

Comau, Inc. and Wisne Automation Employees Association. Case 07–CA–073073

July 14, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On December 26, 2012, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering brief.¹ The General Counsel filed a reply brief.

¹ In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed a postbrief letter calling the Board's attention to recent case authority, and the General Counsel filed a letter in opposition. In the letter, the Respondent, for the first time, contests the validity of Lafe Solomon's appointment as the Board's Acting General Counsel and cites to *SW General, Inc. v. NLRB*, 796 F.3d 67, 74–75 (D.C. Cir. 2015), cert. granted __ U.S.L.W. __, No. 15–1251, 2016 WL 1381487 (U.S. June 20, 2016), as support. The Respondent did not raise any question about the authority of the Acting General Counsel (AGC) in its answer to the consolidated complaint, during the hearing before the administrative law judge, in its posthearing brief, or in its exceptions to the Board. Under these circumstances, we reject the Respondent's challenge to the AGC's authority as untimely. See also *Boeing Co.*, 362 NLRB 1789, 1789 fn. 1 (2015).

Moreover, even if we were to consider the Respondent's challenge to the authority of the AGC, we would not find it appropriate to dismiss the complaint. On May 19, 2016, General Counsel Richard F. Griffin Jr. issued a Notice of Ratification in this case which states, in relevant part,

The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.

The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, __ F.3d __, 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at *10.

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

My action does not reflect an agreement with the appellate court ruling in *SW General*.

Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by ex-

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,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

The Respondent, Comau, Inc., designs and installs assembly lines and robotic equipment for the automotive industry. It operates five production facilities in the Detroit, Michigan area, including the facilities in Wisne, Novi, and Royal Oak involved in this proceeding. Depending on project specifications and customer needs, employees may be temporarily reassigned from their home plant to any one of the other five facilities or to a client's site to perform field service work.

Charging Party Wisne Automation Employees Association (WAEA) represents the 44 production and maintenance employees at Wisne, and the Novi Industries Employees Association (NIEA) represents about 200 production and maintenance employees at Novi. Employees at Royal Oak are unrepresented.

This case arises from the Respondent's temporary shutdown of the Wisne facility on December 1, 2011, its transfer of 12 WAEA-represented employees to Novi and Royal Oak, and its application of the Novi and Royal Oak shop rules to those employees while they worked at those facilities.⁴

As further discussed below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by

pressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. *Id.* at *9 (citing 5 U.S.C. § 3348(e)(1)).

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

² The General Counsel and the Charging Party 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's findings, we do not rely on his citation to *General Die Casters, Inc.*, 359 NLRB 89 (2012), or *Comau, Inc.*, 358 NLRB 593 (2012), because the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), rendered those decisions invalid.

³ We shall modify the judge's recommended Order to conform to the violations found, the amended remedy, and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

⁴ The terms "Wisne employees" and "WAEA-represented employees" refer to the same individuals and are used interchangeably in this decision.

announcing the temporary shutdown of the Wisne facility and the transfer of WAEA-represented employees and their work to Novi and Royal Oak without providing WAEA notice and an opportunity to bargain over the effects of the shutdown and transfer. We also agree with the judge that, by applying the Novi and Royal Oak shop rules to the Wisne employees temporarily working at those facilities, the Respondent violated Section 8(a)(5) and (1) by both failing to continue in effect WAEA's collective-bargaining agreement and unilaterally changing WAEA-represented employees' terms and conditions of employment without notice to WAEA.⁵

Facts

WAEA and the Respondent have had a collective-bargaining relationship covering the Respondent's Wisne employees since 2000. The most recent collective-bargaining agreement was effective from August 22, , through May 3, 2015. Article 25 of WAEA's most recent and previous contracts contains shop rules, which primarily concern leave and attendance. During negotiations in late 2011 and early 2012 for the most recent agreement, the Respondent's key objective was to bargain for more restrictive attendance rules. The Respondent was unsuccessful, however, and WAEA shop rules in the most recent agreement remained virtually unchanged from previous contracts.

On December 1, 2011, the Respondent notified the WAEA that it was temporarily shutting down the Wisne facility "[d]ue to business issues"; the same day, the Respondent began moving equipment out of the facility. The 12 employees then at Wisne were transferred to Novi and Royal Oak effective December 5.⁶ On January 23 and February 3, 2012, the Respondent implemented new shop rules at Novi and Royal Oak.⁷ Both sets of

rules conflicted with, and were more restrictive than, WAEA shop rules on the subjects of overtime, vacation policy, sick and personal days, and discipline. Further, under the new rules, temporary transferees to those facilities would no longer retain their seniority rights.

Without bargaining with WAEA, the Respondent informed employees that the new Novi and Royal Oak shop rules would be applied uniformly to all employees, including WAEA-represented employees, and that employees who did not follow the rules would be subject to discipline, including termination. WAEA objected. The Respondent conceded that the provisions of the WAEA contract regarding wages, health insurance, and benefits continued to apply to WAEA-represented employees working away from Wisne but asserted that the Wisne shop rules were plant-specific and did not apply outside of that facility. WAEA filed several grievances objecting to discipline Wisne employees received under the newly imposed rules.⁸

Discussion

1. The 8(a)(5) failure to engage in effects bargaining

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to give WAEA notice and an opportunity to bargain over the effects of the temporary closure of Wisne and the transfer of unit work and unit employees to Novi and Royal Oak. The judge found that WAEA had no obligation to request bargaining in this instance because the Respondent presented it with a fait accompli. We affirm the finding.⁹

The Respondent asserts that the fait accompli analysis applies only to decisional bargaining cases; it reiterates its argument that the WAEA waived its right to effects bargaining by failing to request it. The Respondent further argues that it was privileged to temporarily close the Wisne facility and transfer the unit work and unit employees to Novi and Royal Oak without bargaining over effects under the "contract coverage" standard applied by some courts of appeals. We find no merit to either of those arguments.

It is well established that an employer is obligated to bargain over the effects of a temporary closure and relocation of work even when it does not have a duty to bargain over the decision itself. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Metropolitan Teletronics*, 279 NLRB 957, 959

⁵ The judge also found four independent 8(a)(1) violations, which we adopt for the reasons stated in his decision.

Contrary to our dissenting colleague, we agree with the judge that Novi Plant Manager Tom Durocher's comments to Wisne employee Jack Vargo, that he heard that Vargo was attempting to influence Novi employees to vote against the NIEA contract, constituted a coercive interrogation. Durocher's comments called for and, in fact, elicited Vargo's response that it was "untrue" he had engaged in the union activity of which he was accused. As the dissent recognizes, an employer's declarative statements can constitute an interrogation where those statements reasonably call for an employee to respond and reveal his union sympathies or whether he has engaged in protected activity. See, e.g., *Children's Services International*, 347 NLRB 67, 79–80 (2006) (finding that manager interrogated employee when she accused her of creating a union flyer).

⁶ Ten were transferred to Novi and two to Royal Oak. The remaining Wisne employees were already working at the Respondent's other facilities, on field work assignments, or on medical leave.

⁷ Prior to February 3, Royal Oak was a temporary facility and did not have a permanent employee complement.

⁸ On June 5, 2012, the Respondent reopened the Wisne facility and all WAEA-represented employees, including those working at Novi and Royal Oak, returned to the facility.

⁹ No exceptions were filed regarding the judge's failure to order a limited backpay remedy under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

(1986) (employer obligated to bargain with union over effects on employees of decision to close and relocate), enfd. 819 F.2d 1130 (Table) (2d Cir. 1987). Moreover, bargaining over the effects of a decision must be conducted “in a meaningful manner and at a meaningful time . . .” *First National Maintenance Corp.*, supra 452 U.S. at 681–682. An element of “meaningful” bargaining is timely notice to the Union. To be timely, the notice must be given “sufficiently before . . . actual implementation so that the union is not confronted at the bargaining table with . . . a fait accompli.” *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). See also *Allison Corp.*, 330 NLRB 1363, 1366 (2000); *Los Angeles Soap Co.*, 300 NLRB 289, 289 fn. 1 (1990). Waiver will not be found where the employer simply announces and implements changes as if it had no obligation to bargain over the effects of the changes. See *Naperville Jeep/Dodge*, 357 NLRB 2252, 2272 (2012), and cases cited therein, enfd. *Dodge of Naperville v. NLRB*, 796 F.3d 31 (D.C. Cir. 2015), cert. denied 136 S.Ct. 1457 (2016).

Here, the Respondent first notified WAEA of its decision on December 1 and began moving equipment from the Wisne facility the same day. A day or two later, at a meeting requested by WAEA,¹⁰ the Respondent presented the shutdown and transfer as final. As to the transfer, prior to this meeting, the Respondent had already determined where each of the 12-unit employees who remained at Wisne would be transferred and told WAEA that those employees were to report to their new posts the very next work day, Monday, December 5. In these circumstances, we find that the Respondent’s December 1 shutdown announcement and its December 3 order that employees report to their new posts the next working day was a fait accompli that precluded meaningful effects bargaining, and that WAEA did not waive its right to bargain.¹¹

¹⁰ The judge found that the meeting had occurred “approximately on December 3.” Employee (and WAEA Treasurer) Paul Ciaramitaro testified that the meeting occurred Friday, December 2, the day after the announcement. Neither of the Respondent’s agents at the meeting, Durocher or Novi Supervisor, Mark Corich, testified at the hearing.

¹¹ We disagree with the dissent’s suggestion that there can be no “fait accompli” in an effects-bargaining case unless the effects themselves “cannot be changed.” Board law is clear that, absent exigencies not present here, notice and an opportunity to bargain must be given before implementation of the decision. See, e.g., *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983) (“A concomitant element of ‘meaningful’ [effects] bargaining is timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible”). The possibility that an employer might be able to modify or “undo” some of the effects of the decision does not preclude a finding of fait accompli. Indeed, in response to management’s question whether employee (and WAEA President) Larry LaForest had any issues he wanted to “discuss in terms of effects” at the lone meeting between the parties after the December 1 announcement, LaForest

The dissent contends that this is an “effects-bargaining success story” because the Respondent met with the Union once and, during that meeting, agreed to switch the job assignments of employees LaForest and Ciaramitaro, who were both present at the meeting. Unlike the dissent, we do not view this single accommodation as supporting the conclusion that the parties engaged in meaningful effects bargaining. *First National Maintenance*, supra 452 U.S. at 681–682. The record shows that WAEA requested the meeting in order to learn why the Respondent had decided to shut down Wisne and if Wisne employees would still have their jobs; in short, WAEA sought information about a decision that was already made and in the process of implementation. The next business day, all 12 of the Wisne employees were required to report to their new posts.¹² Allowing the Union less than one business day to determine how the new postings would affect those employees who were not present at the meeting (and therefore could not immediately be consulted), and to offer counterproposals is not reasonably adequate.

The dissent also observes that the Respondent notified the Union of the closure only 1 day after the Respondent itself learned of the decision from its owner, Fiat. On this point, we note that the Respondent does not argue, and the record does not show, that the timing of the closure—which began the same day the Respondent gave notice to the Union—was controlled by Fiat or necessitated by any economic exigency. See, e.g., *Burk Enterprises*, 313 NLRB 1263, 1268 (1994) (failure to give union pre-implementation notice of change in terms of employment may be excused where employer shows emergency); *Gannett Co.*, 333 NLRB 355, 359 (2001) (same). To the contrary, employees LaForest, Ciaramitaro, and Vargo all testified that, before the December 1 announcement, there was no indication that the Wisne plant would shut down; in fact, the Wisne employees were working on a major project at the time and were told by the Respondent that more work was coming to the plant. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by fail-

responded “no” because he viewed the shutdown and transfer as a “done deal.” He credibly testified that the Respondent’s representatives had already “made up their mind what they were doing.” That is the definition of a fait accompli.

¹² Although all 12 Wisne employees were assigned to either Royal Oak or Novi immediately after the December 1 announcement, it appears that one Wisne employee was sent back to Wisne to load trucks with equipment to be moved to Royal Oak, and that he remained at Wisne until the move was completed on December 15. What happened to that one employee does not affect our analysis.

ing to give notice and an opportunity to bargain over the effects of the Wisne shutdown.¹³

2. The 8(a)(5) violations regarding application of the Novi and Royal Oak shop rules

a. *Contract modification*

We find that the record establishes that the terms of the most recent WAEA agreement, including the shop rules, are applicable to WAEA-represented employees when working at the Respondent's other facilities. There is no dispute that the Respondent's newly imposed Novi and Royal Oak rules differed in significant respects from the shop rules contained in the WAEA contract. Therefore, by applying the Novi and Royal Oak rules to WAEA-represented employees without WAEA's consent, the Respondent modified the terms of the WAEA agreement within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1). *NLRB v. Katz*, 369 U.S. 736, 743 (1962). See also *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), *enfd. mem.* 505 F.2d 1302 (5th Cir. 1974), *cert. denied* 423 U.S. 826 (1975). Section 8(d) provides, in relevant part, that "where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract."

In finding that the contract applied to the WAEA-represented employees when they worked at Respondent's other facilities, the judge credited the testimony of WAEA President LaForest and unit employee Steve Brooks that they used personal days and vacation days in accordance with the WAEA collective-bargaining agreement while working temporarily at Royal Oak in January through May 2010 and February through March 2011. Further, after a 2-1/2 month leave of absence, Brooks returned to work and reported to Novi on January

3, 2012, but was not administered a drug test upon his return. The NIEA agreement (which covered the Novi employees) in effect at that time required drug testing after periods of leave longer than 30 days; the WAEA agreement has never included a drug testing policy. Finally, the judge credited the testimony of WAEA Treasurer Paul Ciaramitaro and WAEA Secretary Jack Vargo that, while working at the Respondent's other facilities prior to January 2012, they were never told that the WAEA shop rules did not apply to them.

The Respondent and the dissent concede that the Novi and Royal Oak rules implemented in January 2012, differ significantly from the WAEA shop rules. The Respondent argues, however, that it had a "sound arguable basis" for interpreting the WAEA agreement to apply only when covered employees were working at Wisne. The dissent makes a similar argument: that there can be no 8(a)(5) contract modification violation because the recognition clause provides that the agreement applies only when the Wisne employees are working at Wisne.¹⁴ We disagree with both of these arguments.

The Respondent and the dissent essentially argue that nothing in the WAEA agreement expressly states that its terms and conditions will continue to apply to unit employees when working away from the Wisne facility, and they point out that the recognition clause in that agreement defines unit employees as those who are "employed by [the Respondent] at its facility located at 42445 West 10 Mile Road," otherwise known as the Wisne facility.¹⁵ Uncontested extrinsic evidence, however, undercuts reliance on the recognition clause to limit the contract's scope. When Wisne employees were working at other facilities—including at Royal Oak and Novi during the times at issue here—it is undisputed that they continued to receive the wages and benefits set forth in the WAEA contract, continued to pay dues to WAEA under the

¹³ We also reject the Respondent's argument that it had no duty to bargain over the effects of the closure of the Wisne facility under the contract-coverage analysis endorsed by some U.S. Courts of Appeals. See, e.g., *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). In *Provena St. Joseph Medical Center*, the Board reaffirmed its adherence to the clear and unmistakable waiver standard and rejected the contract coverage analysis. 350 NLRB 808, 810 (2007). However, even if we were to apply a contract coverage analysis here, we would reach the same result. The Respondent contends that the matter is "covered" in art. 4.18 of the contract, which provides: "should the Company make a business decision to close a plant or to consolidate plants, the Company will bargain with the [WAEA] regarding the effects of the business decision." The Respondent argues that this provision does not require effects bargaining over temporary closures, such as the one at issue here. However, the plain language of art. 4.18 requires that the parties engage in effects bargaining over "a business decision to close a plant" and does not differentiate between a temporary and permanent closure. Even under a contract coverage analysis, therefore, the Respondent was not relieved of its duty to bargain with WAEA over the effects of its decision to shut down the Wisne facility.

