Owens-Corning Fiberglas Corporation *and* Insulation Production Workers Local Union No. 1. Case 17–CA–12843

5 January 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 29 May 1986 Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, cross-exceptions, and a memorandum supporting her cross-exceptions.

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

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

Like the judge, and unlike our dissenting colleague, we find that the employee purchase program in this case is a benefit that accrued to employees out of their employment relationship with the Respondent, and thus is clearly a mandatory subject of bargaining. Such programs have been held to be mandatory subjects of bargaining in the past. See *Master Slack*, 230 NLRB 1054, 1055 (1977), enfd. 618 F.2d 6 (6th Cir. 1980) (layaway purchase program in employer's outlet store). See also *Central Illinois Public Service Co.*, 139 NLRB 1407, 1415 (1962), enfd. 324 F.2d 916 (7th Cir. 1963); *Gulf Refining & Marketing Co.*, 238 NLRB 129, 132 (1978). Moreover, the employee purchase program here had been in effect for more than 20 years and apparently was of significant economic benefit to participating employees. Consequently, our colleague's reliance on *Benchmark Industries*, 270 NLRB 22 (1984), is misplaced. That case involved token "gifts" of holiday lunches or dinners and 5-pound hams; the latter had been given to employees for only 3 years.

Our colleague also appears to confuse the issue of whether the employee purchase program was a mandatory subject of bargaining with the question of whether the Union waived its statutory right to bargain over the terms of the program by its prior actions. Again, we agree with the judge that no such waiver was made. The Board will not lightly infer waivers of statutory rights. See, e.g., *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). Where, as here, the terms of an employee purchase program were never discussed during contract negotiations, we will not infer a waiver by the Union of its right to bargain over proposed changes in that program. *Rockwell*, supra.[2] Nor does the fact that the Respondent previously changed the terms of the program without bargaining preclude the Union from effectively demanding to bargain over the most recent change. A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983); *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969); *Rockwell International Corp.*, supra at fn. 6.[3]

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by modifying its employee purchase plan without giving the Union an opportunity to bargain, the judge correctly ordered the Respondent to reinstitute the purchase plan that was in effect until 12 August 1985. However, we agree with the Respondent and the General Counsel that it was improper for the judge to order that that plan be *kept in effect for 6 months* before the Respondent could even bargain with the Union over implementing its proposed new program.[4] By issuing such an order the Board would, in effect, be imposing a substantive contract term on the parties, rather than simply enforcing the requirement

[1] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5), we do not imply that an employer may not lawfully fully develop a plan for a change in working conditions before announcing to the union its intention to implement that plan. If such an announcement is made sufficiently in advance of implementation to provide time for meaningful bargaining and the union fails to request bargaining, the employer may lawfully implement the plan. The gravamen of the Respondent's offense here was that, according to testimony credited by the judge, the management representatives who announced the plan to union representatives on August 6 also made statements indicating that nothing could be done about the plan. We further note the absence of evidence showing that those management representatives lacked authority to communicate the intent of the Respondent's headquarters regarding implementation of the plan or that the union representatives should reasonably have believed that the management representatives were not knowledgeable spokesmen.

[2] The Board stated (260 NLRB at 1347):

> Where, as here, an employer relies on a purported waiver to establish its freedom unilaterally to change terms and conditions of employment not contained in the contract, the matter at issue must have been *fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter* [Emphasis added]

[3] We are at a loss to understand our dissenting colleague's attempt to portray the Board as some sort of officious intermeddler, interfering gratuitously with the smooth functioning of the employee purchase program at issue here. The Board is not attempting (to use his own analogy) to force the Respondent and the Union to *change* the "boundary markers on which [they] have long relied." Rather, the Board is acting at the request of one of the "local inhabitants" to require the other to *observe* the "boundary marker" that it unilaterally changed, to the detriment of its neighbor, and in violation of the law that the Board is entrusted to enforce.

[4] The judge thought that bargaining would "amount to no more than a charade" unless the former program was reinstituted for 6 months.

to bargain in good faith. The Board is not empowered to issue such an order. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Accordingly, we shall modify the recommended remedy and Order to eliminate the requirement that the former purchase plan remain in place for 6 months after being reinstituted.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Owens-Corning Fiberglas Corporation, Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Reinstitute for the benefit of its employees represented by the Union the employee purchase program in existence until 12 August 1985, and make whole the union-represented employees for any losses suffered by them, in the manner set forth in the section entitled 'The Remedy.'"

