

North Star Steel Company and United Steelworkers of America, AFL-CIO, CLC. Case 18-CA-10357

September 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On December 19, 1990, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a brief in support, and each filed answering briefs.

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 record¹ in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

The Respondent refused to honor the Union's 1988 certification. The Board found that the refusal violated Section 8(a)(5) and a bargaining order was enforced in December 1989, in an unpublished order, by the United States Court of Appeals for the District of Columbia. The Respondent began bargaining in January 1990. On August 8, 1990, the General Counsel amended the 1988 complaint in this proceeding alleging various violations of Section 8(a)(5). The parties then stipulated the facts to the judge.

The judge found that the Respondent had violated Section 8(a)(5) of the Act, as it conceded, when it unilaterally changed an employee health insurance plan that covered unit employees, among others, in January 1988-1990. He also found, however, that the parties had reached impasse as of July 18, 1990,² and, having tentatively agreed on the then-existing plan, that the Respondent lawfully implemented it as of that date. The judge ordered the Respondent to make whole unit employees for any losses they had incurred as a result of the unilateral changes. We agree. He did not, however, require restoration of the status quo because of his finding of impasse. We do not agree. We find that the evidence does not establish impasse and that the Respondent must restore the status quo to January 1988.

The parties first met to negotiate an initial collective-bargaining agreement on January 19, 1990. The first session, and the numerous subsequent sessions during January and February, all focused on non-economic matters. After failing to reach agreement on

noneconomic items the parties began, in March, to discuss economic matters.

On March 7, the Union presented its economic proposals. One of its proposals was that the Respondent continue its current health insurance program. The parties met several times between March 7 and May 2, when they reached tentative agreement³ on many issues, including the Union's proposal that the unit employees be covered by the health insurance program then in effect. The parties subsequently met on May 16 and July 18. No further collective-bargaining sessions were scheduled after July 18, and no collective-bargaining agreement was concluded.

Based on the stipulated facts, the judge, while terming the evidence of impasse "skimpy," nonetheless, found that the parties had reached impasse. The judge relied on the facts that the parties had met for a number of bargaining sessions, failed to reach agreement, and did not schedule any negotiating sessions after July 18. The Board, however, has held that, "The number of bargaining sessions, a hiatus, and failure to reach agreement without more, do not indicate that an impasse has been reached." *Caravelle Boat Co.*, 227 NLRB 1355 (1977). In *Caravelle*, the parties had engaged in 14 bargaining sessions and there had been a 5-month hiatus in bargaining.

The Board, at 1357-1358, quoted *Taft Broadcasting*:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors. . . . [*Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.* 395 F.2d 622 (D.C. Cir. 1968).]

In the present case, the Respondent admits that it engaged in "technical" violations of Section 8(a)(5). The stipulated record does not, however, establish that an impasse had been reached by the parties in subsequent bargaining. Thus, the record fails to show how many negotiating sessions were held; the substance of many of those sessions; the importance of the issue, or issues, separating the parties; and the understanding of the parties as to the state of negotiations. Impasse is a defense to the charge of unilateral change. It must be proved by the party asserting impasse—in this case the Respondent⁴ The stipulated record fails to establish

¹In lieu of a hearing, the parties stipulated facts, exhibits, and briefs as the entire record in the case.

²All dates are 1990 unless otherwise specified.

³All agreed-upon provisions were tentative, conditioned agreement on the terms of an entire collective-bargaining agreement.

⁴*Sacramento Union*, 291 NLRB 552, 556 (1988).

impasse, and we therefore find that the defense is without merit.⁵

Consequently, we shall order that the status quo ante be restored. That is, the terms and conditions of the unit employees' health insurance program shall be returned to the level in existence before January 1988, the date of the Respondent's initial illegal unilateral action. The Respondent's monetary liability shall also continue until the status quo ante is restored.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North Star Steel Company, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and insert the following as paragraphs 2(a) and (b) and reletter all subsequent paragraphs.

“(a) Restore the terms and conditions of the unit employees' health insurance program to the level in existence before the January 1988 unilateral changes and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining.

