

Westvaco Corporation and International Brotherhood of Electrical Workers and Local Union 1753, International Brotherhood of Electrical Workers, AFL-CIO. Case 11-CA-11872

June 22, 1988

DECISION AND ORDER

**BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND BABSON**

On July 29, 1986, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party and the General Counsel filed briefs in response, and the Charging Party filed a cross-exception with a supporting brief.

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

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

¹ In sec IV of his decision the judge inadvertently stated the abbreviation for the United Paperworkers International Union as "UPIU." instead of "UPIU"

² The Respondent excepts to the judge's conclusion that it was clear that the International president of the IBEW had the right to approve or reject the proposed contract which the members of Local Union 1753 had ratified. This proposed contract basically copied the parties' 1982 labor contract, but with certain modifications. Those modifications, however, did not make any change in the provision "Parties to Agreement," which states, in part, "This agreement is to become effective when signed by the Company and the Union and approved by the International President of the International Brotherhood of Electrical Workers." The Respondent argues that any requirement that the International approve the contract was waived because no such approval was required in previous years. However, the evidence regarding the parties' previous labor contracts shows that the International uniformly either approved the contract or in fact signed as a party to the contract. The International president rejected the proposed 1985 contract, and thus the contract, by its own terms, never became effective.

The Respondent also argues that the Union is estopped or barred by laches from asserting that the proposed 1985 contract did not become effective. The Respondent failed, however, to submit evidence sufficient to warrant such a finding. There was no evidence on the parties' past practice regarding the time between membership ratification of a proposed contract and the International's approval of the contract. Thus we cannot say, based on past practice, that the 2-1/2 months between membership ratification of the proposed 1985 contract and the International's rejection of the contract was an unreasonable period of time. Nor can we say that this was such a long period of time that the International must be deemed to have unreasonably delayed its decision, regardless of the parties' past practice. Furthermore, we note that there was no evidence that the Respondent made any effort to learn whether the International had approved or rejected the contract while the matter was pending before the International. Accordingly, we cannot agree that the Union is either estopped or barred by laches from asserting that the proposed 1985 contract did not become effective. In any event, we note our further agreement with the judge's conclusion that the Respondent had unlawfully bargained to impasse as of November 4, 1985, and implemented its proposals on November 21 or 22, 1985, only 10 days after the proposed contract was sent to the International for its approval.

Finally, in adopting the findings and conclusions of the judge, we rely on *Boise Cascade Corp.*, 283 NLRB 462 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Westvaco Corporation, North Charleston, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ann B. Wall, Esq., for the General Counsel.

George P. Smith, Esq. (Constangy, Brooks & Smith), of Atlanta, Georgia, for the Respondent.

Robert D. Kurnick, Esq. (Sherman, Dunn, Cohen, Leifer & Counts), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Charleston, South Carolina, on 28 April 1986. The original charge was filed by International Brotherhood of Electrical Workers and Local Union 1753, International Brotherhood of Electrical Workers, AFL-CIO (the Unions or the Charging Parties or designated separately as the International or Local 1753) on 23 December 1985 against Respondent Westvaco Corporation (Westvaco or the Respondent) and the complaint was issued by the Regional Director for Region 11 of the National Labor Relations Board (the Board) in this case on 3 February 1986 and alleged that Westvaco had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, since on or about 23 June 1985, refusing to bargain collectively with the Union by insisting to impasse over its maintenance and operator performance improvement plan (MOPIP) and has further violated Section 8(a)(5) and (1) of the Act by, since on or about 18 November 1985, unilaterally without notification or consultation with Local 1753, implementing its MOPIP. Respondent by its answer filed on 18 February 1986 has denied the commission of any violations of the Act.

On the entire record, including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

The complaint alleges, Respondent Westvaco Corporation admits, and I find that it has been at all times material a New York corporation with a facility located at North Charleston, South Carolina, where it is engaged in the manufacture of pulp, paper, and by-products, that during the 12 months prior to the filing of the complaint, which period is representative of all times material, Respondent received at its North Charleston, South Carolina facility goods and raw materials valued in excess of

¹ The findings of fact include a composite of the credited testimony of the witnesses, stipulations entered into by the parties, and admitted exhibits.

