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

GRAYMONT PA, INC.,

and **Case 6–CA–126251**

LOCAL LODGE D92, UNITED CEMENT, LIME, GYPSUM AND ALLIED WORKERS, A DIVISION OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL–CIO.

Counsel:

Dalia Belinkoff, Esq. (NLRB Region 6)
of Pittsburgh, Pennsylvania, for the General Counsel

Eugene A. Boyle Esq. (Neal, Gerber & Eisenberg LLP)
of Chicago, Illinois, for the Respondent

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employer that changed its work rules during the term of the labor agreement it had entered into with the union representing its employees. The General Counsel of the National Labor Relations Board (Board) alleges that the employer had a duty to notify the union and provide an opportunity for collective bargaining before making the changes and that it violated the National Labor Relations Act (Act) by failing to do so. The General Counsel further alleges that the employer violated the Act by, in response to a union information request, delaying telling the union for six months that it possessed no information requested by the union regarding the employer's decision to make these changes.

The employer disputes that it violated the Act in any manner. It contends that the unilateral implementation dispute should be deferred to arbitration pursuant to the parties' contractual dispute resolution mechanism. Alternatively, it contends that it was not required to bargain before implementing the changes for three independent reasons: because the changes were not material, because the union waived the opportunity to bargain when the employer announced its intent to make the changes, and, finally, because the union waived the right to bargain based on the management-rights clause in the parties' collective-bargaining agreement. As discussed herein, I reject each of the employer's contentions and find that by implementing the unilateral changes the employer violated the Act, as alleged.

As to the delay in providing information, I reject the employer's "derivative" argument that it had no duty to provide information about the changes because it had no duty to bargain about

the changes. However, as discussed herein, I am constrained to dismiss this allegation. The information the employer delayed providing was notification that it had no information responsive to the request. Under the rule announced in *Raley's Supermarkets*, 349 NLRB 26 (2007), in order for a violation to be found in such circumstances the complaint allegation must specifically allege that the employer failed to provide or delayed in providing notification that it had no information responsive to the union's request. At least where the General Counsel is aware of the situation prior to trial, a complaint allegation, such as that here, of a general refusal to provide or delay in providing information, must be dismissed. This technical and unsatisfying rule is one I must follow unless and until it is overruled by the Board.

STATEMENT OF THE CASE

On April 9, 2014, the Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union) filed an unfair labor practice charge alleging violations of the Act by Graymont PA, Inc. (Graymont), docketed by Region 6 of the Board as Case 06–CA–126251. The Union filed an amended charge in the case on June 20, 2014. Based on an investigation into the charge, on June 27, 2014, the Board's General Counsel, by the Acting Regional Director for Region 6 of the Board, issued a complaint alleging that Graymont violated the Act. Graymont filed an answer, and then an amended answer denying all alleged violations of the Act.

A trial was conducted in this matter on September 16, 2014, in State College, Pennsylvania.[1]

Counsel for the General Counsel and counsel for Graymont filed post-trial briefs in support of their positions by October 21, 2014.[2] On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Graymont is and at all material times has been a corporation with offices and facilities in Pleasant Gap and Bellefonte, Pennsylvania, where it is engaged in the mining and production of lime and lime products. In conducting its operations during the 12-month period ending March 31, 2014, Graymont sold and shipped from these Pennsylvania facilities goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. Graymont is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2),

[1]At the close of the hearing counsel for the General Counsel moved to amend the amended charge filed June 20, 2014, to state as the basis of the charge modifications in policy since on or about March 1, 2014, instead of, as stated in the amended charge (GC Exh. 1(c)), since on or about March 31, 2014. Counsel for the Respondent stated that he did not object (Tr. 131). I indicated a willingness to grant the amendment (Tr. 130) but never, in fact, did. I grant it now.

[2]On October 21, 2014, with the submission of her brief, counsel for the General Counsel moved to amend the complaint—essentially to change the allegation that the Respondent refused to provide the Union with requested information to an allegation that the Respondent unreasonably delayed providing the same requested information. The Respondent did not file an opposition to the motion to amend. I grant the amendment.

(6), and (7) of the Act. The Union is and at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Graymont mines limestone and produces lime products for industrial and environmental application at approximately 19 facilities across the United States and Canada. It operates two facilities—one in Pleasant Gap, Pennsylvania, and the other in Bellefonte, Pennsylvania—at which approximately 150 employees work under a collective-bargaining agreement between Graymont and the Union. The Union has represented employees in this bargaining unit for more than 20 years (the current plant manager testified that he had been told that the Union had represented employees at these facilities since the 1960s).

The current collective-bargaining agreement was effective June 1, 2014, and will continue in effect until at least May 31, 2017. The previous agreement was in effect from June 1, 2011, to May 31, 2014 (the 2011 Agreement). Before that there were successive labor agreements in 2001 and 2006.[3]

The management-rights clause of the labor agreements

The 2001 collective-bargaining agreement contained a short management-rights clause (Art. 1 para. 8) that stated:

> All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain in effect.

In the negotiations for the 2006 Agreement, Graymont proposed a longer management-rights clause. The resulting 2006 Agreement contained the following management-rights clause at Art.1 para. 8 of the contract:

> The Employer retains the sole and exclusive rights to manage; direct its employees; to hire, to assign work, to transfer, to promote, to demote, to layoff, to recall, to evaluate performance, to determine qualifications, to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; to set and establish standards of performance for employees; to determine the number of employees, their duties and the hours and location of their work; to establish, change, or abolish positions; to create and implement training and development programs for employees; to implement drug and alcohol testing rules and procedures that are consistent with applicable law; to create any new processes; to make technological changes; to determine shifts; to install or remove any equipment. The rights expressly reserved by this Article are merely

[3]The 2011 labor agreement contains the following provision, recognizing the Union as the bargaining agent for the following unit of employees:

> Employees in the Bellefonte Plant located on North Thomas Street and the Pleasant Gap plant located on Airport Road . . . The term “employees” as used in this Agreement will not include salaried foreman and office employees.

> illustrations of and are not inclusive of all of the rights retained by the Employer. The rights expressly reserved by this Article are subject to the terms and conditions of the Agreement, and to the extent there is a conflict the terms and conditions of this Agreement shall prevail.
>
> All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain exclusively vested in the Company.

Graymont's office coordinator, Shawn Miller, who handles human resources' duties and was involved in negotiations for the 2006 Agreement, testified that there was significant discussion on the clause in 2006 negotiations. During her testimony she reviewed (and the Respondent offered into evidence) notes of an employer-maintained bargaining file from 2006, which corroborated (and informed) her testimony. Miller testified that in the 2006 negotiations the Union raised concerns about language in the Employer's original proposal regarding the use of outside contractors and about the Employer's ability to change shifts from 8 to 12 hours and back. According to Miller these items were removed by the Employer through the negotiating process. Based on her demeanor and the corroborating force of the notes, I credit Miller's testimony on this score.[4] Notably, neither the Union's President Dan Ripka, Miller, nor any other witness or evidence suggests that discipline or absenteeism and/or attendance were discussed in reference or regard to the management-rights clause.[5]

The foregoing management-rights clause, which was included in the 2006 Agreement, was retained unchanged in the successor 2011 Agreement, and the 2014 Agreement.

In June 2014, during negotiations for the 2014 Agreement, the Union proposed changes to the language of the management-rights clause that included placing the work rules in the labor agreement, and other proposed changes. None of these changes were adopted and the 2014 Agreement, which was effective June 1, 2014, retained the same management-rights provision as was in the 2006 and 2011 Agreements.

The Work Rules and Absenteeism Policy

Until the change in work rules on March 1, 2014 (during the term of the 2011 Agreement), that is the subject of the instant dispute, Graymont maintained the same work rules for over 20 years. The pre-March 1, 2014 work rules set forth three categories (Group A, B, and C) of infractions with penalties established for each category. Penalties for successive violations of Group A (which included the statement that "Continued tardiness will not be permitted") progressed from a first time warning to discharge upon the fourth violation within a year. Group B violations begin with a two-day suspension for the first violation with discharge the prescribed penalty for a third violation within a year. The more serious infractions listed in Group C

[4]The Union's president, Dan Ripka, testified that in 2006 the Union accepted Graymont's proposal as proposed, although he also testified that he did not remember whether the Union made proposals with regard to this clause or what discussion the parties had at the table. Ripka was generally a good witness, and, I believe, an honest one, but in this instance he was uncertain, did not have the same sharpness of memory as Miller on this issue, and had no notes to review. Accordingly, I credit Miller as to this issue.

