JD–17–04
Butler, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AK STEEL CORPORATION, BUTLER WORKS

and Case 6–CA–32677

BUTLER ARMCO INDEPENDENT SALARY UNION

and Case 6–CA–32724

BUTLER ARMCO INDEPENDENT UNION

Patricia J. Daum, Esq., for the General Counsel.
William Bevan III, James R. Haggerty and *Darren P. O'Neill, Esqs., (Reed Smith LLP),* of Pittsburgh, Pennsylvania, for the Respondent.
Marianne Oliver, Esq., for the Charging Party

DECISION

Statement of the Case

JOHN T. CLARK, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on January 22 and 23, 2003. The charge in Case 6–CA–32677 was filed on April 16, 2002[1], by Butler Armco Independent Salary Union (BAISU). The charge in Case 6–CA–32724 was filed on May 8, by Butler Armco Independent Union (BAIU). Separate complaints issued on September 26, together with an order consolidating cases and notice of hearing.

The complaint in Case 6–CA–32677 alleges that AK Steel Corporation, Butler Works (the Respondent) impermissibly altered the scope of the Unit or, alternatively, that it unilaterally eliminated the Scheduler-Electrical North Processing/Cold Mill position and transferred the work performed by that job classification without negotiating with the BAISU , and under either theory, violated Section 8(a)(5) of he Act.

The complaint in Case 6–CA–32724 alleges that the Respondent unilaterally created a plantwide Crane (Seniority) Department and a crane seniority unit, and transferred crane operators' seniority to the newly created plantwide Crane (Seniority) unit, without the consent of the BAIU, in abrogation of the parties' collective-bargaining agreement and thereby, violated Sections 8(a)(5) and (d) of he Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and the Respondent I make the following

[1] All dates are in 2002 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

The Respondent, an Ohio corporation, with a facility in Butler, Pennsylvania, where it is engaged in the manufacture and non-retail sale of steel and related products. During the 12-month period ending March 31, 2002, the Respondent sold and shipped from its Butler, Pennsylvania, facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the BAISU and BAIU are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Introduction

The Respondent is an integrated steel manufacturer that owns and operates a number of steel manufacturing facilities in the United States. The Respondent bought the Butler Works facility from ARMCO in 1999. The Respondent produces stainless and electrical steel products at the Butler facility.

BAISU has represented a unit of salaried office, clerical, technical employees at the facility for over 45 years. At the time of the alleged unfair labor practices the parties were operating under the last collective-bargaining agreement that had been negotiated with ARMCO (Jt. Exh. 1).

BAIU has represented a unit of production and maintenance employees at the facility for almost 60 years. At the time of the alleged unfair labor practices there were approximately 1,700 employees in the Unit represented by the BAIU with about 100 to 125 of those represented employees classified as crane operators. In September 2001 the BAIU and the Respondent entered into their first collective-bargaining agreement. The agreement is effective from October 1, 2001, through September 30, 2006.

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The Respondent's Manufacturing Planning Department plans and schedules the flow of steel throughout the various processes at the facility as well as other of the Respondent's facilities.

Olyn Lauster was one of approximately three employees who held the position of "Scheduler-Electrical." Lauster's job duties were different from those of the other electrical-schedulers, and as such his job was specifically referred to as "Scheduler-Electrical North Processing/Cold Mill." Recognition of the BAISU is set forth in the collective-bargaining agreement. The unit description does not specify job classifications within the unit, but only refers to "certain non-exempt salaried employees" (Jt. Exh. 1 at 3). Counsel for the General Counsel submits, and it is not disputed, that the parties' historical reference to a particular job constitiutes its "job classification."

Lauster held the "Scheduler-Electrical North Processing/Cold Mill," position for 13 years, until he retired on February 28, 2002. Lauster testified extensively about his duties, and I fully credit his testimony. His demeanor was that of a sincere and truthful witness. In addition to his

demeanor, he also appeared to take great pride in himself, and his work. I am mindful that a reason for Lauster's abrupt retirement was that he felt that he deserved a raise for doing his special duties, and when the raise was not forthcoming he retired. I did not detect any sense of bitterness in his testimony. Rather, it appeared that he relished the opportunity to explain, in detail, how his job was far more difficult and important than the other schedulers. Lauster testified that he alone performed his duties and that he trained Utility Scheduler Charles "Ed" Schoeffel, also a unit employee, as his substitute. Schoeffel, who is also retired from the Respondent, corroborated Lauster's testimony and also credibly testified that when substituting for Lauster, he never shared any of the duties with a non-unit employee or supervisor. In any event, it does not appear that the parties have any serious disagreement over Lauster duties or that his duties were different from the other schedulers.

