STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| UNITED STEELWORKERS OF AMERICA, AFL-CIO,<br><br>Complainant,<br><br>vs.<br><br>EGA PRODUCTS, INC.,<br><br>Respondent. | : | Case 5<br>No. 38543 Ce-2058<br>Decision No. 24555-A |

Appearances:

Mr. Robert Glaser, Assistant Director, District No. 32, United Steelworkers of America, 615 E. Michigan Street, Suite 205, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Mr. Russ Mueller, Attorney at Law, 759 N. Milwaukee Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

United Steelworkers of America, AFL-CIO, filed a complaint on March 13, 1987 with the Wisconsin Employment Relations Commission alleging that EGA Products, Inc., had committed unfair labor practices within the meaning of Sec. 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act, herein WEPA, by refusing to comply with an arbitration award. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was initially set for July 20, 1987 but was rescheduled at the Union's request. Thereafter, a hearing was held in Brookfield, Wisconsin, on August 12 and 13, 1987 at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs, and the record was closed on October 7, 1987. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

## FINDINGS OF FACT

1. That United Steelworkers of America, District No. 32, AFL-CIO, hereinafter referred to as the Union, is a collective bargaining representative within the meaning of Sec. 111.02, Stats., and has its principal office at 615 E. Michigan Street, Suite 205, Milwaukee, Wisconsin 53202.

2. That EGA Products, Inc., hereinafter referred to as the Employer or Company, is an employer within the meaning of Sec. 111.02, Stats., and has its principal office at P.O. Box 366, 4275 North 127th Street, Brookfield, Wisconsin 53008-0366.

3. That at all times material to this proceeding, the Union and Employer were parties to a collective bargaining agreement providing for the final and binding arbitration of grievances arising thereunder; that the Union filed a grievance in March, 1986 over the Employer's unilateral changing of the group medical insurance carrier from Blue Cross to Fireman's Fund and seeking a reduction in the deduction for the employes who previously had HMO coverage; and that the grievance was processed through the grievance procedure to arbitration.

4. That Arbitrator Lionel L. Crowley issued an award on October 16, 1986 in that matter wherein he stated the issue before him as follows:

> Did the Employer violate the parties' collective bargaining agreement by unilaterally changing the insurance carrier to Fireman's Fund with the consequence that its contribution to HMO insurance did not change? If so, what remedy is appropriate?;

that Arbitrator Crowley in rendering his award noted:

> Article XVI, Section 1(a) of the parties' agreement provides that: "The Company shall continue to make available to its regular employees Blue Cross Co-Pay Plan, Series 2000, group insurance." This language is clear and unambiguous and requires the Employer to continue with Blue Cross unless and until the parties mutually agree to a different carrier. (citation omitted) The evidence indicated that while the parties attempted to meet to discuss the change in carriers, no meeting took place and the Union informed the Employer that it reserved the right to grieve any action taken by the Employer with respect to a change in carrier. The Employer unilaterally changed the carrier effective March 1, 1986 to Fireman's Fund. The Employer argues that the Union has waived the right to contest the change or has acquiesced in the change because it is not seeking a return to Blue Cross as the carrier. The mere fact the Union is not seeking a certain remedy does not mean it has acquiesced in the change. For example, if an employe was discharged without just cause or laid off out of the line of seniority in violation of the agreement, but had found a different job and did not seek reinstatement but merely back pay, the remedy sought would not establish that the employe or union acquiesced in the discharge or layoff. Therefore, it is concluded that the Union did not waive its right to contest the change in carrier. It clearly indicated that it would grieve the Employer's action and did so. Inasmuch as the Employer changed the insurance carrier without the agreement of the Union, the Employer has violated the express language of Article XVI, Section 1(a).

> Having concluded that the Employer violated the terms of the agreement, the next issue is what remedy is appropriate. The Union seeks the amount that the Employer would have contributed under the Blue Cross Plan be contributed to the HMO insured employes. Article XVI, Section 1(b) provides that the Employer contribute to the HMO the same amount it contributes to the group insurance plan. It does not provide the express reference to Blue Cross as does Section 1(a). Here, the agreement limits the contribution to that contributed under the group insurance plan. The undersigned finds that this amount would be that contributed to Fireman's Fund as long as that is the group plan. To do as the Union requests would ignore this express provision and would require the Arbitrator to add to or modify the terms of the agreement which is prohibited under Article XXI, Section 4(b). Therefore, the remedy sought by the Union cannot be awarded.

