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Mackie Automotive Systems *and* Teamsters Local Union 728, AFL–CIO. Case 10–CA–31189

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On March 12, 1999, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and the brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

A. Facts

The Respondent operates an automobile parts warehouse (the warehouse) in Norcross, Georgia. The warehouse is dedicated to continuously supplying automobile parts[3] on a "just in time" basis to General Motors Corporation (GM) at GM's nearby automobile assembly plant (the GM plant) in Doraville, Georgia, about five miles from the warehouse.[4] The Respondent employs approximately 16 supply delivery truck drivers (the unit employees) at the warehouse for the sole purpose of delivering assembly parts to the GM plant continuously throughout the day. They only drive the trucks; they do not load or unload them. They do not deliver to any other customers.

At all times since February 27, 1997, the Union has been certified as the exclusive collective-bargaining representative of the unit employees.[5] All of the other approximately 200 workers at the warehouse are employees of GM, although they are *supervised* by the Respondent.

The parties stipulated that at various times material herein, during the months of April 1997 through the time of the hearing in February 1999, they met for the purpose of engaging in negotiations over wages, hours, and other terms and conditions of employment of the unit employees. The parties arrived at tentative collective-bargaining agreements about August 12, 1997, and August 25, 1998 (subsequent to the August 3, 1998 unilateral change in lunchbreak practice at issue here), but the unit employees did not ratify the tentative agreements either time.

The record establishes that the Respondent's operational practice has been to mirror the operating hours of the GM plant. When the GM plant has ceased operating for any reason, scheduled or not (e.g., holidays, scheduled plant maintenance shutdowns, unscheduled and emergency plant shutdowns), the Respondent in turn has ceased operating. The unit employees have not been paid for time when the Respondent has not been operating because the GM plant is not operating.

Prior to August 3, 1998,[6] the GM plant operated continuously throughout the workday, with no lunchbreaks, and, mirroring that schedule, Respondent did the same. GM employees loaded the trucks at the warehouse (under the Respondent's supervision) and unloaded them at the GM plant continuously throughout the day, including during what would otherwise have been the GM employees' lunchbreak. The Respondent's unit employees (the drivers) in turn worked 9½hours continuously per day, with no breaks, delivering parts from the warehouse to the GM plant. The Respondent paid them a premium rate (time and a half) for the 30 minutes each day that they worked during what otherwise would have been an unpaid 30-minute lunchbreak.

On August 3 GM notified the Respondent that, effective immediately, GM employees would be taking a 30-minute lunchbreak, during which they would neither load trucks at the warehouse or unload them at the GM plant. The same day, mirroring the GM revised schedule, the Respondent unilaterally discontinued its continuous uninterrupted workday and implemented a 30-minute lunchbreak for the unit employees, during which they did not work, and for which they were not paid. The Respondent did not provide the Union with advance notice of and an opportunity to bargain about this change. At the time, the parties were engaged in ongoing negotiations for a collective-bargaining agreement. Lunchbreaks, and payment for them, were express subjects of discussion during those negotiations. Indeed, the

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a) (5) and (1) of the Act, we do not rely on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), overruled in part on other grounds, *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

[3] Such as gas tanks, carpets, struts, radiators, instrument panel harnesses, etc.

[4] The GM plant produces approximately 1150 automobiles per day.

[5] The bargaining unit is all full time supply drivers employed by the Respondent at its Norcross, Georgia facility, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

[6] All the following dates are 1998, unless otherwise stated.

parties had specifically discussed the very change that the Respondent subsequently unilaterally implemented on August 3. When the Union found out about the Respondent's unilateral implementation of the change about a week later, it demanded that the Respondent bargain about it. The Respondent refused to do so, asserting that it had the right to make the unilateral change in question. Shortly thereafter, on August 31, the Union filed the instant unfair labor practice charge.

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally, without notice to or consultation with the Union, discontinuing its practice of paying unit employees for their lunchbreak.

B. The Judge's Decision

The judge found that the Respondent violated the Act as alleged. More specifically, he found that lunchtime pay is a mandatory subject of bargaining, that the Union was the exclusive collective bargaining representative of the unit employees, and that the Respondent unilaterally ceased paying the unit employees for 9½ hours of work each workday with pay at the premium rate of 1½ times the hourly rate for the 30 minutes each day that would otherwise have been their lunchbreak.

In support of his finding of an unfair labor practice, the judge found generally, citing *NLRB v. Katz*, 369 U.S. 736 (1962), that after employees become represented by a collective-bargaining agent, their employer may no longer make unilateral changes in wages, hours, and other terms and conditions of employment, as it was privileged to do *before* the employees became represented. Applying that principle, the judge found that, starting before the Union's February 27, 1997 certification as the collective-bargaining representative of the Respondent's supply delivery truck driver unit employees, the Respondent had been paying them premium pay for work performed during the 30-minute period each day that they would otherwise have been on an unpaid lunchbreak. He further found, however, that from the time of the Union's certification onward, the Respondent was obligated to bargain with the Union about any changes in that practice, as a mandatory subject of bargaining. Thus, the judge stated:

> Because of the intervention of the bargaining representative, the Company could no longer continue to unilaterally exercise its discretion with respect to working employees nine and a half hours and paying them premium pay for what otherwise would have been the employees' lunch time, without negotiating with the Union.

