Provena Hospitals, d/b/a Provena St. Joseph Medical Center *and* Illinois Nurses Association. Case 13–CA–39122–1

August 16, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 21, 2001, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, counsel for the General Counsel filed an answering brief, and the Respondent filed a brief in reply.

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

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and without notice to the Union, Illinois Nurses Association, implementing changes in the terms of employment of bargaining unit employees. Admitting that it acted unilaterally, the Respondent contends that under either of two alternative rationales, it did not violate its bargaining obligations. The Respondent asserts that the language of the collective-bargaining agreement, coupled with evidence concerning the parties' bargaining history, establishes that the Union clearly and unmistakably waived its right to bargain over the matters in dispute, thereby satisfying the Board's traditional test for determining whether an employer's unilateral actions are lawful. Alternatively, the Respondent argues that the Board should abandon the clear and unmistakable waiver standard and instead use a "contract-coverage" analysis that has been enunciated by two circuit courts of appeals.[1] Under the contract-coverage standard, the Respondent argues that there is also no violation in this case.

For the reasons set forth more fully below, we agree with the judge's application of the clear and unmistakable waiver standard as well as his determination that the Respondent violated its bargaining obligations before implementing the staff incentive policy. We disagree, however, with his determination that the Respondent's implementation of changes in its attendance and tardiness policy violated the Act. In reaching these conclusions, we will explain why we adhere to the Board's traditional waiver standard.

I. BACKGROUND

The Union has represented a unit of the Respondent hospital's registered nurses since 1992. The Union and the Respondent have been parties to successive collective-bargaining agreements since 1993. The agreement involved here was effective from March 24, 1999, through March 23, 2002.

The following management-rights language has been included in every collective-bargaining agreement since the parties' first contract in 1993:

> Except as specifically limited by the express provisions of this Agreement, the Medical Center retains exclusively to itself the traditional rights (as historically existed prior to union organization) to operate and manage its business and to direct its employees, including, but not limited to the following: to direct, plan and control facility operations; to exercise control and discretion over the organization and efficiency of operations; to change or eliminate existing methods, materials, equipment, facilities and reporting practices and procedures and/or to introduce new or improved ones; to utilize suppliers, subcontractors and independent contractors as it determines appropriate; to determine what products shall be used; to establish and change the hours of work (including overtime work) and work schedules; to select, hire, direct and supervise employees and assign them work; to classify, train, promote, demote and transfer employees; to suspend, discipline and discharge employees; to increase, reduce, change, modify, or alter the composition and size of the workforce; to establish, modify, combine or abolish job classifications; to make and enforce rules of conduct, standards and regulations governing conduct of employees; to lay off and to relieve employees from duty because of lack of work or other reasons; to determine the number of departments and units and the work to be performed therein; to determine standards of patient care; to determine the schedules and nature of work to be performed by employees and the methods procedures and equipment to be utilized by employees in the performance of such work; to utilize employees wherever necessary in cases of emergency or in the interest of patient care, to introduce new or improved methods or facilities regardless of whether or not such introduction may cause a reduction in the working force; to establish and administer policies and procedures related to re-

[1] *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); and *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

Our colleague also cites *Bath Marine Draftsmen's Assn*., 475 F.3d 14, 25 (1st Cir. 2007). Although the court in *Bath* stated that it was "adopt[ing]" the contract-coverage test, the court then stated that the proper test was the "sound arguable basis" test. But those two tests are not the same, and the implications of *Bath* are unclear.

> search, education, training, operations, services and maintenance of the Medical Center's operations; to determine staffing patterns including but not limited to the assignment of employees, numbers employed, duties to be performed, qualifications and areas worked; to change or abolish any job title, department or unit; to select and determine the type and extent of activities in which it will engage and with whom it will do business; to determine and change starting times, quitting times, shifts, and the number of hours to be worked by employees; to determine policies and procedures with respect to patient care; to determine or change the methods and means by which its operations are to be carried on; to take any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care.

On December 8, 2000, because of short-term staffing concerns over the holidays resulting from job vacancies, the Respondent implemented a staff incentive policy applicable to bargaining unit employees. The policy provided that nurses who signed up for and worked extra shifts between December 8, 2000, and January 1, 2001,[2] would qualify for premium payments of up to an additional $500 beyond applicable overtime pay.[3] This was the third staff incentive policy adopted by the Respondent in a little over a year.[4]

The contract permitted what it termed "extraordinary pay" for extra hours worked when the Respondent determined that additional work hours or nurses were needed.[5] The collective-bargaining agreement did not, however, contain any provisions relating to incentive pay.

The Union learned about the holiday incentive policy on December 10, 2000, from a unit employee who saw an announcement memo in a work area.[6] During a labor-management meeting in mid-January,[7] the Union expressed displeasure with the Respondent's failure to inform the Union in advance of the offer of incentives.[8]

Admitting that it did not afford the Union an opportunity for bargaining, the Respondent maintains that it had the authority to act unilaterally, in the absence of specific limitations to the contrary in the collective-bargaining agreement, under the agreement's management-rights clause.[9] The Respondent asserts that the Union has historically acquiesced in its implementation of staffing incentives.

Thereafter, in a telephone conversation on January 18, the Respondent's vice president of human resources, Diane Samuels, told union spokesperson Kay Jones that on February 1, the Respondent would be implementing a revised attendance and tardiness policy,[10] replacing one that had been in substantial effect since January 1997.[11] These policy documents addressed disciplinary processes related to attendance and tardiness. The collective-bargaining agreement contained no express provisions outside the management-rights clause regarding disciplinary processes, although it did set forth substantive obligations of employees regarding such matters as the requirements for call-in time and excused time. By letter of January 31, Jones told the Respondent that the Union was filing a grievance, demanded bargaining, and requested a copy of the changes. On February 2, the Respondent provided the Union with a copy of the revised attendance and tardiness policy that had been implemented the previous day. On February 9, Jones proposed several possible dates to begin negotiations. Samuels replied on February 23, agreed to meet, and requested

[2] All dates are in 2001, unless otherwise stated.

[3] The policy was disseminated through a memo from the vice president of patient services to the Respondent's directors, managers, supervisors, and nurses.

[4] The first one covered the period from November 23–27, 2000, and the second covered the period from December 1–4, 2000. A similar incentive had been offered in December 1998, running from December 14, 1998, through January 9, 1999.

[5] Art. XIV of the agreement sets forth the wage scales of unit employees, including annual across-the-board wage increases. Art. VII, entitled "Hours of Work and Extraordinary Pay," also affects employee earnings, and sec. 7.2 of this article states:

> Nothing in this Article or Agreement shall prohibit the Medical Center from scheduling or assigning nurses as it determines appropriate in the event circumstances occur such that the Medical Center determines additional work hours or nurses are needed; however, if a manager determines that additional work hours are needed, the additional hours shall be assigned to those who volunteered before others are assigned provided that the assignment of the volunteers is determined by the manager to be operationally sound and cost prudent.

[6] Staff Nurse Pamela Robbins telephoned Kay Jones, the Union's spokesperson for the bargaining unit, about the incentive policy and thereafter faxed a copy of the memo to her.

[7] Art. I, sec. 1.11 of the collective-bargaining agreement provides for bimonthly labor-management meetings between representatives of the Respondent and the Union to discuss "matters of mutual concern." The contract identifies staffing-related issues as matters of mutual concern and specifically excludes grievances and proposals to alter the terms of the contract as appropriate labor-management meeting topics.

[8] The Union stated that it did not then pursue a grievance on the matter because the period covered by the incentive had expired.

[9] The Respondent's systemwide vice president of human resources, Terry Solem, testified that it was the Respondent's practice to inform the Union, rather than bargain, about proposed changes to matters that were not addressed in the substantive provisions of the parties' collective-bargaining agreement but that fell within the rights reserved by management in the management-rights clause.

[10] This finding is based on Samuel's credited version of the substance of the conversation.

[11] In 1997, the Respondent separated its disciplinary process from its attendance and tardiness policy and implemented two distinct procedures. In February 1998, the Respondent made a minor revision to the tardiness rules.

that the Union contact her by telephone to schedule a date. The Union did not do so.

