UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

WINDSTREAM CORPORATION

and **Case 6–CA–35290**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC ON BEHALF OF ITS AFFILIATED LOCAL UNIONS 463[1], 1189, 1507, 1929, 2089 AND 2374

***Barton Meyers, Esq.,* for the General Counsel.**
***William C. Moul, Esq.,* for the Respondent.**
***Jonathan D. Newman, Esq.,* for the Charging Party.**

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Pittsburgh, Pennsylvania, on February 1, 2007. International Brotherhood of Electrical Workers, AFL-CIO, CLC (the Union), on behalf of its affiliated local unions 463, 1189, 1507, 1929, 2089 and 2374, filed the charge on August 21, 2006[2] and amended it on August 25 and January 8, 2007. Based upon this charge, an amended complaint issued on January 9, 2007, alleging that Windstream Corporation, the Respondent, violated Section 8(a)(1) and (5) of the Act by unilaterally announcing, on July 26, the implementation of a new "zero tolerance policy" regarding all issues of integrity and ethics. This conduct is also alleged as direct dealing in violation of Section 8(a)(1) and (5) of the Act.

On January 17, 2007, the Respondent filed its answer to the amended complaint in which it essentially admitted that it made the announcement alleged to be unlawful and that it did so without providing the Union with advance notice and an opportunity to bargain. Respondent denied that it dealt directly with its employees and further denied that its announcement of a zero tolerance policy violated the Act asserting, inter alia, that the alleged change was not substantial enough to warrant bargaining, that the Union had waived any right it had to bargain over the subject by contract and practice, that none of the local unions had requested bargaining about the subject, and that the complaint should be deferred to the parties' contractual grievance and arbitration procedures. The Respondent also asserted that the Charging Party did not have standing to file the charge on behalf of the local unions with whom the Respondent had a contractual relationship.

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[1] The original caption in this case identified this party as Local 453. I have corrected the caption to reflect the correct Local Union number as evidenced by the collective bargaining agreement in evidence.

[2] All dates are in 2006 unless otherwise noted.

On the entire record[3], including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation headquartered in Little Rock, Arkansas, is engaged in the business of providing voice, data and video telephonic communication services. It provides such services through wholly-owned subsidiaries, including Windstream Kentucky, Inc., Windstream New York, Inc., Western Reserve Telephone Company, Windstream Western Reserve, Inc., and Windstream Pennsylvania, Inc., with facilities in various states, including Pennsylvania. The Respondent and its subsidiaries annually purchase and receive, at their respective facilities, goods valued in excess of $50,000 directly from points outside their respective home states. The Respondent admits and I find that it, and each of its subsidiaries involved in this proceeding, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits that the Union and its affiliated local unions are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Evidence*

The Respondent was created on July 17, 2006 when Alltel Corporation spun off its wireline operations in order to focus on its wireless business.[4] The Respondent and its subsidiaries retained all of the Alltel employees who previously worked in the wireline business, recognized the various unions that had represented these employees for many years, and adopted the existing collective bargaining agreements. This case involves six bargaining units that are represented by six locals of the IBEW. The 363 employees in these units constitute a fraction of the 8000 employees that the Respondent employs nationwide.[5] The bargaining units involved in this case are:

The Kentucky Unit

> All tellers, cable splicers, customer service technicians, facility persons, line workers, business system technicians I, equipment installer/repairmen, network technicians, service activation technician II, service activation technician I, customer engineer data application, employed by Windstream Kentucky West, Inc. at its Kentucky facility, excluding guards, professional employees and supervisors as defined in the Act and all other employees.

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[3] After the close of the hearing, and before filing briefs, the General Counsel filed a motion to consolidate a newly-issued complaint in another case involving the same parties with this case. By Order dated March 14, 2007, I denied the motion.

[4] The new entity also included wireline employees previously employed by Valor Corporation, another telecommunications company which Alltel had acquired.

[5] A much larger group of employees, approximately 1600, are represented by the Communications Workers of America (CWA).

This unit had been represented by Local 463 and recognized by Kentucky Alltel, Inc. since August, 2002 when Alltel acquired Verizon's Kentucky operations. The collective bargaining agreement in effect when the Respondent began operations was effective through March 13, 2007.

The New York Unit

All employees of the Fulton District, Jamestown District, Regional Office District and State Office District of Windstream New York, Inc., excluding all engineers, professional employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

This unit had been represented by Locals 1189 and 2374 and recognized by Alltel New York, Inc. for many years. The collective bargaining agreement in effect when the Respondent began operations was set to expire on October 31. While this case was pending, the parties reached agreement on a new collective bargaining agreement.[6]

The Ohio Unit

All employees in the Northern Service Area of Windstream Western Reserve, Inc., excluding all traffic department employees, professional employees, managerial employees, confidential employees, engineers and guards, and supervisors as defined in the Act.

