

Columbian Chemicals Company and International Chemical Workers Union, Local 888, AFL-CIO. Case 6-CA-21184

May 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On October 17, 1990, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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 conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Columbian Chemicals Company, Moundsville, West Virginia, its officers,

¹Contrary to our dissenting colleague, we agree with the judge that deferral to the arbitral award is unwarranted. In this regard, we note particularly that the arbitrator did not rely on the management-rights clause to find the Respondent's conduct privileged. Instead, *quite apart from the contract*, he found that there was a "basic management prerogative" to take the action. He then found nothing in the contract to *take away* that prerogative. In these circumstances, it is clear that the arbitrator did not rely on the management-rights clause to find the managerial prerogative. We express no view concerning the result we might have reached had he relied, either expressly or implicitly, on the clause.

In sec. I of his decision, the judge correctly noted that during a fourth-step grievance meeting regarding the Respondent's unilateral implementation of its absence control program (ACP), the Union proposed certain changes to the ACP which the Respondent accepted. The union membership, however, refused to ratify the agreement. In sec. III of his decision, the judge erroneously found that it was the Respondent who proposed the modifications to the ACP at this meeting, "possibly catching the Union by surprise." On this basis, as well as other factors, the judge concluded that a good-faith post-implementation bargaining impasse was not achieved.

We agree with the judge that no valid good-faith impasse was reached in this case but we do not rely on his erroneous finding that the Union was caught by surprise by the bargaining that took place at the November grievance meeting or that the bargaining that took place at that meeting was casual in nature. Rather, we rely on the fact that the ACP was not suspended prior to such bargaining and indeed the ACP was enforced against employees Hamilton and Ernest prior to the bargaining. In our view, these facts precluded good-faith impasse. In this regard, we note that the Board in *Storer Communications*, 297 NLRB 296 fn. 9 (1989), specifically declined to reach the question whether an employer's application of a unilaterally implemented policy to employees would preclude a finding that the employer bargained in good faith to impasse after implementing that policy. We now answer that question in the affirmative.

agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I find that the arbitrator's award upholding the Respondent's implementation of its absence control program is susceptible to an interpretation consistent with the Act. Accordingly, since I find that the other criteria of *Olin Corp.*, 268 NLRB 573 (1984), have been met, I would defer to the arbitrator's award and dismiss the complaint.

It is well established that the Board will defer to an arbitrator's award when the proceedings appear to have been fair and regular, all parties agreed to be bound, the arbitrator considered the unfair labor practice issue that is before the Board, and the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act. *Motor Convoy*, 303 NLRB 135 (1991). The Board will find deferral inappropriate under the clearly repugnant standard only when the arbitrator's award is not susceptible to an interpretation consistent with the Act. *Ibid.* An arbitrator's finding that an employer's unilateral change was privileged under a provision of the parties' contract will not be found clearly repugnant to the purposes and policies of the Act despite the arbitrator's use of a test other than the statutory standard of clear and unmistakable waiver in making that finding. *Dennison National Co.*, 296 NLRB 169 (1989).

The arbitrator here concluded that the Respondent's implementation of its absence control program was a permissible exercise of its right to manage the plant. The judge found that the arbitrator's conclusion was repugnant to the Act because it was based not on any provision of the contract but, rather, on an "inherent rights of management" theory. In agreeing with the judge's decision, my colleagues stress the arbitrator's failure to rely expressly on the contractual management-rights clause.

Contrary to my colleagues, however, it is not at all clear that the arbitrator did not rely on the management-rights clause in reaching his decision. Indeed, while the arbitrator did not cite to the management-rights provision of the contract in reaching his conclusion, he tracked its language in his analysis. Thus, the arbitrator stated:

While it is true . . . that excessive absenteeism was dealt with on a case-by-case basis in the past, this does not mean that the Company lost its right to develop reasonable plant rules as part of its *underlying right to manage the plant and direct the working force*. [Emphasis added.]

This wording mirrors the language of the contractual management-rights clause, which provides:

[T]he Company reserves and retains, solely and exclusively, all of its *inherent rights to manage the business* These rights include but are not limited to the right to . . . *direct the working forces* by the right to hire, promote, demote, suspend or discharge for proper cause [emphasis added].