2. Substitute the following for paragraph 2(b).

"(b) Bargain in good faith with the Union, as the exclusive bargaining representative of the Respondent's employees in the appropriate unit, concerning any proposed modifications in the reinstituted employee purchase plan."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN DOTSON, dissenting.

I do not agree with my colleagues' adoption of the judge's finding that the Respondent's employee purchase plan was a mandatory subject of bargaining and that, therefore, the Respondent violated Section 8(a)(5) by unilaterally altering the plan's terms.

The Respondent has maintained an employee purchase plan for more than 20 years whereby employees could purchase items manufactured by the Respondent at a discount. Prior to 1977, the items were sold through a store operated by the Respondent. In 1977, however, the store was closed and the sale of all items except insulation was discontinued. The Respondent did not bargain with the Union over these changes. Since then the plan has continued to be administered entirely by the Respondent. On 6 August 1985 the Respondent informed the Union that changes in the terms of the employee purchase plan would be implemented on 12 August. The effect of these changes was to increase the number and variety of items that could be purchased under the plan, but the new rebate would be smaller than the earlier discount and there would be a limit on how much insulation could be purchased.

Unlike the majority, I do not believe that the Respondent's employee purchase plan constituted terms and conditions of employment subject to the bargaining requirement. It is more analogous to an employer's grant of gifts to employees that the Board has found not to be a mandatory subject of bargaining.[1] Although the plan has been in existence for many years, the Respondent has exercised exclusive control over its operation, including the items offered for sale, the way in which sales are handled, and the price of the items sold. The program also was available to all employees regardless of their performance, seniority, or any employment-related factor. Further, although the plan has been in existence since at least 1962, it has never been formally discussed in negotiations and has not been referred to in any of the collective-bargaining agreements. The Respondent also did not bargain with the Union prior to the 1977 closing of the store and limitation of purchases on insulation. This silence on the part of the Union for such a long period of time indicates an acknowledgement that the employee purchase plan was not a bargainable matter.[2] Consequently, I do not consider the plan to be within the scope of the Respondent's bargaining obligation. Nor do I consider the Board's intrusion, after nearly a generation of mutual understanding between these parties about the status of the employee purchase plan, a felicitous action. Like the visiting surveyor who finds the boundary markers on which the local inhabitants have long relied suddenly to be misplaced, our handling of these parties' affairs is simply disruptive. Accordingly, I would find that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally altering the terms of the employee purchase plan.

[1] *Benchmark Industries*, 270 NLRB 22 (1984).

[2] Arbitrators have found in analogous situations that one party's continued failure to object to the other party's interpretation of a contract constituted acceptance of such interpretation so as to in effect make it mutual. Elkouri and Elkouri, *How Arbitration Works*, 406, 407 (1978).

APPENDIX

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

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

WE WILL NOT fail to bargain collectively in good faith with Insulation Production Workers Local No. 1 as the exclusive representative of our employees in the appropriate unit about substantial changes in the employee purchase program.

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

WE WILL reinstitute at the Fairfax plant in Kansas City, for the benefit of our employees represented by the Union, the employee purchase program in effect until 12 August 1985.

WE WILL bargain in good faith with the Union, as the exclusive bargaining representative of our employees in the appropriate unit, concerning any proposed modification in the reinstituted employee purchase plan.

WE WILL make whole, with interest, our union-represented employees for any losses suffered by them since 12 August 1985 as a result of being required to purchase insulation under the new program instead of the old one, with interest as set out in the Order of the Board.

OWENS-CORNING FIBERGLAS CORPORATION

Julie Hughes, Esq., for the General Counsel.
Stanley E. Craven, Esq. (Spencer, Fane, Britt & Browne), of Kansas City, Missouri, for the Respondent.
Dan Messer, of Kansas City, Kansas, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in Kansas City, Kansas, on 3 April 1986. The complaint alleges a single violation of Section 8(a)(5) of the Act, specifically, that Respondent Owens-Corning Fiberglas Corporation acted unlawfully when, about 12 August 1985, it unilaterally changed an existing program for employee discount purchases of its manufactured goods.

Briefs have been filed by the General Counsel and Respondent. My consideration of the record[1] and the briefs leads me to the following conclusions.