This unit had been represented by Local 1507 and recognized by the Western Reserve Telephone Company, a subsidiary of Alltel, for many years. The collective bargaining agreement in effect when the Respondent began operations is effective through May 15, 2007.

The Western Reserve Central District Unit

All employees of Western Reserve Telephone Company (Central District) except confidential employees, professional employees, managerial employees, engineers, guards and supervisors as defined in the Act.

This unit had been represented by Local 1507 and recognized by Alltel's Western Reserve subsidiary for a number of years. The collective bargaining agreement in effect when the Respondent began operations is effective through May 15, 2007.

The Waynesburg Unit

All employees of Windstream Pennsylvania, Inc. in its Waynesburg, Pennsylvania service area, excluding engineers, confidential employees, guards, and professional employees and supervisors as defined in the Act.

This unit had been represented by Local 1929 and recognized by Alltel Pennsylvania, Inc. for a number of years. The collective bargaining agreement in

[6] The Respondent proffered evidence of certain correspondence between the parties which occurred in the context of these negotiations. I shall address that evidence later in this decision.

effect when the Respondent began operations is effective through November 18, 2008.

The Meadville Unit

All employees employed by Windstream Pennsylvania, Inc. in the Meadville, Pennsylvania service area, excluding all confidential employees, professional employees, engineers, guards and supervisors as defined in the Act.

This unit had been represented by Local 2089 and recognized by Alltel Pennsylvania, Inc. for a number of years. The collective bargaining agreement in effect when the Respondent began operations is effective through June 18, 2007.

On July 26, shortly after the Respondent began operations, it distributed to all its employees, including those in the above bargaining units, *Windstream's Working with Integrity Guidelines*. The distribution was done electronically via an e-mail from the Respondent's Chief Operating Officer, Keith Paglusch. Employees could access the *Guidelines* by a link in the e-mail. With the exception of the introductory letter from Jeffrey R. Gardner, Respondent's President and Chief Executive Officer, the *Guidelines* were identical to a document that Alltel had distributed to employees in March, before the spin-off was complete. The *Guidelines* were also the latest iteration in a series of documents publishing the employer's code of conduct going back at least to 1978. There is no dispute that all of these pronouncements, whether issued by Alltel or one of its predecessor companies, were conveyed to union and non-union employees alike without any advance notification to the various unions representing the unionized employees.[7]

The series of rules or codes of conduct in evidence address a number of topics relating to ethical work practices. The most recent versions, distributed by Alltel in March and by the Respondent in July, contain the same language regarding the consequences of a violation of these guidelines:

> Compliance with applicable laws and these guidelines will be strictly enforced. If you fail to comply with them, you will be subject to corrective action, *up to and including termination of employment* (emphasis added).

The General Counsel and the Charging Party do not take issue with the Respondent's distribution of the *Guidelines* themselves. Rather, the crux of this case turns on statements made by Paglusch in his e-mail transmitting the *Guidelines* to the employees, and in Gardner's introduction to the *Guidelines*.[8]

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[7] The Respondent offered evidence that Alltel followed the same approach when it distributed workplace violence and workplace harassment policies to employees in 2000 and 2003, respectively. Although Alltel did not provide the local unions with advance notice and an opportunity to bargain before implementing these policies, neither policy contained "zero tolerance" language similar to that at issue here. On the contrary, these policies, similar to Alltel's ethics and integrity policies, advised employees they would be subject to discipline "up to and including termination" if they engaged in violence or harassment.

[8] The General Counsel contends that Gardner's letter was included with the version of the *Guidelines* distributed in July. The Respondent, in amending its answer at the hearing, asserts that the Gardner letter was distributed on September 21 when the Respondent initiated a electronic training program for its employees on the *Guidelines*. Neither party was able to

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Paglusch, in his e-mail, emphasized the importance of ethics and integrity to the Respondent's corporate culture. His e-mail contained the following statements to illustrate the new company's approach to this subject:

> …[W]e will hold each other accountable for a zero tolerance policy regarding lying, cheating and stealing. Implementation of this policy makes it very clear regarding the integrity that we will exhibit as a new company…A few examples of violations of the zero tolerance policy are:
>
> - Falsification of company records, including time and expense reporting.
> - The use of company property outside of normal business practice.
> - Not being truthful in communications within the company, or with outside contacts such as suppliers and customers.
> - Any inappropriate use of company funds or cash receipts.
>
> While this is a short list for this category, a more comprehensive description of violations will be provided in the *Working with Integrity* on-line course that will be available in September….
>
> Windstream has a need for creative, talented and dedicated team members. However, a zero tolerance policy on ethics means that if individuals are found to be in violation, their employment will be terminated, regardless of previous years of service or past performance.