\$50,000 directly from points outside the State of South Carolina, and shipped from its North Charleston, South Carolina facility products valued in excess of \$50,000 directly to points outside the State of South Carolina, and that it is now and has at all times material been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The complaint alleges, Respondent admits, and I find that the International and Local 1753 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNIT

The complaint alleges, Respondent admits, and I find that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All electricians, power and boiler house employees, and instrument department employees of the Employer at its Charleston, South Carolina plant, excluding electrician leadmen and shift engineers, all other production and maintenance employees, office clerical employees, plant clerical employees, professional employees, technical employees, guards, watchmen, and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this case are essentially undisputed. The Respondent operates a paper and pulp manufacturing plant with the end products of various cardboard wrappings and other products and also operates as part of the same facility, a small chemical operation. The plant is approximately 50 years of age. Respondent, according to the un rebutted testimony of its Industrial Relations Manager Jack Flynn, became concerned over a period of years of its disadvantages in competing with other newer and more efficient plants that require fewer man-hours per unit of product. One of the problems perceived by management was the organization of the work force along "strict craft lines." There are approximately 800 to 900 hourly employees and a similar number of salaried employees. The hourly workers are represented by four unions, including two locals of the United Paperworkers International Union (IPIU), one of which represents employees in the pulp mill operation and the other of which represents employees in the paper mill. The International Association of Machinists (IAM) represents employees generally referred to as maintenance mechanics. Local 1753 represents the electrical workers composed of employees set out in the appropriate unit, *supra*. Local 1753 represents approximately 125 employees including 60 electricians who install conduit, wire, and cable, and test and maintain pole lines and fixtures, lighting circuits and equipment, power feeders, motors, generators, alternators, and other electrical equipment and devices. Local 1753 also represents 18 instrument technicians who install, repair, and calibrate process control instruments, and 39 powerhouse operators who operate boilers and 11 powerhouse repairmen who repair boilers and turbines.

Over a period of the prior several years, Respondent had designated a committee of its management employees who were assigned to study operations of other pulp and paper mills in the United States and in other countries to determine how to improve the efficiency of its operations in order to effectively compete with other pulp and paper mills, many of which were of relatively recent vintage with modern equipment. One of the central conclusions of the committee was that it would be necessary to eliminate strict adherence to craft lines among the hourly employees in order to facilitate workflow and efficiently operate the plant by permitting employees of one craft (represented by one union) to perform the work of other crafts (represented by other unions) on an as-needed basis in order to avoid delays and downtime in the large plant operation.

The collective-bargaining agreement between Local 1753 and the Respondent was effective on 1 July 1982 and continued through 30 July 1985 and contained a 60-day notice provision for modification and also contained a provision that it would remain in force and effect after the expiration date until either party gave the other a notice of its intent to terminate the agreement in not less than 10 days beyond the date of the notice. In the fall of 1984 the Respondent made an unsuccessful attempt at early negotiations with all the unions at the premises by presenting a comprehensive proposal of work rule changes that would eliminate craft line barriers to assignment of work. This attempt was abandoned prior to the close of 1984.

The contracts of all the unions on the premises were to be negotiated in 1985 and the Respondent made a comprehensive proposal to the unions' MOPIP, which it introduced into its negotiations with the four unions in 1985. The plan would eliminate the contractually designated craft lines by training members of one craft represented by one union in a skill of another craft represented by another union and permit them to perform the work previously performed by the other craft as required by management. In the case of the IBEW group, employees who were not covered by the IBEW agreement would be trained in the field of electricity and would perform work previously performed exclusively by the electricians. Employees in the IBEW group would be trained to perform work previously performed exclusively by the other crafts (i.e., welding or maintenance and repair work). These changes would also require that the second paragraph of article I, Recognition, be removed from the agreement. That paragraph stated:

The Company will not habitually assign work normally performed by employees in the established unit to employees outside the unit as long as employees in the unit are available, either on the job or from the overtime roster, and qualified to do the work involved. Employees are available if they are on the job even though they may be otherwise occupied, provided they can be released, or if they can be called in from the overtime roster.

