

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**CYTEC PROCESS MATERIALS (CA), INC.**

**and**

**Case 21–CA–187639  
21–CA–191718  
21–CA–196463**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS,  
AFL–CIO, DISTRICT LODGE 725**

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**DECISION**

**STATEMENT OF THE CASE**

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Los Angeles, California, on September 12–13, 2017, based upon charges filed by the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 725 (Union) and an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing dated June 27, 2017, which was amended on August 23, 2017 (Complaint). The Complaint, issued by the Regional Director for Region 21 (Regional Director) on behalf of the General Counsel, alleges that Cytec Process Materials (CA), Inc., (Respondent or Cytec), violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (Act) by making

various unilateral changes to employee working conditions and by refusing to bargain with the Union.<sup>1</sup> Respondent denies the allegations.

Based upon the entire record, including my observations of witness demeanor, and after  
5 considering the briefs filed by the General Counsel, the Union, and Respondent, I make the  
following findings of fact and conclusions of law.<sup>2</sup>

## I. JURISDICTION AND LABOR ORGANIZATION

10 Respondent it is a California corporation with an office and place of business in Santa Fe  
Springs, California, where it manufactures and distributes materials for the aerospace and wind  
energy industries. In conducting this business, it annually purchases and receives goods valued  
in excess of \$50,000 directly from points outside of the State of California. Cytec admits, and I  
15 find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and  
(7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within  
the meaning of Section 2(5) of the Act.

## II. FACTS

### A. *Background*

20 Cytec produces plastic and composite material parts used for manufacturing airplanes and  
windmills. This proceeding involves the company’s manufacturing facility in Santa Fe Springs,  
California, which is located just outside of Los Angeles. Starting in February 2016, the Union  
25 filed a series of petitions seeking to represent separate units of Respondent’s employees. Four  
separate elections were held, pursuant to stipulated election agreements, which the Union won.  
On February 23, 2016, the Union was certified as the collective-bargaining representative of  
Respondent’s technology department machine operators (Technology Unit); on March 16, 2106,  
it was certified as the representative of the manufacturing department conversion specialists  
30 (Conversion Unit); on April 14, 2016, it was certified as the representative of Respondent’s  
receiving clerks, shipping clerks, forklift drivers/order pullers, and packers, working in the  
shipping and receiving department (Shipping/Receiving Unit); and on the same date a  
certification issued naming the Union as the representative of Cytec’s quality assurance  
inspectors (Quality Assurance Unit).<sup>3</sup> (Tr. 20–25, 215–17, 260–61; JX 1(a)–1(l))

35 At the time of the certifications, Rosa Bross (Bross) worked at Santa Fe Springs as the  
human resources manager. Reyna Peralta (Peralta) replaced Bross as human resources manager

<sup>1</sup> The Complaint also alleged that Respondent refused to comply with the Union’s various requests for necessary and relevant information. However, these allegations were subsequently withdrawn by the General Counsel.

<sup>2</sup> Credibility resolutions are based upon witness demeanor. In making my determinations, I considered “[a]ll aspects of the witness’s demeanor including the expression of his [or her] countenance, how he [or she] sits or stands, whether he [or she] is inordinately nervous, his [or her] coloration during critical examination, the modulation or pace of his [or her] speech and other non-verbal communication.” *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078–1079 (9th Cir. 1977). Testimony contrary to my findings has been discredited.

<sup>3</sup> Transcript citations are denoted by “Tr.” with the appropriate page number. Citations to the General Counsel, Respondent, and Joint exhibits are denoted by “GC.” “R.” and “JX.” respectively. Transcript and exhibit citations are intended as an aid, as factual findings are based upon the entire record as a whole.

in March 2017. Steven Cozzetto (Cozzetto) held the position of Respondent’s global head of human resources for the composite material business unit, and had ultimate responsibility for employees working at Santa Fe Springs. While Cozzetto was a member of the company’s bargaining team, negotiations with the Union were led by Gerald Prete (Prete), Respondent’s North American director of labor relations. In this position, Prete serves as Respondent’s lead negotiator at sites where the company has collective-bargaining agreements. For the Union, negotiations were led by Steven Van Wie (Van Wie), the Union’s business representative. (Tr. 20, 32–33, 36, 298–301, 363–64)

*B. The Bargaining Between the Parties*

1. Scheduling initial negotiations

On May 6, 2016, Van Wie sent a letter to Bross stating the Union’s desire to open negotiations in all four certified units. And in June 2016, Van Wie and Prete spoke on the telephone to discuss scheduling negotiations. (Tr. 30–31, 154–55, 301; JX. 1(v)) While both agree that they spoke in June 2016, their testimony as to what occurred differs greatly.

According to Prete, he spoke to Van Wie twice in June 2016. The first conversation occurred when Prete returned Van Wie’s phone call; notwithstanding the May 2016 letter to Bross, Prete claimed he did not know who Van Wie was before this conversation. Prete did not remember where he was when this conversation occurred, or the time of day the call took place. But, he testified that Van Wie wanted to start negotiations and bargain over the different organized units; Prete said he was willing to negotiate on the company’s behalf, but Respondent wanted to negotiate the Technology Unit first because that was the first group that was organized. According to Prete, Van Wie was reluctant at first, but then agreed. Prete said that the conversation, which lasted approximately 5 minutes, ended with the pair saying they looked forward to meeting each other and negotiating a successful contract. (Tr. 301–303, 333–334)

Prete testified that, his second conversation with Van Wie occurred about a week or two later. Prete received a call from Van Wie who was following up on their previous call. Prete returned Van Wie’s call and told him Respondent was willing to negotiate for the Technology Unit and then provided potential dates for negotiations. According to Prete, Van Wie agreed to start negotiations for the Technology Unit on the dates provided in August. (Tr. 301–304, 344)

During his testimony, Prete insisted that these two conversations with Van Wie resulted in an agreement regarding certain negotiating “ground rules.” And the ground rules were that the parties would start negotiations and reach an agreement on the first group that was organized, the Technology Unit, before moving on to negotiate the other units. Prete further defined the ground rules as an agreement to negotiate initial contracts for the bargaining units one at a time, in the order they were certified by the Board. However, no agreement on ground rules was ever put into writing. (Tr. 345, 348, 359; JX. 1(y))

Regarding his discussions with Prete in June 2016, Van Wie denied that the two agreed to bargain the Technology Unit first and only then move on to the other units. In fact, according to Van Wie, that topic was not even discussed. Van Wie also denied that the parties ever agreed to

negotiate initial contracts in the order that the bargaining units were certified. (Tr. 66–67, 78–79, 155–160)

5 Van Wie testified that the first time Prete raised the issue of bargaining contracts separately was during a “sidebar” conversation in August 2016, after the Union presented its initial proposal at the bargaining table for all four units combined into one contract.<sup>4</sup> Respondent then presented a counter offer for the Technology Unit only. According to Van Wie, during the sidebar, he told Prete that, if Respondent did not want to bargain the units together, and wanted to do them separately, then the Union would have to open those negotiations immediately and separately; Prete simply shrugged his shoulders. (Tr. 34, 40, 157, 161)

## 2. The August 2016 negotiations

15 The parties scheduled their first bargaining sessions for August 9, 10, and 11 at a local hotel. The Union’s negotiating team consisted of Van Wie, the lead negotiator, and David Brewer (Brewer), the Union’s assistant directing business representative.<sup>5</sup> Two Cytec employees were also on the negotiating team, Gonzalo Fragoza (Fragoza) and Alonso Barragan (Barragan). Fragoza and Barragan had been elected as shop stewards by their coworkers. In this capacity, they attended the negotiations and were also used by the company as a witness whenever employees were disciplined.<sup>6</sup> (Tr. 31–32, 173, 221–235).

