

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 19, 1995

TO : Rosemary Pye, Regional Director
Region 1

FROM : Robert E. Allen, Associate General Counsel
Division of Advice

SUBJECT: AmeriGas, Inc.
Case 1-CA-31994

530-6050-1612-7100
530-6050-1645
530-6050-1662
530-6067-2020
530-6067-2060-1200
530-6067-2060-2700
530-6067-2060-7700
530-6067-2080-6200
530-6067-4001-7500

This Section 8(a)(5) case was submitted for advice as to whether the Employer engaged in bad-faith bargaining by: (1) insisting to impasse on a comprehensive company-wide benefits package, and a company-wide vacation and holiday policy; (2) insisting to impasse on a company-wide benefits package which reserves to the Employer unfettered control to modify or eliminate any or all of the enumerated benefits;¹ (3) insisting to impasse on the above-described company-wide benefits package because it is a permissive subject of bargaining; and (4) unilaterally implementing the company-wide benefits plan, in the absence of bargaining to impasse with the Union over the timing, criteria, and procedures of the plan, under the Board's holding in Colorado-Ute.²

FACTS

The Union has historically represented a unit of employees employed by the predecessor employer, Petrolane, at its Massachusetts facility. In August 1993, the Employer purchased Petrolane and assumed the terms of the existing collective bargaining agreement, which contained an expiration date of March 15, 1994.³

¹ Petrolane, Inc., 21-CA-30141, Advice Memorandum dated October 31, 1994, involved this "benefits program" proposal at another Petrolane/AmeriGas facility in California.

² Colorado-Ute Electric Association, 295 NLRB 607 (1989), enf. denied, 939 F.2d 1392 (10th Cir. 1991), cert denied, 112 S.Ct 2300 (1992).

³ All events occurred in 1994, unless otherwise indicated.

By letter dated January 3, the Union provided notice of contract termination to the Employer and requested bargaining for a successor agreement. The parties met at regular times and places to negotiate a successor agreement on six occasions between April 19 and May 19 and, as of the last bargaining session, had tentatively agreed to a variety of subjects.⁴ However, they were unable to agree to several items including, inter alia, the following employee benefits proposal made by the Employer:⁵

The Union has negotiated participation in the Company Benefits program. As such, the employees will be entitled to benefits under the same terms and conditions that apply to all other employees. The benefits program is normally defined as the benefit plans covering life insurance, medical, dental, retirement, employee savings, 401(k), short-term disability, long-term disability and flexible spending account. The Union recognizes that the benefits program may be changed, modified or terminated at any time. Any dispute in regard to any of the plans is subject solely to the appeals procedure of the particular plan.

As part and parcel of the above proposal, the Employer also proposed and insisted upon retention of its company-wide vacation and holiday policies, although it did not seek to retain total control to change or eliminate such benefits. Agreement was not reached on either a vacation or holiday proposal, in part due to the Employer's refusal to allow independent bargaining on those matters. Rather, all company-wide benefits, including vacation and holidays were presented by the Employer as an integrated whole.

During the initial bargaining sessions on April 19 and 20, the Employer explained that it had approximately 5000

⁴ These subjects included a recognition clause, duration of the contract clause, union security clause, no-strike clause, management rights clause, funeral leave, dues deduction, grievance and arbitration procedure, use of temporary employees, seniority, bargaining unit work, assignment to higher rated jobs, and minor language provisions.

⁵ The Region has concluded that apart from the Employer's conduct in insisting on the proposals at issue, the parties would have reached a valid impasse under Taft Broadcasting Co., 163 NLRB 475 (1967), enf'd. sub nom. Television Artists AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

employees in 43 states, all of whom were covered by the above-described benefit package regardless of their union or non-union status and/or coverage under a collective bargaining agreement.