The Respondent admits in its answer to the complaint that the attendance and tardiness policy covered a mandatory subject of bargaining under the Act and was implemented unilaterally, but argues that the Union's failure to request bargaining promptly upon receiving 2 weeks' advance notice of the Respondent's plan constituted a waiver and privileged its action. But both Respondent's vice presidents, Solem and Samuels, testified that they would not have bargained with the Union over the new policy even if it had made a timely request, because the contract's management-rights clause granted the Respondent the authority to act on its own. Solem relied specifically on the following parts of the management-rights provision as providing this authority: (1) the first sentence, which provides that "[e]xcept as specifically limited by express provisions of this Agreement, [the Respondent] retains exclusively to itself the traditional rights (as historically existed prior to Association organization) to operate and manage its business and to direct its employees"; (2) the clause permitting the Respondent "to change or eliminate existing methods, materials, equipment, facilities and reporting practices and procedures and/or to introduce new or improved ones"; (3) the clause authorizing the Respondent "to suspend, discipline and discharge employees"; (4) the clause allowing the Respondent to "make and enforce the rules of conduct, standards, and regulations governing the conduct of employees"; (5) Respondent's right "to establish and administer policies and procedures related to research, education, training, operations, services and maintenance" of the Respondent's operations; and (6) the final section, reserving to the Respondent the right "to determine or change the methods and means by which its operations are to be carried on; to take any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care." Solem also cited the Respondent's unilateral formulation of attendance and tardiness policies in 1997 and 1998 as further indication of the parties' understanding that the Respondent had unilateral authority in this area.

II. JUDGE'S DECISION

Applying the Board's long-established standard, the judge concluded that the Union did not clearly and unmistakably waive its rights to bargain over either the implementation of the incentive policy or the changes in the policy covering attendance and tardiness. The judge examined the terms of the collective-bargaining agreement, the bargaining history, and the parties' conduct during the course of their bargaining relationship and determined that the Union had not relinquished its right to participate with the Respondent in formulating policies either for unit members' monetary incentives or for attendance and tardiness requirements.

The judge cited the Supreme Court's decision in *Metropolitan Edison Co. v. NLRB*,[12] for the proposition that a waiver of a statutory right will not be inferred from general contractual provisions, but rather must be clear and unmistakable. He then relied on subsequent Board decisions that have consistently held, in accordance with *Metropolitan Edison*, that a waiver of the right to bargain must be clear and unmistakable. The judge found that the broad terms of the contract's management-rights clause did not provide sufficient specificity to authorize the Respondent's unilateral action with regard to the staff incentive policy. Further, he found no evidence that the issue of staff incentives had been mentioned at all during contract negotiations, much less "fully discussed and consciously explored."[13] Accordingly, he concluded that the Union had not clearly and unmistakably yielded to the Respondent its bargaining rights on the subject. Finally, the judge determined that the Union's prior acquiescence in the Respondent's implementation of other short-term incentive policies did not amount to sanctioning the Respondent's continued promulgation of such incentives.

The judge reached the same conclusion with respect to the attendance and tardiness policy changes. He implicitly rejected the Respondent's contention that particular management-rights language established that the Union relinquished its right to bargain over changes in those policies. In addition, finding that Solem's testimony confirmed that the parties did not fully discuss attendance and tardiness policies during negotiations, he concluded that the contract's bargaining history failed to show that the Union relinquished its rights on those subjects. Finally, in light of the Respondent's admission that it would not have engaged in bargaining over those policies even if the Union had made a prompt request, the judge excused the Union's arguable lack of diligence in this regard on the basis that such action would have been futile.

III. ANALYSIS

This case presents us with the opportunity to explain and reaffirm our adherence to one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of a collective-bargaining agreement. The clear and unmis-

[12] 460 U.S. 693 (1983).
[13] *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1983).

takable waiver standard is firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining. It has been applied consistently by the Board for more than 50 years, and it has been approved by the Supreme Court. *NLRB v. C & C Plywood*, 385 U.S. 421 (1967). By contrast, the contract coverage approach, urged by the Respondent and endorsed by the dissent, is a relatively recent judicial innovation, adopted by two appellate courts.[14] In the framework established by Congress, however, it is the function of the Board, not the courts, to develop Federal labor policy. See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).[15]

Applying the clear and unmistakable waiver standard in this case, we find that the Respondent violated Section 8(a)(5) by unilaterally implementing its incentive policy. With respect to the Respondent's newly implemented disciplinary policy on attendance and tardiness, however, we disagree with the judge and find instead that the evidence establishes that the Union waived its bargaining rights, and therefore dismiss the allegation.

A.

The waiver standard is based on the long-established proposition that the duty to bargain created by Section 8(a)(5) of the Act continues during the term of a collective-bargaining agreement. See *Jacobs Mfg. Co.*, 94 NLRB 1214, 1217–1218 (1951), enfd. 196 F.2d 680 (2d Cir. 1952). See also *Proctor Mfg. Corp.*, 131 NLRB 1166, 1170 (1961) (reading management-rights clause broadly would "disregard 'the familiar concept of collective bargaining as a continuing and developing process'") (internal citation omitted).

Accordingly, a union has the statutory right to require an employer to bargain before making a unilateral change with respect to a term or condition of employment.[16] Conversely, the employer's authority to act unilaterally is predicated on the union's *waiver* of its right to insist on bargaining.[17] A leading treatise summarizes the Board's well-established principles this way:

> [U]nless discharged or waived, the duty to bargain continues during the term of the collective bargaining agreement.
>
> . . . .
>
> A party may contractually waive its right to bargain about a subject. Where such a waiver is claimed, the test is whether the putative waiver is in "clear and unmistakable" language.
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> . . . .
>
> When a "management-rights" clause is the source of an asserted waiver, it is normally scrutinized by the Board to ascertain whether it affords specific justification for unilateral action.

1 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 1006–1007, 1014 (5th ed. 2006 John E. Higgins, Jr. ed.) (fns. collecting cases omitted).[18]

The clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. The standard reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.

The earliest published application of the clear and unmistakable waiver standard dates back more than 50

[14] See fn. 1, supra.

[15] Our colleague states that the Board, in developing federal labor policy, should "pay close attention to what the courts are saying." We have done so. First, the Supreme Court and a majority of the appellate courts have approved the waiver standard. Second, our decision here thoroughly explains our reasons for adhering to the waiver standard and therefore fully responds to the minority of courts that have held otherwise.

[16] Of course, the Union's actual consent (and not merely notice and an opportunity to bargain) is required before a term or condition of employment contained in a collective-bargaining agreement can be modified. See, e.g., *St. Vincent Hospital*, 320 NLRB 42, 42 (1995) (explaining "interlocking legal principles of Sections 8(a)(5) and 8(d), and the consent requirement of Section 8(d)"). See also *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), aff.d 475 F.3d 14 (1st Cir. 2007).

[17] In contrast, the "contract-coverage" approach established by the District of Columbia Circuit describes the question of waiver as "irrelevant," reasoning that "where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right." *NLRB v. Postal Service*, supra, 8 F.3d 832 at 836 (emphasis in original), quoting *Dept. of Navy v. FLRA*, supra, 962 F.2d at 57. See also *Chicago Tribune Co. v. NLRB*, supra, 974 F.2d at 937 (applying "contract-coverage" approach and similarly attacking application of waiver principles). The difficulty with this view is that it assumes that determining whether a "matter is covered by the collective bargaining agreement" is simply a matter of contract interpretation, which can be resolved independent of the existence of a statutory duty to bargain. In other words, the Board's waiver standard properly takes the Act's policies into account in determining *whether* a collective-bargaining agreement covers a statutory subject of bargaining. Because a union's statutory right to demand bargaining persists unless it is contractually relinquished, the issue is appropriately analyzed in terms of waiver. See Kenneth L. Wagner, *"No" Means "No" When a Party "Really" Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases*, 13 Labor Lawyer 325, 338 (1997) (observing that the "statutory right to bargain precedes the negotiation of particular terms and conditions into a contract").

[18] See also Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* Sec. 20.16 (2d ed. 2004).

years, to *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949). There, the respondent employer argued that the union had ceded its right to bargain over the terms of a pension plan by agreeing to a broadly worded "Management Functions" clause. The Board rejected the argument that such a contract provision effected a waiver, noting that it was "reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights." Id. at 1098 (fn. omitted).

Since then, in decisions too numerous to cite,[19] the Board has applied the clear and unmistakable waiver analysis to all cases arising under Section 8(a)(5) where an employer has asserted that a general management-rights provision authorizes it to act unilaterally with respect to a particular term and condition of employment.

The Board has never departed from that standard. And it has specifically declined to adopt the approach that the dissent commends.[20] As a result, the Board's waiver analysis has become deeply engrained in the administration of the Act and in the conduct of collective bargaining.

