

The Bakersfield Californian and Bakersfield Typographical Union No. 439, Affiliated with Communications Workers of America, AFL-CIO, CLC. Cases 31-CA-23978 and 31-CA-23979.

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On October 17, 2000, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief.

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

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

Background

The Charging Party, Bakersfield Typographical Union No. 439, represents certain of the Respondent's employees in two separate bargaining units. The complaint alleged that, on or about January 12 and 13, 1999,¹ the Respondent "implemented" its last, best, and final offers for both bargaining units, which offers included a wholly discretionary merit wage and bonus provision. The January dates correspond to when the Respondent, after lawful impasse, posted the terms and conditions of employment encompassed in its final offers.

At the beginning of the hearing, the Respondent stipulated that: (1) throughout 1999, it awarded merit bonuses and merit wage increases to several employees, (2) prior to awarding these increases, it did not negotiate with the Union over the timing or amount of these increases, and (3) its merit pay proposal, just like the merit pay provision in the expired contract, allowed it full discretion over the timing and amount of any payments above scale. Subsequently, in its opening argument, the Respondent stated that, while it had stipulated that it had granted merit increases post-impasse, the complaint referred only to the "implement[ing]" conduct of January 12 and 13, and did not allege that the Respondent violated the Act by actually unilaterally changing wages. The Respondent's counsel stated that he wanted to make his "position clear" that nothing that transpired after January 12 and 13, mattered for purposes of determining whether a violation occurred. The Respondent's counsel also spe-

cifically stated that he was trying to avoid a possible contention by the General Counsel that, even if there was no violation when the Respondent "stuck it [the terms and conditions] on the wall," a violation occurred when the Respondent actually started changing wages.

In response to this statement of position, the judge stated that, if the posting of the terms and conditions was not itself a violation, he would not find the Respondent in violation of the Act for granting subsequent merit pay increases. Neither the General Counsel nor the Charging Party objected or otherwise responded to the judge's statement as to the limited scope of the complaint.²

In *McClatchy Newspapers*, 321 NLRB 1386 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (*McClatchy II*),³ the Board recognized a narrow exception to the general rule permitting an employer, after reaching impasse in bargaining, to unilaterally implement the terms of its final pre-impasse offer. The *McClatchy* exception to that general rule *prohibits* an employer, even after reaching an impasse in bargaining, from unilaterally implementing a wage proposal that gives the employer broad discretionary powers that necessarily entail recurring unilateral employer decisions regarding changes in employee wage rates. *Id.* at 1388. Thus, the Board has stated that a respondent's obligation is "to negotiate to agreement or to impasse 'definable objective procedures and criteria' governing raises under its merit pay proposal prior to implementation of the proposal." *McClatchy Newspapers*, 322 NLRB 812, 813 (1996) (*McClatchy III*).

After the close of the instant hearing on January 31, 2000, but before the judge issued his attached decision on October 17, 2000, the Board issued its decision in *Woodland Clinic*, 331 NLRB 735 (2000) (*Woodland*). There, the Board dismissed a complaint allegation that the respondent in that case unlawfully "implemented" (emphasis in original) merit wage increases under its pay-for-performance system, where "the General Counsel concede[d] that the Respondent never actually *implemented or granted* any merit pay increases pursuant to its proposal." (Emphasis added.) The Board said: "Absent evidence that the Respondent actually granted merit wage increases to unit employees, there is no basis for

² The General Counsel's understanding of the judge's limitation of the litigation is reflected in his posthearing brief to the judge:

The sole issue presented to the Administrative Law Judge was whether Respondent violated Section 8(a)(5) of the Act by implementing a wholly discretionary merit wage and bonus plan on January 12 and 13, 1999, without first offering to meet and bargain with the Union concerning the timing and amounts of such merit and wage bonuses.

³ All subsequent citations to *McClatchy* reference *McClatchy II* unless otherwise stated.

¹ All dates are in 1999 unless otherwise indicated.

finding a violation of the Act under *McClatchy*.” *Id.*, slip opinion at 7.

