Warren Unilube, Inc. *and* Teamsters, Local Union No. 667. Case 26–CA–023910

July 31, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 30, 2011, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

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

We agree with the judge, for the reasons stated in his opinion, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its cell phone and radio usage policy (the CR policy) for bargaining unit employees. Contrary to the Respondent, we agree with the judge that the new CR policy constituted a material, substantial, and significant change from the policy that was in effect just days before, when the Union prevailed in a representation election.

The Respondent previously had no radio usage policy at all. In addition, the new CR policy included an unprecedented emphasis, at least for nonproduction employees, on the prospect of discipline for a violation. See *Success Village Apartments, Inc.,* 348 NLRB 579, 630 (2006), and cases cited therein (explaining that work rules that can be grounds for discipline and thereby affect employees' continued employment are mandatory subjects of bargaining); accord: *Postal Service*, 341 NLRB 684, 687 (2004).

The Respondent's expansion of the limitation on when employees could use cell phones also constituted a significant change. Under the old CR policy, the Respondent prohibited nonproduction employees from using cell phones only when operating company equipment, while under the new policy the prohibition on cell phone usage was extended to any time other than break and lunch periods. The Respondent argues that the breaktime limitation had been in place prior to the Union's election victory, pointing out that since 2003 its employee handbook has contained the following provision: "Personal telephone calls should be held to a minimum and received only during work breaks. However, the office will forward all *emergency* phone calls directly to employees, so long as employees do not abuse such privileges." The Respondent also observes that, even though the judge discredited testimony that the facility-wide rule against cell phone use except at breaks and lunchtime had been posted since 2007, forklift driver Annie Morris (whose testimony the judge broadly credited) testified that she remembered seeing a sign to that effect before the election, and possibly as far back as 2007.[2] The record, however, establishes that the handbook policy and posted signs did not reflect the reality in the facility. According to the credited testimony of Morris and warehouse employee Roshel Howard, the Respondent's actual practice before the election was to prohibit nonproduction employees from using cell phones only while they were operating equipment.[3] Thus, even if old CR policy purported to limit cell phone use to breaktimes, the credited testimony establishes that the Respondent's new CR policy constituted an effort to more strictly enforce that limitation, further supporting the judge's finding. See *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005) (finding the employer's stricter enforcement of a cell phone policy unlawful because "a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over"), enfd. 468 F.3d 952 (6th Cir. 2006).

The Respondent also argues that, as a practical matter, the new CR policy did not materially affect even the nonproduction employees, because employees continually operate equipment except during breaks and at lunchtime. The record does not support that assertion.

[1] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

The Respondent argues that, because it is testing the Board's certification of the Union in the court of appeals, the notice to employees in this case should not state that the Respondent will bargain with the Union. We reject that argument for the following reasons. It is settled that collateral litigation does not suspend the duty to bargain under Sec. 8(a)(5) of the Act. See *Alta Vista Regional Hospital*, 355 NLRB 265, 265 fn. 3 (2010), affirmed by 357 NLRB No. 36 (2011). Contrary to the Respondent's argument, moreover, our application of that legal principle here in no way contravenes the parties' agreement not to litigate in this proceeding the issues underlying the test-of-certification proceeding.

[2] Morris also testified that she saw a sign prohibiting cell phone use while operating equipment.

[3] The judge found that Howard's supervisor had repeatedly observed Howard's cell phone usage. Howard testified to only one such event prior to the election. This misstatement by the judge does not affect our decision.

Indeed, Morris credibly testified that, under the old CR policy, when she needed to use her cell phone while on duty, she would simply park the forklift before using the cell phone, and that her supervisor had observed her doing so without complaint. Since the new CR policy took effect, Morris stated, if she needs to use her cell phone while on worktime, she goes where she cannot be seen in order to avoid detection, risking discipline. The difference between being able to have some control over when to place personal calls, as under the old CR policy, and having only a narrowly prescribed period, as under the new CR policy, can be quite meaningful for employees, and not just a matter of convenience. For example, employee Morris testified that under the old CR policy she was able to maintain necessary phone contact with her children while at work. In these circumstances, we find that the new requirement that employees use cell phones only during breaktimes or lunch periods was a material, substantial, and significant change.[4]

[4] Even if we agreed with the Respondent's contention as to the cell phone policy, we would still find that the Respondent violated Sec. 8(a)(5) by unilaterally implementing the no-radio rule and by emphasizing discipline for infractions of the new CR policy.