On March 18, the BAISU, by memo, asked the Respondent if it was going to fill Lausters's position. Industrial Relations Manager Michael C. Seyler responded by letter stating that the Respondent had the unilateral right, under the collective-bargaining agreement, to implement changes in work assignments, "particularly where the job duties are not exclusively reserved to one job." Seyler ended the letter by stating that, "[n]nevertheless" the Respondent would agree to discuss any questions regarding the issue, at an upcoming meeting "so that by such clarification grievance(s) may possible be avoided" (GC Exh. 4). The meeting was held on April 10, but the issue of filling the vacant position was not discussed. BAISU President Donald Christie testified that because the Respondent stated in the first paragraph of the letter that it had the unilateral right to implement changes, "[w]e did not feel that because of that first paragraph that there was any discussion (Tr. 20)." On April 17, the day after filing the charge, the BAISU filed a grievance alleging that Lauster's job was being done by exempt employees (R. Exh. 1).

On April 18, the Respondent posted for bid by "exempt" employees a position entitled "Master Scheduler-Electrical North Processing/Cold Mill" (GC Exh. 5). An "exempt employee" is a manager or supervisor of the Respondent. Lauster testified that the position description mirrored his job duties with the exception of providing "backup for Supervisor of Electrical Scheduling," and improving "coil storage and transportation procedures." Although the posted position was not filled, the parties stipulated that the bulk of the work that Lauster performed was not being performed by salary bargaining unit employees (Tr. 96).

1. Contentions of the parties

Counsel for the General Counsel contends that the Respondent violated Section 8(a)(5) and (d) of the Act by the creation of a Master Scheduler-Electrical job classification consisting primarily of duties that have historically been performed by the Scheduler-Electrical, a unit job classification, without the consent of the BAISU. In the alternative counsel for the General Counsel contends that the Respondent violated Section 8(a)(5) of the Act by transferring bargaining unit work formerly performed by the Scheduler-Electrical North Processing/Cold Mill outside the unit without affording the BAISU an opportunity to bargain over this conduct and the effects of this conduct.

Counsel for the General Counsel also contends that the Respondent's affirmative defense, that the matter should be deferred under *Collyer Insulated Wire,* 192 NLRB 837 (1971), should be rejected. Counsel for the General Counsel argues that the change in the scope of the unit allegation is nondeferrable, see, *Hill-Rom Co.,* 297 NLRB 351, 360 (1989) enf. denied on other grounds 957 F.2d 454 (7th Cir. 1992), and, because that allegation is related to the alternative argument, alleging an unlawful transfer of bargaining unit work, it would not effectuate the purposes of the Act to defer only the alternative theory. Counsel for the General

Counsel also contends that the dispute has not arisen "within the confines of a long and productive collective bargaining relationship," and thus deferral is inappropriate based on at least two of the *Collyer* factors.

The Respondent argues that this case involves an assignment of work and not a change in unit scope, that it assigned the work pursuant to the collective-bargaining agreement, and, as such, the case should be dismissed. The Respondent cites *NCR Corp.,* 271 NLRB 1212 (1984), as an example of the Board's policy of declining to insinuate itself into labor disputes where the employer acts on a substantial claim of contractual privilege. The Respondent submits that the complaint should be dismissed, or if not dismissed, then deferred to the arbitration provision in the collective-bargaining agreement.

2. Discussion

a. Unit scope issue

Counsel for the General Counsel submits that it is difficult to discern whether an employer's actions are more properly characterized as an attempt to alter the scope of the unit, or an attempt to transfer bargaining unit work outside of the unit. This distinction is not insignificant. Altering the scope of the bargaining unit is a permissive subject of bargaining and, as such, cannot be done without the consent of the Union or by decision of the Board. Conversely, the assignment of work is a mandatory bargaining subject, upon which "an employer normally may lawfully insist to impasse over a change in work assignments, even if it entails transferring work out of the bargaining unit." *Antelope Valley Press,* 311 NLRB 459, 460 (1993).

The Respondent agrees that there is a distinction, but contends that under the law as set forth in *Antelope Valley,* above, it is clear that the Respondent has done nothing more than reassign work duties. The Respondent has not insisted on, or even proposed, a change in the unit description. Similarly, claims the Respondent, "it has not proposed to reclassify as exempt any positions listed as unit positions nor has it removed or sought to remove any position from the unit." Although the Respondent decided not to fill an Scheduler-Electrical position, to the extent that it fills the position in the future, it would do so with a unit employee. The Respondent submits that it "**has done nothing more than transfer certain duties ordinarily performed by non-unit employees to an existing non-unit position rather than assign them to a unit person."**

Counsel for the General Counsel cites to *Mt. Sinai Hospital,* 331 NLRB 895 (2000), as a case similar to the present case, and one in which the Board found that the employer's unilateral reclassification of a unit position as supervisory, where the duties remained essentially the same, constituted a change in the scope of the unit. The Board, in *Mt. Sinai,* citing *Holy Cross Hospital,* 319 NLRB 1361 (1995), stated that once a position has been included within the scope of the unit, the employer cannot remove it without the consent of the union or the Board. Id. at 895 fn. 2.

