

American Electric Power Company and its subsidiary Columbus Southern Power Company, formerly known as Columbus & Southern Ohio Electric Company and Local Union No. 1466, International Brotherhood of Electrical Workers, AFL-CIO-CLC

American Electric Power Company and its subsidiary Kentucky Power Company and Local Union No. 978, International Brotherhood of Electrical Workers, AFL-CIO-CLC

American Electric Power Company and its subsidiary Appalachian Power Company and Local Union No. 978, International Brotherhood of Electrical Workers, AFL-CIO-CLC

American Electric Power Company and its subsidiary Indiana Michigan Power Company, formerly known as Indiana & Michigan Electric Company and Local Union No. 1392, International Brotherhood of Electrical Workers, AFL-CIO-CLC

American Electric Power Company and its subsidiary Kingsport Power Company and Local Union No. 934, International Brotherhood of Electrical Workers, AFL-CIO-CLC

American Electric Power Company and its subsidiary Michigan Power Company and Local Union No. 876, International Brotherhood of Electrical Workers, AFL-CIO-CLC

American Electric Power Company and its subsidiary Ohio Power Company and Local Union No. 981, International Brotherhood of Electrical Workers, AFL-CIO-CLC. Cases 9-CA-15654-1, 9-CA-15654-2, 9-CA-15654-3, 9-CA-15654-4, 9-CA-15654-5, 9-CA-15654-6, and 9-CA-15654-7

May 17, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, AND OVIATT

On April 10, 1989, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief. The Charging Parties filed cross-exceptions and a brief in support of their cross-exceptions and in opposition to the Respondents' exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order as modified.

¹In agreeing with the judge that the complaint was properly amended at the hearing to allege the application of the Corporate Code of Ethics to Columbus Southern Power Company (CSP) in December 1985 and the issuance of the revised Corporate Code of Ethics in January 1987, we note that the Board can

1. The judge, applying the Board's decision in *Peerless Publications*, 283 NLRB 334 (1987), on remand from the D.C. Circuit sub nom. *Newspaper Guild Local 10 v. NLRB*, 636 F.2d 550 (1980), found that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally issuing a Corporate Code of Ethics in February 1980 and certain provisions of a revised Corporate Code of Ethics in January 1987 without first giving the Unions notice and an opportunity to bargain.² We agree, with the modifications set forth below, that the Respondents violated the Act as alleged.

The issue in *Peerless Publications* was whether the respondent, a publisher of a newspaper, was obligated to bargain with the union before issuing its General Office Rules and Code of Ethics. There the Board held that, although rules or codes of conduct governing employee behavior with constituent penalties for their breach constitute "terms and conditions of employment," an employer may, under certain circumstances, overcome the presumption of mandatory bargainability and impose such terms and conditions of employment without prior bargaining. In this regard, the Board held that in order to overcome this presumption:

[I]t is clear initially that the subject matter sought to be addressed by the employer must go to the "protection of the core purposes of the enterprise." When that is the case, the rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives. [Id. at 335.]

The concept of a "core purpose" is derived from the circuit court's citation in *Peerless Publications* to Justice Stewart's concurring opinion in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 217 (1964).³ The court in *Peerless Publications* rejected the union's contention that every matter touching in any way upon conditions of employment is mandatorily bargainable under the Act. The court cited Justice Stewart's *Fibreboard* concurrence for the proposition that the language of Section 8(d) of the Act, while sweeping, must be construed to exclude various kinds of management decisions from the scope of the duty to bargain if the prin-

add new allegations to a complaint based on events that occur after a charge is filed if the allegations are related to the conduct alleged in the timely charge and developed from that conduct while the charge was pending before the Board. See *Davis Electrical Constructors*, 291 NLRB 33, 34 (1988) (citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959)).

²Respondent American Electric Power Company (AEP) and its subsidiaries generate and transmit electrical power. The Unions represent various classifications of the Respondents' production and maintenance employees.

³In *Fibreboard*, the Supreme Court held that an employer was required to bargain about its decision to subcontract certain maintenance work previously performed by unionized employees.

ciple of management control over basic decisions concerning the enterprise is to be preserved. The court explained that such decisions “lie at the core of entrepreneurial control . . . are fundamental to the basic direction of a corporate enterprise . . . or concern its basic scope” 636 F.2d at 559–560.⁴

On remand from the court, the Board, although reaffirming the view that protection of the editorial integrity of a newspaper lies at the core of publishing control, found it unnecessary to decide which, if any, of the ethics code provisions were restricted to subject matter necessary to the protection of the core purposes of the enterprise. The Board found that even assuming that the provisions were so restricted, the provisions did not withstand scrutiny because they were overly broad, open-ended, vague, and ambiguous.

In the instant case, the judge, applying the *Peerless Publications* balancing test to the Respondents’ Corporate Codes of Ethics, first found that the provisions of the Codes constitute terms and conditions of employment because violations of the provisions could subject the violator to a penalty. Next examining the content of the provisions of the Codes, the judge found that the original Corporate Code of Ethics was overly broad in its entirety because it applied not only to employees but also to the families of employees and to “entities in which the employee had an interest.” Regarding the revised Corporate Code of Ethics, the judge found that only paragraphs 5 through 9 and paragraph 10 as it applies to employees “address a subject matter—integrity and lawful behavior—that go to the protection of the core purposes of the enterprise.”⁵ Finally, the judge found that the remaining provisions of the revised Corporate Code of Ethics suffered variously from vagueness, ambiguity, and overbreadth.

