BASF Wyandotte Corporation *and* Local 227, International Chemical Workers Union, AFL–CIO. Cases 3–CA–11270, 3–CA–11322, 3–CA–11374, and 3–CA–11511

22 January 1986

DECISION AND ORDER

BY MEMBERS DENNIS, JOHANSEN, AND BABSON

On 15 February 1984 Administrative Law Judge Steven Davis issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting 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[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, BASF Wyandotte Corporation, Rensselear, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] At fn 17 of his decision the judge cited *Sheet Metal Workers (Florida Sheet Metal)*, 234 NLRB 1238 (1978), for the proposition that he was without jurisdiction to decide issues raised under Sec 302 of the Labor Management Relations Act Subsequent to his decision *Sheet Metal Workers* was overruled *BASF Wyandotte Corp.*, 274 NLRB 978 (1985). In that case the Board found an identical contract clause came within the exception of Sec 302(c)(1) Additionally, a district court reached the same conclusion regarding the same clause and involving the same parties as here *BASF Wyandotte Corp. v. Chemical Workers Local 227*, 591 F.Supp 339 (N.D N Y. 1984) We also note that the parties stipulated that deferral on the underlying issues is not appropriate. Member Johansen, although in agreement that the verbal warning issued to Scales constituted at least a technical violation of the Act, regrets that such minor matters must take up the Board's valuable time He finds it unfortunate that Scales reacted with pique to a legitimate bargaining proposal and ignored the Employer's specific request He finds it equally unfortunate that the Employer reacted to Scales' display of pique in a disproportionate manner, and that the parties failed to amicably resolve this issue short of formal litigation.

Alfred M. Norek, Esq., for the General Counsel.
Joel Spivak, Esq. (Solotoff & Spivak, Esqs.), of Great Neck, New York, for the Respondent.
Dominick Tocci, Esq., of Albany, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to certain charges and amended charges filed in October, November, and December 1982, and a charge filed on March 21, 1983, by Local 227, International Chemical Workers Union, AFL–CIO (the Union), an amended consolidated complaint was issued by Region 3 of the National Labor Relations Board on April 7, 1983, against BASF Wyandotte Corporation (Respondent).

The complaint alleges essentially that Respondent unilaterally (a) modified its collective-bargaining agreement with the Union by failing to honor a provision which provided for the payment by the Respondent for time spent by union officers in performing "union business," other than authorized meetings with Respondent's officials, (b) promulgated a rule requiring that certain employees who use respirators must refrain from wearing facial hair, and disciplined certain employees in enforcement of the rule, and (c) modified the "grievance resolution practice" by restricting the Union's means of communication and investigation, all in violation of Section 8(a)(5) of the Act.

The complaint also alleges that Respondent (a) issued an oral warning to employee Roger Scales in violation of Section 8(a)(3) of the Act, (b) is seeking a remedy in a U.S. district court action that Joseph La Mountain and Scales withdraw certain Board charges, in violation of Section 8(a)(4) of the Act, and (c) reduced the work hours of La Mountain and Scales, in violation of Section 8(a)(3) and (4) of the Act.

Respondent's answer denies the material allegations of the complaint.

The case was heard on April 11–14 and May 9, 1983, in Albany, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, having its principal office and place of business at 100 Cherry Hill Road, Parsippany, New Jersey, and a plant located at 36 Riverside Avenue, Rensselear, New York, is engaged in the manufacture, sale, and distribution of chemicals and related products. During the past year, in the course of its operations, Respondent purchased and received chemicals and other goods valued in excess of $50,000 directly from suppliers located outside New York. In the same period, in the course of its operations, Respondent manufactured, sold, distributed, and shipped products valued in excess of $50,000 directly to purchasers located outside New York.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent purchased its facility from GAF Corporation on April 1, 1978. GAF and the Union had a collective-bargaining relationship for many years. On its purchase of the facility, Respondent recognized the Union and engaged in collective-bargaining negotiations, as will be discussed, infra.

Respondent employs about 380 employees at its facility, of which about 210 are represented by the Union in the unit involved. Local 227 is composed entirely of employees employed by Respondent.

There are two main areas of dispute out of which the complaint allegations arise.

The first is the elimination of the contractual provision for paid time during which union officials could perform union business. Related to that main issue is (a) the alleged modification of the grievance resolution practice by restricting the Union's means of communication and investigation, (b) the alleged reduction of work hours of two union officers, and (c) the U.S. district court action seeking a remedy that the two union officers withdraw certain Board charges.

The second is the promulgation by Respondent of a rule requiring that certain employees who use respirators must refrain from wearing facial hair. Related to that main issue is (a) the enforcement of the rule and discipline of certain employees who failed to comply with it, and (b) an oral warning issued to a union official arising out of his conduct at a meeting with Respondent relating to that rule.

The various allegations will be discussed under two broad headings.

B. *The Union Time Issue*

1. The failure to honor the contractual provisions

Pursuant to the collective-bargaining agreement between GAF and the Union, the union president and secretary, who were both employees of GAF, received an aggregate of 6 paid hours per day within which they could conduct union business on company property. From April 1, 1978, when Respondent purchased the facility, to August 1978, when Respondent reached agreement with the Union on a new contract, the two union officers continued to receive an aggregate of 6 paid hours per day for the conduct of union business on company property.

During the negotiations for a new contract which began in late June 1978, Respondent sought to eliminate completely the paid union time provision. Union International Representative Paul Obermayer[1] told Respondent's officials that if the clause were eliminated the "day to day operations of grievances will bury you."

The negotiations resulted in the modification of the provision to permit an aggregate of 4 hours' paid union time. The relevant clauses as set forth in the 1978 agreement[2] and continued in the 1981 agreement[3] are as follows:[4]

> *Article II, Section 4—Union Representatives*[5]
>
> Official representatives of the union shall be permitted time as necessary during scheduled working hours to attend meetings with the Company. Representatives released for these purposes shall be paid for time spent in attending meetings with the Company to the extent that time spent at these meetings is during their regularly scheduled working hours . . . .[6]
>
> The Company will permit the union president and/or secretary time off to an aggregate of four (4) hours each day for the purpose of conducting union business during normal working hours on company property, and will pay the time at the regular straight time hourly rate . . . .[7]

The provision set at issue here is the third paragraph of article II, section 4, set forth above, dealing with payment to the union president and/or secretary for 4 hours daily for the conduct of union business (union time or union-time clause). The second paragraph of article II, section 4, involving payment for time spent in meetings with Respondent, has continued to be honored by Respondent and is not at issue here.