25 Present for Respondent at negotiations were Prete, Cozzetto, Bross, along with the director of manufacturing Alain Theoret, site manager Ron Cavelli and Lisa Fillmore, who worked in the human resources department. Prete was lead negotiator for the company. Bargaining started at 9 a.m. on August 9 with a “kickoff discussion” where Theoret gave an overview of the business and staffing levels. At about 10:30 a.m. the Union presented its initial contract proposal which was for all four units and had them combined into one contract. The company rejected the proposal. (Tr. 33–34, 299, 346–347)

30 Respondent then presented a counter-offer which was for the Technology Unit only, saying that combining all the units into one agreement was a permissible subject of bargaining and the company did not agree to the proposal.<sup>7</sup> According to Van Wie, after Respondent’s counter-offer the Union did not want to risk an unfair labor practice charge by insisting on a combined unit. Instead, the Union wanted to utilize the time they had set aside for bargaining

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<sup>4</sup> Van Wie testified that a “sidebar” consists of direct discussions involving the lead negotiator from each side (himself and Prete) trying to reach a “gentleman’s agreement” on a specific issue. Once they have done so, they return to the bargaining session to present it to their full negotiating committee. (Tr. 52)

<sup>5</sup> Prete testified the bargaining sessions were August 19–21, 2016. (Tr. 304, 306) However, an email sent by Brewer during bargaining confirms Van Wie’s testimony that the first bargaining sessions were on August 9–11. (Tr. 32, 194; GC. 12)

<sup>6</sup> Barragan stopped working for Cytec on April 21, 2017. (Tr. 417–418 )

<sup>7</sup> While an employer and union may voluntarily agree to merge separate bargaining units into one larger unit, the enlargement or merging of units is not a mandatory subject of bargaining. See e.g., *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904, 906 (1986) (Union’s insistence on the arbitration of grievances seeking to merge three historically separate bargaining units, which is a permissive bargaining subject, violated Section 8(b)(1)(A) and (b)(3)). Thus, absent “mutual consent, one party may not insist on a change in the scope of an existing bargaining unit.” *Id.*

and therefore proceeded with discussing the Technology Unit. Bargaining ended at 5 p.m. that day. (Tr. 34–39, 347–348)

5 According to Prete, at the beginning of the first August negotiating session, he  
 “reinforced” that the company was there to negotiate only for the Technology Unit. Prete  
 testified that during this discussion Van Wie initially resisted, and wanted to bargain all the  
 certified units, but Prete reminded him that they had established ground rules. Then Van Wie  
 agreed to bargain the Technology Unit first and they proceeded to start negotiations. According  
 to Prete, this discussion occurred just before negotiations started at 9 a.m., during a sidebar  
 10 conversation between himself and Van Wie in the hallway of the hotel. When the negotiations  
 started, Prete testified that the Union presented proposals for all four certified bargaining units.  
 However, those were rejected because Respondent only wanted to discuss the Technology Unit.  
 (Tr. 305–308, 347)

15 According to Brewer, he had a “quick” discussion with Prete during the August  
 bargaining regarding ground rules, telling Prete that the ground rules were simple, the parties just  
 negotiate in good faith. Brewer’s testimony was reinforced by Van Wie, who said that during  
 the “kickoff discussion” they discussed what Van Wie characterized as “playground rules,” no  
 “hard hitting” and good faith negotiations. (Tr. 35, 187)

20 On August 10 and 11 the parties met as scheduled with the same people present, except  
 for Theoret. They again discussed the Technology Unit only, presenting proposals back and  
 forth and reaching some tentative agreements on noneconomic issues. According to Van Wie,  
 the parties had multiple sidebar conversations throughout the 3 days of bargaining, including the  
 25 one where he told Prete that the Union would need to open negotiations immediately and  
 separately if Respondent did not want to negotiate the units together. (Tr. 37–41, 161, 309)

30 Van Wie denied that, during the August bargaining, the parties agreed to the order of  
 bargaining for the units, or that they agreed to reach a complete agreement on one unit before  
 moving on to another unit. In fact, throughout his testimony Van Wie consistently denied ever  
 agreeing to negotiate initial contracts one at a time, or in the ordered they were certified by the  
 Board. (Tr. 41–42, 66–67, 71–72, 75, 78–79, 85, 156–157)

### 3. The September 2016 negotiations

35 The parties agreed to meet again for 3 days during the last week of September 2016.  
 Other than Theoret, all the same people were present for the parties. Again, they only bargained  
 over the Technology Unit, and Van Wie characterized the September bargaining meetings as  
 “very slow.” (Tr. 42–45, Tr. 310–312, 348)

40 Van Wie testified that, during one of the September sidebar discussions, Prete said that he  
 was convincing his committee to combine all four bargaining units into one master agreement.  
 Van Wie replied that the Union would be happy to entertain such a proposal. Prete did not deny,  
 or otherwise testify about, this conversation. (Tr. 44, 162–163)

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#### 4. Petition and election for Source One employees

On October 11, 2016, the Union filed a petition seeking to represent a unit of Source One Staffing (Source One) employees who worked for Respondent at Santa Fe Springs. Since at least 2011, Respondent used temporary employees hired through Source One to work at the Santa Fe Springs facility. Employees would work as a temporary worker through Source One for about 9 months, and if successful they would then be hired directly by Respondent as a full-time employee. (Tr. 260–261, 215–217; JX. 1(n))

On October 18, the Union, Respondent, and Source One signed a stipulated election agreement for a unit of employees jointly employed by Respondent and Source One. Under the terms of the agreement, a vote would occur on October 27, and the Source One employees would vote on whether to join the existing Technology Unit through an *Armour-Globe* election.<sup>8</sup> (JX 1(o)) In an *Armour-Globe* election, “a group of employees vote on whether to join a previously existing bargaining unit.” *NLRB v. Raytheon Co.*, 918 F.2d 249, 250 (1st Cir. 1990) (citing *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937) and *Armour and Company*, 40 NLRB 1333 (1942)).

The vote occurred as scheduled with employees unanimously voting to unionize; on November 14, 2016, the Regional Director certified the results. However, the certification did not say that the Source One employees would join the Technology Unit. The Regional Director subsequently issued a corrected certification on December 16 specifically stating that the Source One employees were included in the Technology Unit. Respondent appealed, and on April 4, 2017, the Board issued a decision ordering that the Region Director conduct a new election. The Board found that, although employees voted unanimously to be represented by the Union, the pre-election notices posted at the facility were faulty, as they did not advise employees that they were voting in an *Armour-Globe* election. *Cytec Process Materials (CA), Inc.*, 2017 WL 1279574 (2017) (unpublished decision). Furthermore, there was no evidence that employees were even aware of the fact they were voting to be included into another unit. *Id.* After the remand, the Union withdrew the petition as they were informed that Respondent offered full-time jobs to all the existing Source One employees, and Source One stopped providing temporary employees to Cytec. (Tr. 29; JX. 1(q), 1(t), 1(dd))

#### 5. The December 2016 negotiations

The parties scheduled bargaining sessions at a local hotel for December 13, 14, and 15. On December 13, the Union informed Respondent of its position that the Source One employees had voted in an *Armour-Globe* election and as a result joined the Technology Unit. Prete testified that he did not even know the Union had filed a petition to represent Source One employees, or that the company had signed a stipulated election agreement. Respondent took the position that the Source One employees were in a separate bargaining unit. Although the parties had at least one additional sidebar discussing the legal significance of the election, no further bargaining occurred that day. (Tr. 46–51, 314–321, 350–352).

