New Process Steel, LP[1] ***and*** **District Lodge 34, International Association of Machinists and Aerospace Workers, AFL–CIO.** Case 25–CA–30470

September 25, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On May 1, 2008, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board[2] has considered the decision[3] and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New Process Steel, LP, Butler, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 25, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Fredric D. Roberson, Esq., for the General Counsel.
Joseph W. Ambash, Esq. (Greenberg Traurig, LLP.), of Boston, Massachusetts, and *Sheldon E. Richie, Esq. (New Process Steel),* of Austin, Texas, for the Respondent.

DECISION

STATEMENT OF CASE

DAVID I. GOLDMAN, Administrative Law Judge. This case arises from an employer's repudiation of an initial collective-bargaining agreement reached with its employees union. At the conclusion of 11 months of collective bargaining the Union agreed to the employer's contract proposal which contained what the employer's bargainer called "a lot of take-aways." When the Union accepted this offer, the employer, admittedly motivated by the approaching expiration of the certification year bar and "chatter" about a decertification petition, resisted initialing the agreement, saying it would sign after ratification. The union put the agreement to a vote of employees and, following its established procedures, when less than a majority voted in favor of the contract, this triggered a strike vote requiring supermajority approval, and failing to garner approval for the strike, the contract was deemed accepted. The acceptance was reported to the employer which executed and implemented the agreement. However, a few weeks later, after investigating the procedure followed by the Union for ratifying the contract, the employer declared the contract ineffective.

The Government contends that the employer was required to abide by the agreement reached with the Union and executed after the Union advised the employer of the completion of its contract ratification procedures. The employer contends that a favorable vote on the agreement by employees was an agreed-to condition precedent of the contract, and the union's failure to secure such a vote means that the contract never came into effect. Alternatively, the employer contends that if a favorable vote by the employees in favor of the agreement was not a condition precedent of the agreement, then there was not a "meeting of the minds" between the parties and no contract formed on that basis.

FINDINGS OF FACT

Based on an unfair labor practice charge filed September 17, 2007, by District Lodge 34, International Association of Machinists and Aerospace Workers, AFL–CIO (IAM or Union), the General Counsel of the National Labor Relations Board (Board) issued a complaint on December 28, 2007, alleging

[1] In several of the General Counsel's submissions to the Board, the Respondent is identified as New Process Steel of Indiana, Inc. We note that the Respondent's correct name, as reflected in the caption above, is New Process Steel, LP.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] Although Chairman Schaumber agrees with the judge that the Respondent unlawfully repudiated the contract, he does not rely on a number of the judge's statements. For example, the judge expressed doubts and engaged in extensive discussion about whether the parties agreed to contract ratification despite Union Negotiator Chaszar's specific testimony that he agreed to the Respondent's requirement that ratification was a condition precedent to the contract, and despite the judge's acknowledgement that he need not reach the issue. Furthermore, the judge questioned the Respondent's professed concern for its employees' rights by speculating that its real motivation for refusing to sign the contract was getting rid of the Union.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by New Process Steel, LP (NPS, Employer, or Company). NPS filed a timely answer to the complaint denying all violations of the Act. This dispute was tried in Auburn, Indiana, on March 11, 2008. Counsel for the General Counsel and the Respondent filed briefs in support of their positions on April 15, 2008. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, I make the following findings of fact, conclusions of law, and recommendations.[1]

The complaint alleges, Respondent admits, and I find that at all material times NPS has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Respondent admits, and I find that the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

JURISDICTION

New Process Steel operates five steel processing facilities, four in the United States, and one in Mexico. This case concerns events at its Butler, Indiana facility.

The Union was certified as the exclusive bargaining representative of a bargaining unit of NPS's Butler, Indiana employees on August 25, 2006.[2] Bargaining for a first contract began on or about September 6, 2006. Attorney Mike Oesterle was NPS's lead negotiator and bargaining table spokesperson. Butler facility Plant Manager Steve Hartz was the other member of the NPS bargaining team. Beginning in April 2007, the Union's chief negotiator was Joseph Chaszar, a representative from the Machinist Union. Throughout the negotiations the parties "T/A'ed"—i.e., signed or initialed tentative agreement to—discrete contract provisions as agreement was reached on particular provisions.

The parties met approximately 25 times between September 2006 and August 2007, and by July 31, the Company had offered at least 46 written counterproposals to the Union. At the final bargaining session, Thursday, August 9, 2007,[3] the parties discussed whether to include a union security clause. NPS stuck by its proposal—not to have union security—and ultimately Chaszar told Oesterle, "Fine, I agree to it, to your proposal." Chaszar signed the provision. Chaszar then told the NPS negotiators, "I will agree to your entire proposal" and Chaszar signed the Employer's outstanding proposal in its entirety. Chaszar then slid the proposal over to Oesterle and asked him to sign it. Oesterle refused to sign, and one of the union negotiators, Mike Hall, angrily denounced Oesterle, shouting, "[Y]ou fucking T/A'ed everything else. Why don't you sign off on this so we can get out of here." Chaszar also asked why, remarking to Oesterle that "up until this point, we have agreed to sign off on all proposals that both parties agreed to." Oesterle replied that "once the agreement is ratified, we will be glad to sign it." Chaszar's response was "we would like to vote the contract today." However, Oesterle told Chaszar that "We have production scheduled. We can't do it today. You are going to have to do it on your time." Chaszar asked if work was scheduled for the coming weekend and Hartz told him it was not. Chaszar said, "Fine, then we will schedule the vote for this weekend."

This exchange during the final bargaining session was first and only time in negotiations that the subject of the agreement's ratification was verbally mentioned between the parties. At no time was there discussion of the ratification procedures the Union would employ, or discussion of its standard procedures used in contract ratification, or anything else, relating to ratification.

