Washington Beef, Inc. *and* United Food and Commercial Workers Union, Local 1439, AFL–CIO.
Cases 19–CA–24514 and 19–CA–24665

May 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On May 1, 1997, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited cross-exceptions, and the Northwest Immigrant Rights Project filed an amicus brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Washington Beef, Inc., Toppenish, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(c) and (d) and reletter the subsequent paragraphs.

"(c) Provide the Union with the information requested by letters dated December 12, 1995, April 16, May 21, and June 5, 1996, including information pertaining to a 401(k) retirement program for bargaining unit employees, the semiannual bonus paid to bargaining unit employees, the April 1996 wage increase, the new compensation and incentive bonus programs, hours of work, overtime hours paid, sick hours paid, holiday hours paid, premium hours paid, vacation hours paid, health and welfare premiums, call-in hours paid, and FICA and unemployment compensation contributions.

"(d) On request, bargain with the Union concerning the amount of time to be given bargaining unit employees in order to establish that they possess authentic work documents."

2. Substitute the following for newly relettered paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Toppenish, Washington facility, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 19, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 29, 1995."

3. Substitute the attached notice for that of the administrative law judge.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT implement changes in the below-described bargaining unit employees' compensation package, which resulted in wage increases for all of those employees, and WE WILL NOT implement a new incentive bonus program for bargaining unit employees without affording United Food and Commercial Workers Union, Local 1439, AFL–CIO (the Union) as the exclusive bargaining representative of the bargaining unit employees, an opportunity to bargain over either benefit. The bargaining unit is:

[1] No exceptions were filed to the judge's dismissal of 8(a)(5) and (1) allegations concerning the Respondent's unilateral decision to make semiannual bonus payments to unit employees in December 1995 and April 1996, its unilaterally making the 401(k) retirement program available to unit employees in December 1995, its refusal to bargain over the decision to terminate six unit employees who admittedly did not possess valid work documents and not to provide those six employees an opportunity to produce valid work documents, and its refusal to provide the Union requested information concerning the Respondent's correspondence with the Immigration and Naturalization Service (INS), posted notices regarding the INS, and copies of employees' I-9 forms.

[2] In Case 19–CA-24738, which the judge referred to in the first paragraph of sec. IV,A of his decision, the Board found that the Respondent violated Sec. 8(a)(5) and (1) by refusing to recognize and bargain with the Union following its April 30, 1996 certification as the exclusive collective-bargaining representative of the bargaining unit employees. *Washington Beef, Inc*., 322 NLRB 398 (1996), enfd. 132 F.3d 1483 (D.C. Cir. 1997).

The judge found, and we agree, that the Respondent violated Sec. 8(a)(5) and (1) by refusing to provide the Union with the information requested in its letters dated December 12, 1995, April 16, May 21, and June 5, 1996, and by refusing to bargain with the Union regarding the amount of time which will be given to the unit employees to establish that they possess authentic work documents. The judge, however, inadvertently failed to include in his recommended Order affirmative provisions remedying these violations. We shall modify the judge's recommended Order accordingly.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc*., 325 NLRB 17 (1997).

All full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truck drivers employed by the us at our Toppenish, Washington plant; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors and their employees, quality control employees, beef graders, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to provide the Union information, relevant and necessary for purposes of the Union's representation of the above-described bargaining unit employees, including information pertaining to a 401(k) retirement program for bargaining unit employees, the semiannual bonus paid to bargaining unit employees, the April 1996 wage increase, the new compensation and incentive bonus programs, hours of work, overtime hours paid, sick hours paid, holiday hours paid, premium hours paid, vacation hours paid, health and welfare premiums, call-in hours paid, and FICA and unemployment compensation contributions.

WE WILL NOT refuse to grant the Union access to our Toppenish, Washington facility in order to inspect our bargaining unit employees' working conditions, including safety conditions.

WE WILL NOT refuse to bargain with the Union concerning the amount of time which will be given to our bargaining unit employees in order to establish that they possess authentic work documents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon the specific request of the Union, rescind the new compensation package and new incentive bonus plan, both of which were implemented in April 1996.

WE WILL grant access to our Toppenish, Washington plant to a union official for a reasonable period of time in order to inspect plant safety conditions.

WE WILL provide the Union with the information requested in its letters dated December 12, 1995, April 16, May 21, and June 5, 1996, including information pertaining to a 401(k) retirement program for bargaining unit employees, the semi-annual bonus paid to bargaining unit employees, the April 1996 wage increase, the new compensation and incentive bonus programs, hours of work, overtime hours paid, sick hours paid, holiday hours paid, premium hours paid, vacation hours paid, health and welfare premiums, call-in hours paid, and FICA and unemployment compensation contributions.

WE WILL, on request, bargain with the Union concerning the amount of time to be given bargaining unit employees in order to establish that they possess authentic work documents.

WASHINGTON BEEF, INC.

Eduardo Escamila, Esq., for the General Counsel.
Robert K. Carrol, Esq. and *Daniel A. Croley, Esq.* (*Litler, Mendelson, Fastiff, Tichy, & Mathiason),* of San Francisco, California, for the Respondent.
Pamela K. Griffin, Esq., of Spokane, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in Case 19–CA–24514 was filed by United Food and Commercial Workers Union, Local 1439, AFL–CIO (the Union) on April 25, 1996, and the unfair labor practice charge in Case 19–CA–24665 was filed by the Union on July 12, 1996. Based upon the unfair labor practice charges, on September 6, 1996, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a second consolidated complaint,[1] alleging that Washington Beef, Inc. (Respondent) engaged in, and was continuing to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. As scheduled, the above matters came to trial before me on October 1 and 2, 1996, in Yakima, Washington.[2] At the trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer into the record all relevant evidence, to orally argue their legal positions, and to file posthearing briefs. Such latter documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a State of Washington corporation with an office and place of business in Toppenish, Washington, at which location it is engaged in business as a meat processing plant. During the 12-month period immediately preceding the issuance of the instant second consolidated complaint, which period is representative, during the normal course and conduct of its business operations, Respondent had gross sales of goods in excess of $500,000 and purchased and received goods and materials, valued in excess of $50,000, directly from sources out-

[1] In the second consolidated complaint, the above-captioned unfair labor practice allegations were consolidated for trial with those contained in another unfair labor practice charge. At the hearing, the complaint allegations, relating to that unfair labor practice charge, were settled, and the charge was severed from the instant proceeding.

