

Kolman/Athey Division of Athey Products Corporation and Allied Industrial Workers of America, AFL-CIO. Case 18-CA-10490

May 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On April 5, 1989, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

AMENDED REMEDY

Include the following in the judge's remedy:

"Any backpay due will be determined in accordance with the method described in *Ogle Protection Service*, 183 NLRB 682 (1970). We shall leave to the compliance stage the question whether the Respondent must pay any additional sums into employee benefit funds

¹No exceptions were filed to the judge's finding that the parties were deadlocked or bargained to impasse on April 25, 1988. Additionally, no exceptions were filed to the judge's finding that the Respondent did not violate the Act when it changed health insurance carriers without notice to or bargaining with the Union.

Regarding the Board's jurisdictional requirements, we find that during the 12-month period ending December 31, 1987, the Respondent, in the course and conduct of its business operations, sold and shipped from its Sioux Falls, South Dakota facility products, goods, and materials valued in excess of \$50,000 to points outside the State of South Dakota. During the same period, the Respondent, in the course and conduct of its business operations, purchased and received at its Sioux Falls, South Dakota facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of South Dakota.

We correct the following case citations: *Lloyd A. Fry Roofing Co.*, 123 NLRB 647 (1959); *NLRB v. Southern Materials Co.*, 447 F.2d 15 (4th Cir. 1971); *Athey Products Corp.*, 282 NLRB 203 (1986); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d Cir. 1979); *Saunders House v. NLRB*, 719 F.2d 683 (3d Cir. 1983); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343 (9th Cir. 1978); *Southwest Security Equipment Co.*, 262 NLRB 665 (1982).

²In agreeing with the judge that the Respondent violated Sec. 8(a)(5) by insisting to impasse on its waiver proposal, we find it unnecessary to rely on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Further, we find it unnecessary to decide whether the Respondent's waiver proposal was an illegal, as distinguished from merely a permissive, subject of bargaining. See *Reichhold Chemicals*, 288 NLRB 69, 71-72 (1988).

³The General Counsel has excepted to the judge's failure to include in his remedy a reference to the appropriate formula for the computation of backpay, and a provision for payment of potential retroactive contributions and additional sums into fringe benefit funds. We find merit in the General Counsel's exceptions, and shall amend the remedy section of the judge's decision accordingly. Additionally, we have modified the recommended Order to include the Board's traditional narrow injunctive language and a records preservation provision.

in order to satisfy our 'make-whole' remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979)."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kolman/Athey Division of Athey Products Corporation, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d).

"(d) 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. Substitute the following for paragraph 2(b).

"(b) Make whole the successful bidders for those two jobs for any losses in wages and benefits they suffered by virtue of the fact they were not selected and assigned to operate the machines in the manner set out in the remedy section of the judge's decision, as amended."

3. Insert the following as paragraph 2(d) and reletter the following paragraphs.

"(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

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

CHAIRMAN STEPHENS, concurring in the result.

I agree with the judge that the Respondent violated Section 8(a)(5) by insisting to impasse on an election-of-remedy proposal. I find it unnecessary, however, to determine whether the Respondent's proposal was an illegal, as distinguished from merely a permissive, subject of bargaining. Although the Board has found certain attempted contractual restrictions on access to Board procedures to be per se illegal, other voluntarily agreed-to contractual provisions conditioning access to the Board have been sustained. Compare *Conoco, Inc.*, 287 NLRB 548, 559 (1987), with *St. Joseph Hospital Corp.*, 260 NLRB 691 (1982).

In the latter case, which is most relevant to the instant case but not discussed by the judge, the Board found no violation of Section 8(a)(4) for an employer and a union to agree to include within a grievance-arbitration clause an election-of-remedy proviso barring proceedings by an employee under that procedure in the event that the employee pursued "a legal or statutory remedy." In upholding the provision as not per se illegal, the Board stressed that it "seeks to prevent duplicative adjudication by requiring an election of remedies, especially where the limitation is imposed on a

contractual right, rather than a legal or statutory right.” However, the Board did not face the separate question of whether the employer could insist to impasse on the disputed proviso, and therefore the Board avoided having to decide on which side of the mandatory-permissive fence it fell.¹ Because the Respondent here did insist to impasse on an election-of-remedy type provision, I now consider that issue.

The provision in question stated:

The Company and the Union mutually agree that a condition precedent to the invocation, processing or arbitration of a grievance is that the Union and/or any employee or employees involved must agree that this grievance and arbitration procedure is the exclusive avenue by which the grievance must be resolved, and should the Union and/or any employee or employees file a charge with any federal or state agency, the Union and/or the employee or employees shall be prohibited from processing or arbitrating any grievance hereunder which is based on the same or similar facts. This prohibition will void any arbitration award in favor of the Union and/or any employee or employees should a grievance be arbitrated and/or an arbitration award be made prior to or after a timely charge is filed with the federal or state agency.

In determining whether the Respondent’s election-of-remedy provision was mandatory or permissive, I draw some guidance from the Board’s established framework for assessing whether components of a grievance-arbitration procedure lie on one side or the other of this dichotomy. In *Communications Workers (C & P Telephone)*, 280 NLRB 78, 80–81 (1986), the Board found only those components of the grievance-arbitration procedure to be mandatory which are “essential components of the grievance arbitration process and govern the specific way it is to function.” Precedent in this area, however, provides little definitive guidance in identifying what may be considered an “essential component.” I note that in *C & P Telephone*, the Board made reference to *Electrical Workers UE v. NLRB*, 409 F.2d 150, 156 (D.C. Cir. 1969), which in relevant part stated:

Because the specific provisions . . . are essentially part of the arbitration and no-strike proposals, they are, as components of such proposals, mandatory subjects of bargaining.