¹⁴ The "sound arguable basis" doctrine is set forth in *Bath Iron Works*, 345 NLRB 499, 502 (2005), *affd.* 475 F.3d 14 (1st Cir. 2007). While Chairman Pearce and Member Hirozawa question whether that case was correctly decided, they find it unnecessary to address the issue in light of the finding that the Respondent violated the Act for the reasons stated above.

¹⁵ The General Counsel alleged in the complaint that the bargaining unit described in the most recent WAEA collective-bargaining agreement should be modified to include all employees "employed by [the Respondent] at and out of its facility located at 42445 West 10 Mile Road." (Emphasis added.) The judge declined to do so, and the General Counsel excepted. We agree that, under the present circumstances, it is not appropriate to change the historical, voluntarily agreed-to unit description contained in the collective-bargaining agreement. The parties will have the opportunity to discuss changing the unit description during any bargaining that occurs in compliance with this decision.

agreement's union-security clause, and continued to use the agreement's grievance procedure.¹⁶

Further, as explained above, the record shows that before January 2012, the WAEA shop rules, including time and attendance policies, were applied to unit employees working away from the Wisne facility. Significantly, the Respondent provides no evidence to the contrary; rather, its primary argument is that there could be no such past practice because the shop rules in the prior NIEA and WAEA agreements were "identical." Accordingly, the Respondent claims, it is not possible to determine which shop rules—WAEA or NIEA—were being applied to the Wisne employees working at Novi prior to January 2012. And in any event, the Respondent argues, it was unaware of any such "practice" and therefore not bound by it. The record belies both of the Respondent's claims. First, the shop rules contained in the prior WAEA contract differed from those in the prior NIEA contract in at least two material respects: they did not include a drug testing policy and they allowed for sick leave to be taken in less than 1-day increments. Second, the Respondent's claim that it did not know of this practice is contradicted by the fact that both LaForest and Brooks used personal and vacation days in accordance with the shop rules contained in the WAEA agreement while temporarily working at Royal Oak in 2010 and 2011.

Finally, the Respondent failed to point to any evidence to support its claim that the WAEA contract only applied to Wisne employees while they worked at Wisne. As earlier noted, the WAEA shop rules are contained in and are a part of the WAEA contract. Similarly, there is no evidence to support the Respondent's alternative contention that only certain contractual benefits such as wages and health insurance, which it characterized as "earned benefits," would continue to apply to Wisne employees working away from Wisne. To the contrary, as explained above, the record reflects that the WAEA shop rules were applied away from the Wisne location until the complained-of contract modification.

Accordingly, we reject the Respondent's sound arguable basis claim, and we agree with the judge that the Respondent's application of the Novi and Royal Oak shop rules to WAEA-represented employees unlawfully modified the WAEA contract.

¹⁶ In determining whether a change constitutes an unlawful mid-term modification for purposes of Sec. 8(a)(5) and 8(d), the Board may examine the past practice of the parties as to the interpretation and implementation of the contractual language in question, in order to determine the parties' intent. See, e.g., *American Electric Power*, 362 NLRB 803, 805 (2015) (finding that employer had a sound arguable basis for its interpretation of contract "in light of the parties' past practice under th[e] contractual language" in question).

b. Unilateral changes

The judge also found that, by applying the Novi and Royal Oak shop rules to WAEA-represented employees without giving the WAEA notice and an opportunity to bargain, the Respondent unilaterally changed employees' terms and conditions of employment in violation of Section 8(a)(5) and (1).¹⁷ We agree. See *NLRB v. Katz*, supra 369 U.S. at 743; *Naperville Jeep/Dodge*, 357 NLRB at 2271–2272 (employer's closure and transfer of unit employees to nonunionized facility and unilateral application of new terms and conditions to unit employees, resulting in significant loss of wages and benefits, violated Section 8(a)(5) and (1) under both unilateral change and contract modification theories). There is no dispute that the Novi and Royal Oak shop rules pertain to mandatory subjects, such as discipline, assignment of overtime, absenteeism and tardiness, drug testing, and layoffs. Here, the new shop rules changed existing terms and conditions of employment in two respects.

First, the rules conflicted with express written provisions in the WAEA contract. Further, as explained above, the record shows a historical practice of WAEA-represented employees carrying the express terms of their agreement with them while temporarily working at the Respondent's other facilities. Significantly, the Respondent did not produce any evidence to the contrary, and it failed to call any witnesses with actual knowledge of the day-to-day practices on any of the shop floors. Indeed, the Respondent's sole witness, its general counsel, testified only generally about those practices and admitted to lacking knowledge of how particular shop rules affected employees.

Second, the new rules resulted in a change to an unwritten practice of applying the WAEA shop's seniority in assigning overtime and conducting layoffs of WAEA-represented employees who were working at other locations.¹⁸ For example, during the 2009–2011 Wisne shut-

¹⁷ The complaint alleges, and we have found, that the Respondent failed to continue in effect all the terms and conditions of the WAEA collective-bargaining agreement by distributing new work rules to the Wisne employees working at its Novi and Royal Oak facilities in violation of Sec. 8(a)(5) and (1) and Sec. 8(d). Thus, the complaint allegation appears to be based on a contract modification theory. The allegation, however, was fully litigated under both that theory and a unilateral change theory. And, as previously discussed, the Respondent raised and argued defenses to a unilateral change violation but notably did not argue that the judge erred in applying the unilateral change analysis. Accordingly, we find that the unilateral change theory is properly before the Board. *Pergament United Sales*, 296 NLRB 333 (1989), enf'd. 920 F.2d 130 (2d Cir. 1990).

¹⁸ The judge referred to these latter practices as "extracontractual" practices. According to these practices, which the judge discusses in detail, the Respondent would first lay off contractors, then employees temporarily working at the plant, and finally the home plant employees,

down, the Respondent, WAEA, and NIEA entered into a written agreement providing that the two unions would coexist at Novi and each unit would maintain its own seniority list for purposes of assigning overtime and conducting layoffs.¹⁹ Moreover, according to WAEA Treasurer Ciaramitaro's uncontradicted testimony, during his assignment to Novi from May through June 2010, WAEA-represented employees were routinely offered overtime before contractors.²⁰

The judge found, and we agree, that WAEA did not clearly and unmistakably waive its right to bargain over these changes and that the Respondent, in any event, presented WAEA with a fait accompli. The Respondent again argues that, under a contract coverage analysis, the changes were permissible under the contract's management-rights clause. As explained above, the Board has not adopted the contract-coverage test. Even under that analysis, however, the Respondent's argument would fail. The contract's management-rights clause allows the Respondent to "make and enforce reasonable rules for the maintenance of discipline and protection of life and property" so long as the rules are not in conflict with the WAEA agreement. Accordingly, the clause did not privilege the Respondent to cease applying the specific language in the first paragraph of the WAEA Shop Rules, 25.01, which provides that "any additional [shop] rules may be added or the present rules changed by mutual agreement." See *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 407 (1991) (specific contractual provision trumps general one). Article 25.01 demonstrates that the parties bargained precisely to prohibit the Respondent from unilat-

erally altering the shop rules applicable to WAEA-represented employees.

We therefore agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally applying the Novi and Royal Oak shop rules to WAEA-represented employees temporarily working at those facilities.

AMENDED REMEDY

In addition to the remedies recommended by the judge, we shall order the Respondent to take the following affirmative action designed to effectuate the policies of the Act.

In accordance with our finding that the Respondent failed to engage in effects bargaining in violation of Section 8(a)(5) and (1), and as requested by the General Counsel, we shall require that the Respondent post the notice at all of the Respondent's five facilities and also to mail the posting to WAEA-represented employees on field details. Because the record shows that WAEA-represented employees are routinely transferred to work temporarily at all of the Respondent's Detroit area facilities and perform field service work at customer sites, such a remedy will serve to inform all affected employees of the action the Respondent is required to take to remedy the violations. See, e.g., *Technology Service Solutions*, 334 NLRB 116, 118 (2001) (notice ordered to be posted at all facilities and mailed to home addresses of traveling unit employees).

Further, in affirming the 8(a)(5) and (1) contract modification violation, we shall require the Respondent to cease and desist from failing to continue in effect the terms and conditions of its August 22, 2011 to May 3, 2015 collective-bargaining agreement with WAEA by applying the Novi and Royal Oak shop rules to Wisne employees temporarily working at those facilities without WAEA's consent; to affirmatively rescind the unilateral application of the Novi and Royal Oak shop rules to Wisne employees and restore the status quo ante as it existed prior to January 23, 2012; and to continue in effect all of the terms and conditions of employment contained in its most recent agreement.

In addition, we shall order the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Regional Director allocating the backpay awards to the appropriate calendar years for each employee. See *AdvoServ of New Jersey*, 363 NLRB 1324 (2016).

reversing that order in assigning overtime. The record shows that layoffs were administered by classification and seniority within each classification, and in sequential order based on the equipment-building process. Under these extracontractual practices, if there were temporary transferees from two organized facilities working at a third plant, the Respondent laid off the two groups of transferees in a proportional manner before ever laying off any of the home plant employees. The WAEA maintains its own seniority list by classification, which the Respondent updates monthly.

¹⁹ The judge found that all of the provisions in the WAEA collective-bargaining agreement continued to apply to Wisne employees working at Novi during this period.

²⁰ The Respondent points out that in 2008, when WAEA-represented employees and the Comau Employees Association (CEA), which represented some of the Respondent's other employees, were both working at Novi, the Respondent laid off WAEA-represented employees while retaining the CEA-represented employees. WAEA asserted that the layoffs were not being conducted in an equitable and proportional manner between the two unions, as was the practice. The Respondent assured WAEA that the matter would be rectified but did not follow through. The record is unclear as to how the matter was ultimately resolved. In any event, and particularly in light of WAEA's protest, this one instance is insufficient to defeat a finding of a past practice regarding the use of reverse seniority in conducting layoffs outside the home plant.

ORDER

The National Labor Relations Board orders that the Respondent, Comau, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Wisne Automation Employees Association (the Union) as the exclusive collective-bargaining agent of employees in the appropriate unit below, by failing and refusing to bargain over the effects of the idling of the Wisne facility and the transfer of unit employees from the Wisne facility to the Novi and Royal Oak facilities.

The unit is:

All full-time and regular part-time production and maintenance employees, including inspectors, employed by the Employer at its facilities located at 42445 West 10 Mile Road, Novi, Michigan, but excluding all office clerical employees, guards and supervisors as defined by the Act.

(b) Failing to continue in effect all the terms and conditions of employment contained in the parties' August 22, 2011, to May 3, 2015 collective-bargaining agreement covering the unit employees without the Union's consent.

(c) Unilaterally changing terms and conditions of employment of unit employees.

(d) Informing unit employees that the Union no longer exists at the Novi facility.

(e) Interrogating employees about their union and protected concerted activities.

(f) Directing employees not to discuss issues involving union and protected concerted activity with other employees.

(g) Threatening employees with layoffs and transfers if they do not acquiesce in unilaterally imposed work rules.

(h) 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) Apply and restore the terms and conditions of employment that were applicable to the unit employees under the August 22, 2011, to May 3, 2015 collective-bargaining agreement covering the unit employees, and continue in effect all of the terms and conditions of employment contained in the collective-bargaining agreement, or other applicable collective-bargaining agreement, with the Union.

(b) Refrain from implementing any changes in terms and conditions of employment that are not covered by a current collective-bargaining agreement without first

notifying and, on request, bargaining with the Union as the exclusive collective-bargaining representative of employees in the above-stated bargaining unit.

(c) On request by the Union, rescind the unlawful unilateral changes to the terms and conditions of unit employees.

(d) Make the unit employees whole for any loss of wages and other benefits they suffered as a result of the Respondent's failure to abide by the terms of the August 22, 2011, to May 3, 2015 collective-bargaining agreement and its unilateral changes, in the manner set forth in the remedy section of the judge's decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) Rescind any discipline imposed pursuant to the Novi and Royal Oak rules upon WAEA-represented employees who were temporarily assigned to the Novi and Royal Oak facilities.

(g) Within 14 days from the date of this Order, remove from its files any references to unlawful discipline imposed pursuant to the Novi and Royal Oak rules upon WAEA-represented employees, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Wisne Automation, Novi Industries, Royal Oak, Southfield, and Warren facilities copies of the attached notice marked "Appendix,"²¹ and duplicate and mail, at its own expense, a copy of the notice to all unit employees on field detail in the Detroit, Michigan area. Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's

²¹ 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."

authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 January 23, 2012.

(j) Within 21 days after service by the Region, file with the Regional Director of Region 7 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.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I agree with my colleagues regarding many aspects of this case, but I dissent from their finding that the Respondent violated Section 8(a)(5) based on an alleged failure to satisfy effects-bargaining obligations regarding the temporary shutdown of the Wisne facility and temporary transfer of represented employees to the Novi and Royal Oak locations. Regarding two other issues, I disagree with the *types* of violations found by my colleagues and the judge.¹ I agree that Respondent's unilateral application of Novi and Royal Oak shop rules to transferred Wisne employees constituted an unlawful unilateral change in violation of Section 8(a)(5), but I dissent from any finding that this constituted an unlawful "mid-term modification" of the Wisne collective-bargaining agreement. And I agree that Respondent violated Section 8(a)(1) by making various statements and threats, but I dissent from any finding that the Respondent coercively interrogated employee Jack Vargo.²

¹ For the reasons stated by my colleagues, I agree that the complaint is properly before the Board for disposition.

² I agree that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees with layoffs and transfers, by stating that the Wisne Automation Employees Association (WAEA or Union) no longer existed, and by directing employee Jack Vargo not to discuss union matters with other employees. I disagree, however, that Respondent coercively interrogated Vargo when Novi Plant Manager Tom Durocher stopped Vargo on the shop floor and said that Vargo's name had come up as someone who was influencing Novi employees regarding

A. The Effects-Bargaining Allegation

The Respondent, which is wholly owned by Fiat, designs, builds, and installs automated assembly lines and robotic equipment. At the time of the events at issue here, it operated five facilities in the Detroit metropolitan area: two in Novi—Wisne Automation (Wisne) and Novi Industries (Novi)—and one each in Royal Oak, Southfield, and Warren, Michigan. The WAEA represents approximately 44-unit employees at the Wisne facility, and the current collective-bargaining agreement between the Respondent and WAEA is effective from August 22, 2011, to May 3, 2015.

The events relevant to the effects-bargaining allegation unfolded late in 2011.³ On November 30 in the evening, Fiat informed the Respondent of its decision to temporarily close the Wisne facility and relocate Wisne employees and their work to the Novi and Royal Oak facilities.⁴ The next day, December 1, the Respondent notified the Union of this decision. In its December 1 email, Respondent's director of manufacturing, Marco Andriano, informed WAEA President Larry LaForest that (i) "[d]ue to business issues" and delay on a Chrysler project, the Respondent would be forced to temporarily shut down the Wisne facility; (ii) work performed at the Wisne facility would be moved to Novi and Royal Oak; and (iii) Tom Durocher, plant manager at Novi, would decide where the Wisne employees would be assigned. At this time, there were 12 WAEA-represented employees working at Wisne.⁵ Also on December 1, Respondent began moving equipment out of Wisne.