[5]Throughout this decision I refer to attendance and absenteeism policy interchangeably, which is in accordance with the parties' understanding. See Tr. 7.

prescribed discharge for a first offense. For purposes of imposing progressive discipline, violations of different classifications (for instance, single violation of Group A and a single violation of Group B) were not combined.

The work rules also contained a Policy on Absenteeism that stated:

POLICY ON ABSENTEEISM

When an[ ] employee is habitually absent from his/her job, the Company will notify the employee, in writing, with a copy to the Union that the employee's attendance is unsatisfactory and unacceptable.

If attendance does not immediately improve to the full satisfaction of the Company, a strongly worded letter will be sent to the employee, with a copy to the Union, telling the employee he is on probation and if attendance does not improve immediately he is subject to discharge. At some point during this time period a meeting will be held between the affected employee, Union committeeman and Company Representative to impress upon the employee the seriousness of the situation and to warn the employee that he/she will be discharged the first time he/she is absent without good and sufficient reason within one year, or for continued habitual absence for any reason.

Ripka testified that as early as 2003, the Union requested that a new absenteeism policy be created that would provide more certainty and consistency about attendance expectations. For her part, Miller recalled that the matter was raised at the Employer' s initiative, but in any event, she agreed that when Graymont talked to the Union it agreed "that we needed to do something about it."

The issue was discussed in "policy meetings"—meetings between the Union and Graymont that could be requested by either party to discuss ongoing issues or concerns. Typically, four to six people were present at the meetings for each side. After each policy meeting, Graymont's Miller would type up "minutes" of the meeting, which, more accurately, were notes summarizing the discussions, and distribute copies to all meeting participants from both management and the union side.

A new absenteeism policy was discussed in a policy meeting on May 29, 2003, but no change was made to the absentee policy in 2003. The matter was raised again in 2004, and it was discussed by the parties in October and December 2004, and in January 2005. The Employer advanced new absenteeism proposals during these meetings. According to Miller, "[W]e wanted to put a little more teeth into the absenteeism policy."

On February 14, 2005, a new absenteeism policy was implemented. It stated:

The Company and the Union Committee have agreed to the following terms:

1. Six (6) incidents within a rolling year will warrant:
   A. A letter from Shawn, which will include the date of the last incident
   B. Management and the union will meet with the employee which will be considered a Verbal warning and placed into the employee's file

2. Seventh (7th) incident within a rolling year will warrant:
A. A Written Warning from Management which will be placed into the employee's file

3. Eighth (8th incident within a rolling year will warrant:
A. Two days off without pay which will be noted in the employee's file

4. Ninth (91h) incident within a rolling year will warrant:
A. One week off without pay which will be noted in the employee's file, plus
B. Last Chance Notice, which will cover the next 24 months

Note: A doctor's excuse will be considered an excused absence.

The foregoing absenteeism policy, and work rules generally, remained in effect from 2005 until March 1, 2014.

At one point in late 2006, Graymont approached the Union with a proposal to change the work rules and discipline to make them much stricter. The Union protested in letters sent to Graymont that "these are mandatory subjects of bargaining" and demanded that Graymont "suspend any plan[n]ed implementation of these new rules until after the union and the company ha[ve] had the opportunity to bargain over them," contending that "labor law forbids any implementation of a new policy until the bargaining process is complete." Ripka discussed the matter with then Plant Superintendent Rich Fenush, who explained some problems the Employer was having with employee conduct. Ripka suggested that the Employer's issues could be addressed and resolved by application of the current work rules. The new work rules were not implemented.

The February 14, 2014 announcement of intent to change the work rules and absenteeism policy

In February 2014, during the term of the 2011 Agreement, Miller informed the Union that Graymont had scheduled a policy meeting for February 14.

At the meeting, Plant Manager Martin Turecky began by discussing safety issues and then, according to Union President Ripka, "proceeded to tell us that they were changing the work rules," effective March 1. Miller passed out copies of new work rules, which included new rules on absenteeism and tardiness. This was the first mention to the Union of Graymont's interest in and intent to change the work rules.

The new work rules distributed at this meeting incorporated policies on absenteeism and tardiness at the conclusion of the work rules and read as follows:

Work Rules

The following is a set of work rules for the employees of Graymont (PA) Inc. This set of work rules is in no way conclusive. For example, the Code of Business Conduct and Ethics applies as well. In cases where infractions against the Company or its employees are not specifically listed, common sense will apply.

Group A

1. Carelessness or recklessness, including horseplay, is not permitted.
2. When an employee is absent, for any reason, he must call the report off phone number assigned by his supervisor, prior to the start of his shift, stating the reason why he must be absent and, if possible, when he will return.
3. Every accident must be reported to your supervisor before the end of the shift upon which the accident occurs.
4. Employees must limit all lunch periods to the length of time specified.
5. No employee is permitted to leave the Company premises during working hours without permission,
6. Poor work habits will not be permitted.
7. Failure to promote efficient operation of the plant or equipment will not be permitted.
8. Infractions of Federal, state and general or specific departmental safety rules will not be permitted.
9. Hard hats, safety glasses and safety shoes must be worn in the plant area at all times.
10. Failure to follow instructions is not permitted.
11. Failure to cooperate with inspection or attempt to prevent inspection of tool boxes, lockers, parcels or other containers on or within Company property.
12. Unauthorized use of Company phone will not be permitted.

The discipline progression will normally only be reset after an employee works twelve (12) consecutive months free of any work rule violations. The following are the penalties for infractions of Group A rules:

First – Written warning
Second – One (1) day off
Third – Two (2) days off
Fourth – Discharge

NOTE: Group A and Group B violations will be combined in discipline progression. Please reference the chart in this document.

Group B

1. Verbal abuse of customers, truck drivers, suppliers, or any other outsiders who are conducting authorized business on Company property will not be permitted.
2. Carelessness, recklessness or failure to follow instructions which results in injuries to persons or damage to equipment or property will not be permitted.
3. Punching of time clock for any other person is not permitted.
4. Verbal abuse or harassment of other employees or any interference with Company operations will not be permitted.
5. Sleeping on the job is not permitted.
6. Failure to follow proper lock-out/tag-out procedures.

The discipline progression will normally only be reset after an employee works twelve (12) consecutive months free of any work rule violations. The following are the penalties for infractions of Group B rules:

First – Two (2) days off
Second – Four (4) days off
Third – Discharge

NOTE: Group A and Group B violations will be combined in discipline progression. Please reference the chart in this document.

	First	Second	Third	Fourth
A A A A	Written Warning	One Day Off	Two Days Off	Discharge
AAAB	Written Warning	One Day Off	Two Days Off	Discharge
AABA	Written Warning	One Day Off	Four Days Off	Discharge
AABB	Written Warning	One Day Off	Four Days Off	Discharge
ABAA	Written Warning	Two Days Off	Four Days Off	Discharge
ABAB	Written Warning	Two Days Off	Four Days Off	Discharge
ABBA	Written Warning	Two Days Off	Four Days Off	Discharge
ABBB	Written Warning	Two Days Off	Four Days Off	Discharge
BAAA	Two Days Off	Two Days Off	Four Days Off	Discharge
BAAB	Two Days Off	Two Days Off	Four Days Off	Discharge
BABA	Two Days Off	Two Days Off	Four Days Off	Discharge
BABB	Two Days Off	Two Days Off	Four Days Off	Discharge
BBAA	Two Days Off	Four Days Off	Four Days Off	Discharge
BBAB	Two Days Off	Four Days Off	Four Days Off	Discharge
BBBX	Two Days Off	Four Days Off	Discharge	

Group C

1. Deliberate disobedience of supervisor's instructions, or any form of insubordination will not be permitted.
2. Willful falsification on any Company record will not be permitted.
3. Intoxication on the job and/or use of or possession of alcoholic beverages or illegal drug at work is prohibited. Possession includes having them in your vehicle on Company property.
4. Fighting, disorderly conduct, or any form of physical violence on Company premises is not permitted.
5. Stealing or deliberate damage to Company or employee's property is not permitted, and shall be prosecuted as prescribed by law.