I. BACKGROUND

Respondent produces wool fibrous glass products at the Kansas City, Kansas facility involved here, where it employs, inter alia, some 700–800 production and maintenance workers.[2] According to the complaint and the answer, at all times material, "the Greater Kansas City Building and Construction Trades Council and certain of its affiliated Locals, including [Insulation Production Workers Local Union No. 1, the Charging Party here], have jointly been the designated exclusive collective-bargaining representative of the Unit" of production and maintenance workers and have been recognized as such by Respondent, as embodied in successive collective-bargaining agreements, the most recent covering the period 16 April 1984 to 16 April 1987. The relationship has existed since around 1947.

Although the bargaining agreements have never referred to the matter,[3] over the years Respondent has maintained at the Fairfax plant a program allowing employees to purchase at a discount items manufactured by Respondent. For some period of time, ending perhaps in 1977, a small room in the plant was devoted to the discount sale of mostly insulation products as well as a variety of Respondent-made items such as glasses, bows and arrows, "elliptical pool tables,"[4] etc. When the "store" was discontinued, arrangements were made for the sale to employees of insulation products only through the personnel office at (according to the pleadings) Respondent's cost plus 5 percent. To make a purchase, an employee would inform the personnel secretary of the employee's requirements; after she had written an order, the employee would pay her and take the receipt to the warehouse gate to pick up the order.

An "intra-Company" memorandum, dated 30 July 1985 and received in Kansas City, according to Personnel Manager Browne, on 5 August, from the manager of Respondent's administrative services section located at Respondent's national headquarters in Toledo, Ohio, announced to "All Owens-Corning Managers" that "[a] new Employee Purchase Program (EPP) for company products begins August 12." It went on to state that Respondent's active and retired employees "will be reimbursed 20 percent of the net product purchase price of Owens-Corning bathing fixtures, residential building insulation, and ceiling panels," and "10 percent of the net product purchase price of Owens-Corning shingles, roll roofing, and Energy Shield R foam sheathing."[5]

The memorandum then described how the new program would operate: employees would buy qualifying products from local retail outlets, fill out and send to Toledo, together with his or her sales receipt, two copies of a printed three-copy "Employee Purchase Program (EPP) Reimbursement Application," and thereafter receive his or her reimbursement.

The rebate form lists other restrictions on the reimbursable purchase of products: e.g., an employee can only make such a purchase of insulation once every 4 years, and can buy only 2000 square feet each time.

[1] Certain errors in the transcript have been noted and corrected.

[2] This facility is known as the Fairfax plant. Respondent also operates nearby a North Kansas City plant, which is not part of the Fairfax bargaining unit, and also some other unrelated small proximate facilities.

[3] Not, according to Personnel Manager William Browne, have the negotiations ever formally addressed the subject since he arrived in 1962.

[4] Presumably accompanied by the "twisted cue" and "elliptical billiard balls" fantasized by Sir W. S. Gilbert as a punishment befitting the crime of "billard [sic] sharp" in "The Mikado."

[5] Requests for rebates for the latter product "must be approved by the EPP Administrator in Toledo, OH, prior to purchase."

There are similar restrictions on four of the five other products that come under the program.

The 30 July memorandum to "All Owens-Corning Managers" also set out in some detail the manner in which the program would be publicized to managers, supervisors, retirees, and Toledo employees (materials, including reimbursement applications, would be distributed to the managers and supervisors responsible for the programs in their local area "during the week of August 5"; Toledo employees would receive an application and a flyer by "desk-to-desk" distribution on August 12; "[r]etirees will be informed of the program through an article in the August issue of *Dialog*"; articles would also appear in the "August 9" issue of *Tower News* and in August and September plant publications), but apparently left to the discretion of local plant managers the method and timing of the announcement to active employees.[6]

Business Agent Dan Messer, the highest ranking officer of Local 1, was first told about the new program at a quarterly "communications" meeting on the morning of 6 August, when Personnel Manager Browne read to Messer and a representative of another union the contents of the 30 July memo. Messer asked Plant Manager Jim Hansen "why we are having a change like this," and further stated that he "did not feel that our members would like this kind of change," Browne said that he had heard at a personnel managers conference a year before that the new program was being considered because of complaints from retailers in Respondent's plant areas of price competition from Respondent resulting from the current program. Hansen said that "they weren't doing away with the employee purchase plan, that they were altering it and while you would not get as large a discount on the building insulation, that you would have a larger variety of products to choose from." A "lengthy discussion ensued," which, boiled down, consisted of the Union "protest[ing] that we didn't like it" and management saying that the program was "sent to them from above, meaning Toledo, and that there was really nothing that could be done."