> Because the Employer has violated the agreement, there must be an appropriate remedy, otherwise the Employer would violate the agreement at will. It is axiomatic that the parties must live up to the terms of the agreement that they have voluntarily entered into. The undersigned is of the opinion that the only appropriate remedy for this breach would be to return to the status quo, in other words, to reinstate the Blue Cross insurance. The undersigned recognizes that the Union does not seek this relief but this relief is within the Arbitrator's authority and is what the parties bargained for, and apparently is still available. (citation omitted) The undersigned also recognizes that some employes may lose a benefit while others gain a benefit, but that is what was bargained, and it is up to the parties to negotiate a different result based on the equities desired. Finally, this remedy may be harsh on the Employer but it was the Employer that violated the agreement and it must accept the consequences of its conduct. The undersigned cannot dictate new terms for the contract in an attempt "to

unscramble the egg" on this matter, but can and will offer the parties the opportunity to try to work this out to the satisfaction of both. Accordingly, I will retain jurisdiction in the matter for 30 calendar days from the date of this award so the parties may negotiate a settlement of the remedy for the Employer's improper change in carrier. If the parties cannot reach a disposition in this period, the undersigned will then award what is determined to be the appropriate remedy.;

that the Arbitrator made the following award:

AWARD

The Employer violated Article XVI, Section 1(a) of the parties' collective bargaining agreement by unilaterally changing the insurance carrier to Fireman's Fund with a consequence that its contribution to the HMO insurance plan did not change. The parties are directed to negotiate on the remedy for this breach within the next 30 days. The undersigned will retain jurisdiction such that if the parties fail to reach an agreement on remedy within the 30 day period, the undersigned will make an award as to the appropriate remedy in this matter.;

that the parties met on November 6, 1986 pursuant to the above directive to negotiate on the remedy, but were unsuccessful in reaching agreement; and that this caused the Arbitrator on November 14, 1986 to issue the following supplemental award with respect to remedy:

AWARD

The Employer shall immediately make available to its regular employes, Blue Cross Co-Pay Plan, Series 2000 as its medical insurance carrier pursuant to Article XVI, Section 1 (a) of the agreement and shall immediately pay the appropriate contribution to the HMO pursuant to Article XVI, Section 1(b) based on the reinstated Blue Cross premiums.

5. That after the Company received the above Award, Company President Walter Young contacted the Company's insurance agent, Thomas Kirchen, who was then vacationing in Florida, and told him that the arbitration award just rendered required the Company to reinstate the Blue Cross Plan; that Kirchen indicated he would have his secretary begin the process to accomplish this, and that her efforts produced a letter from Blue Cross to Kirchen dated November 24, 1986, which stated as follows:

EGA (P)roducts currently has 2 options regarding Blue Cross & Blue Shield health insurance products. They can enroll in our HMO's (Compcare & Centurion) or select Blue Cross coverage at the renewal rates, up to 3/1/87.;

that after returning from Florida, Kirchen called Young on November 26, 1986, and related the contents of the Blue Cross letter; and that either on that same date or on December 1, 1986, Kirchen delivered to Young the above Blue Cross letter and about 20-30 subscriber applications to the Blue Cross Co-Pay Plan.

6. That having received this information from Blue Cross & the Co-Pay Plan applications, Young had a meeting with all the bargaining unit employes on December 1, 1986; that at this meeting, Young told the employes that the Company had been ordered by the Arbitrator to reinstate the Blue Cross Co-Pay Plan; that Young also told the employes at this meeting that he thought it was foolish to go back to the Blue Cross program because it would cost everybody more money, that everybody had been unhappy with the Blue Cross program, that there had been past poor experience with Blue Cross with regard to claim processing, and that there had been news reports concerning the poor financial condition of Blue Cross; that for these reasons, Young told the employes he favored keeping the existing Fireman's Fund insurance program; that Young also said at the meeting that he was not for HMO's; that Young said he thought everybody knew how he felt (on the insurance matter) following the meeting; that after Young had made these

statements, he asked if any of the employes wanted a Blue Cross application form, and only one employe, Larry Henderson, responded affirmatively; and that Young requested Henderson to sign the application or return it to him, and that Henderson returned a blank form to Young.

7. That following the meeting, Young and Dan Johnson, Manufacturing Manager, prepared and posted the following:

EMPLOYEE NOTICE

> A meeting was held on December 1st with all employees to explain the arbitration decision that had been issued directing the Company to make available the Blue Cross Co-pay Plan Series 2000 to its regular employees.
>
> The Employees were asked to sign up for this program on application blanks for Blue Cross, which were available to the employees at that meeting.
>
> By this notice and the above mentioned meeting the Company has complied with the arbitrator's decision.
>
> Effective December 4, 1986, after a 3 day opportunity to apply, the Company will either revert to Blue Cross, if we have applicants; or, will continue with the existing plans because of no applicants or interest in the Blue Cross plans, and its obligation will be considered completed.;

that the above Notice was posted on December 1 and remained posted for three days until December 4, 1986; and that no employes signed up for the Blue Cross Plan during this period.

