

Intermountain Rural Electric Association and International Brotherhood of Electrical Workers, Local 111, AFL-CIO. Cases 27-CA-10890, 27-CA-10711, and 27-CA-10711-3

November 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On October 10, 1990, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel and the Charging Party Union filed exceptions and supporting briefs and the Respondent filed a brief in opposition to their exceptions.

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 only to the extent consistent with this Decision and Order.

The amended consolidated complaint, as amended at hearing, alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in three separate areas of unit employees' terms and conditions of employment following the expiration of its collective-bargaining agreement with the Union, and by implementing all its bargaining proposals not previously implemented without a valid impasse in negotiations having been 305 NLRB No. 107 reached. The judge found that the Respondent violated the Act, in one respect, by replacing the established "call-out" and "standby" lists for selecting employees for overtime with an alphabetical rotation system, but he dismissed all other complaint allegations on the basis that the Union waived its bargaining rights in the other areas. We agree with the judge that the Respondent acted unlawfully by implementing changes in overtime scheduling and adopt his findings in that regard.¹ As forth fully below, however, we find that the Union did not waive its bargaining rights and that the Respondent's other unilateral actions—namely, changes respecting payment of medical and dental insurance premiums and changes in its premium pay system—were also in violation of the Act. Consequently, a valid impasse did not exist when the Respondent implemented all of its proposals.

Background

The Respondent, a public utility supplying electricity, has had a collective-bargaining relationship with International Brotherhood of Electrical Workers,

¹ No exceptions have been filed to those findings.

305 NLRB No. 107

Local 111 (the Union), regarding its production and maintenance employees at four facilities for over 10 years. The parties' most recent agreement was effective from December 1, 1987, through November 30, 1988. On September 30, 1988, each party notified the other of its intent "to modify or terminate" the agreement, and provided a list of proposed changes. Nine negotiating sessions were held between early October and November 28, 1988, the final meeting before contract expiration, and four meetings took place thereafter. The parties met for the last time on March 20, 1989, when the Respondent declared an impasse and thereafter implemented terms and conditions set forth in its final offer.

The Respondent's proposals dealing with management subcontracting rights and the status of seniority in layoffs, demotions, transfers, and promotions were major sources of dispute between the parties. Differences in these two areas persisted throughout the course of negotiations and remained unsettled on March 20, 1989. Although acknowledging this fact, and not alleging bad faith, the General Counsel contends that no valid impasse was possible in any event because the Respondent had previously made unlawful unilateral changes in three other areas: methods of selecting employees for overtime; medical and dental insurance premium payments; and method of calculating eligibility for overtime pay. The General Counsel and the Charging Party Union contend that these earlier unremedied actions interfered with the bargaining process and precluded the possibility of impasse. As noted above, the judge found that the Respondent made unlawful changes in callout and standby selection procedures, but because management rights and seniority were of such overriding importance, the Respondent's unilateral changes in such selection procedures did not interfere with the overall bargaining process so as to preclude the existence of a valid impasse. Accordingly, he concluded that the Respondent's post-March 20, 1989 unilateral changes were privileged postimpasse changes. Because we do not adopt the judge's dismissal of allegations concerning the Respondent's unilateral actions relating to insurance premiums and overtime pay, we find that the Respondent's pattern of unlawful unilateral actions interfered with the bargaining process and thereby precluded the parties from reaching a valid bargaining impasse in March 1989. Thus the Respondent could not lawfully implement the terms of its last contract offer.

Insurance Premiums

Under the terms of the 1987—1988 contract, the Respondent paid the full amount of premiums for employees' medical and dental insurance. Because different insurance plans were available, the contract was worded so that the Respondent's contribution would

cover the highest premium of any of the plans, specifically, that the Respondent's "maximum contribution to any of the medical insurance plans in effect for its employees covered by this Agreement "shall not exceed" one hundred percent (100%) of the Blue Cross and Blue Shield Insurance Company premiums." The contract language relating to dental insurance did not refer to a maximum, but rather stated that the Respondent would "pay one hundred percent (100%) of the premiums for the employees covered."

At the outset of the 1988² negotiations, the Respondent told the Union that both its medical and dental insurers were raising their premiums on December 1.³ The Respondent initially proposed a specific dollar limit on its contributions toward insurance premiums, but by November 28, the parties' last meeting before contract expiration, the Respondent proposed paying the premiums in full. Though this was acceptable to the Union, insurance coverage was just one part of the Respondent's overall economic package, which was not otherwise acceptable to the Union. Accordingly, by rejecting the Respondent's comprehensive economic proposal, the Union also rejected this offer on insurance.