During the negotiations for the 1978 and 1981 contracts, there was no discussion regarding what activities could be performed by the union president and secretary while on their 4 hours' paid union time.

There was an office with a telephone located near the Respondent's personnel office for some time prior to April 1982, which the union president and secretary used during their paid union time. About April 1982, the Respondent told the Union that it was obtaining a new phone system, was consolidating telephones, and was removing unnecessary ones including the phone in that office. The Union was also told that one reason for the removal of the phone was that it was not wise to have the Respondent's phone number listed on an information card issued by the Union which contains the names of the officers of the Union, questions and answers concerning job problems, and benefits of union membership. About 1 or 2 weeks later the phone was removed despite Union Official La Mountain's offer to pay for its use. About the same time, Respondent advised the Union that it could not legally provide that office and requested that it be vacated. La Mountain offered to pay rent for the space. Respondent's works control manager, Ronald Cole, replied that the office would be utilized for an expanded smoking area and that no other space was available. The union president and secretary thereafter took

[1] Obermayer is not an employee of Respondent. He is an employee of the International Chemical Workers Union, AFL–CIO.

[2] The 1978 contract ran from August 27, 1978, to August 28, 1981

[3] The 1978 contract runs from August 28, 1981, to August 31, 1984

[4] The 1981 agreement was modified in a manner not material herein

[5] Par. 1, not being relevant, had been omitted

[6] This is par 2, art II, sec 4.

[7] This is par. 3, art II, sec 4.

their paid union time in the cafeteria or in other areas of the plant.[8]

There is no allegation that by removing the phone and office, the Respondent violated the Act.

Until September 7, 1982, the union president and secretary each worked 6 hours per day, from about 7:30 a.m. to 1:40 p.m., and then took their paid union time from 2 to 4 p.m. Prior to September 7, 1982, such union time would be spent in attending meetings in the personnel office with Respondent's personnel and labor relations officials regarding grievances, in meeting with supervisors and employees in the cafeteria and elsewhere on the premises concerning grievances, potential grievances, and problems on the job, and meeting with Respondent's supervisors regarding actual or potential grievances.

The current contract provides for a grievance procedure, with a grievance being defined as "any dispute or difference arising out of the specific terms of this agreement." According to the contract, a grievance, in order to be timely, "must be raised within 10 working days of the date the claimed grievance first occurred." The first step of the grievance procedure provides that "the grievant accompanied at the grievant's option by the designated union representative shall discuss the matter orally with the grievant's immediate supervisor."

Steps 2 and 3 provide for the filing of a written appeal and attendance at a meeting of union and Respondent's representatives. The final step is arbitration by the Federal Mediation and Conciliation Service.

On September 7, 1982, Union President Joseph La Mountain and Union Secretary Roger Scales attended a meeting with Respondent's works control manager, Ronald Cole, at which Cole gave them a letter, dated September 3, 1982, which stated:

> We have been advised by council [sic] that payment for union representatives except for time spent in meetings with management is a misdemeanor under Section 302 of the Taft-Hartley Act, and violates Section 8(a)(2) of the National Labor Relations Act. We have been told that your acceptance of such payment is also a violation of 302 and a misdemeanor under the Act as quoted below:
>
> Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other things of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representation of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).
>
> Therefore effective September 13, 1982 we are no longer able to provide paid time under Article 2, Section 4 except for time spent in meetings with management, which have been authorized by Human Resources and which occur during your regular scheduled working hours.
>
> The law does not prohibit our releasing you without pay for the time provided for in Article 2 section [sic] and I ask that you let me know by September 10, 1982 if you would prefer to take the time or to work the hours involved. For operational reasons this decision must be fixed as we cannot change from day to day.

Prior to receipt of the letter, the Union had no notification that Respondent was considering this action.

In other words, Respondent refused to honor the third paragraph of article 2, section 4 of the contract permitting them to be paid for the conduct of union business up to 4 hours. The second paragraph, providing for pay for time spent in meetings with management, remained in effect.

At the meeting, Cole told La Mountain and Scales that after that week they would no longer be paid for nonprescheduled direct meetings with Respondent, and added that they could either work 8 hours per day and not take union time, or take 2 hours' union time without pay.

The following week, La Mountain and Scales worked 8 hours on certain days and on other days each took 2 hours' union time which was not paid by Respondent unless they were attending meetings with management.

Since September 7 there has been no paid union time for other than scheduled meetings with Respondent's officials.

On September 27 Union Attorney Dominick Tocci sent a letter to Cole which stated his client's belief that the contractual clause at issue was legal and warned that if Respondent did not honor it, the Union would take appropriate legal action, including a Board proceeding.

[8] There was a telephone in the cafeteria which was used by the Union but about the summer of 1982 that phone was removed

2. Alleged restriction of means of communication and investigation

On September 29 La Mountain and Scales met with Jerry Marshall, Respondent's human resources supervisor, who was the assistant to Jane Wittig, the human resources manager. La Mountain informed Marshall that he was advised by counsel that the contractual clause at issue was legal and that he and Scales would be taking the contractually prescribed aggregate of 4 hours' union time each day until further notice. La Mountain told Marshall that he and Scales were available to meet with him and Wittig on a daily basis from 2 to 4 p.m., adding that it was imperative that such meetings be held so that certain problems could be discussed. La Mountain further told Marshall that if he and Wittig were unavailable, they (La Mountain and Scales) would continue to talk to employees, stewards, and supervisors regarding problems and they would "walk around" talking to supervisors concerning grievances. He also threatened to file a charge with the Board if the union-time clause was not honored.