[2] At the close of the session on October 2, the trial was continued until another date. On January 29, 1997, pursuant to a motion to close the record based upon the parties' desire neither to call any more witnesses or to offer additional evidence, I issued an order, closing the record.

side the State of Washington. Respondent admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The second consolidated complaint alleges, and counsel for the General Counsel contends, that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by unilaterally, without affording the Union, as the representative for purposes of collective bargaining of certain of its employees, the opportunity to bargain, making bonus payments to its bargaining unit employees, implementing a change in the employees' compensation package resulting in wage increases, and announcing a change in the bonus payment system for bargaining unit employees and by failing and refusing to provide to the Union certain requested information, including documents relating to the 401(k) plan for bargaining unit employees, to the semiannual bonus paid to bargaining unit employees, to the wage increase and new incentive bonus payments received by bargaining unit employees, to the bargaining unit employees' hours of work, overtime hours, and benefits, and to its dealings with the Immigration and Naturalization Service (INS) from June 1994 until June 1995 and copies of the I-9 forms for all of its bargaining unit employees who were arrested by the INS during the above time period or were called into the office on June 11, 1994, which information is allegedly necessary for and relevant to the Union's performance of its duties as the bargaining representative of certain of Respondent's employees. It is further alleged and contended that Respondent engaged in additional acts and conduct violative of Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with access to its facility and to bargain over this matter and by failing and refusing to bargain with the Union regarding the termination of employees as a result of an INS investigation and the amount of time employees have to validate their eligibility for continued employment. Respondent denies that it committed any of the alleged unfair labor practices, arguing that what constitutes a reasonable period of time for employees to validate their eligibility for employment is not a mandatory subject of bargaining and would conflict with other state and Federal employment laws; that the employee I-9 forms are confidential and private in nature; that, as a matter of law, it had no obligation to permit access to its property by an official of the Union; and that any changes in bargaining unit employees' benefits resulted in benefit increases for them and, therefore, were not unlawful.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent is engaged in the slaughtering, processing, packaging, and shipping of beef products at its facility located in Toppenish, Washington. The record establishes that, pursuant to a representation petition, in Case 19–RC–13065, filed by the Union on July 13, 1995, a representation election was conducted amongst certain of Respondent's employees, working at its beef fabrication plant, on August 25, 1995; that a majority of the votes cast were in favor of the Union; that, thereafter, Respondent filed objections to the conduct of the election; and that, after a hearing on said objections and a report by the hearing officer, on April 30, 1996, the Board certified the Union as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truckdrivers employed by Respondent at its Toppenish, Washington facility; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors, and their employees, quality control employees, beef graders, guards and supervisors as defined in the Act. On or about April 30, in order to test said certification, Respondent refused the Union's request to recognize it and to bargain collectively. Thereafter, on August 22, 1996, the Union filed an unfair labor practice charge in Case 19–CA–24738, and, on August 27, 1966, the Regional Director for Region 19 of the Board issued a complaint, alleging that Respondent's acts and conduct were violative of Section 8(a)(1) and (5) of the Act. Currently, the proceeding is before the Board on a Motion for Summary Judgment, filed by the General Counsel on September 10, 1996. The instant facts are not in dispute.

Several events herein occurred subsequent to the representation election on August 25, 1995, and prior to the Board's certification of the Union as the majority representative of the above-described bargaining unit employees of Respondent on April 30, 1996. Thus, on December 6, 1995, counsel for Respondent, Robert Carrol, wrote to the president of the Union, James Millsap, that "consistent with its lengthy past practice, the company will be making its 401K Retirement Program available to fifty-two (52) newly eligible employees . . . ." and that "the Company will again be providing its hourly employees with a semi-annual bonus . . ."on December 15. The parties stipulated that, in fact, the semiannual bonus was paid to Respondent's bargaining unit employees, and William Betterton, Respondent's vice president of finance and chief financial officer, testified that the bonus had been in effect "for the past several years" and that the formula, used for calculating the bonus, had been the same since 1991 or 1992. On December 12, Millsap wrote to Carrol, stating the Union's desire to bargain about Respondent's semiannual bonus and 401(k) retirement program and requesting "copies of any 401K Retirement Program that have been in effect . . . for the past five years . . . ," the names of bargaining unit employees to whom the program had been offered, information regarding the calculation of the semiannual bonus, to whom the bonus had been paid for the previous 5 years, and the amounts of said the payments. On December 29, Carrol wrote to Millsap, stating that Respondent would not comply with the latter's requests for information.

On April 12, 1996, Carrol wrote to Millsap, informing the latter that Respondent intended to "make certain changes in its compensation package which will result in a wage increase of between $0.10 and $0.90 per hour . . . to bargaining unit employees" and that, on April 21, it "will be paying out to all bargaining unit employees their pro-rata share of the semiannual bonus program . . . ." On April 16, 4 days later, Millsap replied, in writing, to Carrol, demanding to bargain over the matters raised by Carrol in his April 12 letter and requesting information pertaining to the bonus payment, including the calculations upon which payment is based, the amounts to be paid to each bargaining unit employee, and the amounts paid to bargaining unit employees for the previous 5 years, and to the

wage increase, including information concerning the calculations underlying wage increases for the previous 5 years, the names of bargaining unit employees who received wage increases for the previous 5 years and the amounts, and documents setting forth the new bargaining unit compensation package. By letter dated April 19 to Millsap, Carrol refused the Union's demand to bargain and declined to provide the requested information to the Union. On that same date, April 19, Respondent published a three-part announcement, concerning changes in all bargaining unit employees terms and conditions of employment. In the first section, Respondent noted that "currently, all employees receive $0.05 added to their hourly wage for each year worked beginning on their third anniversary" and announced that "this policy will be replaced with a new policy that pays the additional $0.05 per hour beginning on the first anniversary . . . . and all employees who have been here over two years will see their hourly wage increase by $0,10 because of this change." In the second section, Respondent announced a change in the starting hourly wage rate from $5.50 to $6.00 per hour,[3] and, in the final section, it announced a discontinuance of the existing semiannual bonus payment after April 26 and the implementation of "a different kind of bonus. The new bonus will be based on your attendance and tardiness record each week. If you do not miss any time at work for an entire week, you will earn $0.40 per hour more for each hour worked that week unless otherwise required by law." The parties stipulated that the semiannual bonus payment was made to bargaining unit employees on or about April 26. Also, all the announced changes, in the April 19 announcement, appear to have been implemented by Respondent, and Betterton and Rodney White, Respondent's vice-president of operations, admitted that the announced policy changes represented changes in Respondent's bargaining unit employees' terms and conditions of employment.

