Boston Edison Company *and* Local 369, Utility Workers Union of America, AFL-CIO,[1] Case 1-CA-6303

June 24, 1969

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND BROWN

On January 16, 1969, Trial Examiner William F. Scharnikow issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending dismissal of the complaint, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision together with supporting briefs, and Respondent filed both cross-exceptions to the Trial Examiner's Decision together with a supporting brief and a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated it powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER BROWN, concurring:

I concur with my colleagues in dismissing this proceeding, but I do so without resolving the merits of the controversy involved here. This controversy arises out of a contract dispute. There are various contractual provisions dealing with the subject matter of the dispute, and the parties' agreement also contains procedures for resolving their differences. This situation goes beyond and therefore is distinguishable from *C & C Plywood*,[2] where the Supreme Court observed that the Board in that case "has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer" (385 U.S. at 428). Still more recently the Supreme Court has again declared that "the Board has no plenary authority to administer and enforce collective bargaining contracts." *N.L.R.B.* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360. Thus, even apart from considerations of deferring to grievance-arbitration procedures,[3] I do not believe that cases like the present one should be brought to the Board for adjudication of what are essentially contract disputes.[4]

[1]The Charging Party's name appears as amended at the hearing.

[2]*N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421.

[3]*Jos Schlitz Brewing Co.*, 175 NLRB No. 23. See my dissenting opinions in *Univis, Inc*, 169 NLRB No 18; *Washington Hardware and Furniture Co*, 168 NLRB No. 72.

[4]Cf. my concurring opinion in *Cloverleaf Division of Adams Dairy Co*, 147 NLRB 1410, 1420-1425

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

WILLIAM F. SCHARNIKOW, Trial Examiner: The complaint alleges that the Respondent, Boston Edison Company, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq* (herein called the Act), by unilaterally effecting a change in the illness benefits plan which is part of its collective-bargaining agreement with the Union, by converting the benefit allowance from computation by days to computation by hours and unilaterally effecting a change in the illness leave practice by charging illness leave for less than a day to an employee's unused illness leave allowance.[1]

In its answer to the complaint filed on July 12, 1968, the Respondent generally denies the commission of the unfair labor practices alleged in the complaint and further asserts in substance (1) that whatever changes may have been made in the Plan were effected by a committee designated in, and authorized by, the rules set forth in the Plan; (2) that the Respondent had in fact bargained collectively with the Union about these changes and the changes in its leave practice; and (3) that the Respondent has been willing to submit the present dispute with the Union to the arbitration procedures provided by the contract.

Pursuant to notice, a hearing was held at Boston, Massachusetts, on July 15 and 16, 1968, before me. The General Counsel, the Respondent, and the Union appeared by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence upon the issues in the case.

Before the hearing, the Respondent had filed and served upon the General Counsel and the Union a "Motion to Hold Case in Abeyance Pending Utilization by the Parties of their Contractual Grievance-Arbitration Method of Resolving Disputes." At the beginning of the hearing, counsel for the Respondent pressed this motion. After hearing and considering oral argument from counsel for the Respondent in support of the motion and from the General Counsel and counsel for the Union in opposition, I denied the motion.

[1]The unfair labor practice charge was filed by the Union on April 12, 1968, and served on the Respondent on the same day The Regional Director issued the complaint and caused it to be served on the Respondent and the Union on July 2, 1968

Since the hearing, I have received and considered briefs from the General Counsel and counsel for the Respondent. The General Counsel and counsel for the Respondent also filed motions to correct the official transcript of the record of the hearing in certain specific respects. There being no objection, I hereby grant these motions.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, with its principal office and place of business in Boston, Massachusetts, is a public utility engaged in the manufacture, sale and distribution of electric power and in the retail sale of electric appliances. In the operation of its business it purchases large quantities of coal, oil, and gas which is transported to it in interstate commerce from and through States of the United States other than the Commonwealth of Massachusetts. Its annual gross revenue from the distribution of electric power exceeds $250,000 and its annual gross revenue from the retail sale of electric appliances exceeds $500,000.