C. The Respondent's Exceptions

The Respondent contends that the judge incorrectly identified the status quo as payment for lunchbreaks and that he fundamentally misunderstood the issue in finding that it unilaterally changed its practice of paying the unit employees for their lunchbreaks.

The Respondent contends that the record fails to show that it ever paid employees for their lunchbreaks. Rather, the Respondent argues that the record establishes that the unit employees did not *have* lunchbreaks prior to August 3. Instead, in light of the schedule of continuous uninterrupted operations at the GM plant, the unit employees were required to work straight through their workday without such breaks. The Respondent maintains that, prior to August 3, the unit employees had been compensated with premium pay (time-and-a-half for 30 minutes) *not* for their lunchbreaks, but for *working through* what would *otherwise* have been their lunchbreaks. The Respondent maintains that in response to the implementation of a 30-minute lunchbreak interruption in operations at the GM plant starting on August 3, and consistent with its established practice of mirroring changes in the operational schedule of the GM plant, it implemented a scheduling change that provided an unpaid lunchbreak for the unit employees. The Respondent contends that the issue to be decided is whether that scheduling change maintained or changed the status quo.

The Respondent argues that the relevant status quo was that it only paid employees for time worked and never paid for time not worked; particularly, that it never paid for lunchbreaks, but that it paid for time worked in lieu of lunchbreaks; that its work schedule for the unit employees mirrored without exception GM's schedule at the warehouse and the GM plant; and that the unit employees' work schedule was always subject to change based on changes in GM's schedule of operations. The Respondent asserts that, consistent with that status quo, the unit employees were, for example, not paid for time not worked during GM's annual summer and Christmas shutdowns, during a 53-day strike against GM in 1998, and during a GM maintenance/repair shutdown. Thus, the Respondent contends that after GM changed its schedule on August 3 by discontinuing loading trucks at the warehouse or unloading them at the GM plant during the GM employees' 30-minute lunchbreak, the Respondent consistently followed suit. It thereby maintained the status quo by discontinuing its practice of having the unit employees work straight through the 30-minute lunchbreak, and paying them time-and-a-half for those 30 minutes. The Respondent instead provided the unit employees with the same nonworking, unpaid 30-minute lunchbreak that it provided to its nonunit employees.

The Respondent thus contends that it maintained the status quo on and after August 3 by not paying unit employees for time when they were not working and by mirroring the GM schedule of operations.

D. Analysis and Conclusions

The Respondent's operational practice, established prior to the certification of the Union as the collective-bargaining representative of the unit employees, was to mirror the operating hours of the GM plant. Thus, when the GM plant ceased operating for any reason, scheduled or not, the Respondent in turn ceased operating. The Respondent's related practice was not to pay unit employees for time they did not work while the Respondent was not operating because the GM plant was not operating. We agree with the judge that the Respondent's adherence to its pre-Union past practice did not entitle it, after its employees selected union representation, unilaterally to cease paying the unit employees for 9½ hours of work each workday with pay at the premium rate of 1½ times the hourly rate for the 30 minutes each day that would otherwise have been their lunchbreak.

It is well-settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees. *Porta-King Building Systems*, 310 NLRB 539, 543 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), enfd. 559 F.2d 187 (D.C. Cir. 1977). It is also well-settled that lunchbreaks are mandatory subjects of bargaining.[7]

Thus, adherence to past practice does not legitimize the Respondent's unilateral conduct here. Nor is the Respondent's unilateral conduct justified on any other grounds. Where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer has an obligation to refrain from unilateral changes absent overall impasse on bargaining for the agreement as a whole.[8] There are two limited exceptions to that general rule: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action.[9] There is no contention or showing that the parties were at impasse when the Respondent unilaterally implemented the 30-minute unpaid lunchbreak, or that the Union was avoiding or delaying bargaining. Thus, absent compelling economic considerations that would excuse the Respondent from its bargaining obligation, it was obligated to bargain with the Union about discontinuing its current scheduling practice and implementing a 30-minute unpaid lunchbreak.

The Board recognizes as "compelling economic considerations" only extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action.[10] The Respondent does not contend that GM's implementation of a 30-minute lunchbreak and cessation of operations at the GM plant and at the warehouse was an extraordinary, unforeseen event having a major economic effect that required it to take immediate action.[11] Nor does the Respondent contend that it was confronted with an economic exigency short of the type that would relieve it of its obligation to bargain entirely, but nevertheless compelling prompt action, while still requiring it to provide the Union with adequate notice and an opportunity to bargain.[12] Thus, we find that the Respondent was not excused by compelling economic considerations from its obligation to bargain with the Union about the change in lunchbreak practice.

The Respondent cites no case in support of its proposition that the reduced demands of an employer's customer—even its only customer—permit the employer simply to skip bargaining with its employees' collective-bargaining representative and to unilaterally change its employees' terms and conditions of employment. Thus, we also agree with the judge that the fact that this unilateral change was prompted by a bona fide scheduling change implemented by GM does not excuse the Respondent from its obligation to bargain with the Union.