I find the factual pattern in *Mt. Sinai* to be far more compelling, for finding a violation premised on a unilateral change in the scope of the unit, than the facts in this record. In *Mt. Sinai* the employer created the position of sous chef to staff a private kitchen in a private area of the hospital. A dispute arose when the employer claimed that the position was supervisory and, therefore, excluded from the bargaining unit. Shortly after an arbitrator found that the position was not supervisory, and belonged in the unit, the employer reclassified the position to keep it out of the unit. After the reclassification the former unit employees were "promoted" into the

newly created position. The judge specifically found that the employer changed the job title, increased the salary, and modified the job description to make it appear that the position had additional responsibilities to justify the reclassification. *Mt. Sinai* above at 906.

Similarly in *Holy Cross Hospital*, supra, the employer submitted a dispute, by way of a Board unit clarification proceeding, concerning the continued inclusion of "house supervisors" in a nurses' unit. Shortly after the Regional Director found that the "house supervisors" were not statutory supervisors the employer created a new, nonunit position, entitled "shift manager." Many of the duties of the house supervisors were given to the shift managers, which resulted in the elimination of the position of house supervisor. It was under those circumstances that the Board adopted the judge's conclusion that the employer violated the Act, and emphasized that once the Board or the parties included a specific job within the unit, the job could not be removed without the consent of the union or the Board.

The Respondent denies attempting to change the scope of the unit, and in my view the record does not contain sufficient evidence to find otherwise. I do find, as contended by the counsel for the General Counsel, that the position of Scheduler-Electrical North Processing/Cold Mill is unique and that it constitutes a separate job classification, distinct from that of Scheduler-Electrical. I further find, based on the credited testimony of Lauster and Schoeffel, that the duties of Scheduler-Electrical North Processing/Cold Mill have been historically performed exclusively by unit employees. I also find that the transfer of the bargaining unit work performed by the Scheduler-Electrical North Processing/Cold Mill, to nonbargaining unit employees is a mandatory subject of bargaining.

b. Bargining issue

In the alternative, counsel for the General Counsel argues the the Respondent had an obligation to bargain in good faith, to agreement or impasse, before it transferred the bargaining unit work out of the unit. See, e.g., *Regal Cinemas,* 334 NLRB 304 (2001), and cited cases.

The Respondent does not quarrel with that premise. Instead it contends that it acted pursuant to what it believed was its rights under the collective-bargaining agreement, and thus, its action was privileged. Moreover, because the issue is solely one of its rights under the collective-bargaining agreement, the case should be dismissed in accordance with *NCR Corp.,* 271 NLRB 1212 (1984). If dismissal is inappropriate, the Respondent claims that Board intervention is also unwarranted, and the case should be deferred under *Collyer,* supra. Lastly the Respondent contends that, in any event, the BAISU waived any bargaining right it may have had over this issue when it failed to discuss the assignment of duties with the Respondent at the April 10 regularly scheduled rules committee meeting.

Generally, an employer whose employees are represented by a union may not unilaterally change those employees' terms and conditions of employment without giving the union notice and an opportunity to bargain over the proposed changes. *NLRB v. Katz,* 369 U.S. 736 (1962). An exception to this rule is that a unilateral change by an employer may be permissible if the union has "clearly and unmistakably" waived its statutory right to bargain over the particular matter. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1962). A union's waiver of its statutory right to bargain over a particular matter can occur by express language in the collective-bargaining agreement, or it may be implied from the parties' bargaining history, past practice, or both. The waiver of a statutory right is not lightly inferred by the Board, there must be a clear and unmistakable showing that a relinquishment of the statutory right in question has occurred. The burden of proving that a waiver has occurred is on the party asserting the waiver. E.g., *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB No. 44, slip op. at 5 and cited cases

(2003). I find that the Respondent has not met its burden.

The Respondent's claim of waiver is based solely on the Union unwillingness to "discuss . . . questions," regarding the Respondent's position that the Respondent "has the unilateral right under the [collective-bargaining agreement] to implement changes in work assignments . . . ." At most the Respondent's letter of March 28 merely establishes its willingness to answer questions regarding its position "so that by such clarification a grievance[] may possibly be avoided. (GC Exh. 4). A fair reading of the letter establishes that bargaining over the issue would be futile. Assertion of the right to take unilateral action is inconsistent with an offer to engage in collective bargaining. The Board does not require a union to request bargaining when it would be futile to do so. E.g., *Regal Cinemas,* 334 NLRB 304, 315 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003). Accordingly, the Union's silence at the meeting of April 10, concerning this issue, does not constitute a waiver of its statutory rights.