On October 5 Respondent's official, Cole, met with La Mountain and Scales and gave them a letter which stated, inter alia, that:

> You are reminded (as you have previously been informed) that the Company has designated only the following people as its authorized representatives to deal with the union through its officers: Mrs. Wittig and Mr. Marshall. Any attempt to seek out supervisors to deal with labor relations matters is a clear attempt to circumvent our appointed representative, thereby attempting to dictate to us who will represent the Company. Such conduct constitutes bad faith bargaining and is an attempt to restrain and coerce the Company in the selection of its representatives for the purpose of collecitve bargaining and the adjustment of grievances in violation of the National Labor Relations Act.
>
> You are also reminded that Article IV of our labor agreement prohibits interferences with work. Because you have announced an express intent to meet with supervisors, which you know is unauthorized and which would result in interfering with their work and plant operations, you are hereby warned that such conduct is a violation of Article IV and, as such, subject to discipline including possible discharge.
>
> The Company will make itself available on a scheduled basis at reasonable times and places to meet its obligation to bargain under the law. You should contact Mrs. Wittig or Mr. Marshall for purposes of scheduling necessary meetings.
>
> Because you have rejected our offer of work, please be advised that the Company withdraws this offer which would have allowed you to work instead of taking the contractual union time allowed for in Article II, Section 4. Therefore, you will not be included on the afternoon work schedule. You will punch out immediately following your scheduled work time on your regular building clock.
>
> To avoid interference with plant operations, for insurance and safety reasons and because you will not be at work, you are to limit your release time location to the cafeteria unless otherwise authorized by Mrs. Wittig or Mr. Marshall.
>
> Your grievance insisting that the Company make payments to you as a union representative that are illegal and a criminal misdemeanor and your persistence in demanding that the Company commit a misdemeanor, is not only a criminal violation but bad faith bargaining. Since you have been warned, you are also in a knowing violation of the criminal law, Mr. Tocci's letter notwithstanding.
>
> I am surprised that in these difficult economic times you would choose to make an issue out of this matter. This whole process is non-productive, does nothing for our employees, and seeks only to serve the union's individual interest.

La Mountain conceded that when he told Cole that he would meet with supervisors, Cole appeared surprised, as if he were not aware that La Mountain had been meeting with supervisors, and it was La Mountain's opinion that Cole did not know about such meetings.

La Mountain stated that when an employee came to him with a potential grievance, he would investigate the problem quickly in view of the 10-day time limit on filing grievances. He testified without contradiction that, as part of such investigation, he met with supervisors, not on working time, to determine their version of the event in question and, based on the investigation, a decision was made whether a grievance should be filed. La Mountain further noted that he has participated in some step 1 grievances.

La Mountain and Scales continued to each take 2 hours' unpaid union time daily.

3. Alleged reduction of work hours

On October 7, La Mountain requested permission to work a full 8-hour day instead of working 6 hours and taking 2 hours' union time which was not paid by Respondent. Such permission was refused.

On October 15 the instant charge was filed alleging the abrogation of the union-time clause in dispute.

On November 16, at an unrelated arbitration hearing, La Mountain asked Henry Kramer[9] when Respondent would pay him and Scales for union time, adding that the Union would prevail in an arbitration on the issue. Scales was also present. Kramer replied that an arbitrator and the Board have no jurisdiction to decide a question involving a violation of Section 302. Kramer further said that if they do not watch what they are doing, and if they continue to push the matter with the Board and arbitration, they would find themselves in serious legal trouble, adding that criminal charges could be filed, and that "people go to jail, not companies." Kramer did not testify.

[9] It was stipulated that on December 16, 1982, Kramer was the corporate manager of labor relations and legal services of Respondent

In December Scales requested permission to work 8 hours and was refused. He filed a grievance.

On January 17, 1983, La Mountain began work on the midnight to 8 a.m. shift and did not take union time thereafter.[10] He resigned as union president on March 15, 1983.

On January 24, 1983, Scales' supervisor told him he was required to take 4 hours' union time daily, apparently because La Mountain did not take any union time after his transfer to the midnight shift. Accordingly, Scales worked 4 hours and took 4 hours' union time daily.[11] Thereafter, Scales requested to work a full 8-hour day but was refused. Consequently, Scales worked a 4-hour day until March 16, 1983, when Nicholas Crudo became the president of the Union. Thereafter, Scales and Crudo have each worked 6-hour days and have each taken 6 hours' union time daily—the union time not being paid by Respondent.

4. The district court action

On December 21, 1982, Cole told La Mountain and Scales that he was informing them as a "courtesy" that they would be receiving a summons for their "two-pronged attack" against Respondent, specifically the filing of a grievance and a Board charge about the union time issue.

On December 20 a civil action was filed by Respondent in the U.S. District Court for the Northern District of New York against the Union, and against La Mountain and Scales as union president and secretary, respectively, and in their individual capacities. The suit seeks a declaratory judgment that (a) the union-time clause violates Section 302 of the Labor Management Relations Act and (b) the payments received by La Mountain and Scales violate Section 302, and seeks as a remedy that the court direct that La Mountain and Scales (1) repay all the sums received from Respondent, and (2) "rescind all action and take no further action to force the Company to make such payments, including but not limited to withdrawing the National Labor Relations Board charges and Union grievances."

The case is pending before the court.

C. *The Respirator Seal Rule*

1. Background relating to the rule

The parties' current and past collective-bargaining agreements provide for a safety committee, consisting of four unit employees and Respondent's representatives, which is to meet about monthly to make recommendations on safety matters and conditions and review the status of prior recommedations. "The Committee's recommedations may be based on periodic scheduled plant inspections and will also include specific proposals for future safety training and education needs." Safety committee members are paid for their time in attending meetings. Many safety issues were resolved in the course of the meetings.

Scales conceded that Respondent is not required to accept any recommedations made by the safety committee. Moreover, from July 1982 to December 1982, the Union's safety committee representatives refused to participate in committee meetings, withdrew from it, and, as a result, there were no safety committee meetings held during that period of time.

Booklets entitled "General Safety Rules and Plant Regulations," effective since at least 1977, when GAF operated the facility, and reissued in 1981 and 1982 by Respondent, provide generally for the wearing of approved respirators "or other special protective equipment . . . where indicated in the process, or when instructed to do so by a member of supervision."

In addition, a list of 34 rules were posted in the plant when GAF operated it and have remained posted through Respondent's ownership. The list includes a prohibition against disregarding or violating safety rules and regulations, violations of which may lead to discipline or discharge. The document states that the listed rules may be supplemented at any time.