There is no dispute that none of the previous or existing Alltel guidelines or rules of conduct contained such "zero tolerance" language.

As referenced in Paglusch's e-mail, a training course was instituted about September 21. The on-line training program involved, inter alia, employees reading the *Guidelines* on-line and affirming their "commitment to the standards described in the Working with Integrity program" and their understanding that "a violation could be the basis for disciplinary action, including, if appropriate, termination of employment." When an employee clicked the "YES" button, he would be recorded in company records as successfully completing the training. A record of employees who clicked the "No" button in response was also recorded and maintained in their personnel folder. If an employee did not click either button, his name would appear on a report of employees who had not completed training that would be sent to managers for further action, i.e. reminding the employee of the need to complete the training. There is no dispute that this is the same training program and procedures that Alltel had used when it distributed the March version of the Integrity guidelines. Alltel had been utilizing this approach to train employees and electronically record their response to the request for affirmation since at least 2003.

The letter from CEO Gardner, which appeared as the first page of the *Guidelines* no later than September 21, when the training program started, re-iterates Paglusch strict approach to ethical violations. In the second paragraph of his letter, Gardner tells the employees:

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establish through testimony or documents the precise date the letter was communicated to employees. Since it is the General Counsel's burden to prove all allegations of the complaint and no evidence was offered to establish the earlier date, I shall assume for purposes of deciding this case that the Gardner letter was not distributed until September 21.

> It is important that Windstream employees act with the highest ethics and have integrity in all we do. For that reason, we will hold each other accountable for a zero tolerance policy regarding unethical behavior. Implementation of this policy makes it very clear regarding the integrity that we will exhibit as a new company. Windstream maintains a compliance program that outlines ethical guidelines for employees and members of the board of directors. This Working with Integrity brochure provides an overview of those guidelines.

As previously noted, the Respondent admitted in its answer that it distributed Paglusch's e-mail and Gardner's letter to employees in the units involved in this proceeding without providing their respective local unions with advance notice or an opportunity to bargain over the "zero tolerance policy" announced in those communications.

Since the Respondent began operations and distributed the *Guidelines* to employees, there have been few instances of discipline for violations of these rules. Records subpoenaed by the General Counsel and the Charging Party show only two instances of discipline involving unit employees. Neither employee was terminated. Records showing discipline imposed by the Respondent's predecessor Alltel for alleged ethics violations show that a range of discipline was employed based upon the circumstances, the employee's records and input from the employee's bargaining representative. This evidence does not suggest that Alltel ever followed a "zero tolerance policy" with respect to such violations.

Katherine Warn, the Respondent's Director of Labor Relations who held the same position with Alltel for about 6 years before the Respondent was spun off from that company, testified that the Respondent did not provide advance notice to the local unions involved in this case because the issuance of the *Guidelines* was not intended to change the relationship between the Respondent and the unit employees in terms of discipline. Specifically, Warn testified that the "just cause" provisions in its collective bargaining agreements with the unions would apply to any discipline that issued under the ethics and integrity rules. Warn also testified that the Respondent believed that most of its collective bargaining agreements gave the Respondent the right to make and amend rules and that the unions had the right to challenge individual application of the rules through the grievance procedure.

In support of Warn's testimony, the Respondent proffered a letter that Warn wrote to the presidents of Locals 1189 and 2374, which represented the New York bargaining unit, while the parties were in negotiations for a new collective bargaining agreement. General Counsel and the Charging Party objected to the admission of this letter as a statement made in the course of settlement under Rule 408 of the Federal Rules of Evidence. I conditionally received the letter, allowing the parties to argue the matter in their briefs, and have now re-considered my ruling. The letter, dated October 30, begins by referring to the instant charge and the General Counsel's decision to issue complaint in this matter. Warn then states that the purpose of her letter is "to advise you of the Company's position, and the reasons for the Company's concerns". She then sets out the Respondent's position on the unfair labor practice charge and "explains" how Paglusch's e-mail did not change employees' terms and conditions. Attached to the letter is a copy of a settlement proposal the Respondent had received from the General Counsel. Warn testified that she presented this letter to the local presidents and a staff representative from the IBEW, John Amodeo, who was assisting the locals in negotiations, after a negotiation session. According to Warn, when she asked Amodeo if he and the local unions would meet with her to discuss the letter, Amodeo said they weren't interested in bargaining over this subject at the bargaining table. On cross-examination, she acknowledged that Amodeo explained that the local unions did not want to bargain about the subject at that time because

they believed it would not be appropriate to do so since the charge had been filed at the International level. According to Warn, Amodeo also cited the stage of bargaining, i.e. close to agreement on the contract, as another factor in not wanting to bring this matter to the local negotiations.