During the second set of bargaining sessions on April 25 and 26, the Union asked for the Employer's position on the Union's proposals to change health insurance carriers from Blue Cross/Blue Shield to Pilgrim Health Care. The Employer replied that the company was not interested in the Union's Pilgrim proposal because it had its own medical plan and wanted to treat all employees the same. On another occasion, the Employer responded to the Union's benefit proposals by stating that it would not negotiate over any of the benefit items individually, but only as part of the Employer's "benefit package." The Employer similarly responded to the Union's holiday proposal by stating that it would not deviate from its "benefit package." Subsequently, the Employer stated that it was "the Company's benefit package or nothing," and that its position in that regard had remained unchanged from the outset of bargaining. When the Union objected to the co-pay provision in the Employer's health insurance plan proposal, the Employer responded that this was the provision for all of its employees, and had been so since 1989.

In addition to its insistence on integrating the substantive aspects of the company-wide proposals, the Employer also refused to bargain separately over the portion of the proposal reserving to it unfettered control over changes. Specifically, when the Union protested the waiver of its right to negotiate changes in the benefit plans, the Employer responded that the benefits package as proposed was "non-negotiable."

On May 19, the Employer announced the presentation of its "best and final" offer to the Union. No modifications were made to the benefits proposal, including the vacation and holiday proposals, all of which had remained unchanged from the Employer's initial proposal. The employees voted on May 19, and again in early June, to reject the offer.

By letter dated July 12, the Employer advised the Union that the parties were at impasse and, accordingly, that it would "implement the economic (wages and benefits) terms and conditions of [its] last, best and final offer effective August 1, 1994." Following receipt by the Union of the Employer's letter, the parties agreed to meet again on August 2, and the Employer agreed to forestall implementation until after the meeting. The parties were unable to reach agreement. By letter dated August 3, the Employer advised the Union that it would implement the

economic terms and conditions of its final offer effective August 8. In that regard, the Employer's September 7 position statement to the Region at page 3 states:

Since August 8, 1994, the date on which Mr. Murray notified the Union by correspondence that the Company would implement its final and best offer, the Employer has implemented its best and final offer, and has inter alia facilitated the enrollment of members of the bargaining unit in its medical, dental, life and 401(k) plans. No one has refused to enroll.

No bargaining sessions have occurred since August 2.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by insisting to impasse on its company-wide vacation/holiday proposal and benefits proposal, which reserved to the Employer total control over all aspects of employee benefits. We further conclude that the Employer violated Section 8(a)(5) by implementing its company-wide benefits proposal in the absence of the Union's agreement to waive its right to negotiate over the modification and/or elimination of employee benefits, under both the Board's analysis in Colorado-Ute and under the General Counsel's position in response to the Circuit Court's remand in McClatchy Newspapers.⁶ Finally, absent withdrawal, the Region should dismiss the allegation that the Employer violated Section 8(a)(5) and (1) by insisting to impasse on a permissive subject of bargaining.

1. The Employer failed to bargain in good faith by insisting to impasse on company-wide benefits and vacation and holiday proposals, which largely consist of economic terms and conditions of employment over which the Employer retained "total control."

Section 8(d) of the Act does not require parties engaged in collective bargaining to agree on their respective proposals, but does require "more than a willingness to enter upon a sterile discussion of union-management differences."⁷ The parties must enter

⁶ 299 NLRB 1045 (1990), enf. denied and remanded 964 F.2d 1153 (D.C. Cir. 1992).

⁷ NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

discussions with open and fair minds and with the purpose of reaching agreement.⁸ Thus, an employer is "obliged to make some reasonable effort in some direction to compose his differences with the union. . ." ⁹ Further, a "take it or leave it" attitude, while not per se violative, is evidence of bad faith.¹⁰ Bad faith bargaining may also be evidenced by a failure to provide justification for a bargaining posture.¹¹

The Board draws a distinction between lawful "hard bargaining" and unlawful "surface bargaining." The Board will find bad faith bargaining based in part on the content of the employer's proposals, but this examination will relate "to whether they indicate an intention by the Respondent to avoid reaching an agreement; it is not a subjective evaluation of their content."¹² Thus, the Board will not determine whether a proposal is acceptable or unacceptable to a party. Rather, the Board will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."¹³ Further, the Board looks to the totality of the Respondent's conduct, not just the proposals themselves.¹⁴

⁸ NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960), rehearing den. 277 F.2d 793 (5th Cir. 1960); Majure Transport Co. v. NLRB, 198 F.2d 735, 739 (5th Cir. 1952).