For all of these reasons, we do not agree with the principle applied by our dissenting colleague, that scheduling and hours adjustments consistent with past practice not only before but also after the certification of the union

[7] See, e.g., *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998), enfd. 208 F.3d 214 (6th Cir. 2000); *Rangaire Acquisition Corp.*, 309 NLRB 1043 (1992), enfd. 9 F.3d 104 (5th Cir. 1993); *Van Dorn Machinery Co.*, 286 NLRB 1233, 1240 (1987), enfd. 881 F.2d 302 (6th Cir. 1989).

[8] *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (negotiations for a successor collective-bargaining agreement); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (negotiations for an initial collective-bargaining agreement).

[9] *RBE Electronics of S.D.*, supra, 320 NLRB at 81; *Bottom Line Enterprises*, supra, 302 NLRB at 374.

[10] *Maple Grove Health Care Center*, 330 NLRB No. 121, slip op. at 5 (2000), citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

[11] Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action. *RBE Electronics of S.D.*, supra, 320 NLRB at 81 (citations omitted).

[12] See id. at 81–82.

may be made, whether during negotiations or otherwise, without bargaining. Whatever the validity of that proposition in the abstract, it would not license an employer, after its employees have chosen union representation, to unilaterally change terms or conditions of employment that constitute mandatory subjects of bargaining in keeping with pre-unionization practices. Nor would that proposition license an employer, while making changes in schedules and hours of operation that are not impelled by exigent or emergency circumstances, to make pre-impasse unilateral changes in terms and conditions of employment while engaged in negotiations with a union for a collective-bargaining agreement.

The cases relied upon by the Respondent and our dissenting colleague are inapposite, and do not require a different result. In *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975), the respondent unilaterally reduced overtime scheduling when it experienced a 44-percent reduction in production requirements in a one-month period. In dismissing the allegation that the respondent unlawfully failed to bargain with the union about this reduction in overtime, the Board found that (1) the unilateral changes concerned only routine production scheduling and adjustments relating to diminishing available hours of work, (2) the respondent had not varied from its past practice of reducing overtime under such circumstances, and (3) the union had not attempted to discuss the reduction in overtime with the respondent. Id. at 1068 fn. 1. Here, however, the unilateral change concerned (1) an established term and condition of employment, (2) which was being varied for the first time since the Union's certification as collective-bargaining representative in September 1997; and (3) the Union, confronted with this fait accompli, did attempt to bargain post facto about the change, but was flatly denied the opportunity to do so. Thus, we find that *Kal-Die Casting* is fundamentally distinguishable from the instant case, and does not control the result here.

We find *KDEN Broadcasting Co.*, 225 NLRB 25 (1976), also relied upon by the Respondent, to be equally distinguishable. There, the respondent unilaterally changed three employees' work schedules shortly after the union was certified as the collective-bargaining representative. In finding that these unilateral changes did not violate the Act, the Board affirmed the judge's finding that frequent schedule changes were normal procedure before the advent of the union. The Board cited *Kal-Die Casting*, supra, for the proposition that scheduling and hours adjustments consistent with past practice were not violative of the Act. The Board adopted the judge's rationale that "where the past practice is so commonplace as to be a basic part of the job itself[,] a continuation of that past practice cannot be characterized as a unilateral change in working conditions." Id. at 34–35. Here, on the other hand, there is no showing that frequent changes in lunchbreaks and changes in payment for them were normal practice before the advent of the Union, or that such a change was "so commonplace as to be a basic part of the job itself." Thus, we find that *KDEN Broadcasting*, like *Kal-Die Casting* upon which it relies, is fundamentally distinguishable from the instant case, and does not control the result here.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or consultation with the Union, discontinuing its practice of paying unit employees for their lunchbreak.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Mackie Automotive Systems, Norcross, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

Substitue the following paragraph for 2(c).

"(c) 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."

Dated, Washington, D.C. September 28, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER TRUESDALE, dissenting.

I disagree with my colleagues' adoption of the judge's finding that the Respondent violated Section 8(a) (5) and (1) of the Act by unilaterally changing its practice of paying its drivers premium pay in lieu of taking a lunchbreak and instituting a 30 minute unpaid break. In my view, the sole issue for resolution is whether the Respondent deviated from its established practice in instituting this practice. Contrary to my colleagues, I find that the Respondent did not violate the Act because the

policy that the Respondent instituted on August 3, 1998, was consistent with its established past practice.

The facts are straightforward and undisputed. The Respondent's Norcross facility was established in mid-1996 for the sole purpose of warehousing automotive parts and delivering them to the General Motors' assembly plant in nearby Doraville, Georgia. The Respondent employs only 16 supply delivery drivers at the Norcross facility; the balance of the approximately 200 other employees that perform other functions at the facility are General Motors' employees. The Respondent's supply drivers, whom the Union has represented since about February 27,1997, drive trucks loaded by General Motors' employees at the Respondent's Norcross facility to the Doraville assembly plant, where they are offloaded by General Motors' employees for "just-in-time" use. Thus, the sole function of Mackie drivers is to stand by and be prepared to immediately depart in their trucks as soon as they are loaded by General Motors' employees at Norcross and to return to Norcross to await further loads as soon as General Motors' employees at Doraville have finished unloading.

