

Waddell Engineering Company, Inc. and International Brotherhood of Electrical Workers, Local Union No. 1841, AFL-CIO. Cases 4-CA-18660 and 4-CA-19122

September 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On February 13, 1991, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions. The Charging Party filed a letter opposing the Respondent's exceptions and 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 briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Waddell Engineering Company, Inc., Riverside, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Charging Party contends that the Respondent's exceptions and brief argue evidence not contained in the record. We find that they comply with the Board's Rules and Regulations. We have not, however, considered arguments or statements not supported by the record.

²The Respondent and the General Counsel have excepted to what they perceive as a finding that there was agreement between the parties regarding severance. Any such finding would be inconsistent with the judge's other findings, conclusions of law, and recommended Order. In the interest of clarity, we find that there was no agreement regarding severance.

David Faye, Esq. for the General Counsel.
Charles Coward Jr., of Riverside, New Jersey, for the Respondent.
Richard C. McNeill Jr., Esq. (Sagot, Jennings & Sigmond), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on November 30, 1990, upon an initial unfair labor practice charge filed on

February 14, 1990,¹ and a consolidated complaint issued on September 28, 1990, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act both by dealing directly with employees concerning health insurance benefits and modification of a subsisting collective-bargaining agreement through a switch, without consent of the employee representative, in health insurance carriers. The complaint further alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain as to the effects of a close-down decision, and, thereafter, by refusing, in the face of continued operations, to participate in contract renewal negotiations. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.²

On the entire record, including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New Jersey corporation, is engaged in the manufacture of air handling equipment from its facility in Riverside, New Jersey. In the course of that operation, the Respondent, during the calendar year preceding issuance of the complaint, purchased and received goods valued in excess of \$50,000 directly from points outside the State of New Jersey. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Brotherhood of Electrical Workers, Local Union No. 1841, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

¹The Respondent's answer denied that a second unfair labor practice charge, namely, that filed in Case 4-CA-19122 was filed or served. The charge itself bears an official Region 6 time stamp reflecting that it was in fact filed on August 7, 1990. The record includes a proof of service with respect to this document, and the General Counsel's express statement on the record to this effect was not countered by further denial or proof. Accordingly, the allegations in the complaint, in this respect, are presumptively correct. They are sustained.

²As indicated, the Respondent is not represented by counsel. Its posthearing brief was filed by Charles W. Coward, Jr., that firm's president and chief operating functionary. In its most salient aspects, this document seeks to justify the Respondent's action on the basis of a philosophical discourse concerning the inherent objectives and rights of managers. Respect for, and acceptance of law as a restraint upon that authority is hardly given empirical weight in that discussion. There is always the temptation to assist small businessmen, particularly those troubled financially, as they sail alone into this uncharted statutory web. Here, however, the Respondent's penchant for combining contradiction with arrogant defiance of statutory obligation should be carefully considered before compromising the long-standing body of precedent defining just what constitutes "good faith."

III. ALLEGED UNFAIR LABOR PRACTICES

A. Preliminary Statement

The complaint in this case charges the Respondent with independent 8(a)(5) violations in three distinct areas. The first, pertaining exclusively to health insurance, occurred a few months prior to expiration of a subsisting collective-bargaining agreement. In this respect, the complaint alleges that the Respondent unlawfully refused to bargain, initially, by dealing directly with employees concerning the substitution of health carriers, and, later, by actually changing carriers under conditions constituting a midterm modification of that contract.

The balance of the allegations focus upon the period following expiration of the contract. There is no dispute that, after expiration, renewal negotiations were aborted when the Respondent announced an intention to close down. For this reason, bargaining resumed, but the focus was a severance package, rather than a new contract. According to the proponents of the complaint, these latter negotiations were broken off by the Respondent under circumstances constituting an unlawful refusal to bargain. An additional 8(a)(5) and (1) allegation is founded upon the Respondent's refusal to reopen renewal negotiations, pursuant to request of the Union made upon learning that the plant continued in operation.