The Judge’s Decision

The judge found that the Respondent’s wage proposal was “similar to *McClatchy*” in that the “Respondent retained ultimate discretion over the timing and amount of individual merit increases.” However, the judge also found that the Respondent had attempted, during preliminary matters at the hearing, to clarify the scope of the complaint and the General Counsel had “remained silent” during this attempt. Based on the General Counsel’s “seeming agreement,” the judge limited the scope of the complaint to “posting,” to which limitation the General Counsel did not object. Thus, no evidence regarding the Respondent’s actual granting of merit wages was heard.⁴ The judge noted that although he could pass on an issue that was not alleged in the complaint if it were closely related to a subject matter in the complaint and was fully litigated, because he had expressly refused to hear evidence regarding the actual granting of merit pay increases, that issue was not fully litigated. The judge concluded that the only question properly before him was whether the Respondent violated the Act by mere posting. Applying *Woodland*, the judge found that the January 12 and 13 posting, without more, did not violate the Act under *McClatchy*.

Exceptions

The General Counsel excepts, contending that the judge failed to make findings of fact and conclusions of law based on allegations in the complaint. The General Counsel argues that the judge exceeded his authority by effectively revising the complaint from one alleging “implementing” to one alleging “posting.” The General Counsel further argues that his silence at the hearing did not signal agreement. He contends that interjection during the Respondent’s opening statement would have been improper. In any event, the General Counsel asserts, there was no need to amend or clarify the complaint because it alleged “implementing.” Moreover, the General Counsel argues, the issue of *implementation* was fully litigated because the Respondent stipulated that it *granted* fully discretionary merit pay increases throughout 1999, and because the admission of all facts necessary to establish a violation makes an issue “fully litigated.” Finally, the General Counsel argues that there is no prejudice to the Respondent, because there is no evidence which the Respondent could have adduced which would exculpate it from a violation under *McClatchy*.

⁴ However, as noted above, there was a stipulation of fact that the Respondent had granted such increases.

The Charging Party’s exceptions largely mirror the General Counsel’s. Additionally, the Charging Party argues that the judge’s finding that implementation requires that employees actually be granted merit pay is erroneous. The Charging Party further argues that *Woodland* is distinguishable because the employer’s final offer there specifically required further discussion with the union prior to implementation of the merit wage portion of the proposal.

Analysis

For the following reasons, we find that the exceptions do not warrant reversal of the judge’s dismissal of the complaint. The complaint alleged that the Respondent *implemented* its last, best and final offers in two separate bargaining units, on or about January 12 and 13, respectively. The complaint further alleged that those offers included a wholly discretionary merit wage and bonus provision. The complaint did *not* allege that the Respondent violated the Act by actually *granting* merit wage increases.

As noted by the judge, the parties stipulated at hearing that what occurred on January 12 and 13 was the Respondent’s posting of a letter and a listing of its working conditions (which conditions constituted the Respondent’s last, best and final offer). The posted conditions included the right to grant merit increases. As noted above, the parties further stipulated that the Respondent actually granted merit increases throughout 1999 (after January 13), and that it did not negotiate with the Union over the timing or amount of these increases prior to granting them.

Having entered into these stipulations, the Respondent, as recounted by the judge, “took great care” at the commencement of the hearing “to clarify exactly what the factual allegations were,” “voiced its concerns,” and stated its position that the “Complaint and stipulations at hearing concerned the posting of conditions on January 12, 1999 and January 13, 1999 only.” In response, the General Counsel “remained silent.” Relying on this silence, the judge assured the Respondent that, if the posting of the merit wage proposal on January 12 and 13, was not a violation, he would not find a violation based on conduct which occurred after January 12 and 13. Still, as the judge stated, the General Counsel “did not object.” The judge thereafter refused to hear any evidence that the parties may have had regarding circumstances surrounding the actual granting of merit pay. We find that the judge, with no objection from the General Counsel, effectively ruled that the alleged “implementation” in the complaint encompassed only the Respondent’s posting of the merit wage proposal on January 12 and 13.

In *McClatchy*, supra, the Board articulated the issue as whether the respondent had violated the Act by “unilaterally changing” employee wages after having bargained to impasse on its final proposal to institute a wholly discretionary merit pay plan. The respondent had first posted its preimpasse contractual wage proposal and thereafter unilaterally granted wage increases pursuant to that proposal. Without referring to the *posting* of the proposal, and referring only to the actual subsequent unilateral *granting* of wage increases pursuant to the proposal, the Board found that the respondent had unlawfully “implemented” its wage proposal. 321 NLRB at 1388. In *Woodland*, the Board noted that the General Counsel had conceded that the respondent had “never actually implemented or granted” any merit pay increases pursuant to its proposal. Thus, the General Counsel relied solely on the announcement of the system. The Board found that this was not a basis for finding a violation of the Act under *McClatchy*. *Woodland*, supra, 331 NLRB 735, 740. In so finding, the Board in *Woodland* clearly implied that merely posting or otherwise announcing the terms of such a wage proposal, without more, would not violate the Act under *McClatchy*.⁵