6. An employee must not absent himself/herself from work for more than three (3) days without proper notice.
7. Possession of firearms, explosives or other weapons on Company property is prohibited.
8. Threats or threatening behavior against Company property, or anyone on Company property, or any Company employee, whether or not on Company property, is prohibited. All threats will be assumed to have been made with the intent to carry them out.

The following are the penalties for infractions of Group C rules:
DISCHARGE

Policy on Absenteeism
When, all personal days are used, each employee will be allowed one (1) unexcused absence. After that one (1) unexcused absence has been used, the employee will be considered in violation of Group A–6 (Poor work habits will not be permitted) with each proceeding unexcused absence.

NOTE: Supervisors will define the vacation scheduling policy for each department. For example, the supervisors will define how many employees are permitted to be on vacation for any given shift and/or day to ensure efficient operation of their department.

Policy on Tardiness
If you are tardy more than three (3) times in any twelve (12) month period, each proceeding occurrence will be considered a violation of Group A–6 ((Poor work habits will not be permitted).

In his testimony at the hearing, Turecky referred to this as a "proposal" and contended that much of it was "clarification" of the old policy. However, he recognized that the Employer was changing the absenteeism policy, by any definition.

The record does not contain a comprehensive summary of the changes, but some of the major ones include:

including absenteeism within the definition of violations covered by Group A;

shortening the number of unexcused absences (after use of personal days) before beginning progressive discipline from six to one;

the quantifying of the number of instances of tardiness necessary to begin progressive discipline (a change from a penalizing of "continued tardiness");

the change from violations of more than one year not counting towards progressive discipline (i.e., old violations automatically "fell off" after one year), to a system where older violations remained on the employees' progressive discipline record unless and until an employee worked one year without any violations at all;

the "pyramiding," i.e., combining of Group A and B violations for purposes of applying progressive discipline steps.

According to Graymont's notes of the meeting, Turecky "highlighted some of the points which were changed, such as the rolling 12 months, combining of A's and B's, Policy on Absenteeism." Turecky asked the Union if it had any comments. The parties took a break while the Union caucused. When the Union returned its representatives said "[W]e had no comments at this time about the changes." Turecky said that the changes were going to be implemented and Ripka told him that the Union would "file a grievance on the implementation." Turecky said that the Union "couldn't file a grievance because [the work rules and absenteeism policy] were not in the contract anywhere." The Union responded that "we were filing a grievance at that time anyway." The meeting ended.

Later that day, Ripka and fellow union negotiating committee member Bill McElwain approached Turecky at his office and told him "[T]hey would like to discuss the rules and they will withdraw the grievance." Ripka testified that he told Turecky, "[W]e wanted to talk about the work rules." Turecky "said that would be fine and we would have a meeting."

The Union's information request; the Employer's response, and the February 25 meeting

By letter from the union's recording secretary to Turecky, dated February 17, the Union presented Graymont with the following request for information:

> Dear Martin,
>
> Enclosed is a request from the President of Local D92, and Chairman Ralph Houser.
>
> This is a formal information request for any memos, data of any kind or any other Information or Materials which the company relied upon for making the decision to change the work rules, discipline policy, and why changes are being made to the absenteeism policy.
>
> Please include any minutes of policy meeting[s] over the past five years in which these topics were discussed, and any decisions, or agreement that were arrived at, between the company, and the bargaining unit for Local D92 employees.
>
> Your attention to this matter, as soon as you can would be greatly appreciated. Please forward all copies of this information to President Dan Ripka, and Ralph Houser, Committees Chairman.

The parties met February 25. At this meeting, Turecky began by handing the Union a written response to the Union's information request. The response, in the form of a letter from Turecky to Union Committee Chairman Ralph Houser, stated:

> This is in response to your February 19, 2014, information request regarding the revised rules and policies.
>
> Under our collective-bargaining agreement, the Company retains the sole and exclusive right to manage, which expressly includes the right ". . . to adopt and enforce rules and regulations and policies and procedures. . . [."] Therefore, the Company has no obligation to bargain over any of the changes to which your request refers. Since there is no obligation to bargain over the decision to adopt

> the policies to which you refer, there is, likewise, no obligation to furnish any information regarding such decision. In any event, there is no obligation to provide any information regarding internal management discussions leading to such a decision.
>
> Regarding your request for minutes of policy meetings, the Union already has copies of all such minutes. In addition, if the Union contends that there is any agreement between the Company and the Union that prevents or limits the Company's right to adopt the changes in policies to which you refer, the Company hereby formally requests that you furnish us with a copy of any such agreement.

There was discussion about the Union's information request, with Turecky essentially reiterating what was stated in the Employer's letter. According to Graymont's notes of the meeting, although Turecky told the Union that Graymont "had no obligation to bargain over any of the changes made to the work rules" it was "willing to talk to the union and listen to their concerns about any changes." Union Representative Ralph Houser testified that Turecky "said he received the . . . request of information from the Union regarding the work rules, and he said that referring to the management rights that he didn't have to give us any information and he had no obligation to bargain over it."

Turecky asked the Union for comments on the changes. The union representatives objected to the new policies on a number of grounds: generally, the Union was concerned about the lower number of absences that would lead to the commencement of a disciplinary progression under the new rules. The Union also complained about the absenteeism policy being added into the work rules as a Group A violation—the Union wanted the absenteeism policy kept separate. The Union raised an issue with the fact that the under the new policy employees would have to use personal holidays as part of the new absenteeism policy, and that three times tardy was now a violation of Group A rules. The Union objected to Group A and B violations being combined for purposes of progressive discipline (i.e., "pyramided"). The Union raised concern with the change from the current rules, under which older discipline "fell off" after a calendar year, to the new rules in which older discipline fell off only after there were no violations of any kind for a one year period. The Union objected to the inclusion of the word "normally" as a modifier to the policy's statement that discipline would be "reset" after 12 months of no violations. The Union objected to the work rule for insubordination, as it was concerned that an employee refusing to undertake a task that he/she deemed unsafe would be found insubordinate. Finally, the Union wanted clarification on what the rule meant by its prohibition of "unauthorized" use of the company telephone.

More generally, the Union told the Graymont representatives that it wanted to keep the current policy. However, the Union said it would entertain shortening the number of days of absence permitted before discipline was initiated.

In response, and after a caucus, Graymont agreed to remove the word "normally" from the rule's statement that progressive discipline reset after 12 months of no violations. In response to the Union's concern about an employee being charged with insubordination if the refusal to obey involved a safety issue, Graymont pledged not to apply the rule in that manner. This oral pledge was satisfactory to the Union. Finally, Graymont removed from the rules the prohibition on unauthorized use of the company telephone. Turecky told the Union that Graymont could not agree to some of the other changes sought by the Union.

The parties dispute the plan going forward at the end of the meeting. Union President Ripka and testified that "Turecky said we would have another meeting before the implementation." Houser echoed this, somewhat less definitively, testifying that "Turecky told us that we would probably have another meeting for the work rules before March 1st." Turecky testified that he believed he told the Union that "we'll plan to go ahead with the implementation as of March 1st." Turecky testified that he did not recall saying that there would be another meeting before March 1.[6]

On February 27, by email, the Union received the final version of the rules to be implemented. The only changes from the original revisions provided to the Union on February 14, were the removal of the rule prohibiting unauthorized use of the phones, and the removal of the word "normally" from the explanation following the listing of Group A and Group B violations, which now stated: "The discipline progression will be reset after an employee works (12) consecutive months free of any work rule violations." (In the original version it stated that "The progression will normally only be reset after an employee works (12) consecutive months free of any work rule violations.")

The March 1, 2014 implementation, and the August 2014 explanation by the Employer that it had no information responsive to the Union's information request

There was no follow-up meeting. The Employer did not arrange one. The Union did not request one. The new revised rules were implemented March 1, 2014.

In August 2014, a Graymont representative, filling in for Turecky, told Ripka and Houser that with regard to the Union's February information request, "[T]here wasn't any written information that we asked for, that they just . . . met and changed the work rules and absenteeism policy because they thought that there was a better way to run the business."

