Cardi Corporation *and* Carpenters Local No. 94, New England Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America. Case 1–CA–43892

February 25, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On June 5, 2008, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel and the Charging Party each filed an answering brief. Additionally, the General Counsel filed a limited cross-exception and a supporting brief.[2]

The National Labor Relations Board[3] has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions, as modified below, and to adopt the judge's recommended Order as modified and set forth in full below.

We agree with the judge that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a rule requiring that bargaining unit employees possess a valid driver's license as a condition of employment,[5] and by enforcing its unlawful driver's license requirement against Eddie Mejia.[6] We shall modify the judge's conclusions of law to include a reference to the unlawful enforcement of the rule against Mejia.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law.

"3. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a rule without notice to or bargaining with the Union requiring bargaining unit employees to possess a valid driver's license in order to be employed at the Respondent, and by enforcing that rule against Eddie Mejia."

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As we have adopted the judge's finding that the Respondent unlawfully implemented a rule requiring that bargaining unit employees possess a valid driver's license as a condition of employment, we shall order the Respondent to rescind the rule.

To remedy the Respondent's unlawful enforcement of the rule against Eddie Mejia on November 13, 2006, we shall order it to place Mejia in the position he would have been in absent enforcement of the rule, including immediate reinstatement if, absent the enforcement of the driver's license requirement, he would have been reinstated by the Respondent at any time on or after November 13, 2006.[7] We shall also order the Respondent to

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In his cross-exception and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Rogers Corp.*, 344 NLRB 504, 504 (2005).

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] In sec. II,B,1, par. 7 of his decision, the judge inadvertently misstated several dates concerning the work history of Eddie Mejia. The following dates are based on the uncontroverted testimony of Mejia and Safety Director Robert Kunz. The Respondent hired Mejia in June 2002 to perform carpentry work. In November 2002, Mejia suffered a work-related injury. From that time until late January 2003, Mejia continued to work for the Respondent, performing light-duty work. In late January 2003, the Respondent laid off Mejia. In May 2003, Mejia began collecting workers' compensation after contacting Kunz to report that his injury had worsened. In February 2004, Mejia returned to perform light-duty work, until his injury again worsened in the fall of 2004. Mejia ultimately underwent hip replacement surgery in November 2005. In November 2006, Mejia contacted Kunz to report that he was ready to return to a full duty position because his physician had declared him fit to work. During his recovery period from surgery, Mejia continued to receive workers' compensation. The judge's inadvertent errors do not affect the disposition of this case.

[5] Applying the "clear and unmistakable waiver" standard reaffirmed in *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007), we agree with the judge that the Union did not waive its right to bargain over the Respondent's driver's license requirement. Although Member Schaumber adheres to the position that the Board should instead apply a "contract coverage" test, he acknowledges that the "clear and unmistakable waiver" standard is extant Board law and applies it for the purpose of deciding this case. See *Verizon North, Inc.*, 352 NLRB 1022, 1022 fn. 2 (2008).

[6] In adopting the judge's findings, we do not rely on his citation of *Toering Electric Co.*, 351 NLRB 225 (2007). That case involved a different theory of violation that is not applicable to the circumstances of this case.

In finding that Mejia was an employee, rather than an applicant, the judge relied on *Red Arrow Freight Lines,* 278 NLRB 965 (1986). Member Schaumber acknowledges the foregoing as extant Board precedent, but would modify the *Red Arrow* test for the reasons set forth by former Member Hurtgen in *Supervalu, Inc.*, 328 NLRB 52, 52–53 (1999) (Member Hurtgen, dissenting). See *Home Care Network, Inc.*, 347 NLRB 859, 860 fn. 9 (2006).

[7] In light of testimony raising the question of whether unit work was available after Mejia sought to return to work, we leave to compliance the issue of whether Mejia, if the Respondent had not unlawfully enforced its driver's license requirement against him, would have been

make Mejia whole for any loss of earnings and other benefits suffered as a result of the enforcement of the rule.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Cardi Corporation, Warwick, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally requiring that bargaining unit employees possess a valid driver's license as a condition of employment without first giving the Union prior notice and an opportunity to bargain over the requirement.

(b) Enforcing its unlawful driver's license requirement against Eddie Mejia or any other bargaining unit employee.

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

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

(a) Rescind its requirement that bargaining unit employees possess a valid driver's license as a condition of employment.

(b) Place Eddie Mejia in the position he would have been in absent the enforcement of the unlawful driver's license requirement against him on November 13, 2006, including, if appropriate, reinstatement, in the manner set forth in the amended remedy section of this decision.