While there had been no mention of ratification or ratification procedures, three documents exchanged during negotiations referenced ratification. One was in the final proposal accepted by the Union. This was the "wages" provision of the agreement, which included a reference to ratification, stating "[b]eginning the effective date of this Agreement, or on the date the total Agreement is properly ratified, signed and executed, whichever is later [the Company agrees to pay specified wages].

A second ratification reference was contained in the Employer's initial set of bargaining proposals, provided to the Union in October 2006. This stated:

> As proposals are considered by the parties, agreements on Articles an[d]/or Sections of the proposed labor contract will probably occur on a clause-by-clause basis. It is the Company's position that these agreements will not become contractually effective until the day and date that a total agreement on all parts of the contract is reached, ratified, and signed by all parties.

Finally, the Company referenced ratification in an 18-page single-space letter written by NPS negotiator Oesterle on July 31, 2007, in which he indepthly summarized the status of negotiations and the parties' positions. That letter included a summary of the parties' positions on the provision "parties and terms of agreement" and included the statement that "[t]he Company proposes a one-year deal, effective the date the contract is signed, executed, and ratified, whichever is later." This provision, "parties and terms of agreement" was listed in the Company's letter as an "open" proposal, i.e., one on which no agreement had been reached. There was no reference to ratification contained in the final Company proposal on this provision accepted by the Union (R. Exh. 2 at numbered p. 1). None of these three written references to ratification was discussed by the parties.[4]

[1] Respondent filed a posthearing motion to correct the record. That motion is granted. Accordingly, "no" is added as the last word to LL. 3 on p. 15; at LL. 19 of p. 15 "unratified" is inserted in place of "ungratified"; all references in the transcript to the name "Proche" are corrected to read "Proch."

[2] The bargaining unit represented by the Union consisted of:

> All full-time and part-time production and maintenance employees employed by Respondent at its Butler, Indiana facility, but excluding all office clerical employees, professional employees, sales representatives, managerial employees, team leaders, guards, supervisors as defined by the Act, and all other employees.

[3] All subsequent dates refer to 2007, unless otherwise indicated.

[4] Hartz repeatedly testified, in blatantly self-serving testimony cued by Respondent's counsel, that his "understanding" of these written but undiscussed references to "ratification" was "that there would be a positive vote" by employees. (Tr. 45, 47, 49.) Similarly, Hartz testi-

At the trial, Plant Manager Hartz explained the Respondent's motive for wanting a vote of employees as a condition for the contract's effectiveness: "There was a lot of talk in the shop about [ ] decertifying . . . and . . . this contract had a lot of take-aways and . . . [we w]anted to make sure they had an opportunity to, you know, voice their opinion, and vote for the contract and let their voice be heard."

The Union scheduled a meeting and vote for Sunday, August 12, at a hotel in nearby Auburn, Indiana. Approximately 23 employees attended the meeting. At the meeting, the Union followed its standard procedure in contract ratification situations. As Chaszar explained, "All of the contracts that we ratify, we ratify in the same manner." Pursuant to these procedures, which are described in an IAM "circular," an agreement that is not accepted by a majority of those voting, triggers a strike vote:

> In the event that a strike vote fails to carry by the required two-thirds (2/3) majority vote, *the collective bargaining agreement at issue will be accepted*. This is because without the necessary membership support for a strike, our negotiators have no strength from which to insist on our bargaining demands. . . . Again, lodges are reminded that if the strike vote fails to carry, no strike sanction will be granted, and the contract will be accepted.

(Emphasis added in original.)

At the meeting, Chaszar

> explained what we were going to do, the agenda for the day, which is we were going to go over the proposals, give everybody an opportunity to ask questions, and go into a vote which would be a secret ballot, and we also then explained what would happen if that vote failed, that we would have a second vote, which would be a vote to strike or not to strike.

It was explained at the meeting, at the beginning, and at the end, that if the employees voted down the contract, but then did not vote to strike by two-thirds majority, that the contract would be accepted by the Union. This ratification process is followed by IAM Locals around the country and, according to Chaszar, used consistently at least as long as long as he has been on staff.

After an explanation of the contract the Union conducted a secret vote among those present. The employees rejected the contract by one or two votes, meaning the votes in favor of the contract were not 50 percent plus one. At that point the Union explained, for the second time, that they were going to take a second vote, a strike vote, and that a two-thirds vote to strike was required for a strike to be initiated. That vote was then conducted, again by secret ballot, and that vote did not receive the number required to go on strike. At that point, the Union told the employees that "the contract was enacted, because we don't have enough to go out on strike."

Later that day, Chaszar called Oesterle and said that "we have an agreement." NPS executed the agreement.

During that week, Hartz called NPS's CEO Bob Proch at NPS's corporate headquarters in Houston. Hartz told Proch "some of the things that I had heard that had happened during the ratification" and asked Proch "is there something you can do to look into it and investigate." Hartz told Proch in an e-mail "the employees are asking for help. Is there something we can do?" At that point, Hartz is "sure" counsel was involved and he "assumes" an investigation was launched. By letter dated September 11, NPS's attorney, Joseph Ambash, wrote to Chaszar announcing his assumption of the role of chief negotiations representative for NPS and articulating the position on the agreement that NPS maintains to this day:

> As you know, the tentative agreement reached between the parties on August 9, 2007[,] was expressly subject to ratification by members of the bargaining unit. On August 12, 2007[,] you notified the company's then-negotiator that the parties had an agreement, whereupon Mr. Hartz executed the purported contract on behalf of the company.
>
> It has come to the company's attention that, in fact, members of the bargaining unit voted *not* to ratify the contract. Apparently, you and other union representatives then told employees they were required to take a strike vote, and if the strike vote did not pass by a two-thirds majority, the tentative contract would then go into effect. When the contract ratification vote and strike vote failed, you nonetheless falsely told the company's then-negotiator that the parties had reached an agreement.
>
> Since ratification was an express precondition to the agreement, it is clear that there is not nor has there ever been, a contract between the company and the union.
>
> Should you wish to resume negotiations, please contact me.

