The Philadelphia Coca-Cola Bottling Company *and* Teamsters Local Union No. 830 a/w International Brotherhood of Teamsters, AFL–CIO. Case 4–CA–31026

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On February 6, 2003, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union filed answering briefs.

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 and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a bonus incentive program for its quality control employees, and by granting bonuses to those employees. In so concluding, the judge found that union shop stewards were not authorized to act as the Union's agents to receive notice of proposed unilateral changes such as the incentive bonus program at issue here.[2] The Respondent excepts to this finding. We agree with the judge. Article XXX of the parties' collective-bargaining agreement limits shop stewards' duties to (1) investigating and presenting grievances, (2) collecting dues when authorized, and (3) transmitting messages originating with and authorized by the Local Union if it is in writing or is of a routine nature. Further, on March 20, 2001, just prior to the implementation of the incentive bonus program, Union President Joseph Brock sent Respondent's director of labor relations, Luis Fonseca, a letter advising him that stewards do not possess the authority to sign agreements without authorization from the Local Union. Given this evidence of the limited nature of shop stewards' authority, we agree that the Respondent failed to establish that notice of the bonus program to a shop steward, if it had been made, would have served as notice to the Union. Accordingly, we agree with the judge's conclusion that the Respondent violated Section 8(a)(5) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Philadelphia Coca-Cola Bottling Company, Philadelphia, Pennsylvania, its officers, agents, successors and assigns, shall take the action set forth in the Order.

Andrew Brenner, Esq., for the General Counsel.
Stephen Holyroyd, Esq., for the Charging Party.
Michael G. Tierce & Lisa M. Scidurlo, Esqs., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on August 21, 2002, following the filing of an unfair labor practice charge by Teamsters Local Union No. 830 a/w International Brotherhood of Teamsters, AFL–CIO (the Union), and issuance of a complaint on April 26, 2002, by the Regional Director for Region 4 of the National Labor Relations Board (the Board). The complaint alleges that The Philadelphia Coca-Cola Bottling Company (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by granting, on or about mid-December 2001, a bonus to employees represented by the Union without first notifying or bargaining with the Union. In its answer to the complaint dated May 13, 2002, the Respondent denies engaging in any unlawful conduct.

All parties were afforded a full and fair opportunity at the hearing to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is engaged in the production and distribution of soft drinks and related products at its facility in Philadelphia, Pennsylvania. During the year preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped goods valued in excess of $50,000 directly to points and places outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's initial finding on this subject that there was no showing of advance notice to a shop steward of the incentive bonus program.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

The Respondent and the Union have had a longstanding bargaining relationship dating back some 40 to 50 years, and have been parties to successive collective-bargaining agreements covering various groups of production employees,[1] including quality control (QC) employees, the most recent of which runs from April 15, 2000 through April 14, 2004 (see GCX-2).[2] QC department employees are generally responsible for testing the product prior to its distribution. QC employees, according to Respondent's director of manufacturing, Steven Fiore,[3] who oversees the department, are generally better paid than other employees because their duties are more difficult and require greater responsibility.

Fiore testified that in April 2001, he implemented a "one time" incentive program for QC department employees. Under the program, all employees in the QC department would receive a monetary bonus if the department were to achieve an increase in its product quality index in accordance with the "12-month total produced quality index" set by the Coca-Cola Company. The amount of the bonuses was to be determined by the percentage level reached. Thus, if the QC department were to increase its product quality index to 92 percent, the employee bonus would be $1000 each; if a 95 percent increase were achieved, employees would receive a $2000 bonus.

Fiore testified that he prepared a memo setting forth the details of the incentive program but that, while he "probably meant to" distribute the memo to the QC employees, he in fact never did so (Tr. 106). He nevertheless claims that QC employees were notified of the program at employee meetings, and that at one such meeting, one Bill Lancaster, who Fiore believes was a union steward at the time, was in attendance.[4] He further claims that employees were also made aware of the incentive program by virtue of the fact that the progress being made by the QC department towards achieving the program goals was being monitored and posted on a monthly basis in the QC department for all employees to see. The record reflects that on or around December 3, 2001, all QC employees, numbering approximately 15, received $2000 bonuses purportedly for reaching a 95 percent increased quality index (RX-3). The bonuses were given solely to the QC employees. Fiore admits that the bonus program was intended as a one-time deal, and that no similar type bonuses had been given in the past (Tr. 110).