Under MOPIP the employees' job classifications would also be changed with electricians and instrument

technicians becoming I/E mechanics, powerhouse repairmen becoming general mechanics. Several other classifications of other unions would also be designated as general mechanics. The powerhouse operators would be designated as operators. Under MOPIP each union would continue to represent the same percentage of general mechanics as they had prior to its implementation, and newly hired employees would be assigned to one of the bargaining units as required to maintain appropriate percentages of employees.

The negotiations to replace the collective-bargaining agreement commenced on 7 May. Local 1753 was represented by IBEW International Representative E. H. Massey Jr., who served as chief spokesman, Local 1753 President Allen Wall, and other members of the Local's bargaining committee. Respondent was represented by Industrial Relations Manager Jack Flynn, Supervisor Julius Guerard, and others. Massey testified as follows: At the 7 May meeting, the parties exchanged proposals but MOPIP, although included as a proposal, was not discussed because a joint meeting had been set for 17 June to enable Respondent to address all four unions concerning MOPIP and to answer their questions. Massey testified that although the parties met on 3 and 4 June, there was little progress as Respondent held off on discussions of most areas contending they would be discussed or resolved by MOPIP. Respondent met with all four unions on 17-20 June and explained the MOPIP program. The meeting was commenced by Respondent's industrial relations manager, Flynn, who told the Unions' representatives that Respondent expected to have an agreement by 30 June, that they would make a presentation of MOPIP, listen to the Unions' concerns, and address what areas they could, and then give the Unions their final positions as to what MOPIP would entail. On the second day Respondent's representatives responded to questions and told Local 1753 representatives that it was important to it that the employees of other bargaining units perform work on energized lines, and that they would not change their position on this although each of the Unions indicated opposition to crossing the energized lines. The Respondent responded "that they had to have that issue," according to the un rebutted testimony of Massey. During the joint meeting the Respondent committed that members of Local 1753 would continue to have responsibility for voltages of above 440.² Massey testified further that on 17 June Flynn informed the representatives of the four unions that responses would be made to the matters raised by the Unions on 18 June and that these responses would be encompassed into a single package as part of the 17 June offer and this would be the Respondent's offer. The Respondent's proposal remained the same on 20 June as on 17 June with minor modifications according to the testimony of Massey. No agreement was reached on MOPIP at this series of meetings. Local 1753 informed the Respondent it was willing to cross lines between its own instrument technicians and

electricians, but was unwilling to cross the craft lines of other unions to perform other crafts' work or to have them perform its work. After the Respondent's final offer following the 20 June meeting, Massey wrote Flynn on 25 June and indicated those areas of MOPIP Local 1753 would and could not accept. After the 20 June meeting, Respondent entered into negotiations with the Paperworkers local unions and Local 1753 was unable to set up another meeting until at the request of Local 1753 the Federal Mediation and Conciliation Service mediator was able to set up a meeting for 19 July. At that meeting Respondent maintained that MOPIP had to be settled or Local 1753 must accept it in order to obtain an agreement. The Respondent caucused at this meeting and then presented another proposal through the mediator dated 25 June, which was essentially the same proposal as that presented previously by Respondent during the 17-20 June meetings. The Local 1753 committee caucused and reviewed this offer and did not accept it. Massey advised Flynn of this by letter and also requested a meeting on 4 September to resume negotiations. Flynn responded to this letter and stated in his letter response that MOPIP must be resolved to reach an agreement and agreed to the 4 September meeting date. The parties met on 4 and 5 September and Local 1753 withdrew a number of its bargaining demands but according to Massey, Respondent remained firm on most items and made it clear that MOPIP would remain on the table.