B. Concluding Findings

1. The Respondent's obligation to bargain

During times material to this proceeding, the Union remained the statutory representative of employees in the production and maintenance unit. Its standing in this respect was solemnized through a long-bargaining history, marked by successive contracts, the most recent of which expired on July 17, 1990. No challenge to the Union's majority standing is made, and since, at the time of the hearing, the Respondent's operations continued, the presumption of continuing majority prevailed, and the Respondent's obligation to bargain in good faith remained an enforceable statutory concern.

2. Health insurance

a. *The facts*

The most recent collective-bargaining agreement was for an effective term of July 17, 1988 to July 17, 1990. Article 14, section 4 thereof, in material part, states:

The Employer agrees to maintain in full force and effect for the life of this Agreement for each employee Major Medical benefits with Guardian Life Insurance Company of America. In addition, hospitalization and medical benefits with Dental and Prescription Plans shall be provided for all employees with Guardian Life Insurance Company.

In addition, article 1, section 1.3 states:

No alteration or amendment of this Agreement shall be valid unless reduced to writing and signed by representatives of the parties, and approved by the International President of the Union.

The Respondent, during the term of the contract, became disenchanted with the Guardian health plan, claiming that it could not afford an increase in premiums. In September 1989, union representatives met with Charles Coward, the Respondent's president, who advised of the cost increases, expressing a desire to switch to a less expensive HMO plan. Through Business Manager George Elwell, Coward was informed that because of the "choice" factor, the benefits were dissimilar,³ and that "he just couldn't change insurance plans that was negotiated in the contract . . . that if any changes were going to be made, that had to be voted on [b]y the membership to be approved."⁴

Thereafter, the Respondent turned its attention to employees. By memorandum dated October 6, 1989, Coward informed employees of the Guardian premium increase, stating further that the Respondent "cannot afford to absorb this increase." The memorandum listed a number of specified options, including substitution of another carrier, or a variety of diverse coverage reductions under Guardian's program. However, continuation of the status quo was not among them. Employees were asked to put their comments concerning these and other alternatives "in writing."⁵

When the Union learned of this memorandum, it requested a meeting, which was held on October 17, 1989. Elwell stated that Coward should first contact the Union before communicating in this fashion with the employees. He accused Coward of negotiating with employees, explaining that "in no way can we change the insurance because the contract specifies the Guardian life insurance." Coward responded that he had to do something because of the cost. Elwell again stated that you "can't change the insurance without taking it back to the membership for a vote." He insisted that the Respondent abide by the contract, observing that the Guardian plan could be renegotiated upon expiration in July 1990. Nevertheless, in November 1989, Coward conducted a meeting with all employees on this issue. The cost comparison sheet was distributed. (G.C. Exh 4.) According to Coward, he informed them that:

[W]e had some significant financial issues to deal with, that I felt that there were other options in order to keep the company whole, and that I needed as much assistance from as many people as I could find, people as well as ideas, and that we had already done some preliminary investigations. This is what we had done, we would like other people's ideas.

³A cost/coverage comparison between Guardian and three other carriers was given to the Union at that time. (G.C. Exh. 4.) Among the differences discussed, was the fact that some unit employees had dependents in far off sections of the country, raising the problem of accessibility to a local health maintenance facility.

⁴In its posthearing brief, the Respondent states that "the Union declined to discuss various options." Nevertheless, the above is based upon the credited, uncontradicted testimony of George Elwell. It shows that, on request of the Respondent, it met concerning the proposed change in contract terms, listened to the Respondent's proposals, and argued against them. The Union disagreed with substitution of carriers, but it is unfair to suggest that it refused to discuss that possibility.

⁵See G.C. Exh. 5(a). Attached to this document was a news article from Nation's Business descriptive of the emergence of steep increases in health insurance costs, its causes and consequences. (G.C. Exh. 5(b).)

Coward nevertheless insists that he did not solicit employee preferences on this occasion, merely requesting review of the options listed on General Counsel's Exhibit 4. Yet, his pre-hearing affidavit, confirmed that employees responded with a "couple" saying they wished to go with the HMO while Shop Steward Frank Jacobsen indicated that he was in favor of U.S. Healthcare.