The Union claims that it did not learn of the incentive program for QC employees or that QC employees would be receiving bonuses until after the bonuses were distributed. Thus, union president, Joseph Brock, testified that he first learned of the bonuses from production shop steward Joe Carberry in late December 2001, or early January 2002. Carberry, he claims, told him that when given their bonuses, QC employees were instructed not to tell the Union about the bonuses.

Carberry testified that in mid-December, several production (non-QC) employees informed him that employees in the QC department had gotten bonuses. He further claims that QC employee, John Bibby, also approached him and confirmed that he and other QC employees had indeed received bonuses. According to Carberry, Bibby told him that when the bonuses were given, Fiore told QC employees "not to rub it in with the production operators." Fiore admits telling employees not to rub the bonuses in other employees' faces. Bibby, according to Carberry, felt bad that the Union had not been told of the bonuses. Carberry denied having had prior knowledge of the bonuses. He also denied telling Brock that QC employees were instructed not to tell the Union of the bonuses.

Bibby generally corroborated Carberry's version of their conversation. Bibby claims he told Carberry about the bonuses because other non-QC employees were questioning the bonuses, and he simply wanted to confirm to Carberry that bonuses had indeed been distributed. Bibby further recalls that he first heard of the incentive program some 3 months before receiving the bonus, but never mentioned the incentive program to Brock or any other union official during that period.

After receiving confirmation of the bonuses from Bibby, Carberry went to see Brock and asked if the latter was aware of the bonuses that had been given to QC employees. Brock denied knowing of the bonuses. Brock claims that he was doing a routine walk-through of the facility when Carberry approached him, and that he did not, at the time, think too much of the information Carberry had given him about the bonuses because there were always rumors about different things happening at the facility. He testified, however, that as he continued with his walk-through, other production employees notified him of the bonuses.

According to Brock, the next day, he spoke with Respondent's director of labor relations, Luis Fonseca, about the bo-

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[1] The production employees bargaining unit includes:

> All full-time and regular part-time Delivery-Merchandisers, Sales Representatives, Consumer Route Drivers, Quality Control/Syrup employees, Production Operators, Operations Chief Mechanics, Operations Lead Mechanics, Operations Mechanics 2nd class, Operations Apprentices, Tractor Trailer Drivers, Warehouse Operators, Fleet Chief Mechanics, Fleet Lead Mechanics, Fleet Mechanic 2nd class, Fleet Apprentices, Cooler Service Chief Mechanics, Cooler Service Lead Mechanics, Cooler Service Mechanics 2nd class, Cooler Service Apprentices, Cooler Delivery Drivers, Bulk Delivery Drivers, Extra Drivers, Special Event Drivers and Signwriters, excluding all other employees, guards, and supervisors as defined in the Act.

The unit is comprised of some 370 employees of which between 10 to 15 are classified as quality control (QC) employees.

[2] Exhibits received into evidence are referred to herein as "GCX" for a General Counsel exhibit, or "RX" for a Respondent exhibit. Reference to testimonial evidence is identified by transcript (Tr.) page number(s).

[3] Prior to becoming manufacturing director, Fiore was senior operations manager in charge of the Respondent's entire Philadelphia operation. As director of manufacturing, Fiore currently oversees the Company's Philadelphia and Norristown, Pennsylvania, facilities.

[4] Union President Joe Brock admits that Lancaster was at one time a union steward, but claims that Lancaster resigned his steward duties in early 2001, and was replaced by one Jose Padilla. While initially claiming that Lancaster was a shop steward when the incentive program was announced, Fiore subsequently admitted he was not sure how long Lancaster had been a shop steward, or whether Lancaster was still a steward when the QC bonuses were distributed in December 2001.

nuses. Brock recalls telling Fonseca that he had just learned from production and QC employees that bonuses had been given out to QC employees and asking Fonseca to confirm whether such bonuses had indeed been given out and, if so, what the qualifier was for the receipt of such bonuses. Fonseca told Brock he would check with some people and get back to him later. Fonseca, however, never got back to him.

