many employees are permitted to be on vacation for any given shift and/or day to ensure efficient operation of their

department.

Policy on Tardiness
If you are tardy more than three (3) times in any twelve (12) month period, each proceeding occurrence will be considered a violation of Group A–6 ((Poor work habits will not be permitted).

In his testimony at the hearing, Turecky referred to this as a "proposal" and contended that much of it was "clarification" of the old policy. However, he recognized that the Employer was changing the absenteeism policy, by any definition.

The record does not contain a comprehensive summary of the changes, but some of the major ones include:

including absenteeism within the definition of violations covered by Group A;

shortening the number of unexcused absences (after use of personal days) before beginning progressive discipline from six to one;

the quantifying of the number of instances of tardiness necessary to begin progressive discipline (a change from a penalizing of "continued tardiness");

the change from violations of more than one year not counting towards progressive discipline (i.e., old violations automatically "fell off" after one year), to a system where older violations remained on the employees' progressive discipline record unless and until an employee worked one year without any violations at all;

the "pyramiding,' i.e., combining of Group A and B violations for purposes of applying progressive discipline steps.

According to Graymont's notes of the meeting, Turecky "highlighted some of the points which were changed, such as the rolling 12 months, combining of A's and B's, Policy on Absenteeism." Turecky asked the Union if it had any comments. The parties took a break while the Union caucused. When the Union returned, its representatives said "[W]e had no comments at this time about the changes.' Turecky said that the changes were going to be implemented and Ripka told him that the Union would "file a grievance on the implementation.' Turecky said that the Union "couldn't file a grievance because [the work rules and absenteeism policy] were not in the contract anywhere." The Union responded that "we were filing a grievance at that time anyway.' The meeting ended.

Later that day, Ripka and fellow union negotiating committee member Bill McElwain approached Turecky at his office and told him "[T]hey would like to discuss the rules and they will withdraw the grievance." Ripka testified that he told Turecky, "[W]e wanted to talk about the work rules.' Turecky "said that would be fine and we would have a meeting.'

The Union's information request; the Employer's response, and the February 25 meeting

By letter from the union's recording secretary to Turecky, dated February 17, the Union presented Graymont with the following request for information:

Dear Martin,

Enclosed is a request from the President of Local D92, and Chairman Ralph Houser.

This is a formal information request for any memos, data of any kind or any other Information or Materials which the company relied upon for making the decision to change the work rules, discipline policy, and why changes are being made to the absenteeism policy.

Please include any minutes of policy meeting[s] over the past five years in which these topics were discussed, and any decisions, or agreement that were arrived at, between the company, and the bargaining unit for Local D92 employees.

Your attention to this matter, as soon as you can would be greatly appreciated. Please forward all copies of this information to President Dan Ripka, and Ralph Houser, Committees Chairman.

The parties met February 25. At this meeting, Turecky began by handing the Union a written response to the Union's information request. The response, in the form of a letter from Turecky to Union Committee Chairman Ralph Houser, stated:

This is in response to your February 19, 2014, information request regarding the revised rules and policies.

Under our collective-bargaining agreement, the Company retains the sole and exclusive right to manage, which expressly includes the right ". . to adopt and enforce rules and regulations and policies and procedures. [."] Therefore, the Company has no obligation to bargain over any of the changes to which your request refers. Since there is no obligation to bargain over the decision to adopt the policies to which you refer, there is, likewise, no obligation to furnish any information regarding such decision. In any event, there is no obligation to provide any information regarding internal management discussions leading to such a decision.

Regarding your request for minutes of policy meetings, the Union already has copies of all such minutes. In addition, if the Union contends that there is any agreement between the Company and the Union that prevents or limits the Company's right to adopt the changes in policies to which you refer, the Company hereby formally requests that you furnish us with a copy of any such agreement.

There was discussion about the Union's information request, with Turecky essentially reiterating what was stated in the Employer's letter. According to Graymont's notes of the meeting, although Turecky told the Union that Graymont "had no obligation to bargain over any of the changes made to the work rules" it was "willing to talk to the union and listen to their concerns about any changes." Union Representative Ralph Houser testified that Turecky "said he received the request of information from the Union regarding the work rules, and he said that referring to the management rights that he didn't have to give us any information and he had no obligation to bargain over it."

Turecky asked the Union for comments on the changes. The union representatives objected to the new policies on a number

of grounds: generally, the Union was concerned about the lower number of absences that would lead to the commencement of a disciplinary progression under the new rules. The Union also complained about the absenteeism policy being added into the work rules as a Group A violation—the Union wanted the absenteeism policy kept separate. The Union raised an issue with the fact that the under the new policy employees would have to use personal holidays as part of the new absenteeism policy, and that three times tardy was now a violation of Group A rules. The Union objected to Group A and B violations being combined for purposes of progressive discipline (i.e., "pyramided"). The Union raised concern with the change from the current rules, under which older discipline "fell off" after a calendar year, to the new rules in which older discipline fell off only after there were no violations of any kind for a 1-year period. The Union objected to the inclusion of the word "normally" as a modifier to the policy's statement that discipline would be "reset" after 12 months of no violations. The Union objected to the work rule for insubordination, as it was concerned that an employee refusing to undertake a task that he/she deemed unsafe would be found insubordinate. Finally, the Union wanted clarification on what the rule meant by its prohibition of "unauthorized" use of the company telephone.

More generally, the Union told the Graymont representatives that it wanted to keep the current policy. However, the Union said it would entertain shortening the number of days of absence permitted before discipline was initiated.

In response, and after a caucus, Graymont agreed to remove the word "normally" from the rule's statement that progressive discipline reset after 12 months of no violations. In response to the Union's concern about an employee being charged with insubordination if the refusal to obey involved a safety issue, Graymont pledged not to apply the rule in that manner. This oral pledge was satisfactory to the Union. Finally, Graymont removed from the rules the prohibition on unauthorized use of the company telephone. Turecky told the Union that Graymont could not agree to some of the other changes sought by the Union.