This was the first time in their bargaining history that the parties failed to agree to a successor contract before the previous contract expired. Thus no past practice exists concerning payment of insurance premiums during a contract hiatus.

During the November 28 meeting, the Respondent told the Union that if a new agreement was not reached by November 30, it would pay only the same dollar amount it had been paying for premiums under the old plans and that employees would have to make up the difference. Scheduling conflicts precluded the parties from meeting again before the contract expired. On November 30, The Respondent issued a memo to employees notifying them of the increased medical and dental premiums and that deductions would be made from their paychecks to cover the higher costs. On December 2, the Union filed an unfair labor practice charge concerning these unilateral actions. The parties' next meeting took place on December 21, but the subject of insurance premiums was not discussed.

The judge dismissed the complaint allegations on this issue. First, he appears to have found that because the Respondent did not change the amount of its medical premium contribution, and continued to pay the same amount it had paid prior to the contract's expiration, there was no change in the status quo as to that premium. He interpreted the contract's reference to a

"maximum contribution" with respect to medical premiums and the limiting words "shall not exceed" as placing a "ceiling" on the Respondent's obligation of no more than the exact dollar amount of the Blue Cross/Blue Shield rates in effect from December 1987 through November 1988. Because the Respondent continued to provide the same dollar amount toward medical insurance premiums in December, he found that the Respondent made no change with respect to such insurance contributions. Further, although noting the different wording of the Respondent's dental premium obligation, calling for the Respondent to "pay one hundred percent (100%)" without reference to a maximum, the judge reasoned that it might well be argued that the parties "understood" that increases in dental insurance were likely to be effective on December 1 of each year and, therefore, "the entire subject, particularly the contributions amounts, would have to be reconsidered and renegotiated at that time, as part of a total economic package, in light of the carriers' changes." However, the judge concluded that it was unnecessary to decide whether the Respondent actually changed a term or condition of employment concerning payment of the medical and dental insurance premiums, because he found that the Union waived its right to bargain over that subject matter.⁴ In doing so, he found that the Union knew from the beginning of negotiations that if a new contract was not reached before the higher rates went into effect, the Respondent would pay only part of the new premiums and that employees would have to pay the increase. He further found that the November 28 announcement came as no surprise to the Union, and that the Union failed to protest or to seek bargaining then or at the parties' next postimplementation meeting. We differ with the judge on both aspects of his analysis. First, the judge misinterprets the contract language and ignores the impact upon employees in assessing whether the status quo has been maintained in terms and conditions of employment. Second, he fails properly to assess the facts and circumstances of this case in applying case law dealing with bargaining obligations and waiver.

There is no question that contractually provided health plans survive contract expiration and cannot be altered without bargaining.⁵ Here the contractual medical and dental plans were provided at no cost to employees, but with a limitation upon the Respondent's

²Dates hereafter refer to 1988 unless otherwise designated.

³ It was the insurance companies' practice to modify their plans and revise their rates as of December 1 of each year. The parties were familiar with this practice and pegged their collective-bargaining agreement term to coincide with the insurers' calendars.

⁴The judge's decision is unclear concerning whether absent the Union's waiver, he would have found that the Respondent's unwillingness to continue paying the full medical insurance premium would have constituted an impermissible unilateral change, or whether he would have limited any violation that he would have found to the failure of the Respondent to pay all the dental insurance premium. In any event, we are making our own findings on these matters.

⁵*Hen House Market No. 3*, 175 NLRB 596 (1969), enf. 428 F.2d 133 (8th Cir. 1970).

maximum financial liability on medical premiums. The judge's approach focuses narrowly upon the Respondent's preexisting financial obligations, i.e., the amount of money it paid for the expiring medical and dental plans, but completely disregards employees' expectations, i.e., medical and dental coverage under non-contributory insurance plans, and the absence of any limit on the Respondent's liability that would preclude any possible increase. Although the contract language relating to medical insurance clearly refers to a maximum, no particular dollar figure is identified. Instead, the Respondent's maximum liability is described as not to exceed 100 percent of the Blue Cross/Blue Shield rates. Thus, when the dollar amount of those rates increases, so too does the Respondent's maximum dollar obligation. The same result, albeit without reference to a maximum, applies to the Respondent's dental premium obligation. The Respondent agreed to pay 100 percent of those premiums. Maintaining the status quo on dental coverage means that the Respondent pays the entire premium regardless of the cost. Requiring the Respondent to continue to pay 100 percent of the new, December 1 Blue Cross/Blue Shield and dental insurance rates is consistent with the plain meaning of the contract, the Respondent's previous obligation, and the employees' established term of employment. Accordingly, by paying only the premium rates which had been in effect under the previous medical and dental plans and by making payroll deductions to cover the higher costs, the Respondent unlawfully altered employees' terms and conditions of employment, unless the Union clearly and unmistakably waived its right to bargain about these changes.