On December 1, WAEA President LaForest asked the Respondent's human resources director, Lisa Cormier, for a meeting to discuss the matter. On December 3,

their vote on ratifying the tentative Novi collective-bargaining agreement. Vargo replied that it was not true, and Durocher followed up with a statement that my colleagues and I agree was unlawful (telling Vargo not to interfere with that vote). I acknowledge that a statement may constitute an unlawful interrogation if it "reasonably call[s] for an employee to respond and reveal whether he or she has engaged in protected activity." *Food Services of America*, 360 NLRB 1012, 1016, fn. 10 (2014). Here, however, I do not believe that was the case. Durocher merely stated what he already knew—that Vargo was trying to influence Novi employees' ratification votes—as an introduction to ordering Vargo to stop doing it. The order was unlawful, but I would not find that this converts the preceding statement into an interrogation. Contrary to my colleagues' apparent suggestion, the fact that Vargo responded to Durocher's remark is irrelevant. As described above, the analysis turns on whether the remark reasonably called for a response. The statement at issue here did not.

³ All dates are in 2011 unless otherwise stated.

⁴ There is no allegation that the Respondent was obligated to bargain over this decision.

⁵ The remainder of the approximately 44 WAEA-represented employees were working at other facilities or were on field service assignments or medical leave.

plant manager Durocher and Novi Supervisor Mark Corich met with LaForest and WAEA officers Paul Ciaramitaro, Jack Vargo, and Gordie Gault. LaForest asked Durocher and Corich how the decision came about. Durocher replied that “the Italians” made the decision on the evening of November 30. LaForest asked why the decision had been made. Durocher answered that “it’s just the way it was.” Durocher then said that Ciaramitaro was going to Royal Oak and LaForest to Novi. LaForest replied that he lived closer to Royal Oak and Ciaramitaro lived closer to Novi, and Durocher immediately switched their assignments. No WAEA official raised any other matter or requested discussions or bargaining regarding any other issue concerning the temporary closure or its effects.

On December 5, Wisne employees began to report to their respective new facilities (10 employees were temporarily transferred to Novi and 2 to Royal Oak). On December 15, the last of the 12-unit employees left the Wisne facility.⁶ WAEA continued to represent the Wisne unit employees after they were transferred to Novi and Royal Oak.

The above facts are uncontroverted. Therefore, I disagree with my colleagues’ finding that the Respondent failed to meet its effects-bargaining obligation after Fiat decided to close Wisne temporarily and move Wisne employees and their ongoing work to Novi and Royal Oak. Specifically, I believe the record contradicts their finding that the Respondent announced and implemented these changes as a “fait accompli” that precluded effects bargaining. In my view, two considerations warrant a finding that Respondent did not present the Union with a fait accompli.

First, and most importantly, the judge’s factual findings reveal that the Respondent and the Union *actually engaged in effects bargaining* regarding the Wisne facility’s temporary shutdown and the resulting temporary transfer of Wisne employees to the Novi and Royal Oak facilities. As noted above, Fiat communicated its decision to the Respondent on the *evening* of November 30. The very next day, December 1, Respondent notified the Union of the decision. The Union asked for a meeting, and the parties met on December 3. The Union’s representatives asked the Respondent three questions: how the decision came about, why the decision had been made, and whether WAEA officers LaForest and Ciaramitaro could be assigned to facilities closer to their homes. The Respondent answered the first two questions

and agreed to make the requested assignments. Thus, the Respondent promptly notified the Union of the decision, agreed to meet with the Union, answered every question the Union asked, and accommodated the Union’s one and only “effects” request. WAEA did not raise any other issues at the December 3 meeting or otherwise request further bargaining, and there is no evidence that Respondent refused to engage in further discussion or bargaining. Moreover, the Union’s failure to seek further effects bargaining cannot be excused on the basis that it had lost bargaining leverage: at all times, the Union continued to represent employees upon whom the Respondent relied for services. See *Komatsu America Corp.*, 342 NLRB 649, 649 (2004).

Second, my colleagues’ reliance on the Board’s “fait accompli” doctrine in this effects-bargaining case is misplaced. The phrase *fait accompli* refers to “something that has been done and cannot be changed.”⁷ In Board cases, what constitutes an unlawful *fait accompli* varies depending on whether a particular situation involves mandatory *decision* bargaining or mandatory *effects* bargaining.⁸ When decision bargaining is required—which is not alleged here—the employer must provide the opportunity for bargaining over potential alternatives to a tentative decision. In such a context, it is an unlawful *fait accompli* if the employer unilaterally formulates and announces a final decision (thus foreclosing negotiation over potential alternatives). When a case involves effects bargaining, it is lawful for the employer to unilaterally formulate and announce a final decision. However, the employer must provide the opportunity for bargaining over the decision’s effects—i.e., how its *implementation* will affect represented employees—and an unlawful *fait accompli* can occur only if the employer fails to provide reasonable notice and the opportunity for bargaining before implementation. See, e.g., *Komatsu America*, *supra* (“Effects bargaining also must occur sufficiently before actual implementation of the decision so that the union is not presented with a fait accompli”) (citations omitted); *Los Angeles Soap Co.*, 300 NLRB 289, 289 (1990) (“Ab-

⁷ Merriam-Webster Dictionary, definition of “fait accompli” (<http://www.merriam-webster.com/dictionary/fait%20accompli>) (last visited Sept. 30, 2014).

⁸ The Board and the courts have long distinguished between management actions that are mandatory subjects of *decision* bargaining (e.g., changes in wages, hours and other terms and conditions of employment) and actions where decision bargaining is *not* required but where the employer must provide the opportunity for *effects* bargaining (e.g., negotiations regarding how the decision will affect bargaining unit employees). See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (holding that, although a partial plant closing decision is *not* a mandatory subject of decision bargaining, “bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time”).

⁶ On June 5, 2012, the Respondent reopened the Wisne facility, and all WAEA-represented employees who were working at other facilities returned to Wisne.

sent special or emergency circumstances, . . . the Board has held that pre-implementation notice is required to satisfy the obligation to bargain over the effects of a decision to close.”) (internal quotations and alterations omitted).

Here, the Respondent learned on November 30, in the evening, that its owner had made the decision to temporarily shut down the Wisne facility and transfer all Wisne work to the Novi and Royal Oak facilities. The very next day, the Respondent gave notice to the Union. At that point, there was no *fait accompli* for effects-bargaining purposes because the effects were not “something that has been done and cannot be changed.”⁹ Indeed, after the Union requested a meeting, representatives of the Respondent and Union participated in a meeting 2 days later, on December 3, at which the Respondent *changed* two transfer assignments at the Union’s request. There is no evidence that the Union raised any other issues or requested bargaining regarding other effects, or that the Respondent suggested that it would be futile for the Union to do so.¹⁰ Employee transfers did not commence until December 5, and the last employee left the Wisne facility on December 15.

In support of their 8(a)(5) violation finding, my colleagues advance arguments that may be relevant to *decision* bargaining but are irrelevant to effects bargaining. They say that the Respondent “presented the shutdown and transfer as final,” but this is entirely permissible in a case that only involved mandatory effects bargaining.

⁹ Merriam-Webster Dictionary, *supra* fn. 21.

¹⁰ My colleagues quarrel with the dictionary definition of “*fait accompli*,” but we do not disagree regarding the applicable standard. As my colleagues state, “notice and an opportunity to bargain” concerning the effects of a decision “must be given before implementation of the decision.” As explained in the text, I believe the Respondent met its obligations under this standard. Even though the Respondent had provisionally decided who would transfer to Novi and who to Royal Oak, those decisions remained fluid, as the Respondent’s prompt accommodation of LaForest’s and Ciaramitaro’s transfer requests demonstrates. And the Union could have but did not raise additional effects at the December 3 meeting. My colleagues appear to argue that the Union was excused from raising additional issues at that meeting because LaForest testified that the Respondent’s representatives had already “made up their mind” about the shutdown and transfer decisions. But the shutdown decision is not at issue. That decision was not subject to bargaining. At issue here are the *effects* of that decision. Transfers were one such effect. As just stated, however, transfer destinations remained fluid and were, in fact, bargained *and changed*. And there is no evidence the Respondent indicated that it would have been futile for the Union to propose bargaining regarding *additional* effects of the shutdown decision. In short, the Union had the opportunity to raise other matters, and its failure to do so does not make *the Respondent’s* conduct unlawful. See, e.g., *Berklee College of Music*, 362 NLRB 1517, 1518 (2015) (“Once the employer has furnished a meaningful opportunity to bargain, it is incumbent on the union to pursue its bargaining rights.”).

Again, the decision was to temporarily shut down Wisne and transfer its employees to Novi and Royal Oak, and there is no allegation that Respondent had a duty to bargain over this decision. Thus, Respondent could lawfully announce a final decision as long as it provided reasonable notice and the opportunity for effects bargaining before the decision directly affected unit employees. As explained above, the Respondent did so.

Nor is this analysis affected by the fact that the Respondent commenced moving equipment from the Wisne facility on December 1. Moving equipment was an inseparable part of the decision, which (again) was to temporarily shut down the Wisne facility and *transfer the work* to Novi and Royal Oak. Moving the work necessarily meant moving the equipment used to perform the work. However, neither Board law nor the record supports a finding that taking these types of actions, when they follow directly from the decision, precludes meaningful effects bargaining. Indeed, not only did the Respondent give the Union almost the same amount of notice as it had received, the record shows that meaningful effects bargaining occurred while everyone remained employed and before any employee transfers commenced. See *Chippewa Motor Freight*, 261 NLRB 455, 460 (1982) (no effects-bargaining violation, even though employer gave notice to the union only 2 days before shutdown occurred, where the employer “was not required to bargain about the decision to close” and “the record [did] not show that the decision to close was made substantially in advance of the notice” to the union); *Kingwood Mining Co.*, 210 NLRB 844, 845 (1974) (no effects-bargaining violation, even though shutdown decision was announced as a *fait accompli*, where “Respondent’s conduct . . . did not reflect a purpose to foreclose bargaining negotiations regarding the consequences of the shutdown,” and “[n]or did the Union ever test Respondent’s willingness to satisfy its bargaining obligation in this respect”), *affd.* sub nom. *UMW v. NLRB*, 515 F.2d 1018 (D.C. Cir. 1975); *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1035–1036 (10th Cir. 1996) (court finds no effects-bargaining violation where employer announced subcontracting decision 1 day after notifying union, where employees remained on the payroll).

For similar reasons, I believe the record does not support my colleagues’ finding that Respondent irrevocably determined, before meeting with the Union, “where each of the 12-unit employees who remained at Wisne would be transferred.” Again, the *decision* was that each unit employee would be transferred either to Novi or to Royal Oak. All that was left to bargain in that regard was who went where—and the Respondent *changed* LaForest’s and Ciaramitaro’s assignments at the Union’s request.

Thus, the Respondent demonstrated that employee assignments were open for discussion.¹¹ There is no evidence that the Respondent in any way indicated to the Union that it would not entertain further assignment requests or any other proposal concerning the effects of the shutdown and transfer decision, nor did the Union request further bargaining over other potential effects. *Kingwood Mining Co.*, supra.¹²

In short, this is an effects-bargaining success story. The Respondent gave the Union almost as much notice as it had been provided regarding Fiat's temporary shutdown/transfer decision. The parties engaged in effects bargaining 2 days later. An additional 2 days passed before any employee transfers commenced. The Respondent changed its planned implementation in response to a union request, and the Union raised no other issues regarding effects. In my view, these facts do not reasonably permit a finding that the Respondent failed to satisfy its obligation to engage in effects bargaining.¹³

B. The Unilateral Application of Novi/Royal Oak Shop Rules to Wisne Employees

On January 23 and February 3, 2012, the Respondent implemented new shop rules at Novi and Royal Oak,

respectively. These rules were more restrictive than the Wisne shop rules with respect to overtime, vacation policy, sick and personal days, and discipline, and the transferred Wisne employees lost their seniority rights for the duration of their transfer. Without giving the WAEA notice and opportunity to bargain, the Respondent informed employees that the Novi and Royal Oak shop rules would be applied to all employees, including those represented by WAEA.

I agree that these actions constituted unlawful unilateral changes in violation of Section 8(a)(5). However, I disagree with my colleagues' finding that the changes also constituted unlawful mid-term contract modifications to the WAEA collective-bargaining agreement.

For purposes of Section 8(a)(5), there is a fundamental difference between an unlawful unilateral change on the one hand, and an unlawful mid-term contract modification on the other. When a particular change relates to a mandatory subject of bargaining (for example, discipline for different types of employee misconduct), the change can lawfully be implemented during the term of a collective-bargaining agreement—even over the union's objection—but only if the change is preceded by reasonable advance notice and the opportunity for bargaining either to impasse or agreement regarding the change. *NLRB v. Katz*, 369 U.S. 736 (1962). However, if a change constitutes a mid-term “modification” of a collective-bargaining agreement, Section 8(d) indicates that such a modification cannot lawfully be implemented, even if there is advance notice and the opportunity for bargaining, *unless the other party consents* to the change.¹⁴

To prove a contract modification, the General Counsel must show that “the employer has altered the terms of a contract without the consent of the other party.” *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *affd.* sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). It is well established that unilateral changes do not constitute unlawful mid-term contract modifications for purposes of Section 8(d) unless they modify one or more express provisions “contained in” the collective-bargaining agreement. *Milwaukee Spring Division*, 268 NLRB 601 (1984) (“*Milwaukee Spring II*”), *affd.* sub nom. *Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

¹¹ Indeed, the speed with which the Respondent agreed to the request to reassign LaForest and Ciaramitaro suggests that Respondent was more than open to discussion and may have been willing to accede to further reasonable proposals—based, perhaps, on an awareness that the timing of Fiat's decision meant that effects bargaining would have to proceed with some alacrity. However, the Union chose not to test Respondent's willingness. *Naperville Jeep/Dodge*, 357 NLRB 2252 (2012), which my colleagues rely on, is materially distinguishable from the instant case. In *Naperville Jeep/Dodge*, the employer “gave no indication that it was willing to bargain in good faith” concerning the effects of its decision. *Id.* at 2272. Here, by contrast, the Respondent agreed to meet with the Union and agreed to make the one and only change the Union proposed, thus demonstrating its willingness to engage in good-faith effects bargaining.

¹² My colleagues contend that the Respondent's failure to argue that the timing of the shutdown's implementation was “controlled by Fiat or necessitated by any economic exigency” supports a finding that the Respondent did not give the Union sufficient notice and an opportunity to engage in effects bargaining. I disagree. As I have explained, the Respondent gave the Union almost the same amount of notice it had received. Further, meaningful effects bargaining occurred while everyone remained employed and before any transfers commenced. In these circumstances, the Respondent was not required to establish that its action was necessitated by an emergency. Rather, its conduct was consistent with that of employers in cases cited above, which establish that meaningful effects bargaining can occur in a short timeframe. See *Chippewa Motor Freight*, supra; *NLRB v. Oklahoma Fixture*, supra.

¹³ Based on their finding of an effects-bargaining violation and evidence that WAEA-represented employees routinely work at all five of the Respondent's Detroit-area facilities, my colleagues order the Respondent to post the remedial notice at all five facilities and to mail the notice to all WAEA-represented employees. Because I would dismiss the effects-bargaining allegation, I do not join in ordering these remedies.

¹⁴ Sec. 8(a)(5) and 8(b)(3) make it an unfair labor practice if employers or unions, respectively, fail or refuse to “bargain collectively.” The phrase “bargain collectively” is defined in Sec. 8(d), which (among other things) refers to the obligation of employers and unions to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment,” but with a proviso that no party to a collective-bargaining agreement “shall terminate or modify such contract, unless the party desiring such termination or modification” fulfills certain specified requirements.