Indeed, the Respondent's contention throughout this proceeding has been that it has the unilateral right under the collective-bargaining agreement to implement changes in work assignments. In support of this position the Respondent relies on Article IV Section A (3) (a) of the collective-bargaining agreement (Jt. Exh. 1 at 7-8). This section list management rights, one of which is the right to manage the business and direct the workforce, including the right to "change assignments." The Respondent also relies on Appendix E, Section I (C) of the Experimental Agreement which is appended to the collective-bargaining agreement. That section provides that the Respondent "may take actions appropriate to insure the most efficient and effective utilization of bargaining forces," (Jt. Exh. 1 at 89).

Generally worded contract language, whether in a managements rights clause or elsewhere in the labor agreement, does not constitute a waiver of the union's statutory right to bargain about specific mandatory bargaining subjects. As the Board stated in *Hi-Tech Cable Corp.,*

> In order to establish the waiver of a statutory right as to a specific mandatory bargaining subject, there must be clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. Footnote omitted.

309 NLRB 3, 4 (1992) and cases cited, enfd. per curiam 295 F.3d 1044 (5th Cir. 1994). The two contract clauses relied on by the Respondent are not "clear and unequivocal," and the Respondent admits as much when it argues that its "actions were based on a reasonable and plausible interpretation of its contractual rights," and that several arbitrators have interpreted the agreement in the same way.

I disagree with both of the Respondent's foregoing contentions. I find, in agreement with the counsel for the General Counsel, that the Respondent's interpretations are neither reasonable nor plausible. In any case, it would appear that the need for an interpretation of a contract clause, is the antithesis of clear, unequivocal, and unmistakable, language. I also do not find that the arbitration decisions support the Respondent contention because they rely on "shared work," a fact that I have specifically found not to be present in this case. Accordingly, I do not find that the BAISU waived its statutory right to bargain over the mandatory bargaining subject of the assignment of bargaining unit work to nonbargaining unit personnel. I further find, in agreement with counsel for the General Counsel's alternative argument, that the Respondent violated Section 8(a)(1) and (5) of the Act by its transfer of bargaining unit work formerly performed by the Scheduler-Electrical North Processing/Cold Mill, outside the unit, without

affording the BAISU an opportunity to bargain over this conduct and the effects of this conduct.

c. Deferral Issue

I also reject the Respondent's contention that this matter should be deferred under *Collyer Insulated Wire,* 192 NLRB 837 (1971). The issue here does not arise from the meaning of provisions contained in the parties' collective-bargaining agreement. Nor does the dispute arise in the context of a long and productive collective-bargaining relationship. Compare *Caritas Good Samaritan Medical Center,* 340 NLRB No. 6 (2003) (where the issue involved the language of the agreement and the parties had a 6 year bargaining relationship unlike the 3 years here). Moreover, counsel for the General Counsel argues, correctly, that the change in the scope of the unit allegation is nondeferrable. *Hill-Rom Co.,* 297 NLRB 351, 360 (1989) enf. denied on other grounds 957 F.2d 454 (7th Cir. 1992). Because the scope of the unit allegation is related to the alternative argument alleging an unlawful transfer of bargaining unit work, it would not effectuate the purposes of the Act to only defer the alternative theory. Accordingly, I find deferral inappropriate.

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In addition to the basic collective-bargaining agreement between the BAIU and the Respondent, individual departments or seniority sections, have "supplemental seniority agreements." The supplemental seniority agreements usually have a chart with a line of progression for that department, the line of progression lists various seniority moves in the department. The supplemental seniority agreements also have overtime procedures that are a more "department specific" than those contained in the basic agreement. The supplemental seniority agreements are acknowledged in the basic collective-bargaining agreement in article VIII, section C (Jt. Exh. 2 at 24–28). Seven supplemental seniority agreements apply to about 100 to 125 crane operators. Each agreement has specific lines of progression and overtime proccedures outlined. (GC Exhs. 7–14).

1. New plant-wide Crane (Seniority) Department

On March 26 William Gonce, Respondent's manager of industrial relations, sent a letter to then-BAIU President Carl Nanni. The letter announced that pursuant to the management's rights provision in the collective-bargaining agreement the Respondent intented to establish a crane seniority department that would benefit the Respondent as well as the crane operators. The letter set April 15 as the target date for implementation and April 27 for the completion date. During the period April 15 through 27 crane operators could transfer, without change to their existing crane position incumbency, or existing incentive plans applicable to each of the specific cranes. Gonce closed the letter with a request to contact him if Nanni or the BAIU Rules committee wished to meet and discuss the above information. (GC Exh. 15).