The parties dispute the plan going forward at the end of the meeting. Union President Ripka and testified that "Turecky said we would have another meeting before the implementation." Houser echoed this, somewhat less definitively, testifying that "Turecky told us that we would probably have another meeting for the work rules before March 1st." Turecky testified that he believed he told the Union that "we'll plan to go ahead with the implementation as of March 1st." Turecky testified that he did not recall saying that there would be another meeting before March 1.[6]

On February 27, by email, the Union received the final version of the rules to be implemented. The only changes from the original revisions provided to the Union on February 14, were the removal of the rule prohibiting unauthorized use of the phones, and the removal of the word "normally" from the explanation following the listing of Group A and Group B violations, which now stated: "The discipline progression will be reset after an employee works (12) consecutive months free of any work rule violations." (In the original version it stated that "The progression will normally only be reset after an employee works (12) consecutive months free of any work rule violations.")

The March 1, 2014 implementation, and the August 2014 explanation by the Employer that it had no information responsive to the Union's information request

There was no follow-up meeting. The Employer did not arrange one. The Union did not request one. The new revised rules were implemented March 1, 2014.

In August 2014, a Graymont representative, filling in for Turecky, told Ripka and Houser that with regard to the Union's February information request, "[T]here wasn't any written information that we asked for, that they just met and changed the work rules and absenteeism policy because they thought that there was a better way to run the business."

On or about August 26, 2014, the Respondent filed an amended answer to the complaint in this case. The only substantive difference in the amended answer was the Respondent's response to allegations relating to the refusal to provide information. It reiterated its answer but added "affirmatively, that, other than the meeting minutes already in the Union's possession, Respondent has no information responsive to the Union's request." (GC Exh. 1(k) at ¶12.) This affirmation that "the Respondent has no information responsive to the Union's information request" was reiterated in a newly added affirmative defense set forth in the list of affirmative defenses appended to the Respondent's amended answer (See GC Exh. 1(k) at the fourth affirmative defense).

At the hearing, Turecky testified that Graymont did not rely on any data or documents in deciding to make the work rule and absenteeism changes. According to Turecky, the decision to make the changes emerged from internal discussions Graymont management had beginning in November or December 2013. According to Turecky, the outlook for 2014 was that the plant would be operating at full capacity and that anticipation, plus goals for a recently implemented preventative maintenance management program, led management to the "common sense" conclusion that with the "lenient" absenteeism policy in place Graymont could not achieve its goals.

Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing changes to its disciplinary policy for work rules and to its absenteeism policy without affording the Union an opportunity to collectively bargain with the Respondent.[7]

The General Counsel further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying furnishing the Union with information requested February

[6] I do not believe it necessary to resolve this dispute. It makes no difference to the outcome.

[7] The General Counsel also alleges a derivative violation of Sec. 8(a)(1) of the Act. It is settled that an employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

17, 2014, regarding the memos, data, or other information or materials that the Respondent relied upon in making the decision to change the disciplinary and absenteeism policies. Specifically, the Respondent waited until August 2014, to inform the Union that it had no information responsive to the Union's request (other than information previously provided in the course of the parties' meetings over the years). The General Counsel alleges that this delay was unlawful.

Below, I consider, in turn, each of these allegations. However, before analyzing the General Counsel's claims, I consider the Respondent's defense that, in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board should defer resolution of the alleged unilateral change portion of this dispute to the parties' contractual grievance-arbitration procedure.

I. Deferral

The Respondent contends that the Board should defer the unilateral change portion of this case—but not the information-request portion of this case—to the grievance-arbitration procedures in the parties' labor agreement. (R. Br. at 29.)

In *Collyer Insulated Wire*, supra, the Board set forth the standard for determining the circumstances in which an unfair labor practice dispute should be resolved by the contractual dispute-resolution mechanism contained in a union-employer collective-bargaining agreement. The Board held that in certain circumstances, where a "dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes." *Collyer*, 197 NLRB at 839.

The instant dispute involves allegations that the Employer violated the Act by unilaterally changing terms and conditions without bargaining, and allegations that it unlawfully delayed responding to the Union's information request about the changes. Without regard to whether the instant dispute would be suitable for deferral if the issue concerned only the unilateral changes to the discipline and absenteeism policy, "[t]he Board has long held that deferral is inappropriate in 8(a)(5) information request cases." *Chapin Hill at Red Bank*, 360 NLRB No. 27, slip op. at 1 fn. 2 (2014) (and cases cited therein).

This ends the Respondent's deferral defense, as "established Board policy also disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board." *Avery Dennison*, 330 NLRB 389, 390 (1999).

While the Respondent (R. Br. at 29) "recognizes that the Board generally does not defer information request cases to arbitration," it points out, citing *Clarkson Industries*, 312 NLRB 349, 353 (1993), that there are instances where the Board has granted partial deferral—deferring to one issue in a case while retaining for resolution another. But this exception to the Board's "non-bifurcation" policy requires, as the Board found in *Clarkson Industries*, that the "deferrable issues are not in any way factually or legally interrelated with the [non-deferrable] issues." Id.

Here, that is manifestly not the case. Indeed, the Respondent's chief defense to the information issue allegation is its claim—made to the Union on February 25, 2014, and in its brief (R. Br. at 24)—that there was no duty to provide the Union information about its decisionmaking with regard to the absenteeism and disciplinary policy *because* there was no duty to bargain over these decisions. In other words, its defense to the information-request allegations is "derivative" of its defense to the unilateral-change allegations. As the Respondent puts it (R. Br. at 24):

> An employer's duty to provide information is derivative of its duty to bargain under Sections 8(a)(5) and 8(d) of the Act. Where a Union has waived its right to bargain over a particular topic or change to a term or condition of employment, it no longer is entitled to receive information for this purpose.
>
> The Union unequivocally waived its right to bargain over those particular subjects by agreeing to the expanded management-rights clause in 2006. As such, the Union had no right to information for that purpose. (Citations omitted.)