<sup>8</sup> The Union was seeking an *Armour-Globe* election when it initially filed the petition. (JX. 1(m))

5 The next day the parties met but no actual bargaining took place; they only had sidebar discussions. After several caucuses and sidebars, it was clear the parties were firm in their respective positions: the Union claiming the Source One employees were combined with the Technology Unit and Respondent asserting they constituted a separate unit. Prete said that Cytec would only negotiate for the existing Technology Unit and would not continue negotiations if the Union was unwilling to limit discussions accordingly. The Union disagreed, wanting to present proposals for a Technology Unit that included the Source One employees. Negotiations then ended, and Respondent’s representatives left the hotel. (Tr. 51–55; 321–325, 354–355)

10 The Union remained at the hotel and throughout the day Van Wie sent Respondent a series of emails addressed to Prete and Cozzetto. The first email, sent at 10:22 a.m., informs Respondent that the Union would remain at the hotel and had information requests and counterproposals to present to Cytec. Just after noon Van Wie sent another email, proposing that the parties use the remaining time that day, and the next day, to bargain for any of the other three certified units. The fourth email, sent almost 2 hours later, states that the Union was still waiting at the hotel with proposals to present for the combined Technology/Source One unit. In the fifth email, sent at 4:39 p.m., Van Wie attached letters from the Union demanding the parties open negotiations by December 21 to bargain the wages, benefits, and working conditions for the Quality Assurance, Conversion, and Shipping/Receiving units. The day ended with Van Wie sending a final email stating that the Union would be available the next day for negotiations. (Tr. 54–61, 326; GC. 2–5; JX 1(w))

25 Cozzetto replied by email the next morning contesting the assertion that Source One employees were combined into the Technology Unit, and affirming Respondent’s willingness to bargain about the existing Technology Unit only. Cozzetto restated Cytec’s position that the parties had agreed to bargain for the units one at a time, in the order they were certified by the Board. Therefore, Cozzetto wrote that Respondent was not prepared to meet and negotiate contracts for the other bargaining units on such short notice. Finally, the email states that Respondent had filed an unfair labor practice charge against the Union. (Tr. 374–376; GC. 6)

30 Van Wie responded on January 4, 2017, by resending the three letters demanding the parties open negotiations in the Quality Assurance, Conversion, and Shipping/Receiving units and asking for dates to begin negotiations. On January 6, Van Wie also emailed Prete and Cozzetto requesting dates to continue negotiations in the combined Technology/Source One unit. On January 10, Van Wie received a letter from Prete again restating the company’s position that the parties agreed to negotiate initial contracts for the units one at a time, in the order they were certified, and saying that the parties had previously met for 8 days to negotiate only the Technology Unit. Thus, Prete states the company was “not yet” prepared to meet and negotiate over the other units “at this time,” relying upon the parties’ purported agreement and practice. (Tr. 68–71; GC. 7; JX. 1(x), 1(y))

45 Van Wie replied by letter dated January 13, stating that the Union never agreed to the Respondent’s purported ground rules. Along with discussing the *Armour-Globe* issue, Van Wie informs Respondent that negotiations for the Quality Assurance, Conversion, and Shipping/Receiving units will be handled individually by three different union representatives, while Van Wie handles negotiations for the Technology Unit. The letter ends by again

demanding bargaining in the separate units, and providing dates that each of the four different union representatives were available for bargaining; the Union threatened to file a charge if Cytec failed to provide dates to begin negotiations. On January 19, the Union filed the charge in this matter alleging that Respondent was refusing to bargain over the Quality Assurance, Conversion, and Shipping/Receiving units. (Tr. 72; GC. 1(g); JX. 1(z))

Prete replied with a letter dated January 20, disagreeing with the Union’s contentions about the purported bargaining ground rules and stating that Cytec’s primary business is the manufacturing and selling of chemicals and materials, not the negotiation of collective-bargaining agreements. The letter further states that Prete is the only individual accountable for negotiating the company’s labor agreements in the United States, and he has the sole authority to negotiate the initial contracts at Santa Fe Springs. As such, Prete said that he cannot and will not negotiate simultaneously with the various union representatives. Finally, Prete informs the Union that Respondent was appealing the Regional Director’s decision to certify the joint Technology/Source One bargaining unit. (Tr. 72–73; JX. 1(aa))

The battle of letters continued, with Van Wie replying on February 7, 2017, again demanding that the company immediately open negotiations for the remaining units, and asking Respondent provide available negotiation dates by February 13. Prete replied on March 20, accusing the Union of inaccuracies and mischaracterizations, and asserting the Union’s request to open bargaining for multiple bargaining units simultaneously is inefficient and contrary to the parties’ ground rules. Prete asks that the Union return to the bargaining table to negotiate the existing Technology Unit only. According to the document, a copy of Prete’s March 20 letter went to all Santa Fe Springs employees. (Tr. 76; JX. 1(bb), 1(cc))

On March 29, 2017, Prete also sent a letter to Brewer, following up on an earlier phone call; Brewer had called Prete earlier in the week to discuss why Respondent was not negotiating. In the letter Prete states that he remained willing to bargain pursuant to Respondent’s purported ground rules and blames the Union for the stalled negotiations for insisting on bargaining over a joint Source One/Technology Unit. (JX. 1(dd)) Prete also states that the Source One unit no longer existed because Cytec offered full-time jobs to Source One employees working at Santa Fe Springs, and Source One ended its relationship with Respondent; thus the issue had “resolved itself.” Prete ends the letter by stating the company was not interested in bargaining all the units jointly, but remained willing to bargain over the Technology Unit. (JX. 1(dd); Tr. 184–186)

## 6. Employees walkout and go on strike

Employees were upset that negotiations with the company were not progressing, so on March 31, 2017, they went on strike, walking off the job and picketing outside the facility. A day before the walkout, the Union held a strike vote meeting for both shifts. The meeting for first shift employees occurred during their 11 a.m. lunch break in a parking lot across the street from the facility.<sup>9</sup> About 25 to 30 employees were present, as the Union explained the significance of a strike vote, set up ballot boxes, and the employees voted. While the meeting was occurring, two Cytec supervisors, Charlie Schreier (Schreier) and Chris Johnson (Johnson),

<sup>9</sup> The Union had previously conducted meetings for first-shift employees during their lunch break at this same location. (Tr. 234, 274)

were in Respondent’s parking lot about 50 feet away watching. Van Wie instructed a worker to take pictures of the two as they watched the meeting. The strike vote for second shift workers took place during their break at about 1 p.m., in a grassy area near the facility. After the meeting ended, employees went back to work, and eventually learned that the vote was in favor of a strike. The strike lasted until April 4, when employees returned to work. (Tr. 112–124, 128, 223, 230–233, 265–273; GC. 17, 20)

#### 7. The parties resume negotiations

On April 4, Brewer replied to Prete’s March 29 correspondence denying that the Union ever agreed to Respondent’s purported ground rules, and accusing Prete of using alternate facts to fit his narrative. Brewer ends the letter by setting forth 15 days the Union was available to bargain in April, and asking Prete to pick 5 days for bargaining. On April 11, 2017, Prete replied to Brewer stating that Respondent was available to negotiate over the Technology Unit only. Once a contract was reached for the Technology Unit, Prete stated that the company would proceed to negotiate for the second unit organized by the Union pursuant to Respondent’s purported ground rules. (JX. 1(ee), 1(ff))

On April 25, 2017, the parties resumed negotiations over the original Technology Unit. The next day, Respondent filed two unfair labor practice charges against the Union.<sup>10</sup> On April 28, 2017, the original complaint issued in this matter. As of the close of hearing, Respondent had not opened negotiations for the Quality Assurance, Conversion, and Shipping/Receiving units, nor had a collective-bargaining agreement been reached for the Technology Unit.<sup>11</sup> (Tr. 84, 358, 360; GC. 1(p); JX. 2(a), 2(b))