There is no merit to the Respondent's assertion that it was privileged to adopt the new CR policy because, although the Union had won the election, it had not requested bargaining prior to the unilateral change. Long ago, the Board adopted a trial examiner's explicit rejection of that position: "It would also seem to be immaterial that when the Respondents acted unilaterally . . . the Union itself had not yet requested the Respondents to bargain. After the election the Respondents knew that the Union had won the election and represented a majority of their employees. They could act unilaterally thereafter only at their peril." *Laney & Duke Storage Warehouse Co.,* , 151 NLRB 248, 266–267 (1965), enfd. in relevant part 369 F.2d 859 (5th Cir. 1966) That principle is now settled law. See, e.g., *Injected Rubber Products Corp.*, 258 NLRB 687, 687 fn. 2, 696–697 (1981); accord: *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984) ("The [u]nion's victory in a valid election, even where its results have been challenged and are not yet certified, creates an obligation to bargain independent of any request for bargaining."). *Wal-Mart Stores, Inc.*, 348 NLRB 274, 290 (2006), enfd. sub nom. *Food & Commercial Workers v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008), cited by the Respondent, is not to the contrary; there was no unilateral change allegation in that case.

Nor is there merit to Respondent's contention that it would have been unlawful for it to bargain with the Union over the new CR policy because the "general duty clause" of the Occupational Safety and Health Act, 29 U.S.C. Sec. 654(a)(1), requires it to maintain a workplace free from serious hazards. The Respondent has failed to demonstrate that the clause mandated the specific changes at issue here or that bargaining about the new CR policy would be in contravention of a specific statutory mandate. As the judge observed, the existence of such general provisions does not stand in the way of bargaining over the specifics of their implementation. Cf. *Alta Vista Regional Hospital*, 355 NLRB 265, 272 (2010), affd. in 357 NLRB No. 36 (2011). Moreover, even assuming the legitimacy of the Respondent's reliance on the clause, there were a number of pre-implementation issues suitable for bargaining. Thus, the case is unlike *Eddy Potash, Inc.*, 331 NLRB 552 (2000), cited by the Respondent, where the employer unlawfully insisted to impasse that the union agree to a 12-hour shift provision in the face of Federal law prohibiting shifts in excess of 8 hours. There, it was the employer's own proposal that was an illegal bargaining subject, not the subject matter (hours of work). Id. at 559–560. This case is also unlike *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975), where the Board found that the employer did not violate Sec. 8(a)(5) by unilaterally imposing a requirement that salesmen keep records of the hours they work, because the employer was merely correcting an inadvertent failure to comply with specific legal recordkeeping requirements. 209 NLRB at 704. The Board did not suggest that bargaining over the record-keeping requirement would have been unlawful. Rather, it found that the employer was not *required* to bargain under those circumstances. For the reasons discussed in the judge's decision, that is not the situation here.

Member Hayes expresses no opinion whether the implementation of a no-radio usage policy or a broader cell phone usage prohibition would, standing alone, constitute a material, substantial, and significant change. He relies instead on precedent holding that the threat of discipline for a breach of a unilaterally implemented policy may be sufficient to establish such a change, thus triggering a preimplementation bargaining obligation. E.g., *Ferguson Enterprises.,* 349 NLRB 617, 618 (2007), and *Postal Service*, 341 NLRB 684, 687 (2004). However, he disagrees with his colleagues to the extent they suggest that stricter disciplinary enforcement of extant work rules would *necessarily* be a substantial, material, and significant change requiring preimplementation bargaining. See *The Fresno Bee*, 337 NLRB 1161, 1186–1187, and cases cited there (2002). Finally, Member Hayes notes his view that in certain circumstances an employer's need for immediate compliance with the OSHA "general duty clause" should excuse it from bargaining before taking unilateral action, but the Respondent has failed to prove the existence of such circumstances in this case. Indeed, the Respondent does not even claim an immediate need to change policies that had apparently been in effect for some while before the Union's advent.