We also disagree with the judge's resolution of the waiver issue, particularly his finding that the Union had been given sufficient notice of these changes "throughout the negotiations." Only two witnesses testified substantively about health insurance negotiations, Union Business Agent Davis, and Mooney, an associate of the Respondent's attorney who took notes during bargaining sessions while Attorney Semple served as company spokesman.⁶ Mooney testified that the Respondent put the Union on notice on the very first day of negotiations that significant cost increases in the health plans were coming December 1, that these increases would be discussed as part of a total economic package, and that renewed health insurance coverage was dependent upon the parties reaching a new collective-bargaining agreement. Mooney did not testify about the Respondent's position on the issue of payment of insurance premiums in the event of a contract hiatus. Davis corroborates Mooney's assertions that the parties discussed health insurance from the

⁶The judge made no specific credibility resolutions in reaching his factual findings, but rather construed the testimony from both sources.

earliest stages of negotiations, that the Union was informed that rates would be higher for the coming year, and that the Respondent kept the Union apprised of updated information regarding the new rates. Davis stated that at the beginning of negotiations the Respondent's posture was that it would not pay the new insurance rates in full and that employees would then be facing a contributory system. The parties engaged in extensive talks on economic issues, leading the Respondent to modify its original position on the issue. By late November, as a result of this process, the Respondent proposed paying the new insurance rates in full. Because the Respondent was insisting on a total package agreement, however, the Union could not "sign off" on this one area. Davis further testified that on November 28, when the Union indicated that it could not accept the Respondent's total economic package, the Respondent asserted for the first time that with no agreement in place, employees would have to pay the increased health care costs. Davis testified that Semple announced this as a "done deal," not open for further discussion. Both sides knew that long-standing scheduling conflicts precluded the parties from meeting again before the contract expired on November 30, and the new premium rates took effect on December 1. On November 30, the Respondent notified employees of the new rates and that the difference between the old and new rates would be deducted from their December 20 paychecks.

When the parties met on December 21, the Union opened with a question concerning a newly promulgated rule involving employee distribution of company documents.⁷ Davis' and Mooney's testimony, as well as the Respondent's bargaining notes, show that the Respondent refused to discuss the matter, citing the Union's pending unfair labor practice charge over the rule and asserting that the Union had thereby chosen a different forum to discuss that matter.⁸ Davis expressed regret over the Respondent's position, suggesting that discussion of the issue might resolve it. The Respondent repeated its refusal to discuss the matter outside the context of the NLRB and commented that the Union seemed to be engaging in "some sort of guerilla warfare" with its unfair labor practice charges.⁹ Davis testified that in the face of the Respondent's refusal to discuss one subject of an unfair labor practice charge, he did not attempt to raise the Union's objections over the Respondent's actions relat-

⁷Davis testified that he raised this matter because the parties had been bargaining about the subject of promulgation of rules.

⁸The merits of that charge are not involved in the instant proceeding.

⁹Davis did not testify as to this characterization of the Union's actions, but rather this language appears in the Respondent's bargaining notes which were entered into the record.

ing to the insurance premiums, which were also pending before the Board in Case 27-CA-0711.¹⁰

These circumstances do not support a finding that the Union waived its bargaining rights. It is important first to set forth the rights of parties in a collective-bargaining relationship. In a nonnegotiation setting, it is incumbent upon a union to request bargaining when it receives sufficient notice to permit meaningful bargaining over an employer's proposal to change terms or conditions of employment. If a union fails to act diligently in seeking bargaining, it may be found to have waived its right and it is not unlawful for an employer to implement the change unilaterally.¹¹ What period of time is found sufficient for a union to request bargaining will depend upon the facts of each case.¹²

When parties are engaged in negotiations for a collective-bargaining agreement, however, their obligations are somewhat different. Because the parties are in fact bargaining on various proposals, there is no need for additional requests for bargaining on those proposals. During negotiations, a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be deemed to have waived its bargaining rights.¹³ Absent such manifestation by the union, an employer must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole.¹⁴ Although exceptions to these standards exist, no exception is warranted in this case.¹⁵

¹⁰ Davis' testimony as well as the Respondent's notes disclose that the subject of insurance premiums was subsequently discussed in that session, but the discussion did not deal directly with the Respondent's unilateral action. The record reveals that the Respondent offered a proposal revising the effective date of its new premium contribution rate to the date of signing of a new agreement. The union countered that this was regressive, in view of the parties' having earlier agreed that the Respondent would pick up the full dollar amounts of the new medical and dental rates as of their effective date, December 1. The record shows that the topic of medical and dental insurance continued to be discussed at meetings in February and March 1989, but that the discussions related to it were limited to substantive areas, and not the Respondent's earlier unilateral actions.