“(b) Make whole the unit employees for losses they may have incurred as a result of the unilateral changes in the employees' health insurance program implemented by the Respondent about the first of January 1988–1990, and make the unit employees whole for their losses for the period commencing with the January 1988 unilateral conduct until the Respondent restores the terms and conditions of the health insurance program to the level in existence before the January 1988 unlawful unilateral changes, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

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

⁵Indeed, the Respondent's briefs to both the judge and the Board treat the defense of impasse as an afterthought.

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 change our bargaining unit employees' terms and conditions of employment unilaterally,

without affording the United Steelworkers of America, AFL–CIO, CLC an opportunity to bargain about the changes, and without bargaining with that Union either to agreement or to good-faith impasse.

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 restore unit employees' terms and conditions of employment to the level in existence before the January 1988 unilateral changes in the health insurance program and continue them in effect until we reach either agreement or a good-faith bargaining impasse with the Union.

WE WILL make whole our bargaining unit employees, or former employees in the unit, for the losses they have incurred as a result of our unilateral changes in their health insurance program which we implemented about the first of January 1988, 1989, and 1990, and WE WILL make whole these employees for the period commencing with the January 1988 unilateral changes until we restore the terms and conditions of the health insurance program to the level in existence before our unlawful unilateral changes. The bargaining unit is:

All full-time and regular part-time clerical employees designated non-exempt by the Employer at the Employer's facility located at 1678 Red Rock Road, St. Paul, Minnesota, including pricing specialist, purchasing, sales, accounting, and inventory clerks, typists, sales receptionist and secretary, and office equipment operators, plant clerical employees, including rolling mill clerks, maintenance clerk, quality assurance clerk, melt shop clerk and shipping clerk; but excluding temporary employees, executive secretary, personnel secretary, confidential employees, guards, professional and professional trainee personnel, management and management trainee personnel, nurse, sales persons and supervisors, as defined by the National Labor Relations Act.

NORTH STAR STEEL COMPANY

Joseph H. Bornong, for the General Counsel.
John C. Zwakman (Dorsey & Whitney), for the Respondent.
Michael A. Denardo, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. On an original charge filed on January 28, 1988, and a first amended charge filed on February 3, 1988, by the United Steelworkers of America, AFL–CIO, CLC (Union), the General Counsel of the National Labor Relations Board, by the Board's Regional Director for Region 18, issued a complaint and notice of hearing on March 11, 1988, and an amendment

to the complaint on August 8, 1990, against North Star Steel Company (Respondent), alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

More specifically, the amended complaint alleges that on July 30, 1987, the Union was certified by the Board as the exclusive collective-bargaining representative of Respondent's nonexempt clerical employees employed at its St. Paul, Minnesota facility; that subsequently, on or about the first of January of each year in 1988, 1989, and 1990, Respondent changed the health insurance programs covering these employees, including an increase in the amount the employees contributed to the cost of their health and accident insurance; and that Respondent engaged in this conduct unilaterally and without affording the Union an opportunity to negotiate and bargain with respect to such a change in the employees' terms and conditions of employment, and further alleges that by engaging in this unilateral conduct Respondent violated Section 8(a)(1) and (5) of the Act.¹

On March 23, 1988, Respondent filed an answer to the complaint and on August 16, 1990, filed an answer to the amended complaint, in which it admitted that, as alleged in the amended complaint, on or about the first of January of each year in 1988, 1989, and 1990, it changed the clerical employees' health insurance programs, including the amount of the employees' contributions, and also admitted that it engaged in this conduct unilaterally and without prior notice to the Union, but denied its conduct violated Section 8(a)(5) and (1) of the Act, as alleged.

Subsequent to the issuance of the amendment to the complaint and the Respondent's answer to the amendment, all the parties to this proceeding entered into a stipulation of fact. The parties agreed to submit this proceeding, without a hearing, directly to an administrative law judge for recommended findings of facts, conclusions of law, and order. The parties also agreed that the stipulation of fact, together with exhibits attached thereto and the briefs of the General Counsel and Respondent, constitute the entire record in this case.

