The Budd Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2383, UAW. Case 9–CA–38113

December 6, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On December 20, 2001, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering 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,[1] 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) by unilaterally implementing a rule banning radios from the plant. Contrary to the judge, we find that the Respondent was privileged by the collective-bargaining agreement to unilaterally make and enforce the radio ban. We find that the contract provided the Union with specific grounds and clear procedures to challenge the proposed rule, and by agreeing to the provision, the Union clearly and unmistakably waived its right to request bargaining over the Respondent's action. Thus, for the reasons more fully explained below, we reverse the judge and dismiss the complaint.

Background

The Budd Company has manufactured auto parts at its Shelbyville, Kentucky plant since 1988. On May 13, 1998, the Union was certified as the exclusive bargaining representative of a unit of technical and production associates. On November 16, 1998, the parties entered into a collective-bargaining agreement, effective November 16, 1998, to November 9, 2001. The parties appended a list of "Company Rules and Policies" to the agreement, but the list was not incorporated into the agreement. There was no written rule in the contract or the appended list addressing the use of radios in the plant.

The ban on radio use was implemented in November 2000.[2] The Respondent claims that prior to that time, it had maintained an unwritten rule prohibiting radios. However, the Respondent admits that the rule was not consistently enforced. The Union claims, and the judge found, that as of November there was an existing past practice of allowing radios.

In November 2000, the Respondent received safety-related complaints from two employees about radio use in the plant. On November 17, Human Resources Manager Amy Bouque met with Union President Bob Loudermilk and other union officials and announced that, effective November 22, radios, CD players, and similar equipment were banned from the plant because such devices raised safety concerns.

Loudermilk testified that when the Respondent announced the rule, the Union "asked the Company to—to bargain on this so we could set up some kind of, you know, rules governing the use of [radios]." According to Loudermilk, Bouque stated that it was "not negotiable." The Union also sent two e-mails to the Respondent requesting bargaining and contending that the Respondent could not unilaterally modify its past practice. Loudermilk testified that the Respondent did not reply to those requests.

On November 22, the Union filed a grievance over the radio ban. The grievance was denied on November 29, and the Union filed an unfair labor practice charge on December 4 alleging that the Respondent had violated Section 8(a)(5) and (1) by unilaterally banning radios from the plant.

Relevant Contract Provisions

Article IX of the contract, discipline and discharge, states in pertinent part:

> Section (2) The Company shall continue to have and exercise the right to make and enforce rules and regulations to ensure orderly and efficient operations, to maintain discipline, and to provide for the safety of associates and equipment. Existing rules and regulations, which are to be in effect at the inception of this Agreement, will be printed and distributed by the Company.
>
> Section (3) Should the Union wish to contest a rule as being arbitrary, unreasonable or in conflict with the Agreement, the Union must, within a ten calendar day period after being notified in writing of the new or modified rule, protest the specific rule, indicate why it believes the rule is arbitrary, unreasonable or the specific provision of the agreement the proposed rule is allegedly in conflict with, and request an immediate conference and discussion with the Company. If the parties are unable to agree on the rule, and the Union wishes to arbitrate the

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

[2] All further dates are 2000, unless otherwise indicated.

> disagreement it must within ten calendar days of the meeting submit its protest to expedited arbitration.

The agreement also contains a broad management-rights clause and a zipper clause.

Discussion

The judge found that article IX of the collective-bargaining agreement granted the Respondent the right to make and enforce new rules regarding safety. But the judge found that it was unclear whether article IX applied to the radio ban because it did not directly address modifications to existing policies or past practices. The judge also noted Union President Loudermilk's testimony that the Union did not dispute the Respondent's right to make the rule, but sought to bargain over the *implementation* of the rule, a subject not covered by article IX.[3] The judge found, on balance, that the applicability of article IX to the radio ban was not "a foregone conclusion or legal certainty."