8. That the Company did not reinstate or implement the Blue Cross Co-Pay Plan following the receipt of the Arbitrator's Award because no employes signed up for it; and that Blue Cross would have implemented the Co-Pay Plan for the Company in November, 1986.

9. That as part of its market research for possible insurance carriers for the March, 1987 to March, 1988 insurance contract year, the Company had Kirchen solicit Blue Cross in February, 1987 for premium quotations for the Co-Pay Plan, and that Blue Cross refused to quote the insurance to the Company at that time.

10. That by making the Blue Cross Co-Pay Plan available to its regular employes during the first week of December, 1986, the Company complied with the first part of the November 14, 1986 Supplemental Award of Arbitrator Crowley; and that no employes having chosen to participate in said Plan, the Company was not obligated by the second part of the Arbitrator's Supplemental Award to base its HMO contributions on the Blue Cross premiums.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That the Company has complied with the November 14, 1986 Supplemental Arbitration Award issued by Arbitrator Crowley, and thus has not committed an unfair labor practice within the meaning of Secs. 111.06(1)(f) or (g), Stats.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

## ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 16th day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

EGA PRODUCTS, INC.

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

### BACKGROUND

In its complaint initiating these proceedings, the Union alleged that the Employer committed an unfair labor practice in violation of Secs. 111.06(1)(f) and (g) by refusing to comply with the November 14, 1986 Supplemental (Arbitration) Award issued by Arbitrator Crowley. The Employer answered the complaint by denying any statutory violations and alleging that it had made a good faith effort to comply with the Award, but that it was impossible to do so due to circumstances beyond its control.

### THE PARTIES' POSITIONS

The Union contends that the Company has failed to comply with the Supplemental Award. With respect to the first portion of the Supplemental Award directing the Company to make the Blue Cross Plan available to its employes, the Union acknowledges that the Company offered the Blue Cross Plan to employes as directed. According to the Union though, the Company's actions in offering the Plan to employes did not meet the Arbitrator's Award, and certainly not the spirit and intent of the Award, because at this meeting Company President Young strongly expressed dissatisfaction with Blue Cross and HMO's, and satisfaction with the existing Fireman's Fund insurance. The Union focuses primary attention on the second portion of the Supplemental Award dealing with the HMO contribution rates. It argues that the Arbitrator clearly intended that the Company's HMO contribution should be based on the Blue Cross rates, even if the employes did not pick the Blue Cross Plan. Since the Company has not done so, the Union asserts the Company has failed to comply with that portion of the Supplemental Award. It therefore requests that the Company be ordered to comply with the Supplemental Award and base its HMO contribution on the Blue Cross rates.

It is the Company's position that it has complied with the Supplemental Award by having offered and made the Blue Cross Co-Pay Plan available to the employes during the first week in December, 1986. It argues that since none of the employes chose to enroll in that Plan, it could not be reinstated; consequently the Award's contingent requirement to base the HMO contributions on "the reinstated Blue Cross premiums" need not be executed. The Company asserts that the Union's more expansive reading of the Award to require either that the Plan be reinstated or that the HMO contribution formula be determined by Blue Cross Co-Pay premiums is without merit because (1) as just argued, the Company has complied with the Award; (2) Arbitrator Crowley rejected the Union's position in his October 16 Award; and (3) any non-contingent duty that the Company can be said to have had under the Award to reinstate the Blue Cross Co-Pay Plan has been relieved by the doctrine of Impracticability of Performance and Frustration of Purpose (which doctrine excuses performance of a contractual obligation when the subject matter of the contract is frustrated by a supervening event, not forseeable, without fault of the parties). The Company asserts that the two supervening events which frustrated the Company's reinstatement of the Blue Cross Plan were the failure of any employes to enroll or participate in the Blue Cross Plan and the refusal by Blue Cross/Blue Shield to bid on the placement of the medical insurance in February, 1987. According to the Company, these circumstances have

contractual breach by (1) making the Blue Cross Co-Pay Plan available to its employes as their medical insurance carrier; and (2) paying the appropriate HMO contribution based on the reinstated Blue Cross premiums. An examination of whether the Company has complied with each of these directives follows.

The record indicates that the Company offered the Blue Cross Co-Pay Plan to bargaining unit employes in the following fashion. On December 1, 1986, the Company held an employe meeting wherein Company President Young advised the employes that the Company had been ordered by the Arbitrator to make the Blue Cross Plan available to them. At this meeting, Blue Cross application forms were made available to the employes to take and fill out. After this meeting, the Company posted a notice advising employes they had three working days (until December 4) to apply for the Blue Cross Insurance, and if employes did apply for that coverage, then the Company would revert to Blue Cross; if there were no applicants for the Blue Cross Plan though, then the Company would continue with the existing (Fireman's Fund) insurance carrier and plan. It follows from these events that the Company did, in fact, make the Blue Cross Plan available to bargaining unit employes following the Arbitrator's Supplemental Award. Once the Company did so, it complied literally with the first portion of the Arbitrator's Supplemental Award. After the Company made the Blue Cross Plan available to the employes though, it was up to them to decide for themselves whether they wanted to go with Blue Cross or stay with Fireman's Fund. Although none of the employes chose to enroll or participate in the Blue Cross Co-Pay Plan, this does not change the fact that the Blue Cross Plan was nevertheless made available to the bargaining unit employes.