(Emphasis added in original.)

Discussion

The question in this case is whether the parties formed a valid collective-bargaining agreement. If so, the Employer's admitted repudiation of the agreement violates Section 8(a)(5) of the Act. See *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126 (2007).[5]

"'Federal labor policy encourages the formation of collective-bargaining agreements,' and '[i]t is the Board's obligation to "protect the process by which employers and unions may reach agreements with respect to terms and conditions of em-

fied that his understanding was that in order for the contract to be effective that there had to be "a favorable vote for the contract." (Tr. 39.) This "understanding" was not shared with the Union during bargaining, or with anyone, as far as the record reveals. I do not credit this testimony, based on the demeanor with which it was offered, how it was elicited, and its overall lack of plausibility. Hartz maintained in his testimony that requiring employees to vote on the contract was an important issue to NPS. As an experienced bargainer, Hartz would not have left an important issue, and an understanding that the Respondent claims to have relied upon, to the unexpressed understandings of one side of the bargaining table. In any event, as discussed herein, Hartz's unexpressed understanding is of no relevance to the outcome of the issues in this case.

[5] An employer that violates Sec. 8(a)(5) also derivatively violates Sec. 8(a)(1). *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

ployment.""""[6] In carrying out the obligation to encourage and protect the process of forming collective-bargaining agreements, the Board has always been clear that the Act imposes no requirement of employee or union member ratification of collective-bargaining agreements.[7]

The reason for this is that the "subject is unrelated to wages and terms and conditions of employment." *C & W Lektra Bat Co.*, 209 NLRB 1038, 1039 (1974), enfd. 513 F.2d 200 (6th Cir. 1975); *Houchens Market of Elizabethtown, Inc.*, 155 NLRB 729, 730 (1965), enfd. 375 F.3d 208 (6th Cir. 1967). Unless the union and employer have agreed otherwise, "ratification is an internal union matter which is not subject to question by an employer." *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). As the Supreme Court has explained, in a discussion of a contractual "ballot clause" similar to a ratification provision, such a clause

> deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative.

NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 350 (1958).

Notwithstanding these policy concerns, as with other nonmandatory or permissive subjects of bargaining, the parties are free to bargain about and reach agreements, regarding the presumptively internal union issue of ratification.[8] Accordingly, "[an] employer [does] not violate Sec. 8(a)(5) by refusing to execute a bargaining contract which the parties had agreed would be subject to ratification by unit employees" but which the union subsequently refuses to ratify. *Hertz Corp.*, 304 NLRB 469 fn. 4 (1991); *Santa Rosa Hospital*, 272 NLRB 1004, 1006 (1984) ("the agreement reached on 9 March was subject to the express condition of employee ratification; thus, no 'agreement' sufficient to give rise to the Respondent's legal obligation to execute a written contract could exist prior to such employee ratification").

However, the policy concerns with maintaining a union's independence and status as the statutory representative have led the Board to take care not to hobble a union's ratification prerogatives in the absence of a true agreement with an employer regarding ratification. Precisely because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs . . . it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 226 (1991) (Chairman Stephens concurring). Thus, the Board distinguishes between a union's expressions of intent to seek employee ratification, which the union can modify or ignore at will, and an actual bilateral agreement with an employer to make ratification a condition precedent to the formation of a binding contract. Only in the latter instance does the employer have cause to complain about a union's decision, contrary to its agreement, to eschew the ratification process. And a bilateral agreement making ratification a condition precedent for contract formation is not established casually or equivocally. For instance, a union's repeated statements that it will take an agreement to its membership for ratification does not establish a bilateral enforceable agreement to do so, even if it creates an understanding between the parties that the union intends to undertake ratification of the agreement.[9] In order for the Board to find that ratification is a condition precedent to an enforceable agreement, the agreement by the parties to do so must be express.[10] Absent an express agreement between the

[6] *Valley Central Emergency Veterinary Hospital*, 349 NLRB at 1127, quoting, *American Protective Services*, 319 NLRB 902, 904 (1995) (fn. omitted).

[7] *North Country Motors Ltd.*, 146 NLRB 671, 674 (1964) ("The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf"); *Teamsters v. NLRB*, 587 F.2d 1176, 1182 (D.C. Cir. 1978) ("The Labor Act does not require a union to accord its rank-and-file members the right to ratify a collective-bargaining contract which it has negotiated").

[8] Of course, as with any nonmandatory subject of bargaining, a party may not insist to impasse or condition negotiations or overall agreement on the other party's acceptance of a contractually enforceable ratification provision. See *Borg-Warner Corp.*, supra at 349.

[9] *Personal Optics*, 342 NLRB 958, 962 (2004) ("Even if the Union's prior statements arguably may have led the Respondent to believe that the Union would conduct a vote of the bargaining unit, there was never any such agreement between the parties. Accordingly, we agree with the judge that the Union's acceptance of the Respondent's final offer created a binding collective-bargaining agreement"), enfd. 165 Fed. Appx. 1 (D.C. Cir. 2005); *Consumat Systems,* 273 NLRB 410, 413 (1984) ("Although the Union clearly stated that ratification by its membership was necessary for it to make a final and binding agreement, no agreement was made by the parties that made ratification necessary and no requirement that this occur was incorporated into the written contract proposal prepared by Respondent"); *Seneca Environmental Products*, 243 NLRB 624, 628–629, 631 (1979) (management's understanding that contract would be submitted to ratification, based on union's instructions that it would seek approval of the employees of any provisions negotiated, was not tantamount to an agreement that ratification was necessary precondition to execution of contract otherwise agreed upon), enfd. 646 F.2d 1170 (6th Cir. 1981); *C & W Lektra Bat Co.*, supra (stated intention to take any contract reached to the membership for approval does not constitute an agreement to make ratification a condition precedent to a collective-bargaining agreement, and cautioning, "We are unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment"); *Houchens Market of Elizabethtown*, 155 NLRB at 735.