As a threshold matter, we agree with the judge, for the reasons set forth in his decision, that the provisions of the Codes constitute terms and conditions of employment. Contrary to the judge, we find, however, that as a matter of proof the Respondents have failed to demonstrate that the subject matter addressed in any of the provisions of the Codes goes to the “protection of the core purposes of the enterprise.”

The Respondents contend that the core purpose of their business is “maintaining integrity,” and that the provisions of the Codes protect this core purpose. On the other hand, the Unions contend that “ethical conduct” is not a core purpose of an enterprise whose primary function is the generation and transmission of electricity.

⁴We note that the court in *Peerless Publications*, in addressing the union’s contention that the rationale of the *Fibreboard* concurrence should be limited to the commitment of capital investment and similar subjects, found that integrity lies at the core of publishing control and that “[i]n a very real sense, that characteristic is to a newspaper or magazine what machinery is to a manufacturer.” 636 F.2d at 560.

⁵These provisions pertain generally to the employees’ duty to obey the law, the use of company funds, and the prohibition of bribes and kickbacks.

In support of their position regarding the enterprise’s core purpose, the Respondents cite the testimony of Joseph Vipperman, executive vice president of operations of American Electric Power Service Corporation (AEP Service Corporation).⁶ Vipperman testified that the original Corporate Code of Ethics was issued as a result of a recommendation from AEP’s outside auditors that was based on passage of the Foreign Corrupt Practices Act of 1977. An internal memorandum to Vipperman that accompanied a draft of the Code also referred to “a recent SEC ruling requiring a statement by management on internal control to be filed in annual reports.” According to Vipperman, the auditors did not recommend any specific provisions to be included in the Code and suggested only that any Code formulated should at a minimum apply to managerial employees. In this regard, Vipperman stated that he suggested the substantive provisions of the Code based on documents that already existed within the Company such as employee handbooks and decided to broaden its coverage to all employees. On cross-examination by the Respondents’ counsel, Vipperman indicated that the Respondent operating companies are subject to “fairly pervasive regulation” by the state and Federal governments. Finally, when questioned by the Respondents’ counsel regarding the relationship between the Codes and “the integrity of the operating companies,” Vipperman responded:

[B]ecause we’re regulated, most of our customers don’t have another opportunity to go some place else if they don’t like the way we conduct business. And I think it’s more important for us then to behave in an ethical manner maybe even than some other company that might.

We recognize that “integrity”—the subject matter of the Respondents’ Corporate Codes of Ethics—is an important *aspect* of the operation of any business, including an electric power company. From this general perspective, the Respondents’ Codes therefore address desirable standards of behavior to be encouraged among employees. In the context, however, of the limited exception to the rule of mandatory bargainability set forth in *Peerless Publications*, we find that the evidence does not demonstrate that integrity goes to the protection of the *core purposes* of the Respondents’ enterprise.

The employee handbooks of the Respondent operating companies state, “Our job is generating electricity and getting it to where it’s used, and to do both with maximum efficiency and minimum impact on the environment.” Although Vipperman testified that in the performance of these duties the Respondents are subject to pervasive regulation, there is no evidence in the

⁶AEP Service Corporation provides management and technical services to AEP and its operating companies.

record to suggest that specific provisions of the Codes were intended to meet state or Federal licensing or reporting requirements. In this regard, despite Vipperman's conclusory testimony that the original Code was promulgated because of the passage of the Foreign Corrupt Practices Act, it appears that the Code was mainly a compilation of preexisting company documents rather than a response targeted to specific Governmental regulations governing the production of electricity. Further, the Respondents have not demonstrated why the nature of their Government regulation requires that all the many categories of production and maintenance employees included in their bargaining agreements with the Unions were subject to the Codes' provisions.

For the above reasons, we find that the Respondents have not shown that the subject matter of their Corporate Codes of Ethics is necessary for the protection of the core purposes of the Respondents' enterprise—the generation and transmission of electricity. See *Peerless Publications*, supra, 283 NLRB at 335. The fact that the Respondents operate within a regulated industry does not prove that the subject matter of the Codes constitutes the sort of "entrepreneurial" decision that can be exempt from the scope of the duty to bargain. Accordingly, we find that the Respondents have not overcome the initial presumption of mandatory bargainability under *Peerless Publications*. See *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989), enfd. mem. 924 F.2d 1055 (5th Cir. 1991), in which the Board, applying *Peerless Publications*, above, found that the respondent petrochemical company violated Section 8(a)(5) and (1) of the Act by unilaterally issuing a "Policy Statement on Disloyalty" which it intended to enforce with disciplinary sanctions.

Moreover, we find that even if the Respondents had overcome this presumption, the provisions of the Codes are deficient in other respects. In this regard, we agree with the judge that the original Corporate Code of Ethics is overly broad in view of paragraph 14,⁷ and that it should be rescinded in its entirety. Additionally, we agree with the judge's analysis regarding paragraphs 1 through 4, 10 (as it applies to employees' families), and 11 through 13 of the revised Corporate Code of Ethics, and with his findings that these provisions suffer variously from vagueness, ambiguity, and overbreadth. We find, however, contrary to the judge, and in agreement with the Unions' exceptions, that paragraphs 5 through 9 and paragraph 10 (as it applies to employees) are also deficient because, at the least, they are not appropriately limited to affected employees as required by *Peerless Publications*, above. Accordingly, we find that the revised Corporate Code of

Ethics should also be rescinded in its entirety. In light of the above findings, we shall amend the judge's Conclusions of Law and Order and issue a new notice.