#### C. *Change in Employee Lunch and Break Times*

Paul Pleskacz, the production area leader for the technology and conversion departments, testified that the decision to change the starting times for employees originated with him in mid-March 2017. According to Pleskacz, the regular shift for employees was from 6 a.m. to 2:30 p.m. However, workers regularly came into work at 5 a.m. to work overtime. Pleskacz testified that during the week of March 13, he told Barragan that he wanted to change the starting time for conversion department employees to 5 a.m.,<sup>12</sup> and Barragan replied “sounds good.” Pleskacz then said he wanted to ask employees directly and Barragan thought this this was a good idea. At the morning meeting, Pleskacz stood in front of employees, who were joined by Barragan and Fragoza, and said he wanted to gauge what employees thought about changing the start time from 6 a.m. to 5 a.m.; Pleskacz testified the reaction was “pretty positive.” (Tr. 392–401)

According to Pleskacz the change did not occur until Monday March 20, after he received approval from human resources and the plant manager. Then, sometime during the

<sup>10</sup> One charge involved the Source One Unit. In the other, Respondent alleged the Union bargained in bad faith by repudiating the ground rules established by the parties. Both charges were dismissed. (JX. 2(c), 2(d))

<sup>11</sup> In their respective post-hearing briefs, both Respondent and the General Counsel state that, after the hearing closed, Respondent and the Union entered into collective-bargaining agreements for each of the certified units. Apparently one agreement covers the Technology Unit, while another contract covers the Quality Assurance, Conversion, and Shipping/Receiving units. (Resp’t Br. at 20 fn. 5, 22; GC. Br., at 60 fn. 40.)

<sup>12</sup> The change meant that employees working an 8-hour shift would end at 1:30 p.m., instead of 2:30 p.m. (Tr. 398)

week of March 27, Barragan told him that the technology department also wanted to change their starting time to 5 a.m. Pleskacz discussed the issue with his plant manager and with Peralta, and then presented it to technology department employees for a vote, while Barragan and Fragoza were present. All the employees raised their hands in favor of changing the starting time.

5 Pleskacz testified that the vote and implementation of the new starting time for technology department employees occurred the same week that Barragan raised the issue with him, which was sometime during the week of March 27. (Tr. 398–405)

10 The change in employee starting times then caused a corresponding change to employee rest and break times. Pleskacz testified that, after employee starting times were changed, he learned that Respondent needed to change the break and lunch times in order to follow California law. Pleskacz could not recall exactly when the change in rest and meal breaks occurred, but confirmed that it happened after the change in employee starting times. He testified that Peralta informed him about the change, and he was present when Peralta told employees. Pleskacz  
15 testified that employees did not vote on whether to change their lunch and rest breaks because “[w]e need to follow California law. Period.” (Tr. 407–408, 411–413)

20 Peralta testified that on March 15, 2017, she had a conversation with Pleskacz about changing the starting times for employees, which prompted the change in employee lunch and break times; Peralta had just started in her position on March 13. This conversation took place during a weekly site team leadership meeting.<sup>13</sup> According to Peralta, Pleskacz mentioned to her that conversion employees were starting work at 5 a.m., and that the technology department said they also wanted to start at 5 a.m. Pleskacz also told her that he gave them an opportunity to vote, and everyone wanted to start at 5 a.m. Peralta had concerns about the change, and wanted  
25 to make sure the company was compliant with California law on meal and rest breaks. Peralta believed that, under California law, employees were entitled to a 30-minute lunch break which needed to occur between the fourth and fifth hour after employees started work.<sup>14</sup> Peralta also thought that rest breaks needed to occur within 2 hours of the start of a shift, and 2 hours after a meal break. Peralta told Pleskacz that they were out of compliance with the law, and that the  
30 company needed to adjust the break times to comply with California law. Respondent changed the break times with the first rest break occurring at 7 a.m., lunch break at 9:30 a.m., and the second rest break at noon. According to Peralta, Pleskacz was the one who met with employees to tell them about the change, explaining to them that it was done in order to be compliant with the law. (Tr. 420–428, 439, 444–446)

35 Peralta testified that she met with Barragan and Fragoza on Thursday, March 16, and told them the company was going to adjust the break schedules to comply with California law. Peralta originally testified that, after she told Barragan and Fragoza of the change, both replied that they understood the changes and why the company needed to make the adjustments.  
40 However, on cross-examination, Peralta testified that, after she informed them of the changes,

<sup>13</sup> Peralta testified that it was at this same leadership meeting that Respondent discussed and approved prohibiting employees from leaving the premises during their rest breaks. (Tr. 443–446)

<sup>14</sup> Peralta’s belief about what California law required was wrong. The California Supreme Court has stated that, pursuant to the state’s labor code, absent waiver, an employer must provide “a first meal period no later than the end of an employee’s fifth hour of work.” *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 537 (Cal. 2012). Thus, an employee’s “first meal period[ ] must start after no more than five hours” of work. *Id.* Here, if employees started work at 5 a.m., they could work 5 hours, until 10 a.m., before the law required a lunch break.

she did not recall either of them saying anything in response. According to Peralta, the change went into effect a week or two later and it affected the conversion, technology, and a portion of the quality assurance departments. As for the shipping/receiving department, Peralta testified their starting time changed towards the latter part of March 2017; going from 6 a.m. to 7 a.m., with a lunch break at 11:30 a.m. and first rest break at 9 a.m. Peralta said that, at the time, she was not aware of her duty to provide the Union with an opportunity to negotiate about any changes, but thought she only needed to communicate with the shop stewards who would “fly it up the flagpole” and speak with Van Wie. (Tr. 425–426, 429–434, 437)

Derek Davis, a machine operator in the technology department testified that the change in lunch and rest breaks occurred at some point after the strike, and corresponded with the change in starting times. He learned of the change during a daily employee meeting.<sup>15</sup> At the meeting, Chris Dunn told employees that management had “gotten together” and were changing their lunch/break schedules. Dunn told employees that, effective immediately, their first break would be from 7 a.m. to 7:15 a.m., that lunch would be from 9:30 a.m. to 10 a.m., and the last break would be from noon to 12:15 a.m. Before the change, employees worked from 6 a.m. to 2:30 p.m., received a 15 minute rest break at 8:30 a.m. and 1 p.m., and a half-hour lunch break at 11 a.m. (Tr. 236–237, 261, 274–276, 292–293)

The new break schedule was not posted in the technology department. However, the break schedule for the shipping/receiving department was posted on a bulletin board.<sup>16</sup> The posted schedule is dated April 27, 2017, and says that it is effective May 1, 2017. The schedule reminds employees to clock-out during lunch, and also states that “[o]perators are NOT allowed to leave the company property during paid breaks.” (Tr. 277–278; GC. 21)

At trial, Davis complained about the new lunch and break schedule, saying that 9:30 a.m. was too early for a lunch as he is not hungry at that time or at 7 a.m. when employees get their first rest break. Davis testified that the change also impacts workers at the end of their shift. If employees work a 10-hour shift, their last break ends at 12:15 p.m., requiring them to work a long stretch without a break. (Tr. 282–283)

Fragoza testified that he was told about the change in employee lunch breaks the same day as the strike vote meeting. According to Fragoza, when he returned from the union meeting and clocked in, Pleskacz asked him to go to the human resources office where Pleskacz, Fragoza, Barragan, and Peralta met. Peralta told Fragoza and Barragan that Respondent was changing their breaks and lunch period effective the next day. She said the first rest break would be from 7 a.m. to 7:15 a.m., the lunch break would be from 9:30 a.m. to 10 a.m., and the last rest break would be from Noon to 12:15 p.m. (Tr. 235–236, 239)