⁹ Atlanta Hilton & Tower, 271 NLRB at 1603, quoting NLRB v. Reed Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953).

¹⁰ 88 Transit Lines, 300 NLRB 177, 178 (1990), enf'd 937 F.2d 598 (3d Cir. 1991).

¹¹ See, e.g. John Ascuaga's Nugget, 298 NLRB 524, 527 (1990), enf'd in relevant part, 968 F.2d 991 (9th Cir. 1992).

¹² Litton Microwave Cooking Products, 300 NLRB 324, 327 (1990), enf'd 949 F.2d 249 (8th Cir. 1991), cert. den. 112 S.Ct. 1669 (1992).

¹³ Reichhold Chemicals, 288 NLRB 69 (1984), aff'd in relevant part 906 F.2d 719 (D.C. Cir. 1990); Fairhaven Properties, Inc., 314 NLRB 763, 770 (1994).

¹⁴ A.M.F. Bowling Co., 314 NLRB 969, 973 (1994).

The Board has found bad faith bargaining based in part on the employer's insistence on unilateral control over wages and benefits. In A-1 King Size Sandwiches,¹⁵ the employer insisted on unilateral control over merit increases; manning; scheduling and hours; layoff, recall, and the granting and denial of leave; promotion, demotion and discipline; the assignment of work outside the unit; and changes of past practice. The employer's contract proposal also contained a broad no-strike clause and an "essentially illusory" grievance-arbitration procedure. The Board found a Section 8(a)(5) violation, adopting the ALJ's finding that the employer's proposals, "would strip the union of any effective method of representing its members. . ." ¹⁶ The Board further noted that, if accepted, the proposed contract would have left the union with substantially fewer rights than if it relied solely on its certification.

In John Ascuaga's Nugget, the employer proposed that it retain complete discretion to award merit increases; to remove any employee benefit at any time; to determine unilaterally employees' seniority for purposes of its own devising; and, to determine layoffs, transfers, promotions, leaves of absence, and work rules. Characterizing this set of proposals as "extreme" and "unreasonable", the Board concluded that it "evinces a lack of serious intent to reach agreement."¹⁷ Moreover,

[t]he Respondent's unwavering demand for total control of wages, seniority, and work rules--which amounted to excluding these from the bargaining process both at the contract-negotiation table and throughout the term of the contract proposed by the Respondent--was all the more likely to frustrate agreement because of Respondent's refusal to provide any justification for placing subjects of such importance to the employees beyond the influence of the employees' collective-bargaining representative.¹⁸

¹⁵ 265 NLRB 850 (1982), enf'd 732 F.2d 872 (11th Cir. 1984), cert. den. 469 U.S. 1034.

¹⁶ Id. at 859, quoting from San Isabel Electrical Services, 225 NLRB 1073, 1080 (1976).

¹⁷ John Ascuaga's Nugget, 298 NLRB at 527.

¹⁸ Id. In concluding that the employer engaged in surface bargaining, the Board also criticized the employer's obstructionist tactics, such as adamantly refusing to budge

In Harrah's Marina Hotel and Casino,¹⁹ the Board held that in the totality of circumstances, the employer's insistence on complete unilateral control over wages and benefits absent recourse to the grievance and arbitration procedure constituted bad faith bargaining. The Employer's wage proposal did not set minimum or maximum pay rates and made no mention of guidelines for annual pay increases. The benefits proposal specified that the employer could unilaterally change or discontinue any benefit during the term of the contract. The ALJ concluded that considering the totality of the employer's conduct, including its unilateral change of employees' work schedules and a variety of inappropriate tactics²⁰ and Section 8(a)(1) and (3) violations,²¹ the employer's wage and benefits proposals evidenced bad faith. Thus, the ALJ noted that "[t]he Respondent's wage proposal was an attempt to retain unilateral control over all aspects of wages and thus effectively removed wages as a negotiable issue not only at the bargaining table but also for the term of any bargaining agreement."²² The ALJ concluded that the employees would be better off without a contract because the Act itself precludes unilateral action of the sort which the employer demanded.²³

from its only contract proposal, refusing to meet regularly or for long periods of time, repeatedly rejecting a hiring hall even though the union had never proposed one, and abruptly forcing impasse and terminating bargaining.