Massey testified further that the parties met again on 7 October and at that meeting Respondent advised Local 1753 that the Paperworkers locals had ratified their labor agreements and that Respondent was willing to go through all outstanding items and give the Union its final position, but that there were no changes in the Respondent's proposal on MOPIP. The next day Flynn presented Respondent's typed offer, which still contained the MOPIP proposal. The Union's committee was not satisfied with the proposal and did not present it to the membership. On 31 October the Respondent gave the Union a 10-day notice as provided in the agreement to terminate the agreement effective 9 November and forwarded a copy to Massey and also sent a letter to the employees. Massey was contacted by the Federal mediator to meet on 31 October with the Union. At that meeting the parties examined various outstanding items such as the mill provision, vacation sellbacks, refusals of temporary or permanent promotions, and MOPIP. Respondent was not agreeable to any of the Union's proposals except the refusal-to-promote proposal. At the 31 October meeting the Union offered to leave the existing meal allowance as it was and permit employees to sign meal tickets at the cafeteria to eliminate Respondent's cash-flow problem. On vacation sellback, the Union proposed that an employee could sell back only 2 weeks of his vacation. The Union accepted the Respondent's proposal on freezing of promotions. The Respondent offered a \$750 lump-sum payment in the second year of the contract, and the Union proposed a 3-percent general wage increase. The Union asked the Company to agree to the Union's letter proposal of 25 June, and the Respondent rejected this offer and restated its 8 October offer to be effective the

² Ninety percent of the electrical work performed by Local 1753 bargaining unit members involved voltages of 440 or below according to the subsequent testimony at the hearing of Local 1753 Business Manager Allen Wall

first Monday following ratification. At no point in the negotiations did Respondent make changes in its written proposals with respect to what voltages of electricity employees could be assigned to work on, but maintained that any voltages 440 or under could be worked on by any employee at the supervisor's discretion. It did commit that voltages over 440 would continue to be worked on only by I/Es and other crafts would not be assigned this work. At this meeting Respondent also stated that article XXII³ of the existing labor agreement must be eliminated to comply with MOPIP.

On 4 November the parties met again and Massey presented a longhand proposal to Respondent to resolve all issues except MOPIP and to put MOPIP on hold to let the Board decide whether it was a nonmandatory subject of bargaining as the Union had filed a charge with the Board alleging that Respondent was insisting to impasse on a nonmandatory subject of bargaining and was awaiting the answer of the Board. This was one of several similar charges filed by the Union against the Respondent during the course of negotiations. The Respondent rejected the offer of the Union and negotiations were concluded on that date. The union negotiation committee decided to submit the Company's proposal to the membership in view of the termination date of 9 November pursuant to the 10-day notice sent to the Union by the Respondent. The members voted on 8 November to accept the Respondent's proposal. Wall informed the Respondent of the result. Subsequently the Region informed Massey that he should withdraw the charge as the Respondent had not implemented the proposal as yet. Massey withdrew the charge on 20 or 21 November. On 25 November Massey was informed by Wall that MOPIP was being implemented and filed the charge on 29 November, which is the basis for this complaint. This labor agreement provides as have others in the past that it is subject to approval by the International. Massey was informed on 23 January 1986 by the International's vice president that the International would not approve the agreement and this was confirmed in writing by the International's letter of 27 January 1986. Massey called Guerard in Flynn's absence on 24 January 1986 and informed him of the International's decision to refuse to approve the agreement and that "it looked like we needed to get back to the table." Flynn called Massey the following Tuesday and told Massey to submit any further communications in writing to the Respondent.

Massey testified further that the Union objected to MOPIP as it was certified to represent electricians, instrument, powerhouse operators, and instrument repairmen, and the unit would lose its identity under MOPIP. Additionally, under the Respondent's proposal the Union's members designated as general mechanics were not assured of any proportional number of their members being retained to perform work that could be performed by members of other crafts in the bargaining units under MOPIP. Safety was a concern as the members were con-

cerned about inadequately trained personnel handling energized electrical equipment. Money was also a factor in the Union's reluctance to agree to MOPIP. The members also objected to doing other crafts' work.