On or about August 26, 2014, the Respondent filed an amended answer to the complaint in this case. The only substantive difference in the amended answer was the Respondent's response to allegations relating to the refusal to provide information. It reiterated its answer but added "affirmatively, that, other than the meeting minutes already in the Union's possession, Respondent has no information responsive to the Union's request." (GC Exh. 1(k) at ¶12.) This affirmation that "the Respondent has no information responsive to the Union's information request" was reiterated in a newly added affirmative defense set forth in the list of affirmative defenses appended to the Respondent's amended answer (See GC Exh. 1(k) at the fourth affirmative defense).

At the hearing, Turecky testified that Graymont did not rely on any data or documents in deciding to make the work rule and absenteeism changes. According to Turecky, the decision to make the changes emerged from internal discussions Graymont management had beginning in November or December 2013. According to Turecky, the outlook for 2014 was that the plant would be operating at full capacity and that anticipation, plus goals for a recently implemented preventative maintenance management program, led management to the "common sense" conclusion that with the "lenient" absenteeism policy in place Graymont could not achieve its goals.

[6] I do not believe it necessary to resolve this dispute. It makes no difference to the outcome.

Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing changes to its disciplinary policy for work rules and to its absenteeism policy without affording the Union an opportunity to collectively bargain with the Respondent.[7]

The General Counsel further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying furnishing the Union with information requested February 17, 2014, regarding the memos, data, or other information or materials that the Respondent relied upon in making the decision to change the disciplinary and absenteeism policies. Specifically, the Respondent waited until August 2014, to inform the Union that it had no information responsive to the Union's request (other than information previously provided in the course of the parties' meetings over the years). The General Counsel alleges that this delay was unlawful.

Below, I consider, in turn, each of these allegations. However, before analyzing the General Counsel's claims, I consider the Respondent's defense that, in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board should defer resolution of the alleged unilateral change portion of this dispute to the parties' contractual grievance-arbitration procedure.

I. Deferral

The Respondent contends that the Board should defer the unilateral change portion of this case—but not the information-request portion of this case—to the grievance-arbitration procedures in the parties' labor agreement. (R. Br. at 29.)

In *Collyer Insulated Wire*, supra, the Board set forth the standard for determining the circumstances in which an unfair labor practice dispute should be resolved by the contractual dispute-resolution mechanism contained in a union-employer collective-bargaining agreement. The Board held that in certain circumstances, where a "dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes." *Collyer*, 197 NLRB at 839.

The instant dispute involves allegations that the Employer violated the Act by unilaterally changing terms and conditions without bargaining, and allegations that it unlawfully delayed responding to the Union's information request about the changes. Without regard to whether the instant dispute would be suitable for deferral if the issue concerned only the unilateral changes to the discipline and absenteeism policy, "[t]he Board has long held that deferral is inappropriate in 8(a)(5) information request cases." *Chapin Hill at Red Bank*, 360 NLRB No. 27, slip op. at 1 fn. 2 (2014) (and cases cited therein).

This ends the Respondent's deferral defense, as "established Board policy also disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board." *Avery Dennison,* 330 NLRB 389, 390 (1999).

[7]The General Counsel also alleges a derivative violation of Sec. 8(a)(1) of the Act. It is settled that an employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enf'd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

While the Respondent (R. Br. at 29) "recognizes that the Board generally does not defer information request cases to arbitration," it points out, citing *Clarkson Industries*, 312 NLRB 349, 353 (1993), that there are instances where the Board has granted partial deferral—deferring to one issue in a case while retaining for resolution another. But this exception to the Board's "non-bifurcation" policy requires, as the Board found in *Clarkson Industries*, that the "deferrable issues are not in any way factually or legally interrelated with the [non-deferrable] issues." Id.

Here, that is manifestly not the case. Indeed, the Respondent's chief defense to the information issue allegation is its claim—made to the Union on February 25, 2014, and in its brief (R. Br. at 24)—that there was no duty to provide the Union information about its decisionmaking with regard to the absenteeism and disciplinary policy *because* there was no duty to bargain over these decisions. In other words, its defense to the information-request allegations is "derivative" of its defense to the unilateral-change allegations. As the Respondent puts it (R. Br. at 24):

> An employer's duty to provide information is derivative of its duty to bargain under Sections 8(a)(5) and 8(d) of the Act. Where a Union has waived its right to bargain over a particular topic or change to a term or condition of employment, it no longer is entitled to receive information for this purpose. . . . The Union unequivocally waived its right to bargain over those particular subjects by agreeing to the expanded management-rights clause in 2006. As such, the Union had no right to information for that purpose. (Citations omitted.)

Thus, were the Board to defer the unilateral change issue but resolve the information issue, it moots the prospect that the arbitrator and the Board would each be considering an overlapping and related question. The Board might have to decide whether the management-rights clause constituted a waiver of the Respondent's duty to bargain over the decision to change the absenteeism and discipline policy, and thus, as the Respondent claimed, freed it from its "derivative" duty to provide information to the Union on the subject. The arbitrator would be deciding whether the management-rights clause created a contractual right by the Respondent to make the change in absenteeism and discipline without bargaining. The risk of inconsistent results and analysis would be pointed were the Board to defer the unilateral change issue.

On these grounds, I reject the Respondent's contention that the Board should defer the unilateral change allegations to the parties' contractual dispute resolution mechanism.[8]

With regard to the Respondent's deferral argument, I add one final observation. At trial the Respondent introduced evidence showing that a December 2011 unilateral implementation on maximum overtime hours, objected to by the Union, was upheld by an arbitrator who relied upon the management-rights clause as privileging the Employer to make this change. Witness testimony established that the Regional Office of the Board deferred to the arbitrator's decision, and on appeal the General Counsel's office upheld this action. (Tr. 122.) I note that on brief,

[8] I note that the Board's recent decision in *Babcock & Wilcox Construction, Co.*, 361 NLRB No. 132, (2014), modified postarbitral deferral standards and, to some extent, prearbitral deferral standards. Slip op. at 12–13. However, by its terms, the standards articulated in *Babcock & Wilcox* do not apply to cases, such as this one, pending at the time of the issuance of the decision in *Babcock & Wilcox*. Slip op. at 13–14. In any event, nothing in *Babcock & Wilcox*, were it applied to the instant case, would render deferral appropriate.

while the Respondent recites the facts regarding the overtime arbitration (R. Br. at 13–14), the matter forms no part of its argument in support of deferral (or its right to unilaterally implement).[9]

II. The Unilateral Changes

The General Counsel alleges that the Respondent had a duty to notify and provide the Union with an opportunity to collectively bargain before implementing changes to the work rule disciplinary policies and absenteeism policy.

An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enf'd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

Here, there is no dispute, nor could there be, over the General Counsel's allegation that employee absenteeism and discipline are mandatory subjects of bargaining.[10]

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[9]At the hearing, I refused to receive the Respondent's proffer of documentary evidence regarding the deferral decision, as I did not and do not believe the rejected documentary evidence (or even the admitted testimony) relevant to the Respondent's request for deferral in this case. The reasons for my view include: (1) the overtime dispute raised a question of postarbitration deferral, here we have an issue of prearbitration deferral inextricably linked with a clearly nondeferrable issue; and (2) the General Counsel's decisions to not issue complaints are acts of prosecutorial discretion that carry no precedential weight for the Board, and, indeed, are not even binding on the General Counsel in future cases. *Steelworkers (Cequent Towing Prods.)*, 357 NLRB No. 48, slip op. at 3 (2011) (rejecting respondent's assertion that it was justified in maintaining a challenged rule "because the requirement was consistent with the . . . guidelines issued by the NLRB General Counsel prior to his issuance of the complaint in this case. . . . [T]he General Counsel's earlier exercise of prosecutorial discretion in declining to issue complaint does not insulate the requirement from subsequent Board scrutiny upon the issuance of complaint"); *Machinists, Local Lodge 2777 (L-3 Communications),* 355 NLRB 1062, 1066 (2010) (rejecting respondent's reliance on the General Counsel's "exercise of prosecutorial discretion" in not previously issuing complaint).