On November 5, 1990, Deputy Chief Administrative Law Judge Earle V. S. Robbins issued an order assigning this matter to me for the issuance of a decision.

On the basis of the stipulation of fact and exhibits thereto, the briefs filed by the General Counsel and Respondent, and the entire record in this case, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Minnesota corporation with facilities in St. Paul and Eagan, Minnesota, where it is engaged in the manufacture of steel. During the 12-month period ending December 31, 1987, Respondent sold and shipped from its Minnesota facilities products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Min-

¹The amended complaint also alleges Respondent violated Sec. 8(a)(1) and (5) of the Act when, on or about January 21, 1988, it unilaterally changed the unit employees' work rules concerning disciplinary measures related to employees' tardiness. However, all parties agreed that this allegation would not be litigated in this proceeding. Instead all parties entered into an informal settlement agreement disposing of this allegation.

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

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

Respondent owns and operates steel production facilities in several States, including the State of Minnesota. It is a wholly owned subsidiary of Cargill, Inc. (Cargill).

Respondent employs several hundred production and maintenance employees in its Minnesota facilities, who are represented by the Union. Respondent also employs clerical employees in its Minnesota facilities. Before the Union's July 30, 1987 certification, infra, none of these clericals were represented by the Union.

On July 23, 1987, a representation election was conducted by the Board among a unit of full-time and regular part-time nonexempt clerical employees employed by Respondent at its St. Paul, Minnesota facility. The Union was the labor organization seeking to represent those employees. The official tally of ballots shows that a majority of the 24 eligible voters voted in favor of union representation.

On July 30, 1987, the Board, by its Regional Director for Region 18, issued a "Certification of Representative," certifying the Union as the exclusive representative for purposes of collective bargaining of all the clerical employees employed in the above-described voting unit.

Respondent challenged the validity of the certification by refusing to recognize and bargain with the Union as the bargaining representative of the employees in the certified unit. The Union responded by filing a charge with the Board's Regional Director which was docketed as Case 18-CA-10208. On September 15, 1987, a complaint issued against Respondent in that case alleging, in substance, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the representative of the employees in the certified unit.

In *North Star Steel Co.*, 289 NLRB 1188 (1988), a Board majority in Case 18-CA-10208 concluded that the certification issued by the Regional Director in the underlying representation case was valid and found, as alleged in the complaint, that Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.

Respondent refused to comply with the Board's decision. Rather, it petitioned to the Circuit Court of Appeals for the District of Columbia, for review of the Board's decision. In December 1989, the court, in an unpublished memorandum, affirmed the Board's decision.

On July 30, 1987, the date of the Board's certification of the Union as the bargaining representative of the nonexempt classified clerical employees employed at Respondent's St. Paul facility, and for several years prior to that date, the employment benefit plans covering Respondent's office and clerical employees were the same plans in effect for the nonexempt office and clerical employees employed by Cargill, Respondent's parent company.

As of July 30, 1987, and thereafter in 1987, 1988, 1989, and 1990, all of Respondent's office and clerical employees,

including those employed in the certified unit herein, were covered by the same employment benefit plans. One of these plans provided employees with health and accident insurance benefits. This plan, for the sake of convenience, is referred to hereinafter as the health insurance program. Besides covering all of the Respondent's salaried office and clerical employees, the health insurance program covered the approximately 8000 employees employed by Cargill.

For several years before 1987, and subsequent to 1987, Respondent made periodic adjustments in the amount of money employees were required to contribute to the several health insurance plans encompassed by the health insurance program. These contribution rate adjustments included increases and decreases in the amount of the employees' contributions. Respondent, which retains complete discretion over the amount of employees' contributions, has always maintained the same contribution rates for all of the salaried employees covered by the health insurance program.

On or about the first of January in 1988, 1989, and 1990, Respondent made changes in the health insurance program, including changes in the amounts of money employees were required to contribute to the several health insurance plans encompassed by the health insurance program. Similar changes had been made in prior years.

The employees employed in the certified unit, covered by Respondent's health insurance program, were among the employees affected by the changes in the health insurance program, including the changes in the employees' contribution rates, made by Respondent in January 1988, 1989, and 1990. These changes were made by Respondent unilaterally and without prior notice to the Union.