On December 14, 1989, Elwell was informed by Shop Steward Jacobsen that the Respondent was going to replace Guardian with an HMO, but first would hold a vote among the employees. Elwell told Jacobsen that no vote could be held.

In December 1989, the Respondent, without union consent, elected to replace Guardian with U.S. Healthcare, an HMO, effective January 1, 1990.

On December 18, 1989, the Union filed a grievance on the health care change. (G.C. Exh. 6.) On January 12, 1990, a grievance meeting was held, at which the Union insisted upon reinstatement of the Guardian plan, while threatening to pursue a variety of remedies, including the filing of unfair labor practice charges. Coward replied that he had to do something and that he acted only because of the cost factor. On January 15, 1990, the Union's attorney wrote Coward, announcing an intention to arbitrate the change. The latter responded on January 19, 1990, as follows:

May I share a bit of background of this problem. 1989 was a bad year for our little company. Our productivity dropped sizably and wage increases in July combined to give us some financial surprises. I was forced to be as frugal as possible. When the health insurance increase was announced I met with the Union and the employees mentioned that we could not afford the increases and asked for suggestions. After several discussions with all involved, we settled on another carrier with a lower rate, but similar coverage. All but one employee accepted this change. George Elwell [sic] was offered several opportunities to actually participate in these discussions and did so initially.

I am willing to chat further with others but am not willing to incur any costs that I cannot pay for. I mentioned to George that I cannot afford the cost of Arbitration or litigation. We have quite a few unpaid invoices back to March of 1989 which have to be paid if we are to stay in business. [G.C. Exh. 8.]

On January 15, 1990, the Union's attorney wrote the Respondent reiterating its intention to arbitrate, and stating that unfair labor practice charges might also be filed. The following suggestion was included:

The filing of the above does not preclude our resolution of this problem, and in light of the financial difficulties you have outlined . . . kindly contact me as soon as possible and advise me as to whether you would be willing to open the Company's books and records to an audit by the Union. The Union's ability to determine the extent of your Company's financial difficulties would be extremely helpful to the satisfactory resolution of this problem. [G.C. Exh. 9.]

On February 14, 1991, the Union filed refusal-to-bargain charges based upon substitution of health carriers and direct dealing with employees. (G.C. Exh. 1(a).)⁶

b. *Direct dealing*

Once designated by a majority, a labor organization acquires exclusive status as the employee representative. This status derives from Section 9 of the Act and has been defined, from the earliest days of the Act, as exacting, "the negative duty to treat with no other." *NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 44 (1937). Generally speaking, it is unlawful for an employer, to seek to revise employment terms through direct appeals to employees outside the presence of the statutory bargaining representative. Whether intended or not, even absent union animus, such conduct tends to undermine the status of the employee representative and is inconsistent with the principles of good-faith bargaining.

This case does not present the first occasion, in which an employer has sought to substitute carriers by engaging in an end run on collective bargaining. In this area, the Board, heretofore, has deemed employers to have overstepped the line and violated Section 8(a)(5) where employees were simply surveyed on carrier options, and where after discussing a possible change in insurance plans with employees, the employer arranged a meeting between them and an insurance representative. *Kirby's Restaurant*, 295 NLRB 897 (1989); *NLRB v. Walkill Valley Hospital*, 866 F.2d 632 (3d Cir. 1989).

In this case, undisputed evidence shows that the Respondent went even farther in driving a wedge between employees and their Union. Here, not only were the employees sensibilities evoked by Coward's unverified claims of inability to pay,⁷ but he now asserts that he exacted an accommodation from them:

After several discussions with all involved, we settled on another carrier with a lower rate, but similar coverage. All but one employee accepted this change.