[10]*Peerless Publications*, 283 NLRB 334, 335 (1987) ("rules or codes of conduct governing employee behavior with constituent penalty provisions for breach necessarily fall well within the definitional boundaries of "terms and conditions" of employment. . . . [W]e begin with the principle that labor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining") (internal quotes omitted); *Ciba-Geigy Pharmaceuticals,* 264 NLRB 1013, 1016 (1982) (attendance rules are "unquestionably mandatory subjects of bargaining"), enf'd. 722 F.2d 1120 (3d Cir. 1983); *Dorsey Trailers,* 327 NLRB 835, 853 fn. 26 (1999) ("An employer's attendance policy has long been held to be a mandatory subject of bargaining"), enf'd. in relevant part, 233 F.3d 831 (4th Cir. 2000).

In addition, the Respondent does not assert that its pre-implementation meetings and discussion with the Union satisfy its statutory duty to collectively bargain. The Respondent does not advance any such argument, and it would fail if it did, as its meetings with the Union over this issue were at all times conducted on the basis of the Respondent's position that it "had no obligation to bargain over any of the changes," and with a pre-announced and unilaterally determined intention to change the work rules March 1, notwithstanding any discussions. This is antithetical to the most basic precepts of the statutory duty to bargain to impasse before unilaterally implementing a change in a mandatory subject of bargaining. *San Diego Cabinets*, 183 NLRB 1014, 1020 (1970) (rejecting employer's contention that because it informed union of its willingness to meet and discuss matters it had not refused to bargain, where employer consistently maintained that it had no duty to bargain: "its professed willingness to discuss this unlawful position does not excuse the violation"), enf'd. 453 F.2d 215 (9th Cir. 1971).

The Respondent's defense to the unilateral change allegations is three-fold. First, in a partial argument, the Respondent contends that the General Counsel has failed to prove that the changes—other than changes to the absenteeism/attendance policy, as to which the Respondent does not advance this argument—were "material, substantial and significant," and thus, not changes rising to significance requiring bargaining. Second, the Respondent argues that the Union waived any right to bargain over the changes to the absenteeism and disciplinary policies by not demanding bargaining when it learned of the Respondent's intention to make the changes in the work rules. Finally, the Respondent argues that the Union waived the right to bargain in a different way: the Respondent contends that the management-rights clause in the parties' collective-bargaining agreement privileges the Respondent's right to make the unilateral changes without the necessity of bargaining. I consider each argument below.

a. The materiality of the unilateral changes to the work rules and disciplinary rules

As the Respondent correctly points out (R. Br. at 21), and the General Counsel agrees (GC Br. at 14), for a unilateral change in mandatory subject of bargaining to be unlawful it must be a "material, substantial and significant change." *Berkshire Nursing Home, LLC*, 345 NLRB 220, 221 (2005) (finding that a "difference between a 1-minute walk and a 3 to 5-minute walk [for employees] from the parking lot to the entrance is . . . a relatively minor inconvenience and not "sufficiently significant difference to warrant imposing a bargaining obligation on the Respondent before making this change").

As to the changes implemented to the absenteeism/attendance policy, the Respondent stipulated (Tr. 6–7) and agrees on brief (R. Br. at 23 fn. 14) that the changes it made were material and substantial.

However, it contends that the remaining changes to the discipline under the work rules were not significant enough to trigger a duty to bargain. I do not accept this argument. Indeed, given the patent significance of the changes it made to the work rules, it is a frivolous argument.

Self-evidently material changes, in addition to the admitted material changes to absenteeism include the following:

--The rules for absenteeism are not only materially changed, but violations of the new absenteeism rules are now incorporated into the progressive discipline scheme as a Group A violation. In other words, not only are the changes to the absenteeism policy admitted by the Respondent to be material, but those changes are incorporated and made a constituent part of

the work rules, specifically Group A, and thus, one or two violations of the (new) absenteeism rules can be combined with other violations to permit more serious disciplinary action than would have been permitted for the same violations under the old policy.

--Tardiness has gone from a Group A violation that states that "Continued Tardiness will not be permitted," to a policy on tardiness incorporated into Group A that states that "If you are tardy more than three (3) times in any twelve (12) month period, each proceeding occurrence will be considered a violation of Group A–6 (Poor work habits will not be permitted)."

-- Under the old work rules, discipline that was more than a year old would not count toward progressive discipline: the rule read, "The following penalties for infractions of Group A rules [or Group B rules] will be imposed in one year's time from the last violation." Thus, for purposes of progressive discipline, old violations "fell off" after one year. The new implemented work rules changed this so that old violations do not "fall off" unless and until an employee works one year without any violations at all. The new rule reads, "The progressive discipline will be reset after an employee works twelve (12) consecutive months fee of any work rule violations." The materiality of this change to an employee who committed two Group A violations in September, one in October, and one the following August would not be in doubt. Under the old rule, the employee would start the next November with only one violation on his record for purposes of progressive discipline, and for the next 12 months would face a one-day suspension should he violate Group A again. However, under the old rule, from November through August of the next year the employee would face discharge for a new violation of Group A.[11]

--The new policy provides that "Group A and Group B violations will be combined in discipline progression" and adds a "matrix" to the rules to show how an employee who commits violations of both Group A and Group B violations during the year will be penalized. Under the old policy, there is no indication that Group A and B violations were combined, and indeed, it would not seem possible as each group had distinct discipline progressions. The matrix in the new policy melds the two and this is a significant change that would result in a significant change in circumstances under the old and the new policies for an employee with, for instance, two Group A violations and two Group B violations.[12]

[11]The Respondent asserts (R. Br. at 22) that this revision "clarified" but did not change "the period within which the progressive discipline steps will be applied (one year)." As a matter of logic and the English language, that is not the case. Moreover, the argument is inconsistent with the evidence, specifically the Respondent's own notes of the February 14, 2014 policy meeting, at which Turecky "explained why we need to *change* the Work Rules" [and h]e also highlighted some of the points which were *changed*, such as the rolling 12 months." (Emphasis added.) The notes then state: "We explained that those currently in the progressive discipline system will be notified of the *changes* individually." (Emphasis added.) These are admissions, albeit unnecessary ones, as anyone reading the rules can see there are significant changes from the old rules.

[12]Again, the Respondent argues that this is not a change—but rather a "clarification." Its argument on this score is a particularly tortured. It claims that the General Counsel failed to prove that this constituted a change—but, as stated above, there is no question that a reasonable reading of the old rule set out a separate track of progressive discipline for Group A and Group B violations. The new rules change this. Thus, the rule has changed in a significant way. And indeed, in the Respondent's own notes of the February 14, 2014 policy meeting, Turecky "explained why we need to *change* the Work Rules" [and h]e also highlighted some of the points which were *changed*, such as the . . . combining of A's and B's." This is an admission.

--Under the old rules, "Sleeping on the job" and "Failure to follow proper lock-out" procedures were each a Group C violation, subjecting an employee to discharge for one offense. Under the new rules these are Group B violations, which require three B violations for discharge. While "favorable" (to the sleepy and careless) employee, the change puts other employees at risk, and is, in any event, whether favorable or unfavorable, a material change in the disciplinary policy.[13]

Finally, I note that the Respondent's contention (R. Br. at 23–24) that it doesn't matter how the rules are written, because the rules state that "common sense will prevail" and because the Respondent has "discretion" under the rules, is an argument that has been rejected by the Board:

> There is no merit to the argument that employees were not held to a standard because of the discretion and flexibility afforded supervisors in the imposition of discipline for noncompliance. In the first place, whether or not discipline ever is imposed does not in any way detract from the existence of the standard. Employees who are told they are expected to produce at a certain clearly defined rate thereby are subjected to a term and condition of employment of no less an impact than any other instruction relating to their hours of work or quality of work. That an employer may be lenient in requiring adherence to the rule results in the creation of a flexible rule, but a rule nonetheless. Secondly, the Respondent in fact has enforced the new rules, albeit on a selective basis. That very selectivity itself, rather than nullifying the standard, serves to highlight its existence. Exposing employees to a sword of Damocles depending upon a supervisor's discretion and good judgment, or lack thereof, makes the weapon of discipline part and parcel of the performance standard. Respondent's decision to make that weapon an uncertain one has relationship only to the effectiveness of the rule and not to its existence.

Tenneco Chemicals, 249 NLRB 1176, 1179–1180 (1980).

In similar vein, the Respondent's claim that we cannot determine if or how the rule changed until an arbitrator rules on whether it satisfies just cause is a specious claim. The changes the Respondent made to the rules reflect material and significant changes from the old rules, and notwithstanding a future arbitral ruling that effectively amends the rule, for now the changes are in place. The rules are mandatory subjects. The rules are bargainable.