Massey testified further that on several occasions during the course of negotiations Respondent through its spokesman Flynn stated it had made its final offer on MOPIP. Initially at the 19 or 20 June meeting, Flynn informed the union representatives, "We've gone through it all, we've answered all your questions and we're ready to put together our final offer on MOPIP." "In every proposal made by Respondent, MOPIP was a part. Throughout the course of negotiations Respondent insisted that MOPIP was essential to reaching an agreement. Massey testified there were no meetings between the Union and the Respondent between 7 and 31 October as the Union was awaiting a decision from the Board on its charge filed against the Respondent concerning MOPIP. Massey acknowledged that the International had been apprised by him that the local committee disapproved of MOPIP and that the International acted to disapprove the contract at the request of the local committee. On 31 October four items in addition to MOPIP were still unresolved. They were vacation sellbacks, freezing of promotions, wages, and meal allowances.

Local 1753 Union President Allen Wall testified that on 29 October the Union's bargaining committee was called into a meeting with Dr. Thomas, Respondent's president, and Flynn, and given the 10-day notice. Wall testified that the Union was not striking and were concerned about a possible lockout by Respondent. The parties met again on 31 October and the meeting broke up with Respondent giving the Union its final offer in writing. The parties met again on 1 November and the Respondent told the Union that the recognition clause must be eliminated as a result of MOPIP. He asked Flynn whether it was true if the Respondent locked out the employees, no employee could cross the line, and Flynn told him this was correct. Wall testified further that on 8 October when the Respondent had given the Union until 18 October to finalize the agreement, Massey had inquired whether there was any significance to the 10-day notice and Flynn replied, "No, I'm not locking you out. I'm giving you a 10 day notice." At the 29 October meeting with Dr. Thomas, Wall told Flynn, "I was under the impression you weren't going to give us a 10 day notice with the intentions of . . . putting pressure on us to lock us out," and that Flynn responded, "That was on that offer." The membership ratified the agreement on 8 November and Wall notified Massey and Flynn of this. The agreement was signed on 11 November and a copy was provided to Massey for the International for approval. Shortly after the International disapproved the agreement, Wall was to meet with Julius Guerard concerning some grievances, and Guerard told him he (Guerard) understood that the International had disapproved the agreement, and Wall told Guerard he could not respond as he had not seen anything in writing on it. Subsequently, a month before the instant hearing he met informally with Guerard on a few matters and told Guerard that Respondent should save its money and not

³ This article sets out requirements for two electricians or one journeyman electrician and one apprentice electrician to work on jobs involving 440 and above voltages. It also provides that the Union's work will not be habitually assigned to other than bargaining unit members.

print up the agreement since the International had disapproved it, but Guerard said the Respondent was going to go ahead and get it ready. MOPIP was implemented on 21 or 22 November when Respondent assigned powerhouse repairmen to welding classes and on 6 January the employees received wage adjustments for unrestricted flexibility. On 7 January, Respondent commenced training the I/E group of employees. Since that time members of the bargaining unit have been assigned to work with members of other bargaining units such as pipefitters and outside machinists and to perform the work traditionally performed by the other crafts.

On 1 November Wall had a second meeting with Flynn who had called him to his office to tell him that Respondent was firm on MOPIP and the 10-day notice and to give him a copy of the letter sent to the membership, which urged the membership to vote for the labor agreement including MOPIP and which stated in part:

Lastly, and this is very important, the action taken in giving the Union a 10-day notice is of the utmost seriousness. The Company's intent is to bring the parties together and focus on settlement before 8:00 a.m., November 9, 1985. That remains our intent but you must recognize that if this does not occur, the contract terminates at that time. In that event there are three possibilities:

- 1 The Company extends the ten-day notice
- 2 Local 1753, IBEW strikes
- 3 The Company locks out employees represented by Local 1753, IBEW.

Wall testified that Flynn told him at this meeting that Respondent would not let the Union stand in the way of MOPIP and that they did not want to lock the Union out but said, "If you think this is going to be a three-week hunting and fishing trip like 1982 . . . you're sadly mistaken." Wall told Flynn that the Union wanted a continuing working agreement and was not going to strike. Wall testified that the proposal was submitted to the membership because the committee felt a lockout would occur if no agreement was reached, and he was aware of the posting of security guards around the mill as a result of a notice on the bulletin board. He had also seen security guards at two locations around the plant.