The Respondent admits and I find that it is, and has been, engaged in commerce within the meaning of the Act. I further find that it will effectuate the policies of the Act for the Board to entertain jurisdiction in the present case.

II. THE LABOR ORGANIZATION INVOLVED

Local 369, Utility Workers Union of America, AFL-CIO, herein called the Union, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

Since certification by the Board in 1950, the Union has been the recognized exclusive bargaining representative of an appropriate production and maintenance unit of the Respondent's employees. On November 2, 1967, the Respondent and the Union executed a contract covering these employees until April 1, 1969, and, absent a 60-day written notice of termination by either to the other, from year to year thereafter. The 1967 contract incorporated *verbatim* from the preceding contract between the parties, the provisions of an "Illness and Nonindustrial Accident Disability Benefits Plan," hereinafter referred to as the Plan. The broad issue in the present case is whether, in March 1968, the Respondent committed unfair labor practices within the meaning of Section 8(a)(1) and (5) by unilaterally changing the provisions of the Plan and its existing leave practice in connection therewith.

In general outline, the "rules" of the Plan as set forth in identical language in the 1967 contract and the preceding contract have provided for the Respondent's payment of "illness and nonindustrial accident benefits" to employees with 12 or more months of continuous active service *first* during an annually allowed "Waiting Period" of "five (5) days" which may be drawn upon by the employee at the beginning of each period of disability and may be accumulated from year to year, subject to "a maximum of fifteen (15) days;" and *then*, should a particular disability continue, also during a succeeding "Initial Disability Period," and a "Secondary Disability Period" each of varying prescribed lengths depending upon the employee's service. The "Benefits" provided by the Plan are defined as "base pay . . . for such [working] days" as fall within the allowable "Waiting Period," and the "Initial Disability Period," and "three-quarters (3/4) of base pay for such [working] days" as are allowable during the "Secondary Disability Period."

The possible maximum period of an employee's benefits for a continuing disability during any year, ranges from approximately 5 "calendar weeks" in the case of an employee with 1 year's service to approximately 55 "calendar weeks" for an employee with more than 13 years of service and an unused accumulation of 15 days of "waiting period." Consistent with the general provisions of the contract, a "working day" and a "calendar week" have been construed for purpose of the Plan as meaning, respectively, a scheduled 8-hour day and a calendar week of 5 working days of 8 hours each,[2] and "base pay" therefor has been computed at the contractually prescribed hourly rate of the employee.[3]

No conditions are prescribed by the Rules of the Plan for the payment of benefits during the initial and secondary disability periods, but, according to rule 7(a), "Benefits for the working days of waiting periods. . . shall be allowed only at the discretion of the Disablement Benefits Committee." This Committee is constitued under rule 10 of the Plan "to act on all problems arising under this Plan" except the discipline of employees for abuse of leave under the Plan which is a matter reserved to the Respondent. As provided by rule 10, the Committee consists of three members, two of whom are representatives of the Respondent and the third a representative of the Union, and its role is to "administer and interpret this Plan . . . [with] full power to make rules and regulations for its administration in respect to the members of [the Union] which are not inconsistent with the express provisions of the Plan."

The Plan specifically reserves certain rights to the Respondent, as distinguished from the Disablement Benefits Committee, and the Respondent's acts in exercise of these particular rights are expressly subject to "review" under the general grievance and arbitration provisions of the contract. Thus rule 5 of the Plan leaves it to "the Company's Medical Director" to determine whether a particular claimed disability is "a recurrence" of a "previous disability" and thus, by possibility, the period and benefits therefor should be "reduced." And rules 7(e), (f), and (g) provide that at "the end of his secondary disability period," an employee "shall be transferred to the inactive payroll (without pay)" for specified periods of 1 year, 6 months, or 3 months (depending upon his years of service) "or longer, at the discretion of the Company." Finally, in rule 8 ("Review of Absences"), the Plan provides that, "Employees abusing the Plan shall be subject to disciplinary action by the Company. If the Union claims the Company has exercised any of the foregoing rights in an unjust or unreasonable manner, such claim shall be subject to the Grievance Procedure in Article XXXII and Arbitration under Article XXXIII."