After the letter was sent, the Respondent told all crane operators to complete and return an "Election Form Notice." The form allows the current crane operators to move into the new plant-wide Crane Department, on their incumbent crane, effective the week ending May 11. The form outlined the structure of the new department regarding pay, scheduling of overtime and vacations, seniority rights and temporary transfer requirements. Although the method for scheduling overtime and vacations remained the same, because of changes in the composition of the crane sections, the Respondent was able to fill vacancies in a crane section at the straight time pay rate, rather than the overtime rate that was required under the supplemental seniority agreements. Gonce testified that he created the new department primarily to reduce overtime.

Crane Operator Lisa Hutchison testified as to impact of the new department on the scheduling of the crane operators vacations. She testified that because there are more senior crane operators in her new seniority section she went from being the fourth person to select her vacation dates to the fourteenth. In essence the Respondent created the new crane department by merging the seven areas that were covered by the supplemental seniority agreements into five crane sections. This action also impacted on the employees' seniority for being awarded job bids as well as vacation dates. For instance, previously a crane operator in the Processing Maintenance Department, who bid on a vacant crane position in that department, had 13 competitors—the other crane operators in the department. Under the new arrangement the same operator, if he was transferred to the Main Plant Crane Section and wanted to bid on a vacant crane position in that section, would have 27 potential competitors.

The creation of the new department also altered the lines of progression that had been mutually agreed upon in the supplemental seniority agreements. The Respondent developed and implemented new lines of progression for each of the five seniority sections created in the new plant-wide Crane (Seniority) Department (see GC Exh. 15 "Attached is the new Crane Department Line of Progression. . . ."). Thus, the Respondent's unilateral implementation of the new plant-wide Crane (Seniority) Department changed the terms and conditions of the crane operators employment including their bid and cutback rights, lines of progression, and overtime and vacation scheduling practices. The final piece of information on the form stated that if the crane operators did not elect to move they may be required to temporarily fill their previous position until a replacement crane operator could be recruited or trained. BAIU President Gallagher asked Gonce for clarification and was told that any crane operator who did not agree to the transfer, and who was not qualified for another position in their supplemental seniority section, would be considered a reserve employee. Reserve employees are assigned to any vacant position for which they are qualified, and are paid the rate of that position. Gallagher testified that it was his understanding that a number of crane operators who elected to transfer did so under protest. Michael C. Seyler, industrial relations manager,[2] and Gallagher testified that the Respondent was notified that the BAIU did not agree that the Respondent had the right to establish or implement the new crane department and that the Respondent violated article VIII and the supplemental seniority agreements contained in the collective-bargaining agreement by its actions (Tr. 171, 269).

2. Contentions of the parties

Counsel for the General Counsel contends that article VIII, section C, 1 and 2 of the collective-bargaining agreement, requires the Respondent to continue in effect the supplemental seniority agreements and the job progression lines established under those agreements, until changed by mutual agreement of the parties. Counsel for the General Counsel argues that when the Respondent removed the crane seniority sections from each of the applicable supplemental agreements, transferred those sections into the newly created plant-wide Crane (Seniority) Department, and altered the lines of progression established for each of those sections within their particular supplemental seniority agreement, without the agreement of the BAIU, it violated Sections 8(a)(5) and (d) of the Act.

Alternatively, counsel for the General Counsel argues that the decision to create the Crane (Seniority) Department is a mandatory subject of bargaining, that can be resolved

[2] By way of clarification, Seyler, industrial relations manager, reports to Gonce, manager of industrial relations (Tr. 132).

through the collective-bargaining process. Accordingly, because the Respondent failed to bargain over the decision, and its effects, the Respondent violated Section (8)(a)(5). Regarding this alternative argument counsel for the General Counsel further argues that even if it is determined the BAIU waived its rights to bargain over the decision and effects, because the Respondent's implementation was inconsistent with its announced approach, the Respondent still violated Section 8(a)(5). In arguing this theory counsel for the General Counsel submits that the record supports this finding and that, although the allegation was not included in the complaint, the matter was fully and fairly litigated at the hearing.

Lastly, counsel for the General Counsel argues that because the Respondent's actions constitute a modification of the collective-bargaining agreement deferral is not appropriate. Furthermore, should a violation be found under one of the alternative theories deferral would not be appropriate because the collective-bargaining relationship has been ongoing for only three years. Moreover, because the Respondent argues an unreasonably broad reading of the managements rights clause, deferral would effectively license the Respondent to ignore the collective-bargaining agreement under the guise of exercising its right to manage its workforce and operations. Counsel for the General Counsel alleges that the Respondent has demonstrated a pattern of disregard for the principles of collective-bargaining in this case and the consolidated case. This pattern of conduct, as evidence of an overall disregard for its obligations under the Act, is not deferrable because an arbitrator's jurisdiction is limited to the dispute under the collective-bargaining agreement. Counsel for the General Counsel observes that the Respondent also relies on its exclusive right to change methods of production under article IV, section B of the agreement. Section C of that article states that the rights set forth in section B are not subject to the grievance procedure, accordingly, contends the counsel for the General Counsel, deferral is not appropriate.