ORDER

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

Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its West Memphis, Arkansas facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 26, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 November 16, 2010."

Dated, Washington, D.C. July 31, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

William T. Hearne, Esq., for the Acting General Counsel.
Benjamin N. Thompson and *Jennifer M. Miller, Esqs. (Wyrick, Robbins, Yates & Ponton LLP),* for the Respondent.
Frederick J. Lewis, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), for the Respondent.
Samuel Morris, Esq. (Godwin, Morris, Laurenzi & Bloomfield, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A RINGLER, Administrative Law Judge. This case was tried in Memphis, Tennessee, on July 11, 2011. The charge in this proceeding was filed by the Teamsters, Local Union No. 667 (the Union) on November 22, 2010.[1] The Union represents a bargaining unit, which includes production, maintenance, and warehouse employees (the unit), who are employed by Warren Unilube, Inc. (the Respondent or Company) at its West Memphis, Arkansas facility (the facility). On February 28, 2011, a complaint issued alleging that the Company violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally changing the unit's cell phone and radio usage policy (the CR Policy).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Company, an Arkansas corporation, with an office and place of business at the facility, has manufactured petroleum products. Annually, it sells and ships goods valued in excess of $50,000 directly from the facility to points located outside of Arkansas. Accordingly, it admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company blends, produces, and packages petroleum products. Its facility is an expansive and highly-automated enterprise, which includes: a series of high volume oil and chemical storage tanks; multiple warehouses; production, blending, blow molding, and packaging operations; and an office complex. The facility produces roughly 200 oil-based products, including: 10W-30 motor oils; hydraulic, brake and transmission fluids; and gear oils.

On November 5, Region 26 for the National Labor Relations Board (the Board) conducted a representation election at the facility, which resulted in the unit voting in favor of unionization.[3] (GC Exh. 2). Thereafter, the Company filed objections, which were ultimately denied by the Board. As a result, on March 16, 2011, the Board certified the Union as the unit's representative. (GC Exh. 3). The Company, subsequently, filed an appeal with the United States Court of Appeals, which is presently pending.[4]

B. Preelection CR Policies

Before the election, the Company employed various CR policies.[5] It continuously maintained a facility-wide CR policy, as well as a stricter CR policy in its production department.

1. Facility-Wide CR Policy

On July 13, 2007, Dale Wells, president, disseminated the Company's first formulation of its facility-wide CR policy (the original facility-wide CR policy), which stated:

> Effective IMMEDIATELY, cell phones WILL NOT be used while operating ANY type of company equipment. This includes Forklifts, Loading/unloading Trucks or Railcars, Operating production lines, etc.

(GC Exh. 5) (emphasis as in original). This policy, however, failed to address whether cell phones could be used, while not operating Company equipment, or offer any guidance concerning radio usage. Rusty Brown, plant manager, credibly testified that this policy was posted and circulated.

2. Production Department CR Policy

Aaron Black, quality assurance manager, credibly testified that, since approximately 2007, the production department, which he oversaw, applied a more conservative CR policy, which banned all cell phone usage (the production CR policy).

[1] All dates herein are in 2010, unless otherwise stated.
[2] The Union did not submit a posthearing brief.
[3] There are approximately 135 employees in the unit.
[4] The parties, however, stipulated that, by litigating the instant charge, the Company "does not . . . waive any arguments . . . regarding the validity of the Union's certification." (Jt. Exh. 1.)
[5] The employee handbook, however, did not contain a CR policy or discuss cell phone or radio usage, beyond stating that "[p]ersonal telephone calls should be held to a minimum and received only during work breaks." (GC Exh. 8.)