As will appear as the facts are developed, the instant case concerns the application of the Plan's provisions and

[2] See art. X and XI of the contract

[3] All employees in the unit are hourly rated. See art. XII, par. 3, art. XXV, par. 3, and Schedule C of the contract.

the Respondent's related leave practices to partial days of claimed disability during the "waiting period," i.e., to situations in which employees, having worked part of their 8-hour day, report to the Respondent that they are ill and are consequently permitted to quit work for the day.

In applying the Plan's provisions allowing "five days" for waiting period benefits before March 18, 1968, nothing less than a day was charged against the employee's waiting period allowance. In practice, if he had worked less than 1 1/2 hours on a particular day, he was charged with a full day of his waiting period allowance unless he had exhausted it, in which case he was paid only for the time worked, exclusive of any time he may have spent in the Respondent's medical office. But if he had worked more than 1 1/2 hours, exclusive of time spent in the medical office, no charge was made against his waiting period allowance, but he was paid for the part of the day worked and usually given a discretionary "leave allow" payment for the rest of the day. In this last situation, the employee was thus, in effect, usually paid the amount of a full 8-hour day's wage by the Respondent *without* any charge against his "waiting period" allowance under the Plan, although the Respondent reserved the right to withhold any payment for the portion of the day not worked, as a "leave deduct" rather than a "leave allow."

This practice, however, was changed on March 18, 1968. On March 15, 1968, the Disablement Benefits Committee (acting on the decision of the Respondent's two representatives over the objection of the Union member) notified the Union by letter that the "waiting period allowance" under the Plan was "changed from [5] days to [40] hours" and that time spent in the Respondent's medical office would be counted and paid for as time worked. Accordingly, since March 18, 1968, an employee who works only part of a day (whether more or less than 1 1/2 hours) and then goes home for illness, is paid for the time worked including time in the medical department, and charged against his available "waiting period" allowance for the remaining hours of the workday.

As will appear, the Respondent had for some time considered these changes in its leave practice and its construction of the Plan, and its representatives had discussed the matter with the Union's representatives during their negotiation of the 1967 contract as well as just before and at the time the Disablement Benefits Committee gave the Union notice of the changes in March 1968. The propriety of the changes, which the General Counsel and the Union contend were unilaterally made by the Respondent in disregard of its obligation to bargain with the Union, must be evaluated, of course, not only in the light of the overall pattern of the Plan (which has already been summarized), but particularly in the light of the language of the directly pertinent provisions to which the testimony of the witnesses and the arguments of counsel direct the Board's attention. For convenient reference, these provisions are the following:

> Illness and nonindustrial accident benefits shall be governed by the following rules:
>
> (1) ELIGIBILITY
>
> Employees who have completed twelve (12) months of continuous active service on the regular full-time payroll shall be eligible for the benefits provided herein.
>
> (2) WAITING PERIOD
>
> The first five (5) working days included in the first seven (7) calendar days of any disability is defined as the waiting period applicable to such disability.
>
> * * * * *
>
> (7) BENEFITS
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> Subject to all other provisions of this plan, benefit payments shall be as follows:
>
> (a) Benefits for the working days of waiting periods shall be base pay (as defined in the Retirement Plan as amended) for such days, but shall be allowed only at the discretion of the Disablement Benefits Committee. ...
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> * * * * *
>
> (8) REVIEW OF ABSENCES
>
> Employees abusing the Plan or having excessive absences shall be subject to disciplinary action by the Company. If the Union claims the Company has exercised any of the foregoing rights in an unjust or unreasonable manner, such claim shall be subject to the Grievance Procedure in Article XXXII and Arbitration under Article XXXIII.
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> * * * * *
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> (10) ADMINISTRATION
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> The Disablement Benefits Committee, which will act on all problems arising under this Plan, except those referred to in Section (8) of this Plan, shall consist of the Vice President in charge of Employee Relations or his designated representative, the Medical Director of the Company, or the Associate Medical Director, and the President of the Local (or a member of the Local designated by its President). Such Committee shall administer and interpret this Plan and shall have full power to make rules and regulations for its administration in respect to the members of the Local which are not inconsistent with the express provisions of the Plan.