¹⁹ 296 NLRB 1116 (1989).

²⁰ The employer refused to discuss important work schedule issues, made misrepresentations during bargaining and failed to provide information, adopted a "take-it-or-leave-it" attitude, made discriminatory explanations for the reduction in benefits, insisted on reducing benefits, and attempted to have the union abandon the bargaining unit.

²¹ The ALJ held that the employer coercively interrogated and threatened employees, discriminatorily enforced a no-talking rule, and discriminatorily discharged an employee.

²² Id. at 1133. The ALJ further noted that "significantly" the employer never moved off its initial proposal on wages.

²³ Id. at 1134.

In Radisson Plaza Minneapolis,²⁴ the Board held that the totality of the employer's conduct--including its insistence on total control over wages and benefits--constituted bad faith bargaining. The employer insisted throughout bargaining on incorporating its employee handbook into the contract in its entirety, including provisions giving the employer the right to set employee wages, "subject to Radisson's business needs" and to alter or discontinue any employee benefit at any time. In the context of the employer's independent Section 8(a)(5) violations²⁵ as well as its inappropriate behavior at the table,²⁶ the Board concluded that the employer's proposal was "calculated to frustrate agreement."²⁷ The Board explained that the employer's proposal to retain unilateral control over wages and benefits "is at odds with the basic concept of a collective-bargaining agreement" and emphasized that the union could do just as well without a contract at all, since the employer would not have the statutory right to make unilateral changes.²⁸

We recognize that the Board has also held that an employer's insistence on a corporate-wide benefit plan or policy is generally a valid bargaining position, where there has been bargaining on all other terms and conditions of employment.²⁹ For example, in Exxon Co.,³⁰ the Board held that the employer lawfully insisted to impasse on its proposed revisions to a company-wide substance abuse policy, where it had exhibited a willingness to compromise in other areas in order to arrive at an agreement with the union.

²⁴ 307 NLRB 94 (1992), enf'd 987 F.2d 1376 (8th Cir. 1993).

²⁵ The employer also unlawfully refused to discuss changes in job assignments, unilaterally increased wages, and failed to provide the union with information in a timely manner.

²⁶ The employer was unwilling to meet more frequently and repeatedly referred to the slim margin of the union's majority.

²⁷ Id. at 96.

²⁸ Id. at 95.

²⁹ See Shell Oil Company, 194 NLRB 988 (1974) (employer's insistence on uniformity as applied to its company-wide benefit plan not impermissible in and of itself).

³⁰ 313 NLRB 1193 (1994).

Additionally, in John S. Swift Company,³¹ the Board found that the Employer acted lawfully where it had insisted on its company-wide health and welfare plan, but had reached agreement with the union on virtually every other major bargaining issue.

In the above cases however, the employer, in seeking to incorporate certain company-wide proposals in the parties' collective bargaining agreement, did not also seek to retain unilateral control to modify and/or eliminate those provisions during the term of the contract. Here, with the exception of the company-wide vacation and holiday proposals, the Employer is seeking to retain total control over all aspects of its proposed company-wide benefits plan, which includes, inter alia, health insurance, retirement, 401(k) savings, and short and long-term disability. Moreover, the Employer inextricably intertwined its vacation and holiday proposals with its benefits proposals by announcing that all company-wide proposals were offered as a package, and that it would not negotiate over any individual item. Thus, because so many of the proposals allowed the Employer to retain total control over their modification and/or elimination, as discussed below, and because the Union was unable to negotiate separately over those which did not, namely vacation and holidays, the Employer violated Section 8(a)(5) by bargaining to impasse over the entire package of company-wide proposals.