As the arbitrator's language mirrored the language of the management-rights clause, the arbitrator arguably relied on the management-rights clause in deciding that the Respondent could properly unilaterally implement its absence control program. Thus, I view his award as susceptible to an interpretation consistent with the Act.¹ Accordingly, I dissent from my colleagues' refusal to defer to the arbitrator's award.

¹ This case is distinguishable from *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983), relied on by the judge, where the arbitrator's upholding of an employer's authority to make a unilateral change was based solely on a noncontractual theory. See *Motor Convoy*, above, fn. 6 and accompanying text; *Hoover Co.*, 307 NLRB 524, issued today.

Stephanie E Brown, Esq., for the General Counsel.
Ronald B Johnson, Esq. (Volk, Frankovitch, Anetakis, Recht, Robertson & Hellerstedt), of Wheeling, West Virginia, for the Respondent.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was heard in Wheeling, West Virginia, on March 29, 1990.¹ The principal questions presented are whether deferral to an arbitration decision is appropriate and, if not, whether Respondent Columbian Chemicals Company violated Section 8(a)(5) of the Act by unilaterally adopting an "absence control program."

Both participating parties filed briefs on or about May 3, 1990. Based on the record and the briefs, I make the following²

FINDINGS OF FACT

I. THE FACTS

The Charging Party Union represents two bargaining units of employees working at one of Respondent's plants in West Virginia. The parties met for 2 days in April 1988 to negotiate new collective-bargaining agreements. Personnel Director Broadwell mentioned that Respondent was preparing a new absenteeism policy for future implementation. Union Representative Hull replied that such a policy would be a negotiable item. Company representatives did not respond. As signed effective April 1988, the only contractual provisions relating to absentee control pertained to a loosely progressive disciplinary system for employees who failed to report for work without prior notification and without a satisfactory ex-

¹ The charge and amended charge were filed on August 15, 1988, and December 26, 1989. The complaint was issued on December 27, 1989.

² Errors in the transcript have been noted and corrected.

cuse. Both contracts, however, contained "Management Rights" clauses which read, in part:

Except to the extent expressly abridged by a specific provision of this Agreement, the Company reserves and retains, solely and exclusively, all of its inherent rights to manage the business in accordance with its best interests as such rights existed prior to the execution of this Agreement with the Union. These rights include but are not limited to the right to . . . direct the working forces by the right to hire, promote, demote, suspend or discharge for proper cause.

The record leaves no doubt that Respondent's prior practice with respect to imposition of discipline for absenteeism was unwritten and ad hoc. The nearest thing to a description of that policy was given by Union President Stephen Seago, an 18-year employee, as follows:

A. Basically the Company had an unwritten policy. I mean there were—each case was handled separate, you know, on absenteeism. The first, you know, if the company felt that the person had an excess of absenteeism problem, you know, they would call them in and go through a progressive type discipline. And, you know, each case was, like I said, handled different. There were some excusable absences prior to this policy that were—and if, for example, say if a person was fifteen minutes late, as long as it wasn't a repeated offense, you know, if it was just something that happened, you know, it didn't go against the person's record or they weren't even actually docked. But, now if it was a repeated offense, you know, they were docked.

Q. Was there a set number of times before a person was punished that you were aware of?

A. No. There, you know, it was, like I said, each case was handled separately.

In July 1988, Respondent called in union representatives to present and "explain," but not "negotiate," a document, to take effect in August, entitled "Absence Control Program" (ACP). When Union President Seago asked if the subject was not negotiable, Respondent's personnel director Broadwell replied that management did not think so. Broadwell discussed the new program with the union agents and answered their questions. Before the meeting ended, Union Representative Hull volunteered that this matter should be subject to negotiation. Seago spoke of filing a grievance; Broadwell replied that such efforts had turned out to be futile gestures at other plants at which the program had been implemented.

The document presented to the Union in July is not easy to summarize. It speaks of the need for a systematized program to control excessive absenteeism, with the purpose of identifying "actual and potential problem employees at the earliest possible time" in order to "counsel" with them. Thus, "the basic purpose of this Absence Control Program is to provide a consistent set of guidelines, the identification, control and prevention of unsatisfactory attendance records and habits [sic]." The stated underlying mechanism of the ACP is to document every absence, without regard to whether it is "justified, reasonable, excused, etc." Each absence,

regardless of the number of hours or days involved, is to be considered an "occurrence," with, however, quite a number of specified exceptions, such as excused absences without pay, death in family, "medical, industrial injury," and military leave. These exceptions seem to contradict the preceding claim that the ACP "does not judge whether an absence is justified, reasonable, excused, etc." Also expressly listed as absences which *will* be considered to be "occurrences" are five types, such as "absent with permission without pay to tend to personal business," "tardy," and "sickness" (as opposed, it appears, to "medical, industrial injury").