On either 6 or 7 August, the personnel department posted notices stating that "[e]ffective August 12, 1985, Owens-Corning will introduce an employee purchase program covering OCF manufactured products." The notices announced that 7 August would be the last day that items could be purchased through the personnel office; on 8 August, however, the notices were amended to reflect that the existing program would be extended through 12 August. Browne testified that the extension was granted because "we had enough of a run on purchases that we felt that it was only fair to give them a couple of extra days."

By letter dated 15 August, Messer wrote to Manager Hansen to make a "somewhat belated response" to three of the issues discussed at the 6 August meeting. He first broached the "unilateral decision" to discontinue "insulation sales to employees on a direct basis," a longstanding practice that the Union considered a "negotiable benefit." Messer went on: "We would like to meet with the appropriate Corporate officials to discuss the future of this issue before proceeding in any other direction," and he briefly stated sources of his dissatisfaction with the new program—the higher cost to employees for insulation and the "cumbersome reimbursement procedure." Hansen's 26 August reply, while "agree[ing]" with Messer that "the change in policy was arbitrary not only for Kansas City but for all locations," thought that the new program had at least the advantage of providing discounts for additional products. However, he wrote, "We are currently trying to gain exemption for [sic] the new policy and return to plant sales of insulation." Evidently nothing ever came of any such request for exemption that Hansen may have made.

On 17 August, Steward Noland filed a grievance about the new plan, calling it "a lessening of an employee benefit" and a "break from a longstanding past practice," but it was eventually withdrawn and the underlying charge here was filed.

Personnel Manager Browne testified that, in addition to the change from a "store" concept in 1977, the only other modification of significance in the employee sales area occurred in the late 1970s, when Respondent stopped selling scrap insulation to employees at a-penny-a-square-foot and raised the price to the manufactured cost. There was no advance discussion of the change with the Union.

Under the direct sales program in effect until 1985, there were at the Fairfax plant in 1984 total insulation sales to employees amounting to $36,824.63; this included possible sales not only to about 930 Fairfax plant and clerical employees but also to, roughly, 200 employees in smaller Owens-Corning facilities in the Kansas City area. Total labor costs in 1984 at the Fairfax plant, including fringes, premiums, and taxes, ran about "35 plus" million dollars. In 1985, up to 12 August, $29,605.61 in insulation sales had been made; labor costs for that entire year were about "34 and a half" million.

Steward Noland testified that he went through the new procedure in January 1986, buying insulation "on sale" at a local store for "somewhere in the vicinity of $11.00 a roll" for 37 rolls. About a week after filing for reimbursement in Toledo, he received his 20-percent rebate of about $85. A price list given to Business Agent Messer showing the cost to employees of various items as of the last days of sales under the old program shows that Respondent's cost to employees for the same product at that time was $5.75 per roll.

If we were to assume that, like Noland in 1986, each employee who purchased insulation in 1984 bought 37 rolls at $5.75 apiece (or $212.75) it would mean that some 173 employees (the distribution between union-represented and unrepresented purchasers is unknown) participated in the program ($36,824 ÷ $212.75 = 173) and that each saved $112.85 by buying their insulation before 12 August 1985. (37 x $11 = $407 less 20 percent ($81.40) = $325.60; 37 x $5.75 = $212.75; $325.60 - $212.75 = $112.85.) It hardly need be said that the number of purchases and the amounts purchased could have varied significantly from this supposition.

[6] Respondent operates some 71 plants throughout the country and employs altogether about 25,000 employees.

II. DISCUSSION AND CONCLUSIONS

The statutory injunction in Section 8(a)(5) requiring an employer to "bargain collectively" with the representatives of his employees means, according to Section 8(d), that he must "confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." Collective-bargaining agreements do not necessarily reflect all the terms and conditions of employment that may impose, by virtue of Section 8(a)(5) of the Act, a bargaining obligation on employers to the unions that represent their employees. If, of course, a specific benefit is spelled out in the contract, an employer normally may not modify or rescind that term without the express consent of the union. But the Board and the courts have also recognized that the parties may adopt an employment practice that becomes so integrated into the bargaining relationship as "wages, hours, and other terms and conditions of employment" that even though they may not be contractually bound to adhere to it, neither may one of them simply choose to revise or omit it without at least bargaining with the other party in good faith about the proposed alteration in the practice. E.g., *Radio Electric Service Co.*, 278 NLRB 531 (1986) (unilateral discontinuance of Christmas bonus); *Gulf Refining & Marketing Co.*, 238 NLRB 129, 132 (1978) (employee discount program a mandatory subject of bargaining); *Master Slack*, 230 NLRB 1054, 1055 (1977) (change in employer's prior practice of allowing employees to purchase and lay away its goods through its outlet store adversely affected "a benefit which accrued to employees out of their employment relationship").[7]