Since the outset of this arrangement until August 1998, the Respondent's employees, like the General Motors' employees assigned to the Respondent's Norcross facility and the Doraville assembly plant, worked through what would otherwise be their lunchbreak. Mackie's practice was to compensate their drivers for working their entire shift without a lunchbreak by paying them premium pay. On August 3, 1998, the Respondent discontinued that practice and instituted a 30 minute unpaid lunchbreak. It is undisputed that the Respondent did so without notifying or negotiating with the Union before implementing its new practice.

The policy of allowing its drivers a true 30-minute lunchbreak was made only after, and in response to, General Motors' decision to schedule a shutdown of production for 30 minutes in the middle of each shift for its employees. General Motors' decision included both General Motors' employees at Norcross who loaded the parts onto the trucks driven by the employees at issue and the General Motors' assembly employees at Doraville who offloaded the parts. During this shutdown, General Motors not only stopped receiving product at Doraville during this half hour, but also directed its employees at Norcross not to load trucks during this time.

As the majority concedes, the Respondent has consistently altered its employees' schedules and incorporated scheduling changes to mirror changes in the General Motors' Doraville plant schedule. When the Doraville plant ceased production for any reason, such as holiday observances, shut downs for various reasons, or emergency or scheduled plant maintenance, the Respondent's drivers did not work, nor were they paid. Further, when the General Motors' plant instituted work on Saturdays, the Respondent's drivers started to work Saturdays as well. Most pertinently, when General Motors changed the starting time of the second shift, the Respondent changed its shift to correspond to General Motors' changes. In sum, Mackie drivers, without exception, were scheduled to work only when the General Motors' production line was running. Thus, the Respondent's consistent practice when confronted with changes of any type in General Motors' employees' schedules was unfailingly to change the drivers' schedules to reflect such changes.

It is well settled that, absent certain circumstances, an employer acts in violation of Section 8(a)(5) and (1) by unilaterally changing employees' terms and conditions of employment without affording its employees' exclusive representative an opportunity to bargain over such changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).[1] Schedule and hour changes, however, that are consistent with an employer's past practice do not violate of the Act.[2] Thus, the critical issue here is what exactly was the status quo that existed before the change at issue.

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[1] The majority cites cases and principles relating to bargaining obligations. I do not dispute the majority's exposition of these general principles. I agree that under Board law an employer's past practices prior to union certification as the exclusive bargaining representative do not relieve the employer of the obligation to bargain with the certified union about subsequent changes to wages, hours, and other terms and conditions of employment. *Porta-King Building Systems*, 310 NLRB 539, 543 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994). I also agree that lunchbreaks are a mandatory subject of bargaining under well settled Board law. *Kurdziel Iron of Wisconsin*, 327 NLRB 155, 155-56 (1998), enfd. 208 F.3d 214 (6th Cir. 2000). I further agree that when an employer is engaged in negotiations, it must refrain from unilateral changes absent overall impasse on the whole agreement unless the union, in response to the employer's diligent efforts to bargain, engages in delaying tactics or economic or business exigencies compel prompt action. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) and *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub. nom. *Master Window Cleaning, Inc.* v. NLRB, 15 F.3d 1087 (9th Cir. 1994). However, as I note above, I believe that scheduling and hours adjustments consistent with past practice not only before but also after the certification of the union may be made, whether during negotiations or otherwise, without bargaining. And that is the applicable principle I apply to the facts here.

[2] See *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976), citing *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975). These cases stand for the proposition that unilateral scheduling and hours adjustments consistent with past practice are not unlawful. Thus, contrary to the majority, I find they have direct application to the facts here and disagree with the majority's attempts to distinguish them. With respect to *Kal Die*, there, as here, the changes are routine scheduling changes and the employer had not varied from its past practice in making such changes. Further, the fact that the union in *Kal-Die* had not attempted to discuss the change is not, in my view, critical to the Board's finding that the employer's actions there were lawful. This is evidenced in the citation to *Kal-Die* in *KDEN*. With respect to *KDEN*, once again, there, as here, the record

As detailed above, the Respondent's description of its existing practices is uncontroverted. At all times before and after certification of the union, the Respondent's drivers' work schedules were dictated by General Motors' production schedule. All General Motors' production schedule changes were mirrored in changes to the Respondent's drivers' work schedules. Prior to the recent change in midday scheduling, the General Motors' schedule, which the Respondent's schedule mirrored, provided for uninterrupted production throughout the workday, with no lunchbreaks. The Respondent only paid its employees for time worked and gave its employees premium pay to compensate for working an extended midday shift without a break.[3] Finally, the Respondent never paid its employees for time not worked, specifically including lunchbreaks. Additionally, there is nothing to controvert the Respondent's Regional Human Resources Manager's testimony that, even after August, 1998, if an employee was asked to work through what would otherwise be his lunchbreak that employee would be compensated accordingly with 30 minutes of premium pay.

In sum, there is no evidence in the record that the Respondent ever paid employees for time not worked, whatever the reason, or ever scheduled its drivers during times the General Motors' production line was not running. The issue is simply whether the Respondent's conduct in effecting the August 1998 schedule change to continue these practices was unlawful because it was accomplished without bargaining. I conclude it was not.