Each of the foregoing rule changes are significant and these are changes that, as written, have a direct impact on employees' reasonable understanding of their terms and conditions of employment. On their face, and self-evidently, they are not "de minimis" or "immaterial" changes.

[13] I reject the Respondent's contention that the change in disciplinary penalty for sleeping at work or failing to observe certain safety procedures is a nonmaterial change because it lessens rather than increases the penalty for these offenses. The argument misconceives the statutory command. *Goya Foods of Florida*, 351 NLRB 94, 102 fn. 4 (2007) ("The fact that a unilateral change may be favorable toward employees is of no consequence so long as it has an impact on bargaining unit employees").

Absent acceptance of the waiver arguments advanced by the Respondent, to which I now turn, the changes to the work rules are of the type that fall squarely within the ambit of the matters as to which the Act contemplates and imposes a duty of collective bargaining.

b. Waiver based on the Union's alleged refusal to request bargaining

The Respondent contends that the Union waived the right to bargain by failing to demand bargaining when presented with the Respondent's plan to implement the new work rules. This argument is meritless.

The Union did make an effective demand to bargain. When the Union was presented for the first time with news of the rule changes at the February 14 policy meeting, Ripka initially announced that the Union was filing a grievance, but later that day approached Turecky and retracted this and asked to meet to discuss the work rules. Thus, the same day that the work rules were presented to the Union (after months of secret preparation by the Respondent), the Union told the Respondent that it wanted to meet to discuss the work rules. This is a request for bargaining. *Armour & Co.*, 280 NLRB 824, 828 (1986) ("want to discuss your position" is a request to bargain).

And the Union followed this up with a request for information about the Employer's decision to change the work rules, action consistent with an effort bargain, and then again, it came to the February 25 meeting.

There was no waiver for failure to request bargaining. The obstacle to bargaining was not that the Union waived bargaining through its conduct, but rather, that the Employer was refusing to bargain.[14]

Given that the Union requested to bargain, there is no need to reach the General Counsel's argument that the Respondent presented the decision to implement work rule changes March 1, as a fait accompli, a finding that would preclude a finding that the Union waived its right to bargain because a "Union cannot be held to have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli." *Tesoro Refining & Marketing Co.*, 360 NLRB No. 46, slip op. at 3 fn. 10 (2014) ("the Respondent repeatedly told the Union that it did not have to bargain concerning the benefit changes, that it had the right to make those changes unilaterally, and that the changes would be implemented on a date certain. In other words, the Respondent presented the changes to the Union as a fait accompli").

[14]The Union's request to meet must be contrasted with the Employer's actions. At the February 14 meeting, Turecky made himself clear: he "proceeded to tell [the Union] that they were changing the work rules" effective March 1. While willing to discuss the matter, the Respondent's meeting with the Union on February 25 was explicitly premised on the position that "the Company has no obligation to bargain over any of the changes to which your request refers." It maintained the position that it had the "sole and exclusive right" to manage the work force, which in its view included the right to adopt the rules it presented without bargaining. Contrary to the claims of the Respondent, this is a refusal to bargain. *San Diego Cabinets*, supra at 1020. A willingness to meet to talk, but only on a basis on which the Respondent declares itself free from the strictures and obligations of statutory bargaining, constitutes a refusal to bargain.

c. Waiver through the management-rights provision of the collective-bargaining agreement

The Respondent's chief defense is rooted in the contention that in the collective-bargaining agreement the Union waived the right to bargain over the change in work rule discipline and absenteeism policy. Graymont contends that the parties' collective-bargaining agreement—specifically, the management-rights clause, art. 1 Sec. 8—establishes the Union's waiver of the right to bargain over such changes. To this, the Respondent adds an argument that the negotiation of the management-rights clause in 2006, as well as the Union's effort to change it in 2014 negotiations after the Employer's unilateral actions, provides evidence that the clause constitutes a waiver of the Union's right to bargain over the unilateral changes at issue here.

The outcome of this dispute is determined by the Board's "clear and unmistakable waiver" rule. The Board applies the "the clear and unmistakable waiver standard in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of the collective-bargaining agreement." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007). Accord: *Baptist Hospital of East Tennessee*, 351 NLRB 71, 71–72 (2007) (applying clear and unmistakable waiver standard to find unilateral change lawful based on contractual provision); *Verizon North, Inc.*, 352 NLRB 1022 (2008) (applying "clear and unmistakable waiver" standard to employer's claim that contract language regarding Family and Medical Leave Act was defense to 8(a)(5) unilateral change allegation).

Notably, the Respondent does not dispute that this is the correct rule to apply. (See R. Br. at 15–17.)

Under this rule, 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). This means, as the Supreme Court has explained, "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Metropolitan Edison*, supra at 708. In the words of the Board:

> To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.

Allison Corp., 330 NLRB 1363, 1365 (2000).

Thus, in a unilateral-change case, a collectively-bargained provision may be deemed to constitute a waiver by the union of the employer's duty to bargain over the conduct, but only if the contract's text, or the parties' practices and bargaining history "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena*, supra at 811. This is a standard that is purposely tilted in favor of requiring collective bargaining: "The standard reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes." *Provena*, supra at 811.

In conducting its analysis, the Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver. Id. Proof of a contractual waiver is an affirmative defense and it is the Respondent's burden to show that the

contractual waiver is explicitly stated, clear and unmistakable. *AlliedSignal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied, 253 F.3d 125 (2001); *General Electric*, 296 NLRB 844, 857 (1989), enf'd. w/o op. 915 F.2d 738 (D.C. Cir. 1990).

With this standard in mind, we turn to the language of the management-rights provision. In support of its claim of waiver, the Respondent (R. Br. at 16) relies upon the portion of the management-rights clause that states:

> The Employer retains the sole and exclusive rights . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees[.]

The question is whether this language supports the view that the parties specifically and unequivocally expressed a mutual intention to permit unilateral employer action with respect to the particular employment terms at issue here: changes to absenteeism, and changes to the level of discipline and progressive discipline meted out for violation of company-imposed rules.

Given the standard, the answer is, quite clearly, no. There is no reference in the management-rights clause to attendance, or absenteeism, or changing the standards or progression for discipline. What *is* in the management-rights clause is a *general* right "to discipline and discharge for cause" and a *general* right "to adopt and enforce rules and regulations and policies and procedures."

As the Board has explained with regard to a similar management right "to establish and enforce shop rules," this is a "general contractual provision similar to a broadly worded management-rights clause, from which we will not infer clear and unmistakable waiver." *California Offset Printers*, 349 NLRB 732, 733 (2007) (reversing judge for relying on "general authority" of employer under contract to "establish and enforce shop rules" to "discipline or discharge for cause" and "to establish work schedules and make changes therein," to find waiver of right to bargain over establishment of rule requiring employees to be on call for sudden schedule changes). Indeed, the Board has held that a general right to make rules or policies does not waive the right to bargain over the specific subject of rules on attendance. *Ciba-Geigy Pharmaceuticals* , 264 NLRB 1013, 1016 (1982) (employer's authority under management-rights clause to continue and change reasonable rules and regulations as it may deem necessary and proper does not evidence "that the Union waived its right to bargain about absentee rules" as the management-rights clause makes no reference to rules on absenteeism or tardiness).

As to the right to discipline and discharge, it is just that—it "allows the employer to function in accordance with existing contractually agreed-upon procedures, not to change them." *California Offset Printers*, supra at 734. Indeed, the limitation in a contract, such as this one, of the employer's right to discipline "for cause" has been held by the Board as evidence contrary to the waiver of bargaining on the subject. *Windstream Corp.,* 355 NLRB 406 (2010), incorporating 352 NLRB 44, 50 (2008) ("If anything, such language shows the unions interest in the fairness of the Respondent's application of discipline").