The issue of a rule prohibiting the wearing of facial hair when using respirators was first raised in July 1980 at a meeting of the safety committee. Respondent Official Cole stated that he was interested in starting such a program. Union Official Scales replied that he did not see a need for such a program adding that a fitness test was required before any such rule was implemented. The following month the Union made a request for information. A couple of weeks later Scales met Cole in a bar. Cole offered to give Scales monthly monitoring results of respirators in use, and Scales agreed to accept them. Scales did not pursue the information request.

In August 1980, a respirator fitness test was given to unit and supervisory employees. Two employees failed the test—one because of facial hair. He was asked to shave and he did.[12] One of the items on the agenda of the safety committee on August 27, 1980, was the "site respiratory protective equipment program modification."

2. Implementation of the rule and its enforcement

Apparently the facial hair issue was not raised again until late April 1982, when Cole announced at a meeting with La Mountain and Scales that Respondent was interested in making a decision on the issue as to implement a no-beard policy that was in effect at Respondent's other locations. Cole asked for suggestions from La Mountain and Scales. La Mountain replied that the issue had been raised before (apparently referring to the 1980 events) and that Respondent had not demonstrated a need for a no-beard policy, but that he and Scales would discuss the issue with Respondent.

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[10] In fact, when Respondent refused to pay the union president and secretary for union time, the Union began making such payments and continued to do so

[11] There was no evidence that La Mountain was unable to take the union time because of his change of shift Scales rejected Wittig's offer to have Michael O'Sullivan take 2 hours' union time so that Scales need also take only 2 hours' union time. To do so, O'Sullivan would have to be named as acting president of the Union Scales was unwilling to have O'Sullivan involved in the Federal court lawsuit.

[12] The other employee, who had no facial hair, failed the test because the respirator mask did not fit due to the size and shape of his head.

In early May 1982, Cole told La Mountain and Scales that he was under pressure to implement a respirator seal rule. He stated that he wanted to put into effect such a rule in only certain plant buildings. La Mountain replied that there was no need for the rule but that they would discuss it. Cole replied that the manufactures of the respirators claim that in "upset" conditions the seals around the face may not be effective if the user has a beard. Following the meeting, on May 6, 1982, the Union presented Respondent with an extensive request for information relating to respirators and a prospective respirator rule.[13]

On Friday, May 21, 1982, Cole told La Mountain and Scales at a meeting that, after having carefully considered the concerns of the Union and employees and the Respondent's concern for the safety of its employees, a respirator seal rule was being implemented. Copies of the rule were given to La Mountain and Scales. It provides as follows:

> [a]ny employee *whose job may, on occasion, necessitate the wearing of respiratory protective equipment,* must refrain from wearing any growth of hair which could come between the wearer's skin and the sealing surface of such equipment at all times while at work.

Cole told the two men that the rule would be distributed to employees on Monday, May 24, and that they were being given an opportunity to see it in advance. However, Cole told them that the document was company property and he wanted it returned because he did not want it seen by employees before its distrubution on Monday. La Mountain read the rule, chuckled, and said: "You've got to be kidding." Scales read it, said, "This is bullshit," tore it, and threw it into a garbage can in Cole's office. Scales asked Cole if he would answer the Union's May 6 request for information. Cole replied that Respondent has the right under the contract to make and enforce rules and, because this was such a rule, a request for information concerning a plant rule need not be answered.

The new rule was distributed to employees on Monday, May 24, 1982.

The complaint alleges, and the answer admits, that since June 9, 1982, Respondent, in enforcement of the new respirator seal rule, disciplined five named employees.

3. The oral warning given to Scales

On June 1, 1982, Cole issued an oral warning to Scales for his conduct at the May 21 meeting. The oral warning, which is the least severe form of discipline available, was memorialized in writing, as follows:

> Nature of Violation: Improper conduct (Destruction of company property)
>
> We want you to understand that the conduct you displayed at the meeting held on Friday, May 21, at which the Company extended to you the courtesy of an advance look at certain Company materials to be distributed later, was totally unacceptable.
>
> After having been told specifically that we wanted the packet of materials returned to us after you had an opportunity to read it, you proceeded to destroy and dispose of the packet in the waste container.
>
> It is not the value of the Company property that is at issue. It is the principal that you have no right to destroy what you do not own.
>
> Continued conduct of this nature will result in more severe disciplinary action being taken up to and including suspension and or discharge.

On issuing the oral warning, Cole told Scales that his behavior raised the level of antagonism in their meetings and made it difficult to work together. Scales told Cole that he believed that the warning was intended to restrict his behavior, adding that at future meetings he would feel restricted in his actions.

Analysis and Discussion

A. *The Failure to Honor the Union-Time Clause*

It is undisputed that the Respondent announced on September 3, 1982, that it would no longer honor the union-time clause. The General Counsel alleges that this conduct violates Section 8(a)(5) of the Act.

Respondent argues that the clause violates Section 8(a)(2) of the Act, and it therefore properly refused to make payments to employees pursuant to it.

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the . . . administration of any labor organization or contribute financial or other support to it," except, however, that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Payments to union officials do not, per se, violate Section 8(a)(2) of the Act. The Board has historically looked at all the facts in the case to determine whether the conduct at issue amounts to assistance to or domination of the Union.

The facts here reveal an aggressive, independent labor organization which, during collective-bargaining negotiations, lawfully entered into an agreement with Respondent containing the union-time clause which provides for an aggregate of 4 paid hours per day for the conduct of union business.

Payments by an employer for time spent on union business have been found not to violate Section 8(a)(2) of the Act,[14] on the basis that "they serve to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case."[15] Indeed, the evi-

[13] The opening paragraph of the letter states. "With regards to the recent meeting between the Company and the Union pertaining to the possible negotiation of a 'no-beard' policy we hereby request the following information necessary to our bargaining position."

[14] *Sunnen Products,* 189 NLRB 826, 828 (1971); *Hesston Corp*, 175 NLRB 96 (1969).

[15] *Sunnen,* supra at 828

dence demonstrates that the union president and secretary utilized the time to investigate complaints and in certain cases recommend that the employee not file a grievance.