There can be little doubt that the existence of a program more than a quarter-century old under which employees received the benefit of purchasing materials at a substantial discount could constitute such a prevailing term of employment,[8] and that before Respondent could modify the program, it might be compelled, by doctrine whose validity is not in doubt, to give the Union an opportunity to discuss the proposed change, with an eye to convincing the employer to leave it untouched or at least to offering suggestions to make the change more palatable. E.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Central Illinois Public Service Co.*, 324 F.2d 916 (7th Cir. 1963) (employer unlawfully unilaterally terminated extracontractual 33-1/3-percent gas discount given to unionized employees for 36 years, thus affecting fewer than half of his employees by charging them $48 on average more for gas).

Respondent does not take direct issue with any of the foregoing. Its first argument on brief, "The Employee Purchase Plan is not a Mandatory Subject for Bargaining in the Circumstances of this Case," is premised on the assertion that "since at least 1962 the Company has retained unfettered discretion with respect to the operation of the employee purchase plan, including the items offered for sale, the way in which sales are handled, and the price of the items sold." Respondent concludes from this, and the fact that the program was never "the subject of negotiation or of any request by the Union for discussions," that the administration of the program was intended to "be left to the discretion of the Company."

There are two answers to this contention. One is that the record fails to show that the Union did not, in fact, seek an opportunity to bargain about any changes in these matters in the past, but merely shows that there was no bargaining. The other is that the historical changes were not the same as this one, and it is reasonable to assume that a union's desire to negotiate will understandably be based on the particular facts of a case in deciding whether to press for a chance to bargain; no overall waiver can be inferred from such circumstances. *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).[9]

The second contention made by Respondent is that the Union waived its right to bargain about the change. For many years, the Board has taken the position that if a union receives timely notice of a proposed bargainable change in a term of employment, and fails to request the opportunity to bargain, the union has "waived" that right (or "acquiesced in" the change). This is so no matter how vociferously the Union objects to the change, or even if it files an unfair labor practice charge; it must also make clear to the employer its desire to bargain about the proposed new condition. *American Buslines*, 164 NLRB 1055 (1967); *Kentron of Hawaii*, 214 NLRB 834 (1974); *Talbert Mfg.*, 264 NLRB 1051 (1982).

As Business Agent Messer conceded, that did not happen here. Messer learned of the new program, to go into effect on 12 August, on the morning of 6 August; that would ordinarily be considered sufficient time for bargaining to take place. But Messer did not ask to bargain on 6 August or at any time before 15 August. What he essentially did, as he acknowledged at the hearing, was to tell the plant officials that the Union was opposed to the change.

The difficulties with the application of the "request-bargaining-or-waive-bargaining" principle in these circumstances, however, are several. It is as true in this case as in hundreds of its ancestors that the right to bargain about a change in a mandatory subject is a statutory one, and that any asserted claim of waiver by a union must be a "clear and unmistakable" one. *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963).

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[7] In a bargaining agreement, the parties may explicitly agree that there are no cognizable terms or conditions of employment not specifically mentioned therein, or that the employer is not required to bargain about any such matters. That is not the case here. The contract does contain a "management functions" clause, but I find nothing in it remotely touching on the subject at hand, and Respondent makes no contention on brief relying on the clause.

[8] Personnel Manager Browne testified that the employee "store" had been in operation even before 1959, when he first arrived in Kansas City.

[9] In its ending "Summary," Respondent's brief, for the first time, brings up the issue of the magnitude of the change in issue, but does not appear to rely on it in order to claim that the subject was not a mandatory one ("This very slight impact, which to some extent would be offset by a new discount opportunity on certain additionally available products, explains the relatively short period of discussion for this issue"). In any event, the hypothetical example previously given suggests that the August change must have involved a substantial amount of money for a significant number of people. Cf. *Radio Electric Service Co.*, supra (Christmas bonus); *Poletti's Restaurant*, 261 NLRB 313, 317 fn. 16 (1982) (elimination of free desserts), *Kay Fries, Inc.*, 265 NLRB 1077 (1982) (institution of a proof requirement for funeral leave).