Thus, were the Board to defer the unilateral change issue but resolve the information issue, it moots the prospect that the arbitrator and the Board would each be considering an overlapping and related question. The Board might have to decide whether the management-rights clause constituted a waiver of the Respondent's duty to bargain over the decision to change the absenteeism and discipline policy, and thus, as the Respondent claimed, freed it from its "derivative" duty to provide information to the Union on the subject. The arbitrator would be deciding whether the management-rights clause created a contractual right by the Respondent to make the change in absenteeism and discipline without bargaining. The risk of inconsistent results and analysis would be pointed were the Board to defer the unilateral change issue.

On these grounds, I reject the Respondent's contention that the Board should defer the unilateral change allegations to the parties' contractual dispute resolution mechanism.[8]

[8] I note that the Board's recent decision in *Babcock & Wilcox Construction, Co.*, 361 NLRB No. 132, (2014), modified postarbitral deferral standards and, to some extent, prearbitral deferral standards. Slip op. at 12–13. However, by its terms, the standards articulated in *Babcock & Wilcox* do not apply to cases, such as this one, pending at the time of the issuance of the decision in *Babcock & Wilcox*. Slip op. at 13–14. In any event, nothing in *Babcock & Wilcox*, were it applied to the instant case, would render deferral appropriate.

With regard to the Respondent's deferral argument, I add one final observation. At trial the Respondent introduced evidence showing that a December 2011 unilateral implementation on maximum overtime hours, objected to by the Union, was upheld by an arbitrator who relied upon the management-rights clause as privileging the Employer to make this change. Witness testimony established that the Regional Office of the Board deferred to the arbitrator's decision, and on appeal the General Counsel's office upheld this action. (Tr. 122.) I note that on brief, while the Respondent recites the facts regarding the overtime arbitration (R. Br. at 13–14), the matter forms no part of its argument in support of deferral (or its right to unilaterally implement).[9]

II. The Unilateral Changes

The General Counsel alleges that the Respondent had a duty to notify and provide the Union with an opportunity to collectively bargain before implementing changes to the work rule disciplinary policies and absenteeism policy.

An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

Here, there is no dispute, nor could there be, over the General Counsel's allegation that employee absenteeism and discipline are mandatory subjects of bargaining.[10]

In addition, the Respondent does not assert that its pre-implementation meetings and discussion with the Union satisfy its statutory duty to collectively bargain. The Respondent does not advance any such argument, and it would fail if it did, as its meetings with the Union over this issue were at all times conducted on the basis of the Respondent's position that it "had no obligation to bargain over any of the changes," and with a pre-announced and unilaterally determined intention to change the work rules March 1, notwithstanding any discussions. This is antithetical to the most basic precepts of the statutory duty to bargain to impasse before unilaterally implementing a change in a mandatory subject of bargaining. *San Diego Cabinets*, 183 NLRB 1014, 1020 (1970) (rejecting employer's contention that because it informed union of its willingness to meet and discuss matters it had not refused to bargain, where employer consistently maintained that it had no duty to bargain: "its professed willingness to discuss this unlawful position does not excuse the violation"), enfd. 453 F.2d 215 (9th Cir. 1971).

The Respondent's defense to the unilateral change allegations is three-fold. First, in a partial argument, the Respondent contends that the General Counsel has failed to prove that the changes—other than changes to the absenteeism/attendance policy, as to which the Respondent does not advance this argument—were "material, substantial and significant," and thus, not changes rising to significance requiring bargaining. Second, the Respondent argues that the Union waived any right to bargain over the changes to the absenteeism and disciplinary policies by not demanding bargaining when it learned of the Respondent's intention to make the changes in the work rules. Finally, the Respondent argues that the Union waived the right to bargain in a different way: the Respondent contends that the management-rights clause in the parties' collective-bargaining agreement privileges the Respondent's right to make the unilateral changes without the necessity of bargaining. I consider each argument below.

a. The materiality of the unilateral changes to the work rules and disciplinary rules

As the Respondent correctly points out (R. Br. at 21), and the General Counsel agrees (GC Br. at 14), for a unilateral change in mandatory subject of bargaining to be unlawful it must be a "material, substantial and significant change." *Berkshire Nursing Home, LLC*, 345 NLRB 220, 221 (2005) (finding that a "difference between a 1-minute walk and a 3 to 5-minute walk [for employees] from the parking lot to the entrance is a relatively minor inconvenience and not "sufficiently significant

[9] At the hearing, I refused to receive the Respondent's proffer of documentary evidence regarding the deferral decision, as I did not and do not believe the rejected documentary evidence (or even the admitted testimony) relevant to the Respondent's request for deferral in this case. The reasons for my view include: (1) the overtime dispute raised a question of postarbitration deferral, here we have an issue of prearbitration deferral inextricably linked with a clearly nondeferrable issue; and (2) the General Counsel's decisions to not issue complaints are acts of prosecutorial discretion that carry no precedential weight for the Board, and, indeed, are not even binding on the General Counsel in future cases. *Steelworkers (Cequent Towing Prods.)*, 357 NLRB 516, 518 (2011) (rejecting respondent's assertion that it was justified in maintaining a challenged rule "because the requirement was consistent with the guidelines issued by the NLRB General Counsel prior to his issuance of the complaint in this case. [T]he General Counsel's earlier exercise of **prosecutorial discretion** in declining to issue complaint does not insulate the requirement from subsequent Board scrutiny upon the issuance of complaint"); *Machinists, Local Lodge 2777 (L-3 Communications)*, 355 NLRB 1062, 1066 (2010) (rejecting respondent's reliance on the General Counsel's "exercise of **prosecutorial discretion**" in not previously issuing complaint).

[10] *Peerless Publications*, 283 NLRB 334, 335 (1987) ("rules or codes of conduct governing employee behavior with constituent penalty provisions for breach necessarily fall well within the definitional boundaries of "terms and conditions" of employment. [W]e begin with the principle that labor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining") (internal quotes omitted); *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016 (1982) (attendance rules are "unquestionably mandatory subjects of bargaining"), enf'd. 722 F.2d 1120 (3d Cir. 1983); *Dorsey Trailers*, 327 NLRB 835, 853 fn. 26 (1999) ("An employer's attendance policy has long been held to be a mandatory subject of bargaining"), enfd. in relevant part, 233 F.3d 831 (4th Cir. 2000).

difference to warrant imposing a bargaining obligation on the Respondent before making this change").