The judge, considering both *McClatchy* and *Woodland*, found that, substantively, the Respondent’s merit wage proposal was similar to that found unlawful in *McClatchy*. However, he also found that, in *McClatchy*, “implementation” took the form of a unilateral change in wages—i.e., the respondent had actually granted wage increases. The judge acknowledged the Respondent’s admissions here regarding the actual granting of merit pay, but noted that those admissions occurred during preliminary matters and as a “direct attempt by Respondent to clarify the matters alleged in the complaint.” The judge emphasized the General Counsel’s silence, and explained both why and how that silence affected his consequent construction of the complaint. The judge also correctly noted the scope of his authority to rule on an issue not alleged in a complaint. Considering the procedural posture of this case and basic “fairness,” the judge concluded that the only issue he could properly rule on was the January 12 and 13 posting. And he concluded, applying *Woodland*, that the posting, in and of itself, was not unlawful.

We agree with the judge’s findings, conclusions, and analysis. Specifically, we agree with the judge that, un-

⁵ Contrary to our dissenting colleague, we do not find that the facts presented in *Woodland* clearly dictate a different result here. This is especially so, given the procedural history lent to this case by the General Counsel’s pleading and position at the hearing.

der *Woodland*,⁶ the Respondent’s postimpasse posting of its terms and conditions of employment on January 12 and 13 is not a basis for finding a violation under *McClatchy*. Unlike in *Woodland*, of course, the Respondent here has stipulated that it unilaterally granted wage increases pursuant to its final pre-impasse contractual wage proposal. The General Counsel, however, by failing to object when the judge stated that he was not going to consider events after January 12 and 13, has clearly acquiesced in the judge’s limiting of the scope of the complaint to encompass only the Respondent’s January 12 and 13 posting of the proposal.

Implicit in the General Counsel’s exceptions is that he did not know at the hearing that an actual grant of merit pay was an essential element to plead and prove. However, the General Counsel did know at the hearing that the judge had limited the scope of the litigation (and potential legal liability) to the events of January 12 and 13. Further, the General Counsel knew that the Respondent was explicitly attempting to foreclose litigation of the question whether the subsequent act of *granting* merit wage increases violated the Act. Under these circumstances, it was incumbent on the General Counsel to voice his opposition to the judge’s narrowing of the complaint at the hearing, rather than waiting to do so until after the issuance of the judge’s decision.⁷

Our colleague seeks to distinguish *Woodland* on the basis that the employer there, unlike here, promised to meet and confer with the union prior to implementing its pay system. However, that difference relates to the issue of whether a proposal is of the type found objectionable

⁶ The judge’s application of *Woodland*, despite its issuance after the hearing in this case, comports with the well-established legal principle that “a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Certain-Teed Corp.*, 271 NLRB 76, 77 (1984), quoting *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974).

⁷ See *Paul Mueller Co.*, 332 NLRB 1350 (2000), where the Board reversed the judge on due process grounds. The judge had found a violation on a theory effectively disclaimed by the General Counsel. While there the General Counsel had made affirmative representations, our due process concerns regarding the “parties’ understanding of the scope of the complaint allegations” are the same. There, like here, respondent’s counsel sought to clarify the scope of the complaint allegation, and there, like here, the General Counsel’s action (there, by affirmative statements; here, by silence) “reasonably led the Respondent to believe that it would not have to defend” against certain conduct. There, we concluded that the General Counsel was “not entitled to a ‘second bite of the apple’” through a remand, and here we conclude the same.

See also *Precision Products Group*, 319 NLRB 640, 641 (1995), where the Board reversed a hearing officer who had reassured the employer’s counsel that he was limiting the scope of the hearing, and thereafter decided an issue which the employer “had good reason to believe” would not be considered.

in *McClatchy*, which issue goes to the extent to which a proposal excludes the union from the process. It does not relate to the issue of whether the posting of a merit pay proposal is itself a violation.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

Contrary to the majority and the judge, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its wholly discretionary merit pay plan on January 12 and 13, 1999. My disagreement with my colleagues and the judge stems from my belief that *Woodland Clinic*, 331 NLRB 735 (2000), did not establish a per se rule that a *McClatchy*¹ violation may never accrue prior to an employer's actual granting of discretionary merit increases. In my view, the Board may find in appropriate circumstances that an employer has "implemented" a *McClatchy*-type merit pay proposal, even if the employer has yet to actually grant any increases. I would find that this is such a case.²

The Facts

The parties stipulated to the following facts. On December 1, 1997, the Respondent and the Union commenced negotiations for successor collective-bargaining agreements covering two units of the Respondent's employees: the packaging and distribution unit (P&D Unit) and the composing room unit (composing unit). On November 20, 1998, the Respondent presented the Union with "last, best, and final" contract offers for each unit. The Union rejected those offers and the Respondent declared impasse.

