

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

E. I. DU PONT DE NEMOURS & COMPANY

and

Cases 5-CA-24621  
5-CA-24709  
5-CA-24820  
5-CA-24846  
5-CA-25690

UNITED WORKERS, INC., affiliated with the  
INTERNATIONAL BROTHERHOOD OF  
DU PONT WORKERS

*Brenda Valentine Harris, Esq.*, of Baltimore, MD,  
for the General Counsel.

*Alan G. Burton, Esq.*, of Wilmington, DE,  
for Respondent.

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for the Charging Party.

DECISION

Statement of the Case

BENJAMIN SCHLESINGER, Administrative Law Judge. The unfair labor practice complaint in this proceeding alleges, inter alia, that Respondent E.I. du Pont de Nemours & Company implemented portions of its “new work approach” and other proposals piecemeal, and prematurely, before an impasse was reached in its negotiations with Charging Party United Workers, Inc., affiliated with the International Brotherhood of Dupont Workers (“Union”),<sup>1</sup> in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. Respondent denies that it violated the Act in any manner.<sup>2</sup>

Findings of Fact and Conclusions of Law

I. Jurisdiction

Respondent, a corporation, manufactures three textile fibers — lycra spandex, BCF nylon, and permasep — at its facility in Waynesboro, Virginia, where it, during the year preceding April 30, 1996, derived gross revenues in excess of \$50,000 from points located outside Virginia. Respondent admits, and I conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> The name of the Union appeared incorrectly in the original caption and was amended accordingly.

<sup>2</sup> The charges in Cases 5-CA-24621, 5-CA-24709, 5-CA-24820, 5-CA-24846, and 5-CA-25690 were filed on August 8, September 12, October 14, and October 28, 1994, and October 5, 1995 (amended on December 11, 1995), respectively, and the complaint issued on April 30, 1996. The hearings were held in Charlottesville, Waynesboro, and Staunton, Virginia, on 11 days between July 29 and October 18, 1996.

Since 1945, the Union has been the designated exclusive and Board-certified agent of two units, and recognized as such by Respondent, for the purposes of collective bargaining. One is the production and maintenance (“P&M”) unit, about 950 employees, as follows:

5 All the hourly wage roll employees of the Waynesboro Plant including the Bengel Laboratory at the Waynesboro, Virginia Plant of E.I. du Pont de Nemours and Company, but excluding all office, clerical, technical and professional salaried employees, guards, supervisory trainees and all supervisory employees as defined in the Labor-Management Relations Act.

10 The other is the clerical, office, and technical (“COT”) unit, about 130-140 employees, as follows:

15 All salary employees of the Waynesboro, Virginia Plant of E.I. du Pont de Nemours and Company except for employees exempt under the Fair Labor Standards Act, plant guards, supervisor trainees and all supervisors as defined in the Labor-Management Relations Act. Other employees excluded from the Unit are specified in Seniority Exhibit “F” of the Rules of Transfer and Progression.

20 The parties have for years entered into collective-bargaining agreements covering these employees. The last P&M contract, which was for a term of two years, but was extended for six months, expired on November 1, 1993; the COT contract, on December 1, 1993.

25 II. Alleged Unfair Labor Practices

A. Credibility

30 In making credibility resolutions, I find that Respondent’s minutes of the negotiating sessions are accurate. The Union was given drafts and had the opportunity to change and correct them. In addition, the Union’s chief spokesman and president, James Flickinger, reviewed the minutes within a few days or week of the meeting. Knowing the importance of the minutes and being somewhat of a stickler for ensuring that even the most minor of errors or deviations from the contract or past practices were corrected, he would have complained; and, in fact, Respondent’s drafts were frequently revised. If changes were not made to his satisfaction, Flickinger would have memorialized any differences that he felt were significant. I have generally credited the Union’s minutes, particularly when they contain material that supplements Respondent’s, often material that is against the Union’s present interest. I have also credited them, even when the material is self-serving, to the extent that I find it probable that a particular statement was made. I also credit the general bulletins that were issued by Respondent, because they were frequently given to the Union for its review. Respondent distributed them electronically through the different computer terminals on the site, to which most employees had access. In areas where the employees did not have access to computers, the bulletins were posted or distributed to the employees by the supervisors.

45 To the extent that there is testimony which conflicts with my findings, I credit the witnesses whose testimony I rely on. I have frequently discredited the testimony of Flickinger, whom I found unreliable. The following constitute only some, certainly not all, of the reasons for my finding: In one instance, on the mistaken basis that on January 3, 1994 Respondent gave him a booklet that contained on its cover, “procedures effective 2/28/94,” actually given him in

late February, Flickinger fabricated a conversation based on those words, asking whether they reflected the date on which Respondent intended to implement its proposal.<sup>3</sup> On other occasions, his answers consisted of many words which were deceptive and nonsensical. On yet other occasions, Flickinger's memory, clear on direct examination, became hazy on cross-examination, particularly when confronted with minutes of sessions quite contrary to his original recollections. His answers were repeatedly unresponsive, attempting to make a point about the righteousness of the Union's (or his) position, rather than dealing with the question that he was asked. Finally, witnesses often have trouble recalling dates precisely, and Flickinger had his share of troubles. I have disregarded many of his errors in assessing his credibility. However, I find that some of his inaccuracies resulted from his attempt to make winning points, such as demonstrating that the parties continued to bargain and actually made different agreements after Respondent had implemented various provisions of its proposal, whereas those agreements had occurred before the implementation.

In making these credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. Where necessary, however, I have set forth the precise reasons for my credibility resolutions. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

#### B. The February 28, 1994, Implementation

Respondent wanted to attract money from its Wilmington, Delaware, corporate headquarters ("headquarters") to build a new lycra facility at its Waynesboro site.<sup>4</sup> Site development manager Walker Norford repeatedly stated during negotiations that, in order to obtain the funding for this facility, it had to have a "new work approach" at least partly in place. On July 9, 1994, he stated: "All employees know that we are competing for a new LYCRA\* Plant which has a potential initially for 100 new jobs and long-term as many as possibly 400 jobs. . . . [T]o get that expansion our business leaders wanted to place the new plant with the best technology and where the best people systems were placed in order to run the most competitive plant in the world. Tom Harris, then the plant manager, said on September 6, 1994: "We made a promise to the corporation that we'd put in this new work system. This will help us get the new lycra plant - jobs for us and our children."

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<sup>3</sup> Flickinger's narration of this conversation continued: Respondent replied that it had made a commitment, it had to move forward with implementing its new work system, and it and the Union had spent a lot of time bargaining. Flickinger reminded Respondent that it had not completed its proposal and there were still items that still needed to be addressed. As to what items still needed to be addressed, Flickinger testified "Such as all the logical work teams, the area criteria, and we still needed answers to questions so that we could devise counter proposals, and I also believe we told them that it was unfair for them to be putting us in a position where we had to assume their responses, and devise counter proposals based upon those assumptions." Both Respondent's and the Union's minutes lack any mention of this conversation. It did not happen.

<sup>4</sup> Whether the impetus came from headquarters, which is more likely, wanting to find a location for its new facility, or from Respondent, seeking to expand, as most of Respondent's witnesses testified, is unimportant.

On November 30, 1992,<sup>5</sup> Norford presented “an incomplete proposal” and “just a concept” of the new work approach, which Norford wanted to implement in about March to mid-1993. In an effort to revamp its way of production, he proposed a “career development system” to make Respondent’s production the “best-of-the-best.” His intent was to supply “leading edge technology” to maintain an “unexcelled reputation” in meeting the needs of Respondent’s customers. This would require changing the work practices of and policies applied to its employees to make them more responsible for the integrity of the product. Thus, all employees were to understand the “vision, mission and strategic intent” of the company, understand the reasons that management was making its decisions, and exercise teamwork in all facets of the work, including knowing how each employee’s work impacted on the customer. To do so, the employees would be expected not only to know their own jobs but also to be able to fill in at other tasks, continually learn from others and teach others, and take responsibility for their jobs not as mere employees but as those who can be proud of their product.

Respondent proposed that everything would be measured “against our Site Vision and New Work Systems Attributes,” and all work practices might have to be modified for their support. The specific changes that the employees were to expect were:

1. A new leadership approach aimed at more open, inclusive leadership through self-directed teams vs. a hierarchical, top down “staff” structure.

2. A Career Development System that supports teamwork and is directed towards the development of each individual and their contribution to business success vs. a Transfer & Progression System that is individually job focused.

This represented a profound reversal of the manner in which Respondent previously did business. Through 30 years, Respondent and the Union had established and expanded an intricate seniority system embodied in the “rules of transfer and progression,” 38 pages of provisions governing all personnel movement, such as filling of vacancies, staffing, promotions, and demotions. For example, a long-term employee who became disqualified from a job for medical reasons still had seniority to obtain another job anywhere in the facility. Under the new system, plant-wide seniority was essentially eliminated, and seniority rights were based on business-unit seniority.<sup>6</sup> That employee would not have the right to transfer to another business unit without starting the job at the next lower rate of pay. Many of the rights that the employees thought that they had were obliterated by the new work approach. An employee would no longer hold a job with assigned tasks peculiar to what that employee did. A spinner, who worked at a spinning machine that produced yarn, no longer had to do solely the work of spinning. Respondent wanted that employee to be part of a work group, a “logical work team,” as Respondent called it; and seniority depended on the employee’s standing within the smaller groups of logical work teams. An employee with many years of seniority, capable of filling sought-after vacancies throughout the plant and having enough seniority to do so, could conceivably end up with much less seniority, when compared with the other members of that employee’s logical work team and business unit, and thus unable to acquire any prized job.

<sup>5</sup> Except as otherwise stated, all events occurred at the bargaining table. The Union and Respondent frequently met twice a day, and this recital of facts is not intended to convey that the statements were made in order or at the same meeting on a particular day.

<sup>6</sup> The business units are lycra, permasep, BCF, and shared services, which includes maintenance and engineering employees, such as mechanics and persons who run the control equipment and the powerhouse, in other words, those who have a shared responsibility for the entire site.

Before, employees were merely production workers or maintenance employees; now, they were expected to do much more. If employees worked at producing lycra, then all of them were bunched together in one logical work team. For example, the lycra spin/pack support team consisted of employees occupying ten different jobs. Various of the functions associated with that product would no longer be split, depending on one's title. A production worker might have to fix a broken piece of equipment, which before had been exclusively the responsibility of a maintenance employee. If a worker in a higher grade position became ill, other workers, in lower grades or higher, were expected to fill in so that production continued. Planning the day's or week's work was not necessarily the function of a manager any more. Employees were expected to know the product and the needs of the company and the customers well enough that they could participate in the functioning of the team. Members of the team were expected to help others learn how to do all the other functions. All of these constituted the "site criteria," the broad skills needed to support the team. Respondent originally proposed 201 site criteria that all employees would be required to meet. They covered three areas: "Functioning Capability, Teamwork and Personal Growth."<sup>7</sup> Under its proposal, employees would have to meet about 15 criteria every year, over 10 years. If an employee were unable to meet those 15, Respondent said that it would deal with each employee individually; but, if an employee did not meet the criteria because of not wanting to participate, then there would probably be a "developmental action," Respondent's term for disciplinary action, and Respondent would withhold any pay increase. The site criteria were wholly separate from the "area specific criteria," which were discussed later and which Norford, early in negotiations and oft-repeated, described as essentially the tasks that were currently performed by the employees on the floor.

Because Flickinger<sup>8</sup> understood the proposal only as a concept and principles of a new work system, but was not supplied the details of what management thought would be needed to make the new work system function, he wanted to see the entire proposal. In the meantime, not knowing about the particulars, he expressed his concern about the employees' loss of seniority rights. He criticized the new work approach as a means to cut the employees' pay. He was concerned about what would happen if employees were not able to live up to the new expectations of management. The Union's questions and concerns<sup>9</sup> were "charted" by Norford, which meant that he wrote them on paper on an ever-present easel in the conference room. Norford asked for the Union's forbearance on its inquiries and doubts and assured that the Union would have complete answers. Flickinger kept asking when Norford was going to respond to the Union's questions and concerns, and Norford continually replied that, because all the questions and concerns were interrelated with the new work approach, Respondent was going to wait until it completed its presentation and negotiations and heard all the Union's questions and concerns, before answering them. Finally, Flickinger reminded management that the current collective-bargaining agreements were still in effect.<sup>10</sup>

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<sup>7</sup> Some examples finally agreed to are: "identifies and corrects safety hazards," "knows current performance indicator as measured against team goals," "knows how the team controls operating cost," "understands how 'quality control' impacts the product or service of the team," "detects problems and/or deteriorating trends and tasks corrective action," "understands finished product or service requirements needed by your customers and why," "knows different roles on team and how they impact each other," and "works between roles to improve team."

<sup>8</sup> Much of this Decision is based on not only the witness's recollections but also the minutes of negotiations. The Union requested that the minutes not include the names of the speakers but instead recite only "the Union" or "Management." Thus, the precise speaker is often not identified, and the testimony was not aided by at least one witness's constant use of "we." I have attributed many of Respondent's unidentified statements to Norford and the Union's to Flickinger.

<sup>9</sup> A "concern" was something that the Union disagreed with; a "question" merely reflected that it did not understand a proposal.

<sup>10</sup> At that time, the P&M contract was due to expire on May 1, 1993; the COT contract, on December 1, 1993.

What followed were about two hundred negotiating sessions,<sup>11</sup> often two meetings a day, one in the morning and another in the afternoon, lasting until February 28, 1994, when Respondent implemented parts of its proposal for both the P&M and COT units; June 22, 1994, when it implemented the remainder of the P&M agreement, the area specific criteria, those skills that an employee needed to perform the role that the employee had on a logical work team; and even beyond September 12, 1994, when Respondent implemented the rest of its proposal for the COT contract and began the period of transition leading to the full establishment of the new work approach. All negotiations were held between representatives of Respondent and the Union executive board, except early negotiations involving area specific criteria, as to which Respondent suggested negotiations between the managers and Union representatives in the specific areas. The Union agreed, with the stipulation that if the Union representatives reported to the Union executive board that they were dissatisfied with those separate negotiations, the Union was going to bring the bargaining back to the full executive board. By late November 1993, representatives reported to the executive board that their separate bargaining sessions were unsuccessful; and the Union requested that bargaining return to the full table. Other than that bargaining, the Union never agreed to any other format for the negotiations or to discuss and reach agreement separately on each issue. Flickinger never stated to Respondent that his silence meant agreement; rather, at least twice, he said just the opposite.<sup>12</sup>

Flickinger was concerned early in negotiations that Respondent would terminate the collective-bargaining agreements to implement its new work system. (Respondent had never done so before.) Norford replied that Respondent preferred to negotiate to agreement its new work approach and did not want to terminate the contracts. However, he was not going to relinquish his right to terminate them. The Union began immediately to talk about extending the agreements, and Respondent suggested that a possible option would be to remove the rules of transfer and progression, which would allow Respondent to bargain the new work approach while the contracts were in effect. The Union objected that the employees would lose all their seniority protection and declined Respondent's offer. As will be seen, Respondent later terminated the contracts and, as part of its first implementation, removed the rules of transfer and progression from the P&M employees.