Taken too literally, this statement could render all provisions in such proposals to be essential components. Further guidance, however, is offered in *C & P Telephone* to the extent that following its reference to

¹ A contract proposal may not be per se illegal, yet if it is deemed permissive rather than mandatory, it may not be insisted on to impasse. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

the “essential components of the grievance arbitration process,” it thereafter discussed a series of Board decisions in which the focus was on whether the proposal would have an “adverse effect . . . on the collective-bargaining process.” *Id.* at 81. In those cases,² each involving insistence on the recording of proceedings between the union and the employer, the Board reached different results based on whether the proceedings involved collective bargaining (i.e., negotiations for a contract or grievance discussions, with the proposal being found permissive) or adjudication (i.e., arbitration, with the proposal being found mandatory).

As is clear from the Respondent’s proposal quoted above, the election-of-remedy provision would place equivalent and intertwined restrictions both on grievance discussions and on arbitration. Due to the proposal’s severe adverse impact on the Union’s ability to engage in grievance discussions, as explained below, I find that the proposal was to that extent permissive. Accordingly, I need not determine whether its additional impact on the contractual-arbitration procedure provides any further basis for determining that the proposal is on a permissive subject and the Respondent’s insistence upon it is therefore unlawful.

The statutory definition of collective bargaining encompasses more than merely an obligation of the parties to negotiate a collective-bargaining agreement. The 8(d) definition of collective bargaining also includes a more generalized requirement for the parties “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment” . . .³ and to similarly meet and confer with respect to any question arising under the negotiated bargaining agreement.⁴ It was this expansive definition of collective bargaining which underlay the Board’s decision in *Latrobe Steel Co.*, 244 NLRB 528 (1979), *enfd.* as modified 630 F.2d 171 (3d Cir. 1980), *cert. denied* 454 U.S. 821 (1981), which I find articulates the basis for finding a violation in the case now before us. In that case, the employer, in negotiating a new bargaining agreement, attempted to impose a requirement that all grievances must be filed under the signature of individual employees, and that thereby the union would no longer be able to initiate grievances. Notwithstanding the employer’s insistence that the union would still be able to represent employees in their grievances, the Board declared, at 533:

² *Chemical Workers Local 29 (Morton-Norwich Products)*, 228 NLRB 1101 (1977); *Bartlett-Collins Co.*, 237 NLRB 770 (1978), *enfd.* 639 F.2d 652 (10th Cir. 1981), *cert. denied* 452 U.S. 961 (1981); *Bakery Workers Local 455 (Nabisco Brands)*, 272 NLRB 1362 (1984).

³ See generally *Storall Mfg. Co.*, 275 NLRB 220 (1985), *enfd.* 786 F.2d 1169 (8th Cir. 1986), in which the Board found that an employer unlawfully refused to discuss grievances with a union following its certification as bargaining representative, prior to and separate from the negotiation of a bargaining agreement.

⁴ See *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501 (1985), *enfd.* 799 F.2d 84 (3d Cir. 1986).

The right of the Union, however, to represent the employees in the unit, both individually and collectively, at all stages of the grievance procedure, including the right to file grievances and process them, and to administer the collective-bargaining agreement, is a statutory right which Respondent may not insist to the point of impasse that the Union waive. The proposal that only grievances signed by individual employees could be considered under the contract was not a matter included within the term “wages, hours and other conditions of employment” that Respondent was privileged to make a condition precedent to agreement, as Respondent did here.

Although the Respondent’s proposal is not phrased as a bar to the Union’s ability to initiate grievances, its necessary effect is very much the same. Any attempt by the Union to initiate and process a grievance pursuant to the Respondent’s proposal would be contingent on the forbearance of each employee in the bargaining unit from filing a charge with the Board or any other Federal or state agency based on the same or similar facts. Moreover, the prospective as well as retroactive effect of the Respondent’s election-of-remedy proposal makes it equally impossible for the Union to be assured that pending grievance discussions may not be freely blocked by a single employee or that voluntarily adjusted grievances may not be undone due to the subsequent filing of a charge. To the extent that the Act is designed to replace industrial strife with collective bargaining, the Respondent’s proposal undermines this Congressional policy in that it would render uncertain any attempt to resolve grievance disputes through collective bargaining.

In terms of this specific adverse effect on the parties’ ability to mutually adjust their disputes through collective bargaining, I note that the election-of-remedies provision does not have as a prerequisite that the alternative Federal or state agency actually entertain the substance of the parties’ dispute or that such agency resolve the issues which would otherwise be addressed in the grievance process. For example, a charge filed with the Board which is dismissed as untimely under Section 10(b) would just as effectively defeat the processing of a grievance as would a timely filed charge. Moreover, the fact that the two proceedings need only be based on “the same or similar facts” would also mean that contractual disputes which do not rise to the level of an unfair labor practice would not be resolved by the Board,⁵ but that the filing of a charge raising such an unmeritorious contention would preclude a grievance on the contractual issue.

⁵ See, e.g., *Thermo Electron Corp.*, 287 NLRB 820 (1987).

Finally, I note that the breadth of the attempted waiver regarding the Union’s fundamental ability to engage in grievance processing, provides a ready basis for distinguishing this case from recent decisions by the Board which refrained from finding unlawful an employer’s insistence to impasse on a proposed waiver of a union’s statutory rights which was significantly more restricted in scope, and thus did not so severely undermine the collective-bargaining capacity of the union.⁶

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 insist to impasse, during bargaining with Allied Industrial Workers of America, AFL-CIO, over terms for a contract covering your wages, hours, and working conditions, that your union accept an impermissibly broad contract provision limiting its and your exercise of its and your right to file charges with state and/or Federal agencies alleging we have violated public laws based on facts forming a basis for a claim we have also violated a contract between your union and us.