The record here shows, however, that when Messer began to protest the news imparted to him on 6 August by Browne, he was cut short when the managers made it instantaneously clear that they were powerless to ignore the marching orders from Toledo. Hearing this, it would be understandable that Messer would not make a plainly bootless effort to "bargain" with those powerless to bargain.

It may be asked, however, if Messer wanted to bargain, and those who were capable of bargaining could be found in Toledo, why did Messer not contact Toledo.

As shown above, Messer apparently did have bargaining on his mind, certainly by the time he wrote his 15 August letter to Hansen ("We would like to meet with the appropriate Corporate officials to discuss the future of this issue before proceeding in any other direction").[10] But a preliminary question arises whether Hansen unlawfully frustrated the bargaining process by asserting his impotency to bargain on 6 August.

It seems to me that if the Kansas City plant was itself the "employer" with whom the Union had its collective-bargaining relationship, its management had, as a matter of law, the authority to reject the new program as applied to the Fairfax plant, and management's position "that there was really nothing that could be done" would have been an improper response to Messer's protest and an exculpation of his failure to specifically request bargaining. See *Penntech Papers v. NLRB*, 706 F.2d 18, 27 (1st Cir. 1983). The question is not as clear as one might suppose it to be.

The agreement, as shown, is made between the Unions and "the Owens-Corning Fiberglas Corporation, Wyandotte County, Kansas." What that designation signifies is not clear. I doubt that there is a corporation so named, or a division of Owens-Corning so styled. The signature block (unsigned in the copy in evidence) simply reads "Owens-Corning Fiberglas Corporation." The fact that the unit description in the contract contains no geographic or divisional limitation suggests that it must pertain only to that part of Owens-Corning that is located in "Wyandotte County" (clearly, the parties did not intend to cover "all production and maintenance employees and all other employees of the Company" throughout the Nation), and yet the record shows that there is a "North Kansas City" facility, as well as several other Owens-Corning operations in the area, which are not regarded as being within the scope of the agreement.

In the end, however, I conclude that the contracting "employer" is the corporation and not just the Fairfax plant. Various provisions in the agreement (e.g., art. 6(30)) sound like delegations of authority to the plant manager, which would be unnecessary if the plant manager exercised independent control over the administration of the contract; and there being, so far as the record shows, only one corporate entity, it would seem that it would have to be the party-employer.[11]

Other principles of law govern here and, I think, excuse the Union's failure to pursue to Toledo an effort to bargain about the new program. The 8(d) obligation to confer in good faith has repeatedly been construed to obligate both parties "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement," *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939), and to "honestly attempt to reach an accord," *Steelworkers of America v. NLRB*, 390 F.2d 846, 850 (D.C. Cir. 1967). The Supreme Court has termed the "essential" ingredient of bargaining "the serious intent to adjust differences and to reach an acceptable common ground," *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960). In *Intersystems Design Corp.*, 278 NLRB 759 (1986), quoting *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), the Board has recently reiterated that if the employer "has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli.*"

An employer is obviously entitled to fully develop a proposal before presenting it to a union. *Lemon Tree*, 231 NLRB 1168, 1176 fn. 35 (1977); *Lange Co.*, 222 NLRB 558, 563 (1976). That decision, however, may not, under Section 8(a)(5), be a "final one," *J. P. Stevens & Co.*, 239 NLRB 738, 749 (1978); because the law requires "the serious intent to adjust differences," *Insurance Agents*, supra, it "enjoins an employer who has made such a decision to retain sufficient flexibility of purpose as to be receptive to union arguments and counterproposals which may result in a rescission or modification of the plan." Ibid. In the present case, it appears to me that Respondent had gone so far in implementing this program by 6 August that it was, to all intents and purposes, a fait accompli.

Personnel Manager Browne testified that he first heard that such a change was in contemplation when he attended a personnel managers conference in 1984; his failure to make mention of it then to the Union cannot be faulted on the assumption that the program was simply under consideration at that time.[12] But the record shows that

[10] Browne testified that at every set of negotiations in the past representatives from the "corporate and industrial relations department" in Toledo would come to Kansas City to serve as "chief spokesmen or spokesmen for negotiations." Messer had been an alternate steward and a steward in 1981 and 1984, but he was "really not privy to too much of the discussions at that point." Whether this means he was unaware of the presence of the Toledo employees is unclear.