The Board's longstanding adherence to the waiver standard reflects the Supreme Court's approval of the Board's approach. In *C & C Plywood*, supra, the Court reviewed the Board's finding that an employer violated Section 8(a)(5) by unilaterally implementing a premium-pay schedule for a classification of employees. The employer argued that the union representing its employees had waived its statutory right to bargain over the matter, but the Board rejected that argument and found no waiver under its clear and unmistakable standard. *C & C Plywood Corp.*, 148 NLRB 414, 416–417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965). The Court upheld the Board's finding of a violation and explicitly approved the waiver analysis, stating:

> [T]he Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach.

385 U.S. at 430.

The Court later expressly reaffirmed its approval of the Board's waiver standard in *Metropolitan Edison Co. v. NLRB*, supra. There, in considering whether a contractual no-strike clause imposed a duty on union officials to take affirmative steps to end an unlawful strike, the Court observed:

> [W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated."

More succinctly, the waiver must be clear and unmistakable. No later decision of the Court casts doubt on the continuing approval that the Board's traditional analysis enjoys. In the wake of those endorsements, appellate courts—with exceptions that will be addressed—have approved the Board's application of the waiver analysis to 8(a)(5) cases where an employer asserts that a contract provision authorized its unilateral change in working conditions.[21]

B.

There can be no dispute, then, that the Board's traditional waiver standard is exceptionally well established. The venerable age of the standard, coupled with its approval by the Supreme Court, makes a powerful case for stare decisis. But the dissent would have the Board break with its own precedent and turn to the "contract-coverage" standard devised by the United States Court of Appeals for the District of Columbia Circuit[22] and followed by the Seventh Circuit,[23] despite the fact that earlier decisions of those same courts, never reversed, applied the waiver standard.[24] Indeed, in a decision pre-

[19] See, e.g., *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2 (2000) (applying "well-settled 'clear and unmistakable' standard"), enfd. 8 Fed. Appx. 111 (2d Cir. 2001); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) (full Board decision) (It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable); *New York Mirror*, 151 NLRB 834, 839–840 (1965) (The Board will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such a right).

[20] See, e.g., *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750, 753–754 (1996). See also *Developing Labor Law*, supra, at 1008; Wagner, supra, 13 Labor Lawyer at 331–336 (1997).

[21] Decisions from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits have applied the waiver standard in cases where employers invoked contract provisions as authority for making unilateral changes in terms and conditions of employment. See, e.g., *Bonnell/Tredegar Industrty v. NLRB*, 46 F.3d 339, 346 fn. 6 (4th Cir. 1995); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 187 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991); *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983); *American Distributing Co. v. NLRB*, 715 F.2d 446, 449–450 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984); *Tocco Division v. NLRB*, 702 F.2d 624, 626–627 (6th Cir. 1983); *American Oil Co. v. NLRB*, 602 F.2d 184, 188–189 (8th Cir. 1979); *Murphy Diesel Co. v. NLRB*, 454 F.2d 303, 307 (7th Cir. 1971); *Auto Workers v. NLRB*, 381 F.2d 265, 267 (D.C. Cir. 1967), cert. denied 389 U.S. 857 (1967).

When endorsing the clear and unmistakable waiver standard in 8(a)(5) cases, the courts have frequently relied on *Metropolitan Edison*. See, e.g., *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468, 480 (6th Cir. 2002); *Bonnell/Tredegar,* supra at 346 fn. 6; *Olivetti,* supra at 187. Thus, our colleague's attempt to limit *Metropolitan Edison* to 8(a)(3) discrimination cases fails.

[22] See, e.g., *NLRB v. Postal Service*, supra.

[23] See *Chicago Tribune Co. v. NLRB*, supra.

[24] See, e.g., *Murphy Diesel Co v. NLRB*, supra, 454 F.2d at 307; *Auto Workers v. NLRB*, supra, 381 F.2d at 267.

dating its enunciation of the "contract-coverage" standard, the District of Columbia Circuit criticized the Board for *failing* to follow its waiver standard. *Road Sprinkler Fitters Local 669 v. NLRB*, 600 F.2d 918, 922–923 (D.C. Cir. 1979).[25] The court observed that it would "not allow an administrative agency to abandon its past principles without reasoned analysis." Id. at 923. Accordingly, it required the Board to "explain[] why the waiver standard should be changed, and how the new standard furthers the agency's statutory mandate." Id. We can discern neither persuasive reasons for abandoning the waiver standard, nor evidence that a different approach would further the Board's statutory mandate.

1.

The dissent describes the "contract-coverage" approach as follows:

> Under this test where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties *have bargained* about the subject and have reached some accord. Thus, there has been no refusal to bargain. [Emphasis in original.]

With passing acknowledgment to the long history of the Board's waiver standard and its endorsement by the Supreme Court, the dissent offers two reasons for departing from the waiver standard:

(1) "to eliminate the conflict between [the Board] and at least two two circuit courts;" and

(2) "to harmonize [the Board's] views with the grievance-arbitration process."

Neither reason withstands scrutiny.

2.

As the Board explained in *C & C Plywood*, supra, granting an employer the right to act unilaterally with respect to employment terms that are subject to bargaining under the Act "is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact." 148 NLRB at 417. In upholding the Board's decision, in turn, the Supreme Court observed that the Board properly "relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining." 385 U.S. at 430. The dissent points to no new experience with labor relations that would justify a reversal of the Board's traditional approach. Even more significantly, the Act has not changed.

The irony of the dissent's position is that it threatens to upset the settled expectations of parties to existing collective-bargaining agreements. Such a contract "must be read . . . in the light of the law relating to it when made." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956).[26] Because the waiver standard has been settled Board law for more than five decades (and its reasonableness has been established definitively by the Supreme Court for more than three decades), it would be sensible to assume that a collective-bargaining agreement negotiated during that period was reached with the waiver standard in mind. Any attempt to give effect to the intentions of the parties therefore would entail continuing to analyze those agreements under the waiver standard. Changing the standard, in contrast, would create a significant and unbargained-for shift of rights to employers and away from employees and unions, who previously thought they were assured of the right to bargain collectively over matters that were not explicitly waived.[27]

Changing to a "contract-coverage" standard would very likely complicate the collective-bargaining process and increase the likelihood of labor disputes. The waiver standard, on the other hand, effectively requires the parties to focus on particular subjects over which the employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won—in clear and unmistakable language—the employer's right to take future unilateral action should be apparent to all concerned. A "contract-coverage" standard, in contrast, creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of

[25] In *Road Sprinkler Fitters*, supra, the issue was whether, by signing a collective-bargaining agreement with one employer that was part of a "double-breasted" union/nonunion operation, the union was foreclosed from holding the *other* employer to the agreement. The Board held that the "question was a simple matter of contract interpretation," an approach that the District of Columbia Circuit characterized as "abolish[ing] any presumption against the loss of section 8(a)(5) rights." 600 F.2d at 921. The court found that the Board had failed to point to "any consideration that would justify the abandonment of the traditional waiver standard" in favor of a "contract interpretation standard." Id. at 922. The court cited, among other cases, *Auto Workers*, supra, 381 F.2d at 267, which applied the waiver standard to reject the argument that a contractual provision authorized unilateral employer action. Id.

[26] In *Mastro Plastics*, supra, the issue was whether a broad contractual no-strike clause waived the right of employees to engage in an unfair labor practice strike (as opposed to an economic strike). The Court, interpreting the agreement in light of the Act's policies, found no waiver, citing the absence of explicit language. Id. at 280–283.

[27] Cf. Wagner, supra, 13 Labor Lawyer at 340 (arguing that the "contract-coverage approach incorrectly puts the burden, or the risk, of ambiguity on unions," and that applying the test "frequently results in the drawing of an unwarranted inference that the parties bargained over the disputed subject").

no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision.[28] Cf. *Beacon Piece Dyeing & Finishing Co.,* 121 NLRB 953, 960 (1958) (rejecting concept of implied waiver of bargaining rights, based on union's unsuccessful attempt to achieve contractual coverage of subject).

3.

The flaws in the dissent's primary argument in favor of abandoning the waiver standard—the desire to avoid a conflict between the Board and the courts—are clear.

First, as already demonstrated, the waiver standard has been upheld by the Supreme Court itself. The two appellate courts that have rejected the waiver standard in favor of the "contract-coverage" approach are a distinct minority.