On May 21, subsequent to the Board's certification of the Union's representational status, Millsap mailed the following letter to Carrol. It reads, in part:

> In order to adequately represent the interests of the employees of the Washington Beef bargaining unit represented by [the Union], please instruct your client to provide the following information:
>
> A. Complete length of service table for entire bargaining unit as of the most recent available date.
>
> B. For most recent 12 month period, separately for full-time and part-time workers:
>
> 1. Average weekly number of employees and regularly scheduled weekly hours by job classification and wage rate.
>
> 2. Total hours worked.
>
> 3. Overtime hours and total premium expense.
>
> 4. Paid sick time hours and total expense.
>
> 5. Sunday or other weekend premium hours and total premium expense by premium rate.
>
> 6. Holiday hours worked and total premium expense by premium rate (where applicable).
>
> 7. Holiday hours paid but not worked.
>
> 8. Night premium hours by premium rate (where applicable).
>
> 9. Total vacation hours and vacation pay expense plus numbers of employees with 1, 2, 3 weeks, etc. (up to contract maximum for full-time and part-time labor force).
>
> 10. Sixth or Saturday premium, if applicable--hours and total premium expense separately for full-time and part-time.
>
> 11. Total annual contribution (or expense) for health and welfare and pension. Also, for health and welfare and pension respectively, number of hours for which contributions were made. If requirements are specified on per hour basis, provide hours and total expense for each contribution rate, if there is more than one; if on per week or per month basis, provide number of employees for whom pension and health and welfare contributions were made, for each contribution rate if there is more than one.
>
> 12. Total annual contribution for any other benefit . . . and number of hours and employees for whom/which contributions were made.
>
> 13. If appropriate: Provide number of hours for which call-in pay was paid, number of those hours worked and total call-in expense.
>
> 14. Total annual expenses for FICA and unemployment compensation contributions.

In a letter dated June 19, Attorney Carrol advised Millsap that Respondent would not provide the above-requested information to the Union.

On June 5, Millsap sent the following letter to Respondent. It reads, in pertinent part:

> Since [the Union] has been certified as the bargaining representative for the employees of Washington Beef, I would like to schedule a visit to the plant within the next few weeks. This is necessary in order to effectively represent the employees.
>
> As you may or may not know, I served in a packing house for thirteen years. This experience makes me uniquely qualified to examine the working conditions and safety issues at the plant.
>
> Please also provide the information requested in my December 12, 1995 letter. . . .

In his aforementioned June 19 letter, Attorney Carrol reiterated Respondent's refusal to provide the information, which Millsap had requested in his December 12, 1995 letter, and declined to permit the Union to have access to the fabrication facility during the pendency of its test of the Union's certification. With regard to the latter issue and the necessity for inspection of the bargaining unit employees' working conditions by officials of the Union, there can be no doubt that Respondent's fabrication plant was a potentially hazardous work place.[4] Thus, the record discloses that between 55 and 60 percent of Respondent's bargaining unit employees work in jobs involving cutting meat

[3] William Betterton testified that the compensation package changes resulted from a human resources department survey of the wage packages offered by Respondent's competitors in the Yakima, Washington area—fruit and vegetable packers with whom Respondent competes for its labor force. According to Betterton, such a survey is conducted on an annual basis, with wage changes made "every two years, eighteen months to two years." He denied that bargaining unit employees could expect a raise in pay at regular intervals. Finally, Betterton testified that every bargaining unit employee received an overall net wage increase as a result of the wage change.

[4] William Betterton testified that, notwithstanding any inherent dangers, Respondent's workplace safety record is excellent, with a low accident rate.

away from bone, utilizing extremely sharp knives and saws in their work, and that all of the employees work in an extremely noisy working environment, with quite high decimal levels. Given the potential for serious cuts and hearing problems, Respondent requires workers, who use knives, to wear mesh gloves on their "hook" hands, arm shields, and padded apron-like devices over their stomach areas, which are designed to reflect body penetrations, and all bargaining unit employees to wear ear plugs. Because of the dangers inherent in the use of sharp knives and saws, Respondent's employee orientation includes discussion of safety rules and instruction in how to utilize safety equipment; a "trainer" demonstrates the knife positions for the cutting of meat from bone; supervisors are required to be current in their first aide training; hearing tests are administered on an annual basis to all bargaining unit employees; Respondent has safety award programs for all employees in order "to encourage our people to be as safety-conscious as possible;" and supervisors conduct continued safety training and must observe that employees maintain proper ergonomics, including repetitive motions, while cutting. Finally, with regard to bargaining unit employee working conditions, Florencio Mora, a cutter, testified that, both prior to and subsequent to the August 25, 1995 election, the Union has held meetings with bargaining unit employees at which safety issues are discussed and that, at the meetings, those who attend are encouraged to file written reports of any safety problems. According to Mora, said the reports are sent to the Union's office in Spokane and, he believes, forwarded to state and Federal agencies, representatives of which visited Respondent's plant in order to investigate the employees' complaints. William Betterton confirmed that such investigative visits have been made to Respondent's plant.

James Colepaugh testified that, on May 13, he received a telephone call from an agent of the INS, who told him he had information from reliable sources that Respondent was employing undocumented workers. According to Colepaugh, a company is required, by law, to make its employment records available to the INS, and the agent arranged to visit Respondent's facility 2 days later. "And so they came on the 15th. He and two other agents came. They asked to see our complete I-9 files. I gave them the file, put them in a separate room by themselves."[5] During the next 2 weeks, Colepaugh and the INS agent spoke several times, with the latter saying "that they had found that some of the employees were using fraudulent documents and he wanted to come and interview them and arrest those that he determined were using fraudulent documents." Thereafter, Colepaugh met with them in order to facilitate what would occur, and INS agents again visited the plant on May 29. According to Colepaugh, the INS agents arrived with "a prepared list that they gave me at the time. They asked me to read the names, and they interviewed 60 people in the conference room," taking 15 bargaining unit employees from the plant and arresting them.