¹¹ *Emhart Industries*, 297 NLRB 215 (1989); *Jim Walter Resources*, 289 NLRB 1441 (1988); *Clarkwood Corp.*, 233 NLRB 1172 (1977).

¹² See, e.g., *Emhart Industries*, supra, 216; *Jim Walter Resources*, supra, 289 NLRB at 1442, and cases cited therein; *San Antonio Portland Cement Co.*, 277 NLRB 309, 314 (1985).

¹³ *Construction Services*, 298 NLRB 1, 2 (1990), and cases cited therein.

¹⁴ *NLRB v. Katz*, 369 U.S. 736 (1962); *Bottom Line Enterprises*, 302 NLRB 373 (1991); *Gresham Transfer*, 272 NLRB 484, 485-486 (1984); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

¹⁵ A union's efforts to delay or avoid bargaining in the face of an employer's honest and diligent efforts has been recognized by the Board as an exception. See *M & M Contractors*, 262 NLRB 1472 (1982), and *AAA Motor Lines*, 215 NLRB 793 (1974). In this case

The Union did not fail to bargain about insurance premium payments, but instead had been discussing the subject from the very beginning of negotiations. It was a major economic issue. The Respondent's position evolved considerably as bargaining progressed, demonstrated by the fact that by late November the Respondent was proposing to pay the new premiums in full. It was only when the Union did not agree to *all* contract terms in the face of the Respondent's adherence to a "total package" approach, that the Respondent suddenly reverted to its employee contribution position. At that point there was no time left for the parties to meet again before contract expiration and the higher rates took effect; hence, there was simply no opportunity for the Union to attempt further bargaining on the issue before the Respondent unilaterally announced to employees the new rates and the payroll deduction plan. Accordingly, we find that the timing of the Respondent's announcement, in reaction to the Union's nonacceptance of the Respondent's total package of proposals, did not afford the Union a meaningful opportunity to engage in further negotiations over the issue before the Respondent acted.

Though deprived of the opportunity at that point to seek bargaining, the Union nevertheless pursued the matter by filing unfair labor practice charges. Although ordinarily it is not enough for a union to rebut a finding of waiver and preserve its bargaining rights through the filing of charges,¹⁶ in this case it was the Respondent's 11th-hour announcement which precluded the Union from otherwise exercising its bargaining rights. In these limited circumstances, therefore, the Union's promptness in seeking redress through the Board's processes evidences an intent not to relinquish its bargaining rights.

Finally, we do not find that the Union's failure to raise the implementation aspect of the insurance premium issue during subsequent bargaining indicates that it waived its right to bargain about the issue. In this regard, we note the Respondent announced the changes as a "done deal," i.e., a *fait accompli*. Further at the very beginning of the December 21 session, the Respondent flatly refused to discuss another matter, the institution of a rule about company documents, which was also the subject of a union-filed unfair labor practice charge. The Respondent asserted that because the Union had taken that issue to the Board, it would have

there is no suggestion that the Union ever engaged in delay tactics or otherwise sought to avoid its bargaining obligations. Another exception is an economic "business emergency" that requires prompt action. See *Winn-Dixie Stores*, 243 NLRB 972 at 974 and fn. 9 (1979), citing *Katz*, supra, 369 U.S. at 748. There is no evidence, and the Respondent has not asserted either during negotiations with the Union or in this proceeding as a defense to allegations of unlawful conduct, that economic necessity prompted it to act unilaterally.