The Board has stated:

> [W]here a union lawfully has been established as the employees' bargaining representative, and has been accorded lawful recognition by an employer who, following recognition, deals with that representative at arm's length, we have sometimes characterized benefits of the type found herein merely as friendly cooperation growing out of an amicable labor-management relationship.[16]

Respondent takes issue with those cases in which 8(a)(2) violations were not found, on the ground that the payments there were minor and infrequent, whereas here the sums paid were substantial, involving the payment of 4 hours pay per day. The answer to Respondent's concern is that the payments were lawfully made pursuant to the parties' contract.[17]

It is clear that the union-time clause constitutes a mandatory subject of bargaining. It is part of the parties' collective-bargaining agreement, and any unilateral change in that clause would violate the Employer's duty to bargain in good faith. It is undisputed that the Union had no notice, prior to September 7, 1982, that Respondent intended to refuse to honor the union-time clause.

The Board has stated that:

> [W]e have found that wages paid to employees during the presentation of grievances constitutes a mandatory subject of bargaining and that the unilateral abrogation of such a contractual term or past practice violates Section 8(a)(5) and (1) of the Act.
>
> . . . .
>
> These union-related matters inure to the benefit of all the members of the bargaining unit by contributing to more effective collective-bargaining representation and thus "vitally affect" the relations between an employer and employees.

I therefore find and conclude that Respondent's refusal to honor the union time-clause and its unilateral elimination of it violates Section 8(a)(5) of the Act.[18]

B. *The Reduction of Work Hours*

The complaint alleges that since October 7, 1982, Respondent reduced the work hours of La Mountain and Scales in violation of Section 8(a)(3) and (4) of the Act.

When the union-time clause was abrogated by Respondent on September 7, 1982, La Mountain and Scales were given the following choice: (a) work a paid 8-hour day and not take union time or (b) work 6 paid hours per day and take 2 hours' unpaid union time.[19] They were asked to make that choice and adhere to it because "for operational reasons this decision must be fixed as we cannot change from day to day."

On September 29 La Mountain and Scales informed Respondent that they would, "until further notice," take the contractually prescribed aggregate of 4 hours' union time each day.

On October 5 Respondent advised the two men that because they rejected its offer of 8 hours' work without taking union time (option "a," above), Respondent withdrew that offer. La Mountain and Scales accordingly worked 6 hours and each took 2 hours' unpaid union time daily.

On October 7 La Mountain requested and was refused permission to work an 8-hour day. On October 15 the instant charge was filed. In December Scales requested and was refused permission to work an 8-hour day.

On January 17, 1983, La Mountain began work on the midnight shift and did not take union time. On January 24 Scales was directed to take 4 hours' union time daily. He accordingly worked 4 hours per day and took 4 hours' union time. Scales' renewed request to work 8 hours was again refused and he worked 4 hours each day until March 16 when Crudo became union president. Thereafter, Scales worked 6 hours daily and took 2 hours' union time per day.

La Mountain and Scales each legitimately expected, and had a right to receive, 8 hours' pay per day from Respondent. As had occurred prior to the events of September 7, 1982, pursuant to the parties' agreement, La Mountain and Scales had each worked 6 hours daily, and had each taken 2 hours' union time daily, for which they were each paid a total of 8 hours. However, beginning on October 7, as a direct outgrowth of the unlawful, unilateral conduct of refusing to honor the union-time clause, La Mountain and Scales were no longer permitted to receive 8 hours pay from Respondent.

Although it is true that Respondent initially offered the two men an opportunity to work an 8-hour day, that was done at the expense of their abandoning a contractual right to be paid for activities pursuant to the union-time clause. Their initial reluctance to accept that option is understandable. However, in any event, the option was withdrawn by Respondent on October 5, and the men were permitted to work 6 hours only, and later Scales was authorized to work only 4 hours daily.

I accordingly find and conclude that the reduction of the work hours of La Mountain and Scales violated Section 8(a)(1) and (3) of the Act.

I do not find that this conduct violated Section 8(a)(4) of the Act inasmuch as it occurred prior to the filing of the charges. It is clear that the reduction of the hours was implemented as a result of the elimination of the union-time clause and not because charges were filed or threatened to be filed.

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[16] *Duquesne University*, 198 NLRB 891 (1972)

[17] I do not express an opinion whether the union-time clause violates Sec. 302, as I am without jurisdiction to do so *Sheet Metal Workers (Central Florida Sheet Metal)*, 234 NLRB 1238 (1978).

[18] *Axelson, Inc*, 234 NLRB 414, 415 (1978). See also *Meharry Medical College*, 236 NLRB 1396, 1406 (1978), *American Ship Building Co*, 226 NLRB 788 (1976)

[19] Of course if they met with Respondent's authorized officials at authorized meetings during their 2 hours' union time, they would be paid for time spent at such meetings.

C. *The alleged modification of the grievance resolution practice*

The complaint alleges that since about October 5, 1982, Respondent unilaterally modified the grievance resolution practice by restricting the Union's means of communication and investigation in violation of Section 8(a)(5) of the Act.

After being told that they would no longer be paid pursuant to the union-time clause, but would only receive payment for authorized meetings with management, La Mountain and Scales, on September 29, told Respondent's official that if management's officials were unavailable, they would continue to "walk around" talking to supervisors, employees, and stewards concerning grievances.

On October 5 La Mountain and Scales were restricted to the cafeteria during union time and were also prohibited from speaking with supervisors.

The General Counsel argues that such restrictions constitute a unilateral change of an existing practice regarding union time and the contractual grievance procedure—the alleged practice being the unrestricted walking about the plant by the union president and secretary during which they spoke to employees, supervisors, and stewards regarding problems, potential grievances, and actual grievances.

Respondent argues that (a) no past practice was proven, (b) it was not aware of any such practice, and (c) the contract does not provide for such a practice, and indeed expressly states that past practices are not binding on it unless agreed to in writing.

The General Counsel does not rely on the contract[20] but relies on the alleged past practice which permitted unrestricted access to the plant and supervisors, during work hours, by the union president and secretary who were then conducting their activities pursuant to the union-time clause.