The General Counsel here did not establish that any collective-bargaining agreement provisions contained in the Wisne agreement were altered. Although the WAEA collective-bargaining agreement contained its own shop rules, that agreement expressly relates only to the Wisne facility. In fact, the recognition clause in the WAEA agreement is specific to the Wisne facility, which the agreement identifies by its street address.¹⁵ And no collective-bargaining agreement provision indicates what rules apply to Wisne employees if or when they work at another facility.¹⁶ Because the Wisne agreement, by its terms, has no application at other facilities, and there is no other evidence that the Respondent's actions modified terms "contained in" the Wisne agreement, I believe the record does not reasonably support a finding that the Respondent's application of the Novi and Royal Oak shop rules to WAEA employees while they worked at the Novi and Royal Oak facilities constituted an unlawful mid-term modification of the Wisne agreement.

Accordingly, as to the above issues, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose 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.

¹⁵ The collective-bargaining agreement indicates that Respondent recognizes the WAEA as the representative of Wisne employees in the following unit: "All full-time and regular part-time production and maintenance employees, including inspectors, employed by the Employer at its facilities located at 42445 West 10 Mile Road, Novi, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act."

¹⁶ The record suggests that Respondent in the past has applied the Wisne collective-bargaining agreement at sometimes in the past when employees have worked at other facilities. However, even if such a practice existed, it was not expressed in any collective-bargaining agreement provisions. Therefore, even though Respondent engaged in an unlawful unilateral change regarding the rules to be applied to Wisne employees working temporarily in other facilities, such a change did not constitute an unlawful mid-term contract modification for purposes of Sec. 8(a)(5) and 8(d).

WE WILL NOT fail and refuse to bargain with the Wisne Automation Employees Association (Union), as the exclusive bargaining representative of our employees in the appropriate unit below, by failing and refusing to bargain over the effects of the idling of the Wisne facility and the transfer of unit employees from the Wisne facility to the Novi and Royal Oak facilities.

The unit is:

All full-time and regular part-time production and maintenance employees, including inspectors, employed by the Employer at its facilities located at 42445 West 10 Mile Road, Novi, Michigan, but excluding all office clerical employees, guards and supervisors as defined by the Act.

WE WILL NOT fail to continue in effect any provisions of the August 22, 2011, to May 3, 2015 collective-bargaining agreement covering the unit employees without the Union's consent.

WE WILL NOT make unilateral changes without notice to and bargaining with the Union regarding the terms and conditions of employment of unit employees.

WE WILL NOT inform unit employees that the Union no longer exists at the Novi facility.

WE WILL NOT interrogate employees about their union and protected concerted activities.

WE WILL NOT direct employees not to discuss issues involving union and protected concerted activity with other employees.

WE WILL NOT threaten employees with layoffs and transfers if they do not acquiesce in unilaterally imposed work rules.

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

WE WILL apply and restore the terms and conditions of employment that were applicable to the unit employees under the August 22, 2011, to May 3, 2015 collective-bargaining agreement covering the unit employees, and continue in effect all of the terms and conditions of employment contained in the collective-bargaining agreement, or other applicable collective-bargaining agreement, with the Union.

WE WILL refrain from implementing any changes in terms and conditions of employment that are not covered by a current collective-bargaining agreement without first notifying and, on request, bargaining with the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL rescind the unlawful unilateral changes that we made to the terms and conditions of the unit employees.

WE WILL make the unit employees whole, with interest, for any losses of wages and other benefits they suffered as a result of our failure to abide by the terms of the August 22, 2011 to May 3, 2015 collective-bargaining agreement and our unlawful unilateral changes in the unit employees' terms and conditions of employment.

WE WILL compensate the affected employees for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL rescind any discipline imposed pursuant to the Novi and Royal Oak rules upon unit employees who were temporarily assigned to the Novi and Royal Oak facilities.

WE WILL, within 14 days from the date of the Board's order, remove from our files any references to unlawful discipline imposed pursuant to the Novi and Royal Oak rules upon unit employees, and within 3 days thereafter notify the employees in writing that this is been done and that the discipline will not be used against them in any way.

COMAU, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-073073 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Darlene Haas Awada and Patricia Fedewa, Esqs., for the Acting General Counsel.

Theodore Oppenwall, Thomas Kienbaum, and Ryan Bohannon, Esqs., for the Respondent.

Larry LaForest, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 1, 2, and 3, 2012. The Wisne Automation Employees Association (WAEA) filed the

charge on January 25, 2012, a first amended charge on March 5, 2012, and a second amended charge on April 16, 2012. The General Counsel issued the complaint on April 27, 2012.

The complaint alleges that the Respondent, by Tom Durrocher, violated Section 8(a)(1) of the Act in early January 2012 by coercively interrogating employees about their discussions of union matters with other employees and directing employees not to discuss union matters with other employees and by, on or about January 18, 2012, threatening employees that if they did not accept new work rules that vary from the provisions in their collective-bargaining agreement, they could take layoffs. The complaint also alleges that the Respondent, by Mark Corich, violated Section 8(a)(1) about February 24, 2012, by informing employees in the WAEA unit that their Union no longer existed.

The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in unilateral changes in the following respects on the following dates: on December 1, 2011, announcing to unit employees the idling of the Wisne Automotive facility; on December 15, 2011, by idling that facility and transferring unit work and unit employees to other facilities, including its Royal Oak facility and its Novi facility; and on February 24, 2012, by Mark Corich, by informing employees that officials of the WAEA would no longer be able to conduct union business during worktime.

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) and 8(d) of the Act by engaging in the following conduct: about January 23, 2012, at its Novi facility, failing to continue in effect all the terms and conditions of the WAEA agreement by distributing new work rules to unit employees which altered certain provisions of the WAEA agreement and about February 3, 2012, at its Royal Oak facility, failing to continue in effect all the terms of the WAEA agreement by distributing new work rules which altered certain provisions of that agreement.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Southfield Michigan, and various facilities in the metropolitan Detroit, Michigan area is engaged in the design, nonretail sale, and installation of automated industrial systems. During the calendar year ending December 31, 2011, the Respondent performed services valued in excess of \$50,000 in States other than the State of Michigan. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent, which is wholly owned by Fiat, designs, builds and installs automated assembly lines and robotic

equipment, principally for the automotive industry. The Respondent employs approximately 1100 individuals in the United States at various facilities. In the Detroit, Michigan, metropolitan area the Respondent operates five production facilities: Comau Automation, which is referred to by the parties as Comau Automation or Wisne Automation (Wisne); Novi Industries; Southfield, Royal Oak, and Warren. The Respondent's permanent production employees are skilled employees who work in classifications such as machine builder, electrician, pipefitter, robot technician, and welder. The Respondent also employs individuals on certain projects obtained from staffing agencies. The parties refer to these individuals as "contractors."

The WAEA represents approximately 44 unit employees who generally work at the Wisne (Comau Automation) facility. The Respondent and the WAEA have had collective-bargaining history since 2000 when the Respondent acquired its operations in the Detroit area (Tr. 270). The record contains the 2008 to 2011 collective-bargaining agreement between the parties (Jt. Exh. 5) and their present collective-bargaining agreement, which is effective from August 22, 2011, to May 3, 2015 (Jt. Exh. 6).

The collective-bargaining agreement indicates that the Respondent recognizes the WAEA as the exclusive bargaining representative in the following unit:

All full-time and regular part-time production and maintenance employees, including inspectors, employed by the Employer at its facilities located at 42445 West 10 Mile Road, Novi, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.¹

The Respondent also operates two plants located at 44000 and 43900 Grand River, in Novi, Michigan, which are referred to as Novi Industries (Novi or the Novi facility). The production and maintenance employees at the Novi facility are represented by the Novi Industries Employees Association (NIEA). There are approximately 200 employees in that bargaining unit. At the Respondent's facility in Southfield, Michigan, the production and maintenance employees are represented by the Comau Employees Association (CEA). There are approximately 170 employees in that bargaining unit.² The Respondent also operates facilities in Royal Oak and Warren, Michigan. At the time of the hearing there were approximately 100 unrepresented "white-collar" employees and 15 unrepresented production and maintenance employees working at the Royal Oak facility. The Warren facility is normally used for relatively short-term projects and the Respondent has not employed permanent employees at that facility. All of the individuals working at Warren at the time of the hearing were contractors.

The three unions representing the Respondent's employees

in the Detroit area are independent unions and are not affiliated with each other. Each union has a separate collective-bargaining agreement with the Respondent which it negotiates individually. The employees represented by the WAEA have their own seniority list. This list sets forth the seniority date of each employee in the classification in which they work (i.e., machine builder, electrician, and pipefitter). This list is updated by the Respondent each month.

During the time material to this case, Marco Andriano was the Respondent's director of manufacturing; David McKee served as its general counsel; Lisa Cormier was the human resources director; Tom Durocher was the Novi plant manager, and Mark Corich was a supervisor at Novi.³ Larry LaForest was the WAEA's president; Paul Ciaramitaro was the treasurer; and Jack Vargo was the secretary.

The Respondent's represented employees at times work outside their "home plant" (Wisne, Novi, or Southfield) by being temporarily assigned to another one of the Respondent's facilities or being assigned to "field service" work. Field service work occurs when the Respondent's production employees are assigned to work at a customer's facility, typically installing the Respondent's equipment at the facility or performing maintenance work.

The current contract between the Respondent then the WAEA provides for "Location Transfer" (Jt. Exh. 6, art. 4.04). This article provides, in relevant part:

From time to time, when absolutely necessary, that Company may require employees to work temporarily at other permanent or temporary Comau Inc. facilities in Southeastern Michigan. When such transfers are needed the Company will follow the seniority roster with the lowest seniority employee requested to go first. Except as set forth in Article 5: Field service for new employees, if an employee refuses the transfer and there are no other volunteers to replace him/her, he/he will suffer no disciplinary action and will be placed on laid off status.

The Application of the WAEA Contract outside of the Wisne (Comau) Automation plant prior to January 2012

In 2009, the Respondent temporarily closed the Wisne plant and did not reopen it until January 2011. On March 25, 2009, the Respondent, the WAEA, and the NIEA executed a letter of understanding which provided that the WAEA and the NIEA would coexist in the Novi facility and that WAEA represented employees would perform a specified list of projects. The agreement specifically indicated that "During this period, both the NIEA and the WAEA will maintain their current structure with respect to its Union committee, team leaders and seniority." Pursuant to this agreement, the WAEA represented employees worked on the enumerated projects in a specific bay located at the Novi Industries facility. During this period all of the provisions of the WAEA collective-bargaining agreement applied to the employees the WAEA represented while they were working at Novi.

Prior to January 2012, there are other instances of the

¹ The complaint alleges that the appropriate unit is somewhat different than the contractual unit description. In relevant part, the complaint describes the geographic location of the employees in the unit as follows: "employed by Respondent at and out of its facility located at 42445 West 10 Mile Road, Novi Michigan." The Respondent's answer denied the unit pled in the complaint is the appropriate unit.

² The recent collective-bargaining history at that facility is discussed extensively in *Comau, Inc.*, 356 NLRB 75 (2010), enf. denied 671 F.3d 1232 (D.C. Cir. 2012), and *Comau, Inc.*, 358 NLRB 593 (2012).

³ At the time of the hearing Durocher and Corich were no longer employed by the Respondent.

WAEA contract being applied to Wisne employees when they were working outside of the Wisne facility. The record establishes, and the Respondent does not dispute, that the provisions of the WAEA contract regarding wages, health insurance, life and disability insurance, the 401(k) plan, classifications, and paid holidays were applied to WAEA represented employees regardless of where they worked.

The dispute between the parties involves essentially the application of the attendance policies and shop rules contained in the WAEA contract, and practices regarding overtime and layoff, to WAEA represented employees working outside of the Wisne Automation plant. In this connection, LaForest testified that when he worked at the Royal Oak facility during the period from January through May 2010, he was able to use his personal days and vacation days as set forth in the WAEA contract (Tr. 149, GC Exh. 44). Ciaramitaro testified that while working at the Novi facility in May and June 2010, the WAEA employees were assigned overtime prior to contractors. During this period Ciaramitaro was never informed by anyone in management that the shop rules in the WAEA contract did not apply to him. Vargo testified that all the provisions of the WAEA contract, including the shop rules in article 26, applied to him when he worked at the Novi facility from October 2011 until January 2012, when new rules were applied at the Novi facility. (Tr. 79, 84–86.) Vargo also testified that when assigned to field service work, the WAEA contract governs his conditions of employment, but he acknowledged that he would also have to abide by the customer's plant rules.

Current employee Steve Brooks testified that he has worked for the Respondent and its predecessor as a pipefitter since 1984. During his entire period of employment, his home plant has been the Wisne facility and he has always been represented by the WAEA. In September 2009 he was assigned to the Respondent's Royal Oak facility and worked there until January 2010. He was then assigned to field service at a customer's assembly plant and returned to work at the Royal Oak facility in November 2010. While he was working at Royal Oak in February and March 2011, he used personal days under the WAEA contract. (GC Exh. 46.) Brooks further testified that he went on medical leave on October 27, 2011, and when he returned to work on January 13, 2012, he was assigned to the Novi facility. When he reported to Novi, consistent with the WAEA contract, he was not given a drug test. The terms of NIEA contract applicable to the Novi facility, which had expired by its terms on April 3, 2011 (Jt. Exh. 1) contained a provision that employees were to undergo a drug screen after returning from an absence of more than 30 days. (Jt. Exh. 1, art. 37.09.)

The record establishes that the Respondent applied certain practices with respect to the assignment of overtime and selection of employees for layoff at its various plants in the Detroit area prior to January 2012, when its employees were not working at their home plant.

When overtime was assigned, employees of the home plant were given the opportunity first, then the Respondent's employees who were represented by one of the other unions would be assigned overtime. Finally, contractors would be given an opportunity for overtime. (Tr. 120, 272, 394–395.)

Layoffs were conducted on the basis of classifications since there is a sequential order in the manner in which the equipment manufactured by the Respondent is built. Machine builders start the process of building the equipment, pipefitters then begin their work and finally electricians wire the equipment. Because of the nature of the production process, when employees are laid off, they are laid off within a classification, by seniority. Machine builders would be the first classification to be laid off, followed by pipefitters and finally electricians. The first individuals to be laid off within each classification would be contractors. Then, employees of the Respondent, who were not working at their home plant, would be laid off by classification according to the seniority list of their home plant. The last employees to be laid off would be the employees working at their home plant. (Tr. 80, 125, 164–168.) In situations where, in addition to employees of the home plant, employees represented by both of the Respondent's other unions were working at that plant, the general practice was to lay off employees represented by the two other unions proportionally in an equitable fashion, before laying off the employees of the home plant. (Tr. 154–156.)

LaForest testified that in 2008 at the Novi facility he and other employees represented by the WAEA were working along with employees of the Southfield facility represented by the CEA and Novi employees represented by the NIEA. On this occasion, the Respondent laid off the WAEA represented employees and retained the CEA represented employees. LaForest raised the issue personally with the then human resources director, Fred Begle and the director of manufacturing, Ron Kyslinger. LaForest indicated to both individuals that in this situation the practice had been to lay off visiting employees represented by the two other unions in an equitable, proportionate manner. Begle told LaForest he would take care of the matter but later advised him that Kyslinger had overruled him. In this instance, the WAEA represented employees were laid off prior to the CEA represented employees. (Tr. 158–162.)⁴

The December 2011 Temporary Shutdown of the Wisne (Comau) Automation Facility

On December 1, 2011, the Respondent's director of manufacturing, Marco Andriano, sent an email to LaForest (GC Exh. 25) indicating, in relevant part, that "due to business issues" and a delay on a Chrysler project the Respondent would be forced to temporarily shut down the Comau (Wisne) Auto facility. The email further indicated that the ongoing work would be moved to different facilities, specifically referring to Novi, Autotech,⁵ and Royal Oak. The email concluded that all of the Comau Auto personnel would be relocated pursuant to the di-

⁴ Although LaForest protested the matter, the WAEA did not file a grievance over this issue. However, as counsel for the Acting General Counsel note in their brief, both the 2008–2011 contract and the current contract between the Respondent and the WAEA contain a clause which indicates that a waiver of rights "in one case does not establish a precedent of waiving the same rights in the future." (Jt. Exh. 5, sec. 6.04; Jt. Exh. 6, art. 10.)