We further conclude that the totality of the Employer's conduct and proposals, and specifically its benefits plan, establishes that it intended to frustrate bargaining rather than reach an agreement. Although the instant case does not involve an attempt to directly retain total control over wages, the items contained in the benefits plan are, nevertheless, critical economic terms of employment. For example, the Employer's ability to unilaterally increase insurance co-payments would allow it to indirectly reduce employee take-home wages. Under the Employer's benefits proposal, the Union would have no recourse to the grievance/arbitration provision of the contract, and the no-strike clause would further deprive the Union of an avenue to challenge the Employer's exercise of unfettered discretion. Thus, the Employer insisted to impasse on a combination of proposals that effectively removed several critical economic terms as negotiable issues both at the bargaining table, and throughout the life of the agreement.³² As the Board concluded in Radisson Hotel and

³¹ 124 NLRB 394, 395 (1959).

Harrah's Marina Hotel, the Union would be better served by merely relying on its statutory protection against unilateral changes.

In addition to its bargaining proposals, the Employer's conduct at the bargaining table further evidences its bad faith. First, despite the Union's repeated objections to and inquiries about the proposals, the Employer failed to articulate a plausible reason for its insistence on total discretion over the benefits package. Instead, the Employer simply stated that it "wanted to treat all employees the same," and that it had historically treated all employees the same, regardless of their union status. In John Ascuaga's Nugget, the Board held that a refusal to explain a bargaining position constitutes a "significant manifestation" of bad faith, "because it is not the conduct of a party seeking sincerely to reach agreement."³³ The Employer's refusal to explain why it refused to treat represented employees any differently than unrepresented employees demonstrates a similar disdain for the process of collective bargaining.

Secondly, the Employer never budged from its initial proposal to retain unilateral control over its company-wide benefits package, and similarly never made movement from its insistence on its company-wide vacation and holiday policies, all of which it combined into an unseverable "benefits" proposal. The Board has acknowledged that "[r]igid adherence to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement. . ."³⁴ While Section 8(d) does not

³² See Commercial Candy Vending Division, 294 NLRB 908, 909 (1989) ("The Board has found bad-faith bargaining when the employer has insisted on a broad management rights clause and a no-strike clause, while at the same time refusing to agree to an effective grievance procedure.")

³³ 298 NLRB at 527.

³⁴ Kuna Meat Company, 304 NLRB 1005, 1013 (1991), enf'd 966 F.2d 428 (8th Cir. 1992) (employer bargained in bad faith where it refused to budge from its initial contract proposal which sought total discretion over a broad management rights clause not subject to arbitration), quoting Tomco Communications, 220 NLRB 636 (1975), enf. den. 567 F.2d 871 (9th Cir. 1978) (court held employer's wage proposals did not evidence bad faith where they were comparable to those of other employers in area). Total employer control over employee compensation and/or benefits is likely to be "predictably unacceptable" to a union.

compel agreement on bargaining proposals,³⁵ we conclude that the Employer's refusal to consider alternatives to its initial proposals where it demanded unilateral control over matters of paramount importance in the collective-bargaining agreement is further evidence of the type of intransigence and fixed intent indicative of a mindset to frustrate agreement.³⁶

The Board's decision in Colorado-Ute, supra, does not affect this theory of violation. In that case, the Board held, inter alia, that an employer can lawfully insist to impasse on a merit pay proposal giving the employer unlimited discretion to determine merit wage increases. However, in later decisions, the Board has carefully specified that the Colorado-Ute analysis is inapplicable in situations where a party insists to impasse on total control over all compensation issues. In Harrah's Marina Hotel, the ALJ held that the employer's reservation to itself of unilateral control over all aspects of wages was an indicium of bad faith. Upholding the ALJ, the Board distinguished Colorado-Ute because "[t]he instant case involved unilateral control over all wages, not just merit increases. . ."³⁷ In The Cincinnati Enquirer,³⁸ the Board addressed the question of whether the employer violated Section 8(a)(5) by insisting to impasse on unilateral control over wage increases. The Board found no violation because "the General Counsel did not establish that Respondent insisted during negotiations on control of its entire wage system. . ."³⁹ In so concluding, the Board distinguished Harrah's Marina Hotel because there the employer insisted on controlling all aspects of wages. Accordingly, the Board concluded that, "the Respondent's insistence on its proposal, in and of itself, was not unlawful bad-faith bargaining in light of our recent decision in Colorado-Ute

³⁵ Atlanta Hilton & Tower, 271 NLRB at 1603.

³⁶ John Ascuaga's Nugget, 298 NLRB at 527.