The final section of the ACP lists the "steps" to be taken if an employee had 4, 6, 8, 10, or 12 "absence" (as opposed to "tardy"?) occurrences in the prior 12-month calendar period. At the first step, the supervisor "will review" the record with the employee. At the second, the employee "is to be given a counseling letter." After eight occurrences, the employee "will receive a letter of reprimand" and a warning of potential further disciplinary action. At the fourth step, the supervisor "may take one of the following courses of action: (1) suspension or (2) another letter of reprimand." Finally at step five, if the supervisor "feel[s] that further attempts to rehabilitate the employee will be futile, the employee will be terminated."

While the ACP makes several references to the "consistency" it seeks to achieve, it can be seen from the above that, in the imposition of the more severe kinds of discipline, flexibility is permitted. This flexibility is made more explicit by other references in the program: "Rules and regulations can and should be established and penalties assessed as warranted by individual case circumstances, but these actions alone probably will not adequately control absenteeism unless used as a part of a sound program designed to correct the overall problem"; "[S]ome absence is to be expected and the program takes that into account. In fact, even when an absence record is deemed excessive, it may be necessary to alter the action normally taken depending on the circumstances peculiar to that particular case"; "[the five types of absence specified as constituting 'occurrences'] do not preclude disciplinary action from being taken on the first or any subsequent absence occurrence should circumstances warrant."

Subsequent to the July meeting, the Union filed a grievance protesting that the Respondent's failure to negotiate about the ACP was a violation of the contractual recognition clause. At a fourth-step grievance meeting in November 1988, an attempt was made by Respondent to resolve the grievance. The Union suggested certain changes in the ACP and the Respondent agreed to them. However, the union membership voted down the proposed resolution. The Union filed a charge with Region 6 and also continued to prosecute the grievance. A year later, the dispute was heard by an arbitrator, who issued a decision on October 3, 1989, denying the grievance. The complaint, as noted, issued on December 27, 1989.

II. DEFERRAL TO THE ARBITRATION AWARD

The Respondent contends that the Board should withhold its processes and let the arbitrator's decision stand. A brief description of that decision follows.

As indicated, the grievance asserted that the unilateral adoption of the ACP was violative of the recognition clause

of the contract. The arbitrator's decision states that the issue before him, "as stipulated by the parties," was "Did the Company violate the Labor Agreement by implementing the Absence Control Program August 1, 1988?" In a section of the decision entitled "Cited Portions Of The Agreement," neither party is shown to have relied on the "Management Rights" provision of the bargaining agreement. In summarizing the "Contentions Of The Parties," the arbitrator states that the basic claim of the Company is founded on "what it considered to be its fundamental right to establish reasonable plant rules, especially in an area as critical as attendance" and its assertion that "there is nothing which would prohibit it from implementing a program which deals with the critical issue of attendance in a reasonable, fair and non-discriminatory fashion." Again, the arbitrator gives no indication that the Company relied on the "Management Rights" clause.

In his analysis of the "precise and narrow issue" before him, the arbitrator begins by accepting the doctrine that "a Company has the right to establish reasonable plant rules not inconsistent with the Agreement," and he poses the question presented as "[w]hether or not there is anything in the Agreement, or in the form of a long-standing practice, which would impinge on the Company's right to exercise a basic management prerogative." He rejects the Union's claim that the "long standing policy" of dealing with absenteeism on a case-by-case basis precluded the Company from adopting another approach, absent a specific restriction in the contract.

The arbitrator next considers an argument advanced by the *Union*—that "nothing in the Management Rights provision gives the Company the right to make or change rules." By implication, I think, the arbitrator agrees with (or abstains from disagreeing with) the literal contention by responding, "Given the basic, deep-seated right of the Company to manage the plant, it does not need a specific grant of authority to put rules in effect" provided that they are "reasonable." Accordingly, the arbitrator concluded that the implementation of the ACP was not improper.

