

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HUBER SPECIALTY HYDRATES, LLC,)	
Respondent,)	
)	
And)	Case 15-CA-168733
)	
UNITED STEELWORKERS, LOCAL 4880,)	
Charging Party)	
)	
And)	Cases 15-CA-177324
)	15-CA-179549
)	
BRANDON HARMON,)	
An Individual)	

RESPONDENT’S REPLY BRIEF TO GENERAL COUNSEL’S ANSWERING BRIEF

NOW COMES Huber Specialty Hydrates, LLC, Respondent herein, and files its Reply Brief to General Counsel’s Answering Brief, as follows:

INTRODUCTION

On January 29, 2018, Administrative Law Judge Christine Dibble issued her decision in this proceeding. As material here, Judge Dibble recommended that the Board find that Respondent violated §§ 8(a)(5) and (1) of the Act by unilaterally revising its attendance policy. Respondent filed timely exceptions and a supporting brief.¹ Thereafter, the General Counsel filed an answering brief. Respondent now files this reply brief.

¹ The General Counsel asserts (n. 2 of answering brief) that Respondent failed to serve the Union with a copy of its exceptions and supporting brief. This is inaccurate. Although Respondent’s initial certificate of service failed to reflect service on the Union, Respondent filed an amended certificate of service later that same day certifying that the Union had been served by electronic mail on March 16, 2018. Counsel again certifies herein that he did serve the Union on March 16, 2018.

ARGUMENT

A. Howard Industries Sets Forth The Applicable Standard.

As discussed in Respondent's brief in support of exceptions, where the contract establishes a specific bilateral procedure for adopting and implementing new or revised rules, the Board does not expressly ask whether the Union *waived* its right to bargain. Instead, it asks whether the employer complied with the contractually negotiated procedure. If it did, no violation will be found. *Howard Industries, Inc.*, 365 NLRB No. 4 (2016). The General Counsel's position regarding *Howard Industries*, as set forth in its answering brief, is not entirely clear. While attempting to distinguish this case, it seems to acknowledge that in *Howard Industries*, the Board did not apply its usual clear and unmistakable waiver standard:

"Accordingly, here, unlike in *Howard Industries*, the clear and unmistakable waiver standard applies." (GC Ans. Br. at 19). On the other hand, it also argues that in *Howard Industries*, the ALJ found that the parties created a specific procedure for implementing new policies *and the union clearly and unmistakably waived its right to bargain over the changes.*" (GC Ans. Br. at 18-19)(Emphasis supplied). Insofar as the General Counsel contends that the Board in *Howard Industries* actually applied the clear and unmistakable waiver standard, that contention lacks merit.

Indeed, the contract in *Howard Industries*, far from *waiving* the Union's right to bargain, actually *recognized* the union's right to bargain, but placed parameters on the scope and timing of such bargaining, while reserving the union's right to grieve the reasonableness of any newly adopted policy. In finding that the employer did not violate the Act by implementing a revised gift policy, the Board based its conclusion solely on the fact that the Company "compl[ied] with the notice and bargaining requirements that the parties agreed to in section 1 of article XXI of the

collective-bargaining agreement.” As explained in Respondent’s brief in support of exceptions, the same conclusion follows in this case. Respondent was granted the right to adopt reasonable rules and policies, but was required to provide the Union with notice and an opportunity for input within certain established time frames. After compliance with these procedures, Respondent had the right to implement and the Union retained the right to grieve the reasonableness of the rule or policy. Inasmuch as Respondent indisputably complied with the contractually-agreed-upon notice and bargaining procedures, it stands to reason that the Union cannot take unlimited “bites at the apple” to obtain bargaining rights above and beyond those expressly agreed to in the CBA.²

B. The Union Clearly and Unmistakably Waived Any Right to Bargain.

Even if the Board applies its traditional waiver analysis, the result is the same. In its answering brief, the General Counsel cites a number of Board decisions in which no waiver was found even though the pertinent contract contained some provision regarding the employer’s right to make reasonable rules. All of the cited decisions are distinguishable. In *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999), *enforced in part*, 233 F.3d 831 (4th Cir. 2000), the pertinent contractual provision authorized the employer to make reasonable rules “for the purposes of maintaining order, safety, and/or effective operation of Company plants.” *Id.* at 836. The Board found that this provision was too vague and general to encompass substantive changes to an attendance policy which altered the established disciplinary track. In doing so, the Board distinguished its prior decision in *United Technologies Corp.*, 287 NLRB 198 (1987) where the contract authorized the employer “to *make and apply rules and regulations for production, discipline, efficiency, and safety.*” *Id.* (Emphasis included). The Board noted that its conclusion

² In this sense, it *waived* bargaining rights beyond those agreed to in the CBA.

in *United Technologies* that the union waived its right to bargain over the employer's alteration of its progressive discipline track for attendance violations was based on its contractual right to make disciplinary rules. Here, *United Technologies* is the more applicable precedent. The CBA between Respondent and the Union does not contain a general provision authorizing it to make reasonable rules and policies. Rather, it vests "the operation of the plant, and the direction of the working forces, including the right to hire, lay off, suspend, dismiss, and discharge any employee for proper and just cause . . . exclusively with the Company . . . includ[ing] the right to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy." Thus, the right to adopt reasonable rules and policies is expressly linked to the right to operate the plant, direct the working force, and hire, lay off, suspend, and discharge employees for just cause. This is the very type of express linkage that the Board relied upon in *United Technologies* to find that the employer lawfully modified its attendance policy.

In *Murtis Taylor Human Services Systems*, 360 NLRB 546 (2014), the contractual provision authorized the employer "to make and alter from time to time reasonable rules and regulations, not inconsistent with this Agreement." *Id.* at 549. This right was not linked to any other right, nor did the contract define the topics on which the employer might enact rules. As such, it could not be said to include the right to implement a policy requiring employees to sign notes of administrative interviews. Similarly, in *Wind Stream Corp.*, 352 NLRB 44 (2008), the contractual right to adopt rules was not linked to any specific topic. Thus, the union did not waive its right to bargain over the employer's adoption of a "zero tolerance" policy for ethical violations, particularly since this new policy effectively modified the contractual just cause

provision. *Id.* at 50-51. In *High-Tech Corp.*, 309 NLRB 3 (1992), *enf'd*, 25 F.3d 1044 (5th Cir. 1992), the contractual right to make rules was limited to “maintaining order, effecting safe operation of the plant, and promoting efficiency.” The Board found that this language was not sufficiently specific to include the right to implement a no-tobacco usage policy, as it had nothing to do with maintaining order, safely operating the plant, or promoting efficiency.

The difference in contractual language between this case and the decisions cited by the General Counsel are like night and day. Unlike those cases, the CBA here links the right to adopt rules and policies to the right to direct the working forces, and hire, fire, and suspend employees. The changes made by Respondent to the attendance policy certainly fall within these parameters. Further, unlike any of the cases cited by the General Counsel, the parties here negotiated a specific procedure by which the Union could provide input, and Respondent fully complied with that procedure.

CONCLUSION

In their collective bargaining agreement, Respondent and the Union agreed to a specific procedure to be followed in the event that Respondent wished to implement new or revised policies and rules. Respondent fully complied with that procedure, met with the Union multiple times to receive input, and considered that input before implementing a revised attendance policy. Whether viewed as compliance with contractual procedures, waiver of further bargaining rights, or as being fully covered by the contract, Respondent did not violate § 8(a)(5) of the Act. Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 5th day of April 2018.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day, April 5, 2018, I served the foregoing REPLY BRIEF on the following parties of record in the manner indicated below:

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