Having re-considered the matter, I now agree with the General Counsel and the Charging Party that Warn's letter and her conversation with Amodeo was a statement made in the context of settlement discussions which is being proffered by the Respondent to prove the invalidity of the complaint's allegations. Warn's reference in the letter to the Region's decision to issue complaint and her attachment of the Region's proposed settlement agreement make this abundantly clear. The statements made by Warn in her letter were also self-serving, post-hoc justifications for the Respondent's actions that were the subject of the complaint. Any offer to "bargain" in Warn's letter and any "refusal" by the Unions to whom it was addressed is thus inadmissible to disprove a violation of the Act. See *Contee Sand & Gravel Co.,* 274 NLRB 574, n. 1 (1985).

The Respondent, in support of its waiver defense, cites language from each of the collective bargaining agreements that purportedly gives the Respondent the right to unilaterally make and amend rules of conduct. The language relied upon appears primarily in the management rights, just cause and the grievance/arbitration clauses. The management rights clauses cited are worded generally and, with one exception, do not specifically refer to the right to make and amend rules. Only the management rights clause in the collective bargaining agreement covering the Western Reserve Central District Unit explicitly includes the right "to establish reasonable rules and regulations (subject to the Union's right to grieve the reasonableness of such rules and regulations)." The management rights clause in this contract, as well as those in the contracts covering the other unit in Ohio and the New York Unit, specifically provide that the Respondent's exercise of its rights is subject to the right of an employee to file a grievance under the contract.[9] Four of the collective bargaining agreements, i.e., all except those covering the two Ohio units, also contain the following language in the management rights clause:

> Nothing contained in this Agreement shall be deemed to limit the Company in any way in the exercise of the regular and generally recognized customary functions and responsibilities of management. Moreover, such functions of management as may be included herein shall not be deemed to exclude other functions of management not specifically included herein.

Other contract provisions cited by the Respondent generally require employees to work efficiently and to obey company rules. A clause in the collective bargaining agreement covering the Kentucky Unit specifically provides that the Union will "cooperate with the Company in replacing any employee covered by this Agreement found guilty of not performing his or her duties in a reasonably efficient manner, or who consistently acts in an objectionable manner to his fellow employees, customers of the Company or the Company." The grievance and arbitration provisions cited generally provide that all discipline issued by the Respondent is subject to grievance and arbitration with just cause the standard for review of such discipline.

The Respondent also cites provisions in the collective bargaining agreements that specifically require the Respondent to provide the respective local union with advance notice

[9] The New York Unit contract also makes the Respondent's exercise of its management rights "subject…to the provisions of the Agreement."

before implementing certain changes, such as those affecting medical benefits, pensions, and subcontracting. None of the collective bargaining agreements contains a similar provision requiring advance notice before making or changing rules regarding employee conduct.

The parties also offered evidence that, on two occasions, both in early 2002, two local unions objected to discipline imposed on employees which was based, in part, on Alltel's ethics and integrity guidelines. Grievances filed by Local Union 2374 in Jamestown, New York and Local Union 2089 in Meadville, Pennsylvania challenging discipline issued for motor vehicle accidents, objected to the employer's reference to the ethics policy on the basis that it had not been negotiated with the Union.

B. *Analysis*

1. Procedural Issues

The Respondent has raised several procedural defenses which must be addressed before turning to the merits. Respondent first challenges the Board's jurisdiction to resolve this dispute on the basis that the IBEW lacked standing to file the instant charge. Respondent relies upon the fact that the International Union is not a party to any of the six collective bargaining agreements involved here, nor is it the certified or recognized bargaining agent of any of the units in question. The Respondent also cites provisions in the International Union's constitution and By-laws that appear to limit the right of the local unions to act as agents of the International and vice versa.[10] Respondent's defense must be rejected. The Board and the courts have historically recognized, consistent with congressional intent, that "anyone for any reason may file charges with the Board." *Operating Engineers Local 39 (Kaiser Foundation),* 268 NLRB 115, 116 (1993). See also, *United States Postal Service,* 309 NLRB 309 (1992); *Bagley Products, Inc.,* 208 NLRB 20, 21 (1973); Section 102.9 of the NLRB's Rules & Regulations. As the Supreme Court said, many years ago:

> The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading. Dubious character, evil or unlawful motive, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry.