The judge then found that even if article IX applied in this case, it did not express a clear and unmistakable waiver of the Union's right to bargain over the "long-held privilege" of radio use in the plant. Finally, the judge found that the management-rights clause and the zipper clause were generally worded and thus did not manifest a clear and unmistakable waiver of the Union's right to bargain over radio use. In light of these findings, the judge ruled that the Respondent had a duty to bargain over the proposed rule, and that its refusal to do so violated Section 8(a)(5) and (1). We disagree.

Article IX (2) of the collective-bargaining agreement gives the Respondent "the right to make and enforce rules and regulations . . . to provide for the safety of associates and equipment." The Union conceded that the use of radios posed a potential safety hazard in the plant and that the Respondent retained the right to promulgate the rule. In addition, article IX (3) states that the article applies to "new or modified rule[s]." Thus, we find that article IX applies to the Respondent's proposed radio ban, regardless of whether it is characterized as a new rule or a modification of an existing practice.

Article IX (3) also sets out specific grounds and clear, mandatory procedures for the Union to follow in the event that it wishes to challenge a rule such as the radio ban. Contrary to the judge, we find that, by agreeing to the exclusive procedures listed in article IX (3) for challenging a proposed rule, the Union clearly and unmistakably waived its right to request bargaining over the proposed radio ban.[4] See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Ingham Regional Medical Center*, 342 NLRB 1259 fn. 1, 1262 (2004). The Union failed to challenge the radio ban according to the agreed-to procedures, and it may not seek additional recourse from the Board. We therefore reverse the judge and dismiss the complaint.

ORDER

The complaint is dismissed in its entirety.

Linda B. Finch, Esq., for the General Counsel.
Richard R. Parker, Esq. (Ogletree, Deakins, Nash, Smoak and Stewart, P.C.), of Nashville, Tennessee, for the Respondent.
Adrienne A. Berry, Esq. (Segal, Stewart, Cutler, Lindsay, Janes and Berry), of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me on May 23, 2001, in Louisville, Kentucky, pursuant to a charge originally filed on December 4, 2000, against The Budd Company (the Respondent) by the United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 2383, UAW (the Union). On February 27, 2001, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint based on the aforesaid charge. The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by prohibiting the use of radios at its Shelbyville, Kentucky plant and not affording the Union an opportunity to bargain over the implementation of the prohibition.

The Respondent timely filed an answer in which it denied violating the Act in any way.

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

[3] The judge found that the Respondent's failure to bargain over the rule itself violated Sec. 8(a)(5). Neither the General Counsel nor the Charging Party Union submitted exceptions in this case, so the contention that the Union sought to bargain over the implementation of the decision, i.e., the effects, rather than the decision itself, is not before the Board on review of the judge's finding. In any event, the evidence as a whole shows that the Union sought to bargain over the Respondent's decision to promulgate the rule. Loudermilk testified that the Union "asked the Company to—to bargain on this so we could set up some . . . rules governing the use of [radios]," and the judge observed that Loudermilk requested bargaining "with a view toward establishing some mutually acceptable rules governing radio use." As explained below, the Union clearly and unmistakably waived its right to bargain over the decision to promulgate the rule.

[4] In addition to its argument that article IX expresses a clear and unmistakable waiver of the Union's right to bargain in this case, the Respondent argued that it was privileged to implement the rule without bargaining because the contract "covered" the proposed rule. We do not pass on the applicability of a contract coverage argument because the result would be the same under a contract coverage or a waiver analysis.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office in Shelbyville, Kentucky, has been engaged in the business of manufacturing automobile parts. The Respondent admits, and I find, that in conducting its business operations during the last 12 months, it purchased and received at its facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. The Respondent further 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.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The Respondent admits, and I find, that the following employees employed at its Shelbyville facilities constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

> All full time and regular part-time production and maintenance employees, including all technical and production associates and team leaders, employed by the Respondent at its Shelbyville, Kentucky facility.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

The Respondent manufactures automobile parts such as fenders, doors, body sides, and hoods for large American and foreign automobile manufacturers such as Ford Motor Company and Bavarian Motors Workers (BMW). The manufacturing of automobile parts involves stamping and pressing coils of steel into various parts and components and then finishing the products through metallurgical and painting processes. Materials and finished products also are moved about the facility by various powered vehicles equipped with audible and visible alarms. The stamping and pressing processes and these vehicles combine to produce a high decibel noise environment at the plant. Because of the noise level at the facility, workers wear ear plugs.