Second, the Board has a long-established policy of refusing to acquiesce in the adverse decisions of the appellate courts. See, e.g., *Tim Foley Plumbing Service*, 337 NLRB 328, 329 fn. 5 (2001) (citing *Insurance Agents (Prudential Insurance Co.)*, 119 NLRB 768, 773 (1957), set aside 260 F.2d 736 (D.C. Cir. 1958), aff.d 361 U.S. 477 (1960)).[29] The Board's adoption of, and adherence to, the waiver standard is surely within its administrative discretion, as leading scholars have pointed out[30] and as other appellate courts have observed.[31] The dissent does not contend otherwise.

For their part, in adopting the "contract-coverage" standard, the District of Columbia Circuit and the Seventh Circuit have held that the Board is *not* entitled to deference with respect to the waiver standard. See, e.g., *Postal Service*, supra, 8 F.3d at 837; *Chicago Tribune*, supra, 974 F.2d at 937. In the view of those courts, the issue is strictly one of contract interpretation, and the Supreme Court has held that the Federal courts—which have jurisdiction over labor-contract disputes under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185—owe the Board no deference in contract interpretation. Id., citing *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202–203 (1991).[32] The waiver standard, however, does not involve merely a question of contract interpretation, in the sense of determining what the contract means and whether it has been breached. Rather, the waiver standard reflects the Board's interpretation of the statutory duty to bargain during the term of an existing agreement. The *Litton Financial Printing* Court itself made clear that, in interpreting Section 8(a)(5) of the Act, the Board *is* entitled to judicial deference so long as its interpretation is "rational and consistent with the Act". 501 U.S. at 200. Stated somewhat differently, while the Board's interpretation of a collective-bargaining agreement may not be entitled to judicial deference, the Board's interpretation of the Act and the duty to bargain is.

Insofar as they are based on considerations of statutory policy, the principles the Board brings to bear in interpreting a collective-bargaining agreement are distinct from a determination of whether the contract (as opposed to the Act) has been breached. The Supreme Court made this distinction clear in *C & C Plywood*, supra. There, the Court rejected the argument that "since the contract contained a provision which *might* have allowed" the employer to act unilaterally, the Board was "powerless to determine whether that provision *did* authorize the [employer's] action, because the question was one for a state or federal court under §301 of the Act." 385 U.S. at 425–426 (emphasis in original). The Court explained that the Board had "not construed a labor agreement to

[28] Although the issue is not squarely presented, a management-rights clause of the sort presented here—especially if given the broad reading urged by the Respondent—is arguably itself incompatible with the Act. Were a party to present such a proposal during the regular course of contract negotiations, it would be strong evidence of a failure to bargain in good faith. See *Public Service Co. of Oklahoma*, 334 NLRB 487, 487–488 (2001) (An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract.), enfd. 318 F.3d 1173 (10th Cir. 2003).

[29] Here, of course, it is the District of Columbia Circuit that has rejected the waiver standard, which threatens to stalemate its application by the Board, given that court's potential authority to review every Board decision. See Sec. 10(f), 29 U.S.C. Sec. 160(f). But the Circuit itself has acknowledged that the "Board refuses to acquiesce in [the Circuit's] analysis . . . as it has every right to do" and that the Board is "always free to seek certiorari" review in the Supreme Court. *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005).

[30] "At a minimum . . . it is arguable that the Board's 'clear and unmistakable test,' endorsed by the Supreme Court . . . is more consistent [with] the policy of the Act than is the test endorsed in the District of Columbia Circuit. At least as a matter of administrative law . . . . the Board's view is worthy of judicial deference." Gorman & Finkin, supra, *Basic Text on Labor Law,* Sec. 20.16 at 634–635.

[31] See, e.g., *Tocco Division,* supra, 702 F.2d at 627 (applying Board's waiver standard as "rational and . . . consistent with the purposes of the Act," regardless of whether "court might prefer another construction"). See generally *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 787–788 (1996) (discussing "considerable deference" to which Board is due "by virtue of its charge to develop national labor policy . . . through interstitial rulemaking that is 'rational and consistent with the Act'").

[32] The issue in *Litton Financial Printing*, supra, was whether grievances involving a layoff that occurred after the expiration of a collective-bargaining agreement were arbitrable because they arose under the expired agreement. The Board, after finding that the employer violated its duty to bargain in good faith by refusing to process the grievances, nevertheless, refused to order arbitration based on its interpretation of the agreement. The Supreme Court declined to defer to the Board's interpretation, but enforced the Board's order, after independently concluding that the grievances did not arise under the agreement.

determine the extent of the contractual rights which were given the union by the employer." Id. at 428. Rather, the "Board's interpretation went only so far as was necessary to determine that the union did not agree to give up . . . statutory safeguards" against unilateral employer action. Id.

4.

The dissent's further concern over the "danger of different results" depending on the choice of forum as between the Board and arbitration is puzzling. Given the established policy of deferring to arbitration, the Board will decide a case involving contract interpretation—including the application of a management-rights clause—only where there is no basis for deferral. Moreover, the Board has deferred to an arbitrator's decision even where the arbitrator did *not* apply the Board's waiver standard. See, e.g., *Smurfit-Stone Container Corp.*, 344 NLRB 658, 660 fn. 4 (2005). See also Gorman & Finkin, supra, *Basic Text on Labor Law*, §31.5 at 1039–1042. Given this approach, the dissent's concern is misplaced.[33]

IV. APPLICATION

In sum, there is no good reason to depart from the Board's traditional waiver standard. Therefore, we apply that standard to the allegations in this case. For the reasons that follow, we find that the Respondent violated its bargaining obligation with respect to its unilateral implementation of the staff incentive policy, but did not do so with respect to the attendance and tardiness policy.

A.

We find that the Respondent violated Section 8(a)(5) by unilaterally implementing the incentive policy. There is no express substantive provision in the contract regarding incentive pay.[34] Moreover, there is no evidence that incentive pay was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the topic.[35] See generally *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999). In the absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining, the Respondent was not authorized to act unilaterally on this undisputedly mandatory subject of bargaining.

B.

We find that the Respondent did not violate the Act with respect to the newly implemented disciplinary policy on attendance and tardiness. Application of our traditional standard reveals that several provisions of the management-rights clause, taken together, explicitly authorized the Respondent's unilateral action. Specifically, the clause provides that the Respondent has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." By agreeing to that combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements. Such a conclu-

[33] Even if the Board's approach to management-rights clauses diverged from the approach of an individual arbitrator, or from the prevailing approach among arbitrators as a class, there is no compelling reason why the Board should follow the lead of arbitrators, rather than the other way around. It is the Board's duty to enforce the Act and effectuate its policies. See *Radioear Corp.*, 199 NLRB 1161, 1162–1163 (1972) (dissenting opinion of Members Fanning and Jenkins, disagreeing with majority's deferral to arbitration). See also Gorman & Finkin, supra, *Basic Text on Labor Law* Sec. 20.16 at 630 ("There are those who charge that—by deferring to arbitration, where tenets of contract construction will quite commonly favor the employer more than will the 'clear and unmistakable waiver' principle under the Labor Act—the NLRB is tacitly acquiescing in a modification of the substantive standard of 'waiver' to a degree that constitutes an abdication of the Board's function as a congressionally created administrative agency with a public charge.").

Finally, our colleague's attack on the Board's standard in deferral cases (i.e., that the Board will not defer if the arbitrator's decision is repugnant to the Act) is misplaced here. Even assuming our colleague's concerns were valid, they would present an argument for reconsidering the deferral standard, not for jettisoning the waiver standard.

[34] The dissent asserts that the Respondent retained affirmative unilateral authority to implement an incentive pay policy through contract language permitting "extraordinary pay" for extra hours worked when the Respondent determines that such are needed. The provision makes no reference to "incentive pay." We decline to interpret the word "extraordinary" as encompassing such ongoing, periodic, and predictable requirements as holiday staffing needs.

The dissent also cites to a provision in the management-rights clause stating that Respondent may take "any and all actions [the Respondent] determines appropriate . . . to maintain efficiency and appropriate patient care." Whether or not this is a plausible construction of the contract—one would be hard pressed to think of *any* unilateral change that could not be justified by reference to such a broad reading of the management-rights provision—the Board traditionally has refused to find a waiver based on clauses couched in such general terms. See, e.g., *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999) (management-rights clause gave employer "exclusive right to manage the plant and its business, and to exercise the customary functions of management" and "to make such fair and reasonable rules . . . as it may from time to time deem best for the purposes of maintaining order, safety, and/or effective operation of Company plants"), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000).

