St. Vincent Hospital *and* District 1199NM, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO. Case 28–CA–11921

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On February 15, 1995, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions.

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 as explained below, and to adopt the recommended Order.

I. INTRODUCTION

The judge found that in the spring of 1993, at midterm of the parties' collective-bargaining agreement, the Respondent violated Section 8(a)(5) of the Act by discontinuing a contractual health-insurance plan—the ''Advantage Plan''—and by implementing in its place two new health-insurance plans—the ''Blended Plan'' and the ''Supplemental Plan''—without the consent of the Union required by Section 8(d) of the Act. Alternatively, the judge found that the Respondent did not bargain in good faith to impasse with the Union concerning these changes involving the insurance plans above, and accordingly, that the Respondent violated Section 8(a)(5) in any event by its unilateral conduct. In otherwise affirming the judge's findings and conclusions with respect to the Respondent's violation of Sections 8(a)(5) and 8(d), we find it unnecessary to consider his alternative findings concerning impasse. We set out below our reasons for agreeing with the judge's conclusion that the Respondent acted in contravention of the consent requirement of Section 8(d) in terminating the Advantage Plan and implementing the two new plans in 1993.

The interlocking legal principles of Sections 8(a)(5) and 8(d), and the consent requirement of Section 8(d), are well known, and were summarized as follows more than a decade ago:

> Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to ''wages, hours, and other terms and conditions of employment.'' Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to ''modif[y] . . . the terms and conditions contained in'' the contract: the employer must obtain the union's consent before implementing the change. If the employment conditions the employer seeks to change are not ''contained in'' the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

Milwaukee Spring Division, 268 NLRB 601, 602 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985) (fn. citations omitted). The issue we consider here is whether the Advantage Plan was in fact part of, i.e., ''contained in,'' the parties' collective-bargaining agreement for purposes of 8(d)'s consent requirement. Resolution of this question is critical to the finding that the Respondent engaged in an unlawful midterm modification of the contract in the spring of 1993. In our view, this is primarily a question of discerning the parties' mutual understanding concerning the Advantage Plan as of the spring of 1993. This requires reference to their reopener bargaining in 1989–1990, the resulting collective-bargaining agreement they executed, and events leading to the implementation of the Advantage Plan in 1991. It further requires reference to the terms of the 1993–1995 collective-bargaining agreement, which was in effect at the time of the implementation of the two new plans in 1993. In this situation—essentially one of contract interpretation—the parties' intent, when sufficiently manifested, is paramount and will be given reasonable effect. See, e.g., *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989).

II. FACTUAL FINDINGS

In late 1989, the parties began negotiations concerning a limited number of bargaining subjects, including health insurance and wage rates, pursuant to the reopener provision of their 1988–1991 collective-bargaining agreement. Concerning health insurance, the Respondent successfully negotiated for employee contributions to the premium payments for the contractual insurance plan, known as the ''Indemnity Plan.'' The contributions agreement amounted to a concession by the Union that was unpopular with the employees be-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

cause of its cost. The concession, however, was accepted in light of a wage increase to which the Respondent agreed during negotiations and because the Respondent agreed to look into health-insurance alternatives for unit employees with lower costs than the Indemnity Plan. The reopener negotiations eventually broadened and an entirely new successor contract was agreed to, with a term from February 1, 1990, until February 1, 1994. It included the following provisions:

ARTICLE 26

HEALTH INSURANCE

> 26.01 Except as otherwise set forth below, *or mutually agreed*, the Hospital agrees to maintain a group health program for the life of this Agreement. Effective on the date this Agreement is signed by the Hospital and the Union, the Hospital shall have the right to change administrators of the health care plan, or purchase equivalent coverage from another carrier. Except as noted in paragraph 26.02 [concerning psychiatric and chemical dependency treatment coverage] *the Hospital agrees that the current level of health benefits shall not be reduced during the term of this Agreement*. [Emphasis added.]
>
> . . . .
>
> 26.03 Effective February 1, 1990, the cost of dependent group health insurance coverage to regular full-time and regular part-time employees shall be $40.63 per pay period. Thereafter, the maximum employee contribution for full-time and regular part-time employees per pay period shall be as follows: [specific dollar amounts for each contract year are set forth in the contract at this point.]
>
> Except as provided in this section, the cost of group health insurance premiums shall be paid by the Hospital. Except as provided in this section, the employees' contribution to health care coverage shall not be increased during the term of this Agreement . . . .

ARTICLE 32

COMPLETE AGREEMENT

> The parties acknowledge that each has had the unlimited right and opportunity to make demands and proposals with respect to any matter deemed a proper subject for collective bargaining and that all such subjects have been discussed and negotiated upon and the agreements contained in this Agreement were arrived at after the free exercise of such rights and opportunities. The results of the exercise of such rights and opportunities are set forth in this Agreement. Therefore, the Hospital and the Union for the duration of this Agreement each voluntarily and unqualifiably [sic] agree to waive the right to oblige the other party to bargain with respect to wages, hours or any other terms and conditions of employment *unless mutually agreed otherwise*, even though the specific subject or matter may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or executed this Agreement. [Emphasis added.]