[10] *Valley Central Emergency Veterinary Hospital*, supra at 1126, 1132 (condition precedent of employee ratification must be express and not created by union negotiator stating at first bargaining session that "both sides would take any agreement back for ratification" and by union telling mediator that union would recommend employee ratification if employer agreed to union security clause (which it later did)); *West Co.*, 333 NLRB 1314, 1320 (2001) ("there was no explicit agreement regarding ratification and the situation is unlike *Beatrice/Hunt-Wesson*, *Hertz*, and *Santa Rosa*"); *Auciello Iron Works, Inc.*, 303 NLRB 562, 565 (1991) ("The Board has consistently held that where there was no evidence of an explicit agreement between the negotiating parties about union ratification, the formality of such a vote by the

parties to this effect, employee ratification is not a condition precedent for the formation of a binding collective-bargaining agreement, and the union retains sole discretion over whether to ratify the contract or not.

In this case, the General Counsel takes the position that the Union agreed to take the contract back for ratification, and did so pursuant to its own interpretation and application of its procedures for handling the approval of contracts. In this case that means that for members to reject a proposed contract, they had not only to vote against the contract by a majority but had to back up that vote with a supermajority vote in favor of a strike. If they did not, the contract was accepted. That is the Union's established procedure for ratification and in the General Counsel's view, when the Union informed NPS at the outcome of its ratification process that "we have an agreement," NPS had an obligation to execute and adhere to the agreement.

The Employer, on the other hand, takes the position that the Union agreed to ratification and that meant that a majority of employees must vote yes for the contract to be in effect. The Union could not rely on its own ratification procedure to accept the contract because that procedure did not result in a majority of employees voting yes to accept the contract. The Union did not obtain that, therefore, there was no legally binding acceptance of the contract, and no duty to adhere to or execute a collective-bargaining agreement. Therefore, NPS's (conceded) repudiation of the agreement was lawful. Alternatively, if the Union did not agree to ratification (as the Employer defines it), then there was no meeting of the minds, and no contract, because that is what the Employer intended.

Both parties argue from the premise that some agreement on ratification was bilaterally entered in to; they disagree on the scope and implications of that agreement. Accordingly, I will assume, without deciding, that this premise is correct. In truth, I have some doubts on this score, but need not reach the issue.[11]

Even assuming that the parties entered into a bilateral agreement at the conclusion of the last bargaining session to

union membership is not required as the foundation of a binding collective-bargaining agreement"), enfd. denied on other grounds 980 F.2d 804 (1st Cir. 1992); *Hertz Corp.*, supra (finding "express oral bilateral agreement to submit the parties' negotiated contract to a ratification vote"); *Zayre Department Stores*, 289 NLRB 1183 (1988) (no condition precedent of employee ratification based on employer's announcement at final bargaining session that it is "prepared to sign the agreement subject to acceptance or ratification by the employees" and at conclusion of this session union "said the contract isn't acceptable to us, but we will take it to a vote"); *Seneca Environmental Products*, supra at 628–629, 631 ("ratification, to be a condition precedent to a collective-bargaining agreement, must be agreed upon in express words and not merely implied"); *Martin J. Barry & Co.*, supra.; *C & W Lektra Bat Co.*, supra at 1039 ("There is no evidence that the parties agreed in express words to such a condition [of contract ratification]").

[11] It is notable that not one word was uttered by either party to the other regarding ratification during approximately 20–25 bargaining sessions over the course of 11 months, until a*fter* the union accepted (and signed off) on the Respondent's complete proposal for a new collective-bargaining agreement. The prior written references to ratification were inadequate to create a binding agreement on ratification. As to two of them—the one in the 18-page July 2007 letter summarizing bargaining, and the one attached to NPS's opening bargaining proposals on October 2006—they were simply NPS proposals and there is no evidence they were accepted. Neither is reflected in the final proposal accepted by the Union. The third reference to ratification is contained in the wage provision of the tentative contract but this reference, by its terms, does not establish ratification as a condition precedent for enactment of the overall agreement, as it applies only to wages, and even as to that, it is ambiguous as to whether ratification is required.

If agreement on ratification is to be found the focus must be on the verbal exchange between negotiators *after* the Union accepted the contract proposal, when NPS negotiator Oesterle declared that he would sign the contract after ratification. Even indulging the inference that this meant, and was understood as meaning, he would sign the agreement "*only* after ratification," the Union's response strikes me as less than adequate to constitute an acceptance that, by purporting to render ratification a condition precedent to the formation of an agreement, necessarily *annulled* the binding agreement reached just seconds before by the parties. Clearly, had the Union objected to NPS's insistence on delaying signing until after ratification, and demanded that the employer sign the agreement immediately, it would have been an unfair labor practice for NPS to refuse. But while the Union's failure to expressly refuse may alleviate any contention that the Respondent unlawfully conditioned execution of an agreement already accepted on the Union's acceptance of a nonmandatory condition, the failure to expressly object does not convert the Union's preexisting intention to seek ratification of the contract—pursuant to its procedures—into an express agreement that ratification was now a condition precedent for the reaching of a binding agreement. A "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1989). In this case, what the parties said to each other seems inadequate to constitute an express bilateral agreement to ratify. See *C & W Lektra Bat Co.*, supra (cautioning with respect to claims of a ratification agreement: "We are unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment"). The Union was already intending to commit the matter to its internal processes regardless of whether or not the employer mentioned ratification. For that reason alone there was no reason for it to object to NPS's untimely demand for ratification. Given that, it is hard to see that the Union's response to the Respondent's sudden demand—"we would like to vote the contract today"—indicates an agreement to add a condition precedent of ratification, in a very real sense undoing the binding agreement already reached between the parties. Under the circumstances, the Union's response to the employer's refusal to sign the agreement can most reasonably be understood as simply a determination to continue on the ratification path it was planning to pursue anyway: unilaterally seeking ratification as a prelude to requiring Employer performance under the agreement. The union "agreed" only in that sense. Notably, the Board has refused to find ratification a condition precedent for contract formation in strikingly similar circumstances. See *Zayre Department Stores*, 289 NLRB 1183 (1988).