The Respondent contends that this is a case where the parties disagree over the interpretation of the collective-bargaining agreement. The Respondent submits that the Respondent had the right to create the new department in accordance with article VIII, section G.6, and article IV of the collective-bargaining agreement, that the right has been upheld in arbitration, and acknowledged by the BAIU. The Respondent points out that the complaint does not contain an alternative pleading that the Respondent failed to bargain with the BAIU over the change, and even if it did, the case should be dismissed because it is merely a contract interpretation dispute and regardless the BAIU waived its right to bargain. Regarding the counsel for the General Counsel alternative argument, that because the Respondent's implementation was inconsistent with its announced approach, the Respondent still violated Section 8(a)(5), the Respondent moves to strike that argument because not only is the allegation not included in the complaint, the matter was not fully and fairly litigated at the hearing.

3. Discussion

"It is well settled that an Employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act, by modifying a term of a collective-bargaining agreement without the consent of the other party while the contract is in effect." E.g., *Manley Truck Line, 271* NLRB 679, 681 (1984), enfd. 779 F.2d 1327 (7th Cir. 1985), and cited cases. Counsel for the General Counsel relies on article VIII (entitled "Seniority"), section C (entitled "Supplemental Seniority Agreements"). Section C, 1 and 2 state:

> 1. The plant subdivisions (to be termed departments, units within departments, and lines within units) within which seniority as outlined in this Article shall apply, and the job progression therein shall be determined or revised from time to time as necessity shall

> arise, by agreement between the [parties].
>
> 2. Seniority practices shall be established or revised as necessity shall arise by agreement between the parties hereto in the same manner and by the same [parties] specified in Paragraph 1 of this Section and such practices shall not be inconsistent with the provisions of this Article.
> (Jt. Exh. 2 at 24.)

It is obvious from the foregoing that agreement is required to revise a supplemental seniority agreement and the lines of progression established within the agreement. The evidence is also clear that the Respondent changed seven of the supplemental seniority agreements, as well as the lines of progression contained therein, without consent of the BAIU. The Respondent admits as much (see GC Exh. 15 "Attached is the new Crane Department Line of Progression. . . .") and does not seriously contend otherwise.

The Respondent does contend that article VIII, section G.6 and article IV of the collective-bargaining agreement are controlling and that those articles permit the Respondent's actions. Section G, is entitled "Permanent Vacancy and Transfer Rights" (Jt. Exh. 2 at 32). Paragraph 6 states:

> If equipment, production units, or operations are permanently transferred or relocated or assigned to another department, unit or line, any employees dislocated by such moves may be transferred with the equipment, unit, or operation and retain in the new department, unit, or line all the length of seniority service he had previously held in the department, unit, or line from which transferred. An employee who declines the transfer with the equipment will not have any loss in his seniority standing in his present department, unit, or line.
> (Jt. Exh. 2 at 38.)

Article IV is a general management rights provision which gives the Respondent the exclusive authority to manage the business and direct the work force. The Respondent especially relies on the right to "change assignments." The last sentence of paragraph 1 of section A, article IV, specifically provides, "however, that in the exercise of such rights the Company shall observe the provisions of this Agreement." Section B of that article also provides that the Respondent is the exclusive judge of all matters regarding methods, processes, and means of manufacture and the location of operations and grants the Respondent the right to introduce new and improved methods of production. Counsel for the General Counsel correctly observes that Section C exempts the rights granted in Section B from the grievance procedure. (Jt. Exh. 2 at 6.) Based on the foregoing articles the Respondent submits that the issue is one of contract interpretation.

Counsel for the General Counsel argues that article VIII, section G.6 does not grant the Respondent the right to create a new department. Counsel for the General Counsel contends that the only reference to "new department" in that section is an attempt to distinguish the department from which the equipment is transferred i.e., the old department, from the department to which the equipment is moved, i.e., the new department. Had the parties intended otherwise they would have used "new" before department, in the second sentence of the paragraph. By using "another" the parties indicated that the equipment was transferred to an existing department.