WE WILL NOT insist to impasse during such bargaining on a contract provision authorizing a union representing our employees at Raleigh, North Carolina, rather than your union to negotiate and agree to changes in your health insurance plan, including changes in the insurance carrier, changes in benefits, and changes in your contributions towards the premium costs of your coverage or other changes.

WE WILL NOT select and assign employees within the unit represented by your union to operate machines acquired and placed in operation subsequent to the expiration of our 1985-1988 contract with your union and prior either to agreement with your union or a bargaining impasse over a proposal by us permitting our unilateral selection and assignment of such jobs.

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 post the jobs of operating the Whitney machine and the Torch Mark machine on appropriate employee bulletin boards for bid, process the bids received in accordance with the policies and procedures

⁶ See *Toledo Blade Co.*, 295 NLRB 626 (1989), enf. denied 907 F.2d 1220 (D.C. Cir. 1990); *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989). Cf. *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988).

set out in our 1985–1988 contract with your union and select and assign the successful bidders under the application of those policies and procedures to operate the two jobs.

WE WILL make whole, with interest, the successful bidders for those two jobs for any wage losses and benefits they suffered by virtue of our failure to select them for the initial operation of the two jobs.

WE WILL bargain with Allied Industrial Workers of America, AFL–CIO at its request over the terms of a contract covering the wages, hours, and working conditions of:

All production and maintenance employees employed by Kolman/Athey Division of Athey Products Corporation at its Sioux Falls, South Dakota facilities, excluding inspectors, lab technicians, engineers, office clerical employees, guards and supervisors as defined in the Act.

KOLMAN/ATHEY DIVISION OF ATHEY
PRODUCTS CORPORATION

Everett Rotenberry, Esq., for the General Counsel.
John E. Burke, of Sioux Falls, South Dakota, for Athey.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On July 19, 1988, I conducted a hearing at Sioux Falls, South Dakota, to try issues raised by a complaint issued on June 23, 1988, based on original and amended charges filed by Allied Industrial Workers of America, AFL–CIO (AIW) on May 11 and June 15, 1988.

The complaint alleged Kolman/Athey Division of Athey Products Corporation (AP) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by insisting on certain contract provisions, assigning AIW-represented employees to newly created jobs without following existing bid procedures or prior notice and bargaining, making changes in the health plan covering AIW-represented employees without prior AIW consent and failing to bargain in good faith over AIW-proposed changes in the health and pension plans covering the AIW-represented employees, all prior to impasse in bargaining between AP and AIW over terms for a contract supplanting an expiring and expired contract between AP and AIW covering the wages, hours, and working conditions of an appropriate unit of AP's Sioux Falls employees.

AP denied committing any unfair labor practices.

The issues are whether AP committed the acts alleged and if so, whether AP thereby violated the Act.

The General Counsel (GC) and AP appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT¹

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all relevant times AP was an employer engaged in commerce in a business affecting commerce and AIW was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Since 1965 AIW has been, and has been recognized by AP as, the exclusive collective-bargaining agent of a unit of AP's employees appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act consisting of:

All production and maintenance employees at AP's Sioux Falls, South Dakota facility; excluding inspectors, lab technicians, engineers, office clerical employees, guards and supervisors as defined in the Act.

Since 1965 AP and AIW have executed a succession of contracts covering the wages, hours, and working conditions of employees within the above unit, including a contract executed on April 19, 1985, for a term extending from February 1, 1985, through January 31, 1988.

The 1985–1988 contract was terminated in accordance with its terms; AP and AIW met frequently between December 3, 1987, and April 25, 1988, but were unable to reach agreement on terms for a successor to the 1985–1988 contract; and on April 25, 1988, AP presented AIW with a document labelled its final offer. No serious bargaining occurred thereafter prior to AIW's filing of the charges in this case.

B. *The AP Waiver Demand*

The grievance procedure set out in the 1985–1988 contract did not contain a waiver provision.

In its initial written contract proposal of December 3, 1987, a subsequent modification of January 28, 1988, and its final offer of April 25, 1988, AP proposed the following provision be included in the grievance section of a proposed successor to the 1985–1988 contract:

The Company and the Union mutually agree that a condition precedent to the invocation, processing or arbitration of a grievance is that the Union and/or any employee or employees involved must agree that this grievance and arbitration procedure is the exclusive avenue by which the grievance must be resolved, and should the Union and/or any employee or employees file a charge with any federal or state agency, the Union and/or the employee or employees shall be prohibited from processing or arbitrating any grievance hereunder which is based on the same or similar facts. This prohibition will void any arbitration award in favor of the Union and/or any employee or employees

¹ While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, since my findings are based on my examination of the entire record, my observation of the demeanor of every witness while testifying, and my evaluation of the reliability of their testimony, any testimony in the record which is inconsistent with my findings is discredited.

should a grievance be arbitrated and/or an arbitration award be made prior to or after a timely charge is filed with the federal or state agency.

Employees and their authorized agents have a right under the Act to invoke or file and to process or adjust grievances with an employer; such agents have a right under the Act to be present at any attempted adjustment by an employer of the grievance of an employee represented by the agent; both employees and their agents have a right under the Act to file charges alleging an employer has violated the Act based on facts which form the basis for invoking or filing and seeking to process or adjust a grievance alleging that employer has breached a contract; and both agents and employees have rights under various public statutes or laws to file charges alleging an employer has violated the pertinent statute or law based on facts which form the basis for invoking or filing and seeking to process or adjust a grievance alleging that employer has breached a contract.