John Flynn, Respondent's industrial relations manager, testified as follows: The I/E group was not incorporated into the proportional representation portion of MOPIP as it was contemplated that the I/E group would stay the same or increase in number as a result of the plant's becoming high tech and more computerized, which would require greater sophistication and skill and that the I/E group would not be subject to the reductions as much as the mechanics and service portions of the maintenance group. Respondent thus anticipated that the IBEW Union would benefit by increases in numbers as a result of these factors, but was not adverse to according proportional representation to the IBEW group if they had raised this as an issue. To eliminate safety concerns, the Respondent agreed that the operators, including the two UPIU groups and the powerhouse operators, would not work on energized equipment and mechanical crafts-

men would only work on energized equipment alone after they were trained for 8 hours and had worked with I/E mechanics for 2 years and they would not work on starters or switch gears unless accompanied by an I/E mechanic. Over the years the approval of the International has not been crucial to the implementation of the agreement and on at least one occasion was not forthcoming.

Flynn conceded on cross-examination that nothing in the MOPIP agreement guarantees there will be any new apprentices once the current group completes its training or that would prevent a reduction in the I/E mechanics in the future or that would prevent the assignment of I/E work to other crafts when it is 440 or less in voltage with the exception of requiring other craftsmen to work with IBEW I/E mechanics on switch gears and some other equipment. He does not recall that Wall told him that the Union was pursuing its unfair labor practice charge on the night when he called to tell him the Union had ratified the agreement. He acknowledged that at the 3 October meeting the statement was made by the Respondent that "the company was ready and willing to negotiate an agreement; but if there was no movement, continued discussions would be useless."

Wall testified on rebuttal that he had informed Flynn that the Union "had ratified the agreement but that the charges remained active."

V. CONTENTIONS OF THE PARTIES

The General Counsel and Charging Party contend that MOPIP is a nonmandatory subject of bargaining and would blur the craft lines between the unions and thus effect changes in their certifications by allowing the Respondent unfettered control in assigning work on jobs to employees at its whim with the power to decimate the bargaining unit and that it would thereby remove the employees' rights to representation of their own choosing as encompassed in Section 9(a) of the Act. They contend further that Respondent insisted to impasse on 4 November 1985 (and on several prior dates according to the Charging Party's view) up to the time of the acceptance of the agreement under the threat of lockout by Respondent and that this impasse was reached regarding this subject as the principal subject of disagreement between the parties. They thus contend that Respondent violated Section 8(a)(5) and (1) of the Act by its insistence to impasse on MOPIP, a nonmandatory subject of bargaining, as a requisite for reaching agreement on the other mandatory subjects of bargaining and that it also violated Section 8(a)(5) and (1) of the Act by its implementation of MOPIP following the ratification of it by its members and by subsequently refusing to return to the bargaining table to negotiate following the disapproval of the International of the agreement in January 1986 and the verbal request of Massey to negotiate.

The Respondent contends that MOPIP related to work jurisdiction and task and work assignments rather than to the Union's certification and thus did not involve a representational matter, that it was necessary to effect efficiencies and improvements in its operations in order

to enable it to compete, and that the Union's concern was with not having to perform maintenance work rather than with matters of safety as professed by the Union. It further contends that assuming *arguendo* MOPIP was found to be a nonmandatory subject of bargaining, it did not insist to impasse on MOPIP but rather MOPIP was only one of several clearly economic items on the table up to and at the time of its submission of its final offer to the Union relying on *Taft Broadcasting Co.*, 274 NLRB 260 (1985). It also contends that the parties reached no impasse as the agreement was signed. It further contends that the Union did not act in good faith by the refusal of the International to approve the agreement, and that the agreement is binding.

VI. ANALYSIS AND CONCLUSIONS

In reviewing all the above, I find that MOPIP was a nonmandatory subject of bargaining as it would have given Respondent the unfettered right to remove work from the bargaining unit at its whim, thus affecting the composition of the unit and the certification itself. This was not the right to assign a mere specific task out of the bargaining unit. Rather it was the right to redesignate employee classifications and transfer entire work groups out of the unit by totally eliminating their work and altering the scope of the unit and the certification of the Union to represent the employees. The Board has consistently held that such proposals are nonmandatory subjects of bargaining. *Newspaper Printing Corp.*, 250 NLRB 1144 (1980), *enf. denied* 692 F.2d 615 (6th Cir. 1982); *Newspaper Printing Corp.*, 232 NLRB 291 (1977), *enfd.* 625 F.2d 956 (10th Cir. 1980), *cert. denied* 450 U.S. 911 (1981); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 551 (1973).