I agree with counsel for the General Counsel's contention. I also find that the management rights clause does not specifically grant the Respondent the right to create a new

department, but it does specifically state that the Respondent, in the exercise of its rights, shall observe the provisions of the agreement. Thus, assuming the Respondent was applying article IV, it still was required to observe the other provisions of the collective-bargaining agreement, one of which is the requirement, in article VIII, section C 1 and 2, for agreement before any supplemental seniority agreement, and the job progression contained therein, is revised.

I do not find persuasive the arbitration awards cited by the Respondent. The most recent decision was decided by Arbitrator Sergent in 1999, and involved the creation of a new position in an existing department. After quoting the language contained in article VIII, section C, paragraph 1, the arbitrator finds that "[t]he parties are agreed that this language precluded the Company from unilaterally implementing changes to the line of progression" (R. Exh. 15 at 14). The arbitrator went on to find that the parties were at impasse over the proposed changes in the line of progression and that the Respondent had kept the position "outside the line of progression specifically in order to comply with the language of Article VIII" (id. at 18). Here, the Respondent has engaged in a unilateral mid-term revision of the unambiguous language contained in article VIII of the parties collective-bargaining agreement. I do not find that this award explains, or supports, the Respondent's actions.

The other award was decided by Arbitrator Volz in 1973. The dispute involved the elimination of the Wheel Works Maintenance facility and the creation of a Central Maintenance Department. Article VIII, section C, paragraph 1 is quoted by arbitrator, along with four other paragraphs from the collective-bargaining agreement in an introductory section entitled "Contract Provisions" (R. Exh. 13 at 2). After acknowledging the contract provisions the arbitrator never again specifically refers to, or addresses, any of them. He finds that the collective-bargaining agreement has no express provision relating to the abolishment or creation of departments, but that the Respondent has "inherent managerial authority" to take such action (id at 10). From that finding he concludes that the Respondent had the authority to create the new department and that the transfer of employees from the defunct Wheel Works unit to the new department was contractually proper. Although the arbitrator found that "the Union agreed that Management had the right to create a new department. . . ." (Id at 7), The issue here is not the unilateral creation of a new department but the unilateral revision of the supplemental seniority agreements, and the lines of progression therein, which are set forth in article VIII, section C, paragraphs 1 and 2, and that require mutual agreement before being revised.

The Respondent also contends that Carl Nanni, the former BAIU president and chief negotiator, acknowledged the Respondent's right to create new departments during the 2001 negotiations. In this regard William Gonce, Manager of Industrial Relations, stated that although he believed that the Respondent had the right under the collective-bargaining agreement to unilaterally create departments, the Respondent proposed the creation of the central crane department during negotiations. Gonce explained this apparent contradiction by stating that he thought that any company would prefer an agreement, rather than have turmoil in the work force. Gonce stated that Nanni indicated that he felt that the proposal was unnecessary because the Respondent had the right to create departments. Gonce said that he withdrew the proposal based on Nanni's representation, and his request to deal with the issue after negotiations because of Nanni's concern over the difficulty of getting the collective-bargaining agreement ratified by the membership.

Nanni testified and denied telling Gonce that management had the right to create departments. Nanni's testimonial demeanor was that of a very credible witness. His testimony was forthright, clear and certain. I credit his testimony over Gonce's testimony. I also note that Nanni is employed by the Respondent and thus his testimony is given added weight because the Board has long held the belief that the testimony of a current employee that is adverse to

the employer is "given at considerable risk of economic reprisal, including loss of employment. . . and for this reason not likely to be false." *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1977). I also discredit Gonce's alleged reason for putting the proposal for the new crane department on the bargaining table. Not only was his testimonial demeanor lacking but the Respondent's reliance on unilateral action in both cases is inconsistent with his testimony that the Respondent would prefer an agreement. A party must, perforce, be willing to negotiate in good faith before any agreement can be achieved.

I find, in agreement with the counsel for the General Counsel, that the Respondent violated section 8(a)(1)and (5) and section 8(d) of the Act as alleged in the complaint when it altered the supplemental seniority agreements and lines of progression contained therein without the agreement of the BAIU as clearly required by article VIII, section C of the collective-bargaining agreement. *Milwaukee Spring Div.,* 268 NLRB 601, 602 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985). Accord: *St. Vincent Hospital,* 320 NLRB 42 (1995); *Oak Cliff-Golman Baking Co.,* 207 NLRB 1063, 1064 (1993); *Wightman Center,* 301 NLRB 573, 575 (1991); *Gayston Corp.,* 265 NLRB 1, 14 (1982). There is no evidence that the BAIU waived any rights, including the right to insist on the Respondent's adherence to the contractually agreed on terms clearly set forth in article VIII, section C of the agreement. *St. Vincent Hospital,* above, at 49.