AP justifies its proposal on the ground its acceptance by AIW would avoid litigation in multiple forums based on the same or similar facts.

Employer-union agreements limiting or barring the exercise of some statutory rights have been honored, such as the statutory right to strike during the life of a contract (*NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); *Textile Workers UTWA v. Lincoln Mills*, 353 U.S. 448 (1957); *Lloyd A. Fry Roofing Co.*, 123 NLRB 645 (1959)), and the statutory right to bargain during the life of a contract (*NLRB v. Auto Crane Co.*, 536 F.2d 310 (10th Cir. 1976); *NLRB v. Southern Materials Co.*, 446 F.2d 15 (4th Cir. 1971)).

However, employer attempts to limit or bar the exercise of other statutory rights, particularly those of individual employees as distinguished from those of their agents, have been held unlawful, such an employer insistence to impasse on union agreement to condition employee reinstatement on his waiver of his statutory right to file an unfair labor practice charge over his discipline (*Isla Verde Hotel Corp.*, 259 NLRB 496 (1981), enfd. 702 F.2d 268 (1st Cir. 1981); *Reichhold Chemicals*, 288 NLRB 69 (1988)); employer insistence to impasse on union agreement to waive both the union and employee statutory right to file unfair labor practice charges in the event a strike or lockout occurred during the life of a contract (*Newberry Equipment Co.*, 157 NLRB 1527 (1966)); employer insistence to impasse on union agreement to condition employee receipt of severance pay on waiver of the employee statutory right to charge the employer with violation of health and/or safety statutes (*Borden, Inc.*, 279 NLRB 396 (1986)); employer insistence to impasse on union agreement to waive both union and employee statutory rights to file unfair labor practice charges and the employees' statutory right to invoke or file and process or adjust grievances over discipline imposed on them for filing charges with a Federal or state agency alleging violation of Federal or state safety and/or health statutes or laws (*Matlock Truck & Trailer Corp. v. NLRB*, 425 F.2d 671 (6th Cir. 1976)); employer insistence to impasse on union agreement to waive employee statutory rights to reinstatement and union and employee rights to invoke or file and process or adjust grievances over employer refusals of employee reinstatement over discharges or suspensions during a strike

(*American Cyanamid Co.*, 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979)).

The rationale for the last-cited cases was clearly expressed by the United States Supreme Court in stating:

We think it clear there can be no prospective waiver of an employee's rights . . . a union may waive certain statutory rights relative to collective activity, such as the right to strike . . . [but] Title VII concerns . . . an individual's right to equal employment opportunities. . . . In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.²

Under the AP proposal, an AIW attempt to enforce an arbitration award barring AP from discriminating against any AIW-represented employees in wages, work assignments, job bidding, promotions, etc. on the basis of sex, race, or national origin,³ could be nullified by an employee charge filed with an appropriate Federal or state agency alleging he had been disciplined or discharged because of his race or national origin. Similarly, AP could refuse to accept or process an employee grievance over his discharge for refusing to handle materials or substances he believed hazardous or dangerous to his health because AIW had filed a charge with an appropriate Federal or state agency seeking an order prohibiting AP from utilizing the material or substance on the ground it was hazardous or dangerous to the health of all the employees in the plant. Similar examples may be readily visualized.

AP's proposal not only attempts to require AIW either to waive the statutory right of the employees it represents to invoke or file and process or adjust their grievances over alleged AP breaches of an AP-AIW contract covering their wages, hours, and working conditions or their statutory right to file charges with an appropriate Federal or state agency, an election which would bar resort to forums providing different remedies in the interests of differing public and private policies and goals for the sole reason similar facts give rise to their invocation.

I find, on the basis of the foregoing, AP's insistence to impasse on AIW acceptance of a contract provision imposing impermissibly broad limitations on the exercise by AIW and/or the AP employees it represents of their public or statutory rights violated Section 8(a)(1) and (5) of the Act.⁴

C. The AP Transfer of Bargaining Authority Demand

Prior to the execution of the 1985-1988 AP-AIW contract, AP employees at Raleigh, North Carolina, represented by another union and AP's AIW-represented employees at Sioux Falls were covered by a single health plan or policy issued by the Pilot Life Insurance Company (after negotiation of its terms with AP).

In 1985, AP negotiated a health plan with a different carrier, Protective Life Insurance Company.

² *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 51-52 (1974).

³ There was an antidiscrimination provision in the 1985-1988 AP-AIW contract which neither sought to modify in the negotiations.

⁴ I reject AP's contention it did not violate the Act because it did not "insist" on AIW agreement to its proposal. The proposal continued unchanged in all its written contract proposals, including its final offer. While AP did not place the terms of its final offer in effect, it repeatedly asserted (in its brief) the parties were deadlocked or at impasse on April 25, 1988, when it submitted its final offer and it is apparent it did not place its final offer in effect because shortly after that submission AIW charged the proposal was an unfair labor practice.

Under the terms of the 1985–1988 AP-AIW contract, AP agreed to freeze the costs to the AIW-represented employees at Sioux Falls under the 1985 plan or policy provided by Protective.

In 1986, AP and Protective agreed to increase the health plan premiums, increase the employee deductible from \$100 to \$200, increase the out-of-pocket cap on employee expenditures for medical expenses from \$600 for single persons and \$700 for families to \$1000 for both, to restrict hospital admissions, and to eliminate second surgical opinions. The changes were effected without prior notice to or bargaining with AIW.