As to the changes implemented to the absenteeism/attendance policy, the Respondent stipulated (Tr. 6–7) and agrees on brief (R. Br. at 23 fn. 14) that the changes it made were material and substantial.

However, it contends that the remaining changes to the discipline under the work rules were not significant enough to trigger a duty to bargain. I do not accept this argument. Indeed, given the patent significance of the changes it made to the work rules, it is a frivolous argument.

Self-evidently material changes, in addition to the admitted material changes to absenteeism include the following:

–The rules for absenteeism are not only materially changed, but violations of the new absenteeism rules are now incorporated into the progressive discipline scheme as a Group A violation. In other words, not only are the changes to the absenteeism policy admitted by the Respondent to be material, but those changes are incorporated and made a constituent part of the work rules, specifically Group A, and thus, one or two violations of the (new) absenteeism rules can be combined with other violations to permit more serious disciplinary action than would have been permitted for the same violations under the old policy.

–Tardiness has gone from a Group A violation that states that "Continued Tardiness will not be permitted," to a policy on tardiness incorporated into Group A that states that "If you are tardy more than three (3) times in any twelve (12) month period, each proceeding occurrence will be considered a violation of Group A–6 (Poor work habits will not be permitted)."

–Under the old work rules, discipline that was more than a year old would not count toward progressive discipline: the rule read, "The following penalties for infractions of Group A rules [or Group B rules] will be imposed in one year's time from the last violation." Thus, for purposes of progressive discipline, old violations "fell off" after one year. The new implemented work rules changed this so that old violations do not "fall off" unless and until an employee works one year without any violations at all. The new rule reads, "The progressive discipline will be reset after an employee works twelve (12) consecutive months fee of any work rule violations.' The materiality of this change to an employee who committed two Group A violations in September, one in October, and one the following August would not be in doubt. Under the old rule, the employee would start the next November with only one violation on his record for purposes of progressive discipline, and for the next 12 months would face a one-day suspension should he violate Group A again. However, under the old rule, from November through August of the next year the employee would face discharge for a new violation of Group A.[11]

–The new policy provides that "Group A and Group B violations will be combined in discipline progression" and adds a "matrix" to the rules to show how an employee who commits violations of both Group A and Group B violations during the year will be penalized. Under the old policy, there is no indication that Group A and B violations were combined, and indeed, it would not seem possible as each group had distinct discipline progressions. The matrix in the new policy melds the two and this is a significant change that would result in a significant change in circumstances under the old and the new policies for an employee with, for instance, two Group A violations and two Group B violations.[12]

–Under the old rules, "Sleeping on the job" and "Failure to follow proper lock-out" procedures were each a Group C violation, subjecting an employee to discharge for one offense. Under the new rules these are Group B violations, which require three B violations for discharge. While "favorable" (to the sleepy and careless) employee, the change puts other employees at risk, and is, in any event, whether favorable or unfavorable, a material change in the disciplinary policy.[13]

Finally, I note that the Respondent's contention (R. Br. at 23–24) that it doesn't matter how the rules are written, because the rules state that "common sense will prevail" and because the Respondent has "discretion" under the rules, is an argument that has been rejected by the Board:

> There is no merit to the argument that employees were not held to a standard because of the discretion and flexibility afforded supervisors in the imposition of discipline for noncompliance. In the first place, whether or not discipline ever is imposed does not in any way detract from the existence of the standard. Employees who are told they are expected to

[11] The Respondent asserts (R. Br. at 22) that this revision "clarified" but did not change "the period within which the progressive discipline steps will be applied (one year).' As a matter of logic and the English language, that is not the case. Moreover, the argument is inconsistent with the evidence, specifically the Respondent's own notes of the February 14, 2014 policy meeting, at which Turecky "explained why we need to *change* the Work Rules" [and h]e also highlighted some of the points which were *changed*, such as the rolling 12 months.' (Emphasis added.) The notes then state: "We explained that those currently in the progressive discipline system will be notified of the *changes* individually." (Emphasis added.) These are admissions, albeit unnecessary ones, as anyone reading the rules can see there are significant changes from the old rules.

[12] Again, the Respondent argues that this is not a change—but rather a "clarification.' Its argument on this score is particularly tortured. It claims that the General Counsel failed to prove that this constituted a change—but, as stated above, there is no question that a reasonable reading of the old rule set out a separate track of progressive discipline for Group A and Group B violations. The new rules change this. Thus, the rule has changed in a significant way. And indeed, in the Respondent's own notes of the February 14, 2014 policy meeting, Turecky "explained why we need to *change* the Work Rules" [and h]e also highlighted some of the points which were *changed*, such as the combining of A's and B's.' This is an admission.

[13] I reject the Respondent's contention that the change in disciplinary penalty for sleeping at work or failing to observe certain safety procedures is a nonmaterial change because it lessens rather than increases the penalty for these offenses. The argument misconceives the statutory command. *Goya Foods of Florida*, 351 NLRB 94, 102 fn. 4 (2007) ("The fact that a **unilateral change** may be **favorable** toward employees is of no consequence so long as it has an impact on bargaining unit employees").

> produce at a certain clearly defined rate thereby are subjected to a term and condition of employment of no less an impact than any other instruction relating to their hours of work or quality of work. That an employer may be lenient in requiring adherence to the rule results in the creation of a flexible rule, but a rule nonetheless. Secondly, the Respondent in fact has enforced the new rules, albeit on a selective basis. That very selectivity itself, rather than nullifying the standard, serves to highlight its existence. Exposing employees to a sword of Damocles depending upon a supervisor's discretion and good judgment, or lack thereof, makes the weapon of discipline part and parcel of the performance standard. Respondent's decision to make that weapon an uncertain one has relationship only to the effectiveness of the rule and not to its existence.

Tenneco Chemicals, 249 NLRB 1176, 1179–1180 (1980).