Fonseca recalls having a phone conversation with Brock about the bonuses, but believes the discussion may have occurred sometime in January 2002. He agrees telling Brock that he would get back to him at a later date, but thinks he indeed called Brock back within a day or two. Fonseca further recalls that during their initial conversation, Brock mentioned that the Union might have to file an unfair labor practice charge with the Board over the bonuses. (Tr. 190). Fonseca claims that after his discussion with Brock, he spoke to Fiore who explained how and why the bonuses were given out.

After speaking with Fiore, Fonseca claims he researched whether any other types of incentive bonuses had been paid out in years past, and learned that the distribution of bonuses had been going on for quite some time in all departments. He then called Brock and told him that it did not make any sense for the Union to file a charge because "we gave people money," and that "these guys have been getting incentives, bonuses" in the past, and that, if a charge were filed, the bonuses were "going to stop."[5] (Tr. 191–192). Brock, as noted, denies hearing from Fonseca after their initial phone conversation, and claims that the two spoke again after he filed a charge with the Board on January 24, 2002, alleging the Respondent's unilateral grant of the bonus to QC employees to be unlawful. In response to the charge, the Respondent has stopped all employee bonuses and incentives.

Regarding such bonuses and incentives, the record reflects that the Respondent has, in the past, given employees in its various departments noncontractual bonuses, incentives, and noncash gifts for a variety of reasons.[6] Several department managers testified on the subject.

Company witness Edward Layton, who manages the delivery-merchandise department, testified as to the bonuses, incentives, and gifts that have been distributed in the delivery-merchandise department.[7] He testified that before becoming department manager, he worked for 21 years in the department first as a driver/salesman, and then as delivery merchandiser, and that, during that period, he received bonuses, consisting of savings bonds, for having a safe driving record, awards for his years of service with the Company,[8] and performance cash awards for best merchandising work in the stores serviced by him. He testified that during the 3-½ years after becoming manager, he gave out, on a quarterly basis, cash bonuses to the best merchandisers in the department. However, the only evidence produced to bolster his claim in this regard is a document showing that in 1999, the Respondent, following store audits, handed out bonuses ranging from $100 to $200 to certain delivery merchandisers "for their excellence" during the first quarter of 1999 (RX-5). The Respondent did produce a document (see RX-9) showing that bonuses "for excellent merchandising" were handed out in 2001. Unlike RX-5, which makes clear that the bonus given was for work performed in the first quarter of 1999, RX-9 does not specify if the bonuses were based on work performed during a particular quarter of 2001. However, a handwritten notation contained therein stating ". . . for 2001 work," as well as Layton's own testimony that RX-9 listed "the winners for 2001," strongly suggests that the bonuses reflected a year's, not a quarterly, assessment (Tr. 132). With the exception of RX-5, no other evidence was produced by the Respondent to corroborate Layton's assertion that during his 3-½ year tenure as department manager, he has consistently, on a quarterly basis, distributed cash bonuses to the department's best merchandisers. Given Layton's testimony that he routinely, on a quarterly basis, documents and posts on the department bulletin board the names of employees receiving bonuses, the Respondent's failure to produce documentary evidence to confirm Layton's assertion that he has been giving out bonuses on regular, quarterly basis for 3-½ years leads me to doubt that any such documents exist, and to question the reliability of Layton's above assertion. The unreliability of Layton's claim is further enhanced by RX-9, reflecting that the 2001 bonuses were based on the employees' yearly, rather than quarterly, performance.

Layton further testified to having given out "zero occurrence" cash bonuses ranging from $100 to $500 to employees.[9] He claims that the "zero occurrence" bonus program remained in effect for only three years (Tr. 130). Some documentary evidence was produced to corroborate Layton's testimony in this regard. Thus, Respondent's Exhibit 6 shows that in 1999, ten delivery merchandisers received such bonuses, and Respondent's Exhibit 7 reflects that nine such bonuses were

[5] The complaint does not allege Fonseca's remark to be unlawful.

[6] There is only scant reference to bonuses in the parties' collective-bargaining agreement. One such reference is found in art. XXXVII, entitled "Safety Bonus Programs," which states that "Effective in 1990, forklift operators will participate in all employee Safety Bonus Programs." The "Vacations" provision in the contract, found in article VII, also makes reference, in subparagraph (d), to regular full-time employees who have been in the Respondent's employ for a number of years receiving bonuses ranging from $100 to $150 (see GCX-2, p. 34; p. 11).