AIW filed unfair labor practice charges over AP's unilateral implementation of the changes in the plan.

On November 20, 1986, the Board found AP's unilateral implementation violated the Act⁵ and ordered AP to reimburse all AIW-represented employees at Sioux City for medical expenses exceeding the deductible and the out-of-pocket cap established in 1985.⁶

AP complied with the order and since has reimbursed the AIW-represented employees at Sioux Falls for expenditures in excess of the deductible and the cap. The union represented employees at Raleigh, however, accepted the changes and also continued the employee dependency coverage contribution of \$39 per month towards the premium costs for the health plan (as against \$14 per month by the AIW-represented employees at Sioux Falls).⁷

In its initial and first amended proposals for a successor to the 1985–1988 AP-AIW contract, AP demanded AIW agree to the same deductible and out-of-pocket cap for the employees it represented as that of the Raleigh employees and an increase in the dependency coverage contribution of the employees it represented to the same amount the Raleigh employees were contributing.

However, in its April 25, 1988 final offer, AP added an additional demand; that during the life of the successor contract AIW authorize the union representing the Raleigh employees to bargain and agree on changes in the health plan carrier, changes in the health plan benefits, changes in the employee contributions towards the cost of the health plan, and any other changes, with AIW and the employees it represented limited to an explanation of the changes and the reasons for their adoption and implementation.

An employer demand that the collective-bargaining representative of his employees abdicate and assign to another its status and role as bargaining agent with respect to the employees' wages, hours, or working conditions has long been held a nonmandatory subject of bargaining and employer insistence thereupon to impasse a violation of Section 8(a)(1) and (5) of the Act.⁸ Not only that, a bargaining agent's

agreement thereto could subject it to a charge of failure to fairly represent (by employees dissatisfied with the designee's agreement or agreements concerning their wages, hours, or working conditions).⁹

Thus by acceding to the AP demand, AIW not only would authorize another union to negotiate and accept changes in the AIW-represented employees' wages binding on those employees, it would expose AIW to employee claims of failing to fairly represent them in the event the AIW-represented employees were dissatisfied with changes proposed by AP and accepted by the other union in the health plan carrier and/or benefits and/or employee premium contributions.

I therefore find and conclude by insisting to impasse¹⁰ that AIW accept its demand for delegation or transfer to another union of its bargaining authority concerning the negotiation and implementation of changes in the health insurance carrier and/or health benefits and/or employee contributions to health plan premiums and/or other health plan changes affecting the Sioux Falls employees represented by AIW, AP violated Section 8(a)(1) and (5) of the Act.

D. The AP Failure to Post and Bid

The 1985–1988 AP-AIW contract listed the job classification of "layout" at a rate of \$8.26 and the job classification of "welder" at a rate of \$7.95.

The contract also provided AP would post and accept bids on any new job and fill the job with the senior bidder demonstrably able to perform the duties of the posted job.

In February 1988, AP notified AIW it had purchased and installed two new machines—a Whitney machine and a Torch Mark machine—and that it would post the jobs of operating the two machines, in accordance with the terms of the expired contract and past practice.

Instead, however, AP assigned the "layout" rate to the two jobs, assigned unit employee McComber, a welder, to operate the Whitney machine and assigned unit employee Vandenberg, another welder, to operate the Torch Mark machine.

AP neither notified nor advised AIW of the assigned rate and personnel assignments prior to their effectuation, and ignored AIW's position the two jobs should have been filled through the bid-posting and job-filling procedure contained in the 1985–1988 contract and previously practiced.

The Board and reviewing courts have long applied the principle an employer is required to maintain existing wages, hours, and working conditions until the employer and the bargaining agent representing his employees have bargained either to agreement or impasse concerning any changes therein.¹¹

⁵ 282 NLRB 29 (1986).

⁶ AP did not deduct increased contributions towards the health plan premiums from the wages of the AIW-represented employees.

⁷ AP continued to pay the \$25 difference between the Raleigh employees' contribution and that of the AIW-represented employees.

⁸ *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958) (employer demand other than the agent designated by the employees be named as the contract bargaining agent); *Taormina Co.*, 94 NLRB 884 (1951), enf. 207 F.2d 251 (5th Cir. 1953) (same as above); *L. G. Everist, Inc.*, 103 NLRB 308 (1953) (employer demand bargaining agent accept form of another's contract); *Electrical Workers IBEW Local 59 (Textile, Inc.)*, 119 NLRB 1792 (1958) (same as *Borg-Warner*, *ibid.*); *American Vitriified Products Co.*, 127 NLRB 701 (1960) (employer demand limiting bargaining agent's selection of its representative); *King Radio Corp.*, 172 NLRB 1051 (1968) (same as *Borg-Warner*,

ibid.); *Newspaper Agency Corp.*, 201 NLRB 480 (1973) (employer demand bargaining agent abdicate and assign to another its right and duty to bargain on behalf a unit of that employer's employees); etc.

⁹ *Southwestern Pipe*, 179 NLRB 364 (1969); *revd. on other grounds* 444 F.2d 340 (5th Cir. 1971).

¹⁰ I again find and conclude the parties were at impasse on April 25, 1988, based on the reasons cited in fn 4.