Respondent normally granted annual wage increases in the first week of February, and the parties customarily negotiated the increases in January, when Respondent announced them. The Union requested in January 1993 to commence wage negotiations; and negotiations were held, not only on the wage increases, but also on Respondent's "career transition plan," yet another of Respondent's proposals, originally presented on October 6, 1992, which concerned changes to the contractual severance benefits provision. As a result, Respondent offered to table all negotiations on the new work approach until the parties completed these negotiations. Respondent's offer on its voluntary separation program was more beneficial to the

<sup>11</sup> Respondent was in control of scheduling the negotiations. Management posted a written schedule on the bulletin board in the Union office at the beginning of the week, setting forth the dates, times, and subjects of the meetings for that week. The Union executive board members constituted the members of the Union's negotiating team and were paid by Respondent as if full-time employees, yet many of them devoted their energies almost full time to the work of the Union, particularly when negotiating the new work approach. Respondent's management, realizing how new its proposal was going to be and how difficult it was going to be to explain what it desired to do, hardly required the Union board members to spend any time doing production work. Instead, they were to attend negotiations almost exclusively.

<sup>12</sup> This was not contradicted. Respondent's minutes contain one reference; but Flickinger stated it "[a]s a reminder," thus indicating that he had said it before.

employees than the provision of the existing contracts, and the Union did not raise much fuss, if any.<sup>13</sup> But talks on the program continued, and it was not until July 1993 that negotiations on the new work approach resumed.

5 On July 30, Respondent presented its plan for the transition from the old to the new work approach. At that time, all P&M employees were paid, according to their group, one through six, or, within the COT unit, level one through four. (There was also an entry level.) Under the new proposal, all current employees would have from 1 to 10 years, depending on their group or level, to transfer to the new system, which had five levels, technician one through five. (There were also production assistant and entry levels for the newly-hired employees.)  
10 Respondent presented the site criteria that the employees, both old and new, would have to meet. With the exception of those who were group 6 and level 4 employees, all would receive higher pay upon their successful transition.

15 Respondent announced other changes during the summer. Prior to the new work system, the group three P&M employees in two areas of the plant — lycra packing and beaming — were paid at an incentive rate. They had to meet a minimum standard; and, if they met a higher standard, they were paid at a group five rate. The new work system would do away with the incentive program. The new work approach would also eliminate the upgrade system, which was another pay practice for the P&M unit. If a group two employee performed  
20 group four work for 15 minutes, the employee would be entitled to a minimum of two hours' pay. For more than two hours, the employee would be paid at the higher rate for time actually worked.

25 While the parties continued to discuss the new work approach, Respondent pushed for the Union's contributions and proposals and, although it threatened to implement various provisions that it had offered, it delayed many of these dates. By late July, Respondent announced that it wanted to implement the new work approach by the end of the year. The Union met the new dates with requests for extensions of the collective-bargaining agreements to allow it the opportunity to complete the negotiations on the new work system, which would  
30 allow time for Respondent to answer the questions and concerns and give the Union ample opportunity to make a counterproposal. Respondent stated that it thought that, if purposeful bargaining would take place during this remaining time, an agreement could be reached. On August 26, Respondent rejected one of the Union's requests to extend the collective-bargaining agreements. Norford thought that the parties could spend the rest of the time bargaining and be  
35 able to reach agreement. As a result, he presented Flickinger with written notifications to terminate both contracts.

40 Flickinger told Norford that his proposal was incomplete, that he had not answered the Union's questions and addressed its concerns, and that the Union did not know enough about the proposal to be able to make a counterproposal. He griped that Respondent was "terminating our contracts and putting us in a deadline to do all this within the next 60 days. And it realistically just couldn't get done." Norford argued that there was good reason to terminate the agreements. The rules of transfer and progression were contractual and "require any changes to be bargained to agreement during the life of the P&M (11/1/93) and the C.O.T.  
45 (12/1/93) contracts." He added that they:

promote excessive movement and turnover that, in most cases, does [sic] not build on previous training and experience. They are not focused on developing the individual and increasing their opportunity to contribute to the businesses.

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<sup>13</sup> Discussion on the career transition plan concluded approximately a year later.

These rules limits [sic] the flexibility that is needed to respond quickly to business needs and are job focused and do not promote teamwork or an environment for employees to maximize their contributions.

5           On September 16, Respondent presented to the Union its draft P&M contract reflecting all the amendments it proposed. Norford read through the contract page by page, covering all the proposed changes. Flickinger reminded Respondent that there were still outstanding questions and concerns. The Union still had not seen all the area specific criteria, the parties were still negotiating logical work teams, the proposal reflected only the P&M contract, and there had been no proposal for the COT contract. Norford stated that the changes in the COT contract would be essentially the same as in the P&M contract, and that was reaffirmed in a general bulletin issued the same day. Flickinger contended that the parties were still bargaining the site criteria; they had not talked about the training that would be required or how the training was going to take place; and they had not talked about the seniority rules of either contract. 10  
15           Although Respondent had advised Flickinger that the prior rules regarding seniority were going to be eliminated and that there would be seniority within the logical work teams in which the employees worked, Flickinger stated: “[W]e needed to see exactly how the movement system was going to be applied with this new work system, and the business oriented seniority, how would employees bid to vacancies, how would employees be bumped off jobs.” When 20  
25           Flickinger asked, he was told, “that would be reviewed with the seniority rules.” The Union also objected as too broad Respondent’s proposal that changes could be made to the career development system after negotiating with the Union. It gave the management the right to make any changes that it wanted during the term of the contract, simply on reaching an impasse.

25           On October 6, management representative Herb Griffith reviewed all of the Union’s questions that had been charted and provided management’s response. The charts were even provided to the Union upon its request to review them. (I discredit Flickinger’s testimony that “Norford went over a lot, but I really can’t with any clarity, say all. . . . I do not believe that he did.” Later, Flickinger testified: “He went through a lot of questions that he had charted. 30  
35           Whether it was all the ones that he had charted, I really can’t recall.”) Norford said that Respondent was willing to sign its proposed P&M contract that day. Bargaining could then continue on the career development system, and that would avoid the termination of the then subsisting collective-bargaining agreements. Respondent reduced its originally proposed 201 site criteria to 45;<sup>14</sup> and Norford announced that, instead of employees having to document 40  
45           each of the criteria, there would now be a verification process: the employee, with the immediate supervisor, would verify in a book whether or not the employee had met that criteria. Respondent also proposed the establishment of a team, mostly of management, but with one Union representative, to assess whether the employees had met the criteria every two years. The Union countered that the assessment be made with the immediate supervisor, but Respondent would not agree.

On October 13, Respondent proposed logical work teams for lycra and BCF, and bargaining on the composition of the teams began shortly after. Respondent devised the teams

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14 As a result, Respondent modified its proposal to require that transition be completed in four years, during which the employees would have to complete 21 criteria, 11 by the end of the first two years (“the midpoint”), and the remaining 10 at the end of the four years. Thereafter, employees would not only have to retain knowledge of those 21 site criteria, but also have to learn the additional 24 criteria to pass their assessment two years later. From that point, at each assessment, the employee would be expected to have mastered and know each of the 45 site criteria. As Respondent warned in its February 28, 1994, booklet, “Meeting the [site] Criteria is not a one-time event.” In addition, Respondent would assess its employees based on their ability to meet the area specific criteria, yet to be determined.

so that each would have sufficient numbers to do a part of the process of a given business unit and be responsible to produce something or do a specific part of the job. Thus, one of the original teams, the lycra spin/pack support team, against which the Union fought vigorously,

5 Up to the meeting on October 29, the Union had completely opposed any transition period. It argued that Respondent's most junior employee had been employed for five years, and all employees had proved their value to the company. All employees received annual performance reviews, given by their immediate supervisors. If there were any performance problems or disciplinary actions that needed to be taken at the time, the supervisor would have  
10 pointed out the deficiencies and made it clear that, if the employee did not improve, disciplinary action could occur. Thus, the Union's position had been that, if Respondent wanted a new work system, the employees that were on the site should automatically be placed in the new work system, instead of being required to prove their worth. Management had earlier rejected what it called an "automatic transition."

15 The Union proposed at this meeting that 2 of the 45 site criteria be deleted and that only 10 of these criteria be designated as criteria to be used for transition. The remaining ones would be credited for promotion to the higher technician pay level. The Union again expressed concern that Respondent's proposed contract language permitting it to make changes in logical  
20 work teams and area specific criteria during the term of the contract was too broad and offered no protection to the employees during the term of the contract. The Union countered that any changes to the contract should not affect an employee's pay, a proposal that Respondent ultimately agreed to. The Union also opposed the involvement of employees in the assessment or evaluation of other employees and again proposed that the assessment ought to take place  
25 between the employee and the immediate supervisor. All of these proposals were rejected. At the same meeting, the Union also discussed the compensation for the employees in level four of the COT unit and group six of the P&M unit, the most skilled and highest paid employees. Under Respondent's new system, the employees were required to do additional criteria, but were given no additional compensation. The Union thought that unfair.

30 Another of the Union's counterproposals concerned the consolidation of the spinners and packers into one logical work team. The Union feared that the packers many of whom were older service employees, most of them women, many with disabilities and handicaps and physically unable to do the spinning task, would not be able to do the spinning task, and thus,  
35 these employees, at the very least, would be forced to suffer a pay reduction, and ultimately could be forced into either an early retirement or be terminated. The Union also contended that different jobs required special physical attributes, such as strength or extremely good eyesight, or subjected employees to extremely high temperatures; and Respondent should not have the right to move these people from one job to another, knowing that if they did not perform well,  
40 they would be subject to loss of pay and even employment. The Union opposed this spin/pack logical work team.

Respondent first presented area specific criteria for its employees, outlining what the employees would do, once having been assigned to teams, on October 21 (lycra), October 27  
45 (BCF), December 21 (shared services), December 22 (power work team), January 4, 1994 (medical team), January 5 (safety, health, environmental, and administrative, or "SHEA"; and materials control), and February 7 (administrative assistant). Although the criteria were presented on these dates, at least BCF was not actually negotiated until early 1994, and the discussions were not completed until well after February 28, 1994, the first implementation date. In general, the Union was concerned with any criteria that required operators of equipment to do what had previously been done by those, such as mechanics, who were responsible for maintenance and repair; to require employees to do jobs that had been done by

employees in a different unit (such as P&M employees doing the work of employees in the COT unit); and to require employees to do anything that had previously been the function of managers and supervisors. The Union also appeared to generally dislike any logical work teams that included both P&M and COT employees. (Respondent accommodated the Union on  
5 January 4, 1994, by agreeing to discuss separately the criteria as they applied to the COT and P&M employees.)

On November 8, Respondent rejected the Union's proposal on splitting the spin/pack team, as well as proposals to reduce the site criteria from 45 to 43 and to use the team leader for assessments instead of an assessment team. Respondent amended another of its  
10 proposals, so that changes could be made to the logical work team and area specific criteria during the term of the contract, through negotiations; but changes would be implemented in a way that would not negatively affect the employees' pay.

After the collective-bargaining agreements were terminated, Flickinger wrote to Harris  
15 on December 2, asking that negotiations be scheduled as soon as practical to negotiate the Union's "Contract agenda," which is these parties' term for contract proposals. He waited so long, he testified, because he had "little time to generate [the Union's] agenda and because he wanted to see what changes management really wanted to the contract so that he could possibly come up with agenda that would counter it."<sup>15</sup> That request was not immediately  
20 granted. Instead, negotiations on matters that Respondent wanted to discuss continued. On December 16, Respondent proposed that all employees would have to be trained for 13 of the site criteria required for transition. The training was to be given by instructors from the Blue Ridge Community College ("BRCC") at many campuses set up at the Waynesboro facility. On  
25 January 3, 1994, Respondent presented each Union negotiator with a red folder, which had in it the different parts of the new work system that had been negotiated at that point; and a booklet, which was basically a summary of the first nine sections of the red folder and which constituted, with some revisions, what Respondent would implement on February 28. The Union countered that the amount of criteria that the employee would have to perform should be geared to the amount of service: the greater one's service, the less criteria would have to be met.

Respondent rejected this new proposal on January 11; but it accepted other  
30 modifications proposed by the Union. Production associates, who were basically entry level workers, doing entry level jobs (similar to group one and two jobs in the P&M unit) could move directly to the technician two pay level. Respondent also proposed to give employees one-half  
35 of their increase after a successful midpoint assessment. The Union had also proposed that, in order to relieve the problem of the employees who had in the past been working on higher level jobs, the employee could move directly to the technician pay level to which they had upgraded. Respondent now proposed that, if employees were currently upgrading 40 percent of their time, they would be employed at the technician level of their upgraded rate. Respondent also agreed  
40 to give the highest rated employees, who, under the rate schedules, would be receiving no increase, three weeks' pay.