This policy was memorialized within a checklist for new production employees, which succinctly stated, "[n]o cell phones are allowed in the plant. . . ." (GC Exh. 9.) Black stated that he reminded production employees about this policy at periodic staff meetings,[6] and that some production employees were disciplined for violating this policy. Between 2008 and 2009, for instance, five production employees received discipline ranging from warning letters to a 3-day suspension for cell phone-related infractions. (GC Exhs. 11–18). The production CR policy was, however, silent concerning radio usage. The Company failed to present any evidence that nonproduction employees were ever disciplined under the more conservative production CR policy.

3. Enforcement of the Original CR Policy Outside of the Production Department

Annie Morris, a unit forklift operator and long-term employee, testified that, although she observed a CR policy posted at the facility before the election, she could not recall its exact text. She attempted, however, to paraphrase her recollection of the posted CR policy, and related that it solely banned cell phone usage, while operating equipment. She added that, consequently, she openly used her cell phone, and simply parked her forklift before doing so. She noted that she observed other employees openly using their cell phones during the workday, and averred that she was unaware of any disciplinary consequences. She recollected that, in July, James Mengarelli, her supervisor, saw her using her cell phone during worktime, and patiently waited, without comment, for her to finish her call. She reported that, before the election, radios were commonly played throughout the facility.

For several reasons, I fully credit Morris' testimony. First, regarding demeanor, she was a sincere and forthright witness, who was consistently helpful. Second, although she enjoyed no obvious stake in the proceeding, she candidly provided testimony that was adverse to the Company's interests, even though she risked potential disapproval from the audience of management agents and officials who attended the hearing. Her willingness to fully cooperate, in spite of this substantial risk, resonates heavily in favor of her credibility. Third, her testimony was consistent with the documentary evidence, i.e., her oral summary of the CR policy was analogous to the documented original facility-wide CR policy. See (GC Exh. 5).

Roshel Howard, a unit worker and long-term warehouse employee, testified that, before the election, she was never directly told by supervision that the Company actually had a CR policy. She acknowledged, however, that she knew that cell phones could not be used, for example, while operating a forklift. She stated that she consistently brought her cell phone to work, and openly used it. She related that she shares an office with Supervisor Mengarelli, and that he has repeatedly observed her cell phone usage, without incident. She added that she was unaware of any rule prohibiting radio usage, and routinely observed employees playing radios at their workstations. For essentially the same reasons described under Morris' testimony, I also fully credit Howard's testimony.

C. Postelection CR Policy

Following the November 5 union election, the Company amended the facility-wide CR policy (the amended facility-wide CR policy). The Company unilaterally issued the amended facility-wide CR policy, without notifying the Union, or otherwise engaging in bargaining over this matter. This amendment is the gravamen of the instant litigation. Specifically, on November 16, Gary Johanyak, vice president of operations, distributed, via email, the following memorandum:

> All employees must be alert and capable of hearing a fellow employee in need of assistance. With this in mind, the wearing of any type of ear phones, ear buds or any other such device used for listening to radios, iphones, ipods, mp3 players, cell phones, blue tooth devices, or any other device capable of producing sound *is not allowed*. This . . . includes . . . radios or . . . boom boxes. An exception will be made for radios in an office where the sound is low enough that it cannot be heard by . . . workers or by customers conducting business on the telephone.
>
> All the above impair the hearing and communication of one employee with another in case of need or endangerment and will be considered a violation of our safety rules and a violation of the employee handbook.
>
> Also, the use of cell phones, iphones, blackberry, ipad or any other communicative devices at the workplace except at designated break times and lunch *is strictly prohibited*. Communications regarding the operations of the plant primarily by managers and supervisors are accepted.
>
> In the case of emergencies, please let your people know they should contact the guard for all emergencies . . . , the guard will then notify the employee.
>
> The above is effective immediately and violations will result in disciplinary action. . . .
>
> Please have a meeting with all your employees as soon as possible and inform them of these rules and the consequences . . . .