B. *The 1967 Contract Negotiations and the Changes in the Plan and Leave Practice in March 1968*

Negotiation of the Union's and the Respondent's current contract began in February 1967 and concluded with the execution of the contract on November 2, 1967. During the negotiations, the Respondent was engaged in making an independent statistical study of the cost of the Plan through a committee of its own representatives including Dr. Joel Johnson, its medical director who, by virtue of this position was also one of the two employer-members of the three-man Disablement Benefits Committee under the Plan. Although Dr. Johnson's then incomplete study was mentioned by the Respondent in connection with its contract proposals affecting the Plan during the 1967 contract negotiations, he was not one of the negotiators. Nor did the negotiators include any other person who was thereafter to serve on the Disablement Benefits Committee. John Hennessy, the Respondent's director of Labor Relations, was the Respondent's negotiator but did not serve on the Disablement Benefits Committee. And, although Local President Thomas Sullivan was one of the Union's negotiators (along with International Representative McCrevin and Executive Board Member John McKennon), his Local presidency which then made him a member of the Committee expired with the execution of the contract.

During the course of the lengthy 1967 contract negotiations in which there were 30 bargaining sessions, the Union made 35 proposals of contract changes

including one which would have increased the Disablement Benefits Committee to four members with two Union representatives to balance the two employer-representatives on the Committee. The Respondent also made numerous proposals of contract changes in a 14-page document given to the Union on March 17, 1968. One of the Respondent's proposals was to change the language of paragraphs 2 and 7(a) of the Plan's rules with respect to Waiting Period Benefits by substituting "The first 40 regularly scheduled hours" for "The first five (5) working days" as the definition of "waiting period," and by making corresponding, equivalent substitutions of the word "hours" for the word "days" wherever the latter word appeared in these two paragraphs of the Plan. In support of this proposal, Labor Relations Director Hennessy told the Union negotiators that costs of the Plan had "soared" because of abuses by employees in "part-day" absences. It will be noted from my preliminary summary of the facts, that the changes in the language of the Plan thus sought by the Respondent in the 1967 contract negotiations with respect to "waiting periods" — i.e., changes from "days" to "hours" — were the same as those which were later made by the Disablement Benefits Committee in March 1968.

The discussions of the changes proposed in the Plan by the Union as well as by the Respondent were few and brief, and the contract eventually agreed upon and executed again incorporated the Plan with its previous language intact. At only 3 of the 30 bargaining sessions in the early stages of the negotiations (i.e., on March 20, March 30, and April 10, 1967) did the negotiators talk about the proposed changes in the Plan and then only for about 20 or 25 minutes on the first of these occasions and for only 10 minutes on the second and third. Hennessy, for the Respondent, rejected the Union's proposal to add a second Union representative to the Disablement Benefits Committee and thus to equalize representation on the Committee. The Union, just as clearly, rejected the Respondent's proposal to change the word "days" to "hours" in the definition of "waiting period," although Hennessy offered to secure a breakdown of the figures showing the increase of the costs of the "waiting period" in the production and maintenance units.[4] From the testimony of both Hennessy and Union Representative McKennon, it appears and I find, that Hennessy refrained from pressing for the Respondent's proposed amendment in the language in the Plan, with the statement that, in any event, the Disablement Benefits Committee had the power under the Plan to make the change sought.[5]

In February or early March 1968, John Madden a staff assistant in the Respondent's Labor Relations Department, telephoned Daniel Madden, who had succeeded Thomas Sullivan as the Local President of the Union and who, under rule 10 of the Plan, was the primarily designated Union representative on the Disablement Benefits Committee. In this telephone conversation, John Madden said he had been designated by the Respondent to act as its representative on the Committee, and asked Union President Daniel Madden to meet with him and Dr. Johnson (the Respondent's medical director and its other designated Committee representative) to discuss disability problems.