Perhaps the strongest point for Respondent is that union negotiator Chaszar agreed on cross-examination that when the Union accepted NPS's proposal he was "accepting the Company's notion that it would have to be ratified." Chaszar also answered "yes" when asked if there was any language in the contract that required it to be ratified. And he also was willing to agree on cross-examination that he agreed to have the contract ratified. I note only that in the context of the entire record, and in particular in context of what the record demonstrates objectively transpired at the bargaining table and what is objectively contained in the written proposals and documents, Chaszar's testimony finds little to no objective support.

make "ratification" a condition precedent to the Union's acceptance of the contract, the outcome in this case is clear.

The Employer does not have standing to challenge the method or mechanics of the Union's ratification process because it did not bargain for an agreement on the methods or mechanics of the ratification process. As the Board recently explained with regard to employee ratification, "even if such ratification were a condition precedent, Board law is clear that the Respondent does not have standing to challenge the Union's ratification process." *Valley Central Emergency Veterinary Hospital*, supra at 1127. Precisely because the "method of contract ratification was within the Union's exclusive domain and control" an employer's refusal to honor a contract based on objections to the ratification process is unlawful.[12]

This is not to say that an employer, such as NPS, which has entered into an agreement making ratification a precondition to contract formation, is without standing to object (and refuse to sign the contract) if the union fails to undertake any ratification process. See, e.g., *Hertz Corp.*, 304 NLRB 469 (1991) (union repudiated ratification agreement with employer and engaged in no ratification process, and therefore employer's refusal to execute agreement was not a violation of the Act). But an employer's right to take issue with a union's compliance with a bilateral agreement to ratify is limited to those instances where a union has reneged and not undergone a ratification procedure. The employer does not have standing to object to the ratification procedures chosen by the union where the employer has not bargained for an agreement regarding the procedures to be utilized.

In this case, assuming an agreement between the parties to ratify, there was no agreement, or even discussion, on the voting methods or process which the Union was required to undertake. The Employer could have tried to bargain for any or all manner of ratification requirements and procedures. It did not. In the absence of any negotiated agreement on how the Union would ratify the agreement, the Union was left with the discretion to carry out the ratification as it saw fit. That is, in effect, the default position for Federal labor policy, and it is altered only to the extent the Union has expressly bargained away its right to structure its internal relationship with employees and the right to conduct ratification in accord with its discretion as the employees' representative. Unions choose to approve and sanction contracts in a myriad of ways unobjectionable to Federal law and policy. The IAM's process, whatever the arguments in its favor or against it, is not a unique, dubious, or legally controversial process.[13] The IAM's process is obviously designed to avoid rejection of tentative agreements where the membership is unwilling to support a strike in numbers strong enough to give the Union the bargaining power the Union believes it needs to change the employer's position. It *is* an employee ratification process, involves employees voting twice, and it does give employees as a group the opportunity to decide whether to accept the contract. But it is a process designed by

[12] Id. (summarizing and quoting from *Childers Products Co.*, 276 NLRB 709, 711 (1985), review denied mem. 791 F.2d 915 (3d Cir. 1986)); *Newtown Corp.*, 280 NLRB 350, 351 (1986) ("even if ratification were a precondition, we find that Respondent has no standing to question the validity of the procedures used by the Union in ratifying the agreement. It is well settled that ratification is an internal union matter which is not subject to question by an employer. Here, there was a meeting at which a vote was taken, and the Union concluded that the meeting and vote met its standards for a valid ratification vote. . . . Respondent may not raise questions concerning the Union's internal procedures in order to avoid its obligation to sign the agreed-upon contract") (quoting *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979), enfd. 819 F.2d 677 (6th Cir. 1987)). "Whether the ratification process is fair and proper, is not relevant to the question of the existence of an agreement. What is relevant is what the union tells the employer about ratification. . . . '[W]henever a labor organization gives notice to an employer that their agreement has been ratified by the employees, that notice signifies acceptance of the rights and duties arising under that agreement and, in turn, the statutory obligation arises to execute a written contract embodying that agreement.'" *Teamsters Local 589 (Jennings Distribution Inc.)*, 349 NLRB 124, 129 (2007) (fn. omitted) (quoting *Teamsters Local 662 (W. S. Darley & Co.)*, 339 NLRB 893, 899 (2003), enfd. 368 F.3d 741 (7th Cir. 2004)).

[13] Union practices run the gamut, but procedures substantially similar to those utilized by the Union in this case can be found at other unions and other IAM lodges. See, e.g., *Paperworkers (International Paper)*, 295 NLRB 995, 1001–1002 (1989) ("A collective bargaining agreement must be ratified and approved by a majority of the members covered by said agreement present and voting on the question by secret ballot before the same shall be executed on behalf of the union . . . should a vote for ratification of a contract fail to yield a majority vote as required for acceptance by this Constitution and then fail to yield the two-thirds (2/3) majority vote necessary for strike sanction, the local or multiple so affected shall be considered to have accepted the labor agreement"); *Zayre Department Stores*, 289 NLRB 1183, 1185 (1988) ("In the event of rejection of the employer's proposal judged by the Local Union President or negotiating committee to be the employer's final proposal for a collective bargaining contract or renewal of an existing contract and the failure of the affected membership of the Local Union to approve a strike or other economic action by a two-thirds vote, the Local Union Executive Board shall, after notifying the International President and receiving acknowledgment of such notice, have authority to accept or reject such offer"); *Childers Products Co.*, 276 NLRB 709, 710 (1985) ("A bargaining committee made up of bargaining unit employees and union representatives negotiate with the employer for an agreement. When, in the committee's estimation, the best agreement has been reached, the bargaining unit members of the committee are instructed to go back to the other employees, inform them that an agreement has been reached and that a meeting will take place at a certain place and time and when the contract will be presented to them. A meeting is held, the Union reads the contract to the bargaining unit employees and they vote on it. If a majority of the employees vote to ratify the contract it is approved and the employer is instructed to put the agreement into effect. To authorize a strike, the employees must vote the contract down by two-thirds of those present and voting. If two thirds of the employees do not vote to strike, and a majority of the employees do not vote to accept the contract, the contract is presented to the executive board, which then votes on whether or not to accept or reject it. If, in the executive board's opinion, the contract is the employer's final offer, the executive board is obligated to accept the offer. A strike vote may be taken separately or may be accomplished in the vote on whether or not to accept the contract"); *United Technologies Corp.*, 274 NLRB 609, 610 (1985) (other IAM lodge: "At that meeting the Union presented only the 2-year option to the membership. The employees voted against accepting the 2-year option. However, as provided by the Union's bylaws, since a two-thirds majority did not authorize a strike, the Respondent's 2-year offer was automatically accepted").