The testimony of La Mountain and Scales was quite vague and occasionally unresponsive when, on cross-examination, they were asked specific questions regarding the nature and extent of their discussions and meetings with supervisors while on union time. Moreover, it is undisputed that Respondent's officials were unaware of their activities while on union time, including any discussions with supervisors. It is implicit in establishing a past practice that the party which is being asked to honor it be aware of its existence.[21]

Moreover, the parties negotiated and included in their contract an extensive "complete agreement" clause which abolishes past practices as follows:

> This Agreement contains the complete agreement between the parties and any and all past practices, memoranda of understanding, and written side agreements not incorporated herein are void as of August 28, 1981. No new practice shall be considered binding on the Company unless reduced to writing and signed by the Company's Employee Relations Manager and these written agreements shall not be binding beyond the expiration of the underlying labor agreement. The Company retains those rights not expressly limited by this agreement.

Accordingly, the alleged past practice, not having been proven, and in any event not being recognized by virtue of the complete agreement clause, was not elevated to a term of employment and was therefore susceptible to unilateral change.

It should be observed that, even assuming a past practice has been proven,

> [n]ot every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to "a material, substantial, and a significant" one.[22]

I do not believe that the restriction imposed on the union president and secretary had a substantial impact upon their ability to investigate grievances. They were able to meet employees and stewards in the cafeteria during their union time. They had utilized the cafeteria for that purpose even before the restrictions were imposed on October 5.[23] Although they could not meet with supervisors, they still had meetings with management officials for which they were paid, and although the number of such meetings has declined, there is no evidence that such reduction in the number of meetings has had an adverse impact on the ability of the union president and secretary to represent the employees.[24]

I accordingly find that Respondent's imposition of restrictions on October 5, 1982, did not violate the Act.

D. *The U.S. District Court Action*

On December 20, 1982, Respondent filed a civil action in U.S. district court against the Union and against La Mountain and Scales as union officers and individually.

The General Counsel alleges as a violation of Section 8(a)(4) of the Act, Respondent's maintaining that part of its lawsuit which seeks an order that La Mountain and Scales withdraw the Board charges. The General Counsel is not alleging as a violation the filing of the action.

The General Counsel claims that by seeking from the district court an order requiring the withdrawal of the

[20] See *Dow Chemical Co*, 215 NLRB 910, 916 (1974), in which the Board noted that when the contract, as here, provided that employees must first state their grievance to their immediate supervisor, in or out of the steward's presence at the employee's option, such a provision constituted a waiver of the union's right to be present at the initial step of the grievance procedure.

[21] The following cases involving past practices all involved situations where the employer was aware of and acquiesced in it: *Mead Corp*, 256 NLRB 686, 694 (1981), *Smyth Mfg. Co*, 247 NLRB 1139, 1153 (1980); *Peerless Food Products*, 236 NLRB 161 (1978)

[22] *Peerless Food Products*, 236 NLRB 161 (1978).

[23] I recognize that after October 5 much of their union time was spent outside the plant in the Union's office Scales stated that they chose this because they were restricted to the cafeteria and had no phone there. No grievances were filed concerning the removal of the phone in the cafeteria months before.

[24] Although certain unmeritorious grievances have been filed because of the Union's inability to learn the supervisor's version of the incident, the grievance process would not suffer thereby

charges, Respondent attempts to (a) withdraw from the Board its jurisdiction to consider whether the elimination of the union-time clause violates Section 8(a)(5), and to (b) chill employee desire to utilize the Board for fear of a lawsuit.

Respondent argues that its attorney, in his professional opinion, decided that in order to provide a full and complete remedy for the relief requested in the lawsuit and to avoid the necessity to defend duplicative Board charges, properly included in the prayer for relief a request that the charging parties withdraw the Board charges.

The Supreme Court, in *Bill Johnson's Restaurants v. NLRB*,[25] recognized that the institution of a lawsuit against an employee who files Board charges "may be used by an employer as a powerful instrument of coercion or retaliation." However, the Court held that the filing and prosecution by an employer of a meritorious or "well-founded" lawsuit is not an unfair labor practice even if the suit was commenced in retaliation for the employee's filing a charge against the employer.[26] The Court also held that an unfair labor practice may be found where the employer prosecutes a "baseless" lawsuit with the intent of retaliating against an employee for the exercise of his Section 7 rights.

In determining whether a lawsuit is baseless or lacks a reasonable basis, the Court stated that in a case such as this, which turns on an issue of law—whether the union-time clause violates Section 302—the Board "must not deprive a litigant of his right to have genuine state law legal questions decided by the state judiciary." It thus appears that a bona fide legal issue exists.

I accordingly find that the Respondent's lawsuit, in seeking to determine whether the union-time clause violated Section 302, has a reasonable basis.

The General Counsel does not allege that the filing of the district court suit violates the Act, but rather asserts that Respondent's maintenance of that part of the action seeking an order requiring withdrawal of the charges violates Section 8(a)(4). I cannot agree. Inasmuch as the filing of the suit has a reasonable basis in that it seeks a declaratory judgment on a genuine legal issue concerning the validity of the union-time clause, it cannot be said that part of the remedy sought in the action—the withdrawal of the charges—lacks a reasonable basis. The withdrawal of the charges was only part of the remedy requested, which also included a withdrawal of the grievances filed relating to the union-time clause, and was properly included in an attempt to obtain a completed remedy in the event the union-time clause was held to violate Section 302.

I do not find that the lawsuit was instituted in retaliation for the filing of the charge on October 15, 1982, relating to the union-time clause. In support of his argument that retaliation was the motive, the General Counsel points to the comment made by Respondent's official, Kramer, on November 16, 1982, to La Mountain and Scales, that if they continued to press the union-time issue with the Board and at arbitration they would find themselves in serious legal trouble, criminal charges could be filed and that people go to jail, not companies. The General Counsel also asserts that unlawful motivation is shown in the December 21, 1982 statement by Cole to the two men that they would receive a summons and complaint because of the Union's two-prong attack—the filing of the Board charge and grievance concerning the union-time clause.