(GC Exh. 4) (emphasis as in original). Howard and Morris credibly testified that, following the dissemination of the amended facility-wide CR policy, employees ceased using cell phones and radios at the facility.[7]

Brown and Johanyak testified that the amended facility-wide CR policy was simply a reiteration of the CR policy that was in place before the election, although they each failed to describe exactly when the amended facility-wide CR policy supplanted the original facility-wide CR policy. In support of their testimony, the Company offered a photograph, taken on July 10, 2011 (i.e., the day before the hearing), of a bulletin board posting, which paraphrased the amended facility-wide CR policy, and stated, "unauthorized use of cell phones is prohibited . . . [y]ou may use your phones [only] at breaks and lunch in au-

[6] His reminder, however, lifted the full ban on cell phones, and allowed cell phone usage during breaks and lunch periods. (GC Exh. 10.) ("Cell phone use at any time other than breaks or lunch is prohibited.")

[7] They added that they continue to covertly use their cell phones.

thorized areas." (R. Exhs. 5A–B). Brown testified that similar notices were continuously posted throughout the facility since roughly 2007. The Company, however, conspicuously failed to explain why, beyond the photograph taken the day before the hearing, it wholly neglected to offer any documentary evidence memorializing its previous amendment of the facility-wide CR policy.

For several reasons, I do not credit Brown's and Johanyak's testimonies that the November 16 email solely reiterated an earlier CR policy, which became effective before the November 5 election.[8] Moreover, I also do not credit Brown's testimony that the CR policy depicted by the photograph had been posted at the facility since 2007. See (R. Exh. 5A–B). First, because the amended facility-wide CR policy was dramatically stricter than the original facility-wide CR policy, I find it extremely unlikely that this important policy change would not have been contemporaneously documented. As noted, the Company failed, without explanation, to offer any documentary evidence, which memorialized its decision to amend the facility-wide CR policy, and, instead, solely offered a photograph that was taken a day before the hearing. It's inexplicable that the Company would fully document its implementation of the original facility-wide CR policy in 2007 (see (GC Exhs. 5–6)), and yet wholly fail to document its alleged preelection implementation of the amended facility-wide CR policy. Simply put, the Company's failure to provide documentary evidence supporting this key testimony renders such testimony incredible. Second, I find it unlikely that the Company would have overridden and replaced the less stringent original facility-wide CR policy within months of its issuance. As noted, Brown and Johanyak testified that the amended facility-wide CR policy became effective in 2007, which was the same time that the original facility-wide CR policy became effective. Third, I find that Brown's and Johanyak's testimonies on this point were deeply inconsistent with Morris' and Howard's very credible testimonies that, before the election, employees were permitted to openly use cell phones, unless operating company equipment. Lastly, I discredit Brown's and Johanyak's testimonies on the basis of their demeanors. Specifically, I found them each to be partial witnesses, who appeared to advocate the Company's legal position. I find, as a result, that I cannot credit their testimony on these issues, and, specifically, that the amended facility-wide CR policy was not issued before the election.

D. Union Bargaining Request

On November 23, the Union requested the Company to commence collective bargaining regarding the unit's wages, hours, and other terms and conditions of employment. (R. Exh. 8). To date, the Company has refused to bargain over any such matters, including its CR policies.

[8] Inasmuch as Black's production department maintained a more stringent CR policy than the remainder of the facility, it was difficult to discern whether his testimony that a more stringent CR policy existed at the facility was limited solely to his production department, or addressed the entire facility. To the extent that his testimony can be construed to address the entire facility, I discredit such testimony for the same reasons that are cited under Brown's and Johanyak's testimonies.

E. CR Policy's Rationale

Black and Brown credibly testified that the facility is highly-automated, and potentially hazardous. They added that, in order to remain safe, employees must maintain a level of awareness, which is incompatible with cell phone or radio usage. They related that the Company's amended facility-wide CR policy addressed these important workplace safety issues. They contended that the Company was required to address such issues under the general duties clause of the Occupational Safety and Health Act (OSHA).

III. ANALYSIS

A. Legal Framework

In *San Miguel Hospital Corp.*, 357 NLRB No. 36, slip op. at 2 (2011), the Board described an employer's obligation to bargain with a newly established union as follows:[9]

> Sections 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours and other terms and conditions of employment." . . . . Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. . . . When a majority of the unit employees have selected the union as their representative in a Board-conducted election, *the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences . . . [on] the date of the election*.