2. We agree with the judge that Respondent American Electric Power Company (AEP) is a proper party to this proceeding. In so finding, we rely on the "direct participation" theory of intercorporate liability as discussed in *Esmark, Inc. v. NLRB*, 887 F.2d 739, 752-760 (7th Cir. 1989), remanding sub nom. *Swift Independent Corp.*, 289 NLRB 423 (1988). Pursuant to *Esmark*, when a parent corporation disregards the separate legal personality of its subsidiary (and the subsidiary's own decision-making "paraphernalia") and exercises direct control over a specific transaction, derivative liability for the subsidiary's unfair labor practices will be imposed on the parent. *Id.* at 757. In the instant case, in 1979, Vipperman, who was then the controller of AEP Service Corporation, directed AEP Service Corporation personnel to draft a Corporate Code of Ethics based on certain documents that existed within the Company. The resulting Code was drafted without input from or consultation with the operating companies. Vipperman sent the completed draft to W. S. White, chairman of the board and chief executive officer of AEP, AEP Service Corporation, and each of the operating companies, for his approval. In February 1980, the Code was distributed to employees of AEP Service Corporation and AEP's existing operating companies with a cover letter from White. The letter requested that employees read the Code and stated that, inter alia, "all questions concerning the administration of the policy should be directed to J. H. Vipperman, controller." Vipperman testified that the Code is reviewed annually by the controller's office at AEP Service Corporation to determine if revisions are necessary.

In view of the above, we find that AEP's conduct with respect to the promulgation and administration of the Code went beyond active participation in the affairs of its subsidiaries through the normal decision-making channels and constituted impermissible "direct" control in disregard of the subsidiaries' corporate forms. We therefore find that under *Esmark*, above, Respondent AEP is liable for the unfair labor practices committed by its operating companies with respect to the Corporate Codes of Ethics.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. The Respondents violated Section 8(a)(5) and (1) of the Act by issuing a Corporate Code of Ethics in February 1980 and a revised Corporate Code of Ethics in January 1987 without first giving prior notice and opportunity to bargain to the Unions."

⁷Par. 14 states: "The foregoing guidelines apply not only to each employee as an individual but also to his/her family and to entities in which he/she has an interest." Par. 14 was deleted in the revised Code.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, American Electric Power Company, Columbus, Ohio; Columbus Southern Power Company, Columbus, Ohio; Kentucky Power Company, Ashland, Kentucky; Appalachian Power Company, Roanoke, Virginia; Indiana Michigan Power Company, Fort Wayne, Indiana; Kingsport Power Company, Kingsport, Tennessee; Michigan Power Company, Three River, Michigan; and Ohio Power Company, Canton, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Rescind in writing the original Corporate Code of Ethics issued in February 1980 in its entirety and the revised Corporate Code of Ethics issued in January 1987 in its entirety, to the extent they pertain to bargaining unit employees represented by Local Union Nos. 1466, 978, 1392, 934, 876, and 981 of the International Brotherhood of Electrical Workers, AFL-CLO-CLC.”

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN STEPHENS, concurring.

I join my colleagues’ opinion because I regard it as a correct and reasonable application of existing law to the facts of this case and because I would not favor changing the law in any way that would produce a different result. I write separately to express my view that the Board’s decision in *Peerless Publications*, 283 NLRB 334 (1987), on remand from sub nom. *Newspaper Guild Local 10 v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), reflected the special nature of the employer involved there—a newspaper—and that its rationale is not well suited to determining mandatory subjects of bargaining in other industries. I am uncomfortable in particular with such concepts as “overbreadth” and “vagueness,” which make it appear as if we are trying to determine whether an employer’s rules would pass muster under the first amendment.¹

Formulating a code of ethics applicable to the conduct of employees is not an “entrepreneurial” act in any ordinary sense of the word. I would not treat such a code differently from any other set of rules of conduct that an employer might seek to apply to its em-

¹ Such concepts are relevant, of course, when rules applying to activities protected by Sec. 7 are involved, because vague restrictions on such activities as union solicitation could chill the exercise of those protected rights. In *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989), enfd. mem. 924 F.2d 1055 (5th Cir. 1991), we applied the *Peerless Publications* vagueness test to a “Policy Statement on Disloyalty,” but it had special relevance there because the respondent had such a broad and vague prohibition against “disloyal” actions or statements that employees could reasonably have felt intimidated from exercising rights under Sec. 7.

ployees. Such rules are presumptively mandatory subjects of bargaining, and exceptions would be rare.² Finding that such rules are mandatory subjects means only that the respondent must bargain with the union about them, not that it must change them to make them less vague.

Of course vagueness in a rule might be something a collective-bargaining representative would wish to bargain about. Paragraph 7 of the Code is a case in point. It provides:

No false or artificial entries shall directly or indirectly be made to any books or records of the Company or any subsidiary for any reason. Employees shall not directly or indirectly engage in any arrangements that result in such a prohibited act.