On January 13, at a meeting dedicated to that purpose, Flickinger presented the Union's  
45 contract agenda (perhaps not complete, he said), requesting 12 months' back pay (rather than 6, at present) for an unjust discharge, an on-site child care facility, Martin Luther King's birthday as an additional holiday, increased shift differential, and an additional week's vacation for

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<sup>15</sup> This has little substance. Flickinger had been presented long before with the new work approach, the changes in medical care, and the voluntary separation program. If he did not possess the details of everything by at least the time that Respondent terminated the collective-bargaining agreements, he certainly knew enough of the essence of the proposals to propose an additional holiday or week's vacation for some workers, as he ultimately did.

employees with between 15 and 25 years' employment. On January 26, Norford stated that he would like to have the Union's agreement by the end of February, when Respondent wanted to implement. Flickinger said that the date was unreasonable and unrealistic, in part based on the fact that logical work teams and area specific criteria had yet to be fully bargained. On February 5 10, Respondent stated that its proposal of January 11, modifying the logical work teams, was "optimal." The Union complained that Respondent had not even heard all of the Union's concerns, but Respondent insisted that it could address those concerns by modifying the area specific criteria. (For example, regarding the spin/pack team, the minutes indicate that Respondent had addressed the Union's concerns by exercising "[f]lexibility . . . about physical 10 limitations.") On February 11, Respondent again addressed its business needs to implement the career development system, stating that it would not accept any counterproposals given after February 18, without the Union's justification for doing so, so that Respondent could implement the system by the end of February. Flickinger responded on February 14, reiterating that it was unreasonable for the Union to be required to give final input prior to management's 15 complete proposal. Flickinger wrote that he had requested meetings to negotiate the COT contract, but no meetings had taken place and none were even scheduled. The Union also contended that it had presented management with numerous concerns and issues regarding the proposal, most of which, at that point in time, Respondent had not answered or addressed.

20 By letter dated February 15, Norford rejected the Union's request for an extension of time, noting, inter alia: "[T]he competitive needs of our businesses to implement these changes as soon as possible are increasing almost daily as our competitors increase their capacity, establish team based organizations and/or further improve existing team operations." However, Respondent indicated its willingness to limit the Union's input (which meant that this was what 25 Respondent was going to implement) to the "overall site proposal through Logical Work Teams. This would enable us to begin the Transition and continue to discuss the Area Specific Criteria." Flickinger replied on February 15, objecting to the deadline for input. It placed the Union in an unfair position, requiring final input when all of the proposals still had not been negotiated. He countered Norford's contention that the parties had been negotiating since November 1992 by 30 noting that there was a lengthy period of time when no negotiations at all took place on the new work system, due to bargaining on the voluntary separation program and wage negotiations. He reminded Norford that the Union board had not had all of management's proposed logical work teams until January 5, 1994, and they had not been discussed in detail. And he continued to contend that Norford had never answered all the concerns and questions that he had charted.

35 On February 16, Norford wrote that, absent any counterproposals from the Union on or before February 18, Respondent intended to implement "the site proposal down through Logical Work Teams" and that it would "consider any input and upgrades the Union may have post implementation." The Union requested that the time goal of February 18 be extended. It was 40 impossible, Flickinger contended, for the Union to complete negotiations, for management to respond to its questions and concerns, and for the Union to give final input with a possible counterproposal. On February 17, the Union made a counterproposal that in effect objected to many of the logical work teams that Respondent had proposed.

45 On February 22, Respondent rejected the Union's counterproposal. It had presented its entire proposal of the new work approach in the P&M contract, except for area specific criteria, and announced that it was implementing, for both the P&M and COT contracts, effective February 28, the "Career Development System down through the Logical Work Teams," which would include "the Logical Work Team Structures, the Personnel Movement Procedures, the Progression Procedures, the Contribution Criteria Procedures and Site Criteria, the Assessment

Procedures,<sup>16</sup> the Transition Procedures and the Career Development System Memo.” Among the changes encompassed in this implementation were the replacement of the rules of transfer and progression with new seniority rules limiting movement by employees, including in some cases imposing a reduction of pay; the establishment of principles of progression, with  
 5 minimum periods of one or two years before an employee could advance to a higher technician pay level; the establishment of the number and nature of the site criteria, including those which required training and the method of training; the method of assessing whether employees had met their criteria for purposes of transition and progression; and the procedure for transition. Flickinger reminded Respondent that negotiations of the COT contract had still not taken place.  
 10 Norford replied that he considered that the day that he gave the Union the contract constituted a bargaining session. He again stated that the COT contract was essentially the same as the P&M contract and told Flickinger that a scheduled meeting for February 14 had been canceled by the Union. He added that the Union had had ample time to make a counterproposal. Flickinger also submitted a list of 36 concerns and questions which he claimed Respondent had  
 15 not answered or addressed<sup>17</sup> and stated that he had more questions and concerns besides those presented in this meeting. The next day, Respondent addressed the 36 concerns and retracted the implementation of the COT seniority rules on the ground that they had not been completely negotiated.

20 On February 25, the Union presented Respondent with 17 additional contract demands. Some proposals were economic, such as providing for routine eye and hearing examinations and granting three personal days. Some were not economic, such as proposals relating to the arbitration of unjust discharges and a clause prohibiting the contracting out of work that fell within the scope of work of the bargaining unit. In reply, Respondent presented a general  
 25 bulletin, which would be issued that day, setting forth a schedule, with times, commencing on February 28, for employees to begin registering for training by the BRCC for different site criteria. The training sessions were to begin on March 5. The Union’s counteroffer was rejected, and the implementation was effected on February 28.

30 The duty to bargain in good faith, protected under Section 8(a)(5) of the Act, is defined by Section 8(d) as the duty “to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” “[A]n employer’s unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a  
 35 circumvention of the duty to negotiate . . . .” *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The General Counsel’s complaint alleges that the implementation of the P&M contract was piecemeal, illegal under *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), which holds that:

40 [W]hen, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer’s obligation to refrain from unilateral changes extends

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<sup>16</sup> Respondent agreed with the Union’s proposal that mid-term assessments would be done by the team leader.

<sup>17</sup> I discredit Flickinger’s testimony that he also gave Norford a written list of 101 concerns and questions regarding the career development system that was never answered. Among my reasons, only the list of 36 is referred to in the minutes. (With the exception of employee relations specialist Freelyn Stanley, who wrote the minutes, Respondent’s witnesses denied that Flickinger handed over any such list. I find that Stanley was confused, and his recall in this instance should not be credited.) When Flickinger presented that list, he added that he had more questions, but it is likely that he never turned them over. Thus, on May 6, Flickinger wrote Norford, in part, to remind him once again that he was in possession of “a partial list of questions and concerns that was presented to [him] on 2/17/94” and that, since then, many more questions had been raised by the Union that had not been addressed. The “partial” list had to refer to the list of 36, not 101, which Flickinger, resorting to contrivance, claimed was not intended to be complete. Flickinger also presented hesitating, conflicting, and vague versions about the circumstances of his presentation of the longer list, none of which were compelling.

beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole.

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In *Bottom Line*, the Board noted two exceptions to this general rule: when a Union engages in tactics designed to delay bargaining and “when economic exigencies compel prompt action.” Id. at 374.<sup>18</sup> Respondent’s brief concedes that it has met neither of these exceptions.<sup>19</sup> However, Respondent insists that *Bottom Line* is not applicable because the parties “elected to bargain on an issue-by-issue basis rather than beginning with overall contract proposals,” citing *E.I. Du Pont & Co.*, 268 NLRB 1075 (1984). The Union never joined in any such election. Respondent scheduled all meetings, designated the general area of the topics that it wished to discuss, and exercised the right to make any proposal it wanted. The Union never specifically acquiesced in Respondent’s modus operandi, except perhaps by a lack of action concerning some of Respondent’s health proposals. But, even if the Union had agreed to issue-by-issue bargaining, *E.I. Du Pont* did not give a party the unfettered freedom to make unilateral changes. That decision held that an employer can do so, provided that there is an impasse in the entire negotiations. In determining whether an impasse exists, it is not necessary that negotiations be exhausted on every issue about which the parties have been bargaining. An impasse on a single critical issue can in some circumstances create a deadlock in the entire bargaining process.

Thus, *E.I. Du Pont* held only that, when a single issue is of central importance and the parties have been unable to reach agreement concerning it, after negotiations conducted in good faith, “a finding of impasse is warranted irrespective of whether there was some movement in the parties’ position prior to the Respondent’s implementation of its proposals, or whether the deadlock was produced by differences either on one or on many significant issues.” Citation omitted; 268 NLRB at 1076. In *E.I. Du Pont*, at the time of the implementation, the company had presented its entire proposal. Here, to the contrary, Respondent was still in the process of developing its full proposal, and it was only in the next three months that Respondent completed negotiating its proposals for the area specific criteria. The Union was hardly in a position on February 28 to agree to the partial proposal of logical work teams when it had no knowledge of what the members of those teams would be required to do.

For substantially the same reasons, Respondent’s reliance on *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), to support its contention that there was an impasse on February 28, authorizing it to implement its last offer, does not help it. There, the Board held that a claim of impasse requires an analysis of, among other factors, bargaining history, good faith, length of negotiations, importance of issues, and contemporaneous understandings, to show that there was an impasse on February 28. But, although the duty to bargain does not require the parties to agree to or to engage in “fruitless marathon discussions,” *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952), an impasse cannot occur until negotiations reach “that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless . . . .” *Laborers Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 5 (1988) (quoting from the Ninth Circuit decision, 779 F.2d 497, 500 fn. 3 (9th Cir.1985).

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<sup>18</sup> See also *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

<sup>19</sup> Even without the concession, I would have so concluded.

5 Here, assuming, arguendo, that the parties had reached the end of their discussions about all the items that Respondent implemented, Respondent knew that it had months of negotiations left on the issue of the area specific criteria, as to which the parties had talked little. Indeed, these criteria had been proposed late in negotiations, one no earlier than three weeks before the first implementation; and Respondent must have also recognized that it had not offered any criteria for some positions. The area criteria made the logical work teams meaningful. They defined the work that was to be performed by the employees on the teams. They gave substance to the definition of the team; for, without those criteria, no employee had work to do, no employee could be aware of what had to be performed in order to successfully transfer from the present work system to the new one, and no employee could be aware of how to maintain the job and qualify for promotion. Accordingly, they were integral to the remaining discussions, and the reason that Respondent implemented only part of its proposal was that it was aware that negotiations had much further to go. Thus, one need not go beyond the last component of the *Taft Broadcasting* test — contemporaneous understandings of the parties as to the state of negotiations — to recognize that the parties had much left to bargain about. Accordingly, there could be and there was no impasse at the time that Respondent implemented part of its proposals.

20 Respondent contends that the complaint's allegation has no merit because the only changes were de minimus, relying on *Peerless Food Products*, 236 NLRB 161 (1978). It is true that the implementation, according to most witnesses, would not have been readily apparent to an onlooker who attended the plant the day before the implementation and the day after. To the naked eye, there was no change. The employees continued to perform exactly the same functions as they did the day before and were paid the same. There were no transfers of employees under the seniority rules until January 1995. However, within weeks or in some instances a month or two after the implementation, Respondent assigned numerous employees to logical work teams, canvassed the employees to determine which team they wanted to be placed on, and made assignments based on the employees' wishes, using seniority to fill those teams where not enough employees had offered to fill positions.<sup>20</sup> When the employees became members of their teams, they were limited in their movement from that team. Although they were free to move to another business unit, that could occur only once, and no more, without penalty. That was a concession that Respondent made, having first proposed that an employee could never move, unless that employee's wage was to be reduced to the next lower technician pay level. And so the employees were somewhat wedded to their assigned logical work teams.

40 In addition, although employees were not required to train, because, as Norford stated, the transition period had not begun, Respondent posted the registration schedule, thus encouraging the employees' voluntary participation. Norford noted that different areas were at different stages in defining their logical work teams, but he said that an employee could voluntarily begin training to "get a jump on transition." On March 11, Flickinger complained that Respondent was relieving some, but not all, employees to receive training on company time. He wanted the training to be on the employee's time, because it was supposed to be voluntary. Norford replied that employees could begin training on company time because the site criteria had been implemented on February 28, and it was thus irrelevant that the transition had not officially started. On March 14, the Union issued a special bulletin expressing its dismay that, although 88% of the members had expressed disagreement with every aspect of the new work approach, approximately 500 employees had registered for non-mandatory training at BRCC. (By June 21, 700 had registered, and 250 had started training.) It urged, apparently without

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<sup>20</sup> In BCF, no one picked a team. There were no tasks assigned that were moved from one group to another.

5 success, that employees not participate in training until it became mandatory. Some employees also, after Respondent had identified the area specific criteria, began working on those. Other employees were working on a volunteer basis from the onset on some of the site criteria involving the training, and having that training verified. And why should they not? The sooner they completed their transition, they received an eight percent increase, so, even though it was not required, there was monetary pressure to commence training and meet the criteria.<sup>21</sup>

10 In sum, I conclude that there were actual, important changes resulting from the February 28 implementation. I, therefore, conclude that Respondent violated Section 8(a)(5) and (1) of the Act by its premature and piecemeal implementation of the P&M agreement. Although the complaint did not allege the same violation regarding the COT agreement, the facts regarding that contract are almost identical, except that on February 28, Respondent did not implement the COT seniority rules. On November 17, 1993, Norford, concerned that James Campbell, the Union COT representative, normally took his vacation during the last six weeks of the year, gave him and Flickinger Respondent's COT contract proposal so that Campbell could look at it while he was on vacation, and then, after he returned from vacation, meetings could be scheduled to begin negotiations of this contract.<sup>22</sup> Norford said that the format of his proposal was basically the same as he had followed in preparing the P&M contract. However, because the last printed COT agreement expired on December 1, 1986, but was automatically renewed from year to year, and the parties had agreed that whatever had been agreed for the P&M unit applied equally to the COT agreement, the written agreement had not been revised. Thus, with Respondent's termination of the written agreement in 1993, the agreement required more changes than the P&M agreement proposed by Respondent. Otherwise, Flickinger conceded that, in most respects, the contract was the same as the P&M contract.

25 On January 10, 1994, Flickinger pointed out to Norford that no meetings to negotiate the COT contract language had taken place.<sup>23</sup> Norford acknowledged that no meetings had been held and promised to schedule them. There was a meeting scheduled exclusively for COT negotiations for February 14, but the Union canceled. Flickinger claimed that he was under pressure from Norford to supply input for the P&M agreement by February 18, and he could not comply with that direction and tend to COT negotiations. In any event, he contended, it would be fruitless to proceed with negotiations without an extension of the deadline to supply input.<sup>24</sup> Thus, without one negotiating session devoted exclusively to the COT contract language, provisions of the new agreement were implemented on February 28.

35 Board law makes clear that the Board may find a violation, even though the specific violation was never alleged, where the violation was "closely related to complaint allegations

40 <sup>21</sup> Another consequence of the implementation of the logical work teams would have been to change the vacation and overtime rosters. Employees with whom others formerly had nothing in common were placed on the same vacation and overtime roster and competed with other employees for vacation and overtime, resulting in the possibility of some not getting overtime and the vacation of their choice. And, of course, the implementation of the new work approach resulted in the loss to the P&M employees of the rules of transfer and progression, which the Union so desperately wanted to retain. There is, however, nothing in the record that indicates that Respondent utilized the new seniority rules or that any employee suffered any loss or damage as a result. Similarly, the Union contends that the resulting area specific criteria "may well have caused some employees to rue their choice of Teams." There is no evidence that this was so; but, if so, my recommended Order will remedy any adverse effect.