Sometime during the following week, Respondent received two letters, dated May 30, from the INS. The first listed the bargaining unit employees, who had been arrested the previous day and warned Respondent that, if any of the arrested individuals returned seeking employment, he would be required to complete a new form I-9 and to show Respondent "work eligibility documents that are different from those he presented originally. . . . **YOUR IMMEDIATE VOLUNTARY COMPLIANCE WITH THIS NOTICE IS ANTICIPATED. FAILURE TO COMPLY MAY RESULT IN FINE PROCEEDINGS BEING INITIATED AGAINST YOUR BUSINESS.**" The second INS letter, received by Respondent, reads, in part, as follows:

> As a result of our recent contact with your business, INS has determined that several of your employees presented fraudulent documents as proof of work eligibility at the time you hired them. Those employees do not have authorization to work in the United States. The employment of these individuals is a violation of the employer sanctions provisions of the Immigration Reform Control Act of 1986.
>
> This is a **WARNING NOTICE** to you of this violation. It is also **NOTICE** to you of your obligation to correct all deficiencies contained in this **WARNING NOTICE**. You will find a list of the employees' names, immigration numbers, and Washington Beef, Incorporated employee numbers . . . attached to this **NOTICE**. **THE EMPLOYEES ON LIST A ARE NOT ELIGIBLE TO WORK IN THE UNITED STATES**. It is your obligation to complete a new I-9 Form for these individuals. This entails your asking the employees to show you work eligibility documents that are different from those originally presented. You are not being penalized for the fact that your employees presented fraudulent documents. However, now that you have notice of fraudulent document use, you must complete a new I-9 Form for the individuals whose names appear on List A. Failure to complete a new I-9 Form within a reasonable period of time is a violation of law. In the event that any of the employees whose name appears on List A is unable or unwilling to present proof of work eligibility, employment must be terminated. You are not obligated to meet the requirements specified in this **NOTICE** for an employee who is no longer working for you. However, should any of the individuals listed in this **NOTICE** seek future employment with you, you are required to properly complete an I-9 form. Failure to do so may subject you to future civil money penalties.
>
> **YOUR IMMEDIATE VOLUNTARY COMPLIANCE WITH THIS NOTICE IS ANTICIPATED. FAILURE TO COMPLY MAY RESULT IN FINE PROCEEDINGS BEING INITIATED AGAINST YOUR BUSINESS**.

Attached to the letter was a document listing the names of 10 bargaining unit employees. According to James Colepaugh, inasmuch as one of those listed was one of the employees who had been arrested on May 29, as 1 employee was listed incorrectly, and as one had quit his job prior to being sought for an interview, he only interviewed 7 of the 10 listed employees. "I notified them that we had to complete a new I-9 form based on a letter from the INS, and I asked them if they had genuine documents to work in the United States. . . . [S]ome of them indicated that they did not have genuine documents, so that these people I did not give any time at all because they admitted they had false documents." The record establishes there were four such individuals, who were terminated immediately. One employee stated that his documents were genuine, "and so

[5] The I-9 form is a Federal Government form, which, after presenting appropriate supporting documents, an employee must sign, indicating that he is eligible to work in the United States and that he is a legal alien and which the employer signs, signifying that it has verified that the individual has established his eligibility for employment in this country.

I gave him a three-day leave of absence to get us the real documentation. He presented real documentation, and he was kept employed." Colepaugh added that two employees "said . . . their documents were at home, and I asked them when they could bring them, and they said they would bring them the next day. I asked if their documents were real, and they said they were not real, so they were terminated." Finally, Colepaugh testified that what he did was in accord with company past practice in such INS matters, that it would be a felony to continue to employ workers without valid work authorization, that the Union was not notified of the interviews, and that none of those interviewed requested representation by the Union.

Subsequent to the discharges, on June 12, Millsap wrote to Respondent, urging Respondent to rescind the terminations of the six employees, who failed to establish the genuineness of their work documents, and demanding to bargain over the opportunity given the terminated employees, by Respondent, to submit alternate work authorization documents. In a letter dated June 14, 2 days later, Millsap requested that Respondent provide the Union with all correspondence between itself and the INS during the previous calendar year, all posted notices regarding the INS, and copies of the I-9 forms for all employees, who were either arrested by the INS on May 29 or interviewed by Respondent as a result of the INS May 30 letter.[6] By letter dated June 19, Respondent's attorney, Carrol, declined Millsap's demand to bargain over the above terminations and the opportunity given to the terminated employees to submit authentic documents, and, by letter dated July 3, Carrol refused to provide the information, which had been requested by Millsap on June 14.