Rather, I find that the lawsuit was commenced by Respondent in a good-faith attempt to determine the validity of the union-time clause, and not to retaliate against La Mountain and Scales for filing the charge alleging Respondent's refusal to honor it. Thus, on September 3, 1982, 6 weeks before the filing of the charge, and 10-1/2 weeks before the November 16 comment by Kramer, Respondent made clear in its letter to La Mountain and Scales that it regarded the payment of money pursuant to the union-time clause to be an unlawful misdemeanor. This was restated in a letter dated October 5. Its position was therefore made clear long before the charge was filed. The comments by Kramer and Cole, moreover, do not show that the filing of the lawsuit or the maintenance therein of a request for a remedy seeking withdrawal of the charges, was done in order to retaliate against them for filing charges with the Board.

I accordingly find and conclude that Respondent has not violated the Act by its institution and maintenance of a civil action in U.S. district court in which it seeks "that the Court direct the defendants, La Mountain and Scales . . . to withdraw the National Labor Relations Board charges . . . ."

E. *The promulgation and enforcement of the respirator seal rule*

The complaint alleges that on May 24, 1982, Respondent promulgated a respirator seal rule which had the effect of prohibiting the wearing of facial hair for those employees "whose job may, on occasion, necessitate the wearing of respiratory protective equipment." The General Counsel alleges that the institution of the rule violates Section 8(a)(5) because it was put into effect without prior notice to the Union and without affording it an opportunity to negotiate and bargain regarding the rule.

Respondent conceded during the hearing that it did not negotiate to impasse with the Union regarding implementation of the respirator seal rule. However it asserts that the management-rights clause of the contract gave it the authority to institute the rule.

The clause is as follows:

> RECOGNITION OF MANAGEMENT'S FUNCTIONS
>
> The Union recognizes that except as expressly limited by this agreement, the management of the employees, the direction of the work force and the operation of the plant are vested in the employer and shall not be the subject of arbitration. The Union further recognizes that as an aspect of such management rights, the employer may make and en-

[25] 461 U.S. 731 (1983)

[26] Although *Bill Johnson's* involved a state court suit, it would appear that the basic reasoning applies to a suit brought in Federal court, as is the situation here

> force such rules as the Company may deem necessary or proper for the conduct of its employees and the operation of the plant, except to the extent that such rulings may conflict with the provisions of this agreement.

An employer is obligated to bargain, pursuant to Section 8(d) of the Act as to "other terms and conditions of employment." Work rules, particularly when penalties are prescribed for their violations, are included within that phrase.[27] In a recent case not involving the issue of a union waiver, the Board held that an employer's unilateral adoption of a no-facial hair rule with respect to the wearing of respirators violated the Act.[28]

Thus the issue is simply whether, by virtue of the collective-bargaining agreement, the Union waived its right to bargain about the implementation of the rule.

In evaluating Respondent's waiver argument, I have also considered the principle that a waiver "will not be lightly inferred but must be clearly evidenced either by the terms of the parties' collective-bargaining agreement or in the nature of the prior contract negotiations."[29]

Respondent asserts that it had the right to implement the respirator seal rule by virtue of the management-rights clause by which "the union recognizes that . . . the management of the employees, the direction of the work force and the operation of the plant are vested in the employer . . . and that as an aspect of such management rights, the employer *may make and enforce such rules as the Company may deem necessary or proper for the conduct of its employees and the operation of the plant.*" I agree with Respondent. Respondent had in effect, at least since 1981, general safety rules and plant regulations which provide essentially for the wearing of approved respirators "where indicated in the process or when instructed to do so by a member of supervision." In addition, a list of rules posted since Respondent began operating the plant includes a prohibition against disregarding or violating safety rules and regulations, violation of which may lead to discipline or discharge. The document states that the listed rules may be supplemented at any time.

When viewed in the light of the general safety rules and plant regulations, and the posted rules, both of which the Union was aware of at the time of the contract negotiations, I must conclude that the broad right given to Respondent to "make and enforce such rules as the Company may deem necessary or proper for the conduct of its employees and the operation of the plant" constitutes a waiver of its right to bargain concerning the implementation of the respirator seal rule.[30]

The General Counsel urges that Respondent lacks sufficient justification for imposing the rule, asserting that the two reasons given for the need for the rule—manufacturers' recommendations and upset conditions—are insufficient. This argument is irrelevant inasmuch as the Union has contractually waived its right to bargain about the imposition of the rule. Moreover, I cannot find anything in the bargaining negotiations for the 1978 or 1981 contracts which supports the General Counsel's position.[31]

I cannot agree with the the General Counsel's argument that assuming that the Union waived its right to bargain concerning the implementation of the clause, it must first be submitted to the health and safety committee for its resolution before being lawfully implemented by Respondent. The evidence clearly demonstrates that the committee is advisory only. It only has the power, as set forth in the contract, to make recommendations to Respondent, which may or may not be followed. In the past the Union has withdrawn from the committee and no meetings were held, apparently because of that, for several months. Under these circumstances, it cannot be found that the respirator seal rule must first be resolved by the health and safety committee.

I accordingly find and conclude that Respondent did not violate Section 8(a)(5) of the Act by its implementation of the respirator seal rule. Its admitted enforcement of the rule, involving discipline to five employees named in the complaint, must therefore be also found not to violate the Act.

F. *The Oral Warning Issued to Scales*

The General Counsel alleges that the oral warning issued to Scales violates the Act. I agree.

The warning was issued for the destruction of company property. The only property destroyed was a copy of the new respirator rule and perhaps certain accompany documents relating to the rule. Thus, this was not a case where Scales destroyed materials for production or articles related to his work product.[32]

Indeed, Respondent concedes that the value of the property destroyed is not at issue, and it does not appear that Respondent would have disciplined any of the 210 unit employees to whom it distributed the rule if they discarded it in the same manner as Scales did after they received it on May 24. Thus, the only reason that Scales was disciplined was because of his conduct in destroying the papers while at a meeting with Respondent in his capacity as union secretary.