The Respondent opened the Shelbyville facility in 1988. The plant is divided into several departments—the production department, the materials handling department, and two technical departments. The production side of the Respondent's operation is composed of the press shop and assembly, and employs around 700–800 workers who are called production associates. The technical department consists of the tooling and the jig and fixture divisions, and employs around 200–250 employees called technical associates.

On May 13, 1998, the Union was certified as the exclusive collective-bargaining representative of the production and technical associates at the Shelbyville plant, and since that time has been the exclusive collective-bargaining representative of these employees.

Around November 16, 1998, the Respondent and the Union entered a collective-bargaining agreement effective November 16, 1998, to November 9, 2001.[1] Attached to the agreement was an appended document entitled "Company Rules and Policies," which included provisions subtitled "General Conduct Codes." These rules and policies were discussed by the parties in contract negotiations. However, they were not incorporated in the collective-bargaining agreement.[2]

Sometime in early November 2000, the Respondent received complaints from two employees who reported that radios located in overhead positions in the press and assembly areas of the plant had fallen from their perch, nearly missed them, struck the floor and had broken up. Around this time, the Respondent's management had also observed what it considered a substantially increased usage of radios around the plant and determined that the radio playing had become a potential safety issue. The Respondent's investigation disclosed that radio extension cords were presenting trip hazards on the plant floor; radios, without authorization, were being plugged in the factory outlets in a jerry-rigged fashion; and radios had been placed in unsafe and unsecured overhead positions.[3]

On November 17, 2000, Amy Bouque, the Respondent's human resources manager, requested a meeting with the Union to discuss several issues at the plant, but primarily the radio problem.[4] At this meeting, Bouque advised the Union's bargaining committee members, namely Robert Loudermilk (president), Ken Beaton, Charles Biven, and Dennis Weisel, that due to the increased use of radios and the safety issues surrounding their usage, the Respondent was going to invoke a rule prohibiting radios in the plant. At that time, Bouque notified the Union that the radio ban would take effect on November 22, 2000.

On November 17, the Respondent announced to the work force that effective November 22, 2000, radios (and all other types of music playing devices, such as CD players and portable devices, commonly known as Walkman radios) would no longer be allowed in the plant.[5]

B. The General Counsel's Position

The complaint alleges, and the General Counsel contends,

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[1] See GC Exh. 2, the entire collective-bargaining agreement.

[2] The Company rules and policies and the general conduct codes were in existence prior to the Union's certification as exclusive collective-bargaining representative. The parties agreed during negotiations that the rules and policies would be attached to the agreement but would not be incorporated in the agreement.

[3] The Respondent's manager of health, safety, and environment, Michael Welsh, testified at the hearing about the Company's November 2000 response to and investigation of the use of radios and problems associated with them. There is no genuine dispute between the parties that radios, to a greater or lesser degree, had become problematic at the Shelbyville plant, and their usage posed potential safety risks.

[4] Meetings between management bargaining representatives and the Union's bargaining committee are described as issues meetings, which are called to address specific issues that have arisen between the parties. In addition to Bouque, the Company was represented by a group leader, H. R. Brent, and human resources group leader, Brent Winsott. Winsott and Bouque are admitted supervisors and/or agents within the meaning of Sec. 2(11) and 2(13) of the Act. Bouque testified at the hearing; Winsott did not.