NLRB v. Indiana and Michigan Electric Company, 318 U.S. 9, 17-18 (1943).

The Respondent next raises the defense of improper joinder of charges and parties. The Respondent argues that it has been unduly prejudiced by the General Counsel's decision to allege in a single proceeding unfair labor practices involving six separate bargaining units, each represented by a different local of the Union with its own collective bargaining agreement and separate bargaining history with the Respondent's predecessor. I must reject this defense as well. Section 3(d) of the Act gives the General Counsel exclusive and final authority over issuance and prosecution of unfair labor practice complaints, independent of Board review and supervision. *Beverly California Corp. III,* 326 NLRB 232, 236-237(1998). The General Counsel is accorded wide latitude in the exercise of this prosecutorial discretion, including choosing whether to consolidate cases, subject to review only for an abuse of discretion. *Service*

[10] Respondent acknowledges that the International Union has historically assisted the local unions in contract negotiations with Alltel and has continued to perform this role since the Respondent recognized the local unions in July 2006.

Employees Local 87 (Cresleigh Management), 324 NLRB 774 (1997). Here, the General Counsel's decision to prosecute the alleged unfair labor practice which affected six separate bargaining units in a single proceeding can hardly be called an abuse of discretion. Although each unit may have had its own contract and bargaining history, the alleged unilateral change and direct dealing affected all equally. It was not necessary to hold separate proceedings to litigate any issues as to whether a particular contract or past practice waived a particular local union's bargaining rights. Accordingly, I find that the Respondent was not unduly prejudiced by the General Counsel's exercise of its prosecutorial discretion in this case.

The Respondent also raised, as an affirmative defense, that the case should be deferred to the parties' contractual grievance and arbitration provisions under the Board's *Collyer*[11] deferral policy. Counsel for the General Counsel opposed deferral on the basis that the alleged unilateral change and direct dealing occurred on a corporate-wide basis and that deferring to six different contractual grievance procedures could lead to inconsistent results. General Counsel also argues that in three of the collective bargaining agreements, the arbitrator's decision is final and binding only as to questions of fact, not as to questions of law.[12] It is also not clear that an arbitrator would be able to address the direct dealing allegation. Based on the arguments of General Counsel, I shall decline to defer this case pursuant to *Collyer.*

2. Alleged unilateral Change

The complaint alleges that the reference to a "zero tolerance policy" for violations of the Respondent's *Working with Integrity Guidelines,* found in CEO Gardner's introduction to the guidelines and in COO Paglusch's July 26 e-mail, amounted to a unilateral change in unit employees' terms and conditions of employment. The Respondent contends that these statements did not materially and substantially change the Respondent's ethics and integrity program, which it had adopted from its predecessor Alltel. The Respondent argues further that, assuming there was a material and substantial change, the Respondent had no obligation to notify and bargain with the local unions in advance because each union had waived its right to bargain over the subject by contract and practice.[13]

It is well-established that an employer violates Section 8(a)(5) and (1) of the Act if it makes material or substantial changes in employees' wages, hours, or other terms and conditions of employment unilaterally during the term of a collective bargaining agreement. *NLRB v. Katz,* 369 NLRB 736 (1962). Accord: *United Cerebral Palsy of New York City,* 347 NLRB No. 60 (July 27, 2006). The Board has specifically found that changes in an employer's work rules and disciplinary policies that alter the scope of the discipline and the method for determining the level of discipline are material and substantial enough to require bargaining, absent waiver. *Toledo Blade Co.,* 343 BLRB 385 (2004); *Bath Iron Works Corp.,* 302 NLRB 898, 902-903 (1991). Cf. *Berkshire Nursing Home, LLC,* 345 NLRB No. 14 (August 26, 2005); *LaMousse, Inc.,* 259 NLRB 37, 49-50 (1981). Here, the Respondent argues that the "zero tolerance policy" announced by Paglusch and Gardner did not materially or substantially change the ethics and integrity guidelines that had existed for many years under Alltel. The Respondent points to the fact that the section in the guidelines addressing discipline was identical to language in the Alltel policy. The Respondent also relies on the fact that, even after announcing

[11] *Collyer Insulated Wire,* 192 NLRB 837 (1971).

[12] This language appears in the collective bargaining agreements covering the two Pennsylvania units and the New York unit.