The Respondent's alteration of its midday scheduling was a routine modification consistent with these past practices and thus did not violate Section 8(a) (5) and (1) of the Act.[4]

established that frequent changes were the norm and thus, on that basis, the employer's continuation of that practice was found lawful.

[3] In response to the majority's determination that the loss of premium pay was a deviation from past practice, I note that premium pay had been given to the unit employees only because the drivers were forced to work what was in effect "midday overtime" because the General Motors facility they served ran without a break. Thus, in complete conformity with past practice, when the General Motors facility instituted lunchbreaks, Respondent followed the practice and no longer owed its employees a premium for overtime no longer worked. In fact, had the Respondent maintained a policy of paying the drivers premium pay in lieu of a lunchbreak in the face of the General Motors' change, this would have been a deviation from the Respondent's practice.

[4] The majority suggests that the Respondent argues that its sole customer's reduced demand and the bona fides of its need should permit it to omit bargaining. I do not interpret the Respondent's arguments in this way. The Respondent's argument, which I accept, rests on its consistent past practice.

Dated, Washington, D.C. September 28, 2001

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

Katherine Chahrouri, Esq., for the General Counsel.
Claud L. McIver, Esq., Keith B. Romich, Esq., and *Keith A. Watts, Esq.*, for the Company.
Waymon Stroud, Assistant Business Agent, for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a unilateral change in the practice of paying employees for their lunchbreak case. At the close of a 2-day trial in Atlanta, Georgia, on February 17, 1999, I rendered a Bench Decision in favor of the General Counsel (the Government) thereby finding a violation of 29 U.S.C. 158(a)(5) and (1). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the National Labor Relation Board (the Board). I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted[1] by Mackie Automotive Systems, (Company). I found the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act), when on or about August 3, 1998, it unilaterally discontinued its practice of paying employees for their lunchbreak.

More specifically the core issue decided centered around whether the unilateral action by the Company on or about August 3, 1998, regarding its discontinuing to pay for lunchbreak for its unit employees was in fact a change or simply a return to status quo by the Company. The undisputed[2] evidence established it was a change. The Company had, from its inception in mid-1996, paid its unit employees from the time they commenced the work day until they concluded the work day (9½ hours) without any unpaid time. The Company had paid its unit employees from its inception for 30 minutes of each workday at a premium rate (1½times the hourly rate) for time that would have been their lunchbreak. The evidence established that on or about August 3, 1998, the Company unilaterally, without notification to or bargaining with the Union, ceased doing so. This was at a time after the Union had been certified (a Certification of Representative issued on February 27, 1997) as the collective-bargaining agent of the unit employees. I concluded lunchtime pay was a mandatory subject of bargain-

[1] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] The operative/essential facts were stipulated, admitted, and/or were uncontested. In the factual narrative I attributed certain facts to certain witnesses only for clarification; all facts set forth were credited.

ing. See e.g., *Van Dorn Machinery Co.*, 286 NLRB 1233 (1987). Applying settled law that when employees become represented by a collective-bargaining agent, their employer may no longer make unilateral changes in wages, hours, and terms and conditions of employment as it was privileged to do before its employees opted for union representation, I concluded the Company had, by its unilateral action, violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1961).

I certify the accuracy of the portion of the transcript, as corrected,[3] pages 229 to 243, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSIONS OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

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

Having found the Company violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its practice of paying employees for their lunchbreak, it is recommended the Company be ordered to cease and desist from refusing to meet and bargain with the Union with regard to its decision to discontinue paying its bargaining unit employees for their lunchbreak. It is recommended the Company be ordered to reinstate its practice of paying its bargaining unit employees for their lunchbreak in the manner that existed prior to August 3, 1998. It is recommended the Company be ordered to make all affected bargaining unit employees whole for any loss suffered by them as a result of the Company's unilateral decision to discontinue paying its bargaining unit employees for their lunchbreak, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, I recommended the Company be ordered, within 14 days after service by the Region, to post an appropriate Notice to Employees, copies of which are attached hereto as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Company, Mackie Automotive Systems, Norcross, Georgia, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain with Teamsters Local Union 728, AFL–CIO regarding its decision to discontinue its practice of paying employees for their lunchbreak.

(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) Reinstate its practice, which existed prior to August 3, 1998, of paying its unit employees for their lunchbreak.

(b) Make whole all affected unit employees, in accordance with the remedy section of this Bench Decision, for all monetary losses suffered by our unit employees as a result of the above described unilateral change in our paid lunchbreak policy.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of monetary loss due under the terms of this Order.

(d) Within 14 days after service by the Regional Director of Region 10 of the National Labor Relations Board, post at its Norcross, Georgia facility, copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 10 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all employees in the Norcross, Georgia area, employed by the Company at any time since August 3, 1998.

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

Dated, Washington, D.C. March 12, 1999

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[3] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

[4] 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.

[5] 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."

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APPENDIX A

THIS IS MY DECISION

The charge in this matter was filed by the Union on or about August 31, 1998, and thereafter timely served on the Company.