(Id.) (citations omitted, with emphasis. A bargaining obligation similarly arises when an employer enforces an unchanged rule in a more rigorous manner. See, e.g., *Vanguard Fire & Supply Co.*, 345 NLRB 1016 (2005) (changing from lax to stringent enforcement).

In order to trigger a bargaining obligation, a unilateral change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). A change will not, however, constitute an unlawful unilateral change, when it narrowly addresses a newly arising condition encompassed by a pre-existing rule. See *Goren Printing Co.*, 280 NLRB 1120 (1986) (limited fine tuning of pre-existing rules).

A unilateral change is similarly not unlawful, when the change is mandated by Federal law.[10] *Exxon Shipping Co.*, 312 NLRB 566, 567–568 (1993); *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964). The Board has held, however, that, if an employer possesses discretion regarding how to implement a Federal mandate, unilateral implementation of the mandate itself

[9] Given that the Company is challenging the certification and admits a refusal to bargain, the violations found herein are contingent upon enforcement of the Board's Order in *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011).

[10] See also *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) (strike on ship at dock in violation of maritime law unlawful, notwithstanding Act's protections); *U. S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971) (employer could not compel arbitration of seaman's wage claim pursuant to collective-bargaining agreement in light of provisions of maritime law granting seamen right to bring action in court).

remains unlawful because bargaining can still occur over the discretionary component of the mandate. *See, e.g., Hanes Corp.*, 260 NLRB 557, 562–563 (1982) (failure to consult with a union concerning an OSHA-mandated respirator program violated the Act, where the type of respirator to be selected remained discretionary); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (failure to consult with a union regarding the OSHA-mandated designation of "competent persons" was unlawful, where the selection methodology remained discretionary); *Christopher Street Owners Corp.*, 294 NLRB 277, 281–282 (1989).

B. Unilateral Implementation of the Amended Facility-Wide CR Policy was Unlawful

The Company was obligated to bargain over changes to its cell phone and radio rules. It is well established that such topics are mandatory bargaining subjects. *Vanguard Fire & Supply Co.*, supra (cell phones); *Murphy Oil USA, Inc.*, supra (radios). In addition, the unilateral change at issue herein was material, substantial and significant. The amended facility-wide CR policy changed the original facility-wide CR policy by, inter alia: transitioning from previously permitting cell phone usage in nonproduction departments,[11] when not operating equipment, to restricting all cell phone usage, outside of break or lunch periods; moving from a previously unregulated setting to commencing an almost complete ban on radios, ipods, mp3 players and related devices in all departments; and changing from an environment of loose enforcement in nonproduction departments to expressly threatening "disciplinary action" for future violations. Contrary to the Company's assertions, these changes were far-reaching, and ran far afield of the mere fine tuning of a constant policy.

The Company unilaterally changed the CR policy, after its obligation to bargain with the Union had accrued. As stated, it unilaterally promulgated the amended facility-wide CR policy on November 16, even though its bargaining obligation accrued on November 5, the election date. *San Miguel Hospital Corp.*, supra. In spite of the Company's assertions to the contrary, its bargaining obligation did not subsequently commence with the Union's November 23 bargaining request. Id. I find, therefore, that the Company's unilateral implementation of the amended facility-wide CR policy violated Section 8(a)(5).

C. Affirmative Defense

The Company contends that, even assuming arguendo that it had a bargaining obligation regarding the CR policy, its unilateral action remained lawful because it was mandated by OSHA to revise its CR policy. It avers that this mandate absolved its violation, if any, of the Act. In furtherance of its position, it cites OSHA's general duties clause, which provides as follows:

> [Employers] shall furnish to . . . employees . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . .

29 U.S.C. Sec. 654(a)(1). It asserts that, because distracted employees could be harmed while using cell phones and radios at its automated and hazardous facility, it was mandated under OSHA to comprehensively ban such usage.