⁵ The Autotech facility is located on the Novi campus and covered by the Novi collective-bargaining agreement.

rection of Tom Durocher, the then Novi Industries plant manager.

At the time of the notification of the temporary closing, there were approximately 12 employees at the Wisne facility working on automated robotic equipment called aircraft gantries. The remainder of the approximately 44 employees represented by the WAEA were working at other Respondent facilities, were on field service assignments or were on medical leave.

The email from Andriano was the first notification the WAEA had received from the Respondent regarding the temporary closure of the Wisne facility. After receiving the email, LaForest contacted Cormier and requested a meeting to discuss the closure. Cormier agreed to schedule a meeting. On approximately December 3, a meeting was held between the WAEA and the Respondent. Present for the WAEA were LaForest, Ciaramitaro, Vargo and recording secretary, Gordie Gault. Present for the Respondent were Durocher and Corich. When LaForest asked how the decision came about to temporarily close the Wisne facility, Durocher said that on the evening of November 30, "the Italians" made a decision to close the Wisne facility and relocate the existing work to Novi Industries.⁶ When LaForest asked why that decision was made, the Durocher responded "it's just the way it was." (Tr. 187.) Durocher indicated that Ciaramitaro was going to be assigned to Royal Oak while LaForest would be assigned to Novi. When LaForest pointed out that he lived closer to Royal Oak and that Ciaramitaro lived closer to Novi, Durocher indicated they would be assigned to the facilities closer to their home. There were no other discussions regarding the effects of the closure at this meeting.

The Respondent assigned 10 of the employees to Novi Industries while two pipefitters were assigned to the Royal Oak facility. The employees began to report those facilities on Monday, December 5, 2011. Shipping employee Ronnie Deline, who was responsible for packing and shipping the equipment, was the last employee to leave the Wisne facility on December 15, 2011. The equipment from the Wisne facility that was used in assembling the aircraft gantry was moved to Royal Oak.

On June 5, 2012, the Respondent reopened the Wisne facility and all WAEA represented employees who were working at other facilities of the Respondent were transferred back to that facility.

Statements Made by Supervisors Regarding the Novi Contract

Vargo testified he was assigned to work at the Novi facility after the temporary closure of the Wisne facility. According to Vargo's uncontroverted testimony, in December 2011, while he was working at Novi, Durocher stopped him on the shop floor and told Vargo that his name had been brought up and that Durocher had heard that he was influencing the Novi employees about changing their vote on their contract. Vargo replied that was not true. Durocher told Vargo that he did not want him

to interfere with the Novi employees' vote on their contract.⁷

According to the credible, uncontroverted testimony of LaForest and Ciaramitaro, in late December 2011, they attended a meeting with Andriano and other management and union officials at the Respondent's Southfield facility. After the meeting, Andriano asked LaForest and Ciaramitaro to step into an office to speak with him. An individual from the human resources department was present, but neither Laforest nor Ciaramitaro could recall that individual's name. Andriano told Laforest and Ciaramitaro that he had heard that WAEA represented employees at Novi were talking to the Novi employees about the Novi contract that was being negotiated. Andriano said that he wanted Laforest and Ciaramitaro to tell their "guys" at Novi not to talk about the contract. Andriano said he should not say this in front of human resources, but if LaForest and Ciaramitaro did not speak to their members about this, he would shut their plant down permanently. LaForest and Ciaramitaro said they would speak to their members about not talking about the Novi contract negotiations.⁸

The Application of New Novi Work Rules to WAEA Represented Employees

On January 18, 2012, the Respondent executed a new collective-bargaining agreement with the NIEA which was effective by its terms from January 11, 2012, covering the Novi facility. (Jt. Exh. 2.) This agreement had been ratified by the NIEA membership on approximately January 11. Article 1 of the NIEA collective-bargaining agreement altered the recognition clause by adding the following after the description of the unit covered by the agreement:

Any other person that is employed by the Employer and is considered as a regular, full-time employee at another Comau, Inc. facility will be obligated to follow the established protocol and rules as set forth in this agreement for all purposes while they are working within the NIEA bargaining unit. This does not alter the following earned (paid) benefit from the employee's home bargaining unit:

Wages

⁷ At the time of this conversation the Novi employees, who are represented by the NIEA, were considering whether to ratify a new collective-bargaining agreement at their facility. Vargo testified that Novi employees asked him what was in the WAEA contract and some employees told Vargo that they did not like the new contract and were not going to vote for it. Vargo testified that he agreed with those employees who did not think the new NIEA contract was a good one.

⁸ There is no complaint allegation regarding statements made by Andriano. At the trial, counsel for the Acting General Counsel indicated that it was being admitted as background to the complaint allegation regarding Durocher's statement to Vargo that is recited above. I indicated that I would consider this evidence for that purpose but would not consider the evidence as a violation of the Act unless an amendment to the complaint was made at the hearing. No such complaint amendment was made. While the statements made by Andriano were not contained in the affidavits that LaForest and Ciaramitaro gave during the investigation of this case, I found their trial testimony regarding this event to be credible. Their testimony was mutually corroborative and consistent and their demeanor while testifying exhibited certainty regarding the statements made to them.

⁶ None of the individuals who participated in the decision to temporarily close the Wisne facility testified at the hearing.

Vacation
Healthcare benefits

Non-NIEA employees temporarily transferred into the Novi facilities will have no seniority rights within the NIEA bargaining unit.

In mid-January 2012, the Respondent began to hold meetings with employees and contractors who were working at Novi to inform them of the new rules that would be applied there. The uncontroverted testimony of Brooks and Ciaramataro establishes that in one such meeting held at Novi in the maintenance department in mid-January 2012, there were approximately 25 employees and contractors present. Supervisors Matt Parsons and Mark Corich were present but Parsons did most of the talking during the meeting. Parsons stated that the NIEA had settled its contract. He also stated that there was a new set of rules for the Novi facility and that everybody who was working at the facility would have to abide by those rules. He specifically stated that the attendance policies would be changed and that personal days and sick days were no longer valid as they were “negotiated items” and not a “company benefit.” Parsons also stated that the WAEA contract was void at Novi.

On January 17, 2012, after the meetings with employees on the shop floor were held at Novi, LaForest, Vargo, Ciaramitaro, and Gault met with McKee, Cormier and Durocher to discuss what employees had been told about the application of new rules at Novi.⁹ McKee indicated that the Novi employees had ratified their contract and that management wanted to be clear about how the new rules would apply to employees while they working at Novi. LaForest said he wanted something in writing and did not see how management could go out and tell the WAEA represented employees about these rules at this point. Cormier indicated that the contract was not yet signed and that until it was signed she could not finalize any of the other documents that went with it.

Durocher stated that because the NIEA was the bargaining agent at Novi, he owed “due diligence” to the NIEA first and that he owed the WAEA nothing relative to the validity of that contract. He stated that “you didn’t vote on the contract because you are not part of this union.” He added that “if you like this, you can become part of the Novi union.” (GC Exh. 43, p. 6.)

Durocher indicated that the Respondent had agreed that the WAEA, the NIEA, and the CEA employees have the “ability to exercise companywide seniority relative to displacing non-Comau employees also known as contractors.” He indicated, however “you do not have the right to come to the new plant and say, by the way, my rulebook is what I’m working to.” Durocher then stated that “if you can’t live by these rules, you might want to just say I’ll stay on layoff or I’ll wait for different opportunity to come my way. That’s the deal, okay.” (GC Exh. 43, pp. 9–10.)

Durocher told the WAEA representatives that “Your contract has nothing to do with this plant.” Durocher indicated that earned benefits such as seniority, vacation health insurance, and

life insurance go with employees wherever they went within the company but that rules do not, as rules are plant specific. He reiterated that “the rules in the Novi facility apply to everybody that works in here. Attendance which seems to be the sticking point, is a rule.” (GC Exh. 43, p. 11.)

Durocher also told the WAEA representatives that “when it comes to seniority you have no seniority rights within [the Novi] facility.” He stated that WAEA employees had no right to claim overtime over a contractor as “there are no seniority rights beyond the NIEA.” When Vargo asked how long the WAEA employees would be working at Novi, Durocher said that he had no idea and then stated, “you guys have the right to do voluntary layoffs in your language.” Cormier agreed that was the case.

When LaForest asked Durocher if he could find out if the Respondent could get rid of the contractors, Durocher stated he could not answer that. Durocher then stated, “you guys don’t want to come in, take a voluntary layoff, here’s the deal, you displaced the contractor I had in here making money for us. That’s okay you’re making money for us. But understand something; the Company does not need permission from you guys to do our job.” He added “I’m just saying there’s openings in Alabama, too. Would you like me to transfer you there and give you two weeks to report down there, and if you don’t show up it’s a voluntary quit? Because we checked we can do that, too. You don’t get to pick where your transfer goes, you go where the opening is or you say I don’t want to do it, I’ll stay on layoff. So-happy if we can explore that opportunity, too. We’re asking you people to work with us. But you know what-I have-no problems with outside contractors or Novi people in all of these discussions. The only problems come from your guys’ union because of the personal days. And there is no way I’m going to do that.” (GC Exh. 43, p. 29.) Near the end of the meeting Durocher stated that the rules would take effect on the coming Monday (January 23) and indicated that the Respondent would not give copies of the rules to the WAEA before they were given to the NIEA.

On January 20, 2012, the WAEA filed a grievance (GC Exh. 36) claiming that by applying the Novi rules to employees it represented the Respondent was violating article 1, the recognition clause of its current collective-bargaining agreement. The WAEA sought as a remedy that the Respondent honor its contract in its entirety no matter what facility employees were working in.¹⁰ On the same date, the WAEA filed a grievance over the temporary closure of the Comau Auto (Wisne) facility. As a remedy, the WAEA sought the reopening of the facility.

On Monday, January 23, 2012, the Respondent’s supervisors began to distribute to employees and contractors working at the Novi facility a document entitled “Comau Novi Campus Policies and Rules” (Novi rules). The Novi rules were not given to the WAEA prior to their implementation. The Novi rules indicate that they applied to all employees who are temporarily working at the Novi campus. (Jt. Exh. 3.) The rules specifically state:

⁹ Vargo recorded the meeting. A CD recording of the meeting was introduced into the record as GC Exh. 22 and a transcript of the recording was introduced as GC Exh. 43.

¹⁰ The 2011–2015 contract between the Respondent and the WAEA does not contain an arbitration clause although it does contain a no-strike provision.

When temporarily working at the Novi campus, all such employees must comply with the rules and policies as set forth in this document and can be disciplined or terminated for failing to do so. This does not alter the following paid benefits granted to non-NIEA bargaining unit members under their home bargaining unit collective bargaining agreement who may be temporarily working at the Novi campus:

- Wages
- Vacation
- Paid Holidays /Bonus Days
- Healthcare, life, and disability insurance benefits
- Retirement benefits

Non-NIEA bargaining unit members temporarily working at the Novi Campus will have no seniority rights at the Novi Campus, including for purposes of overtime or shift preferences.

The Novi rules make a number of changes in terms and conditions of employment set forth in the WAEA collective-bargaining agreement. The Novi rules eliminate the “50-hour rule” contained in article 25, paragraph 8 of the WAEA collective-bargaining agreement which indicates that when the work schedule for the week is 55 hours or more, an employee is required to work at least 50 hours in that week. That section of the WAEA collective-bargaining agreement further provides that there are other required numbers of hours an employee must work for weekly schedules under 55 hours. The Novi rules also eliminate the provision contained in article 25, paragraph 8 of the WAEA contract which indicates that an employee will be subject to discipline if the employee fails to meet the minimum hours more than 1 week of the month. The parties commonly referred to this provision as the “bad week” rule. In this connection, the Novi rules explicitly state that no “bad weeks” are permitted while working at Novi and that there is no “50 hour” rule. The rule states that, at Novi, employees may be required to work up to a maximum of 58 hours a week.

With regard to personal days, the Novi rules grant one “personal absence day” per month and no credit is given for taking such a day for purposes of calculating the numbers of hours of work regarding overtime pay. The WAEA contract provides that employees can take one “period” of unpaid personal time a month not to exceed two consecutive days and that employees are given credit toward attendance when they use personal time. (Jt. Exh. 6, arts. 6.02 and 6.04). In addition, personal time counts as time worked for calculating when an employee begins receiving overtime pay for the week. (Jt. Exh. 6, art. 12.02.)

The WAEA contract provides that employees are allowed five instances of tardiness a month before discipline would be imposed. (Jt. Exh. 6, art. 25, par. 3.) The Novi rules provide that employees could use three “flextime opportunities” per calendar month. In addition, the Novi rules have no provision for sick time while the WAEA contract provides that employees can use 6 sick days per calendar year and those days apply toward attendance and overtime calculations. (Jt. Exh. 6, arts. 6.03 and 6.04.)

The Novi rules specifically indicate that “Employees tempo-

rary working at the Novi campus will have no overtime priority rights.” The Novi rules also require that employees may be required to work up to a maximum of 50 hours per week and that “employees must work all scheduled hours” unless the employee receives preapproved time off as defined in the Novi rules. The WAEA contract provides that the Respondent “will not insist” on employees working overtime.

The Novi rules increase the penalty for “disregard of safety rules or common safety practices” from the 3 points referred to in the WAEA contract (Jt. Exh. 6, art. 25, par. 13 to “suspension (1-week maximum), up to & including discharge, 3 points.” (Jt. Exh. 3, p. 3, par. 11.)

The Novi rules impose a drug testing policy which provides, in relevant part, that:

Employees temporary working at the Novi Campus may be drug screened on the following conditions: (1) upon returning from a leave of absence or layoff of thirty (30) days or more, (2) upon being injured, at management discretion, depending on the severity and cause of injury, (3) following an accident or incident while on Comau paid time, while on the Novi campus, or while operating Comau equipment, regardless of injury, or (4) due to reasonable cause based on observed behavior or other factual circumstances.

Employees temporarily working at the Novi Campus who test positive for any non-prescription drug will be subject to immediate discharge. Employees temporarily working at the Novi campus who refuse a drug screen request will be subject to immediate discharge. If Comau management determines that suspension, rather than discharge, is appropriate, then the suspended employee will be required to successfully complete an EAP program and will be tested randomly for a period of one year.

The WAEA contract provides only for testing for alcohol (Jt. Exh. 6, art. 25, par. 16).

The Novi shop rules increase the penalty for “threatening, intimidating, coercing or inappropriately disrupting the work of employees or supervision at any time” from 3 points in the WAEA contract (Jt. Exh. 6, art. 25, par. 23) to “suspension (1-week maximum), up to and including discharge, 3 points.”

Finally, the Novi rules change the progression of discipline for a violation. The Novi rules state that, in a 12-month rolling period, 3 points constitute a warning, 6 points will result in a 1-day unpaid suspension, 9 points will result in a 3-day unpaid suspension, and 12 points will result in termination. The Novi rules also state that if an employee is on a disciplinary suspension on a Friday, the employee is ineligible for overtime work that weekend, and if the employee is on a disciplinary suspension the day before or after a paid holiday, the employee will forfeit his/her holiday pay. The WAEA contract states only that a total of 12 points during a rolling calendar year will result in termination. (Jt. Exh. 6, art. 25.)