45 <sup>22</sup> Flickinger testified that by January 1994, he had not seen the COT contract language, but he obviously had.

<sup>23</sup> The parties negotiated the COT seniority rules during late 1992 and early 1993.

<sup>24</sup> Although Respondent makes little of Flickinger's excuse, I note that Norford asked for the Union's input of February 11. If the Union was diligent, seven days was ample time to supply that input (these proposals should have been prepared months before, in any event) and still attend the COT meeting.

and [was] fully litigated.” *Marshall Durbin Poultry Co.*, 310 NLRB 68 fn. 1(1993), citing *Baytown Sun*, 255 NLRB 154 fn. 1 (1981). Here, Respondent presented essentially the same proposals for both contracts. It announced the identical partial implementation of both contracts on the same day (although it retracted the implementation of the COT seniority rules the next day), and it partially implemented both contracts on the same day. The “beginning of “voluntary” training was a serious enough change to warrant the finding of a violation. I conclude, therefore, that Respondent violated Section 8(a)(5) and (1) of the Act by its premature and piecemeal implementation of the COT agreement.

## C. The Legal Consequences of the February 28, 1994 Implementation

### 1. The P&M Unit

The General Counsel and the Union contend that the appropriate relief for the piecemeal implementations is the elimination of the new work approach and the restoration of the status quo, as of February 27, 1994. “It is well established that a make whole order restoring the status quo ante is the normal remedy when an employer has made unlawful unilateral changes in its employees’ terms and conditions of employment [cases cited].” *Southwest Forest Industries*, 278 NLRB 228 (1986), *enfd.* 841 F.2d 270 (9th Cir. 1988). However, there is no “presumption that an employer’s [unlawful unilateral change] automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching a good faith impasse.” *Storer Communications, Inc.*, 297 NLRB 296, 297 fn. 7 (1989). Thus, where an employer and a union have bargained in good faith to impasse, despite the prior illegal unilateral change, the employer’s liability for the violation terminates on the date when the parties reach the impasse. *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1026 (D.C. Cir. 1982); *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985), supplemental decision 276 NLRB 27 (1985). Respondent contends that it ultimately reached a good-faith impasse and, thus, the return to the status quo is inappropriate.

Respondent accurately contends that it indicated its willingness, before the implementation, to discuss matters that had been implemented; and it, in fact, did so, never refusing to meet with the Union after February 28 regarding any additional input that the Union wanted it to consider. The parties continued to bargain about all manner of issues, including even revisiting one of the logical work teams. Shortly after February 28, Kent Kimerer, operations manager for lycra spinning, made changes to the plan and deliver team, based on the Union’s input. On March 18, Respondent presented for the first time area specific criteria for the emergency services technician. The parties continued to conduct negotiating session after session, most concerning area specific criteria, many involving new duties for P&M and COT employees, not simply what they had done on their jobs in the past. There were countless discussions about P&M and COT employees performing tasks formerly performed by supervisors, with the potential of employees disciplining other employees; exempt role tasks formerly performed by the engineering group; and some tasks that were performed by the employees in the other unit. The Union objected to the requirements that employees perform management functions, assume certain of the responsibilities of first-line supervisors, and perform maintenance tasks that had previously been performed by those trained to perform those tasks, to wit, group 6 mechanics. And the mechanics were being given not only their jobs, but were being required to do what the Union considered operational jobs.<sup>25</sup>

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<sup>25</sup> Over the years, there had been some agreements that required operators to acquire some light skilled mechanical tasks, but never mechanics to perform the jobs of operators. Except for administrative tasks that exempt employees had performed, all area specific criteria had previously been performed by employees in both bargaining Continued

Respondent proposed that some employees would lead quality improvement projects, and the Union objected. The Union also objected to any criteria that would require employees to assess the work of other employees. A number of other criteria were inserted because of an international standard that the lycra unit had to meet in order to be able to sell its product internationally. Management wanted employees in lycra to take the lead on all business communications, to determine when to schedule equipment for maintenance, and to perform what management considered low-skilled maintenance work. (Respondent gave a new term — “essential components” — to tasks normally not performed by the employees before the new work approach.) Sometimes, Respondent proposed lists of numerous criteria, and the parties discussed from two to four items each meeting. Other times, individual criteria were presented to the Union at each meeting.

One of the continuing concerns in BCF was that Respondent was assigning employees to perform maintenance tasks, many of which, the Union contended, were unsafe for those who were not trained or physically equipped to do them. For example, sometimes lines would freeze, and maintenance men would heat them with a torch and unthaw them. The line might explode if there was too much heat built up, and the Union feared that operators were ill-prepared to perform this task. Respondent also wanted operators to troubleshoot robot and deflector rotor motors, a task that only some, not even all, engineering employees were capable of performing and used to perform. Union vice-president Larry Parr testified, without contradiction, that the robots can actually kill a person, that the Union did not want manufacturing people meddling with them, and that the Union vehemently objected to these various criteria. (One employee, Bob Simmons, an operator, broke his arm while opening a stuck slide gate, a job that the Union did not want operators to perform, because the Union believed it unsafe.)

Much of the discussion involved the specific functions that Respondent expected its employees to perform. Seemingly simple words such as “analyze” caused trouble. As Parr explained: “[A]nalyze the information to determine the safety, reliability and operability of the equipment. That could go into engineering type work. It could be asking an operator if you have a line that’s not putting the throughput that it should, what is the problem, you know? Well, me being a maintenance man, I’m going to tear that line down if I do not know. That operator is handicapped. He’s not going to be able to do that. So when you say ‘analyze’ just how far do you want the operator to go. And we did not know that.”

As it did before February 28, Respondent continued to press for Union action by setting deadlines. On March 18, Norford set May 2 as the deadline for the Union to provide final input and conclude bargaining on area specific criteria. On March 22, Flickinger objected, noting that the area criteria significantly changed and increased the tasks performed by the employees on the floor. Later, Elmo Lam, Respondent’s employee relations manager, wrote the Union on June 14 that June 15 was a reasonable date to get the Union’s input. Union executive board member Beth Wood reviewed the minutes and found, she testified, 181 area criteria that had not been discussed, or had been discussed only partially; and on June 15 Flickinger presented her list as the Union’s final input regarding the area criteria, stated that the essential components in lycra still needed to be negotiated to completion, and made a counterproposal. He also announced that the Union had other counterproposals that it was not prepared to present on that date.<sup>26</sup> Flickinger wrote to Norford on June 15, objecting to Norford’s forcing the Union to give final input before the negotiations had been completed.

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units.

<sup>26</sup> After being asked for his final input regarding the P&M unit, Flickinger still elected not to make  
Continued

The negotiations recessed until June 20, when Randall Lee, resource manager for BCF, replied to the 181 criteria identified by the Union as incomplete (he counted them and there were only 180) that, because of repetitions — and there are many and, strangely, the Union during the hearing never conceded the existence of any — there were not 181 different criteria on the list, but only 124. He withdrew 3 and stated that some of the remaining criteria had been discussed.<sup>27</sup> The others were tasks currently covered under job procedures, each of which had been bargained (before the current negotiations) and were routinely being performed daily by employees within the area. Respondent did not propose changing any of them. Nonetheless, Wood said that she needed to go over them word by word, and Flickinger insisted that she read each one by number and title. Lee then engaged in a frustrating colloquy with Flickinger about the bargaining criteria that he had already discussed. Describing a portion of the minutes of the meeting, Lee said:

These were from -- the number 504ee [one of the criteria] would denote that that was a criteria that was associated with something that maintenance had been doing. And all of these were things that we were proposing not to take away from maintenance but to be done also by technicians in the operations area. And what it's saying there is that he has a package in his hand that has all those in them, ones that we had covered. And what he's saying is that he wants to talk about each individual page that's in there. Some of them were repeats. And what I'm saying is that we had gone in, and these were from previous bargaining sessions. Because when we finished bargaining a criteria sheet, we would make notes on the criteria sheet what it looked like after bargaining. And he said he wanted to go over them again. And I was telling him that, you know, our notes are on your sheets. You see our intent. Then he states that not only do we need to bargain 504ee forward, but he's gone back to the tool list which we had dealt with in an earlier session. And then what I'm doing down at the bottom is essentially saying we've dealt with the tool list, we provided the tool list, there's nothing else we can do with the tool list. The position was that we had responded to all their concerns, that we had made substantial changes in terms of our proposals, and that we had covered all of those items that fell into those three categories of what their prime drive was and what they were interested in pulling out, which would have been the maintenance-type work, what exempt were doing then, and then the cross contract-type work.

Although Lee conceded that the Union had the right to discuss the same items again, he testified that going back to these items was fruitless. His proposals were “the best he could do.” He had made changes to meet the Union’s input. He assured the Union that the agreement would be written so there would not be any future problems or misunderstandings. On June 21, Respondent issued a general bulletin announcing the second implementation, through the area specific criteria, for the P&M employees, effective on June 22. It added that it expected to resume bargaining of the changes impacting the COT employees in the near future. Because it deemed it inequitable to start the four-year transition period for one group of employees and not the other, Respondent delayed the beginning of the transition until it had completed bargaining the COT contract. Finally, Respondent announced that site and area specific criteria training

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counterproposals on June 15, although, he testified, he had them. Why, he was asked at the hearing. “To the best of my knowledge, I'm not sure they were totally complete.”

<sup>27</sup> The only area specific criteria for the BCF area that had not been negotiated prior to June 22 was for Lowell Grove because of his health condition.

would continue to be voluntary, that employees could continue to have their criteria verified, that team meetings and “functioning processes” would begin, and that there would be no more upgrade pay for P&M employees.<sup>28</sup>

5 By June 22, all the elements of the new work approach had been discussed. Respondent had made many revisions, based on the Union’s objections and comments. Nothing, despite the Union’s position to the contrary, had not been discussed by June 22. The list of the 181 BCF criteria had been discussed, to the extent that those criteria involved employees being required to perform functions that they had not before. I find Lee’s testimony  
10 compelling to the effect that he attempted to isolate those jobs that would require the employees to do something different. As he stated: “If there was no existing job procedure in manufacturing at that time, they were separated out and those are the criteria that we did all the bargaining on.” There is no proof that Lee’s position was incorrect, and I credit him. Similarly, although Lee conceded that there were some criteria that were not discussed, the reason was  
15 that Respondent did not propose to change the work that the employees had been doing. I again find his position compelling and, under the bargaining history here, unassailable. Throughout earlier negotiations of the BCF criteria, when items were identified as possibly different, because they contained the word “maintain” (indicating a job done by maintenance) or “administer” (indicating a job done by a member of the COT unit), the Union would simply ask  
20 whether that function was something that the employees did every day. If it was, there would be no further discussion. In other words, the intent of the negotiations was to negotiate anything that required anybody to do something different after implementation. That was consistent with the overall method of bargaining the P&M agreement. Flickinger did not require Respondent to review all the provisions of the agreement: “If there was no proposed changes, then there’d be  
25 no need to go over it.”

The Union contends that it needed to know what the past job procedures were, so that it could advise the employees. However, the procedures were available to the employees. In all of the manufacturing areas, except polymer, the job procedures resided in the computer system in  
30 the building. In each of the operating areas, located any place where work was being performed, there was a terminal that could be accessed. For example, in spinning, each spinner had a terminal. There were also some common terminals. An employee could use the computer, input the item number, and the job procedure showed on the screen. In addition, the procedures were all kept in manuals, because the employees had told management that, in  
35 case of emergency, they would prefer to access a book because the material on the computer screens rolled. Furthermore, if the real issue was the employees’ need to know the contents of the job procedures, the Union needed only to propose that they be attached to the criteria or made available to the employees in whatever way the Union proposed. The Union made no such proposal.

40 In addition, Lee contended that the job procedures were also available to employees on the third floor: but Wood testified that those procedures had not been updated for years. Even if she were correct, the procedures were available elsewhere and I note a singular lack of complaint from her or anyone else at the bargaining table that the Union was put at some  
45 disadvantage because it did not have copies of the updated procedures. Surely, if the Union

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<sup>28</sup> Flickinger testified that upgrade pay ceased on February 28, 1994, but Norford testified that it did not. Although there was no proof that anyone was paid upgrade pay after that date, neither was there proof that anyone performed work for which upgrade pay should have been paid. I cannot, on the basis of this record, credit Flickinger’s naked, unsupported contention, especially in light of Respondent’s general bulletin of June 21, which announced the end of upgrade pay.

5 really needed them, it would have requested them; yet its sole position in this proceeding is that the criteria were not negotiated because Respondent refused to do so. I find the Union's position disingenuous. I am convinced that none of the existing procedures were negotiated before and that Lee's refusal presented a convenient excuse to the Union to delay the implementation.

10 The other topic that Flickinger claimed had not been completely negotiated was the criteria for essential components in the lycra spinning support area. One of them, Flickinger thought, was the changing of buggy wheels, but the minutes show that that was discussed. Furthermore, after claiming that lycra essential components had not been discussed, and then being shown on cross-examination, minutes of a meeting and one of his letters, he narrowed his objection to his "feeling" that there had been discussion of the lycra polymer area, but there was information outstanding to be presented to the Union for the lycra spinning or spin support. As to those, his new objection was not that they were never discussed: "I can't say that all of them were not. It's my understanding that all of them were not. I can't say that none of them were not, but all of them were not discussed how they were supposed to fit in to the lycra. To the best of my ability to recall, either the lycra spinning or the lycra spin support."

20 I am not persuaded by his testimony. At best, he did not know what had not been discussed. That is not proof that there were still matters pending. I credit the testimony of Respondent's witnesses and the minutes and find that the parties had discussed all the area specific criteria, which is what Respondent implemented on June 22. By then, therefore, except for the beginning of the transition period, Respondent had implemented a complete, new employment relationship for its P&M employees. All the area specific criteria had been reviewed. There was little else to bargain to complete the P&M agreement, with the exception of the health plan, discussed, infra, and a smattering of incidental, related issues, also discussed, infra.