Consistent with discussions in the parties' negotiations, on January 12, 1990, the Respondent's president sent a letter to the Union's president describing the creation of a committee to monitor employee health care coverage and explore alternative health care possibilities. The Union was asked to participate in the committee. The letter concluded with the following two paragraphs:

> We would certainly hope that 1199NM representatives on this committee would provide input and suggestions *in whatever benefits are being changed or modified* and would be the liaison to your bargaining unit for review and concurrence with those benefit changes.
>
> Thank you for your participation in this committee which I believe is consistent with the recommendation of your bargaining unit during our negotiations. [Emphasis added.]

Ultimately, in 1991 this committee devised and recommended the Advantage Plan as a health-insurance alternative to the Indemnity Plan, and with lower costs for employees. On reviewing the Advantage Plan, the Respondent notified the Union that it wished to offer it to the unit employees. The Union agreed with the Respondent's proposal and, beginning on July 1, 1991, the unit employees were able to choose between the Advantage Plan and the Indemnity Plan for their health insurance coverage. The parties' specific understanding concerning the Advantage Plan was not committed to writing.

In late 1992, the parties again formally reopened the contract for negotiations under a provision for limited reopener negotiations. Health insurance was not a reopener subject. The Respondent complained, however, during bargaining about the high cost of maintaining the Advantage Plan. The reopener negotiations expanded in scope and again led to a new collective-bargaining agreement, with a duration from January 1993 until February 1995. No changes were made in the language of articles 26 and 32 above. As the judge described in detail, the parties agreed to create another committee to evaluate health benefits, and the Respondent's violations of the Act involved its unilateral implementation of this committee's recommendations.

III. ANALYSIS

The essential question is whether the Respondent and the Union intended that the Advantage Plan would become part of the parties' collective-bargaining agreement. In the 1989–1990 reopener negotiations, the parties clearly understood that health insurance issues were not fully resolved by the Union's agreement to have employees contribute to the Indemnity Plan's premium payments. The Respondent recognized this and offered to investigate alternatives with lower costs to employees. The provisions of the resulting 1990–1994 collective-bargaining agreement are consistent with the understanding that more could and would be done concerning health insurance. Thus, article 32, commonly known as a ''zipper clause,'' sets forth the parties' waiver of the right to bargain during the term of the agreement ''unless mutually agreed otherwise.'' It seems indisputable that the parties' subsequent agreement in 1991 to offer the Advantage Plan as an alternative to the Indemnity Plan is just such a ''mutually agreed'' upon arrangement. Article 26, entitled ''Health Insurance,'' is also consistent with the parties' subsequent agreement to add another choice concerning health insurance coverage. Thus, the provision sets forth the Respondent's promise to maintain a group health insurance program for the duration of the agreement ''[e]xcept as otherwise . . . mutually agreed . . . .'' In addition, it is significant that, although the dollar figures set forth for employee contributions in article 26.03 comport with the premiums due under the Indemnity Plan and implicitly reference that plan, neither that plan nor any other is explicitly identified, and there is no language that suggests that contractual health insurance coverage was necessarily limited to a single, exclusive plan.

The Respondent's January 12, 1990 letter implicitly reflects the parties' understanding in their negotiations that more would be done on the health insurance issue. The letter notes the creation of a committee to monitor and evaluate health insurance issues. It contemplates health benefits ''being changed or modified'' in light of the recommendations of the committee. Thus the letter, and the committee itself, confirmed the parties' intention in negotiations to do more on health care, and provided a gateway to the parties' 1991 agreement to implement the Advantage Plan as an alternative to the Indemnity Plan.

In view of the above, it is clear that when the parties agreed in 1991 to offer the Advantage Plan to the employees as an alternative to the Indemnity Plan, they intended it to be a modification by mutual consent of the existing health insurance benefits under article 26 of their contract. This conclusion follows from the parties' discussion in the 1989–1990 negotiations, from the contract language in articles 26 and 32 contemplating modification by mutual consent of the written agreement, and from the parties' conduct between the 1989–1990 negotiations and the Advantage Plan agreement in 1991. That the 1991 agreement was an *oral* modification of the written collective-bargaining agreement does not negate its legal validity, especially when the parties' zipper clause does not require such a modification to be in writing. See, e.g., *Martinsville Nylon Employees v. NLRB*, 969 F.2d 1263, 1267–1268 (D.C. Cir. 1992); *Certified Corp. v. Teamsters Local 996*, 597 F.2d 1269, 1271 (9th Cir. 1979). It is also clear that, as a consensual modification of the contract's health insurance coverage, the parties intended that the Advantage Plan, like the Indemnity Plan, would become *part of* the collective-bargaining agreement. This is the reasonable and logical inference from the evidence of the parties' intent here, and there is absolutely no indication of a contrary intent.