On January 26 and February 7 the parties discussed the grievance the WAEA had filed regarding the Respondent’s failure to apply the provisions of its agreement at Novi after the announcement of the Novi rules. As a result of these discussions, the Respondent made modifications to the Novi rules an effort to address the WAEA’s concerns. These modifications

were set forth in the Respondent's written response to the grievance dated February 20, 2012 (GC Exh. 36, p. 2; R. Exh. 8). The response indicated, in relevant part, that:

First, the Company agreed that the first violation of the attendance provisions of the Novi Campus policies and rules by a "guest" employee that occurs on or before March 31, 2012 will result in one disciplinary warning with no points. Any subsequent violations of the attendance provisions by that previously warned "guest" employee, or any first violation of the attendance provisions that occurs on or after April 1, 2012, will not receive a warning, but will instead result in the appropriate disciplinary points being assigned according to the Novi Campus Policies and Rules.

Second, in response to the WAEA Committee questions regarding how "guest" employees would cover legitimate back-to-sick days, the Company agreed to the following approach. The "guest" employee should use his/her personal absence date to cover the first sick day period. If during that personal absence day, the "guest employee" does not believe he/she will be able to come to work the following day due to legitimate sickness, the "guest" employee can call his/her supervisor (by no later than 2:00 on the first day) to request a vacation day for the following day.

The Respondent indicated that this response resolved the grievance and closed it.

On February 20, 2012, the Respondent also responded to the WAEA grievance regarding the temporary closure of the Comau Auto (Wisne) facility by stating that it was done for legitimate business reasons and its right to do so is recognized in the management rights provision of the parties collective-bargaining agreement. (R. Exh. 8.) Accordingly, the Respondent denied the grievance.

On February 6, 2012, the WAEA filed a grievance regarding a warning given to employee Hermon Gray for a violation of one of the new Novi attendance rules. The grievance stated that Gray had not been given the Novi rules and sought as a remedy that the warning be removed from his file along with any points that accompanied the warning. On February 7, 2012, the Respondent indicated that because of its agreement to give WAEA bargaining unit employees a written warning (with no points) for the first violation of the Novi rules occurring before March 31, 2012, it removed the points from the warning given to Gray. (R. Exh. 9.)

On February 13, 2012, the WAEA filed another grievance claiming a lack of any kind of preferential treatment to its members regarding the assignment of overtime. The WAEA sought as a remedy that any and all scheduled overtime should be offered to a WAEA member or other regular Comau employee before it was offered to any contractor (GC Exh. 37).

With respect to the grievance filed by the WAEA on February 13, 2012, regarding the assignment of overtime on March 26 and April 2, 2012, McKee sent emails to LaForest asking if there was any specific instances where the WAEA believed that employees did not receive overtime when they were entitled to it so that McKee could investigate the specifics. (R. Exh. 10.) The record contains no response from the WAEA to this request.

The record indicates that in addition to Gray, other employees received warnings for violating the attendance policy under the new Novi rules. These employees included Ciaramitaro, Rodney Mitchell, Csaba Lastoczi, and Don Hautau. (GC Exhs. 7, 9-13, 17, and 18.)

The Implementation of the Royal Oak Rules

According to McKee's uncontradicted testimony, on December 6, 2011, he attended a meeting between representatives of the Respondent and representatives of the CEA, the NIEA, and the WAEA. LaForest and Ciaramitaro attended for the WAEA. At this meeting the Respondent informed the unions that a decision had been made to make Royal Oak a permanent facility. The Respondent indicated that it would be moving its Powertrain operations to that facility. The unions were also informed that the Respondent intended to hire a permanent roster of employees at that facility. The Respondent indicated it would be posting job opportunities and that all employees were welcome to apply. The unions were also informed that in connection with making the facility a permanent facility, the Respondent would be adopting rules for the employees assigned there that would apply to everyone working at the facility. (Tr. 401-402.)

On December 15, 2011, the Respondent issued an announcement indicating that Royal Oak would be a permanent facility. The announcement indicated in part "we will be hiring a number of new employees in various trades to be permanently assigned to the facility. Job openings will be posted for opportunities at the Royal Oak Plant."

In February 2012, the Respondent supervisors distributed to employees who were working at the Royal Oak Plant, including WEAE represented employees, a document entitled "Comau Royal Oak Facility Policies and Rules Guidelines." (Jt. Exh. 4.) The WAEA was not given a copy of the rules before they were distributed to employees.

The Royal Oak rules altered provisions of the WAEA contract for WAEA represented employees who were working at Royal Oak. In this connection, the Royal Oak rules indicate "all employees are required to work the entire schedule was posted by Royal Oak management" and further indicate that the failure to do so would subject an employee to discipline, unless the employee had received prior written approval. Consequently, there is no allowance in the Royal Oak rules for the application of the provisions in the WAEA contract regarding the "50 hour rule" or "bad week" rule.

The Royal Oak rules provide only for vacation days as "permitted time off." There is no reference to personal days or sick leave. The WAEA contract provides for personal days and sick leave as well as applying those types of leave toward attendance credit and overtime calculations. (Jt. Exh. 6, arts. 6.02, 6.03, 6.04, and 12.02.) The Royal Oak rules provide that employees can only take vacation days in full-day increments while the WAEA contract provides that employees can take a half day of vacation. (Jt. Exh. 6, art. 13.05.)

The Royal Oak rules state that "no employee has overtime priority rights within the Royal Oak facility" and that management has the sole discretion to determine the allocation of overtime. Accordingly, the rules do not accord any priority to em-

ployees of the Respondent over contractors in the assignment of overtime. The Royal Oak rules establish that overtime scheduled is mandatory and that failure to work scheduled overtime hours will subject an employee to discipline. The WAEA contract provides that the Respondent “will not insist” on employees working overtime. (Jt. Exh. 6.06.) The Royal Oak rules also do not permit employees to work weekend overtime if they schedule a vacation day on the preceding Friday or following Monday, while there is no similar restriction in the WAEA contract.

The Royal Oak rules permit drug and alcohol testing “at the discretion of management.” As noted above, the WAEA contract does not provide for drug testing.

The Royal Oak rules contain a list of rules, similar to the shop rules found in article 25 of the WAEA contract. However, the Royal Oak rules do not contain a point system that refers to a progressive disciplinary procedure. The Royal Oak rules state that employees who fail to comply with the rules will be subject to discipline up to and including discharge in the discretion of management.

The Practice of Allowing WAEA Representatives to Conduct Union Business During Working Time

The record establishes that the Respondent’s established practice is to permit WAEA employee representatives time off to conduct union business with the permission of the employee’s supervisor. In February 2012, Ciaramitaro was working at Novi when he asked his supervisor, Mark Corich, for permission to take time off in order to prepare grievances. Corich gave Ciaramitaro permission to do so and Ciaramitaro left to prepare grievances. When Ciaramitaro returned to his workstation, Corich told him that he was not going to be able to take time off for union business in the future as Durocher told him that WAEA did not exist anymore and it could not do business. Corich gave Ciaramitaro a note that Corich had signed which indicated:

Quote from Tom Durocher Feb. 12, 2012

I closed Comau Auto so there isn’t any union (CAE).¹¹ So how can Paul go on union business.

Ciaramitaro testified that Corich later approached him and told him that if he needed to leave to perform union business during working time he had to go through another supervisor and could not talk to Corich about it anymore. After that Ciaramitaro would seek permission to conduct Union business from Supervisor Richard Thompson. According to Ciaramitaro he was never denied permission to conduct union business when he asked to do so. Laforest also testified that he was never denied the opportunity to conduct union business when he requested to do so after February 2012.

Analysis

Whether the Respondent Violated Section 8(a)(5) and (1) of the Act by Failing to Bargain Over the Effects of the Temporary

Closure of the Wisne Facility

The Acting General Counsel contends that the Respondent had an obligation to bargain over the effects of the temporary closure of the Wisne facility and the transfer of employees and relocation of unit work to other facilities. In support of his position, the Acting General Counsel relies on, inter alia, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986); and *Naperville Jeep/Dodge*, 357 NLRB 2252 (2012). The Acting General Counsel further contends that the WAEA was not given notice and an opportunity to bargain over this issue but rather was presented with a fait accompli. Accordingly, the Acting General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent argues that the temporary closure and transfer of employees was routine in nature and did not require bargaining with the Union. The Respondent further contends that if I find that it violated the Act by acting unilaterally regarding this issue, it would not be appropriate to grant an affirmative bargaining order or any backpay as all the affected employees continue to be employed with the same contractual benefits that they had been receiving while employed at the Wisne facility. In support of its position regarding the remedy, the Respondent relies on *AG Communications Systems Corp.*, 350 NLRB 168, 172–174 (2007).

I find that the Respondent had a duty to give notice and an opportunity to bargain to the WAEA regarding the effects of its decision to temporarily close the Wisne facility, including the transfer of employees who were working at that facility to its Royal Oak and Novi facilities and that its failure to do so violates Section 8(a)(5) and (1) of the Act. In reaching this conclusion I have carefully considered the fact that the Respondent’s closure of the Wisne facility was temporary and not a permanent closure. Unlike the situations in *First National Maintenance*, supra, where the partial closure of the employer’s operations caused the termination of all of the affected employees and *Metropolitan Teletronics*, where the employer’s relocation of its operations resulted in the termination of almost all of the unit employees, the temporary closing of the Wisne facility did not result in any loss of jobs to employees. Rather, the 12 WAEA represented employees who were working at Wisne at the time of its temporary closure were transferred to the Respondent’s Royal Oak and Novi facilities and their wage rates and benefits remained the same. Thus, I do not find *First National Maintenance* and *Metropolitan Teletronics* to be precisely applicable to the instant situation.

The Board had occasion to determine whether an employer’s failure to bargain over brief 1-day plant closures violated Section 8(a)(5) and (1) of the Act in *General Die Casters, Inc.*, 359 NLRB 89, 89 fn. 1, 16–18 (2012). There, the employer shut down its plants for 1 day without giving the union notice and an opportunity to bargain over the temporary closure. The affected employees were given the option of taking a vacation day or a day off without pay. The Board found that the closure of the plants which resulted in either a loss of a paid vacation day or an unpaid day off had a “material, substantial and significant” effect on conditions of employment and was therefore a mandatory subject of bargaining. In the instant case, the employees

¹¹ Ciaramitaro testified that the reference to CAE meant “Comau Auto employees” as that was the shorthand reference that Comau Automation (Wisne) employees put on their daily time reports.

affected by the temporary closure of the Wisne facility did not lose any pay or benefits but rather were transferred to other facilities. In *Naperville Jeep/Dodge*, supra at 2253–2254, the Board noted “The obligation to bargain over the effects of the closing of the Naperville facility entailed an obligation to bargain over the transfer of employees to the Lisle facility, including their initial wages, benefits, seniority rights, and working conditions at the new location, including whether they would have continued to work together as a distinct group” While *Naperville* is factually different from the instant case in that there the closure of the employer’s Naperville facility resulted in the transfer of the affected employees to a nonunion facility and consequently involved the loss of wages and benefits, I believe the principle of law stated above regarding the obligation to bargain about the transfer of employees is appropriate to apply in the instant case.

In the instant case, while the employees continued to be represented by the WAEA and did not lose wages or benefits, obviously there was a change in working conditions as they were assigned to different facilities and did not continue to work together as a distinct group. I find that the changes in working conditions were sufficiently material, substantial, and significant so as to constitute a mandatory subject of bargaining. While not dispositive of the issue I note that in 2009, when the Respondent temporarily closed the Wisne plant and transferred the employees working there to the Novi facility, it bargained with the WAEA regarding the effects of the temporary closure, including the relocation of unit work and the transfer of employees. In this connection, the Respondent executed a letter of understanding with both the WAEA and the NIEA, which represented the employees at Novi. As noted above, this letter of understanding indicated that both unions would maintain their respective union committees, team leaders, and seniority. Under the terms of this agreement, WAEA represented employees worked on specific projects in a specific bay located at the Novi facility. During this period, all the provisions of the WAEA agreement were applied to the employees temporarily assigned to Novi. In addition, the current collective-bargaining agreement between the Respondent and the WAEA effective from August 22, 2011, to May 3, 2015 (Jt. Exh. 6, art. 4.18) specifically indicates “should the Company make a business decision to close a plant or to consolidate plants, the Company will bargain with the Union regarding the effects of the business decision.” This contract provision does not exclude by its terms temporary closings.

I also note that when representatives of the WAEA and the Respondent met on December 3, and LaForest was told that he was being assigned to Novi and that Ciaramitaro was informed that he was being assigned to Royal Oak, LaForest indicated that he lived closer to Royal Oak and that Ciaramitaro lived closer to Novi. Upon being apprised of that fact, the Respondent switched their assignments. I note this is a practical example of the issues that can be discussed during effects bargaining. The Respondent’s unilateral implementation of the closing and the transfer of employee, however, greatly limited the Union’s ability to engage in bargaining over the issues presented by the transfer of employees and relocation of unit work.

As noted above, the Respondent began to move the equip-

ment out of the Wisne facility on December 1, 2011, the same day that the Respondent sent the email to the WAEA advising it of the temporary closure and the transfer of the employees. Under these conditions the Union was presented with a fait accompli and the discussions between the WAEA and the Respondent on December 3 did not fulfill the Respondent’s bargaining obligation. The Board has held that “to be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain.” *UAW-Daimler-Chrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Ceigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982). Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice and an opportunity to bargain to the WAEA prior to temporarily closing the Wisne facility and transferring the employees who were working there.

As a remedy for this labor practice I will, of course, order that the Respondent cease and desist from such unlawful conduct and post an appropriate notice. In agreement with the Respondent, however, I find that no useful purpose would be served by an affirmative bargaining order and backpay remedy for this violation. The Board noted in *AG Communication Systems Corp.*, 350 NLRB 168, 173 (2007), that a limited bargaining order and backpay remedy is not awarded in every effects bargaining case but rather the Board may consider any particular or unusual circumstances of the case in fashioning a remedy. In *AG Communications Systems*, the employer failed to give notice and bargain over the effects of integrating the AG telephone equipment installer unit into the Lucent telephone equipment installer unit. The Board found that the employer violated Section 8(a)(5) and (1) but concluded that an affirmative bargaining order and backpay remedy was not appropriate under the circumstances. The Board noted that the former AG installers continued to be employed by the Respondent with full pay and benefits and also continued to be represented by a union, albeit by a CWA local rather than an IBEW local. In the instant case, as noted above, the WAEA represented employees who were working at the Wisne facility at the time of its temporary closure were transferred to the Respondent’s Novi and Royal Oak facilities. They continued to receive the pay and benefits provided for in the WAEA collective-bargaining agreement and continued to be represented by the WAEA. As noted above, in June 2012, the Wisne facility was reopened and, at the time of the hearing, all of the WAEA represented employees were working at that facility. Under the circumstances, I find that the remedy for the effects bargaining violation that the Board applied in *AG Communications Systems* is the appropriate remedy to apply in the instant case.

Whether the Respondent Violated Section 8(a)(5) and (1) by Failing to Bargain With the WAEA Regarding the Application of the Novi and Royal Oak Rules to WAEA Represented Employees

The Acting General Counsel contends that there is a historical practice of applying the provisions of the contract between the Respondent and the WAEA to WAEA represented employees when they are temporarily transferred from the Wisne facility to other Respondent facilities. The Acting General Counsel

asserts that the Respondent violated Section 8(a)(5) and (1) by applying the new rules implemented at its Novi and Royal Oak facilities to employees represented by the WAEA without bargaining with the WAEA.