(c) Make Eddie Mejia whole for any loss of earnings and other benefits suffered as a result of the enforcement of the unlawful driver's license requirement, in the manner set forth in the amended remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful enforcement of the driver's license requirement against Eddie Mejia, and within 3 days thereafter notify Eddie Mejia in writing that this has been done and that this unlawful action will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its facility in Warwick, Rhode Island, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2005.

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

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reinstated at any time on or after November 13, 2006, and the related issue of which party bears the burden of proof on this matter. The resolution of these issues will determine the appropriateness of a reinstatement offer and the amount of backpay owed to Mejia. If reinstatement is found to be appropriate, the Respondent shall offer Mejia full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

[8] The judge's recommended remedy provides that the Respondent make Mejia whole for any loss of pay suffered as a result of the Respondent's unlawful unilateral change, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The *Ogle Protection* formula, however, "applies only to remedy a violation of the Act that does not involve cessation or denial of employment." *CAB Associates*, 340 NLRB 1391, 1393 (2003). Thus, to the extent the Respondent's unlawful unilateral change resulted in Mejia being denied employment, any make-whole remedy shall be in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See, e.g., *Raven Government Services*, 336 NLRB 991, 992 (2001), enfd. 315 F.3d 499 (5th Cir. 2002).

The Respondent shall also be ordered to reimburse Eddie Mejia for any expenses resulting from the Respondent's unlawful changes to its driver's license policy as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra.

The complaint alleges that the Respondent implemented its driver's license requirement between November 2006 and April 2007. The judge, however, found that the Respondent adopted and implemented its driver's license requirement in "late 2005." The parties do not dispute that finding. In those circumstances, we find that it will effectuate the policies of the Act to require the Respondent to, if necessary, mail copies of the notice to all current and former employees employed by the Respondent at any time since November 2005.

[9] 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally require that bargaining unit employees possess a valid driver's license as a condition of employment without first giving the Union prior notice and an opportunity to bargain over the requirement.

WE WILL NOT enforce our unlawful driver's license requirement against Eddie Mejia or any other bargaining unit employee.

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

WE WILL rescind the requirement that bargaining unit employees possess a valid driver's license as a condition of employment.

WE WILL place Eddie Mejia in the position he would have been in absent the enforcement of the unlawful driver's license requirement against him on November 13, 2006, including, if appropriate, reinstatement.

WE WILL make Eddie Mejia whole for any loss of earnings and other benefits suffered as a result of the enforcement of the unlawful driver's license requirement.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful enforcement of the driver's license requirement against Eddie Mejia, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

CARDI CORP.

Karen E. Hickey, Esq., for the General Counsel.
John D. O'Reilly III, Esq., of Framingham, Massachusetts, for the Respondent-Employer.
Aaron D. Krakow, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on April 1, 2008, in Boston, Massachusetts, pursuant to a complaint and notice of hearing in the subject case (the complaint) issued on December 28, 2007,[1] by the Regional Director for Region 1 of the National Labor Relations Board (the Board). The unfair labor practice charge was filed on April 19, by Carpenters Local Union No. 94, New England Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America (the Charging Party or the Union) alleging that Cardi Corporation (the Respondent or the Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent has been failing and refusing to bargain collectively and in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act by unilaterally implementing a rule requiring bargaining unit employees to possess a valid drivers license in order to work on one of its jobs and subsequently enforcing the rule by refusing to reemploy one of its employees.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in highway, concrete, and asphalt construction in the building and construction industry at its facility in Warwick, Rhode Island, where during the past year in conducting its business operations it has provided services valued in excess of $50,000 directly to customers located outside the State of Rhode Island. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is an employer-member of the Construction Industries of Rhode Island, an association composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and

[1] All dates are in 2007, unless otherwise indicated.

administering collective-bargaining agreements with various labor organizations, including the Union. The Association and the Union entered into a collective-bargaining agreement effective by its terms for the period June 5, 2005, through June 7, 2009 (GC Exh. 3).

B. The 8(a)(1) and (5) Violations

1. The facts

In late 2005, the Respondent adopted and implemented a rule requiring bargaining unit employees' to possess a valid drivers license in order to work on its various construction jobs. The Respondent admits that on November 13, 2006, it refused to consider Eddie Mejia for reemployment, due to his acknowledged lack of a valid driver's license. The Respondent further admits that it adopted and implemented its policy without prior notice or bargaining with the Union.