[7] The Delivery-Merchandise Department employs driver salesmen and delivery merchandisers.

[8] Layton could not put a time frame on when he might have received the safety bonuses, stating that "they were scattered out all through the years; some years you would get them, some years you wouldn't." (Tr. 135.) As to the years-of-service awards, Layton believed they were given out after 1, 2, 5, 10, 15, 20, and 25 years and that the award consisted of items such as a shirt or jacket which the employee picked out of a catalog.

[9] The "zero occurrence" program is part of the contractual attendance policy (Tr. 90). Consequently, bonuses handed out to employees for having "zero occurrence" during a particular time period are neither performance or production-related. The criteria for "zero occurrence" bonuses appears to have differed from department to department. Thus, according to RX-16 and RX-19, the criteria in the Operations Department included lateness, leaving work early, absence from a shift, and industrial injury. RX-20, however, reflects that the Bulk Department considered all of the above criteria, as well as whether employees were "properly adhering to timecard procedures."

handed out in 2000.[10] Notwithstanding Layton's claim that the program was in effect for 3 years, no documents showing the distribution of such bonuses for a third year were produced.

Warehouse director, Gene Keller, testified to the bonuses given out in his department. He claims that since becoming director in 1996, employees in his department have regularly received incentives and bonuses, ranging from $150 to $300 based on the number of cases handled per hour.[11] He further stated that at times he would also give out items such as baseball tickets, jackets, dinners, hats, sweatshirts, vests, and "anything and everything" to employees who went over and above what was expected of them (Tr. 159–164).[12] Keller further testified, and documentary evidence shows, that Warehouse employees have received bonuses ranging from $150 to 300 in the form of "credits" to be used at their discretion for having "zero occurrences" in a given year.[13] Thus, RX-15 shows that in 1998, the Respondent awarded one employee a $300 bonus for having "zero occurrences" in 1997 and 1998, and gave another employee a $150 bonus for having "zero occurrences" in 1998. RX-16 shows that the Respondent gave out similar bonuses to three employees for having "zero occurrences" during 1998 and 1999. However, not all "zero occurrence" bonuses were monetary in nature for as made clear in RX-13 and RX-14, employees at times received such nonmonetary gifts as sports or Company jackets for achieving such a goal.

Kevin Looney, director of the distribution department, since 1996, testified regarding the bonuses and incentives given out in his department. Looney testified that he implemented the "zero occurrence" bonuses in his department in 1996 (Tr. 171). To support Looney's testimony, the Respondent produced several documents, received into evidence as Respondent's Exhibit 17, Respondent's Exhibit 18, Respondent's Exhibit 19, and Respondent's Exhibit 20, which purport to show when such bonuses were given. Thus, Respondent's Exhibit 17 shows that employees of various departments, including distribution, received credits in the amount of $150 for having had "zero occurrences" during 1997.[14] Respondent's Exhibit 18 purports to show that the Respondent again issued credits ranging from $150 to $500 to employees in the distribution and other departments who had "zero occurrences" for the years 1996–1998.[15] The record further reflects that certain, but not all, employees in the distribution department received "zero occurrence" bonuses in 1999 and 2000 (RX-19; RX-20). Unlike the "credit" bonuses given out in previous years and described in Respondent's Exhibit 17 and Respondent's Exhibit 18, the bonuses given out in 1999 and 2000 were "cash" incentives.[16] Finally, Looney, like Keller, claims he too gives out bonuses to employees who go above and beyond what is expected of them. Looney, for example, testified that he has rewarded employees who have put out fires on the road with a dinner gift, and has on other occasions given out "sweatshirts, hats, all that fun stuff."

Jim Cho, director of Respondent's sales department, since 1998, testified that, during the three years he has been director, he has created and implemented different incentives and bonuses in the department, and that incentive programs occur on a daily, weekly, and monthly basis (Tr. 140). The department's biggest incentive program, according to Cho, is a profit sharing one by which employees receive ten percent of the profit for achieving their margin goal. To corroborate Cho, the Respondent produced several documents showing the various incentive programs that had been instituted in the sales department during

[10] The record reflects that Layton also gave out a one-time award of $50 to certain merchandisers for their extra effort in achieving a particular sales goal (RX-8). It is unclear from RX-8, or Layton's testimony, when this bonus was given out.