In similar vein, the Respondent's claim that we cannot determine if or how the rule changed until an arbitrator rules on whether it satisfies just cause is a specious claim. The changes the Respondent made to the rules reflect material and significant changes from the old rules, and notwithstanding a future arbitral ruling that effectively amends the rule, for now the changes are in place. The rules are mandatory subjects. The rules are bargainable.

Each of the foregoing rule changes are significant and these are changes that, as written, have a direct impact on employees' reasonable understanding of their terms and conditions of employment. On their face, and self-evidently, they are not "de minimis" or "immaterial" changes.

Absent acceptance of the waiver arguments advanced by the Respondent, to which I now turn, the changes to the work rules are of the type that fall squarely within the ambit of the matters as to which the Act contemplates and imposes a duty of collective bargaining.

b. Waiver based on the Union's alleged refusal to request bargaining

The Respondent contends that the Union waived the right to bargain by failing to demand bargaining when presented with the Respondent's plan to implement the new work rules. This argument is meritless.

The Union did make an effective demand to bargain. When the Union was presented for the first time with news of the rule changes at the February 14 policy meeting, Ripka initially announced that the Union was filing a grievance, but later that day approached Turecky and retracted this and asked to meet to discuss the work rules. Thus, the same day that the work rules were presented to the Union (after months of secret preparation by the Respondent), the Union told the Respondent that it wanted to meet to discuss the work rules. This is a request for bargaining. *Armour & Co.*, 280 NLRB 824, 828 (1986) ("want to discuss your position" is a request to bargain).

And the Union followed this up with a request for information about the Employer's decision to change the work rules, action consistent with an effort bargain, and then again, it came to the February 25 meeting.

There was no waiver for failure to request bargaining. The obstacle to bargaining was not that the Union waived bargaining through its conduct, but rather, that the Employer was refusing to bargain.[14]

Given that the Union requested to bargain, there is no need to reach the General Counsel's argument that the Respondent presented the decision to implement work rule changes March 1, as a fait accompli, a finding that would preclude a finding that the Union waived its right to bargain because a "Union cannot be held to have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli." *Tesoro Refining & Marketing Co.*, 360 NLRB No. 46, slip op. at 3 fn. 10 (2014) ("the Respondent repeatedly told the Union that it did not have to bargain concerning the benefit changes, that it had the right to make those changes unilaterally, and that the changes would be implemented on a date certain. In other words, the Respondent presented the changes to the Union as a fait accompli").

c. Waiver through the management-rights provision of the collective-bargaining agreement

The Respondent's chief defense is rooted in the contention that in the collective-bargaining agreement the Union waived the right to bargain over the change in work rule discipline and absenteeism policy. Graymont contends that the parties' collective-bargaining agreement—specifically, the management-rights clause, art. 1 Sec. 8—establishes the Union's waiver of the right to bargain over such changes. To this, the Respondent adds an argument that the negotiation of the management-rights clause in 2006, as well as the Union's effort to change it in 2014 negotiations after the Employer's unilateral actions, provides evidence that the clause constitutes a waiver of the Union's right to bargain over the unilateral changes at issue here.

The outcome of this dispute is determined by the Board's "clear and unmistakable waiver" rule. The Board applies the "the clear and unmistakable waiver standard in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of the collective-bargaining agreement." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007). Accord: *Baptist Hospital of East Tennessee*, 351 NLRB 71, 71–72 (2007) (applying clear and unmistakable waiver standard to find unilateral change lawful based on contractual provision); *Verizon North, Inc.*, 352 NLRB 1022 (2008) (applying "clear and unmistakable waiver" standard to employer's claim that contract language regarding Family and Medical Leave Act

[14] The Union's request to meet must be contrasted with the Employer's actions. At the February 14 meeting, Turecky made himself clear: he "proceeded to tell [the Union] that they were changing the work rules" effective March 1. While willing to discuss the matter, the Respondent's meeting with the Union on February 25 was explicitly premised on the position that "the Company has no obligation to bargain over any of the changes to which your request refers." It maintained the position that it had the "sole and exclusive right" to manage the work force, which in its view included the right to adopt the rules it presented without bargaining. Contrary to the claims of the Respondent, this is a refusal to bargain. *San Diego Cabinets*, supra at 1020. A willingness to meet to talk, but only on a basis on which the Respondent declares itself free from the strictures and obligations of statutory bargaining, constitutes a refusal to bargain.

was defense to 8(a)(5) unilateral change allegation).

Notably, the Respondent does not dispute that this is the correct rule to apply. (See R. Br. at 15–17.)

Under this rule, waivers of statutory rights are not to be lightly inferred, but instead, must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). This means, as the Supreme Court has explained, "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Metropolitan Edison*, supra at 708. In the words of the Board:

> To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.

Allison Corp., 330 NLRB 1363, 1365 (2000).

Thus, in a unilateral-change case, a collectively-bargained provision may be deemed to constitute a waiver by the union of the employer's duty to bargain over the conduct, but only if the contract's text, or the parties' practices and bargaining history "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." *Provena*, supra at 811. This is a standard that is purposely tilted in favor of requiring collective bargaining: "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*, supra at 811.

In conducting its analysis, the Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver. Id. Proof of a contractual waiver is an affirmative defense and it is the Respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *AlliedSignal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied, 253 F.3d 125 (2001); *General Electric*, 296 NLRB 844, 857 (1989), enf'd. w/o op. 915 F.2d 738 (D.C. Cir. 1990).

With this standard in mind, we turn to the language of the management-rights provision. In support of its claim of waiver, the Respondent (R. Br. at 16) relies upon the portion of the management-rights clause that states:

> The Employer retains the sole and exclusive rights . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees[.]

The question is whether this language supports the view that the parties specifically and unequivocally expressed a mutual intention to permit unilateral employer action with respect to the particular employment terms at issue here: changes to absenteeism, and changes to the level of discipline and progressive discipline meted out for violation of company-imposed rules.

Given the standard, the answer is, quite clearly, no. There is no reference in the management-rights clause to attendance, or absenteeism, or changing the standards or progression for discipline. What *is* in the management-rights clause is a *general* right "to discipline and discharge for cause" and a *general* right "to adopt and enforce rules and regulations and policies and procedures."