B. Legal Analysis

Initially, as to Respondent's admitted unilateral changes in its above-described bargaining unit employees' terms and conditions of employment, which were implemented between date of the representation election, August 25, 1995, and the date of the Board's certification of the Union as the exclusive bargaining representative of said employees, April 30, 1996, I must determine whether, as alleged, the acts and conduct were violative of Section 8(a)(1) and (5) of the Act. In this regard, the record evidence is, and there is no dispute, that, on April 19, 1996, Respondent published an announcement for its bargaining unit employees, detailing changes in their terms and conditions of employment including a raise of 5 cents per hour for each year worked beginning on their first employment anniversary date rather than on the third, an immediate increase of 50 cents per hour in the starting wage rate, and, rather than the semiannual bonuses, which had been paid to all bargaining unit employees for the past several years, "a different kind of bonus," one calculated on each employee's weekly attendance and tardiness record; that said changes were implemented; and that, while having given the Union advance, but not detailed, notice of the changes, Respondent refused to bargain about the changes prior to implementing them. It is, of course, axiomatic that an employer acts in violation of Section 8(a)(1) and (5) of the Act by unilaterally, without affording its employees' exclusive collective-bargaining representative an opportunity to bargain on their behalf, materially and substantially changing the employees' terms and conditions of employment. *NLRB v. Katz,* 369 U.S. 736, 739 (1962); *Serramonte Oldsmobile,* 318 NLRB 80, 96 (1995); *Millard Processing Services,* 310 NLRB 421, 425 (1993). Such conduct is especially egregious when, as herein, unilateral changes occur subsequent to selection, by bargaining unit employees, of a collective-bargaining representative and prior to the Board's eventual certification of the result; in such instances, an employer is held to act at its utter peril by implementing unilateral changes absent compelling economic considerations, which are not asserted herein. *Casa San Miquel,* 320 NLRB 534, 598 (1995); *Haskins Lumber Co.,* 316 NLRB 837, 861 (1995); *Millard Processing Services,* supra; *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974). In Respondent's defense, counsel argues that, rather than imposing more onerous terms and conditions of employment, Respondent's above-described unilateral changes "not only enhanced its employees' terms and conditions of employment but the Union's starting bargaining position." Indeed, every employee received a net wage increase under the new compensation program." However, contrary to counsel, the vice of the unlawful unilateral change is the change in existing employment conditions itself, and whether the change involves an increase or a decrease, a continuance or a discontinuance, or an alteration or modification is simply not determinative. *NLRB v. Dothan Eagle,* 434 F.2d 93, 98 (5th Cir. 1970); *Daily News of Los Angeles,* 315 NLRB 1236, 1237 (1994). Accordingly, I find that by unilaterally, and without bargaining with the Union, increasing bargaining unit employees' wages, increasing the starting wage rate for bargaining unit employees, and changing its bonus system for bargaining unit employees, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.[7]

Turning to the allegations of the second consolidated complaint that Respondent violated Section 8(a)(1) and (5) of the Act by, on various dates in 1995 and 1996, failing and refusing to furnish the Union with certain requested information and documents, it has long been established that, generally, an employer is under a statutory obligation, upon request, to provide a labor organization, which is the collective-bargaining representative of the employer's employees, with information, which is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956); *Aerospace Corp.,* 314 NLRB 100, 103 (1994); *Howard University,* 290 NLRB 1006 (1988). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for the administration of a collective-bargaining agreement, including information required by a labor organization to process a grievance. *Acme Industrial,* supra; *Bacardi Corp.,* 296

[6] Millsap's letter gives no indication that any of the terminated or interviewed employees gave the Union permission to view his I-9 form.

[7] I do not believe that, by giving semiannual bonus payments to its bargaining unit employees in December 1995 and April 1996 or by making its 401(k) retirement program available to bargaining unit employees in December 1995, Respondent violated Sec. 8(a)(1) and (5) of the Act. Thus, the record evidence establishes that Respondent's semiannual bonus program had been in existence, in the identical form, since approximately 1991 and that its past practice was to make the retirement program open to employees after their first year of employment. Accordingly, neither of the aforementioned actions represents a change in bargaining unit employees' terms and conditions of employment; therefore, I shall recommend that the applicable complaint paragraphs be dismissed.

NLRB 1220 (1989). The standard for relevancy is a "liberal discovery-type standard," and the sought-after evidence need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Aerospace Corp.,* supra; *Bacardi Corp.,* supra; *Pfizer, Inc.,* 268 NLRB 916 (1984). Further, necessity is not a guideline itself but rather is directly related to relevancy, and only the probability that the requested information will be of use to the labor organization need be established. *Bacardi Corp.,* supra. Moreover, information, which concerns the terms and conditions of employment of the bargaining unit employees, is deemed "so intrinsic to the core of employer-employee relationship" that such is held to be presumptively relevant. *York International Corp.,* 290 NLRB 438 (1988), quoting *Southwestern Bell Telephone Co.,* 173 NLRB 172 (1968); *Buffalo Concrete,* 276 NLRB 839 (1985).

The record evidence herein establishes that, by James Millsap's December 12, 1995, April 16, May 21, and June 5, 1996 letters to Respondent or its attorney, the Union requested documents and information relating to the 401(k) retirement plan for bargaining unit employees, the semiannual bonus paid to bargaining unit employees, the wage increase for bargaining unit employees, which was implemented in April 1996, the methods of calculation for previous wage increases, the bargaining unit employees' hours of work and their overtime hours, paid sick time hours, holiday hours worked, premium hours, bargaining unit employees' vacation hours and pay, health and welfare and pension contributions for bargaining unit employees, contributions for any other employment benefits, call-in payments to bargaining unit employees, and any FICA and unemployment compensation contributions. Clearly, what was requested from Respondent, by the Union, pertained to the former's bargaining unit employees' terms and conditions of employment and was, therefore, presumptively relevant and necessary to the Union's performance of its duties as the employees' bargaining representative. Accordingly, Respondent's refusal to provide the information to the Union constituted a violation of Section 8(a)(1) and (5) of the Act.

With regard to the allegation in the second consolidated that Respondent engaged in conduct, violative of Section 8(a)(1) and (5) of the Act, by refusing the Union access to its fabrication facility, there is no dispute that, on June 5, 1996, James Millsap wrote to Respondent, requesting the scheduling of a visit to Respondent's fabrication facility in order to effectively represent the bargaining unit employees, and that, on June 19, Respondent's attorney, Carrol, replied, denying Millsap access to the Toppenish facility. Counsel for the General Counsel contends that, as a newly certified bargaining representative, the Union had the right to inspect Respondent's facility, pursuant to its obligations as the bargaining representative of Respondent's bargaining unit employees, in order to prepare for bargaining on an initial collective-bargaining agreement. In this regard, it is clear that Millsap's request for access to Respondent's fabrication facility does not appear to have been frivolously made or meant as harassment. Thus, the record reveals that Respondent's bargaining unit employees perform their job tasks in a rather hazardous working environment. In excess of 50 percent of the employees utilize sharp cutting instruments while they work and must wear protective gear around their hands, arms, and midsections and all employees are required to use ear plugs due to excessive noise levels. Further, Respondent's own concern for worker safety is manifestly certain from its extensive safety training during employee orientation, numerous safety programs, and constant monitoring for unsafe conditions. In these circumstances, I agree with counsel for the General Counsel, and contrary to counsel for Respondent, that the Board's method of analysis, set forth in *Holyoke Water Power Co.,* 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1986), and its progeny is the proper mode of analysis for determining the Union's right of access to Respondent's fabrication facility. In *Holyoke Water Power,* supra, the fan room of the employer's plant was extremely noisy, and the Union requested the employer's permission to have its own "industrial hygienist" inspect noise conditions in the room. The employer denied permission to the Union, and the Board devised a test for establishing whether an outside union representative should have been afforded access to the employer's property:

> [E]ach of two conflicting rights must be accommodated. . . . First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As stated by the Supreme Court in *Babcock & Wilcox* . . . the Government protects employee rights as well as property rights and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. In sum, the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision.