On January 12, 1999,³ the Respondent posted its final contract proposal for the P&D unit and an accompanying letter to the Union and the P&D employees. The letter advised, "effective immediately, we will be implementing the changes in working conditions referenced in the posted documents." On January 13, the Respondent posted its final contract proposal for the Composing Unit and an accompanying letter to the Union and the Composing employees. This letter too advised, "effective immediately, we will be implementing the changes in working conditions referenced in the posted documents."

¹ *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

² Consequently, even if the General Counsel waived reliance on the Respondent's post-January 13 granting of merit increases (a finding about which I have doubts), I would find the waiver immaterial in this instance.

³ All dates hereinafter are 1999, unless stated otherwise.

Among the working conditions in each of the Respondent's final contract proposals was a merit wage increase and bonus provision.⁴ The parties stipulated that, pursuant to this provision, "the Respondent maintain[ed] full discretion . . . as to [the] time and amount of any [such] payments." The parties further stipulated that after January 13, the Respondent granted merit wage increases and/or bonuses to various unit employees without bargaining with the Union as to the timing or amount of those payments.

The Judge's Decision

As more fully described in the majority decision, the judge found that he could not consider the Respondent's actual granting of discretionary merit wage increases and/or bonuses after January 13. As a result, the judge limited his decision to whether the "Respondent violated the Act by posting the last, best, and final offer which included a wholly discretionary merit and bonus wage increase [provision]." As to this issue, the judge read *Woodland Clinic* as holding that the "posting" of such a provision "as part of the implementation of [a] last, best, and final offer does not, itself, constitute a violation under *McClatchy*." Applying this reading of *Woodland Clinic*, the judge found no violation in the Respondent's announcements on January 12 and 13, that, "effective immediately, we will be implementing" the discretionary merit wage increase and bonus provision.

Discussion

As stated, I do not read *Woodland Clinic* as establishing a per se rule that implementation of a *McClatchy*-type proposal may never occur prior to the employer's actual granting of merit pay increases. As the Board explained in *Woodland Clinic*, the vice in a *McClatchy* situation is the employer's "exclusion of the [union] at

⁴ This provision, nearly identical in both proposals, stated:

The wages referred to above are minimum only. The Employer shall have the right to grant wage increases and bonuses based on job performance reviews. ~~on an annual basis.~~

Any employee who receives a job performance review may, within two weeks, appeal the evaluation by:

- (i) The employee shall first take his/her appeal to the Manager.
- (ii) Should the Manager fail to resolve the issue, the employee may then appeal to the Director.

(iii) An appeal may be made for (i) and (ii) to H.R. ~~H.O.D.~~

~~(iv) An employee's Job Performance Rating and the applicable wage rate increase or bonus will be given to the Union.~~

(iv) ~~(iv)~~ The Union representative may participate with the employee in the appeal process.

Contrary to the Respondent's suggestion, this provision proposed material changes in the parties' prior agreement.

the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan[.]” 331 NLRB 735, 740 at fn. 12 (quoting *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998)). To be sure, the Board in *Woodland Clinic* fixed the point of implementation in that case at the employer’s actual granting of merit increases. *Id.* But that result clearly was dictated by the facts presented in *Woodland Clinic*. The employer’s proposal in that case provided in pertinent part:

The [Respondent] shall have the right to develop and implement a pay-for-performance system of its own choosing Prior to implementing such pay-for-performance system the [Respondent] shall notify the Union of the proposed system and, upon request, meet and confer with the Union prior to implementation no later than three (3) weeks prior to the proposed implementation date.

331 NLRB at 739 Obviously, given this language, it would have been premature for the Board to find a refusal-to-bargain violation based on the employer’s post-imasse declaration that it was implementing its merit pay proposal.