Board precedent also supports a finding that the Advantage Plan was a lawful modification of the collective-bargaining agreement, and therefore that it became part of the agreement. In *C & S Industries*, 158 NLRB 454 (1966), a seminal decision concerning Section 8(d), the Board defined a ''modification'' within the meaning of Section 8(d) as a change that has a continuing effect on a basic contractual term or condition. Id. at 458. In finding that the employer unlawfully modified the parties' contract at midterm by unilaterally implementing a wage-incentive plan, the Board stated that ''[a]lthough the contract makes no specific mention of wage incentives, such incentives are inseparably bound up with and are thus plainly an aspect of the payment of wages, a subject expressly covered by the contract.'' Id. at 459. As a matter of legal principle, the only significant difference between *C & S* and the instant case is that here the parties *agreed* to change a basic contractual term—health insurance benefits—before the Advantage Plan was implemented. In *Martin Marietta Energy*, 283 NLRB 173 (1987), enfd. mem. 842 F.2d 332 (6th Cir. 1988), the Board found that the respondent violated Sections 8(a)(5) and 8(d) by implementing, without the union's consent, a second employee health plan as an optional alternative to the plan referred to in the collective-bargaining agreement. The Board concluded that the second health plan was an unlawful *modification* of the contract because it altered terms and conditions ''contained in'' the contract, i.e., the contractual health plan. Id. at 175–176. Similar to the *C & S* case above, the only significant difference between *Martin Marietta* and the instant case (as to whether the Advantage Plan was a modification of the collective-bargaining agreement) is that here the parties *agreed* to alter the health insurance coverage contained in the contract by offering the Advantage Plan. These cases indicate that, as a matter of law, when the parties by mutual consent have modified at midterm a provision contained in their collective-

bargaining agreement, that lawful modification becomes part of the parties' collective-bargaining agreement, unless the evidence sufficiently establishes that the parties intended otherwise. With respect to any *subsequent* attempt at midterm to alter such a contract modification, 8(d)'s consent requirement is applicable.

Applying that legal rule, we find that the Advantage Plan was incorporated as a midterm modification into the 1990–1994 collective-bargaining agreement. The facts set forth above, however, show that the parties engaged in further negotiations in late 1992 and reached agreement on the terms of a new collective-bargaining agreement, with an effective term from January 1993 until February 1995. As noted above, the terms of article 26, covering Health Insurance, and article 32, involving the ''complete agreement'' language, remained unchanged from the prior collective-bargaining agreement. Inasmuch as both the Indemnity Plan and Advantage Plan were established terms and conditions of employment as of the effective date of the 1993–1995 collective-bargaining agreement, it follows that both of these plans were covered by the provision in article 26 that ''the Hospital agrees that the *current* level of health benefits shall not be reduced during the term of this Agreement.'' (Emphasis added.) Accordingly, regardless of the earlier genesis of the Advantage Plan during the prior bargaining agreement, the reference in article 26 to the status quo as it existed in January 1993 rendered the Advantage Plan an integral part of the 1993–1995 agreement from its inception.

Accordingly, in the spring of 1993, at midterm of the parties' 1993–1995 agreement, when the Respondent unilaterally discontinued the Advantage Plan and unilaterally implemented the Blended and Supplemental Plans, it modified the health insurance provisions contained in the contract—i.e., the Advantage Plan as well as the Indemnity Plan—without the Union's consent. Therefore, consistent with the judge's other relevant findings, the Respondent's conduct violated Sections 8(a)(5) and 8(d). See, e.g., *Martin Marietta*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, St. Vincent Hospital, Santa Fe, New Mexico, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Louis Harris, Esq., for the General Counsel.
Nicholas J. Noeding, Esq. (Hinkle, Cox, Eaton, Coffield & Hensley), of Albuquerque, New Mexico, for the Respondent.
Carol Oppenheimer, Esq. (Simon & Oppenheimer), of Santa Fe, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. I heard this case in trial at Albuquerque, New Mexico, on September 23 and 24 and November 2 and 3, 1993.[1] It is based on a charge filed by District 1199NM, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO (the Union) on March 19, 1993, which alleged generally that Respondent violated Section 8(a)(5)[2] and (1)[3] of the National Labor Relations Act (the Act). On May 26, 1993,[4] the Regional Director for Region 28 of the National Labor Relations Board issued a complaint against Respondent alleging violations of Section 8(a)(5) and (1) of the Act.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and it is admitted, that Respondent is a nonprofit corporation duly organized and existing under the laws of the State of New Mexico, with an office and principal place of business in Santa Fe, New Mexico (the hospital), where it is, and at all times material here has been, engaged in providing general and acute hospital services; further, that in the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $250,000 and annually purchases and receives goods or services valued in excess of $50,000 directly from sellers or suppliers located outside the State of New Mexico.

Accordingly, I find and conclude that, at all times material hereto, Respondent is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

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[1] Unless otherwise noted, all dates here shall refer to the calendar year 1993.

[2] Sec. 8(a)(5) of the Act provides that,

> It shall be an unfair labor practice for an employer—. . .
> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

[3] Sec. 8(a)(1) of the Act provides that,

> It shall be an unfair labor practice for an employer—. . .
> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Sec. 7 of the Act provides that,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[4] Unless otherwise indicated, all dates here shall refer to the year 1993.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that, at all times material hereto, the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The essential issue is whether or not Respondent, when it implemented a new ''Blended Plan'' and a new ''Supplemental Plan'' of healthcare insurance for its nurse employees, and at the same time discontinued the existing ''Advantage Plan'' of healthcare for those same employees, made midterm modifications to ''contractual terms and conditions of employment'' without the agreement of the Union, thereby violating Section 8(d), and Section 8(a)(5) and (1) of the Act.

Subsidiary questions are whether or not the Advantage Plan was a contractual term and condition, or could be modified at will by Respondent, and whether or not the Union waived the right to refuse to bargain over the proposed changes.

Respondent also contends that meetings that took place between the members of a committee on benefits constituted collective bargaining, and, even if they did not, that it bargained to impasse over those provisions having to do with the implementation of the new Blended Plan.