> The Board has long held that while employees are engaged in collective bargaining, including the presentation of grievances, they are essentially insulated from discipline for statements made to management representatives which, if made in other contexts, would constitute insubordination.[33]

The Board stated in *Bettcher Mfg. Corp.*:[34]

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[27] *Southern Florida Hotel Assn.*, 245 NLRB 561, 567 (1979).
[28] *Hanes Corp*, 260 NLRB 557, 561 (1982)
[29] *Southern Florida*, supra at 567–568.
[30] *Castle Pierce Printing Co.*, 251 NLRB 1293, 1303 (1980)
[31] In the 1978 negotiations, the Union was told that the management-rights clause was needed to show the German owners of the plant and that it would not be used to hurt the Union. The same clause was included in the 1981 contract notwithstanding that the Union attempted to obtain a modification of it
[32] *Sani-Serv*, 252 NLRB 1336, 1338 (1980), cited by Respondent, is therefore inapposite
[33] *Ryder Truck Lines*, 239 NLRB 1009, 1010 (1978)
[34] 76 NLRB 526, 527 (1948).

> A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted . . . . If an employr were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in bargaining negotiations.

Of course, an employee "may engage in conduct during a grievance meeting which in so opprobrious as to be unprotected."[35]

The question thus raised is whether Scales' conduct on May 21 in destroying a copy of the rule exceeded permissible bounds as established by the Board for an employee acting as a union secretary engaged in the administration of a contract.

It is apparent that the reason that Scales was instructed to return the rule to Cole after reading it was because Cole did not want it seen by employees prior to its formal distribution the following Monday. Scales did not disobey that request. In an act of pique and upset at the rule, Scales destroyed the paper and threw it in a garbage can in Coles' presence. Nothing else is alleged. As noted above, similar destruction of the paper, if performed by unit employees after their receipt of the rule on May 24, would not likely have brought any disciplinary action. Indeed, there was no evidence that such employees were warned that the document was company property and that they were not to destroy it.

It thus appears that Scales was disciplined for his conduct because he was a union official acting in that capacity at a meeting with Respondent's officials. It cannot be said that his conduct was so outrageous or extreme to warrant the denial of his statutory protection and the imposition of discipline for it. On the contrary, it was quite mild, and was not of insufficient severity to cause any discipline, even an oral warning, to be issued to him.

I accordingly find that Scales' conduct at the May 21 meeting was protected and the oral warning issued on June 1 violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondent BASF Wyandotte Corporation is and, at all times material herein, has been an employer engaged in commerce within the meaning of the Act.

2. Local 227, International Chemical Workers Union, AFL–CIO is a labor organization within the meaning of the Act.

3. By failing to continue in full force and effect the terms of article II, section 4 of its collective-bargaining agreement of August 24, 1981, by failing to honor paragraph 3 thereof, which, inter alia, permits the union president and/or secretary paid time off to an aggregate of 4 hours each day for the purpose of conducting union business during normal working hours on company property, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By reducing the work hours of Joseph La Mountain and Roger Scales since October 7, 1982, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By issuing an oral warning to Roger Scales on June 1, 1982, Respondent violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act, as alleged in the complaint, by: (a) instituting and maintaining a civil action in U.S. district court in which it seeks "that the Court direct the defendants, La Mountain and Scales . . . to withdraw the Board charges," (b) modifying the grievance resolution practice by imposing restrictions on October 5, 1982, upon the Union's access to the plant and to supervisors, or (c) promulgating and enforcing the respirator seal rule on May 24, 1982.

THE REMEDY

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

Having found that Respondent has unlawfully failed to continue in full force and effect the terms of article II, section 4 of its collective-bargaining agreement of August 24, 1981, by failing to honor paragraph 3, I shall recommend that Respondent be ordered to continue to honor such paragraph 3, the union-time clause, and to make whole the union president and secretary for any loss of earnings they may have suffered by reason of its failure to honor the union-time clause. Having found that Respondent unlawfully reduced the work hours of Joseph La Mountain and Roger Scales since October 7, 1982, I shall recommend that Respondent be ordered to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 128 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 561 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, BASF Wyandotte Corporation, Rensselear, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[35] *Hawaiian Hauling Service*, 219 NLRB 765, 766 (1975).

[36] 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) Failing and refusing to honor article II, section 4, paragraph 3 of its collective-bargaining agreement of August 24, 1981, the union-time clause, set forth as follows:

> The Company will permit the Union President and/or Secretary time off to an aggregate of four (4) hours each day for the purpose of conducting union business during normal working hours on Company property, and will pay the time at regular basic straight time rate, exclusive of all premiums and differentials.

(b) Reducing the work hours of Joseph La Mountain and Roger Scales because of its failure to honor the union-time clause.

(c) Issuing warnings to Roger Scales because he engaged in union activity.

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

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

(a) Continue in full force and effect and honor and abide by article II, section 4, paragraph 3 of its collective-bargaining agreement of August 24, 1981, the union-time clause set forth in paragraph 1(a), above.

(b) Make whole the union president and secretary for any loss of earnings they may have suffered by reason of its failure to honor the union-time clause.

(c) Make whole Joseph La Mountain and Roger Scales for any loss of earnings they may have suffered by reason of its reduction of their works hours.

(d) Remove from its files any reference to the unlawful warnings issued to Roger Scales on June 1, 1982, and notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Rensselear, New York, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 3, 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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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 fail or refuse to honor article II, section 4, paragraph 3 of our collective-bargaining agreement of August 24, 1981, the union-time clause, set forth as follows:

> The Company will permit the Union President and/or Secretary time off to an aggregate of four (4) hours each day for the purpose of conducting union business during normal working hours on Company property, and will pay the time at regualr basic straight-time rate, exclusive of all premiums and differentials.

WE WILL NOT reduce the work hours of Joseph La Mountain and Roger Scales because of our failure to honor the union-time clause.

WE WILL NOT issue warnings to Roger Scales because he engaged in union activity.

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 continue in full force and effect to honor and abide by article II, section 4, paragraph 3 of our collective-bargaining agreement of August 24, 1981, the union-time clause set forth above.

WE WILL make whole the union president and secretary for any loss of earnings they may have suffered by reason of our failure to honor the union-time clause.

WE WILL make whole Joseph La Mountain and Roger Scales for any loss of earnings they may have suffered by reason of our reduction of their work hours.

WE WILL remove from our files any reference to the unlawful warnings issued to Roger Scales, on June 1, 1982, and notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

BASF WYANDOTTE CORPORATION

[37] 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."