Mackie Automotive Systems, hereinafter, the Company, is a Georgia corporation with an office and place of business located in Norcross, Georgia. Where it is engaged in the business of providing and delivering automotive parts to the General Motors Corporation Doraville, Georgia Assembly Plant. At all times material herein the Company at it's Norcross, Georgia facility purchased and/or received goods valued in excess of fifty thousand dollars ($50,000.00) from suppliers located outside the State of Georgia.

The evidence establishes, the parties stipulated, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the National Labor Relations Act as Amended, hereinafter referred to as the Act.

The evidence establishes, the parties stipulated, and I find that Teamster Local Union 728, AFL–CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

The parties stipulated all full time supply drivers employed by the Company at its Norcross, Georgia facility, but excluding all other employees, office clerical employees, guards, and supervisors, as defined in the Act, constitute a

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unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. The parties admitted and/or stipulated that at all times since February 27, 1997 the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive bargaining representative of the employees in the unit just described for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

If it is not clear, the certification of representative for the Union issued on February 27, 1997.

The parties stipulated that at various times material herein during the months of April 1997 through the present the Company and the Union have met for the purpose of engaging in negotiations with respect to wages, hours, and other terms and conditions of employment.

The evidence establishes, the parties stipulated, and I find that Human Resource Manager Robert Surowiec is an agent and supervisor of the Company within the meaning of Section 2(13), and 2(11) of the Act.

The evidence establishes the Company and Union negotiators arrived at tentative collective bargaining agreements approximately on or about August 12, 1997, and on or about August 25, 1998. The bargaining unit membership, however, rejected and/or failed to ratify both

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tentative agreements.

The Government has alleged in its Complaint and contends that on or about August 3, 1998 the Company discontinued its practice of paying its employees for their lunch beak. The Government further contends or alleges that this change affects the terms and conditions of employment of employees in the bargaining unit that I have earlier described. The Government contends the Company made the change unilaterally without notice to, or consultation with, the Union.

The Company, on the other hand, asserts and/or contends no practice or policy was changed. The Company contends it had never paid for lunch for its employees. The Company contends there was only a scheduling change that was brought about by changes at the General Motors Assembly Plant, Doraville, Georgia. General Motors no longer requiring its employees to load and/or unload during lunchtime any deliveries made to the General Motors Doraville, Georgia Assembly Plant.

The Company contends herein that it simply effectuated a scheduling change to correspond to the scheduling changes General Motors had made. The Company herein contends it simply went back to the status quo that had always been, that it did not pay lunch for its employees at any time. That it only paid for employees when they were actually working. When the time came that they were no longer working during what otherwise would have been a time for a lunch break, they

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were not paid for that.

A factual background is necessary for this case. According to Human Resources Manager Surowiec General Motors is the only customer of the Company served from its Norcross, Georgia facility, which is the only facility of the Company involved herein. The Company is located five point four (5.4) miles, or approximately twenty (20) minutes driving time, favorable traffic conditions, from General Motors Doraville, Georgia Assembly Plant to the Company herein.

The Company herein employs sixteen (16) of its own supply delivery drivers, which drivers constitute the bargaining unit involved herein. There are approximately two hundred (200) other employees that work at the Company's Norcross, Georgia facility, and are supervised by the Company herein. However, these approximately two hundred (200) individuals are General Motors' employees who are represented by the United Automobile Workers Union in a bargaining unit not at issue herein.

Prior to approximately on or about August 1996 the work performed by the Company herein was performed by General Motors itself. General Motors Doraville, Georgia Materials Director testified that General Motors became concerned with the amount of expenditure it was necessary to produce a unit. Meaning, an automobile. And that as a result of that General Motors began to focus on its core business of putting parts on and producing automobiles. General Motors went to a Tier 2

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Suppliers system.

Company Human Resources Manager Surowiec testified that with General Motors seeking to be more competitive in the automobile industry it went to what, in shorthand purposes, may be referred to as "outsourcing". Surowiec testified General Motors went to outsourcing for two primary reasons. General Motors wanted to reduce the number of General Motors

employees in producing cars, and to free up floorspace at its General Motors Assembly Plant, in this particular instance the plant located at Doraville, Georgia.

According to Human Resources Manager Surowiec the Company operates as a "just in time" parts delivery supplier to General Motors Assembly Plant. According to Surowiec the Company receives at its Norcross, Georgia facility parts purchased from various suppliers around the United States, and perhaps the world. These parts are brought to the Company's facility, such as gas tanks, headliners, carpets, struts, radiators, instrument panel harnesses, in-dash computer equipment and the like.

According to Human Resources Manager Surowiec, when an automobile body cavity leaves the Paint Department at General Motors Doraville, Georgia Assembly Plant a broadcast is signaled to the Company's Canadian headquarters, as well as the Company's Norcross, Georgia location. Surowiec testified that as soon as the parts need is signaled to the Company an

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employee, termed by him as "a runner", employed by General Motors and represented by the United Auto Workers, walks around the facility pulling the needed parts and placing them in racks. The racks are then loaded by General Motors forklift operators onto the Company herein's trucks. It is at this point that the sixteen (16) supply drivers in the Teamster Union bargaining unit herein come into the situation.