B. *Background and Labor Relations History*

Respondent operates an acute care, nonprofit hospital in Santa Fe, New Mexico, having 252 beds. It employs 1300 employees, of whom 300 are nurses.

On November 15, 1974, St. Vincent Professional Performance Association was certified as the exclusive collective-bargaining representative of the following appropriate unit at the hospital:

> All registered nurses and licensed practical nurses employed by the [Respondent], but excluding all other employees, all other professional and technical employees, confidential employees, clerical employees aides, orderlies, dietitians, pharmacists, head nurses, guards, watchmen, and supervisors as defined in the Act, as amended.

On April 28, 1978, the certification was amended to substitute the name of the Union as the exclusive collective-bargaining representative of the unit. Since then, the Union has been the exclusive bargaining representative of the employees in the above-described unit, and has entered into a succession of collective-bargaining agreements with the Respondent.[5]

The 1988–1991 agreement contained a reopener clause allowing for reopening of negotiations in order to negotiate regarding health insurance, wage rates and classifications, and ''one other article selected by each party.'' Actually, though, the agreement was reopened and an entire new successor agreement was negotiated between the parties.

That agreement was effective by its terms as amended by mutual agreement from February 1, 1990, to February 1, 1994. Among other provisions, that agreement provides for health insurance, and states:

> Except as noted in paragraph 26.02 the [Respondent] agrees that the current level of health benefits shall not be reduced during the term of this Agreement,

and, further, that,

> [e]xcept as provided in this section, the employees' contribution to health care coverage shall not be increased during the term of this Agreement as defined in Section 37.01.

Unlike previous contracts, this collective-bargaining agreement provided for employees to contribute toward the premium charged for health insurance. This concession on the part of the Union was a part of an overall scheme which enabled to obtain a wage increase for employees, and involved its agreement to consider ways of securing lower cost health insurance.

That agreement was effectuated through a letter from Respondent to the Union's president dated January 12, 1990, setting forth the formation of a committee and the committee's perceived function,

> that the [Union] representatives on this committee would provide input and suggestions in whatever benefits are being changed or modified and would be liaison to your bargaining unit for review and concurrence with those benefit changes.

The committee went to work, assisted by a representative of the Union, Shirley Cruse, and after a time came up with a plan, called the Advantage Plan.

In due course, the Union's president was approached by Respondent's personnel director, Susan Rush, and told that Respondent wished to offer it to the employees.

According to the credited testimony of the Union's vice president, Delma Delora, having checked with employees, and being herself convinced that it was a good plan, Delora assented to Respondent implementing the Advantage Plan from and after July 1, 1991. Thus, from and after that date, employees had two plans for health insurance, i.e., the original plan, called the Indemnity Plan, and the new plan, called the Advantage Plan.

Sometime around July 1, 1991, Respondent distributed to its employees a booklet which it had prepared. The title was ''Your Group Health and Dental Plan Benefits.'' The booklet described the benefits of both the Indemnity Plan and the Advantage Plan, along with instructions as to how to secure the coverage under the plans. In the introduction to the booklet, Respondent's president stated:

> We are pleased to offer eligible employees of St. Vincent Hospital a personalized choice within our Comprehensive Group Healthcare package. Realizing that not all employees have the same healthcare needs, you now may choose between The Indemnity Plan or The ADVANTAGE Plan.

[5] The Union also represents a unit of technical employees at the hospital, composed of employees such as X-ray and respiratory technicians, commonly referred to throughout the record as ''the techs.''

Additionally, Respondent posted on its bulletin boards a summary of the two plans, comparing the features of each.

C. *The Facts of this Dispute*

In the fall of 1992, the contract was reopened according to its terms. Those terms provided that the parties could be reopened to negotiate wage rates, and ''one other article selected by each party.''

Neither party selected health insurance for reopening, and the Union's chief negotiator, Diane Justin, credibly testified that she came to the table prepared to discuss wages plus the one other issue selected by the Union, which happened to be combined leave. Justin further credibly testified that the Union never assented to reopening bargaining over the health insurance plans, and that Respondent never formally notified the Union that it wished to reopen negotiations for the purpose of renegotiating health insurance plans.

Nevertheless, it is not disputed that during the negotiations Respondent repeatedly told the Union that the high costs of the healthcare program would have to be addressed, as Respondent was experiencing losses in recent months. Respondent stressed that, if it was to fund sought wage increases, a way would have to be found to control and reduce healthcare insurance costs.

The parties succeeded in their negotiations, and an entire new agreement was reached on January 12, and signed on January 25, extending the collective-bargaining agreement for 1 year, to February 1, 1995. Among its provisions was the following:

> Benefit Programs: A working group will be established for the purpose of evaluating benefit programs and new benefit plan designs. This group will include one nurse representative from the Nurse Bargaining Unit. The Nurse Bargaining Unit representative will be paid at their regular rate of Pay for time spent in meetings. This working group will be chaired by the Benefit & Compensation Administrator, with each member of the group sharing responsibility for facilitating the meeting. The group will establish protocol for calling meetings and establishing agendas.
>
> These working groups will be established no later than thirty days following contract agreement. Membership and purpose of the working groups will be evaluated each year.