At this meeting Fragoza testified that he asked Peralta why the company was making this change, since employees have had the same break periods for at least 6 years. Peralta told him that, under the law, there needed to be a 2-hour space between breaks. Peralta gave Fragoza and Barragan a copy of the new break/lunch schedule and told them to let the other workers know

<sup>15</sup> Davis replaced Barragan as union steward after Barragan stopped working for Respondent on April 21, 2017. (Tr. 280–281)

<sup>16</sup> Shipping/ receiving employees started later than other employees, and thus had different break times. (Tr. 279)

about the change, which was effective the next day. According to Fragoza he informed the workers and Van Wie about the change that day. (Tr. 238–240)

At the hearing, Fragoza also complained about the new lunch and break schedule, saying it was difficult for workers because the “lunch truck” used to come during their 8:30 a.m. break, but did not come during the new 7 a.m. break time. Plus, Fragoza was not hungry during the new break times. (Tr. 242–43)

*D. Respondent Prohibits Employees from Leaving the Facility During Breaks*

All parties agree that in 2017, Respondent instituted a rule prohibiting employees from leaving the premises during their rest breaks. For at least 6 years before this prohibition, employees were freely allowed to leave the facility during rest breaks and they would frequently drive to a nearby 7-Eleven to get a drink, snack, or fill up their car with gas. After the prohibition, they simply stayed in the parking lot because they were not allowed to leave the facility. (Tr. 441, 244–249, 285)

Although there is no dispute that the new policy was instituted, the testimony differed as to when the prohibition was decided and announced. Peralta testified that the policy became effective “the latter part of March,” that it was an “expectation” the employer can set, and that Respondent did so unilaterally. According to Peralta, the decision to institute this policy change was made at the same site leadership meeting where Respondent discussed changing the break schedule. Peralta testified that she communicated this decision to Fragoza and Barragan in the same meeting where she discussed the change in break times, telling them that the prohibition on leaving the facility during breaks was going to happen. (Tr. 441–443, 446)

Van Wie testified that he learned about the new rule right after the first-shift strike vote meeting, when Fragoza and Barragan told him about the prohibition. According to Van Wie, when second shift employees came out to attend the strike vote, they did not want to cross the street and leave Respondent’s grounds, so the Union conducted the vote for second shift employees on a grassy easement next to the facility. (Tr. 128–133)

Fragoza testified that, when employees returned from their strike, Respondent put up a note next to the time clock saying they were not allowed to leave the premises during their rest breaks. Then, Chris Dunn announced the new rule to employees during a daily employee meeting. Derek Davis also testified that, after the strike, Dunn announced the new rule during a daily employee meeting. (Tr. 244–245, 284–285)

II. ANALYSIS

*A. Refusal to Bargain over the Conversion, Quality Assurance, and Shipping/Receiving Units*

The Complaint alleges that, since December 14, 2016, Respondent has refused to bargain with the Union over the Conversion, Quality Assurance, and Shipping/Receiving units. As a defense, Respondent asserts that the parties agreed to be bound by ground rules whereby they

would negotiate for the units based on the order in which they were certified, and only after reaching an agreement for the first unit would they move on to the next, until agreements were reached for all the units. Therefore, according to Respondent, it was privileged to rely upon these purported ground rules and refuse to open bargaining for the other units until such time as the parties finalized an agreement for the Technology Unit. According to the General Counsel and the Union no such agreement ever existed.

It is undisputed that there is no written agreement, or other document, memorializing any bargaining ground rules. Instead, Respondent points to the two June 2016 phone calls between Prete and Van Wie to argue that an oral agreement on ground rules was established.<sup>17</sup> After assessing the demeanor of both Prete and Van Wie, I credit the testimony of Van Wie that the Union never agreed to withhold bargaining for the other units until a contract was reached for the Technology Unit, and never agreed to bargain the units in the order in which they were certified.<sup>18</sup>

Along with crediting the testimony of Van Wie, I also believe that the Union’s actions show that it never agreed to Respondent’s purported ground rules. As early as May 2016, the Union demanded that bargaining open in all the units. And, on the first day of bargaining in August 2016, the Union presented initial bargaining proposals for all the bargaining units. In fact, after Respondent resisted the Union’s attempts to bargain the units jointly, during one of the August sidebars Van Wie told Prete that, if Cytec did not want to bargain the units together but wanted to bargain them separately, the Union would have to open those negotiations immediately and separately. And, after failing to get Respondent to agree to bargaining the units jointly, and further failing to get Cytec to agree to the Union’s position regarding the Source One employees, the Union demanded that Respondent open bargaining for all the units. This conduct by the Union further support a finding that it did not agree to Respondent’s purported ground rules and never waived the right to immediately open bargaining for the Conversion, Quality Assurance, and Shipping/Receiving units.

The fact the Union only bargained for the Technology Unit in August and September does not detract from this finding. The Union’s position, that they proceeded to bargain for the Technology Unit to make use of the time they had set aside for bargaining and to avoid the risk of an unfair labor practice charge, is reasonable. Respondent had rejected the Union’s initial proposal to combine all the units into one contract as it was a permissive subject of bargaining. With the Respondent presenting a counterproposal for the Technology Unit, it is understandable the Union would want to use this time productively. Furthermore, with plans to file for an *Armour-Globe* election to join the Source One employees into the Technology Unit, which occurred in October, it is reasonable that the Union would continue to bargain over the Technology Unit in September. In any event, a waiver of the statutory right to bargain over a certified unit must be clear and unmistakable. *Shipbuilders (Bethlehem Steel)*, 277 NLRB 1548, 1565 (1986) (“In cases involving alleged written waivers of 8(d) rights . . . a waiver must be most ‘clear and unmistakable’ to be effective. Necessarily, an oral waiver . . . would have to be more ‘clear’ and more ‘unmistakable.’”). Here, the credited evidence “does not support the view

<sup>17</sup> See Resp’t Br. at 14 (“This agreement was reached in the two telephone calls between . . . Stephen Van Wie and Gerald Prete in June 2016.”)

<sup>18</sup> I also credit Van Wie’s testimony as to what occurred during the various sidebar discussions.

that any such clear and explicit agreement was reached by the parties and one will not lightly be inferred.” *Shangri-La Health Care Ctr., Inc.*, 288 NLRB 334, 337–338 (1988).

5 Section 8(d) of the Act requires parties to meet and confer at reasonable times in good faith with respect to wages, hours, and working conditions. Because I credit Van Wie’s testimony that the Union never agreed to Respondent’s purported ground rules, it was incumbent upon Respondent to open bargaining for the Conversion, Quality Assurance, and Shipping/Receiving units upon the Union’s renewed demand for bargaining in December 2016. The bargaining demand by the Union was clear, specific, and seeks to negotiate wages, benefits, 10 and working conditions, all of which are covered by Section 8(d). As such, by ignoring the Union’s bargaining demand, Respondent violated Section 8(a)(1) and 8(a)(5) of the Act.<sup>19</sup> *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962) (“A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective 15 agreement and earnestly and in all good faith bargains to that end.”).