¹⁶ *Ventura County Star-Free Press*, 279 NLRB 412 (1986); *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979); and *American Business*, 164 NLRB 1055, 1056 (1967).

to be handled entirely within that context. The Respondent emphasized its point by even rejecting the Union's offer to try and reach an understanding to resolve the charge. In such circumstances, we find that it was reasonable for the Union to conclude, as Davis testified, that raising its objections to the payment change in insurance premiums, which also was the subject of a charge, would likely receive the same negative response and thus similarly be to no avail. Moreover, there is evidence that the Union was not entirely silent at this meeting concerning its opposition to the Respondent's conduct. When the Respondent offered a revised proposal on premium payments, the Union asserted that it appeared to be a regressive stance, apparently in reference to the full contribution level previously agreed to and the already effective higher rates. In view of the foregoing, we find that the evidence does not establish that the Union consciously relinquished its bargaining rights over the modification of the health insurance program, and that given the Respondent's recalcitrance over the matter, the Union was effectively precluded from seeking further bargaining on the issue. Accordingly, we find that the Union did not waive its right to bargain over the change in insurance premium payments and that the Respondent, by acting unilaterally, violated Section 8(a)(5) and (1).¹⁷

Overtime Premium Pay Eligibility

The parties' long-established method of computing eligibility for overtime pay rates was that all hours for which an employee was compensated, including paid time off such as vacation and sick leave, were included in determining that an employee had reached an 8-hour day or a 40-hour week. Until 1980 this practice was codified in the collective-bargaining agreement. During 1980 negotiations, the Respondent succeeded in changing the contract language to require employees to make up paid time off before being paid at the premium rate for overtime. The language was changed to limit eligibility for the overtime pay rate to employees *working*

¹⁷This case is distinguishable from *Ventura County Star-Free Press*, supra, relied on by the judge, where the Board adopted a judge's findings that the union failed timely to demand bargaining about an employer's announced intention to cease granting salary step increases. In that case the union was apprised of the employer's intention not to continue employee step increases at a bargaining session in early January, but the employer did not actually discontinue the practice until March. The union, however, did not address the issue during intervening bargaining sessions, despite the parties' exchange of proposals dealing with wages, and, in fact, did not raise the subject again until May. In those circumstances the union's lack of diligence signified an apparent acquiescence in the employer's action sufficient to find waiver. There was no similar timely notification by the Respondent to the Union in this case and there were no meetings during the time between the Respondent's announcement and its implementation of the changes. Accordingly, we find the judge's reliance on *Ventura* misplaced.

more than 8 hours a day or 40 hours per week. Although this language appeared in subsequent contracts, including the 1987–1988 agreement, the parties never changed their practice, and premium rates continued to be paid on the pre-1980 basis. In late 1987 or early 1988, the Respondent sought to apply the literal terms of the contract, resulting in a union grievance. By letter of January 15, 1988, the Respondent agreed to settle the grievance by continuing to pay overtime rates based on the number of accumulated hours paid rather than worked, while noting that the issue would be discussed at the next contract negotiations.

When 1988 negotiations began, the Respondent proposed "no change" in the article dealing with overtime. The Union, in anticipation Respondent's efforts to enforce the "hours worked" approach, submitted a proposal modifying the contract language to conform to the parties' practice. As the judge notes, there is little evidence of any real discussion of the issue during negotiations. Based on the Respondent's lack of followthrough on the subject, the Union concluded that the Respondent had decided not to pursue the matter and to leave the practice unchanged. Accordingly, on October 26, the Union withdrew its proposal. There was no further discussion of the matter.

At the December 21 negotiating session, Davis told the Respondent that he had heard¹⁸ that the Respondent intended to exclude excused absences in calculating overtime eligibility. Davis protested this action, stating that the matter had not been addressed when proposals were on the table. The Respondent replied that the Company had been including nonworked hours in error and that "it was now corrected." At a meeting with employees on January 4, 1989, the Respondent announced that they would have to *work* a full 8-hour day or 40-hour week before receiving premium pay for overtime.

The judge found that the Union's failure to request bargaining on the subject on December 21 amounted to a waiver, thereby excusing the Respondent from having to bargain over its subsequent implementation. The General Counsel argues that the Respondent actually implemented the change prior to the parties' December meeting, that there was no opportunity for bargaining because the Union was faced with a fait accompli, and that the Respondent merely postponed explaining the system to employees until January. We find merit in the General Counsel's position.

The evidence establishes that the parties' practice was to credit all time for which employees were paid, including excused time off, toward eligibility for overtime premium pay. For at least 7 years after the contract language was changed, the Respondent continued to use the old overtime formulation. This uninterrupted

¹⁸The record does not disclose through what source Davis had heard this information.