Coward adds: "There have been no criticisms of my actions or the company's actions by the employees that I know of." Any defense grounded upon employee reaction fails to survive the warning articulated in 1944 by the Supreme Court in *Medo Photo Corp. v. NLRB*, 321 U.S. 678, 684 (1944), wherein it was stated that: "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or minority, with respect to wages, hours and working conditions."

The Respondent also contends that it was free to terminate the relationship as the Union no longer represented the employees. This argument is unaccompanied by evidence of loss of majority. Instead, it is argued that the Union's protes-

⁶Initially, the Regional Director deferred consideration of the charge pending arbitration in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971). Due to opposition of the parties, on May 11, 1990, the Region rescinded this procedure. (G.C. Exh. 11.) Ultimately the initial complaint issued on July 27, 1990.

⁷In surveying the employees, Coward delivered the message that it could not afford the plan contracted for, and their assistance was necessary "in order to keep the company whole."

tations of the health care change was tantamount to abandonment of employees and signified "that the employees were not represented by the union." Thus, he argues that: "The union obviously endeavored to impose its will by being signatory to the grievance." There is no merit in this view. Opposition to the midterm modification was a rightful representational prerogative, and, under no conceivable circumstance, would such action afford management an opportunity to abrogate its bargaining obligation. No matter how onerous the contract, the relationship's future is not a matter of management choice, but is relegated exclusively to the judgment of employees. "To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to industrial peace, it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). Under the statutory scheme, where unit employees in sufficient number oppose the union's judgment, they enjoy a protected right, at an appropriate time, to take steps to formally renounce collective bargaining. There is no evidence, whatever, of any such movement on the part of employees in this case.

In sum, the Union's opposition to the proposed change in health carriers offered no legitimate predicate for Coward's pleading poverty directly to the employees, and in the context of meetings independent of their representative, attempting to secure relief from a contract term that he viewed with disfavor. *Medo Photo*, supra, 321 U.S. at 687. By virtue of this direct attempt to undermine the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

c. *The change in carriers*

As for the actual substitution of carriers, the Respondent defends its action as an economic decision benefiting the Company and the employees, which was implemented with employee consent. This is an insubstantial defense. The Board has stated that "Neither a claim of economic necessity nor a lack of subjective bad-faith intent, even if proven, constitutes an adequate defense to an allegation that an employer has violated Section 8(a)(5) of the Act by failing to abide by provisions of a collective-bargaining agreement." *Flood City Brass*, 296 NLRB No. 28 (Aug. 22, 1989), and cases cited therein, unreported in Board volumes.⁸ Also irrelevant is the employer's understanding, or knowledge, that the change reflects the communicated will of employees. The duty to bargain with the exclusive agent would be illusory, indeed, if excused on the basis of concessions exacted by the employer directly from employees, or if secondary to an employer's self-serving, subjective interpretation of what it hears from them.⁹ In *Medo Photo Corp. v. NLRB*, supra, the Supreme Court discounted the fact that a majority of employees agreed to reject unionization in the context of "direct dealing" which produced a promised wage increase. Unlike *Medo Photo Corp.*, here there was no attempt at bribery.

⁸The Board's decision in *L.W. Le Fort Co.*, 290 NLRB 344 (1989), cited by the Respondent, is entirely consistent within this unbroken line of authority. No contract breach was involved there. Instead, that case concerned an employer's right to implement a final proposal following a genuine impasse in renewal negotiations. In fact, in that very case, the Board held that the employer violated Sec. 8(a)(5) by unilaterally changing health and welfare programs.

⁹Apart from being a product of unlawful activity, employer declarations as to the elicited intent of employees is among the least reliable forms of nonprobative hearsay.

However, the Respondent's none-to-subtle references to the future of the Company would naturally stir concern among employees as to whether they were deciding upon a health plan or their jobs. Yet, the choice would be made without objective means of verifying management's representations.