The judge excluded this paragraph from those which he found were mandatory subjects of bargaining because he regarded it as a “quite reasonable” rule that simply tells employees that they should obey the law. He believed this went to the “credibility of the business” and thus involved a “core purpose” over which the Respondent should not have to bargain. I agree with the majority opinion’s reasoning that upright employee behavior is not a core purpose of a utility company in the same sense that avoiding conduct that compromises a reputation for unbiased journalism might be a core purpose of a newspaper. The holding of *Peerless Publications* thus does not dictate a finding that this provision reflects a strictly entrepreneurial concern. But I would focus rather on the fact that employees might reasonably be concerned to know, for example, what the Respondent thought constituted an “artificial entry” and whether an employee who mistakenly misrecorded his arrival time on a sign-in log was guilty of violating that rule. In other words, the Union would not be bargaining for the right of employees to be dishonest or disobey the law, but more likely would be bargaining to establish the parameters of the Code of Ethics as it affected the unit employees.

In sum, it is no interest of ours whether the Respondent wishes to embody broad or vague rules governing employee conduct in a Code of Ethics. To the extent the Respondent plans to apply its Code of Ethics to the unit employees, however, it must negotiate with their collective-bargaining representative about them.

² The Code was clearly more than a list of purely precatory statements, and thus functioned like work rules, even though many of the rules seemed more relevant to employees in the executive ranks than to production and maintenance employees. The judge found, with adequate support in the record, that violating provisions of the code could subject employees to discipline.

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

WE WILL NOT refuse to bargain collectively with Local Unions Nos. 1466, 978, 1392, 934, 876, and 981, International Brotherhood of Electrical Workers, AFL-CIO-CLC, respectively, on request, about terms and conditions of employment embodied in the Corporate Code of Ethics.

WE WILL NOT unilaterally promulgate Corporate Codes of Ethics affecting terms and conditions of employment, or enforce such unilaterally promulgated Corporate Codes of Ethics, without giving the Unions prior notice and opportunity to bargain.

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 in writing the original Corporate Code of Ethics in its entirety, and the revised Corporate Code of Ethics in its entirety, to the extent they pertain to bargaining unit employees represented by the Unions.

WE WILL, on request, bargain with the Unions concerning terms and conditions of employment to be contained in any new Corporate Code of Ethics and, if agreement is reached, embody it in a signed agreement.

AMERICAN ELECTRIC POWER COMPANY
AND ITS SUBSIDIARIES COLUMBUS
SOUTHERN POWER COMPANY, KEN-
TUCKY POWER COMPANY, APPA-
LACHIAN POWER COMPANY, INDIANA
MICHIGAN POWER COMPANY, KINGS-
PORT POWER COMPANY, MICHIGAN
POWER COMPANY, AND OHIO POWER
COMPANY

Vyrone Cravannas, Esq., for the General Counsel.
John A. McGuinn, Esq., of Washington, D.C., and *Frederick
L. Sagan, Esq.*, of Columbus, Ohio, for the Respondents.
Robert D. Kurnick, Esq., of Washington, D.C., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On 5 August 1980 charges were filed by IBEW Locals 1466, 978, 1392, 934, 876, and 981 against American Electric Power Company and its subsidiaries Columbus Southern Power

Company (formerly known as Columbus and Southern Ohio Electric Company), Kentucky Power Company, Appalachian Power Company, Indiana Michigan Power Company (formerly known as Indiana and Michigan Electric Company), Kingsport Power Company, Michigan Power Company, and Ohio Power Company, Respondents herein.

The charges allege that Respondents violated Section 8(a)(1) and (5) when they issued a Corporate Code of Ethics without first giving notice and opportunity to bargain to the Union.

The Board stayed further proceedings regarding these charges pending the outcome of litigation in a case which raised similar issues. On 13 August 1980 the US Court of Appeals for the District of Columbia Circuit issued its decision in that case. *Newspaper Guild Local 10 (Peerless Publications) v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980). The court remanded the case to the Board to reconsider its earlier decision in the same case in light of the Court's decision. The Board did so in a decision which issued on 26 March 1987. *Peerless Publications*, 283 NLRB 334 (1987). Thereafter, on 24 March 1988, the National Labor Relations Board, by the Regional Director for Region 9, issued a consolidated complaint, which as later amended at the hearing, alleges that Respondents violated Section 8(a)(1) and (5) of the Act when it issued a Corporate Code of Ethics and when it issued a revised Corporate Code of Ethics thereafter. Respondents deny they violated the Act in any way.

A hearing was held before me in Columbus, Ohio, on 28 June and 26 July 1988.

On the entire record in this case, to include posthearing briefs submitted on behalf of the General Counsel, Respondents, and, Charging Parties, and upon my observation of the demeanor of the witnesses,¹ I make the following

FINDINGS OF FACT

At all times material herein, Respondent American Electric Power (AEP) a corporation, through its various subsidiaries, has been engaged in the purchase, production, transmission, storage and nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent AEP, in the course and conduct of its business operations described above, purchased and received at its various facilities goods, materials and products valued in excess of \$50,000 directly from States other than the States in which those facilities are located.