Finally, even assuming the parties had orally agreed to Prete’s ground rules, and further assuming that Van Wie’s conduct amounted to a violation of the Union’s duty to bargain in good faith,<sup>20</sup> the Board has found that in similar circumstances, an employer’s own duty to meet and 20 bargain in good faith remains intact, and the union’s conduct does not give the employer the right to refuse to bargain; one unfair labor practice does not excuse another. *Quality Roofing Supply Co.*, 357 NLRB 789, 789 (2011). In *Quality Roofing Supply Co.*, the employer defended against an 8(a)(5) refusal to bargain allegation by relying upon written ground rules where the parties had agreed to meet in the presence of a Federal mediator. After bargaining in 25 conformance with the written ground rules, the union informed the employer that it would no longer meet with a Federal mediator present, and requested to meet and bargain without the mediator. *Id.* at 792–793. The employer contended that the union’s repudiation of their written ground rules privileged its own refusal to meet and bargain with the union. *Id.* The Board adopted the judge’s finding that the employer’s conduct constituted a violation. In making this 30 finding, the Board noted that:

35 Even assuming that the Union’s refusal to continue bargaining with a mediator constituted a breach – or even total repudiation – of the ground rules established by the parties . . . and even assuming that such conduct amounted to a violation of the Union’s duty to bargain in good faith, the Respondent’s own duty to meet and bargain in good faith remained intact.

*Id.* at 789. The same holds true here.

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<sup>19</sup> Any claim that Respondent was privileged to negotiate the units one at a time because Cytec’s “primary business activity is not the negotiation of collective bargaining agreements,” is also meritless (JX. 1(aa)) The Board has consistently rejected a “busy negotiator” defense to an employer’s failure to meet and bargain. *Fruhauf Trailer Services, Inc.*, 335 NLRB 393, 393 (2001). If Prete’s schedule made it impossible for him to personally negotiate with the Union over the other three units, it was Cytec’s “obligation to furnish a representative who could.” *M” System, Inc.*, 129 NLRB 527, 549 (1960) (employer has duty to turn negotiations over to someone whose activities make him available to bargain at reasonable times).

<sup>20</sup> Here, Respondent’s unfair labor practice charge that the Union violated its duty to bargain in good faith by repudiating the purported ground rules was dismissed.

*B. Change in Employee Lunch and Break times*

5 The Complaint alleges that Respondent changed employee meal and rest breaks without bargaining with the Union. According to Respondent, this change occurred because of a corresponding change in employee start times, and a need to follow California law.

10 Fragoza testified that, after returning from the union strike vote meeting on March 30, he and Barragan met with Peralta and Pleskacz. Peralta told them that Respondent was changing their lunch and break periods, effective the next day, because under the law there needed to be a 2-hour gap between breaks and lunches. In contrast, Peralta testified that she met with Barragan and Fragoza on March 16, telling them that the company was going to adjust their break schedules to comply with California law, and that the change did not go into effect until a week or two later.

15 Regarding what was said during this meeting, I credit Fragoza’s testimony over that of Peralta. Along with considering the demeanor of both witnesses, I note that Peralta changed her testimony about aspects of this meeting during cross-examination. When questioned by Respondent’s counsel, Peralta originally testified that after she told Barragan and Fragoza of the change both replied that they understood the changes and the company’s need to alter the schedules. (Tr. 425) However, when asked on cross examination by the General Counsel whether, after being told of the change, either Barragan or Fragoza said anything in response, Peralta answered “[n]ot that I recall.” (Tr. 428–30) Peralta’s changed testimony detracts generally from her credibility about occurred during this meeting.

25 Also, Peralta’s timeline about the events does not comport with the testimony of Pleskacz. According to Peralta, the decision to change employee lunch and break schedules was prompted by her meeting with Pleskacz where she learned about the shift changes. Peralta testified that, at a site leadership meeting, Pleskacz told her that the conversion employees were starting at 5 a.m., and the technology department had approached him saying that they wanted to start at 5 a.m. as well. Pleskacz gave them an opportunity to vote, and all employees wanted to start at 5 a.m. Peralta testified that it was her discussion with Pleskacz, as detailed at this meeting, that caused her concern because she wanted to ensure that, with the new start time, the company was compliant with California law regarding meal and rest breaks.

35 According to Peralta, the discussion with Pleskacz occurred on March 15, 2017, and she met with Barragan and Fragoza to discuss the change in lunch/break times on March 16. However, Pleskacz testified that Barragan did not approach him about changing the starting time for the technology department until sometime during the week of March 27. Peralta was specific in her testimony that her discussion with Pleskacz about changing the technology department starting time occurred while they were at the site leadership meeting, and that this concerned her because she wanted to ensure compliance with California law. Therefore, Peralta could not have met with Barragan and Fragoza to discuss the change in lunch/break times on March 16, because

according to Pleskacz, Barragan did not approach him about changing the starting time for technology department employees until the week of March 27.<sup>21</sup>

5 Pleskacz’s chronology comports with Fragoza’s testimony that he met with Peralta after the strike vote meeting, which occurred on Thursday, March 30, and was told that the change in employee schedules would be put into effect the next day because it was required by law. Of course, employees went on strike the next day, so they were not actually affected by the change until they returned to work on April 4. This timeline also comports with Davis’ testimony that the change in employee lunch/break schedules took effect after the strike had ended. Therefore,  
10 I credit Fragoza’s testimony that, after returning from the union strike vote meeting on March 30, he and Barragan met with Peralta and Pleskacz and Peralta told them that the law required Respondent to change their lunch and break periods, and the change was effective the next day.

15 Employee work schedules are a mandatory subject of bargaining. *NLRB v. Henry Vogt Machine Co.*, 718 F.2d 802, 812 (6th Cir. 1983) (employer violates Section 8(a)(5) by altering wages, hours, and working conditions without first consulting and negotiating with its employees’ bargaining representative). So too are employee lunch and break schedules, and an employer cannot make material changes to these schedules without consulting and negotiating with the union. *El Paso Electric Co.*, 350 NLRB 151, 154, 167 (2007), enfd. 272 Fed. Appx. 381 (5th Cir. 2008) (Unilateral change in employee lunch schedules unlawful). *Blue Circle Cement Co., Inc.*, 319 NLRB 954, fn. 1, 960 (1995), enfd. in pertinent part 106 F.3d 413 (10th Cir. 1997) (unilateral change in break schedule unlawful).

25 “The Board has long held that a reasonable time between notifying the Union of a proposed change and its implementation is required under an employer’s obligation to bargain in good faith.” *Laro Maintenance Corp.*, 333 NLRB 958, 959 (2001). “To be timely, the notice must be given sufficiently in advance of actual implementation to allow a reasonable opportunity to bargain.” *Id.* (quoting *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3rd Cir. 1983)). If the employer has no intention of changing its mind, or if the  
30 notice is given in too short a time before implementation, “then the notice is nothing more than a *fait accompli*.” *Id.* (italics in the original).

35 Here, Respondent does not dispute that it made changes to employee lunch and break schedules, and similarly does not dispute the materiality of the changes.<sup>22</sup> Instead, it argues that Respondent consulted with Barragan and Fragoza before implementing the changes.<sup>23</sup> (Resp’t Br. at 25–26) Even assuming the stewards were considered representatives of the Union for purposes of receiving notice to changes in working conditions, I find that Respondent presented the change to employee break and lunch schedules as a *fait accompli*.<sup>24</sup> Respondent’s notice to

<sup>21</sup> Also generally detracting from the credibility of Peralta’s chronology about these events is her testimony that the shipping and receiving department changed their starting time, and break times, towards the end of March 2017. (Tr. 431–433) The evidence shows that this change became effective on May 1. (GC. 21)

<sup>22</sup> Notwithstanding, based upon the testimony of Fragoza and Davis, I find that the changes to employee lunch and break periods were material and substantial. *El Paso Electric Co.*, 350 NLRB at 166–167; *Blue Circle Cement Co., Inc.*, 319 NLRB at 960.

<sup>23</sup> For the same reasons noted, I do not credit Peralta’s testimony that the stewards consented to these changes.