30 Respondent contends that the parties were at impasse and the Union's attitude demonstrates that there was no hope of reaching an agreement. Returning to the *Taft Broadcasting* test, I find that the parties had a lengthy and peaceful bargaining history for decades. This was the first time that Respondent terminated its collective-bargaining agreements. By June, the negotiations had been going on for almost 11 months, the parties often meeting twice a day and five days a week. The issues were of the utmost importance to the parties. The new work approach was Respondent's key to obtaining its new lycra manufacturing facility. On the other hand, the Union fought it, fearing that it would destroy all vestiges of a system of seniority that the employees desperately wanted to protect and that Respondent would merely exploit them by making them perform higher-rated jobs without paying them higher wages.

40 Regarding contemporaneous understandings, despite Flickinger's protestations that he wanted to make movements in the negotiations, his action belie that testimony. Some of Flickinger's comments are instructive. There is little question that the Union violently disagreed with the new work approach. The parties were very much apart, and Flickinger did not hold back his distaste for the new work approach. "[O]ur members . . . had great issue with this new work system, and our members were telling us they were willing to do anything to try to protect their seniority." On November 8, 1993, Flickinger commented that people in the plant were not going to live with Respondent's proposal for transition and that the transition was "not acceptable." He "considered this to be a stalemate as [he] offered Management a reasonable

counterproposal” and later reiterated that “bargaining appears to be in a stalemate.”<sup>29</sup> The Union, in a newsletter dated February 14, 1994, decried the “atrocities taking place.” Did the Union agree to the elimination of upgrade pay? “Obviously not, no, never,” answered Flickinger. On May 26, Flickinger opined that the new work approach looked good on paper, but the program was “unachievable.”<sup>30</sup> Often, these statements might be considered as part of the give-and-take of negotiations. Here, however, except for its failure to act or its silence, the Union never agreed with one proposal that Respondent had made during the negotiations. The Union primarily expressed its “concerns,” but it never indicated in any meaningful way that it was willing to agree to the new work approach or any of its components. When Norford asked for the Union’s final input, Flickinger had nothing good to say about any component of the new work approach. There was no counterproposal on it. There was no counteroffer on the seniority rules. There had been a counterproposal on the transition period, but that had been rejected; and the Union offered nothing further. There was no counterproposal on the spin/pack team, except that the Union completely opposed it. There was no counterproposal to a single area specific criteria, only opposition or silence. The only counterproposal that Flickinger belatedly offered were new benefits, and some other changes unrelated to the new work approach; and Respondent rejected them.<sup>31</sup> These negotiations were stalemated, and there was an impasse.<sup>32</sup>

The remaining question is whether my earlier conclusion that Respondent violated the Act by its piecemeal implementation destroys a finding that there was a good faith impasse. The possibility of a future good faith impasse is precluded if there is a causal connection between the unremedied changes and the subsequent deadlock in negotiations. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 788-789, enf. 984 F.2d 1562 (10th Cir. 1993); *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enf. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982). Here, the Union relies on two changes that affected subsequent negotiations: the loss of upgrade pay after June 20; and the “voluntary” training that employees took on their own time, with the loss of otherwise “free” time. As to the first change, that took place after the parties had essentially completed discussing the entire P&M agreement. The second is thornier, but the training was clearly voluntary. Although many employees began their training, many did not. In addition, although significant enough to support the violation I have found, it did not affect negotiations. The Union could not be persuasive in convincing Respondent that there should be no new work approach, for that was the very basis of the corporate commitment to build the new lycra facility in Waynesboro; and there was no way that Respondent was going to lose its new facility. That Respondent instituted training for a program that was inevitable could not have affected the Union in its negotiations.

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<sup>29</sup> Flickinger, consistent with his pattern of avoiding written evidence that might be harmful to the Union’s claim, could not recall using the word “stalemate,” despite the fact that the word appears in the Union’s minutes.

<sup>30</sup> On the same day he noted in a newsletter to his members that impasse had been reached on various items, but he credibly explained that that was merely a reflection of what Respondent had declared an impasse on, and not a concession by him that there was an impasse.

<sup>31</sup> Bargaining does not take place in isolation and that counterproposals frequently serve as leverage to obtain concessions elsewhere. *Patrick & Co.*, 248 NLRB 390, 393 (1980), enf. mem 644 F.2d 889 (9th Cir. 1981). Flickinger said that he was hopeful of getting a tradeoff; but I cannot believe him because, other than his words at the hearing, he never showed any indication that he was willing to trade anything. All he expressed was concerns.

<sup>32</sup> There was a continuation of bargaining, but these parties always met. Nothing in the later bargaining indicates that the Union was willing to compromise on any of its earlier hardened positions. Furthermore, although Norford never used the word “impasse” when he implemented Respondent’s proposals in February and June, he indicated that the negotiations had no way to go and that “the potential for agreement really did not exist and any further bargaining was really fruitless.” That is sufficient to show that he thought there was an impasse.

The General Counsel contends that the premature implementation “robbed the Union of any opportunity to develop overall counterproposals seeking to trade off details of one element for another.” I disagree. The Union always had that opportunity, but never took advantage of it and never showed any inclination to make a counteroffer, until prodded by Respondent. Rather, at the time of the first implementation and, later, at the time of the implementation of the area specific criteria for the P&M unit, Norford invited the Union to bring him, and he would consider, any input that might have the potential to lead to the upgrade of Respondent’s high performance work system. Norford testified that he knew that Respondent did not have a perfect system, and he was looking for ways to build on and improve it, as he still was on the day of the hearing. In fact, the Union returned to some issues — for example, the spin/pack logical work team — and made proposals on matters that had been implemented. The General Counsel and the Union also contend that Respondent refused to renegotiate the logical work teams, but I find that inaccurate. The parties were simply at an impasse on the subject, which seems primarily to have dealt with the spin/pack team. The Union did not want it, and Respondent did. The Union raised no new arguments that were persuasive to convince Respondent that it had taken the wrong position. That is not refusal to renegotiate, but permissible refusal to be persuaded.<sup>33</sup>

The Union’s reliance on *Intermountain Rural Electric* is misplaced. In that case, there were three unlawful changes that had an economic impact on the employees: “the diminution of regular take-home pay due to the newly imposed contributory health insurance program; increasing the number of hours employees had to work to make up excused time off before qualifying for overtime premium pay rates; and possibly losing the time to work overtime at all because of the abolition of the standby and callout systems.” 305 NLRB at 789. The Board found that “these were not isolated or insignificant matters, but rather were areas in which the entire bargaining unit was affected adversely in the most fundamental way - in their paychecks.” *Ibid.* Here, however, there is nothing to demonstrate that the voluntary training engaged in by the employees “would likely place the Union at a serious bargaining disadvantage in terms of maintaining the support and trust of the employees [and] serve to undercut the Union’s authority at the bargaining table.” *Id.* at 789. Finally, in *Intermountain Rural Electric*, the employer denied the union the right to raise certain issues and the union believed that it was foreclosed from discussing other changes. Thus, the Board held, “the bargaining arena itself was directly and substantially affected by the Respondent’s concurrent unilateral actions.” *Ibid.* Here, to the contrary, Respondent encouraged the Union to revisit areas of concern and supply new ideas, which were unfortunately not forthcoming.

The Union complains that, even with the second implementation, Respondent did not stop making new proposals. For example, in late June, shortly after the implementation, Respondent introduced for the first time its personal development plan, later called the career development plan, a plan developed by the employee and the supervisor for the employee to meet the criteria and successfully proceed through the transition. Discussions were held in July about the method that employees would be selected to take the training for the various criteria, when the training could take place, and the effect of it taking place during the employees’ working hours or at other times. On July 6, Respondent presented, for the first time, the form that all employees on the site would be required to keep, so that when a vacancy occurred, it

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<sup>33</sup> Ultimately, the Union’s position regarding the consolidation of the spin/pack team proved correct, and the team had to be split in about April or May 1995, but not for the reason that the Union had suggested. Because of some of the competitive pressures and because of some new products coming on line, the requirements for product development was much higher than Respondent had experienced in the previous three or four years. In order to continue to proceed to implement the team, it would have required training many more employees, and Respondent determined that it could not afford that level of training.

knew how to administer the sequence for staffing of vacancies. On July 7, the parties discussed the staffing procedures for the engineering group, about 300 employees who maintain control equipment, which had its own seniority procedures and rules.

5           On July 19, at the Union's requests, Norford reconsidered three of its earlier positions. He refused to fill vacancies on logical work teams from the entire plant on the basis of plant seniority, rather than from the business unit. He agreed to coordinate the movement of personnel through a single source, employment services, as had been done in the past. Finally, he agreed that, if an employee had been moved involuntarily from one business unit to another, that employee could return within 24 months to the original business unit without a reduction in pay. On July 25, Lam qualified Respondent's approach to the extent that the employee must have met all the criteria.

15           The Union also contends that bargaining was not finished because Respondent denied certain requests for changes of area criteria "at this time," thus demonstrating that bargaining was still continuing. However, even if there were matters open, and these were clearly minor, such as the Union's requests to have "quick disconnects" instead of "remov[ing] flax lines," were insufficient to upset my underlying finding that there was an impasse on the new work approach in its entirety. Furthermore, the parties understood that there was a possibility of changes involving the area specific criteria, because one of the implemented proposals was the career development movement memorandum which protected employees in the event of a change.

25           All of these items did not affect the collective-bargaining agreement that Respondent had proposed and on which impasse had been reached. Rather, they related to the techniques that were to be used to apply the more general provisions of Respondent's proposal, which was not being amended. Furthermore, the new work approach was "new," with new problems and new solutions. Respondent had to be given some leeway in developing methods to make it work. What highlights all the negotiations was Respondent's attempt to use the Union somewhat as a sounding board, to refine what it wanted to do and to convince, hopefully, the Union that the approach was to its benefit. As to the latter, Respondent apparently failed, at least from what appears in this record. But it would do a disservice to the aim of collective bargaining, which is fostered by the Act, to punish Respondent when it takes its problems to the Union with the hope of arriving at a peaceful and amicable solution. Furthermore, after June 22, there was still no significant change caused by the implementation with the exception that more employees were trained and the logical work teams began to hold team meetings. The real implementation started in September with the beginning of the transition. Finally, I rely also on *E.I. DuPont & Co.*, 268 NLRB 1075 (1984). Accordingly, I conclude that the new proposals after June 22 did not affect the basic nature of the impasse that existed on that date.<sup>34</sup>

40           Finally, the Union contends that Respondent's proposals made after the second implementation underscore the piecemeal nature of the bargaining. The General Counsel complains that Respondent's "practice was to present each of its proposals in complete isolation from other related contractual items . . . in [an illegal] piecemeal fashion, one issue at a time," citing *Sacramento Union*, 291 NLRB 552 (1988). I do not find that there was the kind of piecemeal bargaining here that violated the Act. All the issues were discussed. The Union was

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<sup>34</sup> Respondent also made proposals on matters that it had agreed to prior to its implementations. For example, on September 13, 1994, it sought to have an assessment team perform the assessment at the midpoint of the transition, rather than the team leader, as the Union had proposed and Respondent had earlier agreed to. The Union rejected that proposal.

never denied the opportunity to discuss anything. What the Board found objectionable in *E.I. DuPont & Co.*, 304 NLRB 792 (1991), was the company's adamant insistence throughout negotiations that two of its proposals were not part of overall negotiations for a collective-bargaining agreement and, therefore, had to be bargained separately from not only all other bargaining proposals but also one another. That "evinced fragmented bargaining in contravention of the Respondent's duty to bargain in good faith." *Id.* at fn 1. But here, the Union had an opportunity to discuss anything, and seemingly did. There is not one instance that Respondent denied the Union the right to raise any contention. It is true that Respondent attempted to delay answering some of the Union's concerns about the composition of the logical work teams to discussions of the area specific criteria;<sup>35</sup> but there is nothing to show that Respondent did not later attempt to deal with them. That is not avoiding a problem. Rather, it is inviting the discussion of it at a time one believes that it will be more appropriate and beneficial.<sup>36</sup>

I conclude that the earlier unfair labor practices had no adverse affect on the later bargaining and that a valid impasse was reached. I will not recommend the status quo order sought by the General Counsel and the Union.

## 2. The COT Contract

After the partial implementation of the COT contract on February 28, Respondent implemented the remainder of the COT contract on September 12, and the complaint alleges that the parties had reached no impasse by then. (There was no similar allegation regarding the P&M contract.) The salient facts, in addition to those set forth above, are as follows:

Flickinger stated on March 9, 1994, that he wanted to be able to go through the entire COT contract, so that he could negotiate it, since this was a "new contract." Norford replied that the COT contract was essentially the same as the P&M contract. On May 2, Norford wrote to Flickinger repeating what he saw as Respondent's compelling business need to implement the new work system. After relating the bargaining history, including his recital of the earlier implementation, "leaving only the bargaining of the C.O.T. Seniority Rules and the Area Specific Criteria to be finalized," he wrote that the parties had been discussing the area specific criteria since January 5, 1994, and stated that Respondent had on March 18 advised the Union that it was reasonable for it to finalize its input no later than May 2. Now, because "we have not concluded discussions regarding the C.O.T. Seniority Rules and also need to finalize discussions on some Area Specific Criteria that represent tasks that are not currently performed by represented employees and tasks that are being moved from Engineering to Operation," it would be reasonable for the Union to provide its final input for the COT seniority rules and area specific criteria by May 31.

On May 6, Flickinger replied, stating his belief that the plant would be healthier if the parties completed negotiations on the new work approach, so that employees would know exactly what was going to be implemented, and, through that process, would produce more and better quality products. He also corrected what he alleged was Norford's inaccurate statement

<sup>35</sup> Note that Flickinger refused to bargain area specific criteria for the lycra spin/pack team until the logical work team was agreed on. He added that his position applied to all sites, but that appears to be merely an idle threat.

<sup>36</sup> It may be that the General Counsel claims that the implementation in September 1994 was "piecemeal," because the issue of managed care, discussed, *supra*, was still being bargained. *E.I. DuPont & Co.*, 268 NLRB 1075 (1984), is dispositive. The issue of the new work approach was so important that an impasse could have been found, even though the parties were still making movement on the other issues. I so conclude.

that the parties had been negotiating for approximately 15 months. He said that, although Respondent's proposal had been submitted in November 1992, the parties did not begin negotiations until July 1993. Flickinger also stated that Norford had "a partial list of questions and concerns that was presented to" him on February 17, 1994, which had not been addressed, and concluded that it was unreasonable for the Union to finalize its input by May 31. On May 26, Norford wrote Flickinger, changing the company's deadline for the Union to finalize its input for the P&M unit until June 6. Norford mentioned that the recent illness of Campbell had restricted the negotiations, but stated that there was still a compelling business need to implement the career development system as soon as possible. Flickinger replied on June 1, again contending that the new deadline was unreasonable and reminding Norford that he had not answered "the many questions and concerns" that had been raised by the Union during negotiations. Finally, on June 13, Norford agreed to postpone negotiations on the COT contract and area specific criteria until June 20, when it was hoped that Campbell would return from his then recent disability. The parties continued to bargain on area specific criteria and seniority rules.