Respondent AEP is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Columbus Southern, a corporation with an office and place of business in Columbus, Ohio, Respondent Columbus Southern's facility, has been engaged in the purchase, production, transmission, storage, and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Columbus Southern, in the course and conduct of its business operations described above purchased and received at its Columbus, Ohio facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Ohio.

¹Based on demeanor and the reasonableness of their testimony and giving due consideration to whether the witnesses were corroborated or not concluded that all witnesses in this case testified truthfully.

Respondent Columbus Southern is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Kentucky Power, a corporation with an office and place of business in Ashland, Kentucky (Respondent Kentucky Power's facility), has been engaged in the purchase, production, transmission, storage and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Kentucky Power, in the course and conduct of its business operations described above purchased and received at its Ashland, Kentucky facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Kentucky.

Respondent Kentucky Power is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Appalachian Power, a corporation with an office and place of business in Roanoke, Virginia (Respondent Appalachian Power's facility), has been engaged in the purchase, production, transmission, storage and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Appalachian Power, in the course and conduct of its business operations described above purchased and received at its Roanoke, Virginia facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Virginia.

Respondent Appalachian Power is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Indiana Michigan, a corporation with an office and place of business in Fort Wayne, Indiana (Respondent Indiana Michigan's facility), has been engaged in the purchase, production, transmission, storage and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Indiana Michigan, in the course and conduct of its business operations described above purchased and received at its Fort Wayne, Indiana facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Indiana.

Respondent Indiana Michigan is now, has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Kingsport Power, a corporation with an office and place of business in Kingsport, Tennessee (Respondent Kingsport Power's facility), has been engaged in the purchase, production, transmission, storage and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Kingsport Power, in the course and conduct of its business operations described above purchased and received at its Kingsport, Tennessee facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Tennessee.

Respondent Kingsport Power is now, has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Michigan Power, a corporation with an office and place of business in Three

River, Michigan, herein called Respondent Michigan Power's facility, has been engaged in the purchase, production, transmission, storage and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Michigan Power, in the course and conduct of its business operations described above purchased and received at its Three River Michigan facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan.

Respondent Michigan Power is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material herein, Respondent Ohio Power, a corporation with an office and place of business in Canton, Ohio (Respondent Ohio Power's facility), has been engaged in the purchase, production, transmission, storage and the nonretail sale and distribution of electricity.

During the past 12 months, a representative period, Respondent Ohio Power, in the course and conduct of its business operations described above purchased and received at its Canton, Ohio facility products, goods and materials valued in excess of \$50,000 directly from points outside the State of Ohio.

Respondent Ohio Power is now, has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that Local 1466, Local 978, Local 1392, Local 394, Local 876, and Local 981, all of which are affiliated locals of the International Brotherhood of Electrical workers, AFL-CIO-CLC, are now, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

It was stipulated that Respondents' Corporate Code of Ethics was issued and distributed to the employees of Kentucky Power Company, Appalachian Power Company, Indiana Michigan Power Company, Kingsport Power Company, Michigan Power Company, and Ohio Power Company in or about February 1980 without Respondent giving prior notice or opportunity to bargain to the Union.

The Charging Party IBEW Locals represent bargaining unit employees in each of the aforementioned Power Companies which are subsidiaries of AEP, which is a holding company.²

The record further reflects that the Corporate Code of Ethics was issued in late December 1985 to bargaining unit employees at Columbus Southern Power Company without giving prior notice and opportunity to bargain to the Union. The bargaining unit employees at Columbus Southern Power Company are represented by Local 1466, IBEW.

The Chairman and Chief Executive officer of AEP and all its subsidiaries is W. S. White, Jr. It was the decision of

²Local 978, IBEW, represents employees at Kentucky Power Company and Appalachian Power Company. Local 1392, IBEW, represents employees at Indiana Michigan Power Company. Local 934, IBEW, represents employees at Kingsport Power Company. Local 876, IBEW, represents employees at Michigan Power Company. Local 981, IBEW, represents employees at the Ohio Power Company.

W. S. White, Jr., to issue the Corporate Code of Ethics in February 1980 and, thereafter, in January 1987, to issue a revised Corporate Code of Ethics.

All of the subsidiaries involved in this case are admitted by counsel for Respondents to be employers within the meaning of the Act. Section 2(2) of the Act defines employer as including any person "acting as an agent of an employer, directly or indirectly" Ergo, Respondent AEP can remain in this case as a party Respondent along with the seven operating companies even though it is a holding company with no employees as such.

In late 1985 employees at Columbus Southern Power Company were informed that the Corporate Code of Ethics applied to the. In February 1980 when the Corporate Code of Ethics was first issued Columbus Southern Power Company was *not* part of the AEP System. It became part of that system when it was purchased by AEP in May 1980. Respondent's counsel objects to Columbus Southern Power Company being a part of this litigation on the grounds that the charge filed by Local 1466, IBEW, alleges that the Corporate Code of Ethics was implemented in February 1980 but it was not until May 1980 that Columbus Southern Power Company even became part of the AEP System. The charge was filed in August 1980. However, while the testimony at the hearing establishes that bargaining unit employees at Columbus Southern were first told the Corporate Code of Ethics applied to them in late 1985 the first page of the Code issued in February 1980 and the Chairman of the Board's cover letter indicated it applied to all employees of AEP's operating companies, of which Columbus Southern was one at the time the charge was filed against it in August 1980.