the Union to meet the tactical and strategic concerns of the union. There is no evidence that the Union utilized a ratification process designed to thwart, escape from, or defeat the agreement reached with the Employer. Rather, it utilized its longstanding ratification process, which did not violate any aspect of its ratification agreement with NPS. There was no discussion between the parties, much less agreement, on whether the ratification would consist of a vote of all employees, or just union members; whether tabulation would be based on those voting, or on the bargaining unit as a whole, or union members. There was no discussion, much less agreement, on whether "ratification" would involve one straight up or down vote by those at the meeting or whether the contract would be accepted or rejected based just on that vote. The fact is there is *no* evidence that the Union and Employer discussed or agreed on any particular form of ratification, "let alone by a majority or even a representative employee group. . . . Thus, if there were any agreement on the part of the Union with respect to employee ratification, it could have extended no further than an undertaking on its part to comply with its internal union procedures and requirements relating to ratification." *North Country Motors Ltd.*, 146 NLRB 671, 673 (1964); *Beatrice/Hunt-Wesson*, supra at 224 fn.1 (distinguishing *Childers*, supra, where "unlike here [in *Beatrice/Hunt-Wesson*] the parties "never established during negotiations what the union meant by 'ratification' . . . [t]herefore, the method of ratification was left for the union to determine").

As explained by Judge Nations in *Childers*, supra at 711, in reasoning adopted by the Board and controlling here:

> In this proceeding, though the contract stated that it was "Subject to ratification," there was no requirement that employees of the Employer ratify the contract. The condition precedent of "ratification" means as defined by the Union in its internal procedures. There was no understanding established by the parties during negotiations concerning what the Union meant by ratification. I find, therefore, that the method of ratification was within the Union's exclusive control and domain and that the Union reasonably interpreted its constitution and bylaws concerning ratification and acted in accordance with them. . . .
>
> A union does not automatically assume the obligation of obtaining ratification of a contract negotiated on behalf of employees. If it does, however, 'it is for the Union, not the employer to construe and apply its internal regulations relating to what would be sufficient to amount to ratification. Although I found in the preceding section of this decision that the Union has properly interpreted and followed its internal procedures, and has thus ratified the contract in question, I further find that Respondent has no standing to question the procedure and that the method of contract ratification was within the Union's exclusive domain and control. Thus, by ignoring the Union's [ ] instruction to put the contract into effect and conditioning acceptance the contract on employee ratification, Respondent has violated Sections 8(a)(1) and (5) and (d) of the Act.

See also *West Co.*, 333 NLRB 1314, 1315 fn. 6, and 1320 (2001) ("we agree with the judge, for the reasons set forth by him, that it is for the Union to construe and apply its internal regulations relating to what would be sufficient to amount to ratification"; ALJ ruling: "even if the offer had been preconditioned upon ratification, it would be inappropriate to permit litigation of the Union's adherence to its internal procedures in conducting the vote. The Respondent has no standing to question the validity of the procedures used by the union in ratifying the agreement").

NPS's position is that once it is conceded that the parties agreed to "ratification," the employer is graced with standing to argue whether that ratification meets standards the employer finds reasonable, desirable, or advantageous, but for which the employer failed to expressly bargain. I think this is a key error. The Federal labor policy disfavoring employer interference in the relationship between employees and their collective-bargaining representatives does not evaporate by virtue of an agreement between the employer and union that there will be "ratification" of a contract. A union entering into such an agreement is bound to engage in a ratification process to render the contract effective—it cannot eschew ratification entirely, as the union did in *Hertz Corp.*, supra—but the union still maintains control over that process unless the process it utilizes runs afoul of an express agreement between the employer and union. A contrary holding would eviscerate Federal labor policy's concern with union independence and lead, as it does in this case, to the spectacle of an employer that bargained for "ratification" scouring union documents and literature (R. Br. at 10–12, 25–26) for statements that support its claim that the union did not comply with its own procedures or carried out ratification in a manner that does not meet standards the employer would impose. Such contentions, and indeed, the Employer's entire argument, reveal the thorough interference with internal union matters to which the NPS position inexorably leads. Federal labor policy foresees the problem and Board precedent has dealt with it. Whether cast as an issue "involving the voluntary waiver of a union's statutory rights—the evidence of which [must] be clear and unmistakable,"[14] or simply as a way of preserving union autonomy in internal affairs and discouraging employer interference in the union-employee relationship,[15] the right of the employer to challenge and dictate ratification procedure is strictly confined to the procedures conceded by the union to the employer through agreement.

This point may be seen in operation in the Board cases on which NPS relies the most. Thus, in *Hertz Corp.*, the union, after agreeing to ratification held none—no vote or process at all. Similarly, in *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991), allegations similar to those at issue here were dismissed against an employer. In that case, the Board relied upon a memorandum of agreement executed by the parties to find that the employer and union explicitly agreed as a condition precedent that the tentative contract would be recommended to "the

[14] *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB at 226 (Chairman Stephens concurring) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)).