Id. at 1370.[8]

Herein, balancing Respondent's property rights against its bargaining unit employees' right to proper representation, I

[8] Counsel for Respondent argues that the Supreme Court's decision, in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), is controlling in that the Court specifically rejected the type of balancing test, announced by the Board in *Holyoke Water Power,* supra, in cases involving nonemployee activities on an employer's property except in exceptional and narrow circumstances. I note that *NLRB v. Babcock & Wilcox,* 351 U.S. 105 (1956), and *Lechmere, Inc.* involve trespassory organizational activities. However, as the Board explained in *Brown Shoe Co.,* 312 NLRB 285 at 285 fn. 3 (1993), decided after *Lechmere, Inc.,* "under the *Holyoke* test . . . we analyze an incumbent union's entitlement to an employer's premises as opposed to a union's attempt to organize an employer's employees as in *Babcock*." Put another way, representational, rather than organizing, rights are involved. Moreover, as in *Holyoke Water Power,* rather than trespassing upon posted property, the Union herein sought Respondent's permission to inspect its plant.

note, at the outset, that the information, regarding safety conditions, which the Union seeks to obtain from direct observation of the plant premises, is presumptively relevant and necessary for its role as the bargaining unit employees' exclusive representative. *C.C.E., Inc.,* 318 NLRB 977, 978 (1995). Respondent has made no assertion regarding the possible disclosure of confidential, proprietary, or trade secret information as a result of Union President Millsap's proposed visit to its Toppenish plant, and, in his posthearing brief, Respondent's attorney merely opined that "a circus-like atmosphere" would accompany the union official's inspection of the plant. While counsel for Respondent correctly points out that the Union has been able to investigate occupational safety and injury issues through solicitation of employee complaints and that such has been accomplished without access to Respondent's plant, "there can be no adequate substitute for [a] Union representative's direct observation of . . . employee operations and working conditions, in order to evaluate . . . safety concerns . . . ." *C.C.E., Inc.,* supra. Moreover, unlike the situation in *Holyoke Water Power* but, just as in *C.C.E., Inc.,* the bargaining relationship between Respondent and the Union is a nascent one, and, as the Board stated in the latter decision, in such circumstances,

> [i]t is readily apparent that the Respondent's denial of access to the Union's [president] prevents the experienced official from gaining a complete understanding of the Respondent's operation and thus prevents the employees from getting the representation they voted for in the certification election. Furthermore, without a collective-bargaining agreement, the Union has not other avenue, such as a grievance procedure or arbitration, for obtaining the desired information. The denial of access at this crucial phase of the parties' bargaining relationship can serve only to undermine the Union's status as bargaining representative.

Id. Furthermore, while Respondent's attorney averred that a visit by Millsap would interfere with production, such, of course, is mere speculation and a disruption of operations was not Attorney Carrol's stated reason for denying Millsap's request. The foregoing convinces me that, as Respondent's interest in keeping Millsap off its property is weak and as the Union's interest in obtaining safety and other information is substantial, on balance, the former's property rights are outweighed and that, therefore, Respondent violated Section 8(a)(1) and (5) of the Act by denying Millsap access to its facility. Id.

The remaining issues pertain to Respondent's conduct subsequent to the INS visit to its facility and arrest of 16 bargaining unit employees on May 29, 1996, and the second consolidated complaint allegations that Respondent unlawfully refused to bargain over its termination of employees, who did not have authenticated work documents, and over the amount of time given to bargaining unit employees to establish that they possess such documents. The record evidence discloses that, during the week following the INS visit, Respondent received a letter and an attached list of bargaining unit employees, from the INS, advising the former that INS had determined that the listed employees had presented fraudulent work eligibility documents, that Respondent was obligated to obtain new I-9 forms from each of the listed employees and be shown different work eligibility documents by each, and that, if any of the listed employees is unable or unwilling to present proof of work eligibility, "employment must be terminated." As a result of this letter and after determining that one of the listed bargaining unit employees was one of those arrested on May 29, another was incorrectly identified, and another had quit after the INS visit, Respondent interviewed 7 of the 10 listed employees; immediately terminated 6 who admitted not having genuine work documents; and, after 1 employee claimed he possessed valid work documents, gave him a 3-day leave of absence in order to locate the documents and present them to Respondent, which he did. The record evidence also discloses that, subsequent to the terminations, Union President Millsap demanded, and Respondent refused, to bargain over the terminations and over the imposition of the 3-day leave of absence given to the one employee. Further, the record discloses that Respondent denied the Union's request for copies of correspondence between itself and the INS and of posted plant notices regarding INS and copies of the I-9 forms of all bargaining unit employees, who were arrested by INS on May 29 or subsequently interviewed by Respondent.

With regard to the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union over its terminations of six bargaining unit employees after each admitted he did not possess valid work documents, counsel for the General Counsel, citing *Ryder Distribution Resources,* 302 NLRB 76 (1991), argues that the termination of employees is a mandatory subject of bargaining and that, therefore, Respondent unlawfully refused to bargain with the Union. Taking a contrary position, counsel for Respondent contends that the Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for an employer to knowingly continue to employ an alien, whose work status is unauthorized; that, upon becoming aware an employee lacks authentic documents, an employer must terminate the employee within some reasonable time period or become subject to civil monetary penalties and cease and desist orders; and that, in these circumstances, citing *Long Island Day Care Services,* 303 NLRB 112 (1991), compliance with IRCA is not amenable to collective bargaining. In determining whether Respondent was obligated to bargain over the six terminations, I note, at the outset, that IRCA and the Act "can and must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both instances, to protect the rights of employees in the American work place." *A.P.R.A. Fuel Oil Buyers Group,* 320 NLRB 408 at 408 (1995). Nevertheless, practical implementation of the above requires the Board to "make policy choices," and the Board recognizes "that the most effective way for [it] to accommodate—and indeed to further—the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the [Act] to undocumented workers in the same manner as to other employees." Id. at 415. In my view and in accord with the Board's policy, once a labor organization has been certified by the Board as their exclusive bargaining representative, all bargaining unit employees, including aliens with fraudulent work documents, are entitled to representation by it. Accordingly, inasmuch as, in *Ryder Distribution Resources,* supra, the Board affirmed an administrative law judge's conclusion that the termination of employees constitutes a mandatory subject of bargaining, an employer is clearly obligated to bargain with the labor organization, which represents its bargaining unit employees, over aspects of INS-related terminations of such employees, who do not possess genuine work documents, a matter nominally covered by IRCA. However, given the clear dictates of IRCA, while the obligation encompasses bargaining over