According to Justin's credited testimony, there was a lot of discussion about the makeup and purpose of the committee. She testified that the Union repeatedly sought assurances, which it was given at the bargaining table, that the committee would not be considered as an alternative to collective bargaining. In the end, however, she testified that during the negotiations, Respondent repeatedly raised the issue of needing relief from excessive healthcare costs, and that this ultimately led the Union to try to accommodate those needs by agreeing to participate in a committee to look into ways of solving the problem. She credibly quoted Respondent's director of organizational development, Kathy Miller, as offering the assurances sought, and telling her that the committee would be considered ''advisory.''

Miller, too, testified that the wage increase mentioned above was given in return for the promise to participate in the plan to look into healthcare cost containment. She admitted, however, that it was never expressly agreed by the Union that the committee's role would be as a substitute for collective bargaining. Indeed, Miller, who seemed a truthful, though confused, witness, also admitted that the Union never used the terms ''collective bargaining'' or ''negotiate'' to describe the workings of the proposed committee. She spoke of how the committee was proposed by the Union's president, Delora, who spoke of having a committee as had been done leading up to the Advantage Plan's implementation, and how Respondent was open to that.

Delora, of course, credibly testified how the Advantage Plan had, as she viewed it, been negotiated between her and Susan Rush. She also credibly testified, without contradiction, as to other examples of how she had, in the past, negotiated with Respondent regarding matters brought up in an agreement's midterm, and spoke of how she had always been vested by the Union with authority to reach agreement upon such matters.

The committee began it's deliberations in early February. It was chaired by Marcia Lindquist, Respondent's human resource administrator. She testified credibly that her understanding was that the committee was to blend elements of the Advantage Plan and the Indemnity Plan into one plan. Among her first actions with the committee was to distribute an action plan, with a deadline for completion of the committee's work on April 1.

Also sitting as members of the committee were Bob Scott, a representative of Respondent, and representatives of both units of employees represented by the Union at the hospital. Shirley Cruse was selected to represent the ''tech unit,'' and David Harrington was selected to represent the ''nurse unit.''

Cruse and Harrington credibly testified that each of them repeatedly advised or warned Lindquist that they were not there to negotiate on behalf of the Union, and that whatever the committee came up with would have to be submitted to the leadership and membership of the Union. Lindquist, after conferring with Miller, assured them that healthcare would not be an item on the table.

Cruse spoke of how she nevertheless came to believe that Lindquist was laboring under the false impression that whatever they came up with would be implemented following approval by Respondent's ''Administrative Council.'' Ultimately, though, having warned Lindquist about it several times, she concluded that she'd done all she could to straighten out Lindquist's thinking, and went ahead and participated in the workings of the committee.

Ultimately, the committee came up with a new plan, called the ''Blended Plan.'' By a memo dated March 8, Lindquist distributed a list of the changes which would constitute the new plan, which she stated had been ''accepted'' by Respondent's ''Administrative Council,'' and which then went on to schedule a meeting for March 11 to speak of, inter alia, ''communication.''

On March 10, by memo to Scott, Lindquist announced an intent to communicate, by means of a flyer to each department for posting, that:

> EFFECTIVE APRIL 1, 1993 St. Vincent Hospital will implement a new Employee Healthcare Plan for eligible St. Vincent Hospital employees.

Justin credibly testified that, upon learning of Respondent's intent to implement the new plan, she ''freaked.'' Lindquist admitted that following the meeting of March 11, she received a call from Justin in which Justin forcefully objected to any implementation of the new plan, saying it had not been negotiated with the Union, and that neither Cruse nor Harrington had been representatives of the Union vested with negotiating authority.

The Union and Respondent met on March 16. Respondent attempted to make a presentation of the new plan, complete with flip charts. Lindquist admitted that the Union's representatives objected to the plan in ''no uncertain terms,'' and spoke of their unhappiness with it, and repeatedly asserted that it could not be implemented without first being negotiated with the Union.

Later that day Respondent received the Union's letter, composed and signed by Delora, which recited how both the Indemnity Plan and the Advantage Plan had been duly agreed upon by the parties in separate past negotiations. The letter went on to assert:

> The contracts allow for changes in insurance plans only by mutual agreement. If you go ahead with implementation of these unilateral changes you will be in violation of both contracts because there is no mutual agreement. . . . The hospital has an obligation to bargain with us before implementing this change on April 1, 1993. The Hospital cannot remove the Advantage Plan without negotiation with the designated Union representatives of both bargaining units.

The following day Respondent sent a letter to the Union asserting for the first time that Delora's assertion in her letter to the effect that the Advantage Plan was a contractual obligation was in error. It went on to state that the Advantage Plan had not been negotiated, and that Respondent did not intend to offer it after April 1. The letter, signed by Miller, went on to state that the Indemnity Plan, which had been agreed to, would remain in effect, and pointed out that the new plan had been reached with input from employee surveys, and with union representatives helping in its development. While offering to meet and discuss these matters, the letter announced that the unit's employees would be covered by the Indemnity Plan beginning April 1, and that any additional premium changes would be charged in the first payroll period after May 1. It closed by advising that employees would have to make a plan election by April 15, and that employees would have two weeks to make their elections.

On March 24, the parties met and agreed to bargain over the implementation of the new plan. Respondent, however, continued to insist that the Advantage Plan had not been part of the agreement between the parties, and could be discontinued without the Union's assent, or bargaining.