[11] The named Respondent in the charge and the complaint is "Owens-Corning Fiberglas Corporation," which is alleged as, and admitted to be, "a corporation with an office and place of business in Kansas City, Kansas."

[12] Browne gave two seemingly conflicting explanations of the basic reason for the change. At first, he testified (and Messer confirmed) that he told the Union on 6 August that

> where it emanated from basically was out of the sales and marketing area in regard to complaints from customers, particularly retail customers about our practices in the various plants of selling at a lower price and the entry into the marketplace of material at a price below what the retailers were able to sell it for.

When asked on cross-examination about the "information" regarding the change given to him at the managers conference, however, Browne replied:

> The only thing I can tell you that is what stuck in my mind as a result of it was that our people had always had trouble getting tub showers, for example. . . . And they were trying to open things up so that employees could have access to the more popular items containing glass fibers produced by Owens-Corning.

by 6 August the new program was so completely set in place that modification or rescission of it as a result of discussion with a union seemed totally divorced from reality.

The printed letter dated 30 July 1985 (numbered "OC-42-2-R2") sent to all Owens-Corning managers flatly and unequivocally announced that "[a] new Employee Purchase Program (EPP) for company products begins August 12." It went on to declare that active and retired employees "will be reimbursed" various amounts for specified items and that requests for a certain item "must be approved by the EPP Administrator in Toledo, OH, prior to purchase."

The letter then summarized the procedure to be followed in order for employees to participate in the program, and assigned responsibility for local administration of the program to eight named managerial categories. Thereafter, it stated that reimbursement applications, flyers, and a cover letter "will be" distributed to the responsible managers and supervisors during the week of 5 August. The letter went on to discuss the publicity plans: "Retirees will be informed of the program through an article in the August issue of *Dialog*. Articles about the program will also appear in the August 9 issue of *Tower News* and the August and September issues of plant and division publications."

The printed three-copy reimbursement application ("OC-14444") is carefully designed to accommodate necessary information. The reverse side of the employee's copy describes in detail how the program works. Under "General Information," the following statement appears: "The program begins August 12 and rebates will not be given for purchases made before this date."

Given the foregoing obviously well-deliberated preparation for the program to commence on 12 August, it is impossible to conceive that a 6 August request by Messer for bargaining could have slowed the momentum of the program. Everything was locked in—prices, procedure, and administration. Many copies of the application, perhaps thousands, had unquestionably been printed by 6 August and were very probably already in the mail, along with the flyers and cover letters, to the local administrators. Surely, the article which "will . . . appear" in the 9 August issue of *Tower News* had already been printed, if not, indeed, circulated; and the same is probably true of the pertinent article in the August issue of *Dialog*.

As counsel for the General Counsel points out on brief, the bargaining obligation refers to the opportunity for "meaningful bargaining." See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981) ("in a meaningful manner and at a meaningful time"). In *Firch Baking Co. v. NLRB*, 479 F.2d 732, 736 (2d Cir. 1973), the court said that the employer has "[a] basic duty of allowing adequate time and opportunity for reasonable discussion of the essential details of its offer." But when an employer has committed itself to a change in employment conditions as emphatically as this employer had by 6 August, it is safe to say that no amount of discussion between then and 12 August could have altered its decision.

Even in *NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095, 1102 (11th Cir. 1983), where the court disagreed with the Board (260 NLRB 1321 (1982)) that the changed condition was an accomplished fact, the court nevertheless recognized that an employer's decision can be "so absolute as to preclude any possibility of bargaining on the issue of [the changed condition]." In my view, it is a fair judgment that Respondent had placed itself in precisely that position. Indeed, Respondent seems to accept the point when it states on brief, "Given that the program is administered out of Toledo for all corporate employees, it is unlikely that either the Union or local management thought the chances good for a modification of the program for Kansas City." But the issue is that had Respondent not locked itself into the program before it first notified the Union, chances would have been infinitely better for effective collective bargaining not only for Kansas City but for the whole corporation.[13]

Finally, Respondent argues that the parties "did discuss the intended program change on August 6 in advance of implementation." Although Messer testified that there was a "lengthy discussion" of the matter that day, he later credibly explained that it amounted to Hansen giving a summary of the new plan, the Union's protest that "we didn't like it," and management's stated position that "it was sent to them from above, meaning Toledo, and that there was really nothing that could be done."