As the Board has explained with regard to a similar management right "to establish and enforce shop rules," this is a "general contractual provision similar to a broadly worded management-rights clause, from which we will not infer clear and unmistakable waiver." *California Offset Printers*, 349 NLRB 732, 733 (2007) (reversing judge for relying on "general authority" of employer under contract to "establish and enforce shop rules" to "discipline or discharge for cause" and "to establish work schedules and make changes therein," to find waiver of right to bargain over establishment of rule requiring employees to be on call for sudden schedule changes). Indeed, the Board has held that a general right to make rules or policies does not waive the right to bargain over the specific subject of rules on attendance. *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016 (1982) (employer's authority under management-rights clause to continue and change reasonable rules and regulations as it may deem necessary and proper does not evidence "that the Union waived its right to bargain about absentee rules" as the management-rights clause makes no reference to rules on absenteeism or tardiness).

As to the right to discipline and discharge, it is just that—it "allows the employer to function in accordance with existing contractually agreed-upon procedures, not to change them." *California Offset Printers*, supra at 734. Indeed, the limitation in a contract, such as this one, of the employer's right to discipline "for cause" has been held by the Board as evidence contrary to the waiver of bargaining on the subject. *Windstream Corp.*, 355 NLRB 406 (2010), incorporating 352 NLRB 44, 50 (2008) ("If anything, such language shows the unions interest in the fairness of the Respondent's application of discipline").

Notably, I agree with the reasoning of the Board in *Kennametal, Inc.*, 358 NLRB 553 (2012), a case cited by both the Respondent and the General Counsel, but which is nonprecedential in light of *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014). Although not precedential, the reasoning of *Kennametal* is persuasive and I adopt it. In *Kennametal*, supra, the collective-bargaining agreement explicitly gave the employer the right "to continue to make reasonable provisions for the safety and health of its employees" as well as "establish" "reasonable safety and health rules." The Board found that this constituted a waiver of the right to bargain over safety rules. However, notwithstanding this waiver, the Board found that *discipline* regarding safety rules had not been waived. In other words, a contractual waiver as to safety rules, premised on the employer's explicit and unambiguous right in the contract to make safety rules, did not extend to the right to alter the progressive disciplinary rules for safety violations as nothing "in the collective-bargaining agreement permits the Respondent to unilaterally change the disciplinary consequences for employees engaging in [violation of safety rule] conduct." 358 NLRB 553, 555.

The reasoning is instructive for our case. And it demonstrates that the instant case is even less suitable for finding

waiver than *Kennametal*. In *Kennametal*, the contract gave the employer the specific and express right to establish rules regarding the specific employment term at issue—in that case, safety rules. Still, even that specific predicate contractual right to establish safety rules in *Kennametal* did not demonstrate waiver of the right to bargain over the establishment or changing of discipline regarding the very safety rules that the employer was free to establish unilaterally. In our case, there is also no explicit right in the contract for the employer to make disciplinary rules or, even more to the point, to "unilaterally change the disciplinary consequences for employees engaging in" any specific type of conduct. And indeed, in our case, there is not even an explicit and specific predicate right to establish the employment terms at issue (e.g., absenteeism, attendance, or progressive discipline). Accordingly, if no waiver of the right to bargain about changing discipline for safety issues can be found in *Kennametal*, none can be found here to change discipline based on a contract that provides neither for an explicit right to make disciplinary rules, or even (unlike in *Kennametal*) for establishing the specific employment terms at issue in the case.

The cases relied upon by the Respondent support the General Counsel's case. The Respondent relies upon *United Technologies Corp.*, 287 NLRB 198 (1987), calling it "nearly identical" to the instant case. However, it is not. The management-rights clause in that case explicitly gave the employer "the right to make and apply rules and regulations for production, discipline efficiency, and safety." The management-rights clause in this case does not grant that right (much less waive bargaining about) making and applying disciplinary rules. As stated above, it is well settled that a general right "to discipline" does not constitute a waiver of the right to bargain over the making or changing of disciplinary rules. In a related argument (R. Br. at 17), the Respondent argues that in the management-rights clause

> [t]he references to the Company's exclusive right to "discipline and discharge for just cause" and to "adopt and enforce rules and regulations and policies and procedures" are contained within the same clause of the management-rights provision, set off by semi-colons, which indicates that they are intended to be read together.

In fact, it is the semi-colons that *separate* the general right to make rules and the general right to discipline and thereby demonstrate that these are separate enumerated management rights. By contrast, the management-rights clause in *United Technologies*, supra, expressly provided for "the right to make and apply rules and regulations *for* discipline." (Emphasis added). The Respondent simply cannot fit this case within the pigeon hole marked *United Technologies*.

Provena Hospital also does not support the Respondent's argument. In that case, the Board agreed with the part of the employer's argument that claimed that the union had waived the right to bargain about a new attendance/tardiness procedure where the contract gave the employer the right—along with the right to make rules of conduct and to discipline/discharge—to "change reporting practices and procedures and/or to introduce new or improved ones." However, in this case there is no specific right in the management-rights clause to "change reporting practices and procedures" or any other reference to attendance or tardiness. No such specific right pertaining to attendance rules is provided for in the management-rights clause.[15]

At the same time, the parties' bargaining history provides absolutely no support for the Respondent's waiver argument. The existing management-rights provision was introduced during 2006 negotiations and it was far more detailed and extensive in its setting forth of management rights than the predecessor clause. However, by no witness' account was there *any* discussion of discipline, absenteeism, or the right under the management-rights clause (or under any clause) to change such rules. This precludes a finding that "the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000).[16]

Notably, with specific regard to the attendance/absenteeism policy, the bargaining history is directly in opposition to the Respondent's waiver claim. The absenteeism policy in effect before the March 2014 implementation was not only the product of extensive bargaining between the parties, but was enacted in 2005 based on an explicit written agreement between the Union and the Respondent. The 2005 Absenteeism policy begins with the preface: "The Company and the Union Committee have agreed to the following terms:"—This is the opposite of a history of waiver of bargaining rights. Rather, the history is of the collective bargaining of issues related to attendance rules and discipline for violation of them. And, consistent with this, in late 2006 when Graymont approached the Union with a proposal to change the discipline for work rules to make them stricter, the Union objected on grounds that labor law required bargaining before there could be any change. The proposals were not implemented.