such peripheral matters as union representation during the termination interview, the undocumented alien's seniority rights and privileges if, and when, he reapplies for a job with genuine work documents, the amount of time necessary for the employee to wind up his employment, and any severance payments, an employer's duty to bargain does not extend to the termination decision itself. On this point, I agree with counsel for Respondent that, pursuant to IRCA, Respondent has no choice but to terminate aliens, who do not possess valid work documents, or become subject to monetary penalties. Put another way, as the Board stated in *Long Island Day Care Services,* supra at 117, which involved funding from the Federal Department of Health and Human Resources and a directive from it that the employer use the funds to pay its employees a 2-percent "salary enhancement," "Respondent's total lack of discretion . . . demonstrates that there was nothing of substance to bargain about . . . ." Therefore, if Millsap's demand was to bargain over the termination decisions, as the second consolidated complaint allegation suggests, as our national labor policy mandates that such must not be considered a mandatory subject of bargaining, Respondent did not unlawfully refuse to do so.

However, rather than being a demand to bargain over the termination decisions, I understand James Millsap's June 12 letter as a specific demand that Respondent bargain over its failure to give each of the six employees time in which to produce authentic work documents prior to termination. In his post-hearing brief, counsel for the General Counsel terms this a mandatory subject for bargaining with the Union, and, while the argument has surface appeal, the salient fact herein is that the six terminated aliens admitted having utilized fraudulent documents in order to gain employment with Respondent. Further, the admissions confirmed what the INS itself had determined and stated in its May 30 letter to Respondent. Thus, as with the termination decision itself, nothing remained about which to bargain. Counsel for the General Counsel has pointed to no provision in IRCA or to any court decision suggesting that, in such circumstances Respondent possessed any option but to terminate the aliens within a prompt time frame, and, in my view, having become aware that the six individuals had gained employment by presenting fraudulent documents, Respondent was prohibited from giving them any time to attempt to obtain valid work documents. *Mester Mfg. Co. v. INS,* 879 F.2d 561, 567–569 (9th Cir. 1989). As with the discharge decision itself, given what I perceive to be the clear intent of IRCA, providing an opportunity for the six aliens, who admitted using fraudulent documents in order to obtain work with Respondent was not a mandatory subject of bargaining. Accordingly, Respondent was under no legal obligation to do so, and I shall recommend that the applicable allegation of the second consolidated complaint be dismissed.

As to the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union over the amount of time given to the bargaining unit employee, who claimed he possessed valid work documents, to establish that he possessed authentic work documents, I have previously concluded that Board policy requires that, even with regard to matters nominally involving IRCA, all bargaining unit employees, including aliens, the validity of whose work documents are questioned, are entitled to representation by their designated bargaining representative, including the exclusive representative's right to bargain over mandatory subjects of bargaining. On this point, there can be no question that the length of time given to aliens in which to establish they possess genuine work documents constitutes a term and condition of employment over which Respondent must bargain upon request. In *Mountain High Knitting, Inc. v. Reno,* 51 F.3d 216, 220 at fn. 5 (1995), the United States Court of Appeals for the Ninth Circuit held that employers are entitled to "a reasonable period of time" to recheck an alien employee's work documents upon receipt of an INS letter, questioning the status of the employee and requiring a new I-9 form, and, in my view, the establishment of such a time period is perfectly amenable to the bargaining process. Herein, while it might be argued that the 3-day leave of absence, which was given to an employee by Respondent, was sufficient for him to establish that his work documents were genuine and that, therefore, the Union's bargaining request was moot, I, nevertheless, believe that the subject matter is of such significance to Respondent's bargaining unit employees that Respondent was obligated to bargain, upon request, with the Union on this issue.[9] Accordingly, Respondent's refusal to do so was violative of Section 8(a)(1) and (5) of the Act.

Finally, I consider the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to comply with the Union's information request, which was made in connection with the latter's bargaining demands concerning Respondent's investigation after receipt of the May 30 INS letters and subsequent termination of six bargaining unit employees. Specifically, there is no dispute that the Union requested that Respondent provide it with copies of all correspondence between it and the INS for the preceding calendar year, copies of all employee notices, pertaining to the INS, during the preceding calendar year, and copies of the I-9 forms of those employees, who were arrested, by INS, on May 29 and who were interviewed by Respondent on June 11, 1996, and that Respondent refused to provide said documents to the Union. Initially, as to the requested copies of correspondence between Respondent and the INS and copies of posted notices regarding the INS, counsel for the General Counsel has offered no evidence as to the relevancy of these documents. Inasmuch as these documents do not themselves concern terms and conditions of employment and are not presumptively relevant, it was his burden to establish their relevancy.[10] As counsel did not do so, I must conclude that Respondent did not unlawfully refuse to give these documents to the Union and shall recommend dismissal of the applicable portion of paragraph 12(a) of the second consolidated complaint

With regard to the I-9 forms, while making no contention regarding the relevance of the forms for those employees who were arrested, counsel for the General Counsel argues that I-9 documents, of the aliens who were terminated, are relevant for purposes of the Union's bargaining over the terminations. Contrarily, counsel for Respondent argues that an employer has no obligation to provide a union with confidential and private information. In this regard,in *Detroit Edison Co. v. NLRB,* 440

[9] Counsel for Respondent argues that forcing Respondent to bargain after receipt of an INS letter would have the unfortunate effect of delaying the employer's compliance with IRCA. I agree, and that is precisely why bargaining between the parties should occur while no INS letter is pending—at a time when the parties have time for an exchange of ideas and reflection.