As a result, the two Maddens and Dr. Johnson met in Dr. Johnson's office on March 7 and again on March 15. Dr. Johnson said in substance that it appeared from his study of the operations of the Plan that the costs of the "waiting period" had increased at the rate of $50,000 a year; that something must be done to control excessive absences and abuses of the Plan by employees in taking parts of days off for illness when it was impossible "to judge accurately . . . whether [they were] sick or not"; and that one step in the direction of discouraging and thus controlling abuses in these cases (which would be fair to the employee) would be for the Committee to change the waiting period allowance from "days" to "hours" so that an employee would be charged against his waiting period with the actual "hours" he took off on the day he became ill rather than (as under existing practice) with either no charge or an arbitrary full day's charge against his waiting period, depending upon whether he had worked more or less than 1 1/2 hours on the particular day. During the discussion of Dr. Johnson's proposal on March 7 or 15, Union President Madden expressed doubt as to whether there had been abuses of the "waiting period" by the production and maintenance employees and argued that, in any event, the Respondent had adequate power to control any such abuses by taking disciplinary action against suspected employees under rule 8 of the Plan, subject to the Union's right to have such action reviewed under the grievance and arbitration provisions of the contract.[6]

In the first meeting between the three Committee members on March 7, Staff Assistant John Madden and Dr. Johnson attempted to persuade Union President Madden to agree to Committee action making the change which they sought. But, before the meeting ended, the three men agreed to meet again on March 15 after Union President Madden had had the opportunity to confer not only with his Executive Board, but also with the presidents of two other Locals who represented separate units of Respondent's clerical and professional employees and who, according to John Madden's statement at the March 7 meeting, had already agreed to change "days" to

[4] This finding is based upon Hennessy's testimony to the effect that he at first had only overall figures of "waiting period" costs in three bargaining units of the Respondent's employees covered by the identical Plan although under separate contracts, with the Union representing the production and maintenance employees and two sister Locals of the Union representing the clericals and professionals respectively. According to Hennessy, whom I credit, International Representative McCrevin (one of the Union negotiators) asked for the production and maintenance figures but, although Hennessy agreed to try to get them within a week, McCrevin had in the meantime rejected the Respondent's proposal. I credit this testimony rather than what I regard to be the less reliable recollection and testimony of Union Representative McKennon, the only Union negotiator who appeared as a witness. For McKennon testified at one point that on March 20 Union President Sullivan and on April 10 also International Representative McCrevin asked Hennessy for a breakdown of the increased costs of the Plan in the production and maintenance unit and Hennessy in the first case, gave no answers, and, in the second case, said he did not have these costs "but he felt they were totally justified." At another point in his testimony, however, McKennon said that he did not recall that either Sullivan or McCrevin had asked Sullivan for these figures.

[5] Hennessy testified that he told the Union representatives not only that the Committee had the power to make the change but that it would. McKennon at first testified that Hennessy said the Committee *could* make the change but not that it would. I credit this testimony by McKennon rather than his later answer to a leading question by counsel for the Union that at no time did the Respondent "take the position that the Disability Benefits Committee was empowered to make the change from days to hours if the Union rejected the [Respondent's proposal]."

[6] Although in their testimony Staff Representative Madden and Dr. Johnson could not recall the Union President's referring to the adequacy of disciplinary action by the Respondent under rule 8 of the Plan as a control of possible abuses, I credit the Union President's testimony that he in fact made such an argument.

"hours" in the identical Plans incorporated in their respective contracts with the Respondent.

At the second meeting between the three men on March 15 Union President Madden said that his Executive Board had instructed him to oppose the change and that he had been informed by the presidents of his sister Locals that neither had agreed to the change although one of them was not "objecting." The Union President also objected to Respondent-Representative Madden's proposal of a Committee vote on the proposed change, saying the Committee had no jurisdiction. The three men agreed, however, that should the two employer-members of the Committee vote to make the change over the Union President's objection, the Union could contest the action under the grievance and arbitration provisions of the contract.[7] Whether or not there was the formality of a "vote" (as Respondent's Representatives Madden and Dr. Johnson testified but the Union President Madden denied), the meeting on March 15 ended with Madden, the Respondent's representative, saying that he and Dr. Johnson were in favor of the change from "days" to "hours" and would note Union President Madden's "disagreement" in the letter which would be sent to the Union.[8]