[5] This announcement was circulated through the Company's internal electronic mail (e-mail) system by Winsott.

that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the rule barring radios at the Respondent's facilities without prior notice to and bargaining with the Union. In support of its contention, the General Counsel called union officials Robert Loudermilk and Ken Beaton as witnesses.

Loudermilk testified that he has been employed as a technical associate at the Shelbyville plant in the maintenance department for about 12 years. He currently serves as president of the Union and chairs its bargaining committee.

Loudermilk related that when Bouque announced the Respondent's intention to ban radios in the plant at the November 17 issues meeting, he asked what the Company's concerns were and was told by Bouque that they were safety related. Loudermilk stated that he and union bargaining committee members Dennis Weisel and Ken Beaton told Bouque that radios had been allowed in the plant for at least 12–13 years (the time of their employment at the plant) and requested that the Company bargain over the matter with a view toward establishing some mutually acceptable rules governing radio use. According to Loudermilk, Bouque said the matter was not negotiable, that the rule was being implemented by direction of the plant manager, Robert "Bob" Rainey;[6] the discussion ended on that note.

Loudermilk stated that after he received the company e-mail announcing the radio ban, he sent an interoffice e-mail to Rainey on behalf of the Union[7] in which he stated the Union's position on the radio issue, mainly that radio usage had been and was, heretofore, permitted by the Company and constituted a permissible past practice and a privileged term and condition of employment for the bargaining unit; that if the ban were implemented without first bargaining with the Union, an unfair labor charge would be filed with the Board. Loudermilk felt that the ban constituted a unilateral mid-term change to the contract. According to Loudermilk, he also sent an e-mail to Winsott on November 20 requesting bargaining on the radio ban and a stay of implementation pending the completion of bargaining; Winsott was invited to contact the Union to discuss scheduling meeting dates.[8] According to Loudermilk, Rainey never responded to his November 18 e-mail and management did not meet with the Union at any time after November 20, which was the last time the Union requested bargaining over the matter.

Loudermilk stated that after the Company implemented the radio ban, the Union filed a grievance on November 22, 2000, against the Respondent, citing violations of specific provisions of the agreement (and the agreement in general) as well as the Act; the Union also requested a stay of what it regarded as a mid-term change in the terms of the agreement.[9]

On November 29, 2000, the Respondent (through Bouque) denied the grievance. Accordingly, Loudermilk stated that on November 30, the Union moved the grievance to step 4 of the grievance process. However, according to Loudermilk, the step-4 meeting between the parties has not been scheduled because the Union elected to file the instant charge on December 4, 2000.[10]

Loudermilk conceded that the ban, which he considered a new rule, was not in itself arbitrary or unreasonable or in conflict with the agreement but that the Union viewed it as a term or condition of employment. Loudermilk stated that he also did not question the Respondent's right to make the radio rule. However, he thought that the matter should be the subject of discussion with the Union in terms of how the rule was to be implemented and what procedures would govern its application.

Ken Beaton[11] testified that during his 12-year employment with the Respondent, radios were used freely around the plant and that he has daily used and played his own radio from the first week he started with the Company. Beaton stated that he attended the November 17 issues meeting with Bouque and that, essentially, she said that the radio ban was based on safety concerns, such as the insecure and unsafe placement of overhead radios, extension cords running across walkways and wrapped around stairwells, and radios being wired directly into shop electrical boxes.

Beaton acknowledged that both he and Loudermilk agreed with management that radios used in these ways posed safety issues. However, according to Beaton, the Union, nonetheless, felt that radio usage was a matter subject to mandatory bargaining irrespective of the Company's concerns for safety. Accordingly, the Union requested bargaining over the matter. This position was rejected by the Company.

Regarding the Union's handling of the matter after the ban was instituted, Beaton essentially corroborated Loudermilk, stating that the Union viewed the Respondent's action to ban radios as a proposal for a new rule, and not a new rule as contemplated by the collective-bargaining agreement's "zipper" clause.[12] Beaton also stated that article IX, another provision of the agreement cited by the Respondent to justify its position, did not apply because that provision related to discharge and discipline of employees who violate company rules, not to mandatory subjects of bargaining.