While the Union acknowledges that the Company offered the Blue Cross Plan to employes as directed by the Arbitrator, it contends the Company failed to comply with the spirit and intent of this portion of the Award because Company President Young expressed strong negative feelings at the employe meeting toward Blue Cross in particular and HMO's in general. It is certainly true that Young painted Blue Cross in less than a favorable light at this meeting and gave the employes the clear impression that he did not think it was a good idea to return to Blue Cross. Young's comments may well have contributed to the fact that no employes enrolled in the Blue Cross Plan. Be that as it may, Young's comments at the meeting do not negate the Company's compliance with the first portion of the Award. This is because all the Company was ordered to do in the first part of the Award was make the Blue Cross Plan available to bargaining unit employes. This directive did not impose upon the Company either an affirmative duty to persuade employes to switch from Fireman's Fund to Blue Cross, or require it to remain objective and neutral when the employes selected their medical insurance carrier. Consequently, Young was not precluded from offering his subjective opinions on HMO's, Blue Cross and Fireman's Fund at the employe meeting.

The second portion of the Supplemental Arbitration Award deals wth the HMO contribution rates. Therein, the Arbitrator directed the Company to "pay the appropriate contribution to the HMO . . . based on the reinstated Blue Cross premiums." It is uncontested that the Company is currently not basing its HMO contribution on the Blue Cross premiums, but rather is basing its HMO contribution on the less expensive Fireman's Fund premiums. The Union contends the Company has not complied with this portion of the Award because it is not basing is HMO contribution on the Blue Cross rates. According to the Union, the Arbitrator intended that the Company's HMO contribution should be based on the Blue Cross premiums even though no employes picked the Blue Cross Plan. This reading of the Award however is not supported for the following reasons. First, this very argument was considered and rejected by the Arbitrator in his discussion of what remedy was appropriate. Before the Arbitrator, the remedy sought by the Union was "the amount that the Employer would have contributed to the HMO insured employees." In rejecting that proposed remedy, the Arbitrator ruled as follows:

> Article XVI, Section 1(b) provides that the Employer contribute to the HMO the same amount it contributes to the group insurance plan. It does not provide the express reference to Blue Cross as does Section 1(a). Here, the agreement limits the contribution to that contributed under the group insurance plan. The undersigned finds that this amount would be that contributed to Fireman's Fund as long as that is the group plan. To do as the Union requests would

ignore this express provision and would require the Arbitrator to add to or modify the terms of the agreement which is prohibited under Article XXI, Section 4(b). Therefore, the remedy sought by the Union cannot be awarded.

The above discussion clearly precludes requiring the Company to base its HMO contribution on the Blue Cross premiums rather than on the Fireman's Fund premiums because the Arbitrator expressly found that the Company's HMO contribution "would be that contributed to Fireman's Fund as long as that is the group plan." In order for the Company to base its HMO contribution on the Blue Cross premiums, the Blue Cross Co-Pay Plan must be in effect as the Company's group medical insurance plan.

Next, the second portion of the Supplemental Award directing the Company to base its HMO contribution on the "reinstated Blue Cross premiums" was not independent of, and could not be implemented separately from, the first portion of the Award directing the Company to make the Blue Cross Plan available to the employes. Instead, this directive was contingent upon the completion of a precondition, namely the Blue Cross Co-Pay Plan being reinstated as the group medical insurance plan. Under the circumstances present here though, that precondition was not met because none of the employes chose to enroll or participate in the Blue Cross Co-Pay Plan when it was made available to them. Therefore, since the Blue Cross Plan was not reinstated as contemplated, it follows that the Company was not obligated by the Supplemental Award to base its HMO contributions on the Blue Cross premiums.

In sum, it is concluded that the Company has complied with the November 14, 1986 Supplemental Arbitration Award. 2/ Consequently, the Company did not violate Secs. 111.06(1)(f) or (g), Stats., and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 16th day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones
Raleigh Jones, Examiner

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2/ In reaching this conclusion, the Examiner has not relied on the Company's argument that Blue Cross refused to bid on the medical insurance in February, 1987, because the record indicates that Blue Cross would have implemented the Co-Pay Plan at the time the Supplemental Award was issued (November, 1986) had the employes chosen to enroll.