This case presents a significantly different situation. The Respondent’s merit pay proposal did not mandate, or even contemplate, further bargaining with the Union prior to the actual granting of merit increases. Indeed, the Respondent’s proposal immediately authorized it to exercise unfettered managerial discretion over such increases. Considering these facts, I would find that the Respondent “implemented” its proposal for purposes of *McClatchy* when it unequivocally declared on January 12 and 13, that its proposal was being implemented, “effective immediately.” I see no sound reason to require a union to delay the filing of an unfair labor practice charge in such circumstances.

I would therefore find that, by implementing its merit pay plan on January 12 and 13, the Respondent violated Section 8(a)(5) and (1) of the Act. I am mindful that the Board may not “brandish *McClatchy* without any real explanation” as to why the implementation of a particular merit pay proposal was unlawful. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 118 (D.C. Cir. 2000). Here, the Respondent’s proposal virtually spoke for itself. As the Respondent admitted, the proposal granted it “full discretion as to [the] time and amount of any” merit increases. The proposal, moreover, contained no other definable procedures or criteria. The only role for the Union under the proposal was as an after-the-fact participant in an employee’s appeal, if any,

of his performance review (the purported basis for the Respondent’s wholly discretionary merit pay decisions). Even then, however, the Respondent remained free to ignore the Union’s input. See *McClatchy*, *supra* at 1391.

In these circumstances, I would find that the Respondent’s merit pay proposal excluded the Union “at the point of its implementation from any meaningful bargaining as to the procedures and criteria governing the merit pay plan.” *McClatchy*, *supra* at 1391. I would find therefore that the Respondent’s implementation of its proposal on January 12 and 13, in the P&D and Composing Units, respectively, was unlawful.

Brian D. Gee, Atty., for the General Counsel.

David S. Durham, Atty., *Littler Mendelson*, of San Francisco, California, for Respondent.

Richard Rosenblatt, Atty., of Englewood, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Bakersfield, California, on January 31, 2000, and is based on two charges filed on July 2, 1999, by Bakersfield Typographical Union No. 439 (Union), alleging generally that The Bakersfield Californian (Respondent) violated Section 8(a)(5) of the National Labor Relations Act, as amended (29 U.S.C. § 151 *et seq.*) (the Act). On September 30, 1999, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued an order consolidating the two complaints and issued a consolidated complaint and notice of hearing alleging violations of Section 8(a)(5) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a California Corporation, with its principal place of business in Bakersfield, California, where it is engaged in the business of publishing a daily newspaper; and that it derives gross annual revenues in excess of \$200,000 and that it annually purchases and receives at its Bakersfield, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Facts

The Union represents employees of the Respondent who work in the mailroom (packing and distributing unit) and the composing room. On September 30, 1997, the separate collective-bargaining agreements covering these employees expired. Negotiations for a new contract began on December 1, 1997, and the parties met on 12 separate occasions.

In regards to pay, Respondent proposed to maintain its merit pay plan and offered no across the board pay increases. The Union made no proposals to change the operative language to the merit pay but actively sought an across the board increase in wages.

On November 20, 1998, Respondent made a last, best, and final offer to the Union which was rejected and impasse was declared. On January 12 and 13, 1999, Respondent posted their last, best, and final offer which included the merit wage and bonus language which had been presented by Respondent during negotiations. The language for the composing unit contract was as follows and included the indicated modification marks

Section 4. The wages to above are minimum only. The Employer shall have the right to grant wage increases and bonuses based on job performance reviews ~~on an annual basis.~~

Any employee who receives a job performance review may, within two weeks, appeal the evaluation by:

- (i) The Employee shall first take his/her appeal to the Manager.
- (ii) Should the Manager fail to resolve the issue, the employer may then appeal to the Director.
- (iii) An appeal may be made for (i) or (ii) to H.R. ~~H.O.D.~~
- ~~(iv)~~ An employee's Job Performance Rating and the applicable wage rate increase or bonus will be given to the Union.
- (v) The Union representative may participate with the employee in the appeal process.

Section 5. The employer shall *provide a copy of applicable Changes of Status to the union.* ~~Keep a copy of payroll for the use of the Union~~

The language of the Packing and Distributing unit contract was the same except that the phrases "on an annual basis" and "applicable wage rate increase or bonus will be given to the Union" were not struck from section four.

Since January 1999, Respondent has granted merit bonuses to certain employees in the composing unit and merit bonuses and merit wage increases to certain employees in the packing and distributing unit.

B. Analysis and Conclusion

At paragraph 10, the complaint alleges:

(a) On or about January 12, 1999, Respondent acting through Koers, implemented its last, best and final offer for the P. + D. Unit employees.

(b) Respondent's last, best and final offer included a wholly discretionary merit wage and bonus provision."