The statute envisions the collective-bargaining agreement as a stabilizing influence upon the basic labor-management relationship. To that end, as a general rule, election petitions will not be processed and employers are not free to question representative status during the contract's term. As is true of any enforceable commitment, such contracts are subject to change solely upon mutual assent. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973). Even in cases presenting a plea of extreme hardship, the Act requires that demands for modification be filtered through a process of open and frank discussion, augmented by the statutory agent's enforceable access to information permitting scrutiny of self-serving claims of inability to pay.¹⁰ The statutory scheme assumes that, once the books are opened, good sense will prevail, and, in the final analysis, the vital interests of all will be recognized. Here, the Respondent arrogated to itself the role of determining what is best for employees, and met with them, outside the presence of their chosen representative, to achieve their endorsement of an abrogation of a contract in furtherance of management's own financial interests. This course of conduct plainly runs afoul of the Court's admonition in *Medo Photo*, supra, that: "The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent . . . at least where the employer is in a position to secure any advantage from these practices." 321 U.S. at 687.

Accordingly, as the undisputed evidence establishes that the Respondent changed terms of an existing contract without assent of the Union, it thereby violated Section 8(a)(5) and (1) of the Act.

2. The negotiations

Concerning this sector of the case, the complaint alleges that the Respondent violated Section 8(a)(5) and (1), first, by refusing to bargain over the effects of its declared intention to close, and, thereafter, when it continued to operate, by refusing to participate in contract renewal negotiations.

As will be recalled, the most recent contract was scheduled to expire on July 17, 1990. In that connection, the parties exchanged proposals on June 25. Negotiating sessions were held on July 2, 10, 16, and 23, 1990. At the July 23 meeting, the Respondent, through Coward, announced that the plant would close at the end of that month due to a lack of business. At this juncture, on request of the Union, Coward agreed to negotiate concerning possible severance benefits.

In the meantime by letter of July 25, the Respondent informed the Union as follows:

This note will confirm our discussion on Monday indicating that because of economic conditions, we will cease manufacturing and discharge our workforce at the end of July or at the latest mid-August 1990.

¹⁰The Union apparently attempted to avail itself of this option through its letter of February 9, 1990. (G.C. Exh. 9.)

We wish you and your group the best of luck. [G.C. Exh. 14.]

In a letter to the American Arbitration Association dated August 1, the Respondent wrote:

The economic laws of life have finally made their decision. We will cease manufacturing products next week. We have retained only four production employees who will be discharged within the week. *All equipment has been sold and a new tenant has started to move in.* [Emphasis added.]¹¹

On August 1, the parties met to negotiate a severance package. Coward stated that he had been advised by his legal counsel that he was obligated merely to pay 3-day severance pay together with one month's insurance. The Union countered with a demand for 6 month's insurance, all accrued vacation pay and severance pay of \$200 for each year of service, with 1 weeks' pay for those with less than 1-year service. Coward indicated he would consider this proposal.

By letter of August 2, the Respondent, in material part, informed the Union:

I believe your suggestion was wise—i.e. there are certain people who have been with us a long time and those who are recently employed. I do have deeper feelings for those who have spent the longer times with us

There are certain other factors which also apply. They are:

1. The contract with the union expired on 7/7/90 [sic]. I guess the result of this is that we are now a non-union operation.
2. Formal litigation has commenced between the company and the NLRB based on a complaint filed by the union. In the absence of the union dropping the charges, one could assume that the union and the company are adversaries—a situation which is not conducive [sic] to a quick and equitable severance pay settlement.

May I suggest that the company will do its best to assist each leaving employee to re-enter the work force and try to assist the employee with certain health benefits. We discussed these items during our meeting on 8/1/90. We will do our best to meet these needs on our own. I believe that if the union continues to be involved that the employees will not benefit as well as if the company is free to do the best that it can do on its own. [G.C. Exh. 15.]

By letter of August 3, the Union advised the Respondent that, contrary to the Respondent's indications, the plant continued to operate, while insisting that those employed be covered by a collective-bargaining agreement. A meeting was requested for Monday, August 6, to discuss this issue. Strike action was among the options mentioned. (G.C. Exh. 16.)

On August 7, the Respondent, through Coward, replied:

¹¹ G.C. Exh. 25. As indicated, in 1989, the Union had initiated grievance action concerning the Respondent's change in health plans. By the above letter, Coward declared that his firm would not participate in arbitration.