³⁷ 296 NLRB at 1116 n.1

³⁸ The Cincinnati Enquirer, Inc., 298 NLRB 275 (1990), pet. for review den. sub nom. Cincinnati Newspaper Guild v. NLRB, 938 F.2d 276 (D.C. Cir. 1991).

³⁹ 298 NLRB at 275 (the Board considered that, although there was some evidence that the employer's initial wage proposal contemplated unilateral control over new hires' wages, the employer did not insist on that point).

Electrical Assn."⁴⁰ Thus, in The Cincinnati Enquirer, the Board distinguished between insistence on unilateral control over wage increases, which, standing alone, is lawful under Colorado-Ute, and insistence on unilateral control of all wages, which is an indicium of bad-faith bargaining not addressed in Colorado-Ute.

The facts of the instant case more closely parallel those in Harrah's Marina Hotel than those in Colorado-Ute. Thus, the Employer insisted on total, unilateral discretion to set, change, and eliminate employees' economic benefits, including but not limited to retirement and health insurance, and thereby could unilaterally control a significant aspect of employee compensation during the entire term of the collective-bargaining agreement. Accordingly, since the Employer demanded complete discretion over numerous economic items, we conclude that Colorado-Ute is distinguishable.

2. The Employer violated Section 8(a)(5) and (1) by implementing a benefit program, the terms of which reserved to the Employer unfettered control to modify and/or eliminate the enumerated benefits, without securing the Union's waiver of its statutory right to bargain over those matters, and absent good faith bargaining to impasse over the procedures, criteria, timing, amounts, and other significant details governing future modification and/or elimination of benefits.

Initially, we conclude that the Employer has "implemented" the terms of its best and final offer, including the benefits proposal. Thus, the Employer's August 3 letter advised the Union that due to the lack of fruitful discussions at the bargaining session of August 2, it would "implement the economic terms and conditions" of its final offer effective August 8. The Employer's September 7 position statement to the Region confirms that the implementation of economic terms and conditions under its final offer had been effectuated. Moreover, the Employer's position statement indicates that it had taken affirmative action to enroll employees in the various company-wide benefit programs outlined in its final offer. The Employer gave no indication at any time that it had not also implemented the terms of its final offer affording it total control to change and/or eliminate the benefit programs.⁴¹

⁴⁰ Id.

⁴¹ Regarding the breadth of the charge allegations, we note that the charge alleges that the Employer violated Sections

Unlike the proposals in Colorado-Ute and its progeny, which deal with merit wage increases, the terms and conditions here involve a much broader subject matter. Moreover, the substantive content of the benefits proposal was inextricably linked by the Employer with the retention of total control to modify and/or eliminate the enumerated benefits. When the Union protested the portion of the benefits proposal giving the Employer unfettered control to modify and/or eliminate various benefits, the Employer responded that the benefits package was "non-negotiable."

FOIA Ex. 5 [REDACTED]

[REDACTED]. The Employer here has taken affirmative action in accordance with the terms of its benefits program proposal by enrolling employees in the various benefit plans. The fact that the Employer has not exercised its right to unilaterally modify or eliminate the benefits enumerated therein is not determinative given the Employer's refusal to entertain Union demands regarding the "waiver" language sought in its proposal. The Employer's own conduct here made negotiation of the "waiver" portion of the proposal an impossibility. Thus, when the Employer took affirmative action to "implement" the benefits program by enrolling employees in the benefit plans, it effectively implemented the portion of that proposal giving it the right to change and/or eliminate those provisions at its sole discretion.

In Colorado-Ute, the Board held that an employer can lawfully insist to impasse on a merit pay proposal giving the employer unlimited discretion to determine merit wage increases and, at impasse, consider employees for merit wage increases and base its consideration on the procedures and criteria that had been proposed to, and adequately discussed with, the union.⁴² However, the Board also concluded that because such a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory rights under Section 8(a)(5) of the Act, a bargaining impasse did not privilege the employer's unilateral exercise of its discretion in granting merit

8(a)(5) and (1) by "declaring impasse and moving to implement prior to actual impasse" (emphasis added). Accordingly, the charge is sufficient to encompass an allegation regarding the Employer's actual implementation of the entire proposal.