¹¹ *NLRB v. Katz*, 369 U.S. 736 (1962); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (1st Cir. 1979); *Old Man's Home of Philadelphia v. NLRB*, 719 F.2d 683 (2d Cir. 1983); *Hen House Market No. 3 v. NLRB*, 428 F.2d 133 (8th Cir. 1970); *NLRB v. Pacific Grinding Wheel Co.*, 512 F.2d 1343 (9th Cir. 1978); *NLRB v. Antonino's Restaurant*, 648 F.2d 1206 (1981); *NLRB v. Cauthorne Trucking*, 691 F.2d 1023 (D.C. Cir. 1982); *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

Thus employers have been found to have violated Section 8(a)(1) and (5) of the Act by:

1. Changing the existing procedure governing assignment of employees to “markup” jobs prior to union agreement or impasse (*Sacramento Union*, 258 NLRB 1074 (1980)).

2. Failing to follow the past practice of recalling employees from layoff on the basis of their seniority prior to union agreement or impasse (*Quality Packaging Co.*, 265 NLRB 1141 (1982)).

3. Failing to follow the past practice of laying off employees on the basis of their seniority prior to union agreement or impasse (*Johns-Manville Sales Corp.*, 282 NLRB 182 (1986)).

4. Combining job classifications following contract expiration but prior to agreement or impasse (*PRC Recording Co.*, 280 NLRB 615 (1986), enfd. 836 F.2d 289 (7th Cir. 1987)).

5. Failing to hire through the hiring hall procedure established in an expired contract in recruiting new employees after contract expiration and prior either to union agreement or impasse (*Southwestern Steel & Supply Co.*, 276 NLRB 1569 (1985), enfd. 806 F.2d 1111 (D.C. Cir. 1986); *Southwest Security Equipment Co.*, 262 NLRB 1328 (1982), enfd. 736 F.2d 1332 (9th Cir. 1984)).

6. Discontinuing payments into health and pension funds and discontinuing other fringe benefits established under an expired contract prior either to union agreement or impasse (*Auto Fast Freight*, 272 NLRB 561 (1984), enfd. 793 F.2d 1126 (9th Cir. 1986); *Stone Boat Yard*, 264 NLRB 981 (1982), enfd. 715 F.2d 441 (9th Cir. 1982); *Peerless Roofing Co.*, 247 NLRB 500 (1980), enfd. 641 F.2d 734 (9th Cir. 1981); *Imperial Foods*, 287 NLRB 1200 (1988); *Beitler-McKee Optical Co.*, 287 NLRB 1311 (1987); *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987)).

AP contends it was not required to post the two jobs and follow the bid procedure because the contract also provided bids were limited to employees earning an hourly rate lower than the rate of a new job and, in AP’s judgment, only four employees within the unit were qualified to perform the duties of the two jobs and all four were earning the rate AP assigned to the job.

That argument is nullified by the fact the two employees assigned the jobs were earning less than the rate assigned to the job when assigned to perform it, and may well have lost out in a bidding competition with other similarly situated employees, had AP posted the two jobs and received bids.

On the basis of the foregoing, I find and conclude by filling two newly created jobs by appointment rather than through the posting and bid procedure established under the expired contract and past practice prior either to securing AIW agreement thereto or bargaining impasse, AP violated Section 8(a)(1) and (5) of the Act.

E. The Health Plan Change

Findings have been entered (in II,C) since 1986 the AIW-represented employees: have been covered by a health plan negotiated between AP and Protective Life Insurance Company; have contributed \$14 per month towards premium cost; and have been reimbursed for their expenditures exceeding \$100 and the \$600/\$700 cap on out-of-pocket expenditures; i.e., AP has continued to comply with the terms of the 1986 Board decision through the term of the 1985–1988 AP-AIW contract and during negotiations for a successor thereto.

Following the expiration of the 1985–1988 AP-AIW contract, AP negotiated a new health plan with Lincoln Life Insurance Company. That plan contained provisions identical to those of the Protective Life plan and AP continued to pay any difference in dependent coverage costs above the \$14 per month contributed by AIW-represented employees thereto and to reimburse AIW-represented employees for expenditures exceeding the original \$100 deductible and \$600/\$700 out-of-pocket maximum.

Thus all that occurred during the negotiations was a change in insurance carriers, with no change affecting the wages, hours, or working conditions of the AIW-represented carriers.

In such circumstances, I find and conclude by effecting the change in carriers during negotiations, AP did not violate the Act.¹²

F. The Health and Pension Plan Bargaining

The 1985–1988 AP-AIW contract contained the following language pertaining to the health and pension plans covering the Sioux Falls employees:

ARTICLE XX

Insurance, Pensions, Etc.

Section 1. During the life of the Athey Products Corporation Union Agreement, we of the KOLMAN Division of Athey Products Corporation agree to continue the insurance and pension plan provisions as attached in Exhibit “D.” The Company also agrees to study and look into any possible changes or advantages that may become available in the future that could help or improve coverage.

Section 2. The Company agrees to freeze the cost of existing insurance paid by the employee at the level of contract date through the life of this agreement. However, if improvements are possible or changes can enhance or improve coverage by a change in insurance companies, etc., these possible changes will be reviewed by both the Company and the Union to determine acceptance of same. In this case the Company and the employees will share equally any increased cost involved.

Section 3. Insurance for laid off employees will continue one I additional month beyond termination.

On October 21, 1987, AP and Local 465 of the Operating Engineers Union (OE) executed a contract for a term expiring April 20, 1990, containing the following language pertaining to health and pension plans covering a unit of AP’s Raleigh employees:

ARTICLE XVI—INSURANCE AND PENSIONS, ETC.