Accordingly, on the same day, March 15, Staff Assistant John Madden mailed the following letter to Donald Wightman the Union's secretary-treasurer:

> As the result of meetings of the Disability Benefits Committee under Section 10 of the Illness and Nonindustrial Accident Disability Benefits Plan on March 7th and March 15th, at which Daniel F. Madden represented the Local, John S. Madden represented the Vice President in charge of Employee Relations, and Joel M. Johnson, Medical Director, was present, the following procedure is to be in effect effective March 18, 1968 with respect to employees represented by the Production and Maintenance Local:
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> 1. Waiting period allowance of employees represented by the Production and Maintenance Local will be changed from days to hours and part-time medical absences will be paid or not paid according to the employee's unused allowance.
>
> 2. Employees will be paid for time worked or spent in the Medical Department waiting treatment and if the employee is sent home, the part-time absence will commence from the time he/she leaves the Medical Department.
>
> As a member of the Committee, Mr. Daniel Madden does not concur with the vote of the majority on the Committee.

Upon receipt of this letter, Union President Madden orally asked Labor Relations Director John Hennessy to meet with him on April 5 to discuss certain written Union grievances and also "the Company's position" with respect to changing "days" to "hours" in the waiting period provisions of the Plan. But before the meeting was held, the Union president told Hennessy that "there was no need of this [matter concerning the Plan] being on the agenda at this meeting" because he "was contemplating an NLRB case." On March 28, the union president also mailed a letter to John Madden, the Respondent's staff assistant, attacking the "fictitious votes" of the Disablement Benefits Committee as "nothing more than the Company's attempt to unilaterally and unlawfully attempt to change terms and conditions of employment . . . during the life of the current bargaining agreement." The letter ended with the statement that "Unless the Company revokes its action and reinstitutes the existing terms and conditions of the Disability Benefits Plan, the Union shall be compelled to seek relief from appropriate Federal or State agencies."

Staff Assistant John Madden replied to the Union President by letter dated April 9. In this letter he set forth his version of the recent Disablement Benefits Committee meetings; denied that "the action of the Company [was] unilateral or unlawful in any respect"; referred to the Union's removal of consideration of the Committee's action from the agenda of the grievance meeting of April 5; and stated that "the Company position was and is that the proper forum [for the dispute] is the Grievance Procedure," and that "The Company declines to revoke the action of the Committee."

In this final posture of the events of the case, the Union filed its unfair labor practice charge on April 12, 1968, asserting that the Respondent had violated Section 8(a)(1) and (5) of the Act in that it "unilaterally altered and diminished existing terms and conditions of employment of its production and maintenance employees, without negotiation or agreement with the certified collective-bargaining representative of such employees."

C. *Conclusions*

The foregoing findings present the material facts in the case. The crucial fact, of course, was the action in March 1968 by the Respondent's two representatives on the Disablement Benefits Committee over the objection of the Union representative in changing the word "days" to "hours" in the provisions of the existing contractual Plan with respect to "waiting period" leave and allowances which had the purpose and effect of charging the employees for the first time with part-days of absence against their "waiting period" allowances.

The General Counsel contends that, in disregard both of its statutory obligation to bargain with the Union and clear and unambiguous language in the Plan as part of the current contract, the Respondent thereby unilaterally changed the terms and conditions of employment provided in the Plan and committed unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. The Respondent, however, while not denying its responsibility for the action of the Disablement Benefits Committee, advances two arguments in justification of its conduct

[7] Staff Representative Madden and Dr. Johnson so testified. During his testimony, Union President Madden's attention was not called to this particular matter and he therefore neither affirmed nor denied the other two witnesses' testimony on the point