C. The Respondent's Position

The Respondent admits that prior to November 22, there was no formal or written rule or policy governing radio use at the plant. However, arguing against the establishment of any past practice allowing radios, the Respondent contends that since the plant opened in 1988, plant managers prohibited them and regularly reminded supervisors of the ban. The Respondent

[6] Rainey is an admitted supervisor/agent within the meaning of Sec. 2(11) and 2(13) of the Act. However, Rainey did not testify at the hearing.

[7] See GC Exh. 4.

[8] See GC Exh. 5.

[9] See GC Exh. 7. The grievance was submitted at step 3 of the agreement's grievance process (art. XII) which allows the union president to present and discuss grievances with the human resources manager.

[10] Under the contract's step-4 procedure, a meeting must be scheduled between the union bargaining committee and a company grievance committee appointed by the plant manager within 5 workdays of a step-3 answer from management.

[11] Beaton has been employed by the Respondent as a technical associate for about 12 years. He was elected as the vice president of the Union in 1999, and serves as a member of the bargaining committee.

[12] This "zipper" clause will be discussed in greater detail later herein.

submits that it consistently enforced the prohibition on the production shifts but may have overlooked radio playing by technical associates during scheduled production shutdown periods, as well as on the weekends.

The Respondent essentially argues that about 2 weeks before the November 17 meeting with the Union, it was forced formally to ban radio usage because of what it deemed a dangerous upsurge in the use of radios by the production workers. The Respondent asserts that the increase was accompanied by actual and potential risks to the safe operation of the plant as attested to by its manufacturing manager, James Gajdzik, and its health and safety manager, Mike Welsh,[13] and these concerns were communicated to the Union on November 17 before implementation of the rule, as well as in many post-implementation conversations between Loudermilk and Amy Bouque. The Respondent contends that it exercised good faith toward and had no animus against the Union in implementing the ban. The Respondent submits it was cooperative with the Union and provided the Union with requested information used by it to justify its action.

The Respondent principally argues that the instant litigation redounds to a dispute over contract coverage and interpretation, as opposed to an unfair labor practice. The Respondent submits that the agreement between the parties contains specific language allowing the Company to promulgate safety rules and providing the Union with a specific avenue to challenge the rules,[14] which avenue the Union elected not to pursue. The Respondent argues that the Union has waived its right to contest the prohibition. The Respondent contends that the General Counsel inappropriately seeks the Board to intervene when, in point of fact, through bargaining over the contract terms, the parties have agreed that an arbitrator, in an expedited procedure, should decide whether the rules are arbitrary, unreasonable, or otherwise in conflict with the agreement.

The Respondent also asserts that article III, section (1) of the collective-bargaining agreement creates certain rights and prerogatives of management, including the right [under art. XXVII] to make reasonable provision for the health and safety of its associates. Further, that by virtue of the so-called zipper clause [art. XXXVI], the Union and the Company agreed (generally) that the contract reflected their full agreement and each party waived the right to bargain over matters covered by the agreement or any matter not specifically referred to or covered in the agreement.

In brief, the Respondent contends that article IX, the management-rights clause, and the zipper clause give it the right to make such safety related rules. Because the provisions were bargained for by each party at arm's length, the Union waived its right to contest the radio rule.

D. Applicable Legal Principles

When managerial decisions affect bargaining unit employees and are "plainly germane to the 'working environment,'" the union has a right to bargain over such issues. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). Such decisions are mandatory bargaining subjects as long as they are "not among those managerial decisions, which lie at the core of entrepreneurial control."[15]

The Board has held that equipment and work rules related to job safety are "germane to the working environment, and not among those managerial decisions which lie at the core of entrepreneurial control. *AK Steel Corp.*, 324 NLRB 173 (1997). Moreover, mandatory subjects of bargaining prohibit an employer from making such changes without giving the Union a meaningful opportunity to discuss the changes. *Flambeau Airmold Corp.*, 334 NLRB 165 (2001).