Section 1. During the term of this Agreement, and after meeting certain requirements, employees in the Bargaining Unit will be fully covered by the provisions of the Company’s non-contributory pension plan. Information concerning the plan can be obtained from the Company Personnel Office. Any improvements made in

¹²Cf. *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973).

the Pension Plan during the term of this Agreement will be applied to all members of the Bargaining Unit.

Section 2. *Health Care Plans, Weekly Disability, Life, and A.D.D. Insurance.* The Company's Comprehensive Plan, consisting of hospital, surgical, medical services, dental in the optional HMO plan only, vision care in the optional HMO plan only, disability, life, and A.D.D. shall be provided for all eligible employees throughout the life of this Agreement in accordance with the current provisions of the plan which are part of this Agreement by reference. The amounts of the employer's and employees' current contribution to the premium rate for any coverage under the plans are set forth below:

	<i>PRESENT PLAN</i>	<i>HMO PLAN</i>
	“Protective Life”	Figures Quoted for Acceptance by Dec. 1, 1987
Employees Only		
Insurance:		
Cost to Employees:	Weekly: \$2.61	
	Monthly: 11.33	
Cost to Company:	Weekly: \$16.00	\$ 16.00
	Monthly: 69.34	69.34
	Total/Month: \$69.34	\$80.67
Family Insurance:		
Cost to Employees:	Weekly: \$9.01	\$20.98
	Monthly: 39.01	90.92
Cost to Company:	Weekly: \$28.61	\$ 28.50
	Monthly: 123.96	123.51
	Total/Month: \$162.97	\$214.43

NOTE: In case of price increases, 50% of the increase will be to the account of the Company; 50% of the increase will be to the account of the employee. In case of price deduction, the savings will be proportioned equally to the Company and employee in accordance to the percentage monetary contributions.

Changes in benefits and/or contributions shall be reviewed by Management and two Bargaining Unit employees selected by the Union prior to implementation by the Company.

AP's initial (December 3, 1987) proposal for a successor to the expiring 1985–1988 AP-AIW contract contained language respecting health and pension plans identical to that contained in article XVI of the 1987–1990 AP-OE contract.

With respect to the health and pension plans, AIW initially (on December 3, 1987) proposed the successor to the expiring 1985–1988 AP-AIW contract contain the language of the 1985–1988 AP-AIW contract as modified by language:

1. Raising A & E benefits to \$125 per week;

2. Providing paid up hospital benefits for employees on retirement from the Company, including employees forced to retire because of disability;
3. Providing dental and optical coverage; and
4. Providing with respect to the pension plan,
 - a. Five year vesting,
 - b. An option to retire after 30 years of service, regardless of age, and
 - c. An increase in pension benefits.

James Cloonan, the president and chief executive officer of AP,¹³ appeared at the first (December 3, 1987) bargaining session between AP and AIW. Asked by the chief AIW negotiator (AIW representative Stan Frank) to respond to AIW's proposals concerning the health plan, Cloonan stated AP had a plan in effect at Raleigh and was not going to negotiate anything else for Sioux Falls employees.¹⁴

Blalock¹⁵ testified AP Counsel John Burke stated Cloonan was only setting out AP's opening bargaining position by the remarks just quoted, everything was negotiable. Frank did not contradict that testimony. (Burke, Cloonan, and others identified as in attendance did not testify.) Blalock's notes of the meeting support his testimony; Burke's notes reflect Cloonan stated AP was proposing the Sioux Falls employees contribute the full \$39 towards the cost of dependent coverage instead of the \$14 they were currently contributing, that this was only AP's initial bargaining position, and that Cloonan confirmed his statement.

In essence, Blalock's testimony is uncontradicted and has documentary support. I therefore credit that testimony.

It is clear AP never deviated from the position Cloonan announced at the opening of negotiations—that AP was not going to settle for other than adoption by the AIW-represented employees at Sioux Falls of the health plan language and plan established by earlier agreement between AP and the representative of its Raleigh employees.

Each time in the negotiations subsequent to December 3, 1987, Frank sought to generate discussion of AIW's proposals concerning the health and pension language and plans to be embodied within a successor contract,¹⁶ Blalock replied there was only going to be one health plan and one pension plan covering the Raleigh and Sioux Falls employees, further commenting the Raleigh employees were upset over the fact Sioux Falls employees had been contributing less than they contributed towards the cost of dependent coverage.¹⁷

In the course of his testimony, Blalock stated there were approximately 67 employees in the Sioux Falls unit represented by AIW and between 300 and 350 union rep-

¹³The complaint alleged, the answer admitted, and I find at all pertinent times Cloonan was an officer, supervisor, and agent of AP acting on its behalf within the meaning of Sec. 2 of the Act.

¹⁴Donald Blalock, the general manager at AP's Sioux Falls plant, corroborated Frank's testimony to that effect, and both the bargaining notes of Blalock and AP Counsel John Burke, who attended the meeting, corroborate Frank's testimony.

¹⁵The complaint alleged, the answer admitted, and I find at all pertinent times Blalock was a supervisor and agent of AP acting on its behalf within the meaning of Sec. 2 of the Act.

¹⁶AIW proposed two modifications of its original proposals concerning health and pensions; AP adhered to its original proposal throughout the negotiations (except for the addition of the transfer of bargaining authority demand set out in sec. II.C above).

¹⁷Blalock did not contradict Frank's testimony to that effect.

resented employees at Raleigh; AP had for at least 10 years provided a single health plan and a single pension plan covering both its union-represented employees at Sioux Falls and its union-represented employees at Raleigh, and that the employees at Sioux Falls benefitted by such inclusion through higher benefits at lower costs than they would receive by separate plan overages.