On August 30, Flickinger stated that, based on the last meeting, it appeared that Respondent was attempting to reach impasse on the lycra criteria and that all the team support (such as participation in safety audits) had not yet been negotiated for the COT unit. Norford replied that he was not saying that the bargaining had been completed or that impasse was being reached. He said that the issue concerned whether Respondent had discussed the criteria with the Union, and Kimerer said that he had reviewed the bargaining minutes and it appeared that the lycra criteria for the COT and P&M units had been bargained in May and June. Flickinger testified that the bargaining had been only for P&M unit, not COT. Kimerer stated that he had discussed the matter on March 25 and 29 and April 4, 6, and 8, with Campbell present, and on May 20 and 31 and June 2, 6, 8, and 10, when Campbell was still on disability. The Union, nevertheless, requested to complete these negotiations, insisting that there was no understanding that the criteria had been bargained for both units. When Respondent advised that the remainder had actually been discussed, Flickinger said that there was some disagreement as to whether or not those had been actually negotiated on those dates and whether they had been negotiated to completion; but, once again, he could not recall what specifics had not been addressed.

On August 31, Norford stated that Respondent had presented all its proposals and had responded to all the input from the Union about the seniority rules of the COT unit. He asked if the Union had any other proposals for Respondent to consider. Flickinger objected that he was asking for the Union's final input, when Respondent had not completed bargaining and identified 14 logical work teams whose area specific criteria had not been completed. On September 1, in a letter to the Union, Norford again stated that the P&M and COT agreements were essentially the same, called the Union's attention to the fact that a complete draft had been presented to it in November 1993, added that changes in the COT agreement had been discussed during negotiations of the seniority rules, and advised that management had presented all its proposals, including the area specific criteria. He asked for the Union's additional input by September 7. Flickinger wrote to Norford on September 6, disagreeing with the deadline and requesting that meetings be scheduled to negotiate in good faith the COT contract language and the area specific criteria. Norford felt that further talks would be fruitless and announced on September 7 that, effective September 12, the transition would begin for both units. From September 14, the Union continued to request that the COT contract be bargained; but Respondent never changed its position.

The General Counsel contends that there could be no impasse in September because the parties still had to discuss the COT contract language line by line, a process that would

have taken Norford less than two hours. However, that exercise would have been meaningless. Flickinger had the proposed COT contract for almost 10 months and never raised any questions about it, despite being requested for his input. The contract was almost a verbatim copy of Respondent's proposed P&M contract, which Norford had thoroughly explained to the Union. Physically, it was almost the same. The amendments proposed by Respondent were the same. On the left side of each page was the old language. On the right side of the page was Respondent's proposal. Repeated on the right, over and over again, was "same." So the Union knew precisely what contract language Respondent was proposing.

The negotiations demonstrate that the new work approach was to apply equally to the P&M and COT employees, and much that was bargained for the P&M contract also applied to the COT contract. And the Union knew that, because what it proposed often applied to both units. Thus, the Union's counterproposal on October 29, 1993, dealt with employees in both the COT and P&M units. Its proposal dealing with the transition affected both units. Its rejection of Respondent's proposal that it could make changes to the career development system as it saw fit after the implementation applied to both units. The discussion on the training under the new work approach applied to the COT as well as the P&M unit. That was consistent with past practice: when the parties earlier negotiated changes to the contracts, the Union would normally start with the P&M agreement, negotiate that, and then take the applicable language from the P&M contract and transfer it to the COT contract. The resulting P&M and COT contract language was almost the same, except for the seniority rules.

Furthermore, the parties scheduled numerous meetings that were devoted to the COT contract. One of them, for February 14, was canceled by Flickinger, without justification. Still, Norford told the Union that he would schedule future meetings to address the Union's questions on the COT contract; and meetings were held throughout 1994<sup>37</sup> devoted to the COT area specific criteria and seniority rules, including displacement procedures and vacancy staffing. The Union had ample opportunity to make any proposals that it desired. It could have questioned Norford's draft of the COT contract. It could have taken issue with some phrase or clause. Having reviewed the P&M contract line by line, the Union does not point to anything new in the COT contract that would have been gleaned from the same exercise. Instead, the Union remained silent and wants me to assume that, if Norford were ordered to read through the contract line by line, it would find something to talk about. This I will not do.

Flickinger testified, however, that, because of Respondent's premature implementation of the COT contract, he was not afforded the opportunity of bargaining a change that he wanted to propose for the COT employees. Specifically, there had been a long-standing pay practice that allowed the COT employees to take time off work, with pay, for such events as a death in the family or to be a pallbearer at a funeral. That practice had been eliminated during the term of the contract in 1991. The Union grieved and won an arbitration award; but Respondent terminated the contract and removed the practice. Flickinger testified that he intended to try to reinstate that practice. Quite simply, I do not believe him. First, he had almost a year to propose that change (the Respondent eliminated the pay practice on January 1, 1993), and he never did, despite Norford's demand for the Union's input. Second, Flickinger's narration of the timing did not ring true. The arbitration award issued on January 16, 1995, four months after Respondent implemented the COT contract. Obviously, the Union was seeking the return of that practice through arbitration and had no intention of proposing it in the negotiations. That is

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<sup>37</sup> There was some delay, from March to August, resulting, at least in part, from Campbell's sick or disability leave.

the reason for Flickinger's silence. His current claim that Respondent somehow stopped him from doing what he wanted to is false and a belated attempt to salvage the old contract.

Accordingly, I find that the parties had exhausted the topics for discussion in their attempt to reach an agreement. Further bargaining would have been fruitless. For the legal reasons set forth in my discussion of the P&M contract, I conclude that the parties had reached a good faith impasse and that the relief for the violation previously found does not require a restoration of the status quo ante. I recommend, therefore, that this allegation be dismissed.

#### D. Health Care; Bargaining and Demands for Information

The new work approach was not the only topic of negotiations, but was easily the most time-consuming. There were other proposals that Respondent made, normally of great weight, but perhaps secondary in significance to the new work approach. The collective-bargaining agreements stated that Respondent would provide medical coverage through headquarters' BeneFlex benefits plan, a "cafeteria-style" benefits plan, for which Respondent provided each employee yearly with a number of BeneFlex dollars which the employee could apportion among various options, such as medical or dental or vision care, and receive any unallocated amount in cash. (An employee might choose vision care and better dental care, while another might not choose vision care, but better medical care coverage.) Prior to January 1, 1996, all employees at the Waynesboro site had a choice under BeneFlex of Medcap, a headquarters-sponsored medical care plan, or Blue Cross-Blue Shield. Respondent's Blue Cross-Blue Shield plan had two types of coverage: basic, paid for wholly by Respondent, covered all the reasonable and customary charges for in-hospital care; and major medical, for which Respondent and the employees shared the premiums, 80-20 percent, covered such expenses, after a deductible, as prescription drugs, office visits, outpatient care, and physical therapy. After an employee met the deductible, Respondent paid 80 percent, the employee paid the remainder. Although Blue Cross-Blue Shield set the premiums each year, those for the major medical portion were then negotiated by Respondent and the Union each year, usually in late August or early September. Medcap, which was less costly and covered a smaller share of medical expenses, was paid for by Respondent and administered by Aetna Insurance. It also had a deductible and then a co-payment until the employee had paid a certain amount, after which the expenses would be covered fully by Respondent.

As of January 1, 1996, Blue Cross-Blue Shield was removed as an option for the medical care of the employees at the Waynesboro site. It was replaced by a managed care plan, administered by Cigna Healthcare ("Cigna"). Lam announced to the Union, in early to mid-October 1995, that, in Respondent's opinion, impasse on the issue had been declared a year prior to that. Respondent's answer goes even further: "Integrated Health Care, including the Managed Health Care system concept, was implemented with nonobjection from the Union in October 1993." The complaint alleges that Respondent refused to provide requested information, "piecemeal[ed]" terms of its managed care proposal through the late stages of bargaining, and unilaterally implemented the managed care program for both the P&M and COT units.

These allegations originate with a letter to all employees, dated January 2, 1993, from headquarters' chairman of the board, E. S. Woolard, Jr., stating the corporate need to cut or at least stabilize the spiraling costs of health care. He announced that Respondent, although it did not know "all the details," could outline the five basic components of its plan: emphasize prevention and wellness, eliminate waste and unnecessary costs through a managed care plan, increase the share of employees and pensioners for health care costs, continue to provide health care benefits for pensioners, and become more involved in the national debate on health care. On April 20, 1993, Norford presented to the Union (and by newsletter, to the employees)

Respondent's proposed modifications to the employees' health care coverage to conform to Woolard's letter, including information about the operation and coverage of the new managed care plan, and distributed a lengthy document detailing Respondent's increasing costs and proposed savings. Respondent hoped that, by 1996, 75 percent of its employees would have access to managed care. Waynesboro employees could remain on Blue Cross-Blue Shield until a network became available, at which time Blue Cross-Blue Shield would be discontinued. Furthermore, costs for medical coverage would be shared, 80 percent by Respondent, and 20 percent by the employees; but, starting in 1997, employees would begin sharing cost increases equally with Respondent.

In negotiations, some doubt was expressed that managed care could be implemented at the Waynesboro site, being in the middle of a very rural area and its employees living as far away as 60 or 70 miles from the facility. Those employees received health care services from doctors within the area in which they lived. In order to be able to service them, the network would have to be very large, allowing the employees to be able to receive health care services without requiring them to travel at great distances to seek medical attention. The problem that Respondent had was to contract with enough physicians to service all the employees. The parties also discussed how the implementation of managed care would change the medical care provided to the employees. One of the Union's concerns was the effect on the Waynesboro site's plant medical section, which had a physician's assistant and two or three nurses and provided the employees with immediate and cost-free care. In May, Stanley reviewed the annual cost of Respondent's health care insurance and answered questions about how many employees, pensioners, and survivors were covered. The Union expressed its concern that doctors who joined the network would not be physicians of the highest quality, but would join the network only because they could not make a good living in their own practice. Stanley stated that the network manager would thoroughly investigate all network physicians' credentials, and he detailed what the manager would look for.

On June 16, Flickinger sent Harris a series of questions prepared by the Union's employee benefits consultant to "evaluate . . . [Respondent's] health care proposal and then prepare a counterproposal." The consultant sought to "review . . . DuPont's health care strategy and medical benefit design changes" and asked for 13 broad categories of information relating to "plan summaries, demographics, premium, claims and administrative cost information." On August 19, Respondent provided much of the requested information, and more on August 30, when Lam discussed the 1994 Blue Cross-Blue Shield renewal rates, as to which Respondent proposed no increase because the premiums fell with the 80 percent - 20 percent cost guideline that was one of the five goals stated in the Woolard letter. On December 17, in a letter to all employees, Respondent reported its progress in implementing Woolard's plan, noting that beginning in 1994, employees could take advantage of an expanded health care package emphasizing prevention and wellness, including health evaluations and immunizations. It also continued to work on its goal to share expenses 80-20. Effective January 1, 1994, headquarters amended the BeneFlex plan to provide certain additional health care options where a managed care network was available. As of that date, each component of Respondent's integrated health care was in place in Waynesboro, except for managed care, because no network of physicians yet existed.<sup>38</sup>

On July 11, Respondent announced that it would be mailing to the employees, pensioners, and survivors, a communication packet about the status of implementation of the managed care. The parties again discussed the managed care plan and the wellness program,

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<sup>38</sup> The Union filed no unfair labor practice charges concerning these implementations.

and Respondent repeated that managed care was to initially start with Respondent bearing 80 percent of the costs and the employees 20 percent, but in 1997 it and the employees would share costs equally. It also repeated that, when managed care became effective, Blue Cross-Blue Shield would be eliminated; but, if Respondent could not form a network of doctors, it assured the Union that the Blue Cross-Blue Shield benefit would remain as a health care option. Respondent also provided a 2-page document for employees to make changes to their BeneFlex options by dialing an appropriate 800 number.

On September 13, Lam stated that, beginning the last week of September, each employee would be receiving the BeneFlex enrollment package, so that employees could enroll for and choose their benefits for the next year. He stated that, because Respondent was having difficulty forming a network, it would not meet its original target date for integrated health managed care, January 1, 1995. Its new target date was January 1, 1996. On September 21, Lam announced the 1995 Blue Cross-Blue Shield rates, again applying the 80 percent - 20 percent formula, and the 1995 BeneFlex enrollment, which was held each October. Obviously, the Blue Cross-Blue Shield plan was still available for 1995, although it is unclear whether an announcement was made at this session. The health care coverage to be provided in 1995 was the same as the employees enjoyed in 1994. Prior to October 28, the Union asked what would happen if "we don't get" managed care in 1996. The Union did not want its employees to be left without physical examinations on the site. Lam felt "certain" that managed care would be a "reality"; but, if it was not, Respondent would continue with on-site health evaluations, unless otherwise bargained. Consistent with that statement, on December 5, Respondent announced in a general bulletin that it planned to establish a managed care network on January 1, 1996. Respondent described the coverage available, but conceded that details concerning the network were "still being developed."

On February 14, 1995, Lam announced that Cigna had been selected as the carrier for the managed care program, which "will be effective" on January 1, 1996. Flickinger stated that managed care had only been discussed in general terms and reminded Lam that he had said that there were a lot of details that needed to be bargained. Lam replied that he would be talking to the Union on such matters as which doctors were in the program and what different options were available; and he added that there was "a lot of information forthcoming" prior to the October sign-up and that the network still needed to be developed. There followed then, and in a number of other sessions, a discussion of how many doctors were needed to set up a network. Lam was less than consistent, at times answering that there was no known number, but rather it was the number of doctors within a certain radius needed to provide services to the employees, with the proper geographic mix and the proper balance between specialists and primary care physicians. At other times, Lam replied that the number would be a "majority"; and that meant a majority of the physicians who previously attended to the medical needs of the employees. Lam assured Flickinger that he and CIGNA and Blue Cross-Blue Shield would be looking at the number of physicians joining the program. Lam also said, from time to time, that, if a majority of the doctors refused to enter the network, Respondent would not have a network.