In January 1987 a revised Corporate Code of Ethics was issued. It differs in some respects from the one issued in February 1980. The Corporate Code of Ethics, which issued in February 1980, provides as follows:

1. Every effort must be made to reach all decisions solely on the basis of merit in those matters affecting employees, customers, investors, suppliers, government, or others doing business with the Company.

2. Company information not generally available to the public shall not be used by employees, directly or indirectly, for their own personal gain, nor shall it be provided for the use of others.

3. Employees shall not seek or accept favors, gifts, entertainment, or the equivalent. This does not apply to the receipt of business gifts of a nominal nature; however, acceptance of these gifts should be held to a minimum. Providing and receiving normal business entertainment, such as lunches and dinners, is allowed provided such activities are not frequent or lavish.

4. Employees will report, through their immediate supervisor, any financial interest in any business (1) which directly competes with the Company or (2) which supplies the Company with a substantial amount of goods or services or (3) which sells to the Company a substantial part of its output. This does not apply to an interest as a security holder in companies whose securities are listed on any national securities exchange or traded over the counter by members of the National Association of Securities Dealers, unless it exceeds ap-

proximately 5% of voting control. This applies to the employee or any member of his/her immediate family.

5. The Company shall not knowingly use any funds or other assets, or provide any services, for any purpose which is unlawful under the laws of the United States, any state thereof, or any jurisdiction, foreign or domestic.

6. The Company or any subsidiary shall not establish any undisclosed or unrecorded funds or assets for any purpose.

7. No false or artificial entries shall directly or indirectly be made to any books or records of the Company or any subsidiary for any reason. Employees shall not directly or indirectly engage in any arrangements that result in such a prohibited act.

8. No payment on behalf of the Company or any subsidiary shall directly or indirectly be approved or made with the intention or understanding that part or all of such payment is to be used for any purpose other than that described by the properly approved document supporting the payment.

9. The Company has a legally organized Political Action Committee (PAC). This Committee may receive voluntary contributions from management personnel and contribute funds to domestic political campaigns. No Company funds or services will be contributed, directly or indirectly, to any political party or to the campaign of any person seeking political office or expended in support of or opposition to such party or person.

10. Employees should not enter into any agreement, arrangement or device by way of fee, rebate, loan, advance, consultant agreement, legal representation or otherwise, designed or intended to reward or remunerate, directly or indirectly, any governmental agency or employee, official or representative, or any officer, director, employee, or shareholder of any private customer for decisions or actions favorable to AEP. In short, nothing in the nature of a bribe, payoff, or kick-back should be or accepted to secure or maintain business.

11. Employees shall not accept additional outside employment if it is judged to interfere with the efficient performance of the employee's duties with the Company.

12. All supervisors are responsible for enforcement of and compliance with this policy, as well as to ensure employees' knowledge and compliance therewith.

13. Any employee having information or knowledge of any violation of this code of ethics must report such information or knowledge promptly to the Controller of the AEP Service Corporation.

14. The foregoing guidelines apply not only to each employee as an individual but also to his/her family and to entities in which he/she has an interest.

The revised Corporate Code of Ethics issued on 1 January 1987 and differs from the Code issued in February 1980 in the following respects:

1. Paragraph 14 is deleted completely.

2. Paragraphs 3, 5, 6, 9, 10, 11, and 13 are worded differently from the original Code. The Revised Code with respect to those paragraphs reads as follows:

3. Employees or members of their immediate families shall not seek or accept favors, gifts, entertainment, or the equivalent. This does not apply to the receipt of business gifts of a nominal nature; however, acceptance of these gifts should be held to a minimum. Providing and receiving noral business entertainment, such as lunches and dinners, is allowed provided such activities are not

5. Employees shall not knowingly cause the Company to use funds or other assets, or provide any services, for any purpose which is unlawful under the laws of the United States, any state thereof, or any jurisdiction, foreign or domestic.

6. Employees of the Company or any subsidiary shall not use Company funds to create any undisclosed or unrecorded Company assets for any purpose.

9. No Company funds or services will be contributed, directly or indirectly, to any political campaign of any person seeking political office or expended in support of or opposition to such party or person except to the extent that Company resources including time of employees may be utilized to maintain the operation of legally organized political action committee as permitted by applicable law.

10. Employees or members of their immediate families should not enter into any agreement, arrangement or device by way of fee, rebate, loan, advance, consultant agreement, legal representation or otherwise, designed or intended to reward or remunerate, directly or indirectly, any governmental agency or employee, official or representative, or any officer, director, employee, or shareholder of any private customer for decision or actions favorable to AEP. In short, nothing in the nature of a bribe, payoff, or kickback should be paid or accepted to secure or maintain business.

11. An employee shall not accept additional outside employment if it is judged to interfere with the efficient performance of the employee's duties with the Company or to result in a conflict of interest.

13. Any employee having information of any violation of this Code of Ethics must report such information or knowledge promptly to the appropriate level of management within that employee's company or to the Controller of the AEP Service Corporation.

Suffice it to say Respondent is at liberty to issue a Corporate Code of Ethics as to all its employees who are not represented by a union. As to those employees who are represented by a union the issue is whether or not the Corporate Code of Ethics contains mandatory subjects of collective bargaining, i.e., such terms or conditions of employment, that Respondent, before implementing such a Code, must give prior notice and opportunity to bargain to the Union.