We have about three days of work left (certainly no more than a week), two people will be retained for general clean up. There have been no changes in wages, work hours or working conditions. I just don't understand—If you feel that a strike would solve a problem, then I guess you are entitled to feel so. I just don't understand what problems have arisen. [G.C. Exh. 17.]

On August 7, the Union filed additional unfair labor practice charges based upon the Respondents refusal to negotiate either a new agreement or a plant closing settlement. (G.C. Exh. 1(f).)

On August 8, the Union by telephone attempted to schedule a meeting concerning a severance package. Coward replied that he could not do so, as he was too busy, but that he would consider the possibility of some form of monetary compensation.

By letter of August 9, the Union informed the Company as follows:

This is to confirm our telephone conversation of August 8. During that conversation I told you that Waddell is still a Union Shop. Since our members are still working, we want to negotiate a new contract as soon as possible. Alternatively, if you are closing the plant, we want to sit down and negotiate a settlement.

Please contact me as soon as possible, so that this matter may be settled to everyone's best interests. [G.C. Exh. 18.]

As I construe the events, August 13 marked a radical shift in the Respondent's position. On that date the Respondent wrote the Union:

As we discussed on the telephone, as well as by letter, we have met twice and negotiated a settlement package. There is no value in any further meetings.

If you wish to communicate, kindly do so through your attorney. [G.C. Exh. 19.]

By letter of that same date, the Respondent wrote a Board agent, addressing the closure and severance issues as follows:

1. The company has not accepted any new orders and is finishing old work which should be finished by 8/15/90.
2. The company and the union did meet on at least two occasions negotiating times [sic] & conditions of plant closings. I accepted the suggestions made by the union which I confirmed in my letter of August 2. [G.C. Exh 20.]

Still in operation, on August 20, the Respondent wrote the Union as follows:

The best laid plans As you know we had sold our equipment and were to have closed operations by August 31, 1990. The reason was that our manufacturing operation was loosing [sic] a sizeable amount of money each month.

The people who contracted to purchase our equipment cancelled their written offer last week. The landlord also is questioning our leaving date.

Our plans are still firm, i.e., to close the plant, however, I will need a month or so to plan for, and hold an auction or find another buyer for the equipment. Inquiries have been sent to prospective purchasers. We have decided to pull back some contracts already given out and work in a much scaled back manner. This will give the fellows more income than unemployment compensation and provide some revenue to offset our losses. This plan is based on a month to month schedule until the equipment is sold. [G.C. Exh. 21.]

Consistent with its proposal at the negotiating meeting of August 1, and apparently in response to statements in the Respondent's letters of August 13, the Union on August 20, wrote the Respondent confirming that the settlement consisted of:

1. Six months of hospitalization insurance for all employees.
2. All accrued vacation to be paid to all employees.
3. All employees with less than one year of service to receive one week's pay.
4. All employees with one or more years of service to receive \$200.00 per year of service. [G.C. Exh. 22.]

Prior to this letter, Respondent's declarations that an accord on the severance issue had been achieved constituted an unambiguous acceptance of the sole offer made by the Union. If there was any question as to the terms of that agreement, they would have been erased by the Union's tactical response of August 20. Yet, instead of disputing the Union's definition of the terms of its proposal, the Respondent twice thereafter clarified that this was the offer that it had accepted. First, by letter of August 22, Coward stated as follows:

This note is in response to yours concerning settlement. Negotiations were held three weeks ago and were closed upon acceptance of your offer. [G.C. Exh. 23.]

Again, by letter of August 29, Coward answered an inquiry by a Board agent stating that further bargaining concerning effects was unnecessary "since we accepted the union offers." (G.C. Exh 27.)