[11] To bolster Keller's testimony regarding the distribution of bonuses in the warehouse department, the Respondent submitted into evidence memoranda reflecting that in October and November, 1997, Keller initiated incentives for those warehouse loading employees who averaged "300 cases or more per hour," and, for the nonloading employees, those who achieved "zero occurrences" and "zero industrial injuries" during the month in question (see RX-13 and RX-14). Employees achieving either of the above goals received a jacket as their reward. In neither the October or November 1997, program were employees offered cash prizes as an incentive. Neither RX-13 nor RX-14, therefore, corroborates Keller's claim that employees were given cash bonuses ranging from $150 to $300 based on the number of cases loaded per hour (Tr. 157). Although Keller testified that he had a habit of retaining memos such as RX-13 and RX-14 in his computer, no other documents were produced to corroborate his claim that warehouse employees had, in the past, received cash bonuses based on the number of cases loaded per hour during a given month.

[12] By way of example, Keller cited an occasion in which an employee handled the trash detail even though the work was scheduled to be performed by another employee. Keller recalls that, on that occasion, he went out and threw the employee either a sweatshirt or a hat as a reward for his extra effort. He claims that when other employees learned of it, they too began emptying the dumpsters in the hope of getting a similar reward, and that he, in turn, also gave them gifts as well. (Tr. 165).

[13] The "credit" bonuses do not involve direct cash payouts to employees, but rather are credits held by the Respondent which the employee could use, at their discretion, to obtain reimbursement for personal expenses, such as the cost of taking a spouse out for dinner. Thus, upon presentation of a receipt, the employee would be reimbursed for the cost of the dinner (see, Tr. 183).

[14] Although RX-17 is dated April 11, 2002, Looney testified that the credit bonuses were in fact awarded in January 1998 (Tr. 174), and that the 2002 date on the exhibit represents the date the document was printed from the computer. It is unclear from a review of RX-17 if all or some employees of each department mentioned therein received a "zero occurrence" credit bonus, as the memo only mentions the department without naming any employees. However, Looney's testimony, that the memo along with the list of names of employees receiving the bonuses was posted in the Distribution area, suggests that the bonuses were distributed to some, and not all, employees in the department. (Tr. 174).

[15] Although RX-18 references the subject matter of the memo as pertaining to "zero occurrences for 1998," a plain reading of the memo makes clear that the bonuses described therein was not limited to 1998 only, but included the awarding of credits to employees who had achieved "zero occurrences" during 1996 and 1997. The memo reflects that employees having "zero occurrences" for 1 year were given a $150 credit, those with 2 years of "zero occurrences" received a $300 credit, and those with three years of "zero occurrences" received the $500 credit. According to Looney, the bonuses were given in 1999.

[16] The bonuses given out in 2000 included cash incentives for employees who had "zero occurrences" in consecutive years, and covered the years 1996–2000.

2001 and 2002 (See RX-10; RX-11, RX-12). One such incentive program covered the period January-February 2001, and involved 1st through 6th place cash prizes ranging from $200 to $750 to the salespersons with the most number of outlets and nonchain outlets carrying a particular ("Dasani") product (see RX-10; Tr. 143). Another incentive program also instituted in January 2001 and covering that month only, rewarded cash prizes, ranging from $25 to $300, to salespersons who achieved a minimum growth rate of 15 percent in the sale of "Dr. Pepper" brand products (see RX-11). A similar incentive was offered in January 2002, except that, unlike the 2001 incentive, the minimum growth rate required for the 2002 cash prize was 10 percent rather than 15 pecent.[17] Respondent's Exhibit 12 includes a series of documents showing that, during the four calendar quarters of 2001, and the first two quarters of 2002, a variety of different short-term cash and noncash incentives and bonuses were implemented in the Sales Department.