As noted above the key to the answer lies in the Board's decision in *Peerless Publications*, 283 NLRB 334 (1987).

As noted from a reading of both the original Corporate Code of Ethics and the revised Corporate Code of Ethics there is not contained therein any penalty provisions for violation of the Code. The evidence at the hearing reflects quite

conclusively, however, that violations of the Code could subject the violator to a penalty. According to Respondents' own witness penalty for a violation of the Code will be decided on a case-by-case basis giving due consideration to the particulars of the violation. As the Board said in *Peerless Publications*, supra, it is the attachment of express or implied penalties for breach of the Code that will transform rules or codes of conduct from mere expressions of opinion or aspiration into terms and conditions of employment.

However, no employee has ever been disciplined for violating the Corporate Code of Ethics. One employee, Terry Giese, was told that his involvement with a consumer group violated the Code but he was not disciplined. Another employee, Al Jones, was told that his outside job violated the Code.

Alan Goddard, then business agent for Local 1392, IBEW, who represented employees at Indiana Michigan Power Company, made a timely request in July 1980 to bargain over the Corporate Code of Ethics and Respondent Indiana Michigan refused to do so. Local 981, IBEW, also requested Respondent Michigan Power Company to bargain about the Corporate Code of Ethics with the same result. There was obviously no clear and unmistakable waiver by the Union of its right to bargain concerning the Code. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Respondents implemented the Code on the orders of W. S. White, Jr., chief executive officer of AEP and all its subsidiaries, because of a recommendation to do so which came from its outside auditing firm, Deloitte, Haskins, and Sells. Evidentially, following passage of the Foreign Corrupt Practices Act, the auditing firm felt that its client, AEP, should promulgate a Corporate Code of Ethics applicable to at least all its management officials. Respondent AEP went further and promulgated a Code applicable to all its employees, and not just management officials. It is clear to me that this was done not because AEP is antiunion or wanted to undercut the Unions but because it thought it appropriate to do so.

Respondents objected to my permitting the General Counsel to amend the complaint at the hearing on 28 June 1988 to allege that Respondents violated the Act when it issued the Revised Corporate Code of Ethics in January 1987 since the Union's charges only addressed the issuance of the original Code in February 1980. It seems obvious to me that the issue of the unilateral promulgation of the Code was properly in the complaint and changes to the Code could be alleged as violative of the Act by the General Counsel without the filing of new charges. I told Respondents' counsel that I would give them more time to prepare to defend against the Complaint, as amended. They took me up on that and the hearing was adjourned on 28 June to 26 July 1988 at Respondents' request. I note that the General Counsel can include in a complaint allegations about events occurring after the charge is filed without the necessity of new charges. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). Section 10(b) of the Act doesn't relate to conduct subsequent to the filing of the charges. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). As the Board stated in *Peerless Publications*, supra at 335:

The concept of "terms and conditions of employment" is itself a broad one—and deliberately so, for

Congress intended it to be broad. Thus, rules or codes of conduct governing employee behavior with constituent penalty provisions for breach necessarily fall well within the definitional boundaries of “terms and conditions” of employment. In determining whether an employer may nevertheless impose such a term and condition of employment without prior bargaining, we begin with the principle that “labor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining.” In order to overcome this presumption, therefore, it is clear initially that the subject matter sought to be addressed by the employer must go to the “protection of the core purpose of the enterprise.” Where that is the case, the rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer’s legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives. [Footnotes omitted.]

In light of the Board’s decision Respondents are free to establish and promulgate a Corporate Code of Ethics applicable to bargaining unit employees without first giving prior notice and opportunity to bargain to the Union *if* the contents of such a Code are necessary to the credibility of the business and/or the quality of its product, the provisions of the Code are narrowly tailored, unambiguous, and designate the category of employees to whom applicable.

Viewing the Code and the revised Code in light of the Board’s decision it is clear to me that Respondent must rescind the Code in part in so far as it is applicable to the bargaining unit employees. The original Code, which was replaced by the revised Code in January 1987, is overly broad in its entirety since it applied not only to employees but also to the families of employees and to entities in which the employee had an interest.

Respondents argue that many but not all of the provisions of the Code are the same or virtually the same as rules in its employee handbooks which everyone concedes already bind the employees, ergo, how can it violate anyone’s rights if these same provisions are recorded in another document. This is a pretty good argument but the language in the Code is *not* precisely the same as that in the handbooks and are subject therefore to a different interpretation. From a practical point of view Respondents’ interest in making sure its bargaining unit employees do not violate provisions of the handbook doesn’t require promulgating the Code since the “rule” is already memorialized in the handbook.

In addition, the provisions of the handbook do not apply to the members of an employee’s family in any way whereas all the provisions of the original and Corporate Code of Ethics and many of the provisions of the revised Corporate Code of Ethics do.

I will examine the provisions of the revised Code separately. With respect to paragraph 1 of the Code, which is the same in both the original and revised versions it fails to meet the *Peerless Publications* test since it is clearly ambiguous. On its face it would appear to conflict with the seniority clauses in collective-bargaining agreements.

Paragraph 2 is also ambiguous, e.g., can an employee disclose his salary to a lending institution to insist the employee in securing a loan on a piece of investment property. Paragraph 2 is considerably broader than the Patent and Confidential Information Statement signed by each employee when hired. That document would appear to adequately protect Respondents’ proprietary interests.