⁴² 295 NLRB at 608, 610.

increases.⁴³ In Colorado-Ute and McClatchy Newspapers, supra, the Board held that the employer violated Section 8(a)(5) by implementing merit wage increases without first consulting the union as to the timing and amounts of these increases. The Board reasoned that an employer cannot implement unilaterally a proposal for unlimited management discretion, because it amounts to a waiver of the union's right to bargain, over a determination of merit wage increases.

The Courts of Appeals in the 10th and D.C. Circuits have rejected the Board's waiver theory, at least under the facts presented therein, and the Board is reconsidering its theory in McClatchy Newspapers on remand. However, the instant case does not involve the narrow issue of a proposal giving the employer unilateral discretion to determine merit wage increases. Rather, the Employer is seeking to retain total discretion to drastically modify or completely eliminate a whole host of economic terms and conditions of employment. As such, the instant case is factually distinguishable from both Colorado-Ute and McClatchy Newspapers. FOIA Ex. 5

[REDACTED]

FOIA Ex. 5

[REDACTED]

[REDACTED]. Proposals giving an employer unfettered discretion to set terms and conditions of employment, where there has been no good faith bargaining over the criteria, procedures, timing, amounts and other significant facts pertaining to the conditions under which the Employer's discretion may be exercised, fall into the narrow class of mandatory subjects that cannot be implemented after impasse (exceptions to "implementation after impasse" rule). Implementation after impasse of such proposals is inconsistent with the employer's established duty to bargain over changes to the terms and conditions of employment of represented employees. Although an employer generally has the right to implement its mandatory bargaining proposals after reaching a good faith impasse with the union,⁴⁴ this rule is not sacrosanct.

⁴³ Id. at 608-610.

There is a class of mandatory subjects---such as union security, dues checkoff, no-strike, and arbitration--that do not survive expiration of the contract and thus cannot be implemented at impasse.⁴⁵

Discretionary benefit proposals, like discretionary merit increase proposals, similarly cannot be implemented unilaterally after impasse because the employer must first bargain to impasse with the union over the procedures, criteria, timing, conditions, and other matters relating to the employer's modifications to, or elimination of, those benefits before such modifications are implemented. Unilateral employer discretion over economic benefits like those in the instant matter uniquely injures peaceful bargaining and labor relations, poses a substantial threat to the Union's role as exclusive bargaining representative, and disturbs the nature of collective bargaining over economic issues.

Although an employer is not required under the statute to offer any particular economic benefits to the union (indeed, it may lawfully offer none), the duty to bargain over economic terms and conditions of employment involves bargaining over the procedure and criteria for modifying and/or eliminating existing or proposed benefits. Thus, if the negotiated or proposed benefit package includes a measure of employer discretion, the employer must consult with the union regarding the procedures and criteria for exercising that discretion. Here, the Employer was

⁴⁴ Taft Broadcasting Co., 163 NLRB at 478. The reason for allowing unilateral changes after impasse was stated by the Board in Bi-Rite Foods, Inc., 147 NLRB 59, 65 (1965):

Thus freedom of action which the employer has after, but not before, the impasse springs from the fact that having bargained in good faith to impasse, he has satisfied his statutory duty to determine working conditions, if possible, by agreement with his employees. Having fulfilled his obligation to fix working conditions by joint action, he acquires a limited right to fix them unilaterally, that is, he is limited to the confines of his pre-impasse offers or proposals.

⁴⁵ See e.g., Litton Financial Printing, 111 S.Ct. 2215 (1991). Cf. Southwestern Steel & Supply v. NLRB, 806 F.2d 1111 (D.C. Cir. 1986) (court affirmed Board decision that employer unlawfully ceased using hiring hall, reasoning that hiring hall provision does not fall within the narrow class of exceptional mandatory subjects which do not survive expiration of the collective bargaining agreement).