The Company's trucks are loaded at the Company facility by General Motors employees, and they are offloaded at the General Motors Doraville, Georgia Assembly Plant by General Motors employees. The employees loading and offloading the trucks are represented by the United Auto Workers labor organization.

The General Motors Doraville, Georgia Assembly Plant produces approximately one thousand one hundred and forty-eight (1,148) units, or automobiles, per day.

Actually, I think the automobile produced is a sports utility type vehicle, but not critical to this case.

According to Human Resources Manager Surowiec, the Company's supply drivers do just that. They drive the delivery trucks. They have nothing to do when the trucks are being offloaded by General Motors' employees at the General Motors Assembly Plant. Likewise, when the trucks are being loaded at the Company here they are loaded by General Motors employees and the supply drivers do not help load the trucks.

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The only other function mentioned for the drivers herein, that they perform at the Company's facility is, they replace batteries in the forklift trucks on the occasions when the batteries are need to be replaced. The forklifts themselves are operated by General Motors employees.

Prior to August 3, 1998, General Motors' employees at the Company's facility herein, and at General Motors Doraville, Georgia Assembly Plant would load and offload the Company supply delivery trucks even during what was General Motors' employees lunch times. Hence, according to Human Resources Manager Surowiec, the Company herein's supply delivery drivers were paid from the time they commenced work until the time they left work for each shift.

According to Surowiec, General Motors communicated to the Company herein that it would no longer ship or receive parts during the General Motors employees' thirty (30) minute lunch period. Surowiec testified that because General Motors changed its schedule the Company herein was compelled to follow suit and change its schedule. Surowiec explained that if General Motors employees were not loading or unloading the Company's trucks at the time they were at lunch, then there was no need for the drivers in this Company to be working.

Therefore, the Company herein provided its employees a fixed lunch time, but without pay. According to Surowiec, the Company's policy and practice was always not to pay for lunch

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time unless directed to work, or the drivers needed to be on call. Surowiec explained that all that took place after August 3, 1998 was merely a scheduling change. Surowiec added, the change was driven by General Motors scheduling, in that when General Motors did not work there was no need for the supply drivers of the Company herein to work.

Company employee supply driver Cloack testified that from September 3, 1996 until August 3, 1998 no lunch break was given, and the employees were paid for thirty (30) minutes at time and a half pay, which time could have been utilized for a lunch period. According to the testimony of Cloack, the loss for each driver amounted to approximately two hundred dollars ($200.00) per month.

Union Assistant Business Agent and Local Vice President Waymon Stroud testified, the unit employees were concerned in negotiations about, among other items, employees working through lunch breaks. Stroud stated lunch breaks was an item discussed during contract negotiations. Union Assistant Business Agent Stroud testified the Company did not discuss with the Union implementing the August 3, 1998 change of where the supply delivery drivers were no longer paid for the time they commenced work until they left work. But rather, were provided a specific thirty (30) minute lunch break to correspond with the General Motors United Auto Workers represented employees thirty (30) minute lunch break.

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Stroud testified the Union demanded bargaining, but the Company had already implemented what he termed was a unilateral change without consulting with the Union about the implementation. Union Assistant Business Agent Stroud acknowledged that prior to August 3, 1998 the unit drivers were paid the entire workday in that they had no lunch break time. He also acknowledged that the supply drivers work schedule mirrored the General Motors employees hours of work.

General Motors Doraville, Georgia Assembly Plant Materials Director testified, General Motors' efforts to reduce overtime, and perhaps other non-productive time, had from his area of concern alone, reduced overtime expenses from twenty thousand dollars ($20,000.00) per day to five hundred dollars ($500.00) per day.

Did the Company's actions herein violate the Act as a unilateral change in working conditions for unit employees? Namely, the supply delivery truck drivers, or was what occurred here a return to the status quo and merely a scheduling change, not a practice or policy change of the Company.

First, let me state what may be apparent, legal principles by which the case will be governed. The parties, I do not think, dispute that if what happened constituted a unilateral change on the part of the Company, then it would be unlawful, and they would have violated the Act if they did not negotiate

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with the Union about the implementation of the change. I don't thing there's any question that they did not negotiate with the Union about it. However, if what took place was merely a return to the status quo, and there was no change, then the Company would be privileged to continue to do that. That is, return to its original status quo, and do so without having violated the Act.

In that respect it is well settled law that when employees become represented by a collective bargaining agent, their employer may no longer make unilateral changes in wages, hours, and terms and conditions of employment as it was privileged to do before the employees opted for Union representation. That principle would be found among other places, in *NLRB v. Katz*, 369 US 736, a 1962 case.

Accordingly, if an employer is contemplating any changes affecting bargaining unit personnel, it has a duty to notify the bargaining agent of the proposed changes, afford that representative an opportunity to bargain over the proposal, and if bargaining is requested, meet with the representative and bargain collectively in good faith concerning the proposal before putting such a proposal into effect.

In order for a duty to rise that they bargain about a change the change must be about a mandatory subject of bargaining. Is compensation for a lunch period a term and condition of employment such that it would be a mandatory

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subject of employment? I don't think there's any dispute that it is. And among one of the cases cited by counsel for General Counsel that principle can be found, among other places, in *Van Dorn Co. Machinery*, reported at 286 NLRB 1233, and specifically at 1240.