The General Counsel contends[18] that the Union was never notified of the bonuses prior to their implementation, that said bonuses are a form of employee compensation, an element of wages, and a mandatory subject of bargaining, and that, as such, the Respondent was not at liberty to implement the bonuses without first notifying the Union and giving it an opportunity to bargain over the bonuses. By failing to do so, the General Counsel argues, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent does not dispute, correctly so in my view, the General Counsel's claim that the QC bonuses were a mandatory bargaining subject.[19] Nor does it deny that the QC bonuses were unilaterally implemented. Rather, it argues only that its unilateral grant of bonuses to the QC employees in December 2001, was consistent with its long-established practice of granting noncontractual performance bonuses and incentives to employees, a practice, it claims, the Union was fully aware of, never objected to, or sought to bargain over. The Respondent thus contends that in these circumstances, the Union's failure to contest, or to request bargaining over, its past practice amounted to a waiver of its right to bargain over the distribution of bonuses and incentives, including the QC bonuses.

I find no merit in the Respondent's waiver defense and agree instead with the General Counsel that the Respondent was obligated to notify and, on request, bargain with the Union regarding the QC bonuses before implementing them.

DISCUSSION AND CONCLUSIONS

Generally, an employer whose employees are represented by a union may not unilaterally change the represented employees' terms and conditions of employment without first giving the Union notice and an opportunity to bargain over the proposed. *NLRB v. Katz*, 369 U.S. 736 (1962) An exception to this rule is that a unilateral change by an employer is permissible if the Union has clearly and unmistakably waived its statutory right to bargain over the particular subject matter. *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983); *New York Telephone Co.*, 299 NLRB 351, 352 (1990); *Johnson-Bateman Co.*, supra at 184; *General Electric Co.*, 296 NLRB 844 (1989); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). A union's waiver of its statutory right to bargain over a particular matter can occur by express language in a collective-bargaining agreement, or may be implied from the parties' bargaining history, past practice, or a combination of both. *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995); *The Register-Guard*, 301 NLRB 494, 496 (1991). Such a waiver, however, is not lightly inferred by the Board. Rather, there must be, as stated, a clear and unmistakable showing that a relinquishment of the statutory right in question has occurred. *Owens-Corning Fiberglas[s] Corp.*, 282 NLRB 609 (1987). In this regard, the burden of proving that a waiver has occurred is on the party asserting the waiver, here, the Respondent. *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104 (1996). The Respondent, I find, has not sustained that burden here.

The record evidence fails to show that the Respondent's occasional distribution of bonuses, gifts, and other sundry items to select employees in its various departments was part of any established past practice, as that term is generally defined by the Board. A past practice is defined as an activity that has been "satisfactorily established" by practice or custom; an "established practice"; an "established condition of employment;" a "longstanding practice" (citations omitted). *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors*, 334 NLRB 651 (2001) *Dow Jones & Co., Inc.*, 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises*, 324 NLRB 1123 (1997); *Blue Circle Cement Co.*, 319 NLRB 661 (1995); *Lamonts Apparel, Inc.*, 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel*, 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida*, 144 NLRB 311 (1963); *The American Lubricants Co.*, 136 NLRB 946 (1962).

Here, the documentary evidence of record, as previously discussed, makes patently clear that the production-related bonuses and gifts distributed by the Respondent to employees in its various departments (delivery-merchandise; warehouse; and sales) did not occur on a regular and consistent basis every year, but rather were intermittently handed out by the Respondent to specific employees at its own discretion and time. In the delivery-merchandise department, for example, the record shows that certain employees in that department received cash bonuses for their "excellent merchandising" work during the first quarter of 1999, and again in the year 2001 (see, RX-5; RX-9). However, no documentary evidence of similar bonuses having been handed out to employees in that department prior to 1999, or during the remaining quarters of 1999, 2000, and 2002, was produced by the Respondent. Similarly, the documentary evidence produced regarding the distribution of production bonuses in the warehouse (RX-13 and RX-14) shows

[17] See RX-12, document entitled "2002 Incentive Program."

[18] The arguments made by the Charging Party in its posthearing brief generally parallel those made by the General Counsel in his brief. Consequently, reference herein to arguments made by the General Counsel incorporate those made by the Charging Party.