obligated to negotiate with the Union over the procedures and criteria for exercising its discretion to modify or eliminate the benefits package, either in part or in its entirety.⁴⁶ To allow the Employer to unilaterally set, alter, or eliminate health insurance, retirement benefits, and the other economic benefits enumerated in the proposals at issue, would effectively exclude the Union from having any voice in determining those benefits. Thus, permitting unilateral implementation of such a discretionary benefits package eliminates future bargaining over those procedures and criteria, thereby undermining the statutory right of the Union to bargain collectively over economic benefits, and increasing the possibility of industrial strife.⁴⁷

The Employer here implemented a proposal giving it unilateral discretion to set, modify and/or eliminate employee benefits relating to retirement, health insurance, dental and life insurance, 401(k) plan, and short and long-term disability. The Employer foreclosed bargaining regarding the procedures and criteria under which it would exercise its discretion to modify or eliminate such benefits, despite the Union's opposition to, and attempt to bargain about, those very matters. Moreover, the Employer's proposal did not include any specifics with regard to the procedures and criteria to be utilized in modifying or eliminating the enumerated benefits. Thus, the Union never waived its right to bargain over the specifics of the benefits program proposal. Accordingly, we conclude the

⁴⁶ NLRB v. Katz, 369 U.S. 736, 746-47 (1962), where the Court held that the employer violated Section 8(a)(5) when it granted discretionary merit increases without notifying the union and bargaining to impasse as to the procedures and criteria for determining the increases. Although the instant case does not involve merit increases, an argument can be made that the same standard should be applied, and that indeed, the instant case involves a proposal giving the Employer much broader discretion to unilaterally determine and affect economic terms of employment.

⁴⁷ See NLRB v. McClatchy Newspapers, 964 F.2d at 1172 (Edward's opinion) (merit pay proposal giving employer unlimited discretion "may pose a substantial threat to the union's role as the employees' representative"); Toledo Blade Co., 295 NLRB 626, 628 n.8 (1989), enf. denied and remanded sub nom. Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220 (D.C. Cir. 1990), decision on remand 301 NLRB 498 (1991), citing NLRB v. C&C Plywood Corp., 385 U.S. 421 n.15 (1967) ("the real injury [resulting from unilateral action by an employer]. . . is to the union's status as bargaining representative.")

Employer violated Section 8(a)(5) and (1) by implementing the benefits program proposal absent good faith bargaining to impasse about the criteria, procedures, timing, amounts and other substantive matters relating to the Employer's modification and/or elimination of such benefits for the bargaining unit employees.

However, the Employer's insistence on its benefits package proposal does not amount to insistence to impasse on a permissive subject of bargaining. The proposal does not give the Employer the right to deal directly with employees over changes to the economic benefits set forth in the benefits package. Rather, the proposal only allows the Employer to unilaterally modify or eliminate the benefits. The economic benefits themselves are clearly mandatory terms and conditions of employment. Thus, unlike the situation in Toledo Blade, where the Court concluded, contrary to the Board, that the employer violated Section 8(a)(5) by insisting on the right to deal directly with its employees over changes in their retirement benefits,⁴⁸ the instant case deals only with unilateral discretion on the part of the Employer to make changes to retirement and other matters. As such, the Employer in this case did not insist to impasse on the right to engage in direct dealing with employees over terms and conditions of employment, and therefore, did not insist to impasse on a permissive subject of bargaining.

CONCLUSION

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) by insisting to impasse on total control over numerous economic benefits, many of which also indirectly impact on employee wages. Complaint should also issue, absent settlement, on the alternative theory that assuming, arguendo, the Employer's conduct does not amount to overall surface bargaining, the Employer nevertheless violated Section 8(a)(5) and (1) by implementing a benefit package proposal giving it unfettered discretion to modify or eliminate the included benefits, without securing the Union's waiver of its right to bargain over those matters, and without bargaining to a valid impasse with the Union over the procedures, criteria, timing, conditions, and other significant aspects involved in making changes to, or eliminating the proposed benefits. The complaint should

⁴⁸ 907 F.2d 1220 (D.C. Cir. 1990), cert. den. 498 U.S. 1053 (1991). On remand, the Board adopted the Court's finding that the employer had insisted on a non-mandatory subject of bargaining. 301 NLRB 498.

not, however, allege that the Employer's insistence on the benefits package proposal amounted to an insistence on a permissive subject of bargaining.

R.E.A