The Respondent contends that its contract with the WAEA contains a management-rights clause (Jt. Exh. 6 art. 11) which gives it the right to make reasonable rules regarding discipline unless expressly abridged by specific provisions of the contract. While the Respondent concedes that the shop rules contained in art. 25 of its contract with the WAEA restricts its right to unilaterally make rules at the Wisne facility, it contends that these rules do not apply at its other facilities. In this regard, the Respondent contends that article 25.02, subsection (e), rule 36 provides that there may be other “Company policies or Procedures or other rules not specifically stated.” The Respondent contends that this language applies to its right to make rules at other facilities for the WAEA represented employees. The Respondent also contends that the Acting General Counsel has not produced sufficient evidence to prove that there has been an established practice of applying the shop rules in the WAEA contract to WAEA represented employees when they are working outside of the Wisne facility. Thus, the Respondent contends that it had no obligation to bargain with the WAEA about the application of the Novi and Royal Oak rules to WAEA represented employees.

In the first instance, I do not agree with the Respondent that the language of the management-rights clause and the provisions of art. 25, rule 36 contained in its agreement with the WAEA privileges its right to unilaterally establish rules and policies affecting the conditions of employment of WAEA represented employees when they are temporarily assigned to the Respondent’s other facilities.

In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Court expressly affirmed the Board’s longstanding policy that a waiver of a statutory right must be clear and unmistakable. The Board reaffirmed its adherence to that standard in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). It is clear that the Novi and Royal Oak rules involve terms and conditions of employment that constitute mandatory subjects of bargaining. In this regard, the Board has specifically found the following subjects contained in those rules to be mandatory subjects of bargaining: work rules involving the imposition of discipline, *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006); and *Toledo Blade Co.*, 343 NLRB 385 (2004); changes in the assignment of overtime, *Dearborn Country Club*, 298 NLRB 915 (1990); absenteeism and tardiness policies, *Dynatron/Bondo Corp.*, 324 NLRB 572 (1997); drug testing policies, *Allied Aviation Fueling of Dallas*, 347 NLRB 248 fn. 2 (2006); and layoffs *General Die Casters, Inc.*, supra.

In *Provena St. Joseph Medical Center*, supra, at 811 the Board indicated that the clear and unmistakable waiver standard “requires bargaining partners to unequivocally and specifically express their mutual intent to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.”

The contract language the Respondent relies on does not specifically exclude the application of the WAEA agreement or

established extracontractual practices to WAEA represented employees when they are temporarily working outside of the Wisne facility. In addition, there is no evidence that the WAEA intentionally waived its right to bargain over mandatory subjects of bargaining applying to WAEA represent employees when they were working on temporary assignment at other Respondent facilities during its 2011 negotiations with the Respondent. Thus, there is neither an explicit contractual disclaimer nor clear evidence of an intentional waiver during bargaining of the WAEA’s right to bargain over mandatory subjects of bargaining applying to WAEA represented employees when they working temporarily outside of the Wisne facility. Accordingly, the current contract between the Respondent and the WAEA does not privilege the Respondent to act unilaterally regarding the mandatory subjects of bargaining contained in the Novi and Royal Oak rules.

The next issue to consider is whether there was a clear practice of applying the terms of the WAEA and extra contractual conditions of employment such as the assignment of overtime and the order of layoffs when the WAEA employees were temporarily assigned to other Respondent facilities. As noted above, it is undisputed that provisions of the WAEA contract regarding wages, health insurance, life and disability insurance, the 401(k) plan, classifications, seniority and paid holidays were applied to WAEA represented employees working outside of the Wisne facility.

With respect to the application of the attendance policies set forth in the WAEA contract to WAEA represented employees when they were working outside of their home plant, LaForest was able to use personal days and vacation days as provided in the WAEA contract, while he was working at Royal Oak from January through May 2010. Brooks was also able to use personal days under the WAEA contract while working at Royal Oak in November 2010. In addition, when Brooks was assigned to the Novi facility on January 13, 2012, after returning from medical leave, he was not given a drug screen despite having been absent for more than 30 days. This was consistent with provisions of the WAEA contract, which provided only for alcohol testing. Clearly, the provisions of the expired Novi contract were not applied to him, since that agreement contained a provision that employees were to undergo a drug screen after returning from an absence of more than 30 days. In addition, Brooks, LaForest, and Ciaramitaro all testified that they were never informed that the shop rules and attendance policies of the WAEA contract were not applicable to them while they were temporarily assigned to other Respondent facilities prior to January 2012.

Prior to January 2012, the Respondent had a practice with respect to the assignment of overtime at its various plants in the Detroit area when employees were working outside of their home plant. The first opportunity for overtime was given to the employees of the home plant. Next, employees of the Respondent who were temporarily assigned to that plant would be offered overtime. Finally, contractors who are not part of the Respondent’s permanent work force would be given an opportunity for overtime.

Prior to January 2012, the Respondent also had a practice regarding layoffs when employees were temporarily assigned to a

plant. Layoffs were always conducted within classifications. The first individuals to be laid off within each classification would be contractors. Next, employees who were not working at their home plant would be laid off by classification according to the seniority list of their home plant. The last employees to be laid off would be the employees working at the home plant. When employees represented by both other unions were assigned to work at another of the Respondent's home plants, visiting employees represented by the other unions would be laid off proportionally in an equitable fashion before the employees of the home plant were laid off. The only exception to this practice occurred in 2008 at Novi when, over the objection of the WAEA, the Respondent laid off WAEA represented employees before those represented by the CEA.

Finally, as discussed above, in March 2009, when the Wisne plant was temporarily closed, the Respondent, the WAEA, and the NIEA entered into a letter of understanding providing that the WAEA and the NIEA would coexist in the Novi facility and that the WAEA represented employees would work on a specific list of projects. During this period of time the provisions of the WAEA contract applied to the WAEA represented employees working at Novi.

The Respondent has correctly noted in its brief that it is the General Counsel's burden to prove that an activity is an established past practice. *National Steel & Shipbuilding Co.*, 348 NLRB 320, 323 (2006). Under the circumstances of this case, I find that the Acting General Counsel has established a past practice of applying the WAEA contract, including the shop rules contained in article 25 and the attendance policies, to employees represented by the WAEA when such employees were working at the Respondent's facilities other than their home plant. I also conclude that established policies regarding the assignment of overtime to WAEA represented employees and the layoff of such employees were applied when WAEA represented employees worked outside of their home plant.

In the first instance, it is undisputed that wages, benefits, classifications and the union security provision of the WAEA contract were applied to WAEA represented employees working outside of their home plant prior to January 2012. It is also clear that the Respondent applied the separate "Wisne Automation Seniority List" to Wisne employees when they worked outside of the Wisne facility. In fact, the current contract between the Respondent and the WAEA requires the Respondent to apply the separate seniority roster of the WAEA to employees it represents when they work outside of their home plant. In 2009, the Respondent entered into a letter of understanding with the WAEA clearly establishing that the WAEA would retain its union committee, team leaders, and seniority list while employees it represents were working at the Novi facility during a period when the Wisne facility was temporarily closed. During this period of time all of the provisions of the WAEA contract were applied to WAEA represented employees working at the Novi facility.

There are also some specific examples of the application of the attendance policies and shop rules contained in the WAEA contract to WAEA represented employees while they were temporarily assigned to other Respondent facilities. In this connection, the Respondent permitted LaForest to take personal

days pursuant to the WAEA contract while he was employed at Royal Oak in 2010. When Brooks returned from a medical leave lasting over 2 months on January 13, 2012, he was assigned to the Novi facility. Although the expired Novi agreement provided that employees returning from a leave exceeding 30 days would be given a drug screen, this provision was not applied to Brooks. There is no evidence that WAEA represented employees were ever told that the shop rules contained in article 25 of the WAEA contract and the attendance policies of that contract would not apply to them when they were working outside of their home plant.

As I have indicated above, there is also an established practice regarding the assignment of overtime to WAEA employees and the layoff of such employees working outside of their home plant.

In reaching the conclusion that the WAEA contract, including the shop rules and the attendance policies, apply to WAEA represented employees while they were working outside of their home plant, I rely heavily on the fact that it is undisputed that the WAEA contract generally applied to employees while they were on temporary assignments. The record contains no evidence of situations prior to January 2012, where different policies regarding shop rules or attendance were applied to WAEA represented employees while they were working at any other of the Respondent's facilities. This detracts from the Respondent's argument that the shop rules and the attendance provisions of the WAEA contract did not apply to WAEA represented employees when they were working outside of the Wisne facility. The only example of the Respondent not applying the assignment of overtime and layoff policies set forth above regarding WAEA represented employees working outside of their home plant occurred at the Novi facility in 2008. In that situation, the Respondent laid off WAEA represented employees working at Novi and retained CEA represented employees rather than laying off employees represented by both unions in an equitable proportionate manner. This occurred over the vigorous protest of the WAEA. This one example does not detract from the established practice the Respondent employed regarding the order of layoffs at its plants when there were employees temporarily assigned outside of their home plant.

Under the circumstances of this case, I find that the cases relied on by the Respondent in support of its position that there is insufficient evidence to establish the claimed practices to be distinguishable. In *BASF Wyandotte*, 278 NLRB 173 (1986), the General Counsel alleged that the employer violated Section 8(a)(5) and (1) by modifying the practice of allowing two employee union representatives to have unrestricted access to other employees and supervisors for the purpose of grievance handling. In finding that the General Counsel had not established a practice, the administrative law judge, whose opinion was adopted by the Board, noted that the testimony of the two employees was vague and unresponsive regarding the specifics of meeting with any supervisors while on "union time." The administrative law judge also noted that it was undisputed that the employer was not aware of the employees' activities while they were on "union time," including any discussions with supervisors. *Id.* at 180. In *Raley's Inc.*, 348 NLRB 382 (2006),

the General Counsel alleged that the employer unilaterally changed a past practice of granting unlimited access to employees by union representatives and shop stewards. The Board adopted the administrative law judge's finding that there was only minimal evidence in the record regarding store visitations by union representatives and thus there was insufficient evidence to establish a practice in this regard.

In the instant case, as I have noted above, it is undisputed that generally the employer applied the provisions of the WAEA contract to WAEA represented employees working outside of the Wisne facility. There are also specific examples of the application of the shop rules and attendance policies contained in that contract. In addition, the Respondent applied consistent policies regarding the assignment of overtime and layoff regarding WAEA represented employees when they were working at other Respondent facilities outside of their home plant.

It is well established that an employer violates Section 8(a)(5) and (1) of the Act by changing wages, hours or other terms and conditions of employment of bargaining unit employees without giving the employees' bargaining representative notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 743, (1962) *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006). As I have indicated above, the Novi and Royal Oak rules changed terms and conditions of employment which are mandatory subjects of bargaining. The Respondent did not give meaningful notice and an opportunity to bargain to the WAEA before implementing the Novi and Royal Oak rules. At Novi, employees were told in mid-January 2012 that the Respondent had reached a contract with the NIEA and that new rules would be applied to all employees who were working at Novi. On Tuesday, January 17 representatives of the WAEA met with the Respondent and were orally apprised in summary fashion of what the rules would apply to and that they would go into effect the following Monday, January 23. When the WAEA requested a copy of the rules, the Respondent indicated that copies were not yet available. On January 23, the Novi rules were distributed to employees by supervisors. Under these circumstances, the WAEA was clearly presented with a fait accompli. *General Die Casters, Inc.* supra, at p. 105.

At Royal Oak on December 5, 2011, McKee informed representatives of the WAEA that the Respondent would be making Royal Oak a permanent facility with a permanent work force. McKee also stated that the Respondent would be adopting rules for the employees assigned there but did not convey any specific information regarding those rules. In February 2012, the Respondent distributed to employees working at the Royal Oak facility the new rules without giving a copy of the rules beforehand to the WAEA. I do not find that the McKee's general statements made on December 5 were sufficient to apprise WAEA of the fact that these rules may have a substantial and material impact on the WAEA represented employees working at Royal Oak. Accordingly, I find that McKee's statements on December 5, 2011, did not constitute sufficient notice to the WAEA of proposed changes in mandatory subjects of bargaining such that the WAEA was obligated to request bargaining at that time. See *Oklahoma Fixture Co.*, 314 NLRB 958, 960-961

(1994), enf. denied 79 F.3d 1030 (10th Cir. 1996).

At neither Novi nor Royal Oak were copies of the rules provided to the WAEA prior to their distribution to employees. At the trial, McKee indicated that the Respondent did not believe it was required to give notice and an opportunity to bargain to the WAEA before implementing the Novi and Royal Oak rules (Tr. 435). The statements of Durocher on January 17, 2012, made it clear to the WAEA representatives that the Respondent did not intend to bargain with them regarding the application of the Novi rules.

I understand the Respondent's desire to have uniform policies regarding attendance; employee rules; the assignment of overtime; and layoffs of employees from different home plants working at the Novi and Royal Oak facilities. The fact is, however, that the provisions of the Respondent's contract with the WAEA do not clearly and unmistakably give the Respondent the unilateral right to apply such policies to WAEA represented employees working at those facilities. As noted above, the record indicates that the Respondent had an established policy of applying the provisions of the WAEA contract to employees represented by the WAEA working at the Novi and Royal Oak facilities. The Respondent also had an established policy of applying extracontractual practices to those employees regarding the manner in which overtime was assigned and the order in which they were laid off relative to employees of the home plant, employees represented by another visiting union, and contractors. Under these circumstances, it was incumbent upon the Respondent to give notice to the WAEA and an opportunity to bargain before applying these rules to the WAEA employees. By failing to do so, the Respondent has violated Section 8(a)(5) and (1) of the Act.

The Acting General Counsel further contends that the Respondent also violated Section 8(d) of the Act by making unilateral changes to terms and conditions of employment contained in the 2011-2015 collective-bargaining agreement between the Respondent and the WAEA. It is clear that an employer violates Section 8(a)(5) and (1) and Section 8(d) by modifying any provision regarding a mandatory subject of bargaining contained in the collective-bargaining agreement during the term of that agreement. *Daycon Products Co.*, 357 NLRB 508 (2011); *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984). As I have found above, the Respondent had a practice of applying the terms of the WAEA collective-bargaining agreement to WAEA represented employees temporarily working at the Novi and Royal Oak facilities. The rules that the Respondent unilaterally implemented at Novi and Royal Oak included changes in the following mandatory subjects of bargaining contained in the collective-bargaining agreement between the Respondent and the WAEA: overtime credits (Jt. Exh. 6, art. 12); seniority for purposes of layoff (Jt. Exh. 6, art. 4); minimum working hours (Jt. Exh. 6, art. 25, rule 8); and penalty increases to existing rules (Jt. Exh. 6, art. 25). It is clear that the Respondent did not seek the consent of the WAEA prior to applying the Novi and Royal Oak rules to employees represented by the WAEA working at those facilities. Accordingly, in addition to the violation of Section 8(a)(5) and (1) set forth above the Respondent also violated Section 8(d) of the

Act by instituting changes regarding the above noted provisions in its current collective-bargaining agreement with the WAEA.

The Appropriate Unit

As noted at the outset of this decision, the Acting General Counsel alleged in the complaint that the appropriate unit is somewhat different than the bargaining unit described in the 2011–2015 collective-bargaining agreement between the parties. In relevant part the unit described in the collective-bargaining agreement is: “[A]ll full-time and regular part-time production and maintenance employees, including inspectors, employed by the Employer at its facilities located at 42445 West 10 Mile Road, Novi, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.” The Acting General Counsel alleges that the unit description should be changed, in relevant part, to indicate that it includes all employees “employed by Respondent at and out of its facility located at 42445 West 10 Mile Road.”