[35] The dissent's implicit suggestion that past practice supports its interpretation of the contract is unpersuasive. "It is well established that 'union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to the those in which the union may have acquiesced in the past.'" *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000).

sion requires no resort to a "contract-coverage" analysis, for the contract itself plainly speaks to the right of the Respondent to act.[36]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Provena Hospitals, d/b/a Provena St. Joseph Medical Center, Frankfort, Illinois, its officers, agents, successors, and assigns, shall take the action set forth below.

1. Cease and desist from

(a) Failing and refusing to bargain with the Illinois Nurses Association, as the exclusive collective-bargaining representative of employees in the unit described below, by unilaterally implementing a staff incentive policy without giving the Union notice and an opportunity to bargain.

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

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

(a) If requested by the Union, rescind the staff incentive policy unilaterally implemented on December 8, 2000, and reinstate the terms and conditions of employment in that area that existed before the unlawful unilateral change.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time registered nurses who hold the position description titles of staff registered nurse, and CWYN nurses who worked more than 130 hours in the preceding six (6) months (to be determined following the first payroll in January and July), employed by the Respondent at its facility currently located at 333 North Madison Street, Joliet, Illinois, but excluding all other persons including but not limited to physicians, all other professionals, technical employees, maintenance employees, business office employees, clerical employees, other staff employees, members of religious orders, supervisors, managers and guards as defined in the Act.

(c) Within 14 days after service by the Region, post at its facility in Frankfort, Illinois, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2000.

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

IT IS FURTHER ORDERED that that complaint is dismissed insofar as it alleges violations not specifically found.

CHAIRMAN BATTISTA, dissenting.

This case offers the Board an opportunity (1) to eliminate the conflict between it and at least two circuit courts on an important issue[1] and (2) to harmonize its views with the grievance-arbitration process—a vital part of our nation's labor relations policy.[2] I would embrace that opportunity in this case.

These cases involve an allegation that an employer acted unilaterally with respect to certain terms and conditions of employment. That unilateral conduct is alleged to be a refusal to bargain under Section 8(a)(5). The employer defends on the basis that the collective bargaining agreement contains provisions which privilege the conduct.

The Board has used a "waiver" test to determine the legality of the employer's actions in this context. Under

[36] See, e.g., *Cincinnati Paperboard*, 339 NLRB 1079 (2003). See also *Ingham Regional Medical Center*, 342 NLRB 1259 fn. 1 (2004).

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Chicago Tribune Co. v. NLRB,* 974 F.2d 933 (7th Cir. 1992); *Department of the Navy v. FLRA,* 962 F.2d 48 (D.C. Cir. 1992); and *NLRB v. Postal Service,* 8 F.3d 832 (D.C. Cir. 1993). The First Circuit has also said that it "adopt[s] the District of Columbia Circuit's contract coverage test to determine whether the Unions have already exercised their right to bargain." *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007).

[2] See the "Steelworkers Trilogy" cases: *American Mfg.,* 363 U.S. 574 (1960); *Warrior of Gulf,* 363 U.S. 574 (1960); *Enterprise Wheel*, 363 U.S. 593 (1960).

this test, the employer's conduct is unlawful unless the contract clause "clearly and unmistakably" waives the union's right to bargain. Unless the clause explicitly covers the action and clearly takes away the union's right to bargain, a violation is found.

This doctrine is in conflict with the views of two circuit courts. These courts apply a "contract coverage" test. Under this test where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties *have bargained* about the subject and have reached some accord. Thus, there has been no refusal to bargain.[3] In sum, the issue is not whether the union has *waived* its right to bargain. The issue is whether the union and the employer *have bargained* concerning the relevant subject matter. If so, the Board and the courts should honor the fruit of that bargaining.[4]

The waiver doctrine also poses conflicts between the Board and the grievance-arbitration process. The Board, viewing a case through the "waiver" prism, would find an 8(a)(5) violation. An arbitrator, viewing the same case through normal principles of contract interpretation, would find that the clause privileges the conduct, albeit not "clearly and unmistakably" so. Phrased differently, the Board would start with the proposition that the unilateral change is unlawful, unless the right to bargain has been "clearly and unmistakably" waived. An arbitrator would ask whether the union has met its burden of establishing a breach of contract. Thus, there is a danger of different results depending on the choice of forum. The union is encouraged to come to the Board, rather than to the agreed-upon grievance-arbitration process.

As stated, I would agree with the courts, and I would encourage support of the grievance-arbitration process. As to the former, courts are correct that there can be no refusal to bargain if the parties *have bargained* about the subject matter. As to the latter, the grievance-arbitration process is supported by an approach that harmonizes the Board and arbitral processes.

My colleagues suggest that there is no danger of discord between the Board and arbitration because the Board will defer to the decision of arbitrators. However, the Board will not defer if, in the Board's view, the arbitral decision is "repugnant" (palpably wrong) under the Act. The issue of "repugnance" is often hotly litigated, and the results are hard to predict.[5] The General Counsel contends in these cases that the decision is repugnant, and there follows extensive litigation on this issue and the underlying issue of the merits. This litigation is in addition to the arbitral litigation which has already occurred. In my view, it would be far better to have the same standard for arbitrators and the Board, and thus the General Counsel, applying that standard, would not begin a second litigation.

Metropolitan Edison[6] does not require a different result. That case involved discrimination against union officials, in violation of Section 8(a)(3). The issue was whether the union had essentially agreed that the employer could treat union officials in a disparate way. The Board and the Court would not lightly infer that the union had consented to discrimination against its own officers. By contrast, the instant case does not involve discrimination. As noted above, the issue is whether the union and the Respondent have bargained on the subject matters. I conclude that they have done so.

Nor does *C & C Plywood*[7] preclude my approach. The employer there argued that the Board was without jurisdictional power to interpret the contract. The Court rejected that contention. I do not argue here that the Board lacks jurisdictional power to analyze the contract. Indeed, I have analyzed the contract (see infra) to determine whether the contract covers the subject matters involved.

The Court also analyzed a second employer contention, i.e., that the contract did not give the employer the right to take the action that it took. The Court ruled that the Board permissively held that the union had retained its statutory right to bargain about the subject matters.

[3] If the contract, as interpreted, proscribes the employer's conduct, the grievance-arbitration process and Sec. 301 offer remedies for the breach of contract. However, a mere breach of contract is not an unfair labor practice. See *NCR Corp.*, 271 NLRB 1212 fn. 6 (1984), and cases cited therein.

[4] Contrary to the suggestion of my colleagues, I am not saying that broad and general language in a management-rights clause (e.g., "the right to operate the business") would show that a given subject matter is covered by the contract. On the other hand, if the language can reasonably be interpreted as dealing with the subject matter at issue, i.e., it can reasonably be said that the subject matter is covered, that can suffice. The test is not "clear and unmistakable."

[5] See discussion and cases cited in *The Developing Labor Law*, pp. 1545–1548. See also Judge Edwards' discussion therein, and concluding as follows: "In short, we are at a loss to discern either the theoretical underpinnings of the 'palpably wrong' criterion, or the standards that the Board purports to follow in applying it. Indeed, the current formulation of the criterion seems designed to permit the Board to give deference when it approves of the result of a settlement, but to intervene when it does not, with no apparent standards for judgment. Such an approach gives the parties no clear indication as to what kinds of settlements will be found to be 'palpably wrong' in a given case. A cynical observer might be inclined to view this approach as a veritable recipe for arbitrary action."

My colleagues suggest that the Board's deferral standard could be modified. However, I have dealt here with the standard as it is, not as it might become.

[6] 460 U.S. 693 (1983).

[7] 385 U.S. 421 (1967).

Interestingly, the Court did not use the term "waiver" and did not use a "clear and unmistakable test."[8]

Further, the circuit courts that use the "contract coverage" approach did so after *C & C Plywood*. Contrary to the suggestion of my colleagues, I am not simply "acquiescing" to these court opinions that have eschewed the Board's "waiver" analysis. Rather, I adopt the contract-coverage analysis applied by these court opinions because they are the better approach. Although the Board is not required to adopt the analysis of a Federal court of appeals, neither is it prohibited from doing so when it finds the court's analysis is more prudent than its own. The fact that the contract-coverage approach reconciles a conflict between the Board and the courts and prevents parties from forum-shopping for those courts are positive consequences of my position but are not the reason for it.