[13] Respondent admitted in its answer that the subject of a zero tolerance policy was a mandatory subject of bargaining within the meaning of the Act.

a "zero tolerance policy", the Respondent has not terminated employees for violations of the policy when they have occurred.

I find, in agreement with the General Counsel, that the announcement of a "zero tolerance policy", meaning that an employee found to have violated one of the Respondent's ethics and integrity rules would be automatically terminated without regard to his work record or the particular circumstances, represented a "material, substantial and significant" change in employees' terms and conditions of employment. *United Cerebral Palsy of New York City*, 347 NLRB supra, slip op., p.5; *Toledo Blade Co.,* 343 NLRB supra, at 388.[14] This language necessarily alters the "just cause" provision in the Respondent's collective bargaining agreements with the six local unions here because it removes from consideration by an arbitrator factors such as an employee's prior work record or the circumstances of the alleged violation. Although the Respondent argued at the hearing and in its brief that the collective bargaining agreement would govern any discipline imposed under the *Guidelines,* there is nothing in Paglusch's or Gardner's letters to employees to suggest that would be the case. On the contrary, the tone of their communications with employees is absolute.

Warn's testimony at the hearing that the Respondent did not intend to change the contractual just cause provision, or its existing disciplinary procedures is nothing more than a post-hoc rationalization of the Respondent's unilateral action. Until such time as the Respondent explicitly disavows the "zero tolerance policy" announcement in a communication to employees, it remains in force and available to the Respondent in the application of discipline to unit employees. Similarly, although the Respondent did not in fact utilize the "zero tolerance policy" when it had the opportunity to do so, this is not proof that a change did not occur. I note that the two instances where employees were alleged to have violated the ethics and integrity rules occurred after the Union had filed the instant charge. The Respondent may well have chosen not to apply its "zero tolerance policy" in these cases in order to avoid liability for a violation of the Act. Accordingly, I find that, absent waiver, the Respondent would have a duty under the Act to provide the local unions here with advance notice and an opportunity to bargain before the announcement of a "zero tolerance policy" for violations of its ethics and integrity rules.

With respect to waiver, the Board and the courts have long held that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983); *C & P Telephone Company v. NLRB,* 687 F.2d 633, 636 (2nd Cir. 1982); *Georgia Power Co.,* 325 NLRB 420 (1998). To establish a waiver by contract, the language must be specific and related to the particular subject or it must be shown that the issue was fully discussed and that the union consciously yielded its interest in the matter. *Georgia Power Co.,* supra. See also *Allison Corp.,* 330 NLRB 1363, 1365 (2000). The Board has held that generally worded management rights clauses or zipper clauses will not be construed as waivers of statutory bargaining rights. *Hi-Tech Cable Corp.,* 309 NLRB 3, 4 (1992); *Johnson-Bateman Co.,* 295 NLRB 180, 184-188 (1989). Finally, with respect to bargaining history, the Board has held that a union's past acquiescence in unilateral changes does not operate as a waiver of its right to bargain over such changes in the future. *Bath Iron Works,* supra, at 900-901 and cases cited therein. See also, *Exxon Research & Engineering Co.,* 317 NLRB 675 (1995).

[14] The cases relied on by the Respondent are distinguishable. In those cases, the administrative law judge found that minor changes in existing disciplinary procedures were not material and substantial because they did not alter the just cause provision of a collective bargaining agreement. See, e.g., *LaMousse, Inc.,* supra.

None of the collective bargaining agreements in the instant case contain specific language authorizing the Respondent to adopt a zero tolerance policy for discipline. On the contrary, all of the collective bargaining agreements contain "just cause" language, which is antithetical to a "zero tolerance" approach to discipline. As previously noted, only one contract includes the right "to establish reasonable rules and regulations" within the management rights clause. However, that particular management right is subject to the particular local union's right to challenge the reasonableness of any rule through the grievance procedure. This hardly amounts to a waiver of the right to bargain over a significant change in the level of discipline the Respondent can impose for violation of its rules. Other language in the collective bargaining agreements requiring employees to abide by the Respondent's rules of conduct is also not specific enough to clearly and unmistakably waive the union's right to bargain over the manner and means or the degree of discipline to be imposed for an employee's failure to obey the rules. The Union's agreement to a grievance and arbitration procedure and to "just cause" language in these contracts does not show a waiver with respect to the subject at issue. If anything, such language shows the unions interest in the fairness of the Respondent's application of discipline. As previously noted, a "zero tolerance policy" for discipline would be devoid of fairness. Accordingly, I find that the Respondent has not demonstrated that any of the local unions here have "clearly and unmistakably" waived by contract any bargaining rights with respect to the zero tolerance policy announced in July 2006.