The most recent comprehensive explication of the Board's principles respecting deferral to an arbitral decision is found in *Olin Corp.*, 268 NLRB 573 (1983). The Board there stated that the appropriate analysis regarding deferral to arbitration awards required some liberalization favoring deferral, in view both of recent restrictive Board precedents and the strong national policy preferring private dispute resolutions. The Board therefore adopted the following standard for deferral: "[A]n arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." Furthermore, the Board would not "require an arbitrator's award to be totally consistent with Board precedent. Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer" 268 NLRB at 574.

I see no need to discuss the initial criteria set out by the Board, because I agree with counsel for General Counsel that "the arbitrator's decision is not susceptible to an interpretation consistent with the Act." *Ibid.* As shown above, the arbitrator adopted an approach to resolution of this case which depended on what both parties refer to on brief as a "resid-

ual rights of management' theory, finding the power to unilaterally establish the ACP in Respondent's inherent "right to exercise a basic management prerogative" (in the absence of any express contractual restraint upon that right).

This approach is wholly at odds, however, with the National Labor Relations Act, which *prohibits* unilateral employer action regarding wages, hours, and terms and conditions of employment unless the employer has secured from the union a waiver of its right to bargain about such matters. Prior to *Olin*, the Board held that arbitral reliance on a residual rights theory is repugnant to the Act, with the concurrence of a divided panel of the Court of Appeals for the Third Circuit. *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, enfd. 722 F.2d 1120, 1126 (1983) ("The arbitrator's conclusion that an extracontractual residual rights theory authorizes management to make unilateral decisions on mandatory subjects of collective bargaining not specifically covered in a collective bargaining agreement disregards clear Board precedent.").

While, as Respondent emphasizes, the instant contracts each contained a general reservation of "inherent rights" clause (set out earlier), it plainly appears that the arbitrator finessed the need to interpret this provision. ("Given the basic, deep-seated right of the Company to manage the plant, it does not need a specific grant of authority to put rules in effect.") Thus, it cannot be said that the arbitrator has construed the contract so as to resolve the issue by holding that the "inherent rights" clause authorized the Respondent to modify terms and conditions of employment not already memorialized in the agreement. This is the crucial distinction between the present case and a recent decision on which Respondent relies. In *Dennison National Co.*, 296 NLRB 169 (1989), the arbitrator expressly found that "under the management rights clause of the contract the Respondent had the right to act unilaterally." In the present case, the arbitrator made no such finding, but relied instead on a "basic management prerogative" to make rules.

Consequently, I conclude that the theory on which the arbitration award is based is in fundamental conflict with Board law, and, being thus repugnant to the Act, the award cannot be given primacy.

III. THE "MEANINGFUL BARGAINING" DEFENSE

Respondent argues, in the alternative, that it engaged in post hoc meaningful bargaining with the Union. As noted, around November 17, 1988, at a fourth-step grievance meeting relating to the ACP, the parties discussed the possibility of settlement of the grievance, and the Respondent made certain proposed modifications to the policy which the union representatives agreed to recommend to the membership. The employees, however, voted down the proposal. By this time, according to the uncontradicted testimony of Union President Seago, employee Hamilton had received a verbal reprimand, and employee Ernest either a counseling or a verbal reprimand, pursuant to the new policy.

In support of its contention that this postunilateral action bargaining satisfied its statutory obligation, Respondent cites only a 1979 General Counsel Advice Memorandum, which on its facts is arguably distinguishable. In any event, as counsel for General Counsel points out, the Board's view on this issue is well settled: unconditional announcement of, refusal to bargain about, and implementation of a modification

of a term of employment constitutes a *fait accompli* and a violation of Section 8(a)(5). *Central Soya Co.*, 281 NLRB 1308, 1310 (1986); *Storer Communications*, 297 NLRB 296 (1989).

In the latter case, a panel of the Board found a violation under the foregoing principle, but went on to hold (Member Cracraft dissenting, *id.* at fn 6) that because the employer had bargained "in good faith" after instituting its new drug/alcohol policy, the Board would not require the employer to rescind the policy. The panel majority stated that although the Board "usually requires such rescission," there is no "absolute rule precluding a finding that the parties have subsequently bargained in good faith over the change." *Id.* at 297.