<sup>24</sup> Because the decision was presented as a *fait accompli*, I find it unnecessary to decide whether Barragan and Fragoza were the Union’s agents for purposes of receiving notice of a unilateral change. *Southern California*

Barragan and Fragoza that the changes were effective the next day, was untimely and not “given sufficiently in advance of actual implementation to allow a reasonable opportunity to bargain” *Laro Maintenance Corp.*, 333 NLRB at 959 (employer’s notification to the union of proposed change one day before its implementation “amounted to the announcement of a fait accompli”).

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Also, the evidence supports a finding that Respondent’s decision was final and that it had no intention of bargaining with the Union about the changes. Peralta announced the change in the lunch and break schedules in definite terms, telling Barragan and Fragoza the new schedules would be implemented the next day, giving them the specific times of the new breaks, saying it was required by law, and telling them to inform the other employees.<sup>25</sup> See *Burk Enterprises, Inc.*, 313 NLRB 1263, 1268 (1994) (the fact the employer announced the decision in definite terms, with a specific date assigned and specific reason attached, supports a finding that the union was confronted with a fait accompli and thus denied a reasonable opportunity to bargain). Also, when asked why employees did not vote on the new lunch/break schedule, as they did with the new start times, Pleskacz responded “[w]e need to follow California law. Period.” (Tr. 413)

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Finally, Respondent has not shown that it was required by California law to change the lunch breaks to 9:30 a.m. or to change the times of the rest breaks. *Western Cab Co.*, 365 NLRB No. 78, slip op at 1–2 (2017) (violation where employer failed to meet its burden to show that change in health insurance package available to employees was mandated by the Affordable Care Act). Regarding lunches, the California Supreme Court has interpreted the state’s labor code as requiring a first meal break “start after no more five hours” of work. *Brinker Restaurant Corp.*, 273 P.3d at 537. Thus, if Respondent’s employees were now starting work at 5 a.m., they could work until 10 a.m. before the law required a lunch break. There is no mandate that lunch occur at 9:30 a.m. as Peralta testified.

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Similarly regarding the two rest breaks, Respondent provided no legal basis showing that the rest breaks needed to occur within 2 hours after the start of a shift and 2 hours after a meal break. Indeed, the Union points to a regulation from the California Industrial Wage Commission which, although mandating breaks for employees in a manufacturing facility, does not specifically dictate the time when the breaks must occur.<sup>26</sup> (Union Br. at 4) As such, Respondent has not shown that the timing of the lunch or rest breaks did not involve discretionary decision-making over which Respondent was obligated to bargain. *Western Cab Co.*, 365 NLRB No. 78 (2017). Accordingly, I find that Respondent had no intention of entering into good-faith bargaining over the changes, which were presented as a fait accompli, and that

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*Edison Co.*, 284 NLRB 1205, 1213 (1987), enfd. 852 F.2d 572 (9th Cir 1988) (unnecessary to decide if steward was union’s agent for purposes of receiving notice of unilateral change, as notice was not clear and unequivocal); See *Cal. Portland Cement Co. v. NLRB*, 19 Fed.Appx. 683, 684–685 (9th Cir. 2001) (notice to union steward was inadequate as steward was not the union’s agent for purposes of receiving notice of unilateral changes in job duties).<sup>25</sup> Also, Peralta testified that, at the time she informed Barragan and Fragoza of the change, she was not aware of a duty to provide an opportunity to negotiate about any changes. (Tr. 437)

<sup>26</sup> The Union cites California Industrial Wage Commission Wage Order 1-2001. Section 12(A) of this regulation provides: “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.” *Rodriguez v. E.M.E., Inc.*, 246 Cal.App. 4th 1027, 1035 (2016) The practicability of the specific time for rest breaks would allow for unit from the Union during bargaining.

any request to bargain by the Union would have been futile. Accordingly, Respondent’s conduct constituted an unlawful unilateral change in violation of Section 8(a)(1) and (5) of the Act.

C. *Respondent Prohibits Employees from Leaving the Facility During Breaks*

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The Complaint alleges that Respondent unilaterally instituted a rule prohibiting employees from leaving Respondent’s premises during their rest breaks. The General Counsel contends the rule was promulgated unilaterally in violation of Section 8(a)(1) and (5) of the Act, and also violated Section 8(a)(3) of the Act as it was done in order to discourage employees from engaging in union activities.

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1. The 8(a)(5) allegation

As previously discussed, Peralta announced the change to employee break times to Fragoza and Barragan on March 30, the day of the strike vote meeting. At the same time she also told the stewards about the new rule prohibiting employees from leaving the facility during their breaks. I find that, since Peralta testified that the prohibition became effective “the latter part of March,” similar to the new lunch/break schedule, it was announced to the stewards as a fait accompli. Because the new policy had a material effect on employee working conditions, Respondent was obligated to give the Union timely notice and a reasonable opportunity to bargain before making any changes. *C. J. Aigner Co.*, 257 NLRB 669, 674 (1981) (unilateral implementation of a rule requiring employees to obtain a supervisor’s permission before going to the restroom a violation); *Cf. East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996, 999–1000 (1982) *enfd.* 710 F.2d 397 (7th Cir. 1983) (Employee walkout protected, as it was a spontaneous reaction to employer’s unilateral action in prohibiting employees from leaving the premises during lunchtime, which was implemented without prior notice or consultation with the union). Because it was announced as a fait accompli, Respondent engaged in an unlawful unilateral change in violation of Section 8(a)(1) and (5) of the Act.

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2. The 8(a)(3) allegation

The General Counsel also alleges that the rule prohibiting employees from leaving Respondent’s facility during breaks violates Section 8(a)(3) of the Act. The Board applies the burden shifting framework of set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), to determine whether an employer’s actions were unlawfully motivated. *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 715 fn. 2, 722 (1994) (applying *Wright Line* to determine whether unilateral change was unlawfully motivated in violated Section 8(a)(3)). Under this framework, the General Counsel must prove by a preponderance of the evidence that union or other protected activity was a motivating factor in the employer’s actions. The elements required to support such a showing are union or other protected activity, knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009). If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action in the absence of the protected activity. *Id.* at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81

F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer’s justification becomes an affirmative defense).

a. The General Counsel’s prima facia case

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Employees at Santa Fe Springs have been continually engaged in union activities since February 2016, when the first unit was certified. And, on March 30, 2017, just before Peralta announced to Fragoza and Barragan the new rule prohibiting employees from leaving the facility during their rest breaks, first shift employees were across the street from the plant having a strike vote meeting. While Respondent argues that the General Counsel has not proven that Schreier or Johnson reported to anyone what they saw while watching the union meeting, Peralta admitted that one of them was in the meeting, held that same day, during which Respondent decided to prohibit employees from leaving the facility during rest breaks. (Tr. 445–446) Moreover, during this same general time frame Respondent and the Union were exchanging battling letters regarding negotiations, with the Union demanding negotiations open immediately for all the units, and Respondent refusing to do so. With this background, it cannot be disputed that, during the period in question, the Santa Fe Springs employees were engaged in union activities, that the Union was agitating on behalf of employees for negotiations to open in all of the units, and that Respondent knew of these activities.

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The timing of the decision to prohibit employees from leaving the plant during their breaks, coming right after the first-shift strike vote meeting and during the Union’s continuous demands that the company open negotiations for all the certified units,<sup>27</sup> supports an inference of unlawful motive. *Pessoa Construction Co.*, 356 NLRB 1253, 1257 (2011) enfd. 507 Fed.Appx. 304 (4th Cir. 2013) (Timing of unilateral change supports an inference of discriminatory motive that the change violation of Section 8(a)(3)); *Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676 (7th Cir. 2000) (timing of discharge supports an inference of unlawful motive).