As shall be seen, Coward seemingly would later ignore his formally stated position in this regard, by defending the "effects bargaining" allegation on grounds that a bona fide impasse had been achieved.¹²

¹² Elwell testified that, contrary to the Respondent's documented position, negotiations between the Company and the Union never produced agreement on any form of settlement package. It may well be the case that, from his point of view, no agreement was achieved that Coward was willing to implement. Yet, apart Elwell's testimony, there was no proof, whatever, refuting the fact that as of August 29, the Respondent had, in writing, and without any mistake of fact, accepted the Union's offer. Nevertheless, because the Union was represented by counsel, I can only assume that Elwell reached his conclusion with full knowledge of the facts and their legal implications. Indeed, The General Counsel's continued prosecution of the severance pay allegation is totally irreconcilable with the resolution of that issue with finality during the bargaining process. Accordingly, since the existence of a "settlement agreement" was far more beneficial to union interests than the terms of any remedial order herein, Elwell's insistence as to the absence of a settlement had all

This penchant for duplicitous posturing also became evident in connection with contract renewal. Here, the Respondent repeatedly fended off the Union's requests for continued discussion by expressing an intent to close. However, as of the hearing, operations continued and no definite date existed for termination. Indeed, when questioned as to his expectations, Coward first replied: "We have work left for about one month, a month and a quarter," but then stated that it was possible that operations might continue for 2 or 3 months.

Since first declaring his intention to close on July 23, the Respondent's entire course of conduct was indicative of bad faith and a rejection of the principles of collective bargaining. Through its chief operating functionary, Coward, the Respondent gave birth to a variety of mind-boggling inconsistencies, if not outright lies,¹³ all thrown at the Union as a roadblock to negotiation either on the renewal issue¹⁴ or a severance package.¹⁵ The evidence, beyond peradventure, establishes that the Respondent offended the duty to bargain on both counts, and thereby violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

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

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

3. The Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with employees concerning a mandatory subject of collective-bargaining, and by modifying an existing collective-bargaining agreement by changing health

the reliability of a declaration against interest, hence, it is assumed that there was more to the matter than revealed by the evidence on this record. In any event, the claim by Coward that an impasse had been reached is patently frivolous, when considered in light of the single negotiation meeting on the severance issue, and his repeated assurances that an agreement had been reached.

¹³ Each and every ameliorative expressions offered by Coward has been viewed with utmost suspicion, given his evasiveness and propensity to manipulate facts to whatever end might be considered useful at the time.

¹⁴ Coward states that because the Company was not soliciting additional business, but completing existing contracts, no purpose would be served "[t]o continue bargaining over a sinking ship." This was Coward's position dating back to July 23. Yet, on November 30, he remained unable to predict when production demands finally would dry up. The uncertainty, alone, suffices to support a continuing obligation to bargain over a new contract. See *Benchmark Industries*, 269 NLRB 1096, 1098 (1984). In the face of past erroneous estimates concerning closure, as well as Coward's lack of credulity, the only fair assumption is that representational interests of employees will continue into the indefinite future.

¹⁵ Facially, these findings might be taken as inconsistent. For, on the one hand, a violation is premised on the assumption that the Employer is going out of business, while a second, assumes continuing operations. Here, however, the offenses emerge from an evasive pattern which, at different stages, made it impossible to identify just which constituted the appropriate mode of bargaining. In other words, this record does not supply an answer as to whether Coward intended to close or invoked that concept as a handy means of enforcing his subsequent declaration on August 2 that "we are now a non-union operation." (G.C. Exh. 15.) As the duty to bargain in good faith, in either context, was breached, a remedy is warranted with respect to both.

insurance carriers without assent of the exclusive collective-bargaining representative in the following appropriate unit:

All hourly rated production, shipping, and maintenance employees, excluding office, sales, administrative, professional, and executive employees and supervisors within the meaning of the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by, without reaching a bona fide impasse, terminating negotiations over the effects of its declared intention to close the plant, and by refusing, on request of the Union, in the face of ongoing operations, to participate in negotiations for a contract to cover employees in the aforescribed collective-bargaining unit.