The Board and the Courts' have held that longstanding practices, such as permitting employees to converse with union officials in production areas, employer purchase programs, the displaying of posters, calendars, and pictures on the walls of work areas, in the Board's view, are characteristics of the employment relationship so as to be terms and conditions of employment and therefore mandatory subjects of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 222 (1964). The Board has specifically held that the promulgation of a rule banning the use of all personal radios is not within the realms of intrinsic management authority so as to exempt it automatically from the category of mandatory subjects of bargaining. *Murphy Oil USA, Inc*., 286 NLRB 1039 (1987). The issue in bargaining cases is whether the change is of legitimate concern to the Union as the representative of unit employees, such that the union would be entitled to bargain about the matter on their behalf. *Northside Center for Child Development*, 310 NLRB 105 (1993).

Notably, it is well settled that Section 8(a)(1) and (5) are not violated when the union has or may be said to have waived its right to bargain about a specific subject. *NLRB v. Katz*, 369 U.S. 342 (1962); *Borg-Warner Corp.*, 356 U.S. 342 (1958); *BASF Wyandotte Corp.*, 278 NLRB 173 (1986).

However, it is equally well settled that the waiver of a statutory right will not be inferred from general contractual provisions. Rather, such waiver must be clear and unmistakable. Generally worded management rights clauses and/or zipper

[13] Gajdzik testified that he had personally tripped over a radio cord. Welsh testified that he had actually received a couple of complaints of falling radios. He also was concerned about Federal Occupational Safety and Health Act (OSHA) noise reduction issues. Welsh testified that he drafted the rule banning radios at the plant.

[14] The Respondent relies on language in art. IX of the agreement, which in sec. (2) allows the Company to make and enforce plant rules and regulations to ensure orderly and efficient operations; and in sec. (3) allows the Union to contest any rule deemed by it to be arbitrary, unreasonable, or in conflict with the agreement and, within a mandatory 10-day period seek expedited arbitration of the rule in question. GC Exh. 2, p. 10.

[15] In *Ford Motor Co.*, in-plant cafeteria and vending machine food and beverage prices and services were determined to be terms and conditions of employment subject to mandatory collective bargaining. See, also, *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988), employer's unilateral change in telephone policy affected all employees and constituted a substantial modification of a privilege and was violative of Sec. 8(a)(1) and (5) of the Act; also *Johnson-Bateman*, 295 NLRB 180 (1989), implementation of drug/alcohol testing procedure held to be a mandatory subject; and *Hedison Mfg. Co.*, 249 NLRB 791 (1980), change in past practice of allowing employees to play radios and using pay telephones held violative of duty to bargain.

clauses will not be construed as waivers of statutory bargaining rights. *Johnson-Bateman*, supra at 184. Notably, the matter claimed to be waived must have been fully discussed and consciously explored during negotiations and the union must have clearly and unmistakably yielded its position for a waiver to have occurred. Id. at 185. Thus, the bargaining history may be examined to determine whether there has been a waiver of a given subject.

E. Discussion and Conclusions

In my view, although radio usage was not necessarily widespread in the plant and not always tolerated by management, it is clear on this record that probably, since around 1988, the Respondent's technical and production employees were generally permitted to use radios at their work station during their shifts[16] and that much usage continued up until the Respondent issued its prohibition on November 22, 2000. The Respondent claims that, nonetheless, it had a policy prohibiting radio use at the plant. However, in my view, such a policy, it if existed, was not evenly and/or consistently enforced. The radio policy may not have been even recognized or understood as such by all or most of the employees, including management representatives.[17] In any event, there certainly was no written policy banning radios. On this point, I find it significant that among the Respondent's many and varied written and published rules governing employee conduct in the work place, nowhere is there a reference to radio usage. Also, significant is the fact that the parties did not discuss radio use in the contract negotiations in 1998. This suggests to me that radio use was probably an accepted and long-time practice at the plant. This point is further borne out by the circumstances leading up to the announcement of a formal ban on November. It seems uncontroverted that the Respondent was concerned not about usage of radios, but the increased usage of the radios along with some safety related concerns associated with them.