At paragraph 11, the complaint makes the same allegation regarding the composing unit employees on January 13, 1999.

At the hearing, it was stipulated that on January 12, 1999, and January 13, 1999, Respondent posted a letter and working conditions. These working conditions were the last, best, and final offer from Respondent. Counsel for the General Counsel argues that under *McClatchy Newspaper*, 321 NLRB 1386 (1996), Respondent cannot implement a discretionary merit wage and bonus plan without bargaining with the Union over the timing and amounts and that Respondent therefore violated Section 8(a)(5) of the Act.

The judicially created "implementation at impasse" doctrine allows an employer to implement its last, best, and final offer after the parties reach a bona fide impasse in negotiations. *NLRB v. Katz*, 369 U.S. 736 (1962); see also *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). *McClatchy* recognized "a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay." 321 NLRB at 1388. Respondent's proposal is similar to *McClatchy* in that "Respondent retained ultimate discretion over the timing and amount of individual merit increases."¹ *Id.* at 1386.

However, in *McClatchy*, implementation was a unilateral change in wages; the employer had exercised its discretion by actually granting the change in wages. During preliminary matters at the hearing, Respondent admitted that it, too, granted merit wage increases and bonuses to certain individuals within the packaging and distribution unit and to individuals within the composing unit throughout 1999, but stated that this was not relevant to any of the alleged unfair labor practices. Respondent stated that the complaint and stipulations at hearing concerned the posting of conditions on January 12, 1999, and January 13, 1999 only.

Respondent was attempting to clarify the allegations in the complaint. The General Counsel could have entered into the colloquy between myself and Respondent to offer comment, to interpret the complaint, or to amend the complaint, which is his right. The General Counsel, instead, remained silent. This left the complaint unamended. Based on this colloquy, and Counsel for the General Counsel's seeming agreement with the statements made therein, Respondent was therefore assured by me that if there was not a violation to be found in the posting of the discretionary language in the last, best, and final offer, no violation would be found. There was no objection. With this assurance, any factual information or legal arguments that the

¹ With the exception of the inclusion of the "on an annual basis" language that was not struck from the packing and distributing unit contract.

parties may have had regarding Respondent's granting of merit wages and bonuses was not heard.

A (judge) is allowed to pass on an issue not alleged in the complaint if it is closely related to a subject matter in the complaint and is fully litigated. *Monroe Feed Store*, 112 NLRB 1336, 1337 (1955); see also *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995); *Meisner Electronic*, 316 NLRB 597 (1995); *Pergament United Sales*, 296 NLRB 333 (1989). Fairness, however, must be considered in the circumstances of the case. *Facet Enterprises v. NLRB*, 907 F.2d 963, 972 (10th Cir. 1990); *Maintenance Service Corp.*, 275 NLRB 1422, 1425-1426 (1985).

Here, Respondent took great care to clarify exactly what the factual allegations were. Notably, the Respondent voiced its concerns about the complaint during the preliminary matters portion of the hearing. That is, prior to putting on its case. The General Counsel had full and fair opportunity to correct the Respondent's understanding of the complaint prior to my hearing any evidence at the hearing but did not.² Therefore, the issue regarding Respondent's actual granting of merit wages and bonuses was not fully litigated.

² It is noted that admissions by a Respondent witness have been considered fully litigated issues. *Pergament United Sales Inc.*, 296 NLRB 333, 334 (1989); *Timken Co.*, 236 NLRB 757, 758 (1978). When considering the fairness argument, I find these cases are distinguishable from the present case in two respects. First, the admission occurred during the testimonial phase of the hearing, not while attending to preliminary matters. Second, the admission in this case was a direct attempt by Respondent to clarify the matters alleged in the complaint.

Accordingly, the question is whether or not Respondent violated the Act by posting the last, best, and final offer which included a wholly discretionary merit and bonus wage increase.

In its interpretation of *McClatchy*, in *Woodland Clinic*, 331 NLRB 735 (2000), the Board found that the mere posting of a wholly discretionary merit wage program as part of the implementation of the last, best, and final offer does not, itself, constitute a violation under *McClatchy*. Following this precedent, I therefore find no violation in Respondent's posting of their last, best, and final offer which included a wholly discretionary merit wage and bonus program.

CONCLUSIONS OF LAW

1. By posting its last, best, and final offer, Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

2. By posting its last, best, and final offer, Respondent has not violated Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint should be, and is, dismissed in its entirety.

³ 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.