On March 25, the Union's president, Fonda Osborn, delivered a letter to Respondent, arranging negotiations for both units represented by the Union, and demanding certain items of information. Among them was a demand for utilization figures for each plan. Though the Union persisted in demanding this information, Respondent never provided it, saying that getting it together was simply too difficult.

Thereafter, the parties met and bargained on March 29 and 30, and April 6, 7, 13, and 14.

During the meetings, so Miller admitted, the parties met, exchanged proposals and made considerable headway in bridging their differences. As she stated, the parties got so close to agreement that ''it squeaked.''

The April 1 deadline was extended by Respondent to April 15.

By letter of April 7, Respondent stated that the Advantage Plan would be discontinued on April 15, that the Indemnity Plan would continue to be offered to employees, and that from and after April 15 the Blended Plan would be implemented and offered to nurse bargaining unit employees, ''as originally designed.''

At the last meeting of April 14, the Union still sought the implementation information it had previously requested, and Respondent adhered to it's position that securing or compiling such information would be too difficult. The parties were in apparent agreement that a new plan administrator should be selected. Accordingly, at the meeting, the Union suggested that implementation should be delayed until such an administrator was selected and had time to work on the problems. Further, the Union stated that it was willing to have Respondent offer all three plans to employees, but continued to object to implementation of the plan to discontinue the Advantage Plan. Miller, however, had come to distrust the Union, and concluded that it's request for information was a delaying tactic. So, she stated that she saw no need to meet again, because Respondent couldn't provide the information requested. In response to questions from Respondent concerning whether or not the parties were at impasse, the Union said that it didn't see how it could move from it's position without the information it had requested.

In any event, no agreement was reached by the end of the April 14 meeting.

Respondent concedes that it implemented the Blended Plan on April 15, and at the same time discontinued the Advantage Plan. Nurses were then given their choice between the Indemnity and the Blended Plans.

On May 1, Respondent offered a Supplemental Plan to nurses, which contains matters not covered by the Blended Plan. While it seems clear that some of the matters set forth in the Supplemental Plan had been discussed during the negotiations of March and April, it is also clear and is undisputed that no agreement was reached concerning all those matters, such as the premiums to be charged of employees.

Premiums for the discontinued Advantage Plan were lower than the new Blended Plan, and the benefits of the Blended Plan were thought by the Union to be less than the Advantage Plan.

On June 14, Osborn again wrote Respondent asking for information. She requested the names of nurses who had requested coverage under the Blended Plan.

D. *Discussion and Conclusions*

Based on the testimony of Delora and Justin (which I do not consider to have been truly contradicted by that of either Miller or Lindquist), I find and conclude that Respondent broached the idea that it faced financial difficulties to the Union during the course of its reopener talks with the Union in the fall of 1992, and that, in due course, this led to the formation of a benefits committee, charged with reviewing, inter alia, healthcare insurance plans for employees of Respondent. However, I also find that the Union reserved it's

right not to engage in collective bargaining over the healthcare insurance, but that, in an effort to cooperate with Respondent, offered to, and did, participate in the workings of a committee which looked into ways of granting benefits, including healthcare, to employees at a lower cost.

At that time the parties already had a healthcare plan in place, as a result of agreements previously reached between them. There is no dispute that the Indemnity Plan, which was in place at the time the collective-bargaining agreement was reached by the parties, constituted an agreed-upon term or condition of employment. Respondent does not dispute this, nor could it.

Thus, there can be no question that Respondent was not free to discontinue or modify the Indemnity Plan without the Union's agreement to do so, or to, at the least, bargain about it. In *C & S Industries*, 158 NLRB 454, 457 (1966), in distinguishing this sort of situation from those where the parties have not yet reached agreement upon the terms that employees are to work under, the Board held that

> In . . . situation[s] . . . [where] a bargain [has] already been struck for the contract period and reduced to writing, neither party is required under that statute to bargain anew about the matters the contract has settled for its duration, and the employer is no longer free to modify the contract over the objection of the Union.

The Board went on to explain its rationale, referring to Section 8(d) of the Act, and it's express language, saying:

> In line with that provision, the Board has consistently held that a party does not violate its bargaining obligation when it refuses to discuss changes proposed by the other party in the terms of an existing contract. The Board has also held that an employer acts in derogation of his bargaining obligation under Section 8(d), and hence violates Section 8(a)(5), when he unilaterally modifies contractual terms or conditions of employment during the effective period of a contract—and this even though he has previously offered to bargain with the union about the change and the union has refused. [Id.]

In short, the Board will not permit an employer to break an agreement once it has been made, and, will not even require a union to discuss an employer's desires for changes in the agreement reached.

Thus, in this case the Union would have been well within it's rights had it simply refused to negotiate over healthcare insurance provisions when first approached by Respondent in the course of the negotiation on the ''wage and one-other item'' reopener in the fall of 1992.

But, instead of flatly refusing to offer any response to the plight of Respondent, the Union took a more constructive approach. It cooperated with Respondent, while reserving it's right not to negotiate.

Then, when it repeatedly appeared to it's representatives that Respondent was either mistakenly, or stubbornly, attempting to convert the workings of the benefits committee into negotiations, it protested repeatedly, and was repeatedly assured by Respondent that the healthcare provisions were not on the table.

Now, Respondent asserts that the workings of the committee did constitute collective bargaining, and that the Union waived its right to assert that they were not by it's participation in them. Respondent, at trial, repeatedly conveyed that it's representatives on the committee felt betrayed by the Union's assertion that the changes in the healthcare provisions recommended by the committee could not be implemented without the Union's assent, or at least without bargaining.