My colleagues say that "it is the function of the Board, not the courts, to develop federal labor policy." I agree. However, the Board, in developing that policy, should pay careful attention to what the courts are saying.

I recognize, as my colleagues have noted, that the contract-coverage approach breaks with current Board precedent. The Board has long exercised its right to depart from precedent when it finds that precedent imprudent. In the instant matter, there are conflicts with circuit courts and there are conflicts with the arbitral process. I believe that these conflicts warrant a fresh approach.

I do not agree with my colleagues that a change in law would upset the expectations of the parties in bargaining. This case, and others like it, involves bargaining that occurred after the court decisions of 1992 and 1993. The parties knew, or reasonably should have known, that the waiver standard was not unchallenged law.

Similarly, I do not agree that my approach complicates the collective-bargaining process. Under my approach, the parties are encouraged to bargain about matters that are relevant at the time of bargaining. If they do so, and reach an accord, I would honor the accord even if the accord is that the employer can act in a certain way. I cannot see how this complicates the bargaining process.

Application of Standard

I now apply these principles to the instant case.

1. Time and attendance policy

The Employer unilaterally implemented a new policy that was more strict in its enforcement of time and attendance rules. The contract gives the Employer the right "to make and enforce rules of conduct of employees," the right to "change reporting practices and procedures and or to introduce new or improved ones," and the right "to discipline employees for breach of those rules." The contract thus contains provisions that are relevant to the dispute. The issue of whether the contract proscribes the specific action is grist for an arbitrator's mill.

2. Staff incentive policy

Because of concerns about short-term staffing over the holidays, the Respondent implemented a staff incentive policy applicable to bargaining unit employees. The policy provided that nurses who signed up for and worked extra shifts between December 8, 2000, and January 1, 2001, would qualify for premium payments of up to an additional $500 beyond applicable overtime pay. This was the third staff incentive policy adopted by the Respondent in little over a year. The first one covered the period from November 23 to 27, 2000, and the second covered the period from December 1 to 4, 2000. A similar incentive was previously offered in December 1998, running from December 14, 1998, through January 9, 1999.

The contract contains provisions which are relevant to the dispute. It permits "extraordinary pay" for extra hours worked when the Respondent determined that additional work hours were needed.

The contract also provides that the employer can "establish and change the hours of work (including overtime work) and work schedules" and can "take any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care."

In view of the above, it is apparent that the contract contains clauses which are relevant to the dispute about overtime work and the compensation to be paid therefore. Again, this dispute is grist for the arbitral mill. An arbitrator could reasonably conclude that the Respondent did not breach the contract when it implemented its system. Conversely, an arbitrator could conclude that "extraordinary pay" does not include "incentive pay" and that the latter exceeded the provision of the contract.

Conclusion

I would apply the "contract coverage" analysis, and I would find no refusal to bargain about the subject matters involved herein. The issue of whether the parties reached an agreement on those subjects, and what those agreements were, would be left to the arbitral process.

[8] Concededly, the Board used the "waiver" test, and the Court affirmed the result. As noted, the Court did not use that word or the phrase "clearly and unmistakably."

Further, even if the Court intended to affirm the test, it did not mandate that test. It simply held that the Board *could* use that test.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the Illinois Nurses Association as the exclusive collective-bargaining representative of employees in the unit described below by unilaterally implementing a staff incentive policy without giving the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, if requested by the Union, rescind the staff incentive policy unilaterally implemented on December 8, 2000, and reinstate the terms and conditions of employment in that area that existed before the unlawful unilateral change.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

All full-time and regular part-time registered nurses who hold the position description titles of staff registered nurse, and CWYN nurses who worked more than 130 hours in the preceding six (6) months (to be determined following the first payroll in January and July), employed by us at our facility currently located at 333 North Madison Street, Joliet, Illinois, but excluding all other persons including but not limited to physicians, all other professionals, technical employees, maintenance employees, business office employees, clerical employees, other staff employees, members of religious orders, supervisors, managers and guards as defined in the Act.

PROVENA ST. JOSEPH MEDICAL CENTER

Jessica Willis Muth, Esq., for the General Counsel.

Kerry E. Saltzman, Esq. and *Jeffrey Ward, Esq.,* of Chicago, Illinois, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on October 16, 2001,[1] in Chicago, Illinois, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 13 of the National Labor Relations Board (the Board). The complaint, based on an original charge filed by Illinois Nurses Association (the Charging Party or Union), alleges that Provena Hospitals, d/b/a Provena Saint Joseph Medical Center (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that without prior notice to the Union and without affording the Union an opportunity to negotiate, the Respondent implemented a staff incentive policy for the bargaining unit on December 8, 2000, and a revised staff attendance and tardiness policy for the bargaining unit on February 1. Additionally, the complaint alleges that Respondent, by one of its supervisors, told a unit employee that she could not do union business on her floor.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the operation of a medical center providing inpatient and outpatient medical care, with an office and place of business located in Frankfort, Illinois. Respondent, in conducting its business during the previous calendar year, derived gross revenues in excess of $250,000 and purchased and received at its facility goods valued in excess of $5000 directly from points located outside the State of Illinois. 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

A. Background

The Union and the Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective by its terms from March 24, 1999, through March 23, 2002 (Jt. Exh. 3).[2]

[1] All dates are in 2001 unless otherwise indicated.

[2] Prior collective-bargaining agreements were effective from March 24, 1993, to March 23, 1996 (Jt. Exh. 5), and from March 24, 1996, to March 23, 1999 (Jt. Exh. 6).

In 1992, the parties commenced negotiations on their initial collective-bargaining agreement. As part of its June 29, 1992 proposal to the Union, the Respondent proposed a management-rights clause that has been included in all subsequent agreements between the parties.[3]

At all material times, Terry Solem held the position of vice president of human resources for the Employer's healthwide system, Diane Samuels serves as vice president of human resources at the Medical Center, and Linda Hulbert holds the position of vice president for patient services. Kay Jones, an employee of the Union, holds the position of staff specialist labor relations and is the spokesperson on behalf of bargaining unit employees.

During the negotiation session of November 20, 1992, the Respondent proposed an expansive-waiver clause that was rejected by the Union.[4]

During negotiations leading to the parties' second collective-bargaining agreement in January 1996, the Union proposed language as an addendum to the management-rights clause that would clarify statutory bargaining rights.[5] The Respondent rejected the Union's proposal. Although the Union ultimately withdrew the proposal, it apprised the Respondent that it was not waiving any of its rights under the Act.

Both Solem and Samuels testified that the Respondent would give notice to the Union and provide an opportunity to negotiate on any matter that is covered or set forth in their collective-bargaining agreement. For example, if the Respondent intended to change the wages of nurses that are set forth in the parties' agreement, it would provide advance notice to the Union and negotiate upon request. On the other hand, the Respondent takes the position that if a proposed subject matter needed to be changed or revised and it was not addressed in the parties' agreement, while the Employer would notify the Union of the change, it would not engage in negotiations. This position has remained firm throughout the parties' collective-bargaining relationship due to the Respondent's belief that the Union clearly and unmistakably waived its right to bargain over changes in mandatory subjects of bargaining when it agreed to the management-rights clause that has remained unchanged in all successor collective-bargaining agreements.

The testimony of the parties confirms that over the approximately 8 years of their collective-bargaining relationship, when changes announced by Respondent were favorable to the Union, no request to negotiate was undertaken. On a number of occasions, testimony indicates that even if anticipated changes adversely impacted bargaining unit employees, the Union either neglected to or refrained from making a request to negotiate. Over the years, the Union only filed one grievance contesting the failure to negotiate over changes in work rules and policies, and it was not referred to arbitration. Indeed, the subject unfair labor practice charge is the first time the Union has formally challenged the Respondent's position that it has no obligation to negotiate on changes in policies or rules that are not addressed in the parties' agreement.