I further find that the Respondent insisted to impasse on the Union's acceptance of its MOPIP proposal as a requisite for its agreement to other mandatory subjects of bargaining. Throughout the course of the bargaining up to and including the final offer prior to the ratification of the agreement by the employees, the Respondent set out its MOPIP agreement as an absolute it must have in order to reach agreement. Although there were some modifications of the proposal made by Respondent during the current negotiations, the MOPIP proposal stood out as the single significant impediment to reaching an agreement as asserted by Respondent's representative Jack Flynn on several occasions and as set out by Respondent in its 10-day notice of termination of the agreement and in the letter to the employees. The Board in *Douds v. Longshoremen ILA*, 241 F.2d 278 (2d Cir. 1957), has held it immaterial that impasse may have been reached on mandatory subjects of bargaining as well as nonmandatory subjects of bargaining in finding a violation of Section 8(a)(5) and (1) of the Act had occurred by the Employer's insistence on a nonmandatory subject of bargaining to impasse. It is rare indeed for all items to be resolved save a single nonmandatory subject of bargaining. In the more common situation there may be several unresolved issues. In the *Taft Broadcasting Co.*, *supra*, cited by the Respondent, the Board did not reject the premise that an employer may unlawfully insist to impasse on a nonmandatory subject of bargaining al-

though there may be several other mandatory subjects of bargaining as yet unresolved that may also be contributing to the impasse. Rather the Board in *Taft Broadcasting*, *supra* at 261 stated:

The existence of several unresolved items at the point impasse is reached, however, does not necessarily mean that each of the unresolved items caused the impasse. Thus, in evaluating whether parties have insisted to impasse on a particular nonmandatory subject of bargaining, the Board and the courts have looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the nonmandatory subjects of bargaining.

Applying this test to the facts in this case, I find that the Respondent's MOPIP proposal was the central focus of disagreement between the parties throughout the course of the negotiations. See *Bozzuto's, Inc.*, 277 NLRB 977 (1985). The evidence was virtually undisputed that the Respondent had throughout negotiations informed the union representatives that MOPIP was critical to reaching an agreement. I find that the Respondent insisted to impasse on the acceptance of MOPIP by the Union at the final substantive meeting when it rejected the Union's proposal to resolve all issues but MOPIP and that it thereby violated Section 8(a)(5) and (1) of the Act by its insistence to impasse on a nonmandatory subject of bargaining as a condition for reaching agreement on mandatory subjects of bargaining. Although wages and other mandatory subjects of bargaining had not been resolved, the evidence demonstrates that these were not the cause of the impasse. I find the evidence is insufficient to demonstrate that impasse was reached prior to this during the course of bargaining from June to October as there appears to have been ongoing efforts at negotiations by both parties that were interrupted by other matters including ongoing negotiations by Respondent with the three other unions at the plant. I further find that Respondent violated Section 8(a)(5) and (1) of the Act by its implementation of MOPIP in November and by its continuation of its implementation of MOPIP in January after it had been advised of the International's refusal to approve the agreement and by its failure to return to the bargaining table as requested by Wall. It is clear that the International had the right to approve or reject the agreement that the union membership had ratified in the face of a threatened lockout. Following the rejection of the agreement by the International, the Respondent had the obligation to return to the bargaining table as requested by Wall.