[10] *Maple View Manor,* 320 NLRB 1149, 1151 at fn. 2 (1996*); Miami Rivet of Puerto Rico,* 318 NLRB 769, 771 (1995).

U.S. 301 (1979), the Supreme Court "recognized a limited exception [to the duty to provide relevant information to a bargaining representative] for information that is confidential in nature." *New Jersey Bell Telephone Co. v. NLRB,* 720 F.2d 789, 791 (3d Cir. 1983). In such circumstances, where the employer has raised a "legitimate and substantial" claim of confidentiality,[11] "the Board is . . . required to balance the [labor organization's] need for the information against the legitimate confidentiality interest established by the employer." *General Dynamics Corp.,* 268 NLRB 1432, 1433 (1984). Herein, while there is no record evidence regarding the confidentiality of I-9 forms, in his posthearing brief, counsel for Respondent cited to an INS regulation which limits the use of the information, contained in an I-9 form or appended to it, to enforcement of the provisions of the IRCA. In balancing the interests of the parties, I have previously concluded that, as the Union's bargaining request concerned whether the six aliens should have been given an opportunity to obtain valid work documents prior to termination and as Respondent legally had no option but to terminate the individuals, Respondent was not obligated to bargain with the Union on this subject. Further, there is no record evidence as to the relevancy of the I-9 forms of other bargaining unit employees, who were arrested by INS on May 29. Moreover, not only do INS regulations mandate the confidentiality of the information contained in an I-9 form but also there is no record evidence that any of the individuals, who were arrested or interviewed by Respondent as a result of INS letters, gave his consent for the Union to view his I-9 form. In these circumstances, I do not believe that Respondent was obligated to furnish any of the requested I-9 forms to the Union and shall recommend dismissal of the applicable portion of paragraph 12(a) of the second consolidated complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truck drivers employed by Respondent at its Toppenish Washington plant; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors and their employees, quality control employees, beef graders, guards and supervisors as defined in the Act.

4. By implementing changes in the above-described bargaining unit employees' compensation package, which resulted in wage increases for all of the employees, and by implementing a new incentive bonus program for bargaining unit employees without affording the Union, as the exclusive representative for purposes of collective bargaining for the employees in the above-described appropriate unit, an opportunity to bargain over either benefit, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to provide to the Union information, relevant and necessary for purposes of the Union's representation of the above-described bargaining unit employees, including information pertaining to a 401(k) retirement program for the employees, the semiannual bonus paid to the employees, the April 1996 wage increase, the new compensation and incentive bonus programs, hours of work, overtime hours paid, sick hours paid, holiday hours paid, premium hours paid, vacation hours paid, health and welfare and pension premiums, call-in hours paid, and FICA and unemployment compensation contributions, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. By refusing to grant the Union access to its Toppenish, Washington facility in order to inspect the above-described bargaining employees' working conditions, including safety conditions, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

7. By refusing to bargain with the Union with regard to the amount of time which will be given to above-described bargaining unit employees in order to establish they possess authentic work documents, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

8. The aforementioned acts and conduct affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Unless specified above, Respondent engaged in no other unfair labor practices.

THE REMEDY

Having found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist from engaging in any such violations of the Act and to take the following affirmative actions. Specifically, in order to remedy the unlawful unilateral changes implemented by Respondent, while the standard Board remedy involves rescission and restoration of the status quo ante, it appears that the newly implemented compensation package constituted a benefit to bargaining unit employees and that the new incentive bonus program may also constitute a benefit. Accordingly, I shall not require Respondent to rescind the programs unless the Union requests that such be done. *Kendell College,* 228 NLRB 1083 (1977). Further, I shall order that Respondent be required to grant access to its plant to a Union official for a reasonable period of time to inspect plant safety conditions. Additionally, Respondent shall be ordered to post a notice, informing its employees of its obligations herein.

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I issue the following recommended[12]

ORDER

The Respondent, Washington Beef, Inc., Toppenish, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[11] An employer bears the burden of demonstrating that its refusal to provide relevant and necessary information to a labor organization is excusable because the requested data is privileged information. *McDonnell Douglas Corp.,* 224 NLRB 881 (1976).

[12] 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.

(a) Implementing changes in the below-described bargaining unit employees' compensation package, which resulted in wage increases for all of the employees, and by implementing a new incentive bonus program for bargaining unit employees without affording the Union, as the exclusive representative for purposes of collective bargaining for the employees in the below-described appropriate unit, an opportunity to bargain over either benefit. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truck drivers employed by Respondent at its Toppenish Washington plant; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors and their employees, quality control employees, beef graders, guards and supervisors as defined in the Act.

(b) Failing and refusing to provide to the Union information, relevant and necessary for purposes of the Union's representation of the above-described bargaining unit employees, including information pertaining to a 401(k) retirement program for the employees, the semiannual bonus paid to the employees, the April 1996 wage increase, the new compensation and incentive bonus programs, hours of work, overtime hours paid, sick hours paid, holiday hours paid, premium hours paid, vacation hours paid, health and welfare and pension premiums, call-in hours paid, and FICA and unemployment compensation contributions.

(c) Refusing to grant the Union access to its Toppenish, Washington facility in order to inspect the above-described bargaining unit employees' working conditions, including safety conditions.

(d) Refusing to bargain with the Union with regard to the amount of time which will be given to above-described bargaining unit employees in order to establish that they possess authentic work documents.

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

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

(a) If the Union specifically requests, rescind the wage compensation package and incentive bonus program, both of which were implemented in April 1996.

(b) Grant access to its Toppenish, Washington plant to a union official for a reasonable time in which to inspect plant safety conditions.

(c) Within 14 days after service by the Region, post at its facility in Toppenish, Washington, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 1995.

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

IT IS FURTHER ORDERED that the second consolidated complaint be dismissed insofar as it alleges that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a semiannual bonus plan, refusing to bargain over whether aliens, who admitted having provided fraudulent work documents to Respondent, should be given time to obtain valid ones, and by refusing to give information, including copies of INS correspondence, employee notices concerning the INS, and I-9 forms, to the Union.

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[13] 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."