David Palmisciano, the Union's district business manager, has serviced the bargaining unit for approximately 9 years. He along with fellow Business Manager William Holmes participated in collective-bargaining negotiations for the parties' most recent agreement. Both individuals testified that no discussions took place during the course of those negotiations regarding a policy that employees were required to possess a valid driver's license as a condition of employment and there is nothing in the current agreement to this effect. In addition, neither of these individuals had any independent discussions with any of Respondent's representatives that such a requirement was necessary for continued employment at the Employer. Lastly, both business managers testified that no discussions concerning the requirement for valid driver's licenses was undertaken in the prior set of negotiations that led to the parties' June 4, 2001, to June 5, 2005 collective-bargaining agreement (GC Exh. 4).

Palmisciano further testified that the first time the Union learned about the driver's license requirement was in November 2006. At that time, employee Eddie Mejia informed Palmisciano that the Respondent refused to re-employ him when he was released by his physician to return to full-time employment after being on workmen's compensation disability. Palmisciano noted that he immediately telephoned Respondent's safety director, Robert Kunz, who told him that the Respondent had adopted such a policy. Kunz admitted, however, that he was not aware of any written policy to this effect. He also told Palmisciano that maybe he was not aware of the policy because the Union had not referred any employees for work since April 2005. Around the same time, Palmisciano talked with Respondent's treasurer, Stephen Cardi, who informed him that the policy was implemented during the last construction season between the winter of 2005 and spring of 2006 for all employees represented by labor organizations including the Charging Party.

Kunz and Cardi apprised Palmisciano that it did periodic checks to discern whether bargaining unit employees had valid driver's licenses. These checks were made on the jobsite when employees received their paychecks or when employees were rehired. Palmisciano testified that he checked with two of his job stewards, James Mulcahey and Guy Alves, who informed him that they were not aware of any such policy and that no respondent supervisor had ever asked them whether they possessed valid driver's licenses. Likewise, both of these stewards told Palmisciano that they never received any notice in their paychecks about the requirement for having a valid driver's license nor did other employees on the job with whom they worked ever inform them that Respondent's supervisors asked about whether they had valid driver licenses.[2]

By letter dated November 21, 2006, Palmisciano wrote Cardi summarizing the Union's position that the Respondent had added an additional requirement for employment that all employees shall possess a valid motor vehicle driver's license (GC Exh. 6). Palmisciano ended the letter by referring to a communication received from Cardi dated November 17, 2006, in which there is no reference to the requirement of a driver's license in either the old or the new collective-bargaining agreement (R. Exh. 1).[3]

Mejia testified that he has been a member of the Union since 2001 and was employed at the Respondent from June 2002 until November 2006. He noted that when he was hired in June 2002, he was not asked whether he possessed a valid driver's license. Mejia acknowledged, however, that during his entire tenure at the Respondent he at no time had a valid driver's license.

In November 2002, Mejia suffered a work-related injury. He collected workmen's compensation until he was able to return to light duty. When Mejia returned to work he was not asked if he held a valid driver's license. Mejia was laid off in May 2003 and went on workmen's compensation again as his hip injury worsened. After participating in intensive physical therapy sessions, Mejia returned to work at the Respondent in May 2004 performing light duty, but he was not asked whether he possessed a valid driver's license.[4] Mejia worked on light duty for approximately 8 months but found that his injury worsened and after further medical evaluation and a MRI, underwent hip replacement surgery in November 2005. After a lengthy convalescent period, during which he was on workmen's compensation, the doctors cleared him to return to full-time status.

[2] Mulcahey and Alves both testified during the hearing that since they became union stewards in 2004 and 2005 respectively, they have never been asked whether they possessed valid driver's licenses and during the period that they both were laid off in 2004–2005 and 2007–2008, no respondent supervisor ever inquired whether they had valid driver's licenses when they were recalled from layoff.

[3] The Union sought to remove from the parties' June 8, 1998, to June 3, 2001 collective-bargaining agreement, art. 21, sec. 2, that provided Carpenters shall not be required to possess an automobile as a prerequisite for employment. That provision was ultimately deleted and did not appear in the parties' successor agreement (GC Exh. 4). Palmisciano testified that the Union wanted to delete the provision because in their opinion it conflicted with art. 19, sec. 3 of the agreement and it should not be a requirement for an employee to have an automobile to get to work, when in certain circumstances public transportation was available or an employee could car pool or be driven to work by someone else. Palmisciano confirmed that he informed the Respondent that the only contractual requirement was for bargaining unit employees to arrive for work in a timely manner and put in a full day's work.

[4] Palmisciano testified without contradiction that the Respondent previously reassigned employees to light duty after coming off workmen's compensation status. For example, the Respondent offered this status to employees Curt Hancock, Kevin Gerard, and Chuck Falco.