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[15] The Respondent also relies on *Quebecor World Mt. Morris II*, 353 NLRB 1 (2008), a two-member Board case that was never adopted by the Board after *New Process Steel*, 560 U.S. 674 (2010). Thus, the case is of no precedential force. However, it too is easily distinguishable: the Board Members found a waiver of the union's right to bargain over implementation of a "performance improvement procedure (PIP) procedure where the management right to discipline was combined with a right on the employer's part to "establish and apply reasonable standards of performance and rules of conduct.' The Board Members found that this language authorized the unilateral establishment and application of disciplinary procedures for work-performance issues, which they found the PIP to be. But in the instant case, the unilateral changes involve attendance, tardiness, and their place in and the progressive discipline scheme generally. The contract's language does not clearly and unmistakably endorse any unilateral right of action on these subjects.

[16] The Respondent proposes (R. Br. at 18–19) to turn the "clear and unmistakable" standard on its head when it argues that because during the 2006 negotiations the Union succeeded in having the Employer remove certain express rights from the proposed management-rights clause (i.e., the right to change shift duration and the right to hire subcontractors), this means that the Union has waived the right to bargain over every other alleged management right—whether or not discussed and whether or not explicitly and specifically stated. This is essentially the reasoning of the judge that the Board rejected and reversed in *California Offset Printers*, supra.

Finally, the Respondent advances the specious argument that the Union's effort in June 2014 negotiations to negotiate changes to the management-rights clause evidences that the Respondent had the right to make the unilateral changes all along. In these negotiations, occurring in the aftermath of the Respondent's unilateral action, the Union (unsuccessfully) proposed changing the management-rights clause to explicitly prohibit unilateral action with regard to work rules.

The Respondent reasons: "These changes would be wholly unnecessary if, as the Union and the General Counsel now contend, the Company did not possess the right to make such changes in the first place." But it is also the case that the Union's proposed contract revisions would have been wholly unnecessary if the Respondent had not relied upon the existing contract language to make unlawful unilateral changes.

The Respondent's argument assumes what it must prove. In other words, the Respondent's argument works only if you first assume that under the existing management-rights clause the Union had no right to bargain about the unilateral changes undertaken by the Respondent. But I have found that this is not the case. And in the context of unlawful unilateral action by the Respondent, the Union's subsequent effort to amend the management-rights clause reasonably cannot be understood as an admission but, rather, as an effort to adapt to the Respondent's unremedied unlawful conduct.

A final note about the complaint: The complaint suggests that the Respondent's violation began on or about February 25, 2014, which is the date that the Respondent announced that it was refusing to bargain about the changes in policy it planned to implement March 1, 2014. However, on brief, counsel for the General Counsel contends that the violation was the unilateral implementation, which occurred on March 1, 2014. I think the brief is right. Absent the implementation, there was no statutory duty to bargain. These events occurred during the term of an existing labor agreement. Had the Respondent not implemented changes to the attendance and disciplinary policies, there was no separate duty to bargain over these issues at this time. Had the Employer threatened but in the end not implemented changes to the policies (see, e.g., events in late 2006), there would have been no *bargaining* violation. The violation in this case was the unilateral implementation without affording the Union an opportunity to collectively bargain.

III. The delay in providing information

As referenced above, counsel for the General Counsel has moved to amend the complaint to allege that the Respondent unlawfully delayed providing requested information to the Union. The Respondent has not objected to the amendment, which I have granted, and which, in any event, is not required under Board precedent with regard to such closely-related allegations. *Care Manor of Farmington*, 318 NLRB 330 (1995).

In August 2014, the Respondent announced that it had nothing responsive to the Union's request (other than the policy meeting notes that the Union already had in its possession). Before this, since the Union's February 25, 2014 information request, the Respondent had maintained a refusal to provide the Union information on grounds that, having no obligation to bargain over the decision to implement changes to the absenteeism and disciplinary policies, it similarly had no obligation to furnish information regarding the decision.[17]

But for a complication I will arrive at shortly, all of this seems like a straightforward violation of the Act.

An employer, on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 867 (2006). The duty to provide information includes information relevant to contract administration and negotiation. *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "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." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch 'as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000) (Board's brackets), quoting, *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

I have rejected the Respondent's defense that it had no duty to bargain over the decision to change the absenteeism and disciplinary policy. Its "derivative" defense—that it had no obligation to provide information on these decisions *because* it had no obligation to bargain—is, accordingly, also rejected as baseless. There is no reasonable grounds identifiable in the record for the delay in telling the Union that it had no responsive information. The Respondent could have determined, and likely did determine within days that it had no documents responsive to the Union's request. The Union was entitled to know this forthwith.[18]

There is, however, a problem. Somewhat remarkably, in my estimation, in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26, 28 (2007), a Board majority held that the failure to inform the union that requested information does not exist is not a violation that can be found based on a complaint allegation that generally states that the respondent has unlawfully

[17] The Respondent's February 25, 2014 response to the Union also contained the independent (but unexplained) claim that "in any event, there is no obligation to provide any information regarding internal management discussions leading to such a discussion." However, neither at trial nor on brief does the Respondent advance this argument as a rationale for noncompliance. In addition, the Respondent took the position that as to Union's request for minutes of policy meetings, it did not need to provide such documents because the Union already had copies of them. The General Counsel does not argue that the failure to provide the Union with (additional copies) of policy meeting minutes forms a part of the violation.

[18] I note that the General Counsel does not claim that the Respondent, in fact, has documents responsive to the Union's request. In other words, the General Counsel accepts the Respondent's contention that the Respondent did not rely on any responsive information in making the decisions at issue.

failed to provide (or delayed in providing) requested information.

According to the Board in *Raley's*, at least where the General Counsel is on notice before trial that the respondent is claiming that the requested information does not exist, the General Counsel must amend the complaint to reflect this, or face dismissal of the complaint.