In order to establish a waiver by practice, or bargaining history, the Respondent relies essentially on the history of relations between the local unions and Alltel, which is not the employer in this case. There is very little bargaining history between the Respondent and these local unions on which to base a finding of waiver. Moreover, both Paglusch and Gardner were hired specifically to lead the Respondent and had no prior history of dealing with the unions at Alltel. Their desire to establish a new corporate culture is evident from the communications at issue here. Thus, whatever might be said of the unions' acquiescence in Alltel's previous distributions of its ethics and integrity policies can hardly be construed as a waiver of the right to bargain over such a change in the corporate approach to discipline as that announced by this new employer. Accordingly, I find that the Respondent has not demonstrated that any of the local unions here have waived their bargaining rights by practice or bargaining history.[15]

The Respondent also raised, as an affirmative defense, that none of the local unions ever requested bargaining over the "zero tolerance policy" announced by Paglusch and Gardner. I reject this defense because the Board has consistently held that a union is not required to request bargaining when a change in employees' terms and conditions of employment is presented as a fait accompli, or where it would be futile to do so. See *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017-1018 (1982) and cases cited therein. The evidence here clearly establishes that the Respondent's announcement of its "zero tolerance policy" was a fait accompli. The local unions received notice of the new policy at the same time as the unit employees. Nothing in the announcement indicated that it would not be immediately effective. A request to bargain after the policy had already been announced and implemented would be futile. [16] Accordingly, I reject this affirmative defense and find, as alleged in the

[15] I also note that it is undisputed that Alltel had never adopted a "zero tolerance policy" for discipline in its dealings with unit employees. The new policy represented such a dramatic change in the employer's approach to discipline that the unions' past practice with Alltel, even if relevant, would not show a waiver.

[16] I previously rejected the Respondent's proffer of evidence purportedly showing that Local Unions 1189 and 2374 refused to bargain when offered the opportunity to do so during contract negotiations in October. This offer was made in the context of settlement negotiations and can

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complaint, that the Respondent violated Section 8(a)(5) and (1) in July 2006 when it unilaterally announced a "zero tolerance" disciplinary policy.

3. Alleged Direct Dealing

The complaint alleges that the Respondent's unilateral announcement of its zero tolerance policy also constituted direct dealing in violation of Section 8(a)(5) and (1) of the Act. The General Counsel and the Charging Party rely on the fact that the Respondent communicated the new policy directly to the employees, before notifying their respective bargaining representatives of this significant change in their terms and conditions of employment. The Charging Party, in its brief, also cites the evidence that, as part of the Respondent's on-line training program, employees were required to affirm their agreement with the policy. The Respondent argues that the mere communication to employees of a change, even if made unilaterally, does not amount to direct dealing.

The Board has long held that the obligation to bargain collectively requires "recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly with the employees." *General Electric Co.,* 150 NLRB 192, 194 (1964), enfd. 418 F.2d 736 (2nd Cir. 1969), cert. denied 397 U.S. 965 (1970). See also *Medo Photo Supply Co. v. NLRB,* 321 U.S. 678 (1944). In *Georgia Power Co.,* 342 NLRB 192 (2004), the Board found that the employer bypassed the union and dealt directly with its employees by communicating directly to the unit employees regarding the formation of its Workplace Ethics program. In that case, however, the employer solicited its unit employees to participate in the formation of work teams and processed employee concerns through the ethics program. Here, the Respondent's announcement of the zero tolerance policy did not invite any feedback from employees, nor solicit them to negotiate with the Respondent over the policy. In *Sonic Automotive,* 343 NLRB 1058 (2004), the Board adopted the judge's finding that merely informing employees of a predetermined course of action does not amount to direct dealing. See also *Huttig Sash and Door,* 154 NLRB 811, 817 (1965).

The Charging Party cites *United Cerebral Palsy of New York City,* supra, in which the Board found direct dealing where the employer distributed a new handbook, which unilaterally changed employees' terms and conditions of employment, and required the employees to sign a receipt acknowledging they had received the handbook and agreed to comply with it. Although there are some similarities to the Respondent's conduct here, the key difference is that the acknowledgement in *United Cerebral Palsy* also required the employees to agree that the employer could unilaterally change terms and conditions of employment in the future. See also *Heck's, Inc.,* 293 NLRB 1111, 1120 (1989). The affirmation utilized by the Respondent as part of its on-line training program is different. It does not require unit employees to agree that the Respondent may make future changes in their terms and conditions of employment without prior notice.