Notably, I agree with the reasoning of the Board in *Kennametal, Inc.*, 358 NLRB No. 68 (2012), a case cited by both the Respondent and the General Counsel, but which is non-precedential in light of *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014). Although not precedential, the reasoning of *Kennametal* is persuasive and I adopt it. In *Kennametal*, supra, the collective-bargaining agreement explicitly gave the employer the right "to continue to make reasonable provisions for the safety and health of its employees" as well as "establish"

"reasonable safety and health rules." The Board found that this constituted a waiver of the right to bargain over safety rules. However, notwithstanding this waiver, the Board found that *discipline* regarding safety rules had not been waived. In other words, a contractual waiver as to safety rules, premised on the employer's explicit and unambiguous right in the contract to make safety rules, did not extend to the right to alter the progressive disciplinary rules for safety violations as nothing "in the collective-bargaining agreement permits the Respondent to unilaterally change the disciplinary consequences for employees engaging in [violation of safety rule] conduct." 358 NLRB No. 68, slip op. at 3.

The reasoning is instructive for our case. And it demonstrates that the instant case is even less suitable for finding waiver than *Kennametal*. In *Kennametal*, the contract gave the employer the specific and express right to establish rules regarding the specific employment term at issue—in that case, safety rules. Still, even that specific predicate contractual right to establish safety rules in *Kennametal* did not demonstrate waiver of the right to bargain over the establishment or changing of discipline regarding the very safety rules that the employer was free to establish unilaterally. In our case, there is also no explicit right in the contract for the employer to make disciplinary rules or, even more to the point, to "unilaterally change the disciplinary consequences for employees engaging in" any specific type of conduct. And indeed, in our case, there is not even an explicit and specific predicate right to establish the employment terms at issue (e.g., absenteeism, attendance, or progressive discipline). Accordingly, if no waiver of the right to bargain about changing discipline for safety issues can be found in *Kennametal*, none can be found here to change discipline based on a contract that provides neither for an explicit right to make disciplinary rules, or even (unlike in *Kennametal*) for establishing the specific employment terms at issue in the case.

The cases relied upon by the Respondent support the General Counsel's case. The Respondent relies upon *United Technologies Corp.*, 287 NLRB 198 (1987), calling it "nearly identical" to the instant case. However, it is not. The management-rights clause in that case explicitly gave the employer "the right to make and apply rules and regulations for production, discipline efficiency, and safety." The management-rights clause in this case does not grant that right (much less waive bargaining about) making and applying disciplinary rules. As stated above, it is well settled that a general right "to discipline" does not constitute a waiver of the right to bargain over the making or changing of disciplinary rules. In a related argument (R. Br. at 17), the Respondent argues that in the management-rights clause

> [t]he references to the Company's exclusive right to "discipline and discharge for just cause" and to "adopt and enforce rules and regulations and policies and procedures" are contained within the same clause of the management-rights provision, set off by semi-colons, which indicates that they are intended to be read together.

In fact, it is the semi-colons that *separate* the general right to make rules and the general right to discipline and thereby demonstrate that these are separate enumerated management rights. By contrast, the management-rights clause in *United Technologies*, supra, expressly provided for "the right to make and apply rules and regulations *for . . .* discipline." (Emphasis added). The Respondent simply cannot fit this case within the pigeon hole marked *United Technologies*.

Provena Hospital also does not support the Respondent's argument. In that case, the Board agreed with the part of the employer's argument that claimed that the union had waived the right to bargain about a new attendance/tardiness procedure where the contract gave the employer the right—along with the right to make rules of conduct and to discipline/discharge—to

"change reporting practices and procedures and/or to introduce new or improved ones." However, in this case there is no specific right in the management-rights clause to "change reporting practices and procedures" or any other reference to attendance or tardiness. No such specific right pertaining to attendance rules is provided for in the management-rights clause.[15]

At the same time, the parties' bargaining history provides absolutely no support for the Respondent's waiver argument. The existing management-rights provision was introduced during 2006 negotiations and it was far more detailed and extensive in its setting forth of management rights than the predecessor clause. However, by no witness' account was there *any* discussion of discipline, absenteeism, or the right under the management-rights clause (or under any clause) to change such rules. This precludes a finding that "the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000).[16]

Notably, with specific regard to the attendance/absenteeism policy, the bargaining history is directly in opposition to the Respondent's waiver claim. The absenteeism policy in effect before the March 2014 implementation was not only the product of extensive bargaining between the parties, but was enacted in 2005 based on an explicit written agreement between the Union and the Respondent. The 2005 Absenteeism policy begins with the preface: "The Company and the Union Committee have agreed to the following terms:"—This is the opposite of a history of waiver of bargaining rights. Rather, the history is of the collective bargaining of issues related to attendance rules and discipline for violation of them. And, consistent with this, in late 2006 when Graymont approached the Union with a proposal to change the discipline for work rules to make them stricter, the Union objected on grounds that labor law required bargaining before there could be any change. The proposals were not implemented.

Finally, the Respondent advances the specious argument that the Union's effort in June 2014 negotiations to negotiate changes to the management-rights clause evidences that the

[15]The Respondent also relies on *Quebecor World Mt. Morris II*, 353 NLRB 1 (2008), a two-member Board case that was never adopted by the Board after *New Process Steel*, 560 U.S. 674 (2010). Thus, the case is of no precedential force. However, it too is easily distinguishable: the Board Members found a waiver of the union's right to bargain over implementation of a "performance improvement procedure (PIP) procedure where the management right to discipline was combined with a right on the employer's part to "establish and apply reasonable standards of performance and rules of conduct." The Board Members found that this language authorized the unilateral establishment and application of disciplinary procedures for work-performance issues, which they found the PIP to be. But in the instant case, the unilateral changes involve attendance, tardiness, and their place in and the progressive discipline scheme generally. The contract's language does not clearly and unmistakably endorse any unilateral right of action on these subjects.

[16]The Respondent proposes (R. Br. at 18–19) to turn the "clear and unmistakable" standard on its head when it argues that because during the 2006 negotiations the Union succeeded in having the Employer remove certain express rights from the proposed management-rights clause (i.e., the right to change shift duration and the right to hire subcontractors), this means that the Union has waived the right to bargain over every other alleged management right—whether or not discussed and whether or not explicitly and specifically stated. This is essentially the reasoning of the judge that the Board rejected and reversed in *California Offset Printers*, supra.

Respondent had the right to make the unilateral changes all along. In these negotiations, occurring in the aftermath of the Respondent's unilateral action, the Union (unsuccessfully) proposed changing the management-rights clause to explicitly prohibit unilateral action with regard to work rules.

The Respondent reasons: "These changes would be wholly unnecessary if, as the Union and the General Counsel now contend, the Company did not possess the right to make such changes in the first place." But it is also the case that the Union's proposed contract revisions would have been wholly unnecessary if the Respondent had not relied upon the existing contract language to make unlawful unilateral changes.

The Respondent's argument assumes what it must prove. In other words, the Respondent's argument works only if you first assume that under the existing management-rights clause the Union had no right to bargain about the unilateral changes undertaken by the Respondent. But I have found that this is not the case. And in the context of unlawful unilateral action by the Respondent, the Union's subsequent effort to amend the management-rights clause reasonably cannot be understood as an admission but, rather, as an effort to adapt to the Respondent's unremedied unlawful conduct.

A final note about the complaint: The complaint suggests that the Respondent's violation began on or about February 25, 2014, which is the date that the Respondent announced that it was refusing to bargain about the changes in policy it planned to implement March 1, 2014. However, on brief, counsel for the General Counsel contends that the violation was the unilateral implementation, which occurred on March 1, 2014. I think the brief is right. Absent the implementation, there was no statutory duty to bargain. These events occurred during the term of an existing labor agreement. Had the Respondent not implemented changes to the attendance and disciplinary policies, there was no separate duty to bargain over these issues at this time. Had the Employer threatened but in the end not implemented changes to the policies (see, e.g., events in late 2006), there would have been no *bargaining* violation. The violation in this case was the unilateral implementation without affording the Union an opportunity to collectively bargain.

III. The delay in providing information

As referenced above, counsel for the General Counsel has moved to amend the complaint to allege that the Respondent unlawfully delayed providing requested information to the Union. The Respondent has not objected to the amendment, which I have granted, and which, in any event, is not required under Board precedent with regard to such closely-related allegations. *Care Manor of Farmington*, 318 NLRB 330 (1995).