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[3] The clause states as follows:

Except as specifically limited by the express provisions of this Agreement, the Medical Center retains exclusively to itself the traditional rights (as historically existed prior to union organization) to operate and manage its business and to direct its employees, including, but not limited to the following: to direct, plan, and control facility operations; to exercise control and discretion over the organization and efficiency of equipment, facilities and reporting practices and procedures and/or to introduce new or improved ones; to utilize suppliers, subcontractors, and independent contractors as it determines appropriate; to determine what products shall be used; to establish and change the hours of work (including overtime work) and work schedules; to select, hire, direct, and supervise demote and transfer employees; to suspend, discipline, and alter the composition and size of the workforce; to establish, modify, combine, or abolish job classifications; to make and enforce rules of conduct, standards, and regulations governing conduct of employees; to lay off and to relieve employees from duty because of lack of work or other reasons; to determine the number of departments and units and the work to be performed therein; to determine standards of patient care; to determine the schedules and nature of work to be performed by employees and the methods, procedures, and equipment to be utilized by employees in the performance of such work; to utilize employees wherever necessary in cases of emergency or in the interest of patient care; to introduce new or improved methods or facilities regardless of whether or not such introduction may cause a reduction in the working force; to establish and administer policies and procedures related to research, education, training, operations, services, and maintenance of the Medical Center's operations; to determine staffing patterns including but not limited to the assignment of employees, numbers employed, duties to be performed, qualifications, and areas worked; to change or abolish any job title, department, or unit; to select and determine the type and extent of activities in which it will engage and with whom it will do business; to determine and change starting times, quitting times, shifts, and the number of hours to be worked by employees; to determine policies and procedures with respect to patient care; to determine or change the methods and means by which its operations are to be carried on; to take any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care (R. Exh. 5, art. II).

[4] The clause provided:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Union, for the life of this Agreement, voluntarily and unqualifiedly waives the right, and agrees that the Medical Center shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge of contemplation of the parties at the time they negotiated or signed this Agreement.

[5] The proposal stated:

> provided however, that such rights shall not be exercised in conflict with express provisions of this Agreement, nor shall the Medical Center in exercising its right disregard the professional responsibilities of the nurses. In the event the Medical Center wishes to change or alter existing practices and/or policies related to terms and conditions of employment that are not otherwise provided for by express provisions of this Agreement, the Medical Center will notify the Association in writing of the desired change and reasons for any proposed change, and provide an opportunity for the Association and the Medical Center to bargain .(R. Exh. 1.)

B. The 8(a)(1) Allegation

The General Counsel alleges in paragraph 6 of the complaint that in about November 2000 Respondent, by Sandy Mariotto, interfered with employees' union activities by telling employees that they could not do union business on her floor.

This incident concerns a conversation that took place between Respondent's patient care manager, Sandy Mariotto, and registered nurse Deborah Cowger that was witnessed by unit coordinator Amber Findlay while all three individuals were in the Respondent's nineth floor nurses lounge.

Mariotto testified that she was certain that the conversation took place on October 26, 2000, around 11:20 a.m. in the nurse's lounge.[6] On that morning, Cowger was assigned the duties of charge nurse for the entire day as she was on a light duty restriction due to a back injury.[7] Just after starting work that morning, Cowger apprised Mariotto that she had a doctor's appointment around 9:40 a.m. and would return in about an hour. Upon returning from the doctor, who lifted the light duty restriction, Mariotto informed Cowger that she would again be assuming the duties of the charge nurse and would be taking over for Mariotto when she went to lunch. Mariotto told Cowger that upon her return from lunch she would then relieve Cowger so she could take her lunchbreak. Before Mariotto left for lunch, around 11:20 a.m., she observed Cowger in the nurse's lounge sitting at a table and reading the collective-bargaining agreement while writing out a grievance form. Mariotto asked Cowger, what are you doing, as she had just given her the assignment to serve as charge nurse. Cowger replied, "I am on break." Mariotto informed Cowger, "that no union business could be performed on the floor during work time." According to Mariotto, she left the nurse's lounge to make her scheduled lunch appointment and did not discipline Cowger. Both Cowger and Findlay, who were in the nurses' lounge on the day the conversation occurred, could not establish the date or time the conversation took place. Findlay testified that Cowger was looking through a binder when Mariotto came into the nurse's lounge. Mariotto informed Cowger that she wasn't to do union business on my time. Cowger replied, "I am on break." Mariotto said, "You're not supposed to do union business while you're working." In her deposition, as she was unavailable to testify in person at the hearing, Cowger first states that Mariotto told her she could not do union business on worktime. Cowger then states that Mariotto informed her she could not do union business on her floor. Findlay, however, did not testify that Mariotto informed Cowger that she could not do union business on her floor.

Mariotto, a former union president and representative, testified that she is aware that union stewards may perform union duties while on nonworktime or breaks. Likewise, she is aware that union duties may not be performed on worktime.

Under these circumstances, and particularly noting that Cowger was not disciplined and continued after October 26, 2000, to perform union duties while in a nonwork status, I do not find that Mariotto made the statement alleged by the General Counsel in paragraph 6 of the complaint. First, I found Mariotto to be a sincerely credible witness whose testimony had a ring of truth to it. Second, as confirmed by Findlay, I find that Mariotto informed Cowger that she could not perform union duties while working and never made the statement that Cowger could not perform union duties on her floor. I conclude that Mariotto informed Cowger that she could not perform union duties while working because she believed Cowger was in a work status due to her previous instructions to act as charge nurse. Thus, Mariotto concluded that Cowger was not on a scheduled break when she made the statement to Cowger. I note that Cowger had been away from work while at the doctor and was paid for this absence without having to take sick or annual leave. Likewise, there is no evidence that Mariotto gave Cowger permission to take a break on October 26, 2000, and no other managers were on the floor that could have given such permission.[8]

Accordingly, I recommend that paragraph 6 of the complaint be dismissed since I do not find that Mariotto made a statement to Cowger that she could not do union business on her floor.

C. The 8(a)(1) and (5) Allegations

1. The staff incentive policy

The General Counsel alleges in paragraph 7(a) of the complaint that about December 8, 2000, Respondent unilaterally implemented a staff incentive policy for the bargaining unit.[9]

Respondent admits that it unilaterally implemented the staff incentive policy on December 8, 2000, without notice to or providing the Union with an opportunity to bargain. The Respondent defends its conduct based on the parties' management-rights clause and argues that as long as the subject matter is not specifically addressed in the current collective-bargaining agreement, even if a significant change in policy is contemplated, there is no obligation to negotiate.

For the following reasons, I find that the parties' management-rights clause does not constitute a waiver of the Union's right to bargain about the staff-incentive policy, that the bargaining history of the parties' contract does not establish that a staff incentive policy was discussed in contract negotiations and that the parties' past practice of union acquiescence in the Respondent's unilateral implementation of other policies or rules does not constitute a waiver of the Union's right to bargain about the subject staff-incentive policy.

It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather such

[6] Mariotto testified that she attended a luncheon with the bishop of the Joliet diocese on that date which was a special occasion. Thus, she was certain that the conversation took place on that date.

[7] The charge nurse acts as a resource person and plays a lead role in the medical center. Those assigned to the position are paid an extra 75 cents per hour.

[8] Between 10:45 a.m., when Cowger returned from the doctor and 11:20 a.m. when Mariotto left for lunch, Cowger should have been performing the duties of charge nurse.

[9] The policy was implemented to meet short term or interim staffing requirements resulting from vacant positions and would be in effect between December 8, 2000, and January 1. Nurses who signed up and worked extra shifts during the scheduled time period were eligible to receive credit that translated into extra compensation with a maximum value of $500 (GC Exh. 3).

waivers must be clear and unmistakable.[10] Accordingly, the Board has repeatedly held that generally worded management-rights clauses or "zipper" clauses will not be construed as waivers of statutory bargaining rights.[11] In *Suffolk Child Development Center,* for example, the Board found that the management-rights clause did not constitute a waiver by the union of its right to bargain about changes in medical benefits, because there was no specific reference in that clause to employee medical benefits or other terms of employment. Likewise, in *Kansas National Education Assn.,* 275 NLRB 638, 639 (1985), the Board found that language in the management-rights clause reserving to management "the right to carry out the ordinary and customary functions of management and to adopt policies and practices in furtherance thereof," did not constitute a waiver by the union of its right to bargain about employee transfer arrangements.[12] More specifically, the Board found "[t]he provision is at best vague and as such insufficient to meet the standard of a 'clear and unmistakable waiver.'"

Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.[13]

The Respondent has not pointed to anything in the bargaining history of the parties' current collective-bargaining agreement to show that the meaning and potential implications of the management-rights clause in general, or staff-incentive policies in particular, were "fully discussed and consciously explored" during negotiations, or that the Union "consciously yielded or clearly and unmistakably waived its interest" in regard to bargaining about staff incentive requirements. Indeed, there is nothing in the record to show that the subject of a staff-incentive policy was mentioned much less discussed, during contract negotiations that preceded the parties' current agreement.