[19] See, e.g., *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989).

only that in October and November 1997, a handful of warehouse employees received either a company jacket or an "Eagles" sports jacket for achieving a certain production quota during the months of October and November 1997. However, no documentary evidence whatsoever was produced to show that productivity bonuses, either in cash or noncash form, were given out at any time prior to October 1997, or at any time after November 1997. The documentary evidence produced regarding the distribution of bonuses and incentives in the sales department, while more substantial than that shown for the delivery-merchandise and warehouse departments, nevertheless falls short of establishing that the bonuses given in that department occurred with such regularity and consistency as to constitute an established past practice. Thus, the evidence shows only that from the beginning of 2001 through the second quarter of 2002, employees in the sales department were presented with a variety of opportunities to win cash and noncash prizes through the different incentive programs instituted by Department Manager Cho. Cho's claim, that the incentive programs in the Sales Department have been in effect since at least 1988, when he first began working for Respondent, like Layton's and Keller's claims regarding the distribution of bonuses in their own respective departments, was not corroborated through documentary evidence and is, likewise, given no weight.

In sum, the Respondent, I find, has not demonstrated that the bonuses given out in its various departments occurred with such frequency and regularity as to constitute under Board law an established past practice. But even if the Respondent's prior distribution of bonuses could be construed as a past practice, it is patently clear from their size and scope that the December 2001, QC bonuses were not consistent with, and indeed radically departed from, that alleged practice. Thus, the evidence shows that the productivity bonuses handed out in the delivery-merchandise, warehouse, and sales departments were relatively smaller in amounts, ranging, as noted, from mere jackets up to $1000, and were in no way comparable to the $2000 given to each and every employee in the QC department in December 2001.[20] More importantly, the bonuses handed out to employees in the past were based on an individual employee's personal achievement, whereas the QC bonuses were based on a departmentwide achievement and were awarded across-the-board to all employees in the QC department, regardless of the individual employee's personal contribution (Tr. 87). The Respondent, as noted, concedes it had never before given out bonuses in the QC department similar to the December 2001, bonuses. Nor, in fact, is there any evidence to show that similar department-wide production-related bonuses had ever been given out across-the-board to employees in any other department.[21]

Thus, even if I were to agree with the Respondent, and I do not, that it had an established past practice of handing out bonuses and incentives to employees, the Respondent's December, 2001 across-the-board grant of bonuses to all employees in the QC department clearly was not consistent with, and indeed was a substantial deviation from, that practice. Thus, no waiver of the Union's right to bargain over the December 2001, QC bonuses can be inferred from the fact that the Union may have known of and not objected to the Respondent's alleged past practice of distributing bonuses and other incentives to individual employees. Nor could the Respondent have relied on the Union's past failure to request bargaining over its prior unilateral grant of bonuses to employees to justify unilateral action, for "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). As the Board further noted in *Exxon Research & Engineering Co.*, 317 NLRB 675 at 685–686 (1995), "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." In sum, I find no evidence that the Union clearly and unmistakably waived its right to bargain over the December 2001, QC bonuses, or for that matter, over the grant of any other bonuses. Accordingly, the Respondent's failure and refusal to give the Union prior notice of,[22] and an opportunity to bargain over, the December 2001 QC bonuses before implementing them amounted to a violation of Section 8(a)(5) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and the exclusive bargaining representa-

[20] The first page of RX-12, for example, shows that Sales employees Hangey and Wagner each received $1000 performance bonuses during 2001.

[21] See, e.g., *Register-Guard*, 301 NLRB 494 (1991), where an employer's reliance on a past practice defense to justify a unilaterally-imposed wage adjustment for entire classifications of employees was rejected on grounds that the employer's past practice had been limited to making unilateral adjustments in the wages of individual employees, not to entire employee classifications; and *Lincoln Child Center*, 307 NLRB 288, 316 (1992), where an employer's similar reliance on a past practice defense to justify unilaterally removing entire classifications of teachers from the bargaining unit was likewise rejected because the employer's past practice had been limited to the unilateral transfer or removal of individuals only.