Having found that the Respondent has violated section 8(a)(1) and (5) and section 8(d) of the Act when it made a mid-term modification of the collective-bargaining agreement without consent of the BAIU, it is unnecessary to pass on the counsel for the General Counsel's alternative arguments or the Respondent's motion to strike. Because I have found that the Respondent's actions resulted in an unlawful mid-term modification of the parties' collective-bargaining agreement I also find, consistent with long-standing Board precedent, that deferral is not appropriate. *C & S Industries, Inc.,* 158 NLRB 454, 459 (1966); see also, *R.T. Jones Lumber Co.,* 313 NLRB 726, 727 (1994) (The Board found deferral not appropriate were the employer admitted the breach).

Conclusions of Law

1. The Respondent, since on or about March 1, 2002, has refused to bargain collectively and in good faith with the BAISU, and has committed an unfair labor practice in violation of Section 8(a) (1) and (5) of the Act, by unilaterally transferring bargaining unit work formerly performed by the Scheduler-Electrical North Processing/Cold Mill, to nonbargaining unit personnel, a mandatory subject of bargaining, without affording the BAISU an opportunity to bargain over this conduct and the effects of this conduct.

2. The Respondent since May 11, 2002, has committed an unfair labor practice in violation of Section 8(a) (1) and (5) of the Act, and 8(d) of the Act by unilaterally revising the supplemental seniority agreements, and the lines of progression contained therein, without obtaining the consent of the BAIU to this mid-term modification of article VIII, section C of the collective-bargaining agreement.

3. The above unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the unlawful unilateral transfer of bargaining unit

work from the Scheduler-Electrical North Processing/Cold Mill job classification I shall recommend that the Respondent cease and desist transferring the bargaining unit work and restore the unlawfully transferred work to the Scheduler-Electrical North Processing/Cold Mill job classification and that it cease and desist transferring bargaining unit work outside of the unit without first affording the BAISU timely notice and a meaningful opportunity to bargain about the transfer. I shall also recommend that the Respondent make whole its employees for any loss of earnings suffered by virtue of the Respondent's unlawful unilateral transfer of bargaining unit work on March 1, 2002, with interest as described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

To remedy the unlawful mid-term modification of the collective-bargaining agreement I shall recommend that the Respondent be ordered to rescind the seniority units and lines of progression that it unlawfully established on May 11, 2002, and to restore the supplemental seniority agreements referenced in article VIII section C of the collective-bargaining agreement between the BAIU and the Respondent, and to cease and desist from making any modifications to the supplemental seniority agreements, and the lines of progression contained therein, without consent of the BAIU I shall also recommend that the Respondent make whole its employees for any loss of earnings suffered by virtue of the Respondent's unlawful mid-term modifications on May 11, 2002, with interest as described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, AK Steel Corporation, Butler Works, Butler, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain collectively and in good faith with the Butler Armco Independent Salary Union (BAISU), as the exclusive representative of its employees in the following appropriate unit, by making unilateral changes in any mandatory subject of bargaining without affording the BAISU, timely notice and a meaningful opportunity to bargain about the changes. The appropriate unit is:

> "Certain non-exempt salaried employees" as more particularly described in the most recent collective-bargaining agreement between the Respondent and the BAISU at article I, section B.

(b) Changing mandatory terms of collective-bargaining that are contained in the current collective-bargaining agreement between the Butler Armco Independent Union (BAIU), as the exclusive representative of its employees in the following appropriate unit, without the consent of the BAIU. The appropriate unit is:

> "All hourly paid production and maintenance employees" of the Respondent and as more particularly described in the most recent collective-bargaining agreement between the

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

Respondent and the BAIU at article I, section B.

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

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

(a) Restore the unlawfully transferred work to the Scheduler-Electrical North Processing/Cold Mill job classification.

(b) Notify the BAISU in advance of any proposed changes in the mandatory subjects of bargaining and afford the BAISU a meaningful opportunity to bargain about the changes.

(c) Make whole any employee for any loss of earnings suffered by virtue of the Respondent's unlawful unilateral transfer of bargaining unit work on March 1, 2002, in the manner set forth in the remedy section of the decision.

(d) Rescind the seniority units and lines of progression that the Respondent unlawfully established on May 11, 2002, and restore the supplemental seniority agreements referenced in article VIII section C of the collective-bargaining agreement between the BAIU and the Respondent and maintain those supplemental seniority agreements, and the lines of progression therein, during the term of the collective-bargaining agreement unless the BAIU consents to any modifications.

(e) Make whole any employee for any loss of earnings suffered by virtue of the Respondent's unlawful mid-term modifications on May 11, 2002, in the manner set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Bulter, Pennsylvania, copies of the attached notice marked “Appendix.”[4] Copies of the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2002.

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[4] 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.”

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(i) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. [*Date*]

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John T. Clark
Administrative Law Judge