5. The above unfair labor practices 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, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully modified a subsisting collective-bargaining agreement by changing health insurance programs, it shall be recommended that the Respondent make whole employees in the appropriate unit for any and all losses sustained by reason of diverse eligibility, coinsurance, benefits, or any and all further variations in the plans, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The reimbursement order shall extend to all periods, continuing until such time as the Respondent bargains to a genuine impasse upon this issue, or effectively reinstates the Guardian policy in effect prior to January 1, 1990. The General Counsel contends that the Respondent should be ordered to rescind the U.S. Healthcare plan and to immediately restore the previously existing Guardian health plan, "without any lapse in coverage." Despite the scope of the reimbursement order, the recommended Order shall be broadened to include such provisions for two reasons. First, in *Arno Moccasin Co.*, 274 NLRB 1515 (1985), such a remedial formulation was approved. Second, as an HMO, the U.S. Healthcare plan imposes limitations upon physician choice, which cannot be relieved by reimbursement without imposing considerable risk upon employees who select doctors or medical services un sanctioned by that plan.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Waddell Engineering Company, Riverside, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

All hourly rated production, shipping, and maintenance employees, excluding office, sales, administrative, professional, and executive employees and supervisors within the meaning of the Act.

(b) Refusing to bargain in good faith by dealing directly with employees concerning a mandatory subject of collective bargaining.

(c) Refusing to bargain in good faith by changing health insurance carriers without assent of the Union, thereby modifying terms of an existing collective-bargaining agreement.

(d) Refusing to bargain in good faith by refusing, upon request, and without impasse, to continue negotiations over the effects of its declared intention to close the plant.

(e) Refusing to bargain in good faith by refusing, on request of the Union, in the face of ongoing operations, to engage in contract renewal negotiations on behalf of employees in the aforescribed collective-bargaining unit.

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

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

(a) Bargain in good faith with the Union concerning wages, hours, and terms and conditions of employment of employees in the aforescribed collective-bargaining unit.

(b) Rescind the U.S. Healthcare plan, and immediately restore for employees in the aforesaid collective-bargaining unit, without lapse in coverage, the Guardian health plan in effect at at times prior to January 1, 1990.

(c) Reimburse employees in the appropriate unit for any and all losses sustained by reason of diverse eligibility, coinsurance, benefits, or any and all further variations between the plans sponsored by U.S. Healthcare and Guardian, with interest, and as specified in the remedy section of this decision.

(d) Post at its facility in Riverside, New Jersey, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 said notice is not altered, defaced, or covered by any other material. Should the Respondent close its facility prior to completion of the 60-day posting period, it shall mail individual copies of the notice to each member of the collective-bargaining unit who was employed on January 1, 1990.

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

¹⁶If 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.

¹⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 1841, AFL-CIO concerning the rates of pay, wages, hours, and working conditions of employees in the following unit:

All hourly rated production, shipping, and maintenance employees, excluding office, sales, administrative, professional, and executive employees and supervisors within the meaning of the Act.

WE WILL NOT refuse to bargain in good faith by dealing directly with employees concerning their rates of pay, wages, hours, and working conditions.

WE WILL NOT refuse to bargain in good faith by declining, upon request of the Union, and without impasse to continue negotiations should we decide to close the plant.

WE WILL NOT refuse to bargain in good faith by declining, on request of the Union, in the face of ongoing operations, to engage in contract renewal negotiations on behalf of employees in the aforescribed collective-bargaining unit.

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

WE WILL bargain in good faith with the Union concerning wages, hours, and terms and conditions of employment of employees in the aforescribed collective-bargaining unit.

WE WILL rescind the U.S. Healthcare plan, and immediately restore for employees in the aforesaid collective-bargaining unit, without lapse in coverage, the Guardian health plan which was in effect immediately prior to January 1, 1990.

WE WILL reimburse employees in the appropriate unit for any and all losses sustained by reason of diverse eligibility, coinsurance, benefits, or any and all further variations between the plans sponsored by U.S. Healthcare and Guardian, with interest, and as specified in the remedy section of this decision.

WADDELL ENGINEERING COMPANY, INC.