As set forth above, I have found that, by practice, the Respondent applied the terms of the WAEA collective-bargaining agreement to WAEA represented employees when they were temporarily assigned to another of the Respondent’s facilities. I do not believe, however, under the circumstances of this case, that it is appropriate to change the historical, voluntarily agreed to unit description contained in the WAEA collective-bargaining agreement. It is important to keep in mind that the contract was applied to employees working outside of the Wisne plant by practice and that the violations of the Act that the Respondent committed involve a deviation from that practice in that it unilaterally implemented new terms and conditions of the employees to WAEA while they were temporarily working outside of the Wisne facility.

I find the cases relied on by the Acting General Counsel in support of his position regarding changing the contractual unit description to be unpersuasive. In this connection, in *Cencom of Missouri*, 282 NLRB 253 (1986), the employer consolidated job functions and reclassified employees into new categories. *ADT Security Services*, 355 NLRB 1388 (2010); *Comar, Inc.*, 339 NLRB 903 (2003); and *Leach Corp.*, 312 NLRB 990 (1993), all involved the permanent closure of a facility and the permanent relocation of unit work. These cases all involved situations quite different from the instant one.

As will be set forth in more detail herein, I will order the Respondent to rescind the unlawful unilateral changes it instituted and bargain with the WAEA in good faith if it wishes to change the conditions of employment of WAEA employees working outside of their home plant. Of course, with respect to matters that are expressly contained in the 2011–2015 collective-bargaining agreement between the Respondent then the WAEA, any changes can only be made with the WAEA’s consent. Under these circumstances, I do not find it to be appropriate to change the existing unit description in the manner sought by the Acting General Counsel. Rather, I will leave it to the parties to discuss changing the unit description if they so desire during any bargaining that occurs in compliance with this decision.

Whether the Respondent Violated Section 8(a)(5) and (1) by Unilaterally Changing the Policy of Permitting Union Repre-

sentatives to Conduct Union Business During Working Time

As set forth above, the Respondent had a practice of permitting WAEA employee representatives to take time off with permission of a supervisor to perform union business. While working at Novi in February 2012, Ciaramitaro asked his supervisor Corich for permission to take time off in order to prepare grievances. Corich gave Ciaramitaro permission to do so and Ciaramitaro left his work area to prepare the grievances. When Ciaramitaro returned to his workstation, Corich told him that he was not going to be able to take time off for union business in the future as Durocher told him that the WAEA did not exist anymore and it could not do business. Corich gave Ciaramitaro a note that Corich had signed indicating that Durocher had stated “I closed, Comau Auto so there isn’t any union (CAE). So how can Paul (Ciaramitaro) go on union business.”

Corich later told Ciaramitaro that if he needed to leave to perform union business during working time he had to go through another supervisor and could not talk to Corich about it anymore. After that Ciaramitaro would go to another supervisor, Thompson, in order to get permission to conduct union business. The record establishes that there was not even one occasion when a WAEA representative was denied permission to conduct union business during working time after February 2012.

An established practice of permitting employee union representatives to conduct union business during working time is a mandatory subject of bargaining. *Ernst Home Centers, Inc.* 308 NLRB 848–849 (1992). There, the Board found that the employer had an established practice of permitting the union’s business representatives to have limited conversations with the employer’s employees on the sales floor of the employer’s stores. The Board found that the employer’s unilateral prohibition of the union business representatives right to speak with employees in all areas except the break room or lunchroom was a material change and one that the employer was obligated to bargain over with the union. The Board determined that the employer’s failure to do so violated Section 8(a)(5) and (1) of the Act.

In the instant case, the only change that the Respondent implemented was requiring Ciaramitaro to seek permission from Thompson rather than Corich before he conducted any union business during working time. There is no evidence that the Respondent ever actually restricted the right of any WAEA employee representative from conducting union business during working time with permission of a supervisor. Thus, the Respondent took no action to unilaterally restrict WAEA employee representatives in a material, substantial, and significant way from conducting union business during working time with supervisory permission. Accordingly, I shall dismiss the allegation contained in paragraph 13 of the complaint alleging that the Respondent unilaterally changed its past practice of allowing WAEA officials the right to conduct union business during working time.

A related allegation in paragraph 9 of the complaint alleges that on or about February 24, 2012, the Respondent, through Corich informed employees in the unit that their Union no longer existed in violation of Section 8(a)(1) of the Act. The above-noted testimony of Ciaramitaro, together with the note

given to him by Corich, establishes that the Respondent conveyed to Ciaramitaro that it did not recognize the right of the WAEA to represent employees in its historical unit while such employees were working at the Novi plant. Since, as I have found above, the WAEA did have the right to continue to represent employees in its historical unit while they were working at the Novi plant, the Respondent has violated Section 8(a)(1) as alleged in the complaint. *Ed Morris Auto Park*, 336 NLRB 1090, 1099 (2001).

I do not agree with the Respondent's assertion in its brief that it should not be held liable for Corich's statement because it is not consistent with the Respondent's position and was not authorized. The Respondent's answer to the complaint admits that Corich was a supervisor and agent of the Respondent within the meaning of the Act. Thus, Corich had actual authority to act on the Respondent's behalf. It is the Board's established policy that a "principal is responsible for its agents actions undertaken in furtherance of the principal's interests that fall within the general scope of authority attributed to the agent." *Wal-Mart Stores, Inc.*, 350 NLRB 879, 884 (2007). It is clear that making statements regarding labor relations matters was within the scope of Corich's authority.

As noted in the Acting General Counsel's brief, the Board has specific standards that an employer must meet in repudiating unlawful conduct in order to escape liability. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In order to be effective, the repudiation must be "timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct." In addition, there must be adequate publication of the repudiation to the employees involved and there can be no unlawful conduct on the employer's part afterwards. Finally, the employer should give assurances to employees that in the future it will not interfere with their Section 7 rights. *Id.* at 138-139. In the instant case, the Respondent took no affirmative action to repudiate Corich's conduct and is therefore responsible for it.

The Additional 8(a)(1) Allegations

Paragraph 8 of the complaint alleges that in early January 2012, the Respondent, by Durocher, violated Section 8(a)(1) of the Act by coercively interrogating employees about their discussion of union matters with other employees and directing employees not to discuss union matters.

In December 2011, while Vargo was working at Novi, Durocher stopped him on the shop floor and told him that his name had come up as influencing the Novi employees about changing their vote on ratifying their contract. Vargo replied it was not true. Durocher then told Vargo that he did not want him to interfere with the Novi employees' vote on their contract. At the hearing, Vargo explained that Novi employees had approached him and asked him questions about some of the issues contained in the WAEA contract. According to Vargo, some of these employees had told him they did not like the terms of their new contract and were not going to vote for it. Vargo testified that he expressed his agreement with those employees who did not think the new contract was a good one.

When Vargo spoke to Novi employees about the relative merits of the WAEA contract as compared to the proposed

NIEA contract, he was engaged in union and protected concerted activity. When Durocher told Vargo that he had heard that Vargo was influencing Novi employees to vote against their proposed contract, Durocher's statement clearly invited a response from Vargo and sought information regarding his union and protected concerted activity. Durocher's statement to Vargo was therefore interrogation in violation of Section 8(a)(1) of the Act. Durocher's statement to Vargo that he did not want Vargo to interfere with the vote of the Novi employees on the contract was a clear directive not to discuss an issue involving union and protected concerted activity with other employees and thus also violated Section 8(a)(1) of the Act. *Trade West Construction, Inc.* 339 NLRB 12 fn. 2, 14 (2003).

Paragraph 10 of the complaint alleges that on or about January 18, 2012, the Respondent, through Durocher, violated Section 8(a)(1) by threatening employees that if they did not accept new work rules that varied from the provisions of the WAEA agreement they could take layoffs.

On January 17, 2012, Durocher held a meeting with WAEA employee representatives Vargo, LaForest, Ciaramitaro, and Gault to discuss the new Novi rules that would be implemented at the Novi facility. During this meeting Durocher told the WAEA representatives that "your contract has nothing to do with its plant." Durocher indicated that while "earned benefits" such as seniority, vacation and insurance went with an employee to wherever the employee moved within the company, plant rules did not as those were plant specific. Durocher added that the rules at the Novi facility applied to everybody that worked there. He emphasized that the attendance policy, which seem to be the "sticking point," was a rule. Durocher then stated "if you can't live by those rules, you might want to just say I'll stay on layoff or I'll wait for different opportunity to come my way. That's the deal, okay."

Later in the meeting when LaForest asked Durocher if he could find out if the Respondent could get rid of the contractors, Durocher responded that he did not know. Durocher then stated again that if "you guys don't want to come in, take a voluntary layoff, because here's the deal, you displaced the contractor we had in here making money for us. That's okay because you are making money for us. But understand something, the Company does not need permission from you guys to do our job." Durocher then added that there were openings in Alabama and asked if they would like him to transfer them there and give them 2 weeks to report and if they did not show up "it's a voluntary quit." Durocher said that employees do not get to pick where they are transferred; they either go where the opening is or stay on layoff. Durocher added that he had no problems with outside contractors or Novi employees on this issue and stated "The only problems come from your guys' union because of the personal days. And there is no way I'm going to do that."

Durocher's statements indicated that the recently negotiated provisions of the Respondent's contract with the NIEA regarding attendance in plant rules would apply to the WAEA represented employees working at Novi. He further indicated that the attendance provisions and shop rules of the WAEA contract would no longer be applicable to the WAEA represented employees working at Novi. He further stated that if the WAEA

represented employees could not accept the new Novi rules they could take a layoff. He also added that there were openings in Alabama and asked the WAEA representatives whether they would like him to transfer WAEA represented employees there and give them 2 weeks to report and if they did not show up, they would be considered to have voluntarily quit.

Since I found that the Respondent unilaterally applied the Novi rules to WAEA represented employees in violation of Section 8(a)(5) and (1), Durocher's statements indicated that if employees could not accept unlawfully implemented rules they could take a layoff. He added that he could also transfer them to Alabama. I find that these statements restrained and coerced employees and thus violated Section 8(a)(1) of the Act.

The Respondent contends that since the WAEA contract gives employees the right to accept a layoff rather than being temporarily transferred to another of the Respondent's facilities, Durocher's statements truthfully advised employees of their rights under the contract and therefore was not a threat; rather it is protected by Section 8(c) of the Act. I do not agree with this position as Section 8(c) explicitly provides that an expression of an opinion by an employer must be unaccompanied by any threats or promises of benefits in order to be privileged. In the instant case the proposition advanced by Durocher was either accept working under unlawfully implemented rules or take a layoff or be transferred. I find that this statement threatened employees with either a layoff or transfer if they continue to exercise their Section 7 rights to protest an unlawful unilateral change instituted by the Respondent. Accordingly, the statements are not protected by Section 8(c).

The Allegation that the Respondent is Maintaining a Facially Invalid Rule

In his brief, the Acting General Counsel seeks a finding that the Respondent's maintenance of the following rule at its Novi facility violates Section 8 (a) (1) of the Act:

Threatening, intimidating, coercing, or inappropriately disrupting the work of employees or supervision at any time. (Jt. Exh. 3, rule 21)

The Acting General Counsel claims that the rule is facially invalid and seeks an order requiring it to be rescinded. The complaint, however, does not specifically contain an allegation that the above noted rule is facially invalid. In so far as relevant to this issue, paragraph 14 of the complaint alleges that the Respondent failed to continue in effect the terms and conditions of the WAEA agreement by handing out new work rules to WAEA represented employees which altered provisions of that agreement regarding certain subjects including "(f) penalties for threatening, intimidating, coercing or inappropriately disrupting the work of employees or supervision at any time." The complaint further alleges that the conduct alleged in paragraph 14 violated Section 8(a)(5)(1) and Section 8(d) of the Act.

The complaint allegation, in my view, is insufficient to put the Respondent on notice that the Acting General Counsel was challenging the facial validity of the rule quoted above. The complaint only alleges that the Respondent violated the Act by unilaterally changing the penalties for violation of that rule. At the hearing in this case, I cautioned counsel for the Acting

General Counsel that I would not make a finding that certain statements made by the Respondent supervisor and agent Marco Andriano violated Section 8(a)(1) of the Act unless the complaint was amended to allege that statements to be a violation of the Act. I indicated at that time, the Respondent has a right to know specifically what the alleged unfair labor practices are. The same rationale applies here. If the Acting General Counsel wish to litigate this issue, at minimum, the complaint should have been amended at the hearing to specifically allege that the rule was facially invalid in violation of Section 8(a)(1) of the Act. No such complaint amendment was made, however. Without a specific complaint allegation that the rule quoted above was facially invalid, in my view, the Respondent was not accorded sufficient due process to defend itself on this issue and I will therefore not consider this issue on the merits.

CONCLUSIONS OF LAW

1. The Wisne Automation Employees Association (WAEA) is, and, an at all material time was, the exclusive representative for the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including inspectors, employed by the Respondent at its facilities located at 42445 West 10 Mile Road, Novi, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

2. By failing to bargain over the effects of the temporary closure of its Wisne Automation facility with the WAEA, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By failing to bargain with the WAEA regarding the application of the Novi and Royal Oak rules to WAEA represented employees temporarily working in those facilities, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By unilaterally changing certain terms of its 2011–2015 collective-bargaining agreement with the WAEA, the Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

5. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Informing employees represented by the WAEA that their Union no longer existed at the Novi facility.

(b) Interrogating employees about their union and protected concerted activities.

(c) Directing employees not to discuss issues involving union and protected concerted activity with other employees.

(d) Threatening employees with layoff and transfer if they do not acquiesce in unilaterally implemented work rules.

6. The above offer labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

7. The Respondent has not otherwise violated the Act.

REMEDY

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

As I indicated above, with respect to the Respondent's violation of Section 8(a)(5) and (1) of the Act by failing to bargain over the effects of the temporary closure of the Wisne facility, under the circumstances of this case, I shall limit the remedial

relief to ordering that the Respondent cease and desist its unlawful conduct and post an appropriate notice.

With respect to the failure of the Respondent to bargain with the WAEA regarding the application of the Novi and Royal Oak rules to the WAEA represented employees temporarily assigned to those facilities, upon request of the WAEA, I shall order that the Respondent rescind the application of those rules, and any discipline that resulted from the application of those rules,¹² to WAEA represented employees. In addition, I shall order the Respondent to apply the terms of the current contract between it and the WAEA, including the attendance provisions and shop rules, to WAEA employees temporarily assigned to the Novi and Royal Oak facilities. I shall also order the Respondent to restore the pre-January 2012 method of assigning overtime to, and the method of determining the order of layoff of, WAEA represented employees temporarily assigned to the Novi and Royal Oak facilities. I shall also order the Respondent to give notice and, on request, bargain with the WAEA regarding the application of the Novi and Royal Oak rules to employ-

¹² The record indicates that employee Hermon Gray, who was ultimately discharged for his attendance record, apparently would have been eligible for discharge under the attendance policy set forth in the WAEA agreement. (Tr. 338; R. Exh. 7.) However, I will leave the final resolution of this issue to the compliance phase of this proceeding.

ees represented by the WAEA who are temporarily assigned to those facilities.

I shall order the Respondent to make WAEA represented employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral application of the Novi and Royal Oak rules to them. Any amounts of money necessary to make employees whole under the terms of this remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970); with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

With respect to the notice posting portion of the remedy, the record clearly establishes that from time to time WAEA represent employees have been temporarily assigned to work at the Novi and Royal Oak facilities. Some of the unfair labor practices I have found occurred at those facilities while WAEA represented employees were working there. The Board's policy is to have notices posted in the manner that will best inform affected employees about the outcome of this proceeding and the nature of their rights under the Act. Under these circumstances, I find that it would best effectuate the policies of the Act to require that the notice be posted not only at the Wisne Automation facility but also at the Novi and Royal Oak facilities. *Technology Service Solutions*, 334 NLRB 116 (2001).

[Recommended Order omitted from publication.]