Thus, I would agree with the General Counsel and conclude that the radio prohibition rule unilaterally implemented by the Respondent on November 22, 2000 "affected all or a substantial number of the unit employees and constituted a substantial modification of a privilege [to use radios] which had been an existing condition of employment," supra at 764.[18]

The issue of whether the Union waived its right to bargain over the radio prohibition remains. As noted earlier in this decision, the Board requires waivers of statutory rights to be clear and unmistakable on the part of the party's whose rights are affected. The Respondent essentially argues that article IX, section (3) of the agreement provides the sole mechanism for the Union to contest rules made by the Company pursuant to section (2) of article IX.

I have carefully read article IX, section (2), and, while it does grant the Company the general right to make and enforce rules "to provide for the safety of associates and equipment, it does not directly address modifications or changes to existing policies or past practices. Thus, the applicability of article IX to the radio ban is not a foregone conclusion or legal certainty.[19] The Union, of course, took the view that article IX did not apply (at least exclusively) to redress the radio prohibition on "due process" grounds. While the union representatives did not elaborate on the meaning they attached to due process, it appeared to me that the gravamen of the Union's concerns was that article IX only gave the Union contest rights after implementation of the ban. However, the Union wanted to discuss the matter before implementation. Since the Respondent was not willing to negotiate the matter prior to implementation, the Union felt an unfair labor practice charge was the appropriate mechanism to redress the issue.

The Union's questioning of the application of article IX is reasonable. First, there was no bargaining history (at least adduced at the hearing) to clarify the application of the provision. Second, in about August 1999, the Union and the Respondent were at loggerheads about the application of article IX contest procedures to the rules and regulations attached to but not incorporated in the collective-bargaining agreement. The Union took the view that article IX applied; the Respondent opposed, taking the view that the article applied only to "new or modified rules."

On balance then, it seems to be there is or was substantial controversy about the applicability of article IX to various issues in the area of rulemaking. Clearly, here, the issues are joined in that the Union views radio usage as a privilege acquired years ago which hardened into a term and condition of employment. The Respondent views banning radios a prerogative of management to secure safety in the plant. Given these circumstances and having no history to guide me, I would be hard pressed to conclude that at the time the Union entered into the agreement, as argued by the Respondent, the Union waived its entitlement, clearly and without mistake, to bargain over a subject it viewed as a long-held privilege and one which I have

[16] In this regard, I have fully credited the testimony of Loudermilk and Beaton, both of whom were long-term employees, who testified in a straightforward and honest fashion about the general use of radios in the plant by production and technical workers. Moreover, seemingly widespread radio use at the plant was conceded by Gajdzik who stated that from the beginning, radios started popping up throughout the plant. In spite of a "policy" by the original plant manager prohibiting them, radio use continued until around November 2000 when an increase in usage became an issue for the Company.

[17] I note that Bouque, a relatively new management employee, herself did not know that radios and CD players were prohibited because she had to be reminded by a senior office worker of the rule. It is also significant that company witness Rex Edwards, a group leader, testified that he attempted to enforce the no-radio rule in his area and was told by protesting employees that other workers were allowed to play radios. He decided to allow his employees to play radios.

[18] The parties are in apparent agreement that there was no bargaining over the implementation of the rule, which was deemed nonnegotiable on November 17, 2000, by Bouque, according to Loudermilk. In my view, the conversations between the Union and the Respondent after implementation are not bargaining.