The test applied by the *Storer* majority examined all the circumstances, but seemed to focus on whether the employer had bargained in good faith to impasse and whether the unilateral change, unless rescinded, would have undermined the union's strength in the postimplementation bargaining.

While the result the Board might reach on this issue in the present case is not easily determinable, I am of the view that the bargaining which occurred here probably did not qualify the remedy for nontraditional treatment. The "bargaining" occurred in the context of a fourth-step grievance meeting after Personnel Director Broadwell had instructed Sutton, his representative, to "try to find a middle ground that we could agree on." The Respondent did not offer to rescind the policy, but it did propose several "clarifications" (R. Exh. 1) presumably favorable to the Union. The membership, however, found the proposal unacceptable and chose to proceed to arbitration with the grievance. There is no evidence that any efforts were made by either party to engage in subsequent negotiations.

Given these facts, I find it somewhat difficult to judge that good-faith bargaining, resulting in impasse,³ occurred here. The casual nature of the bargaining at the fourth step of the grievance procedure, possibly even catching the Union by surprise in view of the Respondent's previous clearcut position that it did not believe the matter to be negotiable; the absence of any acknowledgement by the Respondent that it deemed the ACP to be, in fact, negotiable in its entirety; and the failure of either party to pursue the issue further, all suggest that there was neither bargaining nor impasse, in the common acceptance of those words.

IV. THE EFFECT OF THE MANAGEMENT-RIGHTS CLAUSE

Respondent would have the Board hold that the preservation-of-"inherent-rights" clause, which expressly included the authority to suspend and discharge for "proper cause," empowered the Respondent to promulgate the ACP unilaterally. The clause does not, however, invest Respondent with the specific "right to adopt reasonable rules and regulations," which is the Respondent's first contention.

The Respondent's second argument is that it is authorized by the management-rights clause merely to define "what it considers to be 'proper cause' subject to the union's right to grieve management's determination," and that it has done no

³ The Board held, in *Arrow Automotive Industries*, 284 NLRB 487, 489 (1987), that, in all contexts, an employer must bargain "to impasse" prior to implementing a unilateral change in mandatory subjects of bargaining.

more than this. In fact, Respondent *has* done more, since the “inherent-rights” clause refers only to the rights to “suspend” and “discharge” for “proper cause,” and thus does not include the other disciplinary measures addressed by the ACP. Moreover, Respondent’s position here—that the ACP simply defines “what the employer would consider to be ‘proper cause,’” subject to the ultimate judgment of an arbitrator, contradicts its claim before the arbitrator that its adoption of the ACP is substantively binding in effect, an exercise of Respondent’s “fundamental right to establish reasonable plant rules,” with which claim the arbitrator agreed. Rules are rules, and not simply guidelines for arbitrators; if the new standards are applied so as to discharge an employee, and the Union, for any reason (including lack of funds), chooses not to process the discharge to arbitration, the rule becomes very effective indeed.

For the foregoing reason, I reject this argument based on the management-rights clause.⁴

V. DID THE ACP CONSTITUTE A MATERIAL CHANGE?

Finally, Respondent asserts that the effect of the adoption of the ACP was negligible, and urges application of the Board rule that unilateral changes are violative only if they are “material, substantial, and significant.” *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *Peerless Food Products*, 236 NLRB 161 (1978); *La Mousse, Inc.*, 259 NLRB 37, 48–50 (1981).

Distinctions in this line of cases are not simple to draw. Respondent argues that the ACP is, at bottom, simply a more formal and specific adoption of the existing “case-by-case” practice. This argument is founded on those provisions of the ACP which, contrary to the seemingly unqualified character of most of the rules, allow for the exercise of discretion depending on the circumstances.

However, while room for discretion is permitted, that margin is characterized by the ACP as the exception rather than the norm (“In fact, even when an absence record is deemed excessive, it may be necessary to alter the action normally taken depending on the circumstances peculiar to that particular case.”). The formalization of absences into those “occurrences” which must be “counted” against the employees and those which will not be recorded leaves no room for discretion or a case-by-case evaluation, and forces supervisors to regard the particular type of absence in a certain way. Thus, as the program reads, while some discretion attaches in the case of an overall absence record deemed “excessive,” an “AWOL” or “sickness” will be counted as an “occurrence” regardless of the cause of the absence.