I find that the Respondent's communication of its new zero tolerance policy directly to unit employees did not amount to direct dealing in violation of the Act because it did not invite the employees to bypass their representative and negotiate with the Respondent over any term or condition of employment nor did it undermine the Unions' role as the employees' exclusive bargaining representative by requiring the employees to agree, in advance, to future unilateral changes. Accordingly, I shall recommend dismissal of this allegation of the complaint.

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not be relied upon to show a disinterest by the Unions in bargaining over the subject.

Conclusions of Law

1. By unilaterally implementing a zero tolerance disciplinary policy for violations of its ethics and integrity rules, the Respondent has failed and refused to bargain collectively with the local unions representing its employees and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

2. By announcing the zero tolerance policy directly to unit employees without soliciting or inviting the employees to negotiate with it, the Respondent did not engage in direct dealing and did not violate Section 8(a)(5) and (1) 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. In order to remedy the unlawful unilateral change found here, I shall recommend that the Respondent rescind the zero tolerance policy announced on July 26, 2006 via e-mail from COO Paglusch and re-affirmed by letter from CEO Gardner and restore the status quo ante. The Respondent shall further be ordered to communicate the rescission to all employees in the bargaining units involved in this proceeding via electronic mail, which is the Respondent's preferred and customary method of communicating with employees. See *National Grid USA Service Co.,* 348 NLRB No. 88, n. 2 (December 11, 2006).[17] No unit employees had been terminated under this policy as of the date of the hearing. However, should it be determined at the compliance phase of this proceeding that the Respondent has in fact terminated any unit employees pursuant to the unilaterally adopted policy, I shall recommend that it be order to offer reinstatement to said employee and expunge from the employee's record any reference to the termination. I shall also recommend that the Respondent provide advance notice and an opportunity to bargain to the respective local unions before making any future changes to unit employees' wages, hours and terms and conditions of employment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Windstream Corporation, Little Rock, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making changes to the wages, hours, and terms and conditions of employment of employees in the bargaining units represented by IBEW Locals 463, 1189, 1507, 1929, 2089 and 2374 without first providing those unions with notice and an opportunity to bargain.

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[17] For the same reason, I shall also recommend that the Respondent post the attached Notice to Employees electronically.

[18] 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.

(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) Rescind the zero tolerance policy for violations of the "Working with Integrity" guidelines, that was announced in July 2006, and notify employees in the units represented by the local unions identified above that this has been done. Such notification to be by electronic mail and any other manner in which the Respondent customarily communicates such policies to its employees.

(b) In the event any unit employee has been terminated as a result of the unilaterally adopted zero tolerance policy, rescind the termination and offer the employee reinstatement to his prior position, without loss of seniority or other benefits, make him whole for any wages and benefits lost as a result of the termination and expunge from its files any reference to the termination.

(c) Notify the Local Unions identified above and, on request, bargain with them as the exclusive collective bargaining representative of their respective units, before making any changes to unit employees' wages, hours and terms and conditions of employment

(d) Within 14 days after service by the Region, post at its facilities covered by its collective bargaining agreements with Locals 463, 1189, 1507, 1929, 2089 and 2374, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 6, 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 any of the facilities 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 that facility at any time since July 26, 2006.

(e) Within 14 days after service by the Region, post the attached notice marked "Appendix" electronically on the Respondent's intranet with a link sent by electronic mail to employees in the units represented by the above local unions.

(f) 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.

[19] 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."

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

Dated, Washington, D.C. , April 9, 2007.

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Michael A. Marcionese
Administrative Law Judge

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 unilaterally make changes to your wages, hours, and terms and conditions of employment without notifying your bargaining representative in advance and affording your local union an opportunity to bargain regarding such changes.

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 rescind the zero tolerance policy for violations of the “Working with Integrity” guidelines, that was announced in July 2006, for employees in the bargaining units represented by Local Unions 463, 1189, 1507, 1929, 2089 and 2374 of the International Brotherhood of Electrical Workers, AFL-CIO, CLC.

WE WILL offer reinstatement to any employee in the above units who was terminated pursuant to the unilaterally implemented zero tolerance policy and WE WILL make him whole for any wages and benefits lost as a result of the termination.

WE WILL expunge from our files any reference to such termination and WE WILL notify the employee that this has been done.

WE WILL notify your Local Union before making any changes to your wages, hours, and terms and conditions of employment and, upon request, bargain with the Local Union before implementing any changes.

WINDSTREAM CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two Chatham Center, Suite 510

112 Washington Place

Pittsburgh, Pennsylvania 15219-3458

Hours: 8:30 a.m. to 5 p.m.

412-395-4400.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.