[19] In a letter dated August 11, 1999, to the Union, Bouque stated that art. IX's arbitration procedure only applied to new or modified rules and not the preexisting rules that were appended to the collective-bargaining agreement. (See GC Exh. 8.) The Respondent takes the view that the radio ban implemented in November 22, 2000, was a new rule. This is, of course, inconsistent with Respondent's stated position that there always was a rule or policy prohibiting radio use.

found to be a mandatory subject of bargaining.[20]

The Respondent also asserts that the bargained for management rights and the zipper clauses in the collective-bargaining agreement also constitute waivers by the Union of the right to bargain over the radio prohibition.

The pertinent management-rights clause, as cited by the Respondent, appears in article III, section (1) of the agreement as follows:

> The terms of this Agreement establish the relationship between the Company and its associates. Except as specifically abridged, delegated, granted, or modified by this Agreement, all of the rights, powers, prerogatives, and authority the Company had prior to the execution of this Agreement are retained by the Company and remain the sole and exclusive rights of management.[21]

The "zipper" or agreement-completeness clause is contained in article XXXVI of the agreement:

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 matter not removed by law from the area of collective bargaining, and that all understandings and agreements arrived at by the parties after the exercise of that right and opportunity are fully set forth in writing in this agreement. Therefore, for the life of this agreement, each party voluntarily and unqualifiedly waives the right, and each agrees that the other 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 or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.

In agreement with the General Counsel, I would conclude that the management-rights clause and the zipper clause are basically generally worded statements that cannot be construed to embrace a clear and unmistakable waiver of the Union's right to bargain over a specific bargaining entitlement. Here, too, the record is devoid of any bargaining history which would support the Respondent's position which, boiled to its essence, is that the Union waived its right to bargain over specific rules or policies unilaterally proposed by the Company the moment the contract was executed. This certainly could not have been the intention of the parties. Nevertheless, there is no record evidence to support this stance with regard to the radio rule at issue here.

Accordingly, I conclude that in light of all these considerations, the radio prohibition rule is a mandatory subject of bargaining; that the Union did not waive its right to bargain with the Respondent about the matter; and that the Respondent's unilateral implementation of the radio prohibition, without providing the Union with prior notice and an opportunity to bargain, violated Section 8(a)(5) and (1) of the Act. *Johnson-Bateman Co.*, supra at 180.

CONCLUSIONS OF LAW

1. The 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. The following described employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part-time production and maintenance employees, including all technical and production associates and team leaders, employed by the Respondent at its Shelbyville, Kentucky facility.

4. At all times material herein, the Union has been the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. By unilaterally promulgating and implementing effective November 22, 2000, a prohibition of all radio usage at its facilities without first bargaining with the Union, the Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
7. The Respondent has not violated the Act in any other way or manner.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent has unlawfully and unilaterally promulgated, instituted, and implemented a prohibition of radio (and similar devices) usage at its facilities effective November 22, 2000. I shall recommend that the Respondent be ordered to cease and desist from unilaterally implementing and instituting any such prohibition. I also shall recommend that the Respondent rescind the November 22, 2000 radio prohibition and, on request, bargain with the Union about the promulgation, institution, and implementation of any such prohibition governing employees represented by the Union.

[20] I note in passing on this point that art. IX, sec. (3) allows the Union to contest rules it deems arbitrary, unreasonable, or in conflict with the agreement. However, Loudermilk testified that he fully understood and was sympathetic to the Company's concerns about the safety issues associated with radio usage, but merely wanted to discuss the matter so that mutually agreed-upon rules and procedures could be developed. Thus, the "exclusive" mechanism for contest of arbitrary and unreasonable, as offered by the Respondent, may have been unavailing to the Union.

[21] Interestingly, this provision contains the following language which appears immediately after the language quoted above:

> Additionally, the Company will meet and confer and make its best efforts to reach a consensus with the Union prior to initiating or change Company policies relating to terms and conditions of employment.

I shall also recommend that the Respondent fully restore the status quo ante that existed at the time of its unlawful action by removing from the files of employees all memoranda, reports, or other documents resulting from the application of the radio prohibition.

[Recommended Order omitted from publication.]