In *Raley's*, the complaint alleged that since a certain date, the employer had failed and refused to provide the union with information allegedly in an investigator's report. The Board majority, in response to the arguments of their dissenting colleague, explained that

> At no time, even after learning that such a report did not exist, did the General Counsel amend the complaint to allege that the Respondent violated the Act by failing to timely inform the Union that there were no such reports. Accordingly, we do not find a violation on that basis.
>
> Our colleague would construe the complaint to allege precisely the opposite of what it does allege. As noted above, the complaint alleges that the Respondent failed to furnish a document, viz., a copy of the investigator's report. The complaint therefore implicitly alleges that the report exists and that the Respondent refuses to furnish it. Further, we assume arguendo that the allegation can be broadly construed to cover an untimely furnishing of the report or an incomplete furnishing of the report. However, it is an unreasonable stretch to convert this allegation into its opposite, i.e., that the report does *not* exist, and that the Respondent failed to inform the Union of this fact. If the General Counsel wanted to allege this as an alternative pleading, he could have done so. He did not. We therefore decline to find a violation on this basis.

349 NLRB at 28.

The unavoidable holding of *Raley's* is that where the General Counsel learns prior to the hearing that the Respondent is taking the position that it did not possess anything responsive to the information request, the complaint must be amended to explicitly allege a refusal (or delay) in conveying to the Union the fact of the lack of existence of responsive information.

The situation here is essentially indistinguishable from that in *Raley's*. One might entertain the argument that here, unlike in *Raley's*, the complaint allegation did not refer to a specific identifiable document that the Respondent had failed to provide. This might be said to make less apposite the Board's conclusion in *Raley's* that the complaint "therefore implicitly alleges that [the specific information] exists and that the Respondent refuses to furnish it." However, this is a thin and unsatisfying reed of a distinction.

Under the reasoning of *Raley's*, at least where the facts are known to the General Counsel before trial, the respondent's unlawful failure to provide, or the delay in providing, the news that information does not exist must be based on a complaint allegation specifically asserting a failure to inform (or delay in informing) the union that the requested documents do not exist. See *Albertson's, Inc.*, 351 NLRB 254, 255 (2007) (reversing judge's finding of violation because "[u]nder the standard set forth in *Raley's Supermarkets*, the General Counsel must specifically allege that the failure to inform the union that the requested documents do not exist (or the delayed communication of that fact) was unlawful. The instant complaint, which does not even mention the nonexistence of the documents, plainly fails to satisfy this pleading requirement") (citation omitted).

While I may agree that the dissent in *Raley's* has the better of the argument,[19] the reasoning of the Board's decision in *Raley's* must be followed until overruled. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied.") (citation omitted). Here, the complaint allegation, as amended, alleges only a delay in providing information—notwithstanding the Respondent's pretrial declaration that it had no information responsive to the Union's request. Accordingly, I find no violation as to the delay in providing information, as alleged.

CONCLUSIONS OF LAW

1. The Respondent Graymont PA, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the designated collective-bargaining representative of the following bargaining unit of the Respondent's employees:

> Employees in the Bellefonte Plant located on North Thomas Street and the Pleasant Gap plant located on Airport Road.
>
> The term "employees" as used in this Agreement will not include salaried foreman and office employees.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its work rule disciplinary policies and absenteeism policies without affording the Union an opportunity to collectively bargain.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed

[19] In *Raley's*, the dissent explained:

> [t]he notion that an employer's failure timely to indicate that it lacks requested information is somehow distinguishable from a failure to provide available information does a disservice to the Act. The purpose of the Act's requirement that parties provide each other with relevant information is to maximize *communication* between them and so minimize industrial strife. For this purpose, it is elementary that parties must not only provide requested information, but also timely inform each other when they have none to provide. The failure to do either is obviously a violation of the duty to provide relevant information.

349 NLRB at 30 (original emphasis).

to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its work rule disciplinary and absenteeism policies without affording the Union an opportunity to bargain, the Respondent shall be ordered, to rescind those changes encompassed within the implementation and restore the status quo ante. The Respondent shall be required to rescind all discipline issued based in any way upon the unilaterally changed portions of the work rules or attendance policy and shall make any employees adversely affected by the unlawful changes whole for any loss of earnings and other benefits suffered as a result of the unlawful changes. The make-whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Tortillas Dan Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate any employees adversely affected by the unlawfully changed policies for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, 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. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a 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 March 1, 2014. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Graymont PA, Inc., Pleasant Gap, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms of conditions of employment of its unit employees, including, but not limited to, unilaterally implementing changes to its absenteeism and/or work rules disciplinary policies without first notifying the Union and giving it an opportunity to collectively bargain.

(b) 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) At the request of the Union, rescind the unilateral changes to the absenteeism and work rules disciplinary policies and/or the enforcement of those changed policies, and restore the status quo ante with regard to these changes.

(b) Rescind all discipline issued to employees based in any way upon the unilaterally changed portions of the policies and make any employees adversely affected by the unlawful changes whole for loss of earnings and other benefits suffered as a result of the unlawfully imposed changes to policies, in the manner described in the decision.

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

> Employees in the Bellefonte Plant located on North Thomas Street and the Pleasant Gap plant located on Airport Road.
> The term "employees" as used in this Agreement will not include salaried foreman and office employees.

(d) 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.

(e) Within 14 days after service by the Region, post at its facilities in Pleasant Gap, and Bellefonte, Pennsylvania copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 6, 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, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

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

[21] 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.'

(f) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

Dated, Washington, D.C. December 30, 2014

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 change the terms of conditions of your employment, including the absenteeism and the work rules disciplinary policies, without first notifying the Union and giving it an opportunity to collectively bargain.

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 rescind the unilateral changes we made to the absenteeism and work rules disciplinary policies.

WE WILL rescind any discipline issued to employees based in any way upon the unilaterally changed portions of the absenteeism and/or work rules disciplinary policies and make any employees adversely affected by the unlawful changes whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes.

WE WILL notify, and upon request collectively bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of your employment.

GRAYMONT PA, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06–CA–126251 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.