As noted supra, in December 1989 the Court of Appeals for the District of Columbia affirmed the Board's Decision and Order in Case 18-CA-10208, wherein the Board found Respondent had violated Section 8(a)(5) and (1) of the Act by failing and refusing in 1987 to recognize and bargain with the Union as the exclusive representative of Respondent's nonexempt clerical employees employed at its St. Paul, Minnesota facility; the certified unit.

In January 1990, negotiators for Respondent and the Union met to negotiate a collective-bargaining contract for the employees employed in the certified unit. The first bargaining session was held on January 19, 1990, at which time the Union presented a proposal covering noneconomic matters only.² There were "numerous" collective-bargaining sessions held in January and February 1990 concerning noneconomic matters. In early March 1990 the negotiators, having failed to reach agreement on all of the noneconomic matters in dispute, commenced to negotiate about economic matters.

On or about March 7, 1990, the Union presented its economic proposal to Respondent. Several negotiation sessions were held after that date, during which a wide range of economic matters, including wages and benefits, were the subject of the negotiations.

² Respondent and the Union have had a longstanding collective-bargaining relationship involving Respondent's production and maintenance employees and, as a matter of general practice, have negotiated contracts covering those employees by first negotiating about so-called noneconomic matters and then moving on to so-called economic matters.

As a part of its March 7, 1990 economic package submitted to Respondent, the Union proposed that the unit employees be covered by all of the Respondent's current employment benefit programs including the health insurance program. In this last regard, the Union proposed the continuation of the health insurance program in all respects including the schedule of employee contributions required under the various insurance plans included in the program.

The parties continued to negotiate about economic matters after the submission of the Union's March 7, 1990 economic proposal. The record does not reveal the number of negotiation sessions held between March 7 and May 2, 1990, when the parties reached tentative agreement on many language and other benefit issues, including tentative agreement on the Union's proposal that the unit employees be covered by Respondent's health insurance program.

The language of the parties' May 2, 1990 tentative agreement concerning the health insurance program, reads as follows:

The Company agrees to continue, during the term of this agreement, the Health Plan currently in effect for the employees covered by this agreement. It is agreed and understood between the parties that the Company, during the term of this agreement, reserves the right to change, modify, alter, amend, or terminate (in whole or in part) the provisions of the Plan. It is also recognized by the parties that there shall be no requirement by the Company to provide notice prior to any such action that may be taken. It is agreed that notice to Plan participants/employees covered by this agreement shall be administered in the same manner as it has in the past.

Monthly employee premium contribution rates will be the same as those paid by other salaried employees covered by this Plan.

On May 2, 1990, besides agreeing that the unit employees would continue to be covered by the terms of the Respondent's health insurance program for the duration of any contract negotiated by the parties, the parties agreed that the employees would continue to be covered for the duration of that contract by all of Respondent's employee benefit programs. These agreements, as well as all the other agreements reached by the parties on May 2, 1990, were tentative agreements, conditioned on the parties reaching agreement on the terms of an entire collective-bargaining contract.³ As of the date of the submission of the stipulation of fact in this case, October 3, 1990, the parties had not reached agreement on the terms of a collective-bargaining contract.

Following the May 2, 1990 negotiation session, the parties next met for negotiations on May 16, 1990, and did not meet again until July 18, 1990. The July 18, 1990 negotiation session ended with the parties not scheduling further negotiation

³ The parties stipulated that, "if called upon to testify, union witnesses would testify that the union agreed to the terms of the health plan in hope of encouraging movement on other issues." The parties also stipulated that, "if called upon to testify, representatives of the Company would testify that agreement on the union's benefit proposal, including the health plan, was made in the hope of resolving and agreeing upon a major issue in negotiations and encouraging movement and negotiation on other issues."

sessions. Thereafter, between July 18 and October 3, 1990, the date of the submission of the stipulation of fact, no further negotiation sessions were scheduled.