I find that this argument lacks merit, and that the Company's bargaining obligation was not eliminated under OSHA's general duties clause. Although the Company is clearly obligated to minimize workplace hazards under OSHA, and took steps in furtherance of this mandate when it limited cell phone and radio usage, it retained wide-ranging discretion regarding the appropriate manner to address such issues. Such discretion was well suited for the collective-bargaining process. Moreover, the Company, minimally, had the flexibility to discuss with the Union, prior to implementation, the following matters: the list of prohibited items (i.e., cell phones, iphones, ipods, etc.); the applicable facility locations (i.e., which departments required a total ban and which did not); the affected positions (i.e. which positions required a total ban and which did not);[12] as well as the interplay between shift and the ban (i.e. how, if at all, one's shift affected their coverage under the CR policy). The Company's wide-ranging discretion to discuss these issues rendered the CR policy well-suited suited for bargaining. See *Hanes Corp.*, supra.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is, and, at all material times was, the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular part-time employees, including production, plastics, blending, maintenance, warehouse, plant clericals, quality inspectors and truck drivers employed at the Company's West Memphis, Arkansas facility, excluding all office clerical employees, professional employees, quality control employees, housekeeping employees, temporary employees, guards and supervisors as defined by the Act.

4. The Company violated Section 8(a)(1) and (5) of the Act by unilaterally changing the CR policy applicable to the unit.
5. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company 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.

The Company is required to, upon request by the Union, rescind the amended facility-wide CR policy that was promulgated on November 16, restore the status quo ante, and engage in bargaining concerning these issues. Restoration of the status quo ante shall also include expunging all reports, memoranda, written warnings and disciplinary records, if any, which were

[11] As noted, the production department already had a stricter prohibition against cell phone usage.

[12] For example, such discussions could have, arguably, addressed whether a unit office worker (i.e. Howard), who presumably encounters fewer workplace hazards, could have been safely regulated under to a less stringent CR policy than a forklift operator (i.e. Morris), who encounters additional workplace hazards.

connected to its promulgation and enforcement of the amended facility-wide CR policy.

The Company is also ordered to distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Warren Unilube, Inc., West Memphis, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing new CR policies without bargaining with the Union. The appropriate bargaining unit is:

> All full-time and regular part-time employees, including production, plastics, blending, maintenance, warehouse, plant clericals, quality inspectors and truck drivers employed at the Company's West Memphis, Arkansas facility, excluding all office clerical employees, professional employees, quality control employees, housekeeping employees, temporary employees, guards and supervisors as defined by the Act.

(b) Refusing to bargain with the Union regarding CR policies.

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

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

(a) Upon request by the Union, rescind the amended facility-wide CR policy, and restore the former CR policy that was in existence immediately before Respondent unilaterally eliminated this policy.

(b) Upon request by the Union, bargain in good faith regarding the CR policy applicable to the unit, and, if any agreement is reached, embody their understanding in a signed agreement.

(c) Within 14 days after service by the Region, physically post at the West Memphis facility, and electronically distribute via email, intranet, internet, or other electronic means to its unit employees, who were employed by the Company at its West Memphis facility at any time since November 16, 2010, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be physically 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 November 16, 2010.

(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.

Dated, Washington, D.C., September 30, 2011

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically,

WE WILL NOT refuse to bargain with the Union, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees, including production, plastics, blending, maintenance, warehouse, plant clericals, quality inspectors and truck drivers employed at the Company's West Memphis, Arkansas facility, excluding all office clerical employees, professional employees, quality control employees, housekeeping employees, temporary employees, guards and supervisors as defined by the Act.

WE WILL NOT refuse to bargain with the Union regarding the usage of cell phones, radios, boom boxes and other portable listening devices at the facility, or create policies restricting such usage, without first bargaining with the Union.

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

WE WILL, upon request by the Union, rescind the changes we made to our cell phone, radio and portable listing device policy, and reinstate the policy that was in effect immediately before we unilaterally changed our cell phone, radio and portable listing device policy.

WE WILL, upon request by the Union, bargain in good faith with it over changes to our cell phone, radio and portable listing

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] 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."

device usage policies at the facility.