If, on the other hand, the changes that were made herein, for lack of a better way to describe them, was really a movement back to what had previously been the case, then the Company could do so and be supported by the cases that the Company cites. In particular, *KDEM Broadcasting Co.* reported at 225 NLRB 25, specifically at 34 and 35, a 1976 case; and *Kal-Die Casting Corporation*, 221 NLRB 1068, more specifically at 1071 and 1072, a 1975 case.

I am persuaded that the Company herein violated the Act as alleged in the Complaint for the following reasons. Always from the inception of this Company, the Company paid premium pay for the one half hour time that the employees could otherwise have been on a lunch break, or lunch period.

You have the inception of the Company probably taking place in August of 1996. In February, more specifically, February the 27th of 1997, you have the advent of the Union. And from that point forward the Company is compelled to bargain with the Union in good faith about any changes. That the Company did not do. When the Union first learned of the implementation the change had already been made. The Union

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sought bargaining, and was told that it was not a bargainable matter, that they were privileged to do so in that they had never paid for work not performed. And that it was not a change, it was merely a scheduling situation.

I am persuaded contrary, that it was a change. And that no defense has been established by the Company that would justify its actions, or relieve it from its responsibility to bargain over that subject matter.

The Company contends that the status quo is the key, and that the status quo herein was these four factors. That the Company only paid for time worked, that the Company never paid for time not worked, that the Company herein's schedule was the same as General Motors' schedule, and that they only paid this premium because the employees could not take a lunch break. That's the key on which this case turns, in my opinion, is Item 4. It had always been, from the inception of this Company, its practice to pay a premium because the employees could not take a lunch break.

You have the Union come along as the representative of these employees, and then you have a change from that practice where a paid premium was provided the employees because they could not take lunch. The fact that this change was prompted by a bona fide scheduling change of General Motors, and was in no way discriminatorily motivated does not remove it from the umbrella of bargaining obligations. Because of the

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intervention of the bargaining representative the Company could no longer continue to unilateral exercise its discretion with respect to working employees nine and a half hours and paying them premium pay for what otherwise would have been the employees' lunch time without negotiating with the Union.

It is no defense to a finding of a violation of the Act that the decision herein, as I have decided, will have profound effect on the Company herein, as well as on General Motors. That may well be the fact, but standing alone that does not warrant a dismissal of the allegations herein. How easily all of this could have been avoided had the Company simply negotiated on this particular matter before it went forward and implemented it.

Even in the two tentative agreements that are in the record reached between the Union's negotiator and the Company's negotiator the Company's position prevailed. Unfortunately the employees did not ratify them.

The two cases that the Company would rely on for their position that this is a return to the status quo are distinguishable. In the *KDEN Broadcasting Co.* case, for example, the record is replete with evidence that the working schedules of the employees were frequently changed by the Company before the

advent of the Union. And, that the changes made were simply to follow the same pattern they had exercised earlier.

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In the current case, the case before me, the Company had always paid a premium for the thirty (30) minutes that would have been available for the employees as a time for lunch, or a lunch break.

In the *Kal-Die Casting Corporation* case, for example, where the hours of overtime available were dramatically reduced and the Company had always used overtime in a manner consistent with a need, they were privileged to do so without violating the Act on that particular point. But here, without sounding redundant, this Company had always, without fail, paid a premium of thirty (30) minutes at time and a half for the employees at a time when the employees could otherwise have been on break.

The key and controlling factor here is the intervention of the Union between what the Company had always done, and what it unilaterally changed to. And without bargaining with the Union before implementing it, the Company violated Section 8(a)(1) and (5) of the Act. And I so find.

I will order that the Company not refuse to meet and bargain with the Union regarding premium payments for what otherwise would allow a time for employees to take lunch breaks. And that the Company will, on request of the Union, reinstate the payments, and negotiate with the Union on the subject matter. And I will order that the Company make whole affected employees for any monetary loss they suffered as a

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result of the unilateral change.

In due time the court reporting service will serve on me, and any party requesting a copy, a copy of the transcript. At that point I will certify to the Board the pages of the transcript that constitute my decision. It is my understanding that the time for taking exceptions or appealing my decision runs from my certification of the decision. However, I would invite your attention to the Board's Rules and Regulations with respect to taking exceptions in this case.

It has been a pleasure to hear this case. I urge the parties, as I have throughout this proceeding, to work this matter out among themselves in a manner that is acceptable to all sides.

And with that, this trial is closed.

(Whereupon, the hearing in the above entitled matter was closed.)

APPENDIX B

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and bargain with Teamsters Local Union 728, AFL–CIO with regard to our decision to discontinue our practice of paying our bargaining unit employees for their lunchbreak. The bargaining unit is:

All full-time supply drivers employed by the Company at its Norcross, Georgia facility, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT In any like or related manner interfere with, restrain, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate our practice that existed prior to August 3, 1998, of paying our unit employees for their lunch break.

WE WILL make whole all affected bargaining unit employees for any monetary loss they suffered as a result of our unilateral change regarding paying our unit employees for their lunchbreak.

MACKIE AUTOMOTIVE SYSTEMS