Thus, in light of the complete absence of any evidence that the parties discussed staff-incentive policies during negotiations for the instant collective-bargaining agreement, I will not infer a waiver by the Union of its right to bargain about that subject.

Finally, I do not find that the Union's acquiescence in either prior staff incentive policies or the Respondent's unilateral implementation of numerous work rules or other policies, constitutes a waiver by the Union of its right to negotiate about the staff incentive policy that was unilaterally implemented on December 8, 2000. First, a union's past acquiescence in an employer's unilateral action on a particular subject generally does not, without more, constitute a waiver by that union of any right it may have to bargain about future action by the employer in that matter. As the Board found in *Owens-Corning Fiberglas,* 282 NLRB 609 (1987), the fact that an employer previously changed the terms of a particular program without bargaining does not preclude a union from effectively demanding to bargain over the most recent change in the program. A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.

A fortiori, the Union's acquiescence in the Respondent's past unilateral implementation of other work rules, not involving staff-incentive policies, does not constitute a waiver of the Union's right to bargain about the Respondent's new policy involving staff incentives.[14]

Likewise, in *Murphy Diesel Co.,* 184 NLRB 757 (1970), enfd. 454 F.2d 303 (7th Cir. 1971), the Board held that the union's past acquiescence in the employer's unilateral promulgation of written work rules concerning, inter alia, lateness and absenteeism did not constitute a waiver of the union's right to bargain about the employer's subsequent unilateral promulgation of substantially revised, stricter rules concerning lateness and absenteeism.

Accordingly, in light of the above considerations, I find that the staff incentive policy is a mandatory subject of bargaining; that the Union has not waived its right to bargain with the Respondent about this subject; and that the Respondent's unilateral implementation of the subject staff incentive policy, without providing the Union with prior notice and an opportunity to bargain, violated Section 8(a)(1) and (5) of the Act, as alleged.

2. The revised staff attendance and tardiness policy

The General Counsel alleges in paragraph 7(b) of the complaint that the Respondent, on or about February 1, implemented a revised staff attendance and tardiness policy for the bargaining unit without prior notice to or affording the Union an opportunity to bargain.

By letter dated January 31, Jones apprised Samuels that the Union was filing a grievance concerning the implementation of the new absenteeism policy. Additionally, the Union demanded to bargain over the policy and requested that it be provided a copy of the revised changes (GC Exh. 5). By letter dated February 2, Samuels replied and provided a copy of the revised staff attendance and tardiness policy to Jones. No mention of agreed-upon bargaining dates was contained in the letter. Accordingly, by letter dated February 9, Jones proposed a number of dates in February 2001 to commence negotiations

[10] *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). The Supreme Court stated that it would not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless such an intent is explicitly stated. Id.

[11] *Suffolk Child Development Center,* 277 NLRB 1345, 1350 (1985).

[12] While bargaining team member Mariotto testified that during negotiations for the initial contract, the Union was concerned that the management-rights clause as written would allow the Respondent to implement employment policies without bargaining, Chief Negotiator Jones did not testify in this manner. Rather, Jones testified that the parties argued about the extent and impact of the management-rights clause from day one. Accordingly, the Union proposed to amend the management-rights clause in 1996 (R. Exh. 1). Although the Respondent rejected the proposal, they did come back with a counteroffer, but it did not contain language about negotiating with the Union. Under these circumstances, the Union withdrew its proposal but informed the Respondent at the bargaining table that they were not waiving any rights under the National Labor Relations Act.

[13] *Rockwell International Corp.,* 260 NLRB 1346, 1347 (1983).

[14] *Ciba-Geigy Pharmaceuticals,* 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (union's acquiescence in employer's past unilateral changes in other plant rules does not constitute waiver by union of right to bargain about employer's implementation of new plant rule).

(GC Exh. 7). On February 23, Samuels responded to Jones and agreed to meet to discuss the revised policy (GC Exh. 8).

Respondent does not dispute that the revised staff attendance and tardiness policy was implemented on February 1, and that the policy itself is a mandatory subject for the purpose of collective bargaining. It does dispute, however, that the policy was implemented unilaterally and argues that in a telephone conversation with Jones on January 18, the Union was apprised that the revised staff attendance policy would be implemented on February 1 (GC Exh. 6).

Jones testified on direct examination that the Union was not informed in the telephone conversation of January 18 that the revised staff attendance and tardiness policy would be implemented on February 1. Samuels testified that she informed Jones on January 18 that the revised attendance and tardiness policy would be implemented on February 1. Under normal circumstances, the absence of a request to negotiate after being informed of a scheduled implementation date would be fatal to a union. If such a situation occurs, a subsequent implementation by a respondent would be privileged under the Act. Here, even if the Union was notified in advance that the revised staff and attendance policy would be implemented on February 1, and did not request to negotiate, I find the particular circumstances of this case dictate a different result.[15]

The testimony of Solem and Samuels confirms that even if the Union made a timely request to negotiate over the revised staff attendance and tardiness policy the Respondent would have refused to do so based on their articulated position discussed above.[16] The position of the Respondent remains unchanged even though they acknowledge that the changes in the revised staff attendance and tardiness policy significantly impact terms and conditions of employment. In this regard, the changes combine all forms of absence and tardiness under a single tract and the proposed changes increase the penalties for corrective action.

Since Solem admits that the parties did not fully discuss or consciously explore the subject of staff attendance and tardiness policies in prior negotiations, I find that the Union did not waive its right to negotiate over the revised policies.[17] Likewise, even if the Union previously acquiesced to the implementation of prior staff attendance and tardiness policies, it does not constitute a waiver for all time.

Based on the totality of the circumstances in the subject case, and particularly relying on the discussion above concerning the management-rights clause, prior bargaining history, and past practices, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union about the implementation of the revised staff attendance and tardiness policy. *Roll & Hold Warehouse,* 325 NLRB 41 (1997), enfd. 162 F.3d 513 (7th Cir. 1998).

CONCLUSIONS OF LAW

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

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

3. By failing to bargain with the Union about the implementation of a staff incentive policy and a revised staff attendance and tardiness policy, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Remedy

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

Since the Respondent refused to bargain with the Union about the implementation of the staff incentive policy and revised staff attendance and tardiness policy, I shall order it to cease and desist from engaging in such conduct and to bargain on request with the Union about both of these policies. I shall further order the Respondent to rescind the staff incentive policy unilaterally implemented on December 8, 2000, and the revised staff attendance and tardiness policy that was implemented on February 1, 2001. The Respondent shall also make whole any employee for any loss of earnings and other benefits suffered as a result of its unlawful action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). The Respondent shall rescind and expunge from employees' files all discipline issued to them as a result of Respondent's unilateral implementation of the revised attendance and tardiness policy and make employees whole for any loss

[15] If this issue is dispositive upon review, I find that Samuels informed Jones on January 18 that the revised staff attendance and tardiness policy would be implemented on February 1. In this regard, Samuel's testimony has a ring of truth to it and is buttressed by the reference to the revised staff attendance and tardiness policy in her February 2 letter to Jones. I further find, however, that even if Samuels notified Jones about the revised policy on January 18 she gave no specific details and did not furnish copies of the policy to the Union until after the February 1 implementation date. I am hard pressed to find that without specific information about the revised policy the Union was in any position to be able to assess whether there were any issues over which to demand bargaining. Thus, I cannot find that the Union waived its right to bargain over the revised staff attendance and tardiness policy by not requesting to negotiate prior to February 1.

[16] In *Westinghouse Electric Corp.,* 313 NLRB 452 (1993), the Board found that the union did not waive its right to bargain by failing to request bargaining in the nearly 2-month period between disclosure of the employer's plans to transfer work and the implementation of such plans. Since the employer's labor officials clearly indicated their view that the decisions involved were matters solely within management discretion and not subject to collective bargaining, it would have been futile for the union to make a formal request about a decision which was effectively presented as a fait accompli.

[17] The Respondent argues that the holding of the Board in *Continental Telephone Co.,* 274 NLRB 1452, 1453 (1985), dictates a different result. I find that the specific language in the management prerogatives clause of that case to "promulgate and from time to time change the rules and regulations not inconsistent with this Agreement governing the conduct of employees both on and off the Company premises during the performance of work assignments" is not found in the subject collective-bargaining agreements. Thus, I find that the holding of that case is not binding in this case because much broader language is contained in the parties' management-rights clause.

they may have suffered as a result of such discipline in the manner set forth in the above cases.

[Recommended Order omitted from publication.]