B. *The Question Presented*

The sole question presented is whether the usual restoration of the status quo ante and make-whole remedy is appropriate to remedy Respondent's admitted illegal unilateral changes in the health insurance program covering the employees represented by the Union in the certified unit. Respondent concedes it violated Section 8(a)(5) and (1) of the Act, when, as alleged in the amended complaint, on or about the first of January in 1988, 1989, and 1990, it unilaterally, without affording the Union an opportunity to bargain, implemented changes in the health insurance program covering the unit employees, including changes in the amount of contributions paid by the employees for the cost of their health insurance coverage. But, while admitting it violated the Act by engaging in this unilateral conduct, Respondent argues that it would be inappropriate to remedy its unfair labor practices by imposing the usual restoration of the status quo ante and make-whole remedy. The General Counsel takes the position that the usual restoration of the status quo ante and make-whole remedy constitutes an appropriate remedy for Respondent's unfair labor practices.

C. *Analysis*

"It is well established that a make whole order restoring the status quo ante is the normal remedy when an employer has made unlawful unilateral changes in its employees' terms and conditions of employment [cases cited]." *Southwest Forest Industries*, 278 NLRB 228-228 (1986), enfd. 841 F.2d 270 (9th Cir. 1988). It is also well established, "that where an employer and a union have bargained in good faith, despite the employer's prior unilateral changes in wages and conditions of employment, the employer's liability for the unlawful unilateral changes terminates on the date when the parties execute a new agreement or reach a lawful impasse." *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 (D.C. Cir. 1982). See also *Dependable Building Maintenance Co.*, 274 NLRB 216, 219 (1985), 276 NLRB 27 (1985); *Eagle Express Co.*, 273 NLRB 501 (1984); *J. D. Lunsford Plumbing*, 254 NLRB 1360 (1981). More specifically, to remedy an employer's illegal unilateral action, the Board usually orders the employer to, among other things, restore the unit employees' terms and conditions of employment to the level in existence before the unilateral changes were implemented and to continue them in effect unless or until a new agreement is reached or an impasse is reached in bargaining, and to make the employees whole for the losses they incurred as a result of the unilateral changes. *Southwest Forest Industries*, 278 NLRB 228, 229 (1986), enfd. 841 F.2d 270 (9th Cir. 1988). See also Morris, *The Developing Labor Law*, Vol. II at 1665 (2d ed. 1983) ("In such cases [referring to an employer's refusal to bargain by unilaterally changing employees' terms and conditions of employment] in addition to ordering the employer to bargain on the matters in issue, the Board will usually order that the status quo ante be restored and that employees be made whole for any benefits that the employer has unilaterally discontinued [cases cited]").

Respondent argues that the Board's usual status quo ante and make-whole remedy is inappropriate for the instant case, because if Respondent had satisfied its statutory obligation by recognizing and bargaining with the Union in 1987, after the Board's July 30, 1987 certification of the Union, the Union would have entered into an agreement with Respondent allowing Respondent to make the unilateral changes in the unit employees' health insurance program made by Respondent in January 1988, 1989, and 1990, or that after good-faith negotiations the Respondent and Union would have reached a bargaining impasse which would have privileged Respondent to unilaterally implement the terms of that agreement. This argument is based on what occurred in 1990 when Respondent belatedly satisfied its statutory bargaining obligation by recognizing the Union as the unit employees' bargaining agent and by entering into negotiations with the Union for a contract covering the unit employees. The relevant portion of those negotiations, described supra, can be briefly summarized as follows: on March 7, 1990, as part of its economic proposal, the Union proposed that the unit employees be covered by Respondent's health insurance program in all respects, including its schedule of employee contribution payments;⁴ on May 2, 1990, the Union and Respondent agreed that if they were able to reach agreement on all the terms of a collective-bargaining contract, one of those terms would be that the unit employees would be covered for the duration of the contract by Respondent's health insurance program and that for the duration of the contract Respondent would have the right to unilaterally change or modify the provisions of the health insurance program and that the monthly employee premium contributions would be the same as those paid by Respondent's other nonunit salaried employees covered by that program;⁵ the Respondent and the Union were unable to reach agreement on all the terms of the collective-bargaining contract; and, as I have found infra, by July 18, 1990, the parties reached a bargaining impasse which would have privileged Respondent to implement the aforesaid tentative agreement concerning the health insurance program.