[8] The findings just made with respect to the meetings of the three members of the Disablement Benefits Committee on March 7 and 15, 1968 present the full material substance of these meetings and are based upon a composite of the testimony of the two Maddens and Dr Johnson It is clear from this testimony that Union President Madden objected to the proposed change, but was overridden by the two employer-representatives on the Committee. This was the essence of the Committee action. It was certainly not the accomplishment of a change by collective bargaining between co-equal parties. Its propriety depended upon whether the Committee, although preponderantly an employer-committee, was empowered by the existing contractual Plan to make the change even over the Union's objection. Accordingly, I have found it unnecessary to consider and resolve such conflicts in the testimony as whether Union President Madden, by his statements and attitude appeared to the other two members of the Committee to be at first reluctant to oppose the change and even willing to permit its accomplishment in practice. Nor do I regard it to be material whether the Union's sister Locals representing other units of Respondent's employees had in effect consented to the same change in practice under their identical Plans

through its two Committee members. It contends that even assuming that the changes made by the Committee were changes in terms and conditions of employment prescribed in the contractual Plan, it actually bargained with the Union concerning these changes in the March 1968 discussions between its two representatives and the Union's representative on the Committee and therefore did not commit an unfair labor practice within the meaning of Section 8(a)(5) or (1) of the Act. But the Respondent's primary argument and the one it stresses in its brief is that the Committee was "empowered" to make the changes it made in the operation of the Plan, by the provisions of the contract itself, i.e., by rules 10 and 7(a) of the Plan setting forth respectively, the general powers of the Committee and its "discretion" with respect to the allowance of waiting period benefits. The essence of this argument is that the action of the Respondent's two members on the Disablement Benefits Committee, though unilateral and attributable to the Respondent, was taken pursuant to a contractually reserved right and power vested in the Committee by Rule 10 of the Plan to "administer and interpret" the Plan and "to make rules and regulations for [the Plan's] administration . . . which are not inconsistent with the express provisions of the Plan."

The issues which are thus presented raise material and proper questions for the Board's determination under the applicable provisions of the Act. Thus, the rights of employees under contractual sick benefits plans, like the Plan in the present case, are unquestionably terms and conditions of employment subject to mandatory bargaining under Section 8(a)(5) and 8(d) and Section 9(a) of the Act.[9] Under Section 8(d) of the Act, once a contract has been executed by a union and an employer establishing terms and conditions for "a fixed period," neither party is under the duty "to discuss or agree to any modification" of these terms or conditions during the contract period.[10] Consistently, unless permitted by the contract or waived or consented to by the union, unilateral action by an employer changing or affecting existing terms or conditions of employment during the contract period is an unfair labor practice within the meaning of Section 8(a)(5) of the Act.[11] Finally, the Board has the power to construe or interpret a contract, when such construction or interpretation is essential to a determination by the Board of whether an unfair labor practice has been committed.[12]

The Respondent's contention that the discussions between its two representatives and the Union's representative on the Disablement Benefits Committee constituted collective bargaining within the meaning of the Act, is without merit. Under Section 8(d), the Union was under no duty to bargain at that time concerning any changes in the terms of the Plan since they were not open for renegotiation during the "fixed period" of the contract. Furthermore, the insistence by the Respondent's two Committee representatives over the Union representative's objection, that their proposal become effective as the majority action of the Committee was certainly not the "negotiation of an agreement" with the Union as is required in collective bargaining under Section 8(d).

A more complicated issue is presented by the opposing contentions of the General Counsel and the Respondent as to whether the Disablement Benefits Committee had the power under the Plan to make the changes it did in March 1968. In essence, the issue is whether the use of the words "days" and "working days" under rules 2 and 7 to define "waiting period" allowances, were such "express provisions" of the Plan limiting the units of waiting period benefits and allowances to "days," that the Disablement Benefits Committee was not empowered by rule 10 to change the unit to "hours."

The General Counsel, in denying that the Committee had the power to change "days" to "hours" in March 1968, focuses attention on the use of the word "days" in rules 2 and 7 of the Plan and the fact that in practice before March 1968, nothing less than a day had been charged to "waiting period" allowances. In further support of his argument that rules 2 and 7 were thus regarded by the Respondent as well as by the Union as clear and unambiguous "express provisions" that a "day" and nothing less was the contractually prescribed unit for computing "waiting period" benefits and charges, the General Counsel relies upon the fact that in the 1967 contract negotiations the Respondent unsuccessfully attempted to negotiate a change from "days" to "hours" in these sections of the Plan, thereby indicating (according to the General Counsel) that the Respondent believed the change was a bargainable matter and not subject to action by the Committee.