Thus, I find and conclude that the Union did not waive it's right to insist upon Respondent adhering to it's contractually agreed healthcare insurance provisions. The offer to cooperate in a method of looking into alternatives, which Respondent, itself, termed advisory, was clearly not a waiver of it's rights in this respect. To hold otherwise would be to totally ignore the express words of the parties, and especially the assurances given the Union by Lindquist and Miller that no such result was sought or planned by Respondent. Based upon those assurances, which I find were given to the Union, based upon the credited testimony of Delora and Justin, it would seem that if any party had a right to feel betrayed, it would be the Union, and not Respondent.

I find that, until it received Lindquist's March 10 memo, the Union had a right to rely upon the express assurances offered to it repeatedly that Respondent was not attempting to use the workings of the committee as ''collective bargaining.'' And, immediately upon receipt of that memo, I find that, far from waiving it's right's in this respect, the Union's representative, Justin, freaked and protested directly to Respondent that it could not do what it proposed to do. Thus, just the opposite of the waiver claimed by Respondent, the Union did not waive any of its rights, and, as of the time that it announced it's intent to change it's healthcare insurance provisions Respondent had no right to change any contractually agreed-upon provision of it's collective bargaining agreement with the Union, absent the Union's assent.

Respondent, however, next asserts that *C & S Industries*, supra, has no application in this case. It argues that it was privileged to drop the Advantage Plan without assent from the Union. That argument is based upon it's view that the collective-bargaining agreement between the parties, which contained a zipper clause and a management-rights clause, operated as a relinquishment by the parties of their right to negotiate concerning healthcare during the term of the agreement. Respondent argues that, since the only insurance pointed out in the agreement was the provision of Section 26.02 (which, though not mentioning any plan by name, could only refer to the Indemnity Plan), only the Advantage Plan constitutes the ''contractually agreed-upon'' healthcare provision of the parties' agreement.

Respondent then points out that the Advantage Plan had it's inception after the parties negotiated their February 1990 agreement, and did not reduce it to writing and specifically include it within the subsequent agreements.

Under articles 26 and 32 of the agreement of the parties, Respondent was obligated to maintain the ''current level of benefits.'' Respondent argues that this could apply only to those benefits, including healthcare insurance provisions, which were extant when the agreement, and it's zipper clause, were executed. Accordingly, in Respondent's view, it had no obligation to maintain the Advantage Plan because it was not part of the written agreement between the parties.

However, Respondent's arguments all ignore several important facts which I find were present in this case.

First of all, as has been previously found, Respondent provided the Union with explicit assurances that its cooperation in helping to solve Respondent's financial distress would not be used against it and be termed to be collective bargaining, which is precisely what Respondent has done. I find, and conclude, that the effect of these assurances was to shield the Union from any claim of waiver that could possibly be advanced because of its participation in the processes of the benefits committee. It would be utterly unfair were the law to permit a party to an agreement to seek the help of the other party to the agreement, and, where there is clearly no obligation of that party to cooperate, to hold the cooperation against it in the face of express assurances that no such result would be asserted.

Second, Respondent's arguments ignore the evidence of how the Advantage Plan came into existence. True enough, the Advantage Plan had it's inception in the workings of a benefits committee having no discernible differences from the benefits committee which worked here. But, in the first use of a benefits committee, unlike here, there was no claim advanced that the workings of the benefits committee constituted collective bargaining. Mortal to Respondent's argument is the fact, which I find to be true based upon the credited testimony of Delora, that, after the committee finished it's deliberations on the Advantage Plan, and after Respondent's administrative committee approved the proposed plan, Respondent approached Delora and specifically made an offer of the plan to her as the authorized agent of the Union, an offer which she readily accepted. As is obvious from her undisputed testimony, Delora, unlike the members of the benefits committee, was fully vested by the Union with authority to negotiate, and even commit, on behalf of the Union. No further proof of that is needed than her undenied testimony that she had done so several times in the past, and had never been previously met with any claim from Respondent that whatever agreement she entered on behalf of the Union did not thereby become part and parcel of the contractually agreed-upon working conditions for employees of Respondent. Neither the Advantage Plan nor the Indemnity Plan secured their status as contractually agreed-upon working conditions by virtue of the workings of a benefit committee. They achieved that status as a result of having been agreed upon by the Union and Respondent.

Other so-called evidences of waiver by the Union, such as the participation of union members (among others) in the benefits committee, the conveyance of information by such union members to other union members, or the failure of the Union to object to the workings of the benefits committee, are all obviated by the fact of the assurances found to exist earlier. Certainly, such evidences fall far short of the standard for waiver of statutory rights, i.e., that the waiver be accomplished by actions which do so clearly and unequivocally. In this light I find that the alleged trade of a $1 wage raise for a waiver of rights was not clearly and unequivocally expressed; true, that carrot was dangled, and the Union no doubt wanted such a raise for its members, but that such a trade was made expressly for a waiver is far from clear.

Accordingly, I reject Respondent's arguments to the effect that the Advantage Plan was not part of the agreement between the parties, and that it could be discontinued or modified by Respondent, as was done in this case.