Neither party to negotiations for a collective contract may be required to make concessions or yield on a position fairly maintained (*H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)), but (pursuant to Secs. 8(a)(5) and (d) of the Act) are required to seriously pursue negotiations aimed at resolving their differences and ultimately reaching agreement on contract terms (*NLRB v. Insurance Agents*, 361 U.S.477 (1960)).

I find and conclude AP's adherence throughout bargaining on AIW acceptance of continued coverage under single health and pension plans covering both the Sioux Falls and Raleigh employees and assumption by the Sioux Falls employees of the same deductible, cap, and contribution for dependent coverage was a fairly maintained position based on reasonable economic grounds and therefore not violative of the Act.

CONCLUSIONS OF LAW

1. At all pertinent times AP was an employer engaged in commerce in a business affecting commerce and AIW was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times AIW was duly designated by a majority of AP's employees within the following unit as their exclusive representative for collective-bargaining purposes within the meaning of Section 9 of the Act:

All production and maintenance employees at AP's Sioux Falls, South Dakota facility; excluding inspectors, lab technicians, engineers, office clerical employees, guards and supervisors as defined in the Act.

3. AP violated Section 8(a)(1) and (5) of the Act by insisting to impasse in negotiations for a successor to the 1985–1988 contract between AP and AIW on AIW acceptance of AP proposals:

a. That AIW accept impermissibly broad limitations on the exercise by AIW and/or the employees it represented of their public or statutory rights;

b. That AIW transfer to another union its bargaining authority concerning any changes during the life of a successor contract in the health plan carrier and/or benefits and/or employee contributions to premium costs with respect to the health plan, benefits thereunder and employee contributions thereto established at the execution of the successor contract.

4. AP violated Section 8(a)(1) and (5) of the Act by selecting and assigning employees to operate the Whitney and the Torch Mark machines rather than posting the jobs of operating the machines for bid and selecting the operators through the procedures set out in the 1985–1988 contract between AP and AIW following the expiration of that contract but prior to either agreement with AIW on terms for a successor contract or bargaining impasse.

5. AP did not otherwise violate the Act.

6. The aforesaid unfair labor practices affected and affect interstate commerce as defined in the Act.

THE REMEDY

Having found AP engaged in unfair labor practices, I recommend AP be directed to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

In view of my findings AP violated the Act by selecting and assigning employees to operate the Whitney and Torch Mark machines subsequent to the expiration of the 1985–1988 AP-AIW contract and prior either to agreement on changes for incorporation in a successor contract or bargaining impasse, or AIW agreement to such selection and assignment rather than resort to the bidding and selection procedures set out in the 1985–1988 AP-AIW contract, I recommend AP be directed to post the two jobs in question for bid, fill them by applying the selection and assignment procedures set out in the 1985–1988 contract, and pay to the successful bidders (if other than the incumbents in the two jobs) the difference in wages between the rates the successful bidders were receiving when the incumbent jobholders were selected and assigned and the rates the successful bidders would have received had the 1985–1988 contract's bid and selection procedures been followed, for a period commencing with the date the incumbent jobholders were selected and assigned to the jobs and the date the successful bidder is assigned thereto, with interest on the sums due computed in accordance with the formulae set out in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Kolman/Athey Division of Athey Products Corporation, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Insisting to impasse during bargaining with Allied Industrial Workers of America, AFL–CIO, over terms for a contract covering the wages, hours, and working conditions of Athey employees represented by that organization on that organization's acceptance of a contract provision limiting the exercise by that organization and the employees it represents of their right to file charges with Federal or state agencies administering public statutes over claims based on same or similar facts forming a basis for a claim Athey has violated its contract with Allied Industrial Workers of America, AFL–CIO.

(b) Insisting to impasse during bargaining with Allied Industrial Workers of America, AFL–CIO, over terms for a contract covering the wages, hours, and working conditions of Athey employees represented by that organization on that organization's acceptance of a contract provision authorizing and empowering another labor organization representing Athey employees at Raleigh, North Carolina, to negotiate

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and agree on behalf of Athey employees represented by Allied Industrial Workers of America, AFL-CIO to changes in their insurance carrier, benefits, employee contributions to premiums, or other health plan changes during the life of a successor to Athey's expired contract with Allied Industrial Workers of America, AFL-CIO.

(c) Unilaterally selecting and assigning Athey employees within the unit represented by the Allied Industrial Workers of America, AFL-CIO to operate machines acquired subsequent to the expiration of Athey's 1985-1988 contract with that organization and prior either to agreement by that organization or bargaining impasse over a proposal by Athey to permit Athey's unilateral selection and assignment of such jobs.

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

(a) Post the jobs of operating the Whitney and the Torch Mark machines on the appropriate employee bulletin boards for bid, process the bids received in accordance with the policies and procedures set out in the 1985-1988 contract between Kolman/Athey Division of Athey Products Corporation and Allied Industrial Workers of America, AFL-CIO and select and assign the successful bidders under the application of those policies and procedures to operate the two machines.

(b) Make whole the successful bidders for those two jobs for any wage losses they suffered by virtue of the fact they were not selected and assigned to operate the two machines in the manner set out in the remedy section of this decision.

(c) Bargain with Allied Industrial Workers of America, AFL-CIO at its request concerning the terms of a contract covering the wages, hours, and working conditions of:

All production and maintenance employees employed by Kolman/Athey Division of Athey Products Corporation at its Sioux Falls, South Dakota facility, excluding inspectors, lab technicians, engineers, office clerical employees, guards and supervisors as defined in the Act.

(d) Post at its Sioux Falls, South Dakota facilities copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹⁹If 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."