On July 5, Stanley proposed issuing a general bulletin concerning an improved prescription drug plan, to be effective January 1, 1996. Flickinger stated that the Union understood the proposal, but could not take a position because "there are still more things to be negotiated with Managed Care, it is premature for the Union to take a position at this time and to wait and see what other needs there are to be proposed and the Union will take their [sic] position at that time." Stanley replied that he was sure that Lam had reviewed all the details of managed care and, as of that time, Respondent was favorably moving toward managed care. But, Stanley explained, if managed care could not be effected, another option would have to be taken; but it was almost a "certainty" that managed care was in Waynesboro's near future. On

July 20, the Union informed its members that Respondent would implement managed care on January 1 "if the majority of health care providers who are currently providing health care services to our membership" join the network. Otherwise, the existing Blue Cross-Blue Shield and Medcap plans would remain in effect.

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In the meantime, Respondent kept information flowing to the Union and the employees. In a general bulletin, dated July 25, Respondent restated that it would implement managed care effective January 1, that 50 physicians had applied and were being considered, and that a "satisfactory" network would be established by the effective date. In answer to the frequent question from employees about what to do if their physicians did not join, Respondent answered that they could still use them, but would pay more than if they selected network providers. On August 10, Stanley informed the Union that Respondent was mailing to employees' homes an updated communication on integrated health care. The communication would include information about premiums, deductibles, and co-payments that would be in effect for 1996. Flickinger said that he had not agreed with integrated health care or managed care and did not have "all the information" on managed care. He also reminded Stanley that Lam had given a commitment that, if a majority of the physicians did not join the network, there would be no network; and Respondent would continue to provide Blue Cross-Blue Shield.

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On August 17, Lam, who assured Flickinger that there was going to be managed care for 1996, reviewed a bulletin that he was going to release regarding meetings with the employees, survivors, and pensioners on managed care by representatives from the headquarters' benefits delivery section, Cigna, and Aetna. Flickinger asked why Respondent was scheduling meetings before giving the Union the necessary information about managed care. Lam asked what questions the Union still had, and Flickinger asked if there were going to be managed care for Waynesboro. Lam said there was. Flickinger then complained that the bargaining seemed to be "somewhat piecemealed" and that numerous unfair labor practice charges had been filed about piecemeal bargaining. He then added that: "he really didn't know what we do and don't have." He said that Lam had assured the Union that he "would come back in August with all of the information." Flickinger asked for a complete list of doctors that were in the network and the coverage. Lam said that probably next week he would be giving the Union a list of doctors and that he had previously reviewed the coverage but would do so again.

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On August 22, Lam explained the details of the managed care and various options available to the employees. He repeated that Blue Cross-Blue Shield would end with the implementation of managed care and stated that Respondent had "enough" doctors to constitute the network. Lam reviewed information provided to the Union at that meeting, including schedules of meetings and enrollment packages. Flickinger asked what happened if doctors were dissatisfied and dropped out of the managed care program, and Lam replied that the doctors would probably be committed by a contract for a certain length of time. Flickinger asked that the cost sharing should be delayed to 1999 "just as Managed Care was moved back to give Managed Care a chance to work." On August 28, Flickinger asked for the identity of the doctors who were approached for the network and, once again, those who had agreed to join the network. In a Union newsletter, dated September 8, the Union reported "the agreement that had been negotiated with this Union Board" that managed care would not be implemented if the majority of the doctors who are currently providing health care services to the employees do not join the network.

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There began at this point a stream of Union requests for information. On September 7, orally, and the next day by letter, Flickinger requested: "all information relevant to Managed Care that was given or shared with any or all of the physicians and hospitals as a means to have them enlist in the Managed Care Network. This would include, but would not be limited to,

all documents relevant to coverage rates, schedule of charges, authorization forms and any incentive bonuses that may have been shared.” (“Request 1.”)

5 On September 12, Lam admitted that he had provided incorrect information during the bargaining over managed care. He had erroneously said that, if the primary care physician sent an employee to a physician or hospital not in the network, the charge would be covered. Flickinger stated that the Union was aware of several problems, including doctors’ opposition to Cigna. Lam replied that managed care was a headquarters’ operation; Cigna was only headquarters’ administrator. Lam introduced Cigna representatives to answer questions. The Union noted that the list of doctors would not be complete until long after employees had to enroll in the program. Lam suggested that the employees should then elect Medcap. When the parties discussed Lam’s erroneous statements, Lam replied that managed care was a corporate plan and that the Union was stuck with it, regardless of what was negotiated. Flickinger requested the information that Respondent had sent to the doctors and hospitals in Respondent’s attempt to solicit doctors for the network. Lam said that he still did not have the information.

10 By letter, dated September 14, the Union requested (“Request 2”) “a complete list of physicians, (Primary Care Physicians and Specialists) and hospitals which have been contacted regarding Managed Care.” The Union also requested: “all relevant information regarding Cigna’s accreditation process for these same physicians. This would include, but not be limited to, all forms and material presented during the initial contact and thereafter, documentation about the accreditation process, the contract between Cigna and these physicians and hospitals, as well as the contract language between Cigna and DuPont.”

15 Between October 1 and November 3, employees were required to elect their 1996 BeneFlex options, including managed care. On October 9, the parties’ tone had turned decidedly legalistic. Lam began by noting that, from the time that bargaining had begun in 1993, the parties had discussed all aspects of managed care. The BeneFlex program stated that Respondent would provide medical coverage, and alternate coverage would be provided by Blue Cross-Blue Shield. When the managed care network was established, the alternative Blue Cross-Blue Shield coverage was eliminated. Lam claimed that the Union had not objected to the implementation of managed care when the employees signed up for health care benefits in October 1994. He insisted that managed care had been in effect since January 1, 1995. Flickinger disagreed, noting that Lam had promised to complete the bargaining in September 1995 and that the Union had withheld its position. Lam claimed that the only new information was the announcement of the rates, as Respondent normally did when it announced the Blue Cross-Blue Shield rates each year. Flickinger stated that “there was much more to be covered” and that the National Labor Relations Board had issued a complaint that encompassed Respondent’s failure to bargain health care in good faith. He reminded Lam that the Union was still waiting for an updated list of doctors and was not satisfied that a majority of the health care providers had joined the network. Lam stated that he could not provide the number that would constitute a network; but it was not necessarily a number that would establish the network, but the different types of specialists in order to establish an effective network so that there would be a balance between the personal care physicians and the specialists. Lam concluded that, because bargaining was complete, Respondent was not obligated to provide additional information. On the same day, Respondent issued a general bulletin announcing the result of the meetings with its employees, stating that it had supplied lists of participating physicians and hospitals at the meetings, and setting forth a schedule for employees to enroll for the following year’s health care coverage. It promised that a new directory would soon be mailed to all employees.

By letters, dated October 26 and November 30, the Union made another information request: "A copy of each of the health care plans offered to unit employees, including the coverage provided by each plan and the cost of each plan. Should any such plan encompass any other coverage policies, please provide a copy of such other policies as well." ("Request 3.") The Union wrote that it needed this information "to better evaluate the current health care plans and costs as well as to prepare for future negotiations." Finally, by letter, dated December 14, the Union requested: "A list of all Du Pont Plants within the United States with the type(s) of health care insurance provided at each plant. This list should also include, but limited to, the number of employees at each plant using each type of health care insurance, as well as the cost of each health care insurance, both to the employee and to the Company. This cost should include single, primary plus one and family coverage." ("Request 4.") The letter recited that the Union needed the information "to better evaluate the current health care plans and costs as well as to prepare for future negotiations."

The General Counsel contends that, on the basis of this record, the parties had not reached the point that further negotiations would have been fruitless; and Respondent implemented the managed care plan before the parties reached an impasse. Respondent contends, first, that the issue of managed care was not even subject to bargaining, because the collective-bargaining agreements provided that: "the employees shall also receive benefits as provided by the COMPANY'S BeneFlex Benefits Plan, subject to all terms and conditions of said Plan"; and the plan provided that: "The Company reserves the right to change or discontinue this Plan in its discretion." Respondent, therefore, contends that it could make any change it wanted. However, it was Respondent that proposed an amendment to the collective-bargaining agreements that BeneFlex provide managed care. Thus, managed care, proposed by Respondent, was a proper subject of bargaining, as many of Respondent's representatives conceded. For example, the Woolard letter stated: "[C]hanges in the plans of represented employees will be negotiated with their collective bargaining representatives by their site management." Even Lam, who opposed further bargaining on the ground that headquarters could do as it wanted, agreed that Respondent would not change anything "without discussions with the Union" and that Respondent has always negotiated any changes with the Union. Finally, considering how much time was spent by Respondent in negotiations on managed care, with representatives of management stating during negotiations that they were negotiating managed care and conceding at trial that they were engaged in negotiations, Respondent's reliance on its plan's authority to change benefits is baseless.

Respondent next contends that there was already an agreement that the managed care program would go in effect by reason of the Union's "nonobjection." Silence rarely signifies agreement. Here, Flickinger specifically said that his silence did not mean that he agreed, and Respondent cannot rely on it to constitute an assent to its offer. Aside from that, there is little from which Respondent may argue.<sup>39</sup> The most that can be said is that Respondent threatened

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<sup>39</sup> I do not rely on Respondent's minutes of the meeting of October 24, 1994, to the effect that physician assistant Dave Snyder's statement that: "the Integrated Health Care Plan beginning 1-1-96 dealing with Managed Care has previously been bargained," if those words were recorded verbatim, meant that the negotiations had finished. The statement can also be read to mean that negotiations had been held, but without result. In any event, Snyder did not testify; and thus I cannot interpret what he meant nor determine the basis of his knowledge of the state of negotiations. Furthermore, the Union's minutes attribute to Snyder: "It is my understanding that IHC has been proposed, but am not sure as to where these negotiations stand." At this meeting, according to the Union's minutes, Flickinger responded: "IHC has been proposed but many questions have not been addressed. Furthermore, the Union, as we have stated previously, is opposed to IHC, and we feel that all of these changes should have been bargained all at once instead of piecemeal fashion." There is, in Respondent's minutes, no indication that Flickinger said anything. The quotation in the Union's minutes attributed to Flickinger appears to be the kind of comment that Flickinger would have made, with the words that he would have spoken. I credit them.

to implement the managed care plan once it had obtained a network. Assuming that Flickinger agreed to that, which he never did, such an agreement had a condition precedent, that is, that Respondent had to form a network. When Lam claimed that Respondent had “enough” physicians, Flickinger asked him for proof. He wanted to see a list of the physicians that Respondent contacted and the physicians who joined. Lam did not give proof that it had met its condition in 1995.<sup>40</sup> Respondent, therefore, could not lawfully implement the managed care plan.<sup>41</sup>

Besides that, Flickinger repeatedly objected that he had never agreed to managed care, and so there is nothing to show that the Union agreed with the plan. Finally, Lam repeatedly promised Flickinger that he would have more information for the Union, at a time when Respondent moved closer to implementation. Obviously, the Union was entitled to digest that information before making its decision to accept or reject Respondent’s proposal, particularly when the decision involved the persons who were to attend to the medical care of the employees and the cost that the employees would have to pay for those services, when compared with Blue Cross-Blue Shield. Even Lam conceded that, in forming a network, the ratio of primary care physicians to specialists and the geographical distribution of physicians within the residential area of the Waynesboro employees, are of fundamental importance.

In addition, the Union requested other information that would help it decide whether the managed care plan was more beneficial to the employees than Blue Cross-Blue Shield. Section 8(a)(5)’s duty to bargain in good faith requires an employer to provide relevant information needed by the employees’ bargaining representative for the proper performance of its statutory duties and responsibilities to represent the unit employees of that employer. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). The standard for relevance is “the probability that the desired information [is] relevant,” a liberal “discovery-type standard.” *Ibid.* As to some material, Respondent refused to produce it for invalid reasons. For example, Respondent claimed that it did not have contracts between Cigna and various physicians (Request 1) and other material listed in Requests 1 and 2 and only Cigna did; therefore, Respondent had no obligation to produce the material. Cigna is Respondent’s agent and designated representative; and Respondent never made an attempt to obtain this information, which should have been readily available. *Arch of West Virginia*, 304 NLRB 1089 fn. 1, 1091 (1991). The Union had a legitimate interest in assessing whether the contracts ensured for the employees that the physicians would stay in the program and whether physicians were being encouraged, by means of a bonus system, not to refer their patients to specialists. The Union also had a legitimate interest in ensuring the integrity of the network, whether there was a proper mix of primary care physicians and specialists and whether there were hospitals for the employees to go to.<sup>42</sup> When the Union wanted to see the contract between headquarters and Cigna (Request 2), Respondent took the position that there was no contract. However, at the hearing, it appeared that, although a final agreement had not been worked out between them, they had a letter of

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<sup>40</sup> As late as October 9, 1995, Respondent admitted to its employees that the network was incomplete: “A large void in the network is Rockingham Memorial Hospital as well as many doctors in the Harrisonburg area. Cigna will continue to contact providers and build the network.”

<sup>41</sup> It is probable that during the Fall, Respondent was still pursuing physicians and ensuring that those who had agreed to join the network had sufficient credentials; and, although Respondent may not have actually signed up enough physicians, it was persuaded that enough would be signed up by the turn of the year. In any event, in light of this finding, I dismiss Respondent’s Section 10(b) defense, which was based on the Union’s failure to file an unfair labor practice charge within six months of the date of the “nonobjection” that Respondent relied on.

<sup>42</sup> In light of these findings, I reject Respondent’s claim that the Union’s requests for information were made in bad faith. It may be that some of the requests partially duplicated requests earlier made by the Union’s consultant; but, if so, Respondent should have been able to gather that material easily.

understanding. Respondent was wholly incorrect in withholding that letter, which is nothing less than a contract, for the reason given.

5           Regarding the remainder of Request 2, Respondent provided a list of positions (primary care physicians and specialists) and hospitals which have been contacted regarding managed care twice, first, in late September or early October, which was timely, and, second, in February 1996, after Lam had been to Baltimore NLRB as part of the investigation of the unfair labor practice charge. Although it timely supplied Cigna's accreditation process on October 9, it never provided the details of what Cigna would require before accepting a doctor into the network.