Paragraph 3 appears to be overly broad and vague. How does it protect the core purposes of the AEP system to prevent an employee’s wife, son, or daughter from accepting a favor or gift and it doesn’t appear that this prohibition on receiving gifts is dependent in any way on the identity of the gift - given.

Does paragraph 4 require an employee to report what his son makes as an employee for a company which does a lot of business with AEP or one of its operating companies? This paragraph is also vague and doesn’t appear to protect the core purposes of the AEP system.

Paragraphs 5, 6, 7, 8, and 9 appear to be quite reasonable and essentially say to the employees that they should obey the law. They go to the core purposes of the enterprise. AEP and its operating companies can unilaterally demand that their employees obey the law. Bargaining about this would not make a lot of sense because compromise is out of the question. It would be contrary to public policy, e.g., for the parties to agree that employees will obey only the law east of the Mississippi and not the law west of the Mississippi. A heavily regulated public utility (or for that matter any other employer) has the right to unilaterally tell its employees to obey the law without running afoul of the National Labor Relations Act.

Paragraph 10 is reasonable in so far as it applies to the employees; themselves. It is overly broad when it informs employees, implicitly, that they can be disciplined for actions by members of their families in the absence of evidence that employees directed or caused members of their immediate family to violate this paragraph’s prohibition against bribery, kickbacks, etc.

Paragraph 11 prohibits an employee from accepting additional outside employment if it is judged to interfere with the efficient performance of the employee’s duties with the company or to result in a conflict of interest. This subject matter is covered in more detail and with slightly different language in Employee Handbooks introduced into evidence at the hearing. Having item 11 in the Corporate Code of Ethics can only lead to confusion and ambiguity since it is *not* exactly like the language in the handbook.

Paragraph 12 is vague. Does the word “supervisor” in the paragraph refer to that term as defined in the National Labor Relations Act? Does it include employees presently in bargaining units represented by one of the Charging Parties?

Paragraph 13 is vague and ambiguous. If prior paragraphs of the Code are vague—which I find they are—then it is equally vague to require employees to report violations of vague provisions of a Code by other employees. Indeed to even require employees to report violations of vague provisions committed by the wives, sons, and daughters of fellow employees.

Only paragraphs 5, 6, 7, 8, and 9 or less than half the Code address a subject matter—integrity and lawful behavior—that go to the protection of the core purposes of the enterprise.

In light of all of the above Respondents may well be on the right track in following the advise of their outside auditor to publish a Corporate Code of Ethics. They can do so unilaterally as regards management officials and employees not represented by a union but as regards represented bargaining unit employees Respondents should give prior notice and opportunity to bargain to the Union involved before issuing a Corporate Code of Ethics applicable to bargaining unit employees that covers employees families as the original Code did or one that contains language the same as paragraphs 1, 2, 3, 4, 10 (only in so far as it applies to an employee's family), 11, 12, and 13 of the revised Corporate Code of Ethics.

Their failure to do so in this case constitutes a violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents violated Section 8(a)(1) and (5) of the Act when it issued its Corporate Code of Ethics, in February 1980 and December 1985 and when it issued the revised Corporate Code of Ethics in January 1987 with paragraphs 1, 2, 3, 4, 10 (insofar as it applies to families of employees), 11, 12, and 13 without first giving prior notice and opportunity to bargain to the Unions.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record in this proceeding, I issue the following recommended³

ORDER

The Respondents, American Electric Power Company and its subsidiaries Columbus Southern Power Company, formerly known as Columbus and Southern Ohio Electric Company, Kentucky Power Company, Appalachian Power Company, Indiana Michigan Power Company, formerly known as Indiana and Michigan Electric Company, Kingsport Power Company, Michigan Power Company, and Ohio Power Company, and their officers, agents, successors, and assigns, shall

³If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, on request, about terms and conditions of the employment embodied in the Respondents' Corporate Code of Ethics.

(b) Unilaterally promulgating or modifying Corporate Codes of Ethics which affect terms and conditions of employment, or enforcing such unilaterally promulgated or modified Corporate Codes of Ethics without giving prior notice and opportunity to bargain to the Union.

(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 in writing the original Corporate Code of Ethics issued in February 1980 and paragraphs 1, 2, 3, 4, 10 (only in as far as it applies to the families of bargaining unit employees), 11, 12, and 13 of the revised Corporate Code of Ethics issued in January 1987 as to bargaining unit employees represented by Locals 1466, 978, 1392, 934, 876, and 981, IBEW.

(b) On request, bargain with the Union concerning terms and conditions of employment to be contained in any revised Corporate Code of Ethics, and, if an agreement is reached, embody it in a signed agreement.

(c) Post at its place of business⁴ copies of the appropriate attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional director for Region 9, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately on receipt 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent have taken to comply.

⁴Respondent Columbus Southern should post the notice at its facility in Columbus, Ohio, Kentucky Power in Ashland, Kentucky, Appalachian Power in Roanoke, Virginia, Indiana Michigan in Fort Wayne, Indiana, Kingsport Power in Kingsport, Tennessee, Michigan Power in Three River, Michigan, and Ohio Power in Canton, Ohio.

⁵If 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."