Accordingly, Mejia telephoned Kunz in November 2006 to apprise him of his updated medical status and was told to come in to the office in order to take a drug test and fill out employment forms. While Mejia provided Kunz with a State ID card and his social security card, Kunz was aware from the prior workmen's compensation proceeding that Mejia did not possess a valid driver's license. Kunz informed Mejia, during the meeting, that the owners required employees to have a valid driver's license to work at the Respondent. Mejia replied, that he worked before without a driver's license and had never been asked about or required to have a valid driver's license as a condition of employment. Kunz promised to look into the matter and several days later informed Mejia that the Respondent's policy was that a valid driver's license was required to work at the Respondent and presently there was no work available.[5]

Subsequent to meeting with Kunz, Mejia met with Palmisciano to inform him about the new driver's license policy. Thereafter, at the urging of Palmisciano, he applied for and obtained his driver's permit. In February 2007, he received his permanent driver's license.

During the period between June 2002 and November 2006, when Mejia was employed at the Respondent, he never received any written or oral notification that his employment was terminated.

2. Position of the parties

The General Counsel and the Charging Party argue that the Respondent's rule or policy requiring bargaining unit employees to possess a valid driver's license was implemented without the Union's consent, without notice to the Union, and without affording the Union an opportunity to bargain with respect to the conduct and effects of the conduct. Thus, the General Counsel seeks a status quo ante remedy, an opportunity for the Union to negotiate and reinstatement and backpay for Mejia with quarterly compounded interest.

The Respondent first argues that Mejia was an applicant for employment when he met with Kunz in November 2006, and not an employee within the meaning of Section 2(3) of the Act. Accordingly, they opine that in the absence of a reasonable expectation of employment or re-employment there is no obligation to negotiate or make him whole.

Second, the Respondent asserts that since the possession of a valid driver's license is a necessary requirement for employment on highway construction projects where employees are frequently required to drive their own vehicles, as well as company vehicles on company business, the possession of a valid driver's license is not a mandatory subject for the purpose of collective bargaining.

Lastly, the Respondent contends that the underlying charge was not filed within the period of time set forth in Section 10(b) of the Act.

3. Legal principles

An employer violates Section 8(a)(1) and (5) of the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz,* 369 U.S. 736, 743 (1962). The Board has held that changes in job requirements or job qualifications are mandatory subjects of bargaining. *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001). However, where an employer's action does not change existing conditions, the employer does not violate the Act. An established past practice can become part of the status quo. Accordingly, the Board has found no violation of the Act where an employer has followed a well-established past practice. *Luther Manor Nursing Home,* 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985).

An employer may also avoid a finding of violation if it can show that the union waived bargaining regarding the subjects of the unilateral changes. A waiver of bargaining rights by a union is not to be lightly inferred, but rather must be demonstrated by the union's clear and explicit expression. *Beverly Health & Rehabilitation Services*, 335 NLRB 636 (2001); *Rockford Manor Care Facility*, 279 NLRB 1170, 1172 (1986).

Section 10(b) is a statute of limitations and is not jurisdictional in nature. The Respondent has the burden of showing that the Union knew or should have known prior to the 10(b) period that the driver's license policy was in effect. *Dutchess Overhead Doors,* 337 NLRB 162 (2001).

4. Analysis

The Respondent's defenses as alleged above have not been sustained by record testimony. In this regard, the Respondent did not establish that the practice in the industry is to require journeymen carpenters to possess a valid driver's license when working on jobsites. While the Respondent did establish that carpenter foremen are often requested to drive company vehicles on the jobsite or on occasions transport or pick up supplies from off-site locations to the job, it did not conclusively establish that journeymen carpenters are required to perform these responsibilities. Indeed, Kunz was only able to point to one journeyman carpenter, Chris Hartman, who he observed driving a company vehicle on the jobsite. He could not articulate how often this occurred or how many times Hartman drove the company vehicle while working for the Respondent.[6] While Kunz opined that he observed other journeymen carpenters drive company vehicles, when pressed, he could not identify any other individuals. Kunz testimony was contrary to the two job stewards who credibly testified that carpenter foreman rather then journeymen carpenters routinely drove company vehicles on the jobsites. Nor was the Respondent able to establish that employees were routinely asked whether they possessed valid driver's licenses either by written communication or after employees returned to work from seasonal layoffs. Both union stewards credibly testified that they had never been asked whether they held valid driver's licenses after returning from layoff's or at any time by their supervisors.

As it concerns the Respondent's argument that the Union waived its rights to contest the driver's license policy during

[5] Kunz testified that no carpentry employees were hired until April 2007.