[22] The Respondent's implicit assertion on brief (RB:2), that the Union must have known of the QC bonuses prior to December 2001, because Lancaster purportedly learned of the bonuses in April 2001, is without merit. First, it is not all that clear that Lancaster was a union steward in April, 2001, as argued by the Respondent, for union president Brock, as noted, testified that Lancaster ceased being a steward in "early 2001," presumably prior to April, 2001, and Fiore, who identified Lancaster as a steward, was himself not certain how long Lancaster had served as steward. Thus, the evidence is too ambiguous to support a finding that Lancaster was a union steward in April 2001, when QC employees purportedly first learned of the QC bonus program. Nor would there be any basis for imputing such knowledge to the Union even if Lancaster had been a steward in April, 2001, for there is no evidence to show that Lancaster had been authorized to act as the Union's agent with respect to the receipt of notice of a proposed unilateral change. *Catalina Pacific Concrete Co.*, 330 NLRB 144 (1999). As such, there is no record evidence to show that the Union ever received prior actual or constructive notice of the Respondent's unilateral institution of the December 2001 QC bonuses.

tive of the Respondent's employees in the following appropriate unit:

> All full time and regular part time Delivery-Merchandisers, Sales Representatives, Consumer Route Drivers, Quality Control/Syrup employees, Production Operators, Operations Chief Mechanics, Operations Lead Mechanics, Operations Mechanics 2nd class, Operations Apprentices, Tractor Trailer Drivers, Warehouse Operators, Fleet Chief Mechanics, Fleet Lead Mechanics, Fleet Mechanic 2nd class, Fleet Apprentices, Cooler Service Chief Mechanics, Cooler Service Lead Mechanics, Cooler Service Mechanics 2nd class, Cooler Service Apprentices, Cooler Delivery Drivers, Bulk Delivery Drivers, Extra Drivers, Special Event Drivers and Signwriters, excluding all other employees, guards, and supervisors as defined in the Act.

3. By instituting a bonus incentive program for QC employees, and thereafter granting said bonuses to all QC employees on December 3, 2001, without first notifying the Union or affording it an opportunity to bargain over the incentive program, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The Respondent's above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having unlawfully failed and refused to bargain with the Union over the institution and implementation of the bonus incentive program for QC employees, the Respondent shall be required, on request, to meet and bargain collectively and in good faith with the Union regarding said program and to rescind, if requested by the Union, the incentive program established for QC employees.[23]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, The Philadelphia Coca-Cola Bottling Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instituting and implementing a bonus incentive program for its Quality Control employees without first notifying the Union, Teamsters Local Union No. 830 a/w International Brotherhood of Teamsters, AFL–CIO, which is the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit, and affording it an opportunity to bargain over the program. The appropriate unit includes:

> All full-time and regular part-time Delivery-Merchandisers, Sales Representatives, Consumer Route Drivers, Quality Control/Syrup employees, Production Operators, Operations Chief Mechanics, Operations Lead Mechanics, Operations Mechanics 2nd class, Operations Apprentices, Tractor Trailer Drivers, Warehouse Operators, Fleet Chief Mechanics, Fleet Lead Mechanics, Fleet Mechanic 2nd class, Fleet Apprentices, Cooler Service Chief Mechanics, Cooler Service Lead Mechanics, Cooler Service Mechanics 2nd class, Cooler Service Apprentices, Cooler Delivery Drivers, Bulk Delivery Drivers, Extra Drivers, Special Event Drivers and Signwriters, excluding all other employees, guards, and supervisors as defined in the Act.

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

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

(a) Upon request from the Union, rescind the December, 2001 bonus incentive program for QC employees, and bargain collectively and in good faith over the institution and implementation of any such bonus program for QC employees and embody any understanding reached in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 3, 2001.

(c) 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.

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[23] While the evidence suggests that the distribution of the QC bonuses was intended to be a one-time event, the Board's traditional remedy in cases such as this calls for a rescission of the unilaterally-imposed program, if so requested by the Union. *Washington Beef, Inc.*, 328 NLRB 612, 621 (1999); *American Packaging Corp.*, 311 NLRB 482, 483 (1993). No restoration or make-whole remedy, however, is not needed here as the grant of the QC bonuses inured to the benefit, not the detriment, of the QC employees.

[24] 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.

[25] 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."

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 any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT institute or implement a bonus incentive program for our Quality Control employees, or any other employees represented by Teamsters Local Union No. 830 a/w International Brotherhood of Teamsters, AFL–CIO, without first notifying the Union and affording it an opportunity to bargain over said program.

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, on request, rescind the bonus incentive program established for our Quality Control employees and bargain with the Union over the establishment of such a program and, WE WILL embody any understanding reached in a signed agreement.

PHILADELPHIA COCA-COLA BOTTLING CO.