The General Counsel's argument is thus based upon an insistence that the word "days" in rule 2 and 7 be given its literal, isolated, and unqualified meaning as it was in practice before March 1968, plus the fact that the Respondent attempted to pursuade the Union to make the change to "hours" in the 1967 contract negotiations. In making this argument upon the assertedly clear, unambiguous meaning of the word "days" in rules 2 and 7, the General Counsel ignores, as being irrelevant, other factors shown by the evidence and urged by the Respondent for a contrary interpretation of the Plan: (1) the qualifying significance of the rest of the language of the Plan relating to the Committee's general powers and its discretionary power with respect to "waiting period" benefits and allowances; (2) the obvious object of the Plan to provide employee-benefits in lieu of pay for all time actually lost from work by reason of illness; (3) the related observation that, even if considered in isolation, the words "days" and "working days" as used in Rules 2 and 7 do not clearly and unambiguously have the narrowly restricted interpretation urged by the General Counsel but are also reasonably susceptible to a distributive interpretation and construction equating a "working day" with "8 hours"; (4) the fact that in pre-1968 practice, a literal, mechanical, application of the work "days" as a minimum unit of sick leave under the Plan had resulted in the arbitrary and unreasonable charge of a full day against an employee's waiting period allowance when he had actually worked as much as 1 1/2 hours that day, and in the similarly arbitrary payment of the amount of a full day's wage, but without any charge against his waiting period, when he had worked more than 1 1/2 hours but less than 8 hours; and (5) the fact that although the Respondent had chosen to attempt to persuade the Union to agree to a change of "days" to "hours" in the 1967 contract negotiations, little time was spent in these discussions and the Respondent, apparently

[9] *N.L.R.B.* v. *Katz*, 369 U.S. 736.

[10] *C & S Industries, Inc.*, 158 NLRB 455, 457-459 See also *N.L.R.B.* v. *Lion Oil Company*, 352 U.S. 282, 290-291.

[11] *N.L.R.B* v. *C & C Plywood Co.*, 385 U.S. 421, 425-6; *C & S Industries, supra.*

[12] See *N.L.R.B.* v. *C & C Plywood Co., supra.* See also *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S 270.

unwilling to burden the negotiations with undue attention to the matter, had then abandoned the attempt and informed the Union that the change could be made by the Disablement Benefits Committee.

Upon consideration of these factors, I am persuaded, in agreement with the Respondent, that a proper interpretation of the provisions of the Plan conferred upon the Disablement Benefits Committee power to make the change of "days" to "hours" in the application of the waiting period provisions of rules 2 and 7(a), and that in doing so through its two members on the Committee, the Respondent took action permitted by the contractual Plan and did not commit an unfair labor practice within the meaning of Section 8(a)(1) or (5) of the Act. Specifically, I conclude, in agreement with the Respondent, that in view of the broadly expressed discretionary control over allowances of waiting period benefits entrusted to the Committee by Rule 7(a) of the Plan and of the general provisions of the contract equating a "working day" with "8 hours," the use of the words "days" and "working days" in Rules 2 and 7 to define "waiting period" allowances cannot be held to be "express provisions" of the Plan limiting the units of waiting period benefits and allowances to "days" and precluding the computation of such benefits by the Committee in units of "hours"; that the Committee's change of the words "days" to "hours" in order to charge employees with part-days of sick leave and discourage unjustified claims of part-day illnesses, was therefore not a substantive change in any limiting "express provision" of the Plan and was accordingly permissible and within the Committee's broad powers under Rule 10 to "act on all problems arising under this Plan," to "administer and interpret" the Plan, and to "make rules and regulations for its administration . . . which are not inconsistent with the express provisions of the Plan."

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent, Boston Edison Company, is an employer engaged in commerce within the meaning of the Act.

2. Local 369, Utility Workers Union of America, AFL-CIO is a labor organization within the meaning of the Act.

3. The Respondent has not engaged in the unfair labor practices within the meaning of the Act which are alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, it is recommended that the complaint herein be dismissed in its entirety.