In August 2014, the Respondent announced that it had nothing responsive to the Union's request (other than the policy meeting notes that the Union already had in its possession). Before this, since the Union's February 25, 2014 information request, the Respondent had maintained a refusal to provide the Union information on grounds that, having no obligation to bargain over the decision to implement changes to the absenteeism and disciplinary policies, it similarly had no obligation to furnish information regarding the decision.[17]

[17]The Respondent's February 25, 2014 response to the Union also contained the independent (but unexplained) claim that "in any event, there is no obligation to provide any information regarding internal management discussions leading to such a discussion." However, neither at trial nor on brief does the Respondent advance this argument as a rationale for noncompliance.

But for a complication I will arrive at shortly, all of this seems like a straightforward violation of the Act.

An employer, on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 867 (2006). The duty to provide information includes information relevant to contract administration and negotiation. *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch 'as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000) (Board's brackets), quoting, *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

I have rejected the Respondent's defense that it had no duty to bargain over the decision to change the absenteeism and disciplinary policy. Its "derivative" defense—that it had no obligation to provide information on these decisions *because* it had no obligation to bargain—is, accordingly, also rejected as baseless. There is no reasonable grounds identifiable in the record for the delay in telling the Union that it had no responsive information. The Respondent could have determined, and likely did determine within days that it had no documents responsive to the Union's request. The Union was entitled to know this forthwith.[18]

There is, however, a problem. Somewhat remarkably, in my estimation, in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26, 28 (2007), a Board majority held that the failure to inform the union that requested information does not exist is not a violation that can be found based on a complaint allegation that generally states that the respondent has unlawfully failed to provide (or delayed in providing) requested information.

According to the Board in *Raley's*, at least where the General Counsel is on notice before trial that the respondent is claiming that the requested information does not exist, the General Counsel must amend the complaint to reflect this, or face dismissal of the complaint.

In addition, the Respondent took the position that as to Union's request for minutes of policy meetings, it did not need to provide such documents because the Union already had copies of them. The General Counsel does not argue that the failure to provide the Union with (additional copies) of policy meeting minutes forms a part of the violation.

[18]I note that the General Counsel does not claim that the Respondent, in fact, has documents responsive to the Union's request. In other words, the General Counsel accepts the Respondent's contention that the Respondent did not rely on any responsive information in making the decisions at issue.

In *Raley's*, the complaint alleged that since a certain date, the employer had failed and refused to provide the union with information allegedly in an investigator's report. The Board majority, in response to the arguments of their dissenting colleague, explained that

> At no time, even after learning that such a report did not exist, did the General Counsel amend the complaint to allege that the Respondent violated the Act by failing to timely inform the Union that there were no such reports. Accordingly, we do not find a violation on that basis.
>
> Our colleague would construe the complaint to allege precisely the opposite of what it does allege. As noted above, the complaint alleges that the Respondent failed to furnish a document, viz., a copy of the investigator's report. The complaint therefore implicitly alleges that the report exists and that the Respondent refuses to furnish it. Further, we assume arguendo that the allegation can be broadly construed to cover an untimely furnishing of the report or an incomplete furnishing of the report. However, it is an unreasonable stretch to convert this allegation into its opposite, i.e., that the report does *not* exist, and that the Respondent failed to inform the Union of this fact. If the General Counsel wanted to allege this as an alternative pleading, he could have done so. He did not. We therefore decline to find a violation on this basis.

349 NLRB at 28.

The unavoidable holding of *Raley's* is that where the General Counsel learns prior to the hearing that the Respondent is taking the position that it did not possess anything responsive to the information request, the complaint must be amended to explicitly allege a refusal (or delay) in conveying to the Union the fact of the lack of existence of responsive information.

The situation here is essentially indistinguishable from that in *Raley's*. One might entertain the argument that here, unlike in *Raley's*, the complaint allegation did not refer to a specific identifiable document that the Respondent had failed to provide. This might be said to make less apposite the Board's conclusion in *Raley's* that the complaint "therefore implicitly alleges that [the specific information] exists and that the Respondent refuses to furnish it." However, this is a thin and unsatisfying reed of a distinction.

Under the reasoning of *Raley's*, at least where the facts are known to the General Counsel before trial, the respondent's unlawful failure to provide, or the delay in providing, the news that information does not exist must be based on a complaint allegation specifically asserting a failure to inform (or delay in informing) the union that the requested documents do not exist. See *Albertson's, Inc.*, 351 NLRB 254, 255 (2007) (reversing judge's finding of violation because "[u]nder the standard set forth in *Raley's Supermarkets*, the General Counsel must specifically allege that the failure to inform the union that the requested documents do not exist (or the delayed communication of that fact) was unlawful. The instant complaint, which does not even mention the nonexistence of the documents, plainly fails to satisfy this pleading requirement") (citation omitted).

While I may agree that the dissent in *Raley's* has the better of the argument,[19] the reasoning of the Board's decision in *Raley's* must be followed until overruled. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied.") (citation omitted). Here, the complaint allegation, as amended, alleges only a delay in providing information—notwithstanding the Respondent's pretrial declaration that it had no information responsive to the Union's request. Accordingly, I find no violation as to the delay in providing information, as alleged.

CONCLUSIONS OF LAW

1. The Respondent Graymont PA, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the designated collective-bargaining representative of the following bargaining unit of the Respondent's employees:

> Employees in the Bellefonte Plant located on North Thomas Street and the Pleasant Gap plant located on Airport Road. . . . The term "employees" as used in this Agreement will not include salaried foreman and office employees.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its work rule disciplinary policies and absenteeism policies without affording the Union an opportunity to collectively bargain.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) 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 there from and to take certain affirmative action designed to effectuate the policies of the Act.

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[19] In *Raley's*, the dissent explained:

> [t]he notion that an employer's failure timely to indicate that it lacks requested information is somehow distinguishable from a failure to provide available information does a disservice to the Act. The purpose of the Act's requirement that parties provide each other with relevant information is to maximize *communication* between them and so minimize industrial strife. For this purpose, it is elementary that parties must not only provide requested information, but also timely inform each other when they have none to provide. The failure to do either is obviously a violation of the duty to provide relevant information.

349 NLRB at 30 (original emphasis).

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its work rule disciplinary and absenteeism policies without affording the Union an opportunity to bargain, the Respondent shall be ordered, to rescind those changes encompassed within the implementation and restore the status quo ante. The Respondent shall be required to rescind all discipline issued based in any way upon the unilaterally changed portions of the work rules or attendance policy and shall make any employees adversely affected by the unlawful changes whole for any loss of earnings and other benefits suffered as a result of the unlawful changes. The make-whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In accordance with *Tortillas Dan Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate any employees adversely affected by the unlawfully changed policies for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Graymont PA, Inc., Pleasant Gap, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   (a) Changing the terms of conditions of employment of its unit employees, including, but not limited to, unilaterally implementing changes to its absenteeism and/or work rules disciplinary policies without first notifying the Union and giving it an opportunity to collectively bargain.

[20]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) At the request of the Union, rescind the unilateral changes to the absenteeism and work rules disciplinary policies and/or the enforcement of those changed policies, and restore the status quo ante with regard to these changes.

(b) Rescind all discipline issued to employees based in any way upon the unilaterally changed portions of the policies and make any employees adversely affected by the unlawful changes whole for loss of earnings and other benefits suffered as a result of the unlawfully imposed changes to policies, in the manner described in the decision.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, collectively bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Employees in the Bellefonte Plant located on North Thomas Street and the Pleasant Gap plant located on Airport Road. . . . The term "employees" as used in this Agreement will not include salaried foreman and office employees.

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

(e) Within 14 days after service by the Region, post at its facilities in Pleasant Gap, and Bellefonte, Pennsylvania copies of the attached notice marked "Appendix."[21] 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

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

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. December 30, 2014

_____
David I. Goldman
U.S. 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 change the terms of conditions of your employment, including the absenteeism and the work rules disciplinary policies, without first notifying the Union and giving it an opportunity to collectively bargain.

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

WE WILL rescind the unilateral changes we made to the absenteeism and work rules disciplinary policies.

WE WILL rescind any discipline issued to employees based in any way upon the unilaterally changed portions of the absenteeism and/or work rules disciplinary policies and make any employees adversely affected by the unlawful changes whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes.

WE WILL notify, and upon request collectively bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of your employment.

GRAYMONT PA, INC.
(Employer)

Dated _____ By _____

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.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-126251 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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.