Respondent's contention that if it had negotiated with the Union in 1987, when the Board certified the Union as the unit employees' bargaining agent, that the course of bargaining concerning the health insurance program would have been the same as during the parties' 1990 negotiations, lacks support in the record. There is no evidence that the same or similar economic conditions which influenced the parties' respective bargaining positions in 1990 existed in 1987. Nor is there evidence which indicates that the parties' relative bargaining strengths or leverages in 1987 were the same or similar as in 1990. Indeed, in view of Respondent's illegal refusal to recognize and bargain with the Union in 1987 and its illegal unilateral conduct in January 1988, 1989, and 1990, all of which was reasonably calculated to undermine

⁴ There is no evidence that the Union at this time either proposed or agreed that during the term of the parties' collective-bargaining contract, Respondent would have the right to unilaterally change the terms of the health insurance program including the employees' contribution payments.

⁵ The record does not reveal whether it was the Union or Respondent who proposed that during the term of the parties' contract Respondent had the right to act unilaterally with respect to the health insurance program.

the Union in the eyes of the unit employees, it is a reasonable inference that the Union in 1990 had substantially less bargaining strength or leverage than it had in 1987. In view of these circumstances, the Respondent has failed to establish that the Respondent and Union would have engaged in the same or in a similar course of bargaining concerning the health insurance program in 1987 as occurred in 1990.⁶

In considering Respondent's argument that the Board's usual status quo ante and make-whole remedy is not appropriate to remedy Respondent's illegal unilateral changes in the unit employees' health insurance program, I considered the courts' decisions in *Kallmann v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981), and *Armco, Inc. v. NLRB*, 832 F.2d 357, 365 (6th Cir. 1987), and the Board's decisions in *Ramos Iron Works*, 234 NLRB 896, 906 (1978), and *Hanes Corp.*, 260 NLRB 557 (1982), relied on by Respondent. Those decisions, for the reasons below, do not dictate the appropriate remedial order for this case.

Kallmann and *Armco* are factually distinguishable from this case. In those cases the *practical effect* of the Board's usual status quo ante and make-whole remedy was to bind successor employers to their predecessor employers' collective-bargaining contracts, even though a successor employer has no legal obligation to accept his predecessor's collective-bargaining contract. The application of the Board's usual status quo ante and make-whole remedy in this case would have no such effect. Moreover, in *Armco* and *Kallmann*, the courts concluded that the Board's usual status quo ante and make-whole remedy was inappropriate because the facts demonstrated that the successor employer probably would not have agreed to union demands to pay the higher wages set by the predecessor employer's contract with the union. In this case, however, the record does not reveal what the probable course of bargaining would have been, if Respondent, instead of unilaterally altering the unit employees' health insurance program, had negotiated with the Union concerning that matter. As I have found supra, the record does not establish that if Respondent had recognized and bargained with the Union in 1987, that the Union would probably have entered into an agreement with Respondent allowing Respondent to make the unilateral changes found, or that the parties' negotiations would have reached an impasse, thereby enabling Respondent to unilaterally implement that agreement. I also note that there is no evidence from which to draw the conclusion that it would have been impossible or unfeasible for Respondent, in its contract negotiations with the Union, to have agreed to modify the health insurance program in certain respects, i.e., employee contributions, so that it differed from the program covering Respondent's other office and clerical employees. Accordingly, I find *Armco* and *Kallmann* inapplicable. In any event, the Board has specifi-

⁶*Lawrence Textile Shrinking Co.*, 235 NLRB 1178 (1978), relied on by Respondent, is factually distinguishable. There the employer violated Sec. 8(a)(5) by decreasing an employee's wages without consulting or bargaining with the union which represented him. The Board in remedying this unfair labor practice did not restore the status quo ante nor did it impose a make-whole remedy, because the record revealed that it was pursuant to the employee's request that the employer decrease his wages. Here there is no contention or evidence that when Respondent unilaterally changed the unit employees' health insurance program in January 1988, 1989, and 1990, that it did so at the request of either the employees or the Union.