and accepted custom had thus become an implied term and condition of employment by mutual consent of the parties. Once an implied term is so established, a unilateral change in that term is unlawful.¹⁹ The Respondent first expressed dissatisfaction with the overtime calculation approximately 9 months before the opening of contract negotiations. At that time, the Respondent tacitly acknowledged that the written contract had been superseded by the parties' practice, stating only that it would raise the matter during negotiations. When those negotiations began, however, the Respondent's proposal did not specifically address the issue, but rather simply included it with five other paragraphs in the overtime article in which it sought "no change." By contrast, the Respondent's written proposal identified two other paragraphs in the overtime article in which it desired changes, and it discussed them with the Union. The Respondent did not discuss the overtime calculation issue with the Union or otherwise reiterate its January 1988 position. The Respondent also did not respond in any way to the Union's written proposal, which reduced the existing system to writing. In these circumstances, it was reasonable for the Union to conclude that the Respondent was no longer interested in changing the established system, and that the Respondent's proposal repeating the contract provision that the parties had long ignored thus amounted to nothing more than a meaningless reiteration of that provision. Thus, when the Respondent failed to pursue negotiations on changing the practice and the Union withdrew its proposal, the parties objectively manifested mutual assent on continuing the extant term and condition of employment. Consequently, the practice of including paid time off toward eligibility for premium pay was left unchallenged, and no change could be effected in it without bargaining.

The Respondent admits, by virtue of an on-the-record stipulation, that sometime after the contract expired, during December 1988, it unilaterally discontinued the established system and began excluding paid time off toward premium pay eligibility. It appears highly likely that the Respondent had already discontinued the practice prior to December 21 for the Union to have "heard" about it. In any event, according to Davis' uncontroverted testimony, the Respondent informed the Union at their December 21 meeting that the overtime pay eligibility "was now corrected." Thus, when Davis asked the Respondent about it at the December 21 meeting, he was asking about something the Respondent had already done, *a fait accompli*.²⁰

¹⁹ See *Riverside Cement Co.*, 296 NLRB 840, 841 fn. 6 (1989), and cases cited therein.

²⁰ That the Respondent did not announce the discontinuation of the system to employees until January does not prove that it had not previously implemented the change; such lack of announcement when the change was implemented suggests only that it did not immediately notify employees.

The Union had no opportunity to request bargaining because the change had already been effectuated. In these circumstances the Union did not relinquish its bargaining rights, but rather was deprived of them through the Respondent's ambivalent conduct.

Accordingly, we find that the Union did not waive its right to bargain over the premium pay system and that the Respondent unlawfully changed the established method of determining eligibility for premium pay in violation of Section 8(a)(5) and (1).

Effect of Unfair Labor Practices on Asserted Impasse

The judge found that by March 20, 1989, the parties remained apart on two issues that had separated them from the beginning of negotiations: management rights and seniority. Though he found that in mid-December, the Respondent had violated Section 8(a)(5) and (1) by unilaterally implementing a new system for selecting employees for overtime, he concluded that there was no causal connection between those unremedied changes and the parties' subsequent deadlock in negotiations. Absent a nexus establishing that the earlier unfair labor practice affected the ongoing bargaining process, the judge concluded that a valid impasse had been reached by March 20, 1989, and that the Respondent's implementation of the terms of its last offer did not violate the Act. Because of our findings of additional unlawful unilateral actions, and the impact of them on the bargaining unit employees, we reverse his finding that the Respondent's post-March 20 implementations were privileged.

The Board's decision in *Taft Broadcasting Co.*,²¹ sets forth the standards for determining whether parties have exhausted the prospects of concluding an agreement and a bargaining impasse exists. Factors such as the parties' bargaining history, their good faith, the length of time spent in negotiations, the importance of the issues about which the parties disagree, and the parties' contemporaneous understanding of the status of negotiations are all relevant parts of the analysis.

There is no dispute as to the parties' persistent differences with regard to management rights and seniority. These were areas of relative importance to each of the parties and their differences were not minor. Those subjects were not the only important topics of negotiation, however, and examining the manner in which other bargaining points were addressed contributes to an understanding of the parties' overall bargaining environment.

In this case we have found that the period of bargaining immediately following the expiration of the contract was characterized by three separate instances of unlawful unilateral changes by the Respondent. Each of these changes had an economic impact upon

²¹ 163 NLRB 475 (1967).

employees: the diminution of regular, take-home pay due to the newly imposed contributory health insurance system; increasing the number of hours employees had to work to make up excused time off before qualifying for overtime premium pay rates; and possibly losing the opportunity to work overtime at all because of the abolition of the standby and callout systems. Clearly, these were not isolated or insignificant matters, but rather were areas in which the entire bargaining unit was affected adversely in the most fundamental way—in their paychecks. These actions would likely place the Union at a serious bargaining disadvantage in terms of maintaining the support and trust of the employees. This would serve to undercut the Union's authority at the bargaining table.