Finally, Respondent advances the argument that, regardless of the previous findings, Respondent was privileged to make the changes in working conditions which it made on April 15 and May 1. Respondent's argument in this regard is based upon the claim that the negotiations between the parties in March and April led to an impasse on April 14, and that the changes made thereafter were encompassed within Respondent's preimpasse offers to the Union.

Here, as previously noted, the Union was not obliged to bargain over the healthcare insurance provisions. By all that appears, the Union could have, upon learning of Respondent's intent to implement the new insurance plan, simply protested Respondent's actions, and, following implementation, insist upon Respondent rescinding whatever changes it had made in working conditions. The Union chose, instead, to enter into negotiations with Respondent.

However, the Union's action in this regard did not serve as of its right to refuse to bargain further, or to demand that Respondent's plan not be implemented. As counsel for the General Counsel points out, in *Herman Bros., Inc*., 273 NLRB 124 (1984), the Board held that an impasse in negotiations is irrelevant in a situation where a party seeks, unilaterally to change an existing agreement. See also *Standard Fittings Co. v. NLRB*, 845 F.2d 1311 (5th Cir. 1988), enfg. 285 NLRB 285 (1987).

Accordingly, I find that it makes no difference in this case whether or not the parties reached impasse in their negotiations from and after April 14.

Even if it did, however, I would not find that an impasse occurred here.

In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), the Board stated that:

> 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 contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

In considering the good faith of the parties I bear in mind that Respondent was obviously rushing through negotiations in order to meet an administrative deadline needed to change the third party administrator. In doing so, it ignores the fact that progress was being made almost up to the date of implementation of its plans, and that the Union had not been given certain information which had been requested by it and which would have presumably been helpful to in negotiations. The Union, in fact, asked for a hiatus in further bargaining until it could receive and review the information it had requested. Specifically, the Union sought information going to either support or disprove Respondent's claim that it needed the changes it planned because of dire financial straits. Respondent did not give the Union this information. Instead, it took the positions that it had given the Union sufficient information, that the Union's request was a mere delaying tactic, and that the information either did not exist in the form that the Union demanded or was too difficult to compile.

In viewing the entire record, it seems clear to me that Respondent rushed to declare impasse because it was deter-

mined to do what it had intended to do since first broaching the subject of reviewing the healthcare insurance program at the hospital, i.e., change the program and lower costs, even though it didn't have the right to do so without reaching agreement with the Union.

Accordingly, in agreement with counsel for the General Counsel and the Union, I find and conclude that by implementing its plan to discontinue the Advantage Plan, and by implementing the Blended Plan and the Supplemental Plan, Respondent has violated Section 8(d) and Section 8(a)(5) and (1) of the Act. I shall recommend an appropriate remedy therefore.

CONCLUSIONS OF LAW

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

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

3. Since on or about April 15, 1993, Respondent has violated Section 8(d) and Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively with the Union's chosen representative in good faith, by implementing new healthcare insurance plans and by discontinuing an existing healthcare insurance plan.

4. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All registered nurses and licensed practical nurses employed by St. Vincent Hospital, but excluding all other employees, all other professional and technical employees, confidential employees, clerical employees aides, orderlies, dietitians, pharmacists, head nurses, guards, watchmen, and supervisors as defined in the Act, as amended.

5. The above unfair labor practices have an effect upon commerce as defined in the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, St. Vincent Hospital, Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the above named labor organization as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All registered nurses and licensed practical nurses employed by St. Vincent Hospital, but excluding all other employees, all other professional and technical employees, confidential employees, clerical employees aides, orderlies, dietitians, pharmacists, head nurses, guards, watchmen, and supervisors as defined in the Act, as amended.

(b) Making unilateral changes in wages, rates of pay, or other terms and conditions of employment of its employees in the above-described appropriate unit during the term of the contract without first reaching agreement with the above named labor organization concerning such changes.

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

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

(a) On request of the above-named labor organization, rescind any plan for healthcare insurance which Respondent may have unilaterally instituted, and reinstate any plan of healthcare insurance which it may have unilaterally discontinued.

(b) Make whole all employees for losses sustained as a result of Respondent's unilateral actions, including any increases in premiums charged for healthcare insurance, and any losses sustained by employees for claims not paid, or not paid as fully, under the plans unilaterally instituted as compared to the plan unilaterally discontinued, together with interest. Interest shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) 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.

(d) Post at its office and facility at its hospital in Santa Fe, New Mexico, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 28, 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.

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[6] Counsel for the General Counsel's unopposed motion to correct the transcript is granted in all respects. All other outstanding motions, if any, inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, 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.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith with District 1199NM, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO in the following unit which is appropriate for the purposes of collective bargaining:

All registered nurses and licensed practical nurses employed by St. Vincent Hospital, but excluding all other employees, all other professional and technical employees, confidential employees, clerical employees aides, orderlies, dietitians, pharmacists, head nurses, guards, watchmen, and supervisors as defined in the Act, as amended.

WE WILL NOT make unilateral changes in wages, rates of pay, or other terms and conditions of employment during the term of a collective-bargaining agreement without first reaching agreement with the Union about such changes.

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, on request of the Union, rescind any plan for healthcare insurance which we have unilaterally instituted.

WE WILL, on request of the Union, reinstate any plan of healthcare insurance which we have unilaterally discontinued.

WE WILL make employees whole for any losses sustained by them as a result of our unilateral action.

ST. VINCENT HOSPITAL