[15] *Borg-Warner Corp.*, supra.

members of the bargaining unit for ratification as soon as possible." 302 NLRB 224 fn. 1, and 228 fn. 3. After the bargaining unit employees repeatedly rejected the proposed contract, "the Union obtained what it considered to be adequate ratification from a vote of the union members, which actually consisted of just one individual." 302 NLRB at 224. (Chairman Stephens concurring). The point of *Beatrice/Hunt Wesson*—both the majority and concurrence—was that the union and employer negotiated for a specific set of employees—the members of the bargaining unit and not just union members—to ratify, and the union abandoned that negotiated requirement. The Board in *Beatrice/Hunt-Wesson*, distinguished *Childers*, supra, where, although the agreement stated "THIS AGREEMENT SUBJECT TO RATIFICATION," the parties did not discuss the meaning of the ratification language:

> "[T]he employer and union in *Childers* never established during negotiations what the union meant by 'ratification,' nor did they even discuss ratification during their negotiations. Therefore, the method of ratification was left for the union to determine. In contrast, the Respondent and Union here agreed that ratification by bargaining unit members was a precondition to the contract and discussed the ratification process. Thus, ratification was clearly defined and not left to the Union's internal procedures.

In his concurrence in *Beatrice/Hunt-Wesson*, Chairman Stephens made this point separately, approvingly citing a General Counsel Advice memorandum, *Nichols Homeshield*, Case 18–CA–8439 (1983) (available on Lexis at 1983 NLRB GCM Lexis 78), where

> The employer and the union had initially reached agreement on all terms and conditions of employment, subject to ratification. However, the employer then proposed, and the union acquiesced in, a revision that called for participation by both union members and nonmembers in the ratification vote. *The General Counsel noted that because nothing at first was said as to who would participate in the vote, the issue normally would be an internal matter that the union could resolve unilaterally.* But the General Counsel then concluded that the evidence of a subsequent agreement on full employee participation was clear enough, and the employer could refuse to execute as long as ratification was not conducted in accordance with the parties' agreement.

Beatrice/Hunt-Wesson, supra at 226 fn. 14 (emphasis added). Thus, Chairman Stephens endorsed the view that an undefined agreement to ratify leaves to the union the unilateral discretion on the methods and procedures of that ratification. That discretion is narrowed only and to the extent that the parties agree to specific rules or procedures for that ratification. In this case, the parties' agreement did not prescribe the ratification procedures, and NPS has no standing to challenge the methods utilized by the Union.[16]

The Employer offers two further closely related arguments. NPS contends that the agreement to "ratify" *is* an agreement to use the ratification procedure preferred by Respondent: namely an up or down vote by the bargaining unit employees on whether a majority (presumably a majority of those voting, and not a majority of those in the unit, although this is not clear) support or reject the contract. NPS contends that "'[r]atify,' when used in the field of labor relations has a generally prevailing meaning of a vote in favor by a majority of bargaining unit members" and that "the Union had every reason to know that this was the meaning the Employer attached to it" (R. Br. at 23). Under this view, NPS has standing to challenge the Union, for it is only enforcing the agreement it reached with the Union on ratification.

However, there is no basis for Respondent's view that an agreement to ratify *must* mean, or *must* be interpreted to mean, ratification as envisioned by the Respondent. It is not that NPS's preferred ratification process is unreasonable. It is just not self-evident, and, indeed, it is contrary to the way the IAM and other unions proceed. The word "ratification" itself means to "approve and sanction" (Webster's Third New International Dictionary (1986)) and, as noted, supra, unions choose to approve and sanction contracts in a myriad of ways. As discussed, the IAM's procedure is a ratification procedure, involving multiple votes by employees, weighted toward acceptance of the contract unless a supermajority is willing to strike in support of a better proposal. NPS cannot impose its model of ratification on the Union by claims that the Union should have known what it meant.

Finally, as a corollary of its argument, NPS contends that since it claims it intended ratification to mean an up or down vote by employees, if the Union did not, there was no "meeting of the minds" and, therefore, no contract. This is entirely unpersuasive. First, for the reasons discussed, supra, I do not credit the claims of Hartz, for which no objective support exists, that throughout negotiations, his unexpressed understanding of the Employer's intent was that it was proposing the particular form of ratification it now seeks to impose as a condition precedent to contract formation. However, even if that were his (and Oesterle's) unexpressed view, as referenced above, a

[16] NPS also argues vigorously that a General Counsel internal Advice memorandum, *Machinists Lodge 1746 (United Technologies Corp.)*, Case 39–CB–761 (December 20, 1985) (available on Lexis at 1985 NLRB GCM LEXIS 90), supports its position. It does not, and not just because Advice memoranda do not constitute Board precedent. *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992), enfd. w/o op. 9 F.3d 108 (6th Cir. 1993). In *Machinists Lodge 1746*, the General Counsel's Division of Advice counseled against prosecuting an IAM local, which utilized the same ratification process at issue here, but then refused to sign the agreement after the employees did not vote to accept the contract and did not vote to strike. This, the employer contended, was at odds with the union's longtime practice and, the employer argued, the IAM should be required to execute the contract in accordance with its longstanding ratification process. The General Counsel's Division of Advice recommended dismissal, precisely because "it does not appear that the parties ever expressly agreed that a vote by members to reject an offer but not to strike automatically created a contract." In truth, the case is more inapposite than contradictory of Respondent's position, since in *Machinists Lodge 1746*, there was no condition precedent which the union was bound to undertake before accepting the contract. But more generally, the case affirms the extent of union discretion in carrying out and implementing ratification procedures in the absence of an express agreement between the parties as to the precise methods and procedures required.

"meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1989). Or, as the Board has recently explained, "[t]he expression 'meeting of the minds' is based on the objective terms of the contract, not on the parties' subjective understanding of those terms." *Winward Teachers Assn.*, 346 NLRB 1148, 1150 (2006). The expression is a misnomer to the extent it is used to suggest that for there to be a contract that "both parties have an identical understanding of the agreed-upon terms." Id. "Where the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract." Id. As the Board has repeatedly explained, the "subjective understandings or misunderstandings as to the meaning of terms which have been agreed to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard." *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985).

The Board's recent decision in *Winward Teachers Assn.*, supra, is instructive. In that case, the parties negotiated language stating that "[t]he School has the right to pay bonuses without Union approval." Subsequently, the union refused to execute the contract, contending that this language did not adequately describe its understanding, which included the additional requirement that the bonuses the school had a right to pay be disbursed in a manner that was "fair and equitable and across the board." The Board rejected the union's contentions, holding that "[w]here the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract." 346 NLRB at 1150.

Similarly, in the instant case, assuming an agreement to "ratify" or for "ratification" of the contract involving voting, nothing more than that was stated or written, much less agreed. That the Union and NPS have different ways of carrying out a ratification is without consequence for the issue of whether an agreement was reached. Assuming there was an agreement to make "ratification" a condition precedent, it is binding, and the Employer may not rely on varying subjective understandings of what "ratification" should entail to void the agreement.[17]

The Respondent and the General Counsel contend that NPS and the Union bargained for "ratification." They got it. That it does not match what the Employer wishes it had bargained, or hoped it would get, is of no consequence to its obligation to execute and adhere to the collective-bargaining agreement reached with the employees' designated representative.[18]

CONCLUSIONS OF LAW

1. Respondent New Process Steel, LP is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party District Lodge 34, International Association of Machinists and Aerospace Workers, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since August 25, 2006, the Union has been the certified exclusive collective-bargaining representative of a bargaining unit of Respondent's employees composed of

> All full-time and part-time production and maintenance employees employed by Respondent at its Butler, Indiana facility, but excluding all office clerical employees, professional employees, sales representatives, managerial employees, team leaders, guards, supervisors as defined by the Act, and all other employees.

4. Respondent and the Union entered into a collective-bargaining agreement effective by its terms August 12, 2007.

5. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to adhere to and repudiating its collective-bargaining agreement with the Union.

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

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must, upon request of the Union, adhere to the collective-bargaining agree-

[17] The instant case offers an instructive contrast with the ALJ's decision in *Teamsters Local 926 (Penske Truck)*, Case 6–CB–11383 (September 4, 2007) (available on the NLRB website), cited by NPS. There, the General Counsel failed to show a meeting of the minds between the parties on a key issue in negotiations—the staffing of a newly created position—which had been discussed, but as to which there had been neither oral agreement nor any language in the written agreement pertaining to the issue. It was not that the parties held subjectively different views on the meaning of an oral or written agreement on the issue, rather, there was nothing agreed to on the key issue. That is decisively different than the NPS's claim here, where it insists that the parties agreed to ratification, but then claims no meeting of the minds because the parties had different subjective views on the best way to conduct a ratification.

[18] Throughout its brief and at trial, NPS suggested that its stance on ratification was a product of its concern with employee rights, and an awareness of the potential for decertification of the union as the employees' representative. As the United States Supreme Court has warned, in the context of an employer seeking to withdraw recognition from a union based on its perception of the employees' lack of support for the union: "[t]he Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). In this case, as in *C & W Lektra Bat Co.*, supra, the employer's motive for its commitment to a version of ratification that the union cannot meet is obvious, if not directly relevant to the 8(a)(5) issue at stake. As the Board recognized in *C & W Lektra Bat Co.*:

> "The facts Respondent knew of the Union's membership problems; had received a petition by the employees to oust the Union; had heard 'rumbles' about employee dissatisfaction . . . and knew the Union's certification year expired [soon], all tend to suggest that Respondent was more interested in getting rid of the Union than in obtaining any legitimate benefit for itself in having the contract ratified and, indeed that insistence on ratification . . . was intended toward this end." 209 NLRB at 1039.

Here, as in *C & W Lektra Bat Co.*, the employer's interest in removing the union is not directly at issue, but serves as a rejoinder to the concern for employee rights with which it vests its position.

ment reached with the Union, restoring and giving effect to its terms retroactive to August, 12, 2007, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, Respondent must bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.

Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of Respondent's repudiation of and refusal to adhere to the collective-bargaining agreement, to be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest on all sums shall be computed as prescribed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[19]

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 25 for the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 2007.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, New Process Steel, LP, Butler, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and refusing to adhere to the collective-bargaining agreement reached with the Union and effective by its terms August 12, 2007.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Upon request of the Union, adhere to the collective-bargaining agreement reached with the Union, restoring and giving effect to its terms retroactive to August, 12, 2007, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.

(b) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings and other benefits suffered as a result of Respondent's repudiation of and refusal to adhere to the collective-bargaining agreement reached with the Union and effective by its terms August 12, 2007.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available at a reasonable place designated by 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, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Butler, Indiana, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since September 11, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C. May 1, 2008

[19] The remedy and recommended Order shall not include direction to Respondent to reimburse the Union for dues lost on account of Respondent's failure and refusal to honor the collective-bargaining agreement, as the agreement contains neither a dues-checkoff provision nor any requirements related to union membership.

[20] 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.

[21] 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."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate or refuse to adhere to the collective-bargaining agreement reached with the Union and effective August 12, 2007.

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

WE WILL, upon request by the Union, adhere to the collective-bargaining agreement reached with the Union and effective August 12, 2007, giving effect to its terms retroactive to August, 12, 2007, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, we will, upon request, bargain with the Union and embody any understanding reached in a signed agreement.

WE WILL make all affected employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our repudiation of and refusal to adhere to the collective-bargaining agreement reached with the Union and effective August 12, 2007.

NEW PROCESS STEEL, LP