Moreover, in the face of these unilateral cutbacks, the Respondent acted even further to denigrate the Union's position by denying it the opportunity to raise certain issues at the bargaining table. As described above, the Respondent refused to discuss the promulgation of a new rule at the December 21 session because it was the subject of an unfair labor practice charge. Because of the Respondent's adamancy regarding that bargainable area, the Union believed that it was foreclosed as well from discussing changes in the insurance premium levels. Thus, the bargaining arena itself was directly and substantially affected by the Respondent's concurrent unilateral actions.²² In these circumstances, where the process itself has been shown to have been adversely affected by the Respondent's unfair labor practice, we find that the parties could not have reached a valid bargaining impasse.²³ Accordingly, we find that the Respondent's unilateral implementation of its last offer following its March 20, 1989 declaration of impasse also violates Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

²²The judge's reliance on *J. D. Lunsford Plumbing*, 254 NLRB 1360 (1981), enfd. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982), is misplaced in this regard. In *Lunsford* the employer was found to have engaged in unfair labor practices prior to the start of the bargaining process and the Board determined that those unremedied violations did not taint the subsequent negotiating process.

²³The Board's decision in *Litton Microwave Cooking Products*, 300 NLRB 324 (1990), is distinguishable. In *Litton*, the Board concluded that the parties had reached a valid bargaining impasse despite certain unlawful unilateral actions by the employer. There, however, the employer's actions were found to have involved only "minor topics" that were not "crucial to the failure of the parties to reach an agreement." *Id.* at 333. The subjects of the Respondent's changes here were not minor and were likely to have substantially affected all unit employees, and the actions themselves directly impacted on the bargaining process.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining:

All production and maintenance employees employed by the Respondent at Sedalia, Strasburg, Woodland Park, and Conifer, Colorado facilities, but excluding office clerical employees, and all guards, professional employees, managerial employees, confidential employees, and supervisors as defined in the Act, and all other employees.

4. At all times material the Union has been the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by the following acts and conduct:

(a) By unilaterally failing to pay the full amount of employees' medical and dental insurance premiums and by deducting money from employees' paychecks to cover the cost of those premiums.

(b) By unilaterally changing the callout and standby procedures for overtime.

(c) By unilaterally changing the method of calculating eligibility for premium pay for overtime.

(d) By unilaterally implementing terms and conditions of employment set forth in its final bargaining proposal without having reached a valid bargaining impasse.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully deducted money from the wages of employees to pay for insurance premium increases, we shall order the Respondent to make whole employees for all losses sustained from these premium deductions, plus interest.

Having found that the Respondent unlawfully changed the manner in which eligibility for premium pay for overtime is calculated, the Respondent is also ordered to restore the system of including all compensated hours toward eligibility for overtime premium pay and to make employees whole for all losses sustained as a result of the Respondent's failure to pay premium rates under the prior system, plus interest.

Having found that the Respondent unlawfully changed the procedures for selecting employees for

callout and standby, the Respondent is ordered to restore the procedures for callout and standby at its Sedalia, Colorado facility to the ones that existed prior to December 14, 1988, and to make whole employees for any loss of pay they may have suffered as a result of the unlawful unilateral changes in those procedures made on that date, with interest. Having found that the Respondent unlawfully implemented terms and conditions of employment without having reached a valid impasse in bargaining with the Union, the Respondent is ordered to restore terms and conditions to those which existed prior to March 20, 1989, and make whole employees for all losses sustained from those changes, plus interest.

Such sums shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970),²⁴ Interest on all amounts owing will be paid in accordance with the formula set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Intermountain Rural Electric Association, Sedalia, Strasburg, Woodland Park, and Conifer, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in employees' medical and dental insurance premium obligations without providing adequate notice of proposed changes, and adequate opportunity to bargain about them, to the collective-bargaining representative of the employees affected by those changes.

(b) Making unilateral changes in the callout and standby selection procedures for overtime without providing adequate notice of proposed changes, and adequate opportunity to bargain about them, to the collective-bargaining representative of the employees affected by those changes.

(c) Making unilateral changes in the method of calculating eligibility for premium pay for overtime without providing adequate notice of proposed changes, and adequate opportunity to bargain about them, to the collectivebargaining representative of the employees affected by those changes.

(d) Implementing unilaterally terms and conditions of employment without having reached a valid bargaining impasse with the representative of the affected employees.

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

²⁴ Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay additional amounts into any benefit funds in order to satisfy our "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with International Brotherhood of Electrical Workers, Local 111, AFL-CIO as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit described below and, if an understanding is reached, embody that understanding in a signed contract. The appropriate bargaining unit is:

All production and maintenance employees employed by Intermountain Rural Electric Association at its Sedalia, Strasburg, Woodland Park, and Conifer, Colorado facilities, but excluding office clerical employees, and all guards, professional employees, managerial employees, confidential employees, and supervisors as defined in the Act, and all other employees.