cally declined to follow the reasoning applied by the courts in those cases. See *Armco, Inc.*, 298 NLRB 416 (1990), and *State Distributing Co.*, 282 NLRB 1048 (1987). As an administrative law judge of the Board, I am compelled to follow Board precedent. I am likewise precluded from applying the reasoning of *Ramos Iron Works* and *Hanes Corp.*, insofar as it applies to the applicable remedy in this case, inasmuch as the Board in *Adair Standish Corp.*, 292 NLRB 890 (1989), specifically overruled those decisions in that respect. See also *Lapeer Foundry & Machine*, 289 NLRB 952 (1988).

As discussed supra, to remedy an employer's illegal unilateral conduct, the Board usually orders the employer to, among other things, restore the unit employees' terms and conditions of employment to the level which existed before the unilateral changes were implemented and to continue them in effect unless or until an agreement or bargaining impasse is reached, and to make the employees whole for the losses they incurred as the result of the unilateral changes. Having rejected Respondent's argument that this remedy is inappropriate for this case, the remaining questions raised by the stipulated record are twofold: whether by tentatively agreeing during the 1990 contract negotiations that the unit employees would be covered by Respondent's health insurance program, the Union engaged in conduct sufficient to toll Respondent's backpay liability as of the date of that agreement and has made it inappropriate to restore the status quo ante; and/or, whether during the 1990 contract negotiations the Union and Respondent bargained to an impasse which privileged Respondent to unilaterally implement the parties' tentative agreement that the unit employees would be covered by Respondent's health insurance program, thereby tolling Respondent's backpay liability and making it inappropriate to otherwise restore the status quo ante. These issues are examined below.

The tentative agreement reached by Respondent and the Union during the 1990 contract negotiations, pursuant to which the unit employees would be covered by the Respondent's health insurance program if the parties agreed on all the terms of a collective-bargaining contract, did not toll Respondent's backpay liability nor otherwise makes it inappropriate to restore the status quo ante. This is so because the Union never agreed that Respondent could implement this agreement. It was a tentative agreement, conditioned on the parties reaching agreement on all the terms of a collective-bargaining contract.

Although the concept of impasse eludes precise definition, it has been held that an impasse exists when "good-faith negotiations have exhausted the prospects of concluding an agreement" or when "there [is] no realistic possibility that continuation of discussion[s] . . . would be fruitful." *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 624, 628 (D.C. Cir. 1968). For "[w]here good-faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted . . . and perhaps sometimes even required . . . to make a determination that an impasse existed [emphasis added]." *Teamsters Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966).⁷ Under such circumstances, the employer is free to in-

⁷The Board has established general criteria for determining whether an impasse exists. Some of the relevant factors are the parties'

stitute unilateral changes, so long as they are not “substantially different from, or greater than, any which the employer has proposed during the negotiations.” *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225. I am of the opinion, for the reasons below, that the parties in this case reached an impasse in collective-bargaining negotiations by July 18, 1990, and as of that date Respondent was privileged to institute the parties’ May 2, 1990 tentative agreement concerning the health insurance program.

The record establishes that the parties’ collective-bargaining negotiations reached an impasse by July 18, 1990, inasmuch as: (1) Respondent was negotiating with the Union in good faith with a sincere desire to reach a collective-bargaining agreement;⁸ and (2) after numerous negotiation meetings held over a period of 6 months, the parties failed to reach agreement on the terms of the collective-bargaining agreement and, at the conclusion of their last bargaining session held on July 18, 1990, did not schedule another bargaining session, and subsequently, between July 18 and October 3, 1990, the date of the submission of the stipulation of fact in this case, no further bargaining sessions were scheduled. These circumstances, particularly the failure of the parties on July 18, 1990, to schedule another bargaining session in an effort to break their bargaining deadlock and then for the next 3 months failing to schedule such a meeting, persuades me that as of July 18, 1990, the parties had reached an impasse concerning the issues which were preventing them from reaching a collective-bargaining contract.