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b. Respondent has not rebutted the General Counsel’s case

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With the General Counsel having established a prima facia case, the burden shifts to Respondent to show that it would have taken the same action in the absence of the protected activity. Respondent has not done so. In fact, Respondent presented no evidence as to why it decided to change the longstanding practice of allowing employees to leave the facility during their paid breaks. Instead, Peralta simply testified that the decision was an “expectation” that the company had the right to set unilaterally. As such, Respondent has not rebutted the General Counsel’s case, and the evidence supports a finding that the decision was unlawfully motivated in violation of Section 8(a)(1) and 8(a)(3) of the Act. *Vincent M. Ippolito, Inc.*, 313 NLRB at 722 (where employer submitted no reason for its unilateral change, it failed to meet its *Wright Line* burden and the unilateral change also constituted an 8(a)(3) violation); *Indiana Hospital*,

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<sup>27</sup> On March 20, 2017, just 10 days before the decision, Prete sent a letter to Van Wie accusing the Union of “mischaracterizations and inaccurate statements,” refusing to open negotiations in the remaining units, and insisting that the parties meet only over the Technology Unit. All Santa Fe Springs employees were copied on the letter. (JX. 1(cc)) And, on March 29 Prete sent a letter to Brewer blaming the Union for the stalled negotiations, saying the Source One issue “resolved itself” and again stating the company’s position that the parties bargain only over the Technology Unit. (JX. 1(dd))

315 NLRB 647, 654–655 (1994) (Unilateral change prohibiting employees from using certain areas for their breaks and lunches, coming eight months after employees voted to unionize, and two months after Union’s second request for a meeting with the employer, violated Section 8(a)(3) as it was a reprisal against employees for their union support).

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#### CONCLUSIONS OF LAW

1. The Respondent, Cytec Process Materials (CA), Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. The Charging Party International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 725, is a labor organization within the meaning of Section 2(5) of the Act.

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3. At all material times the Union has been the exclusive collective-bargaining representative of the following four units of Respondent’s employees:

#### (Technology Unit)

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All full-time and regular part-time machine operators in the Technology Department employed by Respondent at its facility located at 12801 Aim Street, Santa Fe Springs, California. Excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

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#### (Conversion Unit)

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All full-time and regular part-time conversion specialists in the Manufacturing Department employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

#### (Quality Assurance Unit)

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All full-time and regular part-time quality assurance inspectors employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, conversion specialists in the Manufacturing Department, employees in the Shipping/Receiving Department, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

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#### (Shipping/Receiving Unit)

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All full-time and regular part-time receiving clerks, shipping clerks, forklift drivers/order pullers, and packers in the Shipping/Receiving Department employed by Respondent at its facility currently located at 12801 Ann Street,

Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, conversion specialists in the Manufacturing Department, quality assurance inspectors, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

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4. By refusing to meet and collectively bargain with the Union over the terms and conditions of employment for employees in the Conversion Unit, Quality Assurance Unit, and Shipping/Receiving Unit, Respondent has violated Section 8(a)(1) and (5) of the Act.

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5. By unilaterally and without giving the Union an opportunity to bargain over the decision to change the employee lunch and rest break schedules, Respondent has violated Section 8(a)(1) and (5) of the Act.

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6. By prohibiting employees from leaving the premises/facility during their paid rest breaks Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

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

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REMEDY

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

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Respondent shall restore the status quo ante regarding employee lunch and rest break schedules, and shall bargain with the Union regarding any changes to these schedules. Respondent shall also restore the status quo ante and allow employees to leave the premises/facility during their paid rest breaks, and shall bargain with the Union regarding any proposed changes to this practice.

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Finally, Respondent will be required to bargain with the Union in good faith as the exclusive representative of the Conversion Unit, Quality Assurance Unit, and Shipping/Receiving Unit, concerning employee terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.<sup>28</sup>

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On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>29</sup>

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<sup>28</sup> The General Counsel also seeks a Notice reading as a remedy. However, given the representation by the General Counsel that the Respondent and the Union have now entered into collective-bargaining agreements covering all the units, I find that a notice reading is unnecessary as a remedy.

<sup>29</sup> 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.

## ORDER

Respondent Cytec Process Materials (CA), Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively and in good faith with the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 725 (Union), as the exclusive collective-bargaining representative of employees in the following appropriate units by unilaterally changing employee lunch and rest break schedules, and by prohibiting employees from leaving Respondent’s premises/facility during paid rest breaks:

(Technology Unit)

All full-time and regular part-time machine operators in the Technology Department employed by Respondent at its facility located at 12801 Aim Street, Santa Fe Springs, California. Excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(Conversion Unit)

All full-time and regular part-time conversion specialists in the Manufacturing Department employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(Quality Assurance Unit)

All full-time and regular part-time quality assurance inspectors employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, conversion specialists in the Manufacturing Department, employees in the Shipping/Receiving Department, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(Shipping/Receiving Unit)

All full-time and regular part-time receiving clerks, shipping clerks, forklift drivers/order pullers, and packers in the Shipping/Receiving Department employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, conversion specialists in the Manufacturing Department, quality assurance inspectors, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Failing and refusing to bargain with the Union as the exclusive representative of employees in the Conversion Unit, Quality Assurance Unit, and Shipping/Receiving Unit, concerning employee terms and conditions of employment.

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(c) Prohibiting employees from leaving the premises/facility during their paid rest breaks in order to discourage them from engaging in union activities.

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

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

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(a) Restore the employee lunch and rest breaks to the schedule that existed before Respondent made its unlawful unilateral changes.

(b) Restore the status quo ante and allow employees to leave its premises/facility during their paid rest breaks.

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(c) Meet and bargain, upon request, with the Union as the exclusive bargaining representative in the units described above, regarding any changes to employee lunch and rest break schedules, and any proposed changes to the practice of allowing employees to leave the premises/facility during paid rest breaks.

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(d) Meet and bargain with the Union as the exclusive bargaining representative in the Conversion Unit, Quality Assurance Unit, and Shipping/Receiving Unit concerning employee terms and conditions of employment, and, if an agreement is reached, embody such understanding in a signed agreement.

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(e) Within 14 days after service by the Region, post at its Santa Fe Springs, California facility copies of the attached notice marked “Appendix.”<sup>30</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. 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

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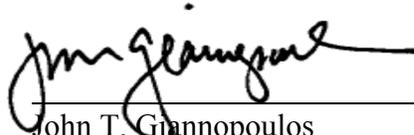
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<sup>30</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

5 the Respondent has gone out of business or closed any of the facilities  
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 the closed facilities any time  
since December 14, 2016.

- 10 (f) Within 21 days after service by the Region, file with the Regional Director  
for Region 21 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 with this order.

Dated, Washington, D.C. March 27, 2018

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John T. Giannopoulos  
Administrative Law Judge

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**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 a representative 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** fail and refuse to bargain collectively with the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 725 (Union), as the exclusive collective-bargaining representative in the below appropriate units by unilaterally changing employee lunch and rest break schedules and by unilaterally prohibiting employees from leaving the premises/facility during their paid rest breaks. The appropriate units are:

(Technology Unit)

All full-time and regular part-time machine operators in the Technology Department employed by Respondent at its facility located at 12801 Aim Street, Santa Fe Springs, California. Excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(Conversion Unit)

All full-time and regular part-time conversion specialists in the Manufacturing Department employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(Quality Assurance Unit)

All full-time and regular part-time quality assurance inspectors employed by Respondent at its facility currently located at 12801 Ann Street, Santa Fe Springs, California. Excluding all other employees, machine operators in the Technology Department, conversion specialists in the Manufacturing Department, employees in the Shipping/Receiving Department, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(Shipping/Receiving Unit)





**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 634-6502.