[6] It was estimated that employee Chris Hartman worked approximately 2000 hours over the last year but Kunz was unable to establish how many of these hours or how often he observed Hartman drive a company vehicle. It is noted that the Respondent does not maintain any job description for Carpenter bargaining unit employees.

prior collective-bargaining negotiations, no such evidence was presented by the Employer. While the Respondent argues that the Union's request to remove article 21, section 2, from the parties' agreement stands for the proposition that employees must have valid driver's licenses as a condition of employment, such a position does not withstand scrutiny. While the deleted provision provided that journeymen carpenters shall not be required to possess an automobile as a prerequisite for employment, one can not make the jump to the proposition that journeymen carpenter employees must have valid driver's licenses to be employed at the Respondent. The Union's position that employee's may get to work in any manner including public transportation, carpooling, or by being dropped off at the jobsite by a family member or friend is reasonable when the Union sought to remove the requirement of an automobile from the parties' agreement. Concluding, as the Employer suggests, that journeymen carpenter employees must have a valid driver's license does not logically follow as the record confirms that they have not been required nor have they regularly driven company vehicles as part of their job responsibilities.

While the record confirms that the Respondent terminated several employees who did not possess valid driver's licenses, these actions took place based on reasonable suspicion of a specific problem involving those individuals. For example, when the Respondent became aware of a traffic-related offense or DWI infraction that it learned about in the newspaper or a complaint from an incumbent employee, it took the action. It is noted that two of the employees that were terminated were removed in early 2007, a period of time after Mejia was refused full-time employment because of not possessing a valid driver's license. I also note that none of the employees terminated by the Respondent for lack of a driver's license were carpenters.

I also reject Respondent's argument that Mejia was an applicant and not an employee when he contacted Kunz to seek to return to full-time employment after being approved to do so by his physician.[7] The Board has held that an employee on sick or maternity leave is presumed to continue in an employment status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned. *Red Arrow Freight Lines,* 278 NLRB 965 (1986). Thus, the Respondent's argument that Mejia has no "reasonable expectation of employment" and is not an employee within the meaning of Section 2(3) of the Act has not been established. In this regard, such a test applies to employees that have been laid off which is not the case herein. Indeed, the past practice of the Respondent is normally to retain employee's who have suffered work-related injuries returning them first to light duty when medically cleared, and then to reinstate them to full-time employment. The record confirms that Mejia was returned to light duty on at least two occasions in between his recuperative period while on workmen's compensation. Therefore, the employment relationship was uninterrupted and he continued to maintain his employee status during the period between November 2005 and November 2006, when he regularly received checks under the Respondent's workmen's compensation insurance policy. *J. P. Stevens & Co.,* 247 NLRB 420, 482 (1980) (individuals on leave and receiving workers' compensation are considered employees). Lastly, and most significant, the Respondent never orally or in writing terminated Mejia's employment relationship during the entire period of his tenure and in November 2006, he was put on the payroll and paid for hours worked, conclusive evidence that he was an employee. *Thorn Americas, Inc.,* 314 NLRB 943 (1994).

Additionally, the Respondent did not meet its burden that the underlying unfair labor practice charge was untimely filed. The evidence presented conclusively establishes that the Union did not learn of the requirement that a valid driver's license was necessary for continued employment until November 2006. Indeed, Kunz acknowledged that the Union probably did not know of the requirement, which was never reduced to writing, until November 2006 since the Union had not provided any carpenters to the Respondent since April 2005. Therefore, the April 19 charge in this matter was timely filed.

For all of the above reasons, and particularly noting that the Respondent admits that it did not notify the Union in advance or engage in negotiations over the driver's license requirement, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act by its unilateral action.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a rule without notice to or bargaining with the Union requiring bargaining unit employees to possess a valid driver's license in order to be employed at the Respondent.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be ordered to restore, for unit employees, the terms and conditions that existed before the 2005 unilateral changes to its driver license policy, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. I recommend that the Respondent be ordered to reinstate employee Eddie Mejia to his former position or a similarly situated position and to make him whole for any loss of pay he suffered as a result of the Respondent's unlawful implementation of its 2005 changes to their driver license policy, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, I recommend that the Respondent be ordered to reimburse Eddie Mejia for any expenses resulting from the Respondent's unlawful changes to its driver license policy as set forth in *Kraft Plumbing & Heat-*

[7] The Board held in *Toering Electric Co.,* 351 NLRB 225 (2007), that even an applicant for employment is protected under the Act. Here, there is no question that Mejia exhibited a "genuine interest" in seeking employment with the Respondent.

ing, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra.[8]

[Recommended Order omitted from publication.]

[8] Since the undersigned must apply current Board precedent, any change in the manner that interest on backpay is computed must be undertaken by the Board.