Finally, there is little or no option in applying the first four disciplinary steps. At each step, respectively, an employee “will” receive a review of his record from a supervisor; “is to be given a counseling letter”; “will receive a letter of reprimand”; and, as I read the fourth step, will be given either suspension or another letter of reprimand (the supervisor “may take one of the following courses of action: (1) suspension or (2) another letter of reprimand”; it is quite

unlikely that “may” signifies that the employee need receive *no* discipline).

The foregoing leads me to conclude that the changes wrought by the ACP constitute material, substantial, and significant alterations of the preexisting, totally unstructured, case-by-case system for disciplining employees with attendance problems. *Murphy Diesel Co.*, 184 NLRB 757 (1970), *enfd.* 454 F.2d 303 (7th Cir. 1971).

In the final analysis, then, I conclude that the Respondent violated Section 8(a)(5) and (1), as alleged, by adopting, in August 1988, the ACP.

CONCLUSIONS OF LAW

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

2. International Chemical Workers Union, Local 888, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The production unit and the laboratory unit, as described in paragraph 7 of the complaint, constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act, and at all times material the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate units.

4. By adopting, in August 1988, an absence control program applicable to both units without bargaining with the Union as requested, Respondent violated Section 8(a)(5) and (1) of the Act.

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

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

I recommend that Respondent be ordered to cease and desist from unilaterally instituting any absence control program and to cease disciplining union-represented employees pursuant to such procedure adopted in August 1988. I recommend that Respondent rescind the aforesaid program as it applies to represented employees and, upon request, bargain with the Union about the implementation of any absence control program governing employees represented by the Union.

I shall also recommend that Respondent fully restore the status quo ante which existed at the time of its unlawful actions by (1) rescinding all disciplinary actions against union-represented employees resulting from the unlawfully instituted program, (2) offering all such employees discharged or suspended or otherwise denied work opportunities as a result of the program, immediate and full reinstatement to their former positions, or if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and (3) making whole those employees who were either discharged, suspended, or otherwise denied work opportunities as a result of the program. In all cases of lost pay and/or benefits, the amounts shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁴The Board has “repeatedly held that generally worded management-rights clauses or ‘zipper clauses’ will not be construed as waivers of statutory bargaining rights” *Johnson-Bateman Co.*, 295 NLRB 180 (1989).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Columbian Chemicals Company, Moundsville, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instituting unilaterally and thereafter enforcing an absence control program applicable to employees represented by International Chemical Workers Union, Local 888, AFL-CIO.

(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) Bargain collectively, on request, with the above-named Union as the exclusive representative of the employees of the appropriate units described above, concerning any material change in absence control procedures.

(b) Rescind the August 1988 absence control program in effect as to employees represented by the Union

(c) Remove from the files of employees who are represented by the Union, all disciplinary warnings, notices, or memoranda issued since August 1988 resulting from the application of the absence control program.

(d) Offer all such employees discharged, suspended, or otherwise disciplined or denied work opportunities as a result of the institution of the absence control program immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

(e) Make whole all such employees who were discharged, suspended, or otherwise denied work opportunities as the result of institution of the absence control program in the manner set forth in the remedy section of this decision.

(f) 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.

(g) Post at its Moundsville, West Virginia facility, copies of the attached notice marked "Appendix."⁶ Copies of the

⁵If 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.

⁶If 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."

notice, on forms provided by the Regional Director for Region 6, 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.

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

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 unilaterally and without consultation with International Chemical Workers Union, Local 888, AFL-CIO institute or implement any material changes with respect to absence control.

WE WILL NOT discipline our union-represented employees by applying to them the absence control program adopted in August 1988.

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

WE WILL bargain collectively on request with International Chemical Workers Union, Local 888, AFL-CIO as required by law.

WE WILL rescind the August 1988 absence control program in effect as to employees represented by the Union.

WE WILL remove from the files of employees who are represented by the Union all disciplinary warnings, notices, or memoranda resulting from the application of the absence control program.

WE WILL offer all employees discharged, suspended, or otherwise disciplined or denied work opportunities as a result of the unilateral implementation of the absence control program immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones without prejudice to their seniority or other rights and privileges.

WE WILL make whole all union-represented employees who were discharged, suspended, or otherwise denied work opportunities as a result of the absence control program, by payment of backpay and interest.

COLUMBIAN CHEMICALS COMPANY