Respondent also notes in the "Summary" section of its brief that the change was implemented for "reasons unrelated to the bargaining unit and unrelated to issues that could be addressed by bargaining in the unit (i.e., the change was made due to the complaints of retailers who were buying and selling the Company's products)." It should be pointed out that this parenthetical explanation was given by Browne, who was unspecific about the source of such an explanation at the personnel managers meeting the year before; furthermore, as set out supra, on cross-examination Browne testified that the "only thing" that "stuck in [his] mind" as an explanation of the change was that the Company was "trying to open things up" so that employees could have access to the more popular items produced by Respondent.

In either event, there appears to be much that *was* bargainable: the prices, the time and amount limitations for purchases, and what Messer called in his 15 August letter the "cumbersome reimbursement procedure" entailed in obtaining a rebate—all were susceptible to modification.

In accordance with the foregoing, I conclude that Respondent violated Section 8(a)(5) in these circumstances. Normally, as Respondent points out, 6 days may be considered an adequate opportunity for a union to ask for

[13] As indicated above, in Messer's 15 August letter to Hansen, he asked to "meet with the appropriate Corporate officials to discuss the future of this issue before proceeding in any other direction." Hansen's reply, dated 11 days later, ignored Messer's request to meet with Hansen's appropriate superiors, saying simply, "We are currently trying to gain exemption for the new policy and return to plant sales of insulation." The record is silent as to what effort Hansen made toward that end. It seems quite improbable that Respondent would have agreed to exempt from the newly instituted program a bargaining unit which constituted perhaps 4 percent of its entire work force throughout the country

bargaining and present its arguments. A review of the cases shows that they generally involve issues in which rescission or modification of the proposed change is a reasonable and rather easily accomplished alternative. See, e.g., *Medicenter Mid-South Hospital*, 221 NLRB 670 (1975); *Holiday Inn Central*, 181 NLRB 997 (1970). This, however, is one of those cases in which the evidence convinces that Respondent had traveled so far down the road to consummation of its elaborate plan before it gave notification to the Union that bargaining would have been a wholly empty gesture.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.
3. By, about 12 August 1985, instituting modifications in its employee purchase plan at its Fairfax plant in Kansas City, Kansas, without affording the Charging Party an appropriate opportunity to bargain, Respondent violated Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The first appropriate remedy for Respondent's failure to bargain appropriately about the change in the employee purchase program is to require reinstitution of the former program at the Fairfax plant for the benefit of the employees represented by Local Union No. 1. Commonly, this remedy envisions allowing Respondent to thereafter reinstate the new program if, after bargaining in good faith, it has not been otherwise persuaded by the Union. E.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215–216 (1964).

On the facts of this case, however, I believe that such an order requires some supplementation, unless the bargaining so ordered simply amount to no more than a charade. Accordingly, I recommend that Respondent be required to reinstitute its former program for the benefit of its employees represented by Local Union No. 1 for a period of 6 months, after which, if Respondent wishes, it may bargain with the Union about the application of the new program to such employees. If good-faith bargaining does not convince Respondent to continue the old program for such employees, it may then make the new one applicable to those employees.

In addition, Respondent should be required to reimburse all employees represented by Local Union No. 1 for any monetary losses they suffered since 12 August 1985 as a result of being required to purchase insulation under the new program instead of the old one, with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Finally, I recommend entry of the customary cease-and-desist order and posting of the traditional notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Owens-Corning Fiberglas Corporation, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with Insulation Production Workers Local Union No. 1 (the Union) as the exclusive representative of its employees in the appropriate bargaining unit about substantial changes in the employee purchase program at the Fairfax plant in Kansas City, Kansas.

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

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

(a) Reinstate for a period of 6 months for the benefit of its employees represented by the Union the employee purchase program in existence until 12 August 1985, and make whole the union-represented employees for any losses suffered by them, in the manner set forth in the section above entitled "The Remedy."

(b) If Respondent desires thereafter to apply the post-12 August employee purchase program to the union-represented employees, bargain in good faith with the Union as the exclusive bargaining representative of Respondent's employees in the appropriate unit.

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

(d) Post at its Fairfax plant in Kansas City, Kansas, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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[14] 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.

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