I recognize that the evidence in this stipulated record concerning the bargaining impasse issue is skimpy. Nevertheless, I am satisfied, for the above reasons, that there is sufficient evidence to warrant the conclusion that the parties reached impasse by July 18, 1990. I did not leave this issue for the compliance stage of the proceeding because it would have been inappropriate to have done so. See *Dependable Building Maintenance Co.*, 274 NLRB 216 (1985). In this regard, I note that it would have been especially inappropriate in the instant case to have left this issue for the compliance stage or to have reopened the record to afford the parties an opportunity to present additional evidence on this issue, inasmuch as the sole issue litigated by the parties in this case concerned the type of remedial order appropriate to remedy Respondent’s admitted unfair labor practices.

Having found that Respondent had bargained to an impasse with the Union on July 18, 1990, and having further found that during the course of their bargaining the parties had previously, on May 2, 1990, agreed that if they suc-

ceeded in reaching agreement on all the terms of a collective-bargaining contract, that the unit employees would be covered by Respondent’s health insurance program, it follows that as the result of the parties’ July 18, 1990 bargaining impasse, the Respondent at that time was privileged to unilaterally implement for the unit employees, the terms of its health insurance program. It is for this reason that Respondent’s monetary liability is tolled as of July 18, 1990, and why I shall not recommend that Respondent restore the status quo ante by reinstating the terms of the health insurance program for the affected unit employees to what those terms were immediately prior to the January 1988 illegal unilateral changes found herein. I have, however, recommended that Respondent make whole the affected unit employees for the losses they incurred as a result of Respondent’s January 1988, 1989, and 1990 unilateral changes in Respondent’s health insurance program and to make the employees whole for the period from the commencement of its unilateral conduct in January 1988 until July 18, 1990, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material, the Union has been the exclusive bargaining representative of Respondent’s employees in the following unit which is an appropriate unit within the meaning of Section 9 of the Act:

All full-time and regular part-time clerical employees designated non-exempt by the Employer at the Employer’s facility located at 1678 Red Rock Road, St. Paul, Minnesota, including pricing specialist, purchasing, sales, accounting, and inventory clerks, typists, sales receptionist and secretary, and office equipment operators, plant clerical employees, including rolling mill clerk, maintenance clerk, quality assurance clerk, melt shop clerk and shipping clerk; but excluding temporary employees, executive secretary, personnel secretary, confidential employees, guards, professional and professional trainee personnel, management and management trainee personnel, nurse, sales persons and supervisors, as defined by the National Labor Relations Act.

4. By unilaterally changing the health insurance program covering the unit employees on or about the first of January in each of the years in 1988, 1989, and 1990, without affording the Union with an opportunity to bargain about the changes, Respondent violated Section 8(a)(5) and (1) of the Act.
5. The above 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, I issue the following recommended⁹

⁹If 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

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“bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or the issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *affd.* 395 F.2d 622 (D.C. Cir. 1968).

⁸There is no contention or evidence that Respondent was not bargaining in good faith. Quite the opposite, the record reveals that on May 31, 1990, the Board’s Regional Director notified the parties that he was satisfied Respondent had complied with the Board’s Order in Case 18-CA-10208, affirmed by the court of appeals, which required Respondent to bargain with the Union as the exclusive bargaining agent of the unit employees. This, plus the above-described course of bargaining conduct stipulated to by the parties, skimpy as the description is, establishes that Respondent was bargaining in good faith.

ORDER

The Respondent, North Star Steel Company, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the unit employees' terms and conditions of employment without affording the Union an opportunity to bargain about the changes and without bargaining with the Union to either an agreement or impasse.

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

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

(a) Make whole the unit employees for the losses they may have incurred as a result of the unilateral changes in the employees' health insurance program implemented by Respondent on or about the first of January in the years 1988, 1989, and 1990, and make the unit employees whole for their losses for the period commencing with the January 1988 unilateral conduct until July 18, 1990, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

_____ adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) 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.

(c) Post at its facility in St. Paul, Minnesota, copies of the attached notice marked "Appendix."¹⁰ 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.

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

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."