VII. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The unfair labor practices of Respondent as found in section VI, above, in connection with the business of Respondent as found in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent, Westvaco Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Electrical Workers and Local 1753, International Brotherhood of Electrical Workers, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.
3. By its insistence to impasse on and by its implementation of its maintenance and operator productivity improvement plan (MOPIP), a nonmandatory subject of bargaining, and by its refusal to return to the bargaining table, Respondent violated Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain violations of Section 8(a)(5) and (1) of the Act, it will be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act, and post the appropriate notice. The Board does not require that employees suffer losses of increases in wages and benefits under circumstances such as have occurred in this case in order to effectuate the policies of the Act, and I do not recommend that the increases in wages and benefits implemented by Respondent be rescinded. *Kendall College*, 228 NLRB 1083 (1977); *Dura-Vent Corp.*, 257 NLRB 430 (1981); and *Pace Oldsmobile*, 256 NLRB 1001 (1981). I do, however, recommend that all other terms and conditions of the collective-bargaining agreement be reinstated to the status quo ante prior to 9 November 1985 when the agreement was ratified by the membership under threat of a lockout by the Respondent in support of its insistence to impasse on the nonmandatory subject of bargaining until Respondent fulfills its obligation by bargaining, on request, with Local 1753 as the collective-bargaining representative of its employees in the appropriate unit, and executes a written agreement with Local 1753 or until a valid impasse occurs, and that Respondent make its employees whole for any losses of earnings or benefits they may have sustained by the implementation of Respondent's proposal. Interest on the losses of earnings or benefits shall be applied in accordance with the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁴

In the absence of any special circumstances asserted or argued in this case, I do not recommend the inclusion of a visitatorial clause as requested by the General Counsel to allow the Board to engage in discovery under the Federal Rules of civil procedure in order to monitor compliance. See *O. L. Willis, Inc.*, 278 NLRB 203 (1986); *United Cloth Co.*, 278 NLRB 583 (1986). Compare *Hilton Inn North*, 279 NLRB 45 (1986).

⁴ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)

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

ORDER

The Respondent, Westvaco Corporation, North Charleston, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining to impasse over its MOPIP proposal, a nonmandatory subject of bargaining.

(b) Instituting unilateral changes in the employees' terms and conditions of employment by implementing its proposal on its MOPIP until such time as it has bargained the agreement by Local 1753.

(c) Refusing to bargain in good faith with Local 1753, International Brotherhood of Electrical Workers, AFL-CIO.

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

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

(a) On request, bargain in good faith with Local 1753, International Brotherhood of Electrical Workers, AFL-CIO.

(b) Make whole its employees for any losses they may have sustained as a result of Respondent's implementation of the aforesaid unilateral changes contained in its contract proposal.

(c) Reinststitute the existing terms of the labor agreement to the status quo ante prior to 9 November 1985 until such time as the parties have bargained in good faith and have executed a new agreement or, in the alternative, have reached an impasse.

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

(e) Post at its Charleston, South Carolina facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 11, 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.

⁵ 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.

⁶ 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"

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

APPENDIX

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

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

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 refuse to bargain in good faith with Local Union 1753, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive representative of the employees in the following appropriate unit:

All electricians, power and boiler house employees, and instrument department employees of the Employer at its Charleston, South Carolina plant, excluding electrician leadmen and shift engineers, all other production and maintenance employees, office clerical employees, plant clerical employees,

professional employees, technical employees, guards, watchmen, and supervisors as defined in the Act.

WE WILL NOT insist to impasse on our maintenance and operator productivity improvement plan (MOPIP) proposal, a nonmandatory subject of bargaining.

WE WILL NOT institute unilateral changes in the terms of the 1982-1985 collective-bargaining agreement by the implementation of our MOPIP proposal or otherwise unilaterally institute changes in existing terms and conditions of employment of our employees in the bargaining unit without notifying Local 1753 and bargaining collectively in good faith concerning such proposed changes, provided that nothing here shall require us to rescind any increases in wages or benefits that we have previously granted.

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 rescind the MOPIP put into effect in November 1985 and will return to the status quo ante prior to 9 November 1985.

WE WILL, on request, bargain collectively with International Brotherhood of Electrical Workers, Local 1753, as the exclusive representative of employees in the appropriate bargaining unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole the employees of Respondent in the above-described bargaining unit for any losses they may have sustained by the implementation of unilateral changes contained in our contract proposal with interest.

WESTVACO CORPORATION