10           Regarding Request 3, the General Counsel admits that Respondent provided this material, but alleges not in a timely fashion. Shortly after receiving the request, Lam discussed it with Flickinger to determine exactly what he was asking for and to point out that, based on Lam's understanding of the letter, the Union already had the information that it was requesting.  
15           Respondent had previously presented the Union with a copy of the BeneFlex medical plan, which included the wording for managed care and Medcap, enrollment guides and information from headquarters such as Plain Talk, the magazine that headquarters issues periodically with explanations of the different benefits in it. Lam ultimately provided the information again, on  
20           December 5, three days before the Union had asked the information in its letter, dated November 30. Lam provided a copy of a booklet of the Blue Cross-Blue Shield and Medcap plans, as well as the IRS Form 5500 for 1994 for headquarters, which showed its cost of hospital and medical coverage for that year. Flickinger was unsure that it was what he had asked for. Lam replied that, as far as the cost to individuals and to Respondent, the Union already had that information in the benefits guides that Respondent mailed to all its employees.  
25           Lam showed Flickinger where to find the information. Respondent did not delay answering this Request.

30           Finally, regarding Request 4, the Union wanted to determine whether headquarters had better health plans in effect at its other plants, so that it could argue in favor of better coverage than was offered by Respondent. That is relevant. The General Counsel contends that Respondent did not provide any of this material, but it clearly did. On February 5, 1996, Lam told Flickinger that there were four health care programs within the company and related what they were. About 90 percent of the employees were in BeneFlex and about 90 percent were in managed care at that time. He stated that the actual cost to an individual would depend on how  
35           much medical care they required. Individuals who are not sick and do not use the insurance are going to pay less than someone who has an illness and has to use it. He talked about the 80-20 cost sharing. He reviewed the IRS Form 5500s that he had given the Union previously concerning the costs. He gave the Union copies of the different options with the cost to employees. Lam asked, if there were any information requests outstanding, for a list so that he  
40           could supply what had not been turned over. Flickinger replied that he would take Lam's request into consideration. Lam never heard from Flickinger on the subject. In these circumstances, I find that Respondent complied with the request, albeit untimely

45           I conclude that Respondent violated Section 8(a)(5) and (1) by refusing to provide certain information requested by the Union or by providing it untimely. Under *Taft Broadcasting*, there could be no impasse of the managed care issue because the failure to furnish information, an unfair labor practice, unlike others found herein, directly impeded negotiations. Thus, even if there were an impasse, the impasse could not have been the result of good-faith bargaining. *Pertec Computer Corp.*, 284 NLRB 810 (1987).

          The General Counsel contends, additionally, that Respondent engaged in the separate violation of piecemeal bargaining. I find no violation. The separate parts of Respondent's

integrated health care were all spelled out in meticulous detail by Respondent, and there was nothing fragmented about their presentation. New issues arose, and were negotiated, as they should have been. The General Counsel has presented nothing to show that the different proposals were not given the treatment that they deserved under the Act. There is no citation of authority to demonstrate that what Respondent did was illegal in any sense or did not accord with the duty to bargain collectively, other than as found, *supra*.

## E. Unilateral Changes

### 1. Employees Required to Perform Higher Rated Jobs

After bargaining to impasse, an employer violates Section 8(a)(5) by implementing terms more beneficial or regressive than its final proposal. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949). After the final implementation of the two agreements, the Union learned that Respondent was requiring the technician level 1 employees in beaming to learn to run the warpers in beaming, a technician 4 job which was not part of their negotiated criteria. On October 27, 1994, the Union complained. Respondent discontinued the training, pending further review. Also in late October 1994 Respondent hired some additional employees in the lycra spinning area at the entry level rate and required them to perform what had formerly been the group 4 job of spinning and was, pursuant to the implemented contract, a technician level 2 job. Respondent also required some technician level 1 employees to do the same job. The Union objected, to no avail. At the time of the hearing, there were perhaps as many as 50 new employees doing this work full time. The complaint alleges that Respondent unilaterally changed the conditions of employment because Respondent represented in negotiations that it would assign higher-rated tasks to lower-paid employees only occasionally and not routinely

There is no question that one of the purposes of the new work approach was to permit Respondent the latitude of using its employees where they were needed. The Union expressed its concern that the employees had the obligation to work not only on the particular machine that they normally worked but to be capable to do other tasks. On November 22, 1993, the discussions in BCF revolved about the Union's concern that "under the new system, new hires will be 'doing it all,' but for less money." Respondent replied that "when a new hire and an incumbent [sic] both reach Technician 5, they will be doing the same tasks." The Union complained that "tasks done today by a Group 3 will be required for a new hire at Technician 2." Respondent agreed. The Union then complained that "anybody will do any job Management wants them to do"; and Respondent replied that that was not so, but only the tasks performed within the logical work team that the employee had been trained to do.

However, in other bargaining sessions, Norford explained that, if there were a snowstorm, and someone did not show up, another employee would have to fill in. In answer to Flickinger's question whether that employee would have to work at the higher-rated job permanently, Norford assured him that this situation would arise only occasionally. And Kimerer mentioned that it could be done in the event of a "catastrophic failure of machinery" and informed the Union that technicians *occasionally* would be required to train on and perform higher-level tasks. Kimerer conceded that, when Respondent made the proposal for the logical work teams, it was not its intention to hire somebody at the entry level to do technician five work. This was no emergency or unusual occurrence. Indeed, it was anticipated that up to half of the employee population would retire within the next three years; and he must have known that there would be many new hires. Here, new employees were hired at lower wages to perform jobs listed as area specific criteria for higher-paid positions. That is not what Respondent represented during negotiations, in answer to the Union's fears that employees would be misused and in support of Respondent's proposal to eliminate upgrade pay. I

conclude, therefore, that Respondent unilaterally changed its terms and conditions of employment and violated Section 8(a)(5) and (1) of the Act.

## 2. Alleged Violations in the Process of Transition

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Late in 1994, some unit employees complained to the Union that Respondent threatened to discipline them if they did not participate in the new work approach training within 90 days of the beginning of the transition. Flickinger took the position that that they could not be disciplined until they had not met the criteria on the completion of the two-year assessment. Stanley disagreed and issued on October 11, 1995, a "Response to Training," concluding that "Employees deliberately not participating [in training] will be subject to discipline." The complaint alleges that "implementing a discipline system" — more specifically, before the two- and four-year transition points — was new and an illegal unilateral change.<sup>43</sup>

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Flickinger's impression was that Respondent stated that it would discipline an employee only at the end of the two years, and not before, and certainly not within 90 days of the beginning of the transition. Flickinger testified that: "The only time frame I can recall in the meetings is the time frame of what was the transition time frame, [then] four years." At another point of his testimony, Flickinger stated no time limitation: "Management stated that failure . . . to complete the criteria would result in the pay increases being withheld. And then they also mentioned that there possibly could be performance . . . issues, . . . that if an employee said they wasn't going to participate, that would be a performance issue, and that could result in — they didn't use the word disciplinary action. They used the word, I believe, development action, which is just another word for disciplinary action." Thus, Flickinger differentiated between an employee who was trying to complete the requirement for transition and could not and an employee who, for whatever reason, did not. If an employee was trying to meet the requirements, but could not, "probably what would take place would be the forfeiture of future pay increases." But if the employee was not trying, "more than likely developmental action would take place. . . . If an employee is told you go train and that employee refuses to go train, then that's a different issue. That's an act of insubordination. That's in addition to and separate from this issue."

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Thus, Flickinger's position is not really contrary to the position of Respondent's witnesses, who testified that an employee was expected to commence training as soon as possible and that it could discipline an employee who did not. The minutes sustain this position. On July 30, 1993, Respondent stated that, if an employee had done nothing simply because of no desire to participate in the transition, "it would result in a loss of pay increases and development action." On September 20, Respondent indicated that, if an employee started the transition and did not meet the criteria for the promotion, the employee could be subject to discipline. On December 9, Respondent stated that all employees would participate in training and that, if they failed to do so, they would not be able to complete the transition. On February 28, 1994, the Union asked what would happen if an employee "does not elect to sign up for BRCC or do the training." Norford replied that "the appropriate disciplinary action would be taken." Even according to the Union's minutes, disciplinary action could be taken immediately. Thus, the Union asked, once the four-year clock started, was registration required; and Respondent answered yes. The Union asked what happened if an employee did not register,

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<sup>43</sup> On March 7, 1995, Respondent issued a disciplinary report to employee Tom Glover for failing to participate in the career development system transition. The Union pursued a grievance, and, because Glover began to participate in the training, Respondent removed his formal reprimand on April 24, 1995.

and Respondent's answer was: "We take disciplinary action." The Union asked what disciplinary action and Respondent replied: "Up to and including discharge."<sup>44</sup>

5 Accordingly, although the words recalled by the parties may be somewhat different, I find that Respondent stated its intent to discipline employees who refused to start their training. Accordingly, I dismiss this allegation.

### The Remedy

10 Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes of the Act.

15 Specifically, having found that Respondent unilaterally implemented parts of its new work approach at a time when no impasse had occurred, I shall order Respondent, on request, to bargain collectively in good faith with the Union on terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement. Because one of the effects of the implementation was to place employees in logical work teams perhaps not to their liking, and to their detriment, because there may have been  
20 duties that they would not have preferred to perform and because they are entitled to change business units only once, without penalty, I shall order that Respondent give the employees the opportunity, if eligible, to change logical work teams, without penalty, and without using their lifetime exemption.

25 I shall order Respondent to make whole those employees who have been assigned to perform higher-rated jobs, and not been paid for them, and, upon request, to reinstate the Blue Cross-Blue Shield plan, making whole any employee for any losses incurred by reason of the unlawful unilateral implementation of the managed care program. Interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

30 Finally, to the extent that the unlawful unilateral changes may have improved the terms and conditions of employment of unit employees, I note that no provision of my recommended Order shall in any way be construed as requiring Respondent to revoke such improvements.

35 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>45</sup>

### ORDER

40 Respondent, E.I. du Pont de Nemours & Company, Waynesboro, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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<sup>44</sup> Despite what was contained in the Union's minutes, Flickinger recalled nothing.

<sup>45</sup> 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.

(a) Unilaterally changing its bargaining unit employees' terms and conditions of employment, without bargaining with United Workers, Inc., affiliated with the International Brotherhood of DuPont Workers ("Union"), either to agreement or to good-faith impasse.

5 (b) Failing to furnish and failing to timely furnish the Union with information it requests which is necessary for it to discharge its function as the exclusive representative of Respondent's employees in the appropriate bargaining units described below.

10 (c) Employing lower-level employees to routinely perform the tasks of higher-level technicians.

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

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

(a) On request, bargain collectively in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate units on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

25 All the hourly wage roll employees of the Waynesboro Plant including the Bengel Laboratory at the Waynesboro, Virginia Plant of E.I. du Pont de Nemours and Company, but excluding all office, clerical, technical and professional salaried employees, guards, supervisory trainees and all supervisory employees as defined in the Labor-Management Relations Act.

30 All salary employees of the Waynesboro, Virginia Plant of E.I. du Pont de Nemours and Company except for employees exempt under the Fair Labor Standards Act, plant guards, supervisor trainees and all supervisors as defined in the Labor-Management Relations Act. Other employees excluded from the Unit are specified in Seniority Exhibit "F" of the Rules of Transfer and Progression.

35 (b) On request, restore the Blue Cross and Blue Shield plan to the level in existence prior to January 1, 1996, and continue it in effect until it and the Union either reach an agreement or a good-faith impasse in bargaining.

40 (c) To the extent that it has not already done so, furnish the Union with the information that it requested on September 7 and 14, 1995.

45 (d) Make whole its employees for any losses suffered as a result of and from the date of its unilateral changes, including but not limited to losses incurred resulting from its routine assignment of higher-rated tasks to its lower-level employees and its unilateral implementation of managed care, with interest. However, no provision of this Order shall in any way be construed as requiring Respondent to revoke unilaterally implemented improvements in terms and conditions of employment to its employees, unless specifically requested to do so.

(e) Preserve and, within 14 days of a 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.

5 (f) Within 14 days after service by the Region, post at its facility in Waynesboro, Virginia, copies of the attached notice marked "Appendix."<sup>46</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

Dated, Washington, D.C. April 24, 1997

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Benjamin Schlesinger  
Administrative Law Judge

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<sup>46</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "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

5 Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

10 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.

15 WE WILL NOT unilaterally change our bargaining unit employees' terms and conditions of employment, without bargaining with United Workers, Inc., affiliated with the International Brotherhood of DuPont Workers ("Union"), either to agreement or to good-faith impasse.

20 WE WILL NOT fail to furnish and fail to timely furnish the Union with information it requests which is necessary for it to discharge its function as the exclusive representative of our employees in the appropriate bargaining units described below.

25 WE WILL NOT employ lower-level employees to routinely perform the tasks of higher-level technicians.

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

35 WE WILL on request, bargain collectively in good faith with the Union as the exclusive bargaining representative of our employees in the following appropriate units on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

40 All the hourly wage roll employees of the Waynesboro Plant including the Bengier Laboratory at the Waynesboro, Virginia Plant of E.I. du Pont de Nemours and Company, but excluding all office, clerical, technical and professional salaried employees, guards, supervisory trainees and all supervisory employees as defined in the Labor-Management Relations Act.

45 All salary employees of the Waynesboro, Virginia Plant of E.I. du Pont de Nemours and Company except for employees exempt under the Fair Labor Standards Act, plant guards, supervisor trainees and all supervisors as defined in the Labor-Management Relations Act. Other employees excluded from the Unit are specified in Seniority Exhibit "F" of the Rules of Transfer and Progression.

50 WE WILL on request, restore the Blue Cross and Blue Shield plan to the level in existence prior to January 1, 1996, and continue it in effect until we and the Union either reach an agreement or a good-faith impasse in bargaining.

WE WILL to the extent that we have not already done so, furnish the Union with the information that it requested on September 7 and 14, 1995.

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WE WILL make whole our employees for any losses suffered as a result of and from the date of our unilateral changes, including but not limited to losses incurred resulting from our routine assignment of higher-rated tasks to our lower-level employees and our unilateral implementation of managed care, with interest. However, no provision of this Order shall in any way be construed as requiring us to revoke unilaterally implemented improvements in terms and conditions of employment to our employees, unless specifically requested to do so.

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\_\_\_\_\_  
(Employer)

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Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 103 South Gay Street, 8th Floor, Baltimore, Maryland 21202-4026, Telephone 410-962-2772.