(b) Resume paying the full amount of all employee medical and dental insurance premiums and make whole employees for the losses they sustained as a result of the payroll deductions used to pay those premiums after December 1, 1988, in the manner set forth in the remedy section of this decision.

(c) Restore the practice of including all compensated time, including paid time off, toward employees' eligibility for premium pay for overtime work, and make whole employees for any losses they suffered as a result of the unlawful unilateral change in that practice, in the manner set forth in the remedy section of the decision.

(d) Restore callout and standby selection procedures to those which existed at Sedalia, Colorado, prior to December 14, 1988, and make whole employees for any losses sustained as a result of the unlawful changes in those procedures on that date in the manner set forth in the remedy section of this decision.

(e) On request by the Union, restore all other terms and conditions of represented employees' employment as they existed prior to the Respondent's March 20, 1989 declaration of impasse and implementation of changes and make employees whole for all losses sustained from these changes in the manner set forth in the remedy section of this decision.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Sedalia, Strasburg, Woodland Park, and Conifer, Colorado facilities copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT make unilateral changes in the practice of paying premiums for medical and dental insurance without providing the collective-bargaining representative of affected represented employees adequate notice of the proposed changes and an adequate opportunity to bargain about them.

WE WILL NOT make unilateral changes in the practice of crediting all compensated hours toward employees' eligibility for overtime premium pay without providing the collective-bargaining representative of affected represented employees adequate notice of the proposed changes and an adequate opportunity to bargain about them.

WE WILL NOT make unilateral changes in callout and standby procedures without providing the collective-bargaining representative of affected represented employees adequate notice of the proposed changes and an adequate opportunity to bargain about them.

WE WILL NOT declare impasse and implement changes in employment terms and conditions of rep-

resented employees when a valid bargaining impasse does not exist.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with International Brotherhood of Electrical Workers, Local 111, AFL-CIO as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit, described below, and, if an understanding is reached, embody that understanding in a signed contract. The appropriate unit is:

All production and maintenance employees employed by Intermountain Rural Electric Association at its Sedalia, Strasburg, Woodland Park, and Conifer, Colorado, facilities, but excluding office clerical employees, and all guards, professional employees, managerial employees, confidential employees and supervisors as defined in the Act, and all other employees.

WE WILL restore the practice of paying employees' medical and dental insurance premiums in full and WE WILL make whole employees for any losses sustained as a result of our failure to pay the entire premiums and resulting from payroll deductions implemented on December 1, 1988, to cover the costs of the medical and dental premiums, with interest.

WE WILL restore the pre-December 1988 practice of including all compensated hours in calculating employees' eligibility for overtime premium pay and WE WILL make whole employees for any losses they sustained as a result of the unlawful changes in those methods which we announced on January 4, 1989, with interest.

WE WILL restore callout and standby selection procedures to those which existed at Sedalia, Colorado, prior to December 14, 1988, and WE WILL make whole employees for any losses sustained as a result of the unlawful changes in those procedures which we announced on that date, with interest.

WE WILL, on request by the Union, restore all other terms and conditions of represented employees' employment as they existed prior to our March 20, 1989 declaration of impasse and implementation of changes, and WE WILL make employees whole for all losses sustained from these changes, with interest.

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION

William J. Daly, for the General Counsel.
Martin Semple and *Patrick B. Mooney* (*Semple & Jackson*), of Denver, Colorado, for the Respondent.
Joseph M. Goldhanlmer (*Brauer & Buescher*), of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Denver, Colorado, on February 21–23, 1990. On November 2, 1989, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued an alleged consolidated complaint, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). That complaint was based on three unfair labor practice charges. The charge in Case 27–CA–10711 was filed on December 2, 1988, and alleged, *inter alia*, that unlawful unilateral changes had been made in the practice of paying premium for medical and dental insurance, resulting in employees having to pay a portion of those premiums. The charge in Case 27–CA–10711–3 was filed on January 4, 1989, and alleged, *inter alia*, an unlawful unilateral change in the past practice of computing regular hours worked before qualifying for premium pay for overtime payments. The charge in Case 27–CA–10890 was filed on April 28, 1989, and alleged, *inter alia*, unlawful unilateral implementation of “a new system for distributing overtime callouts,” changing from a system whereby “employees with the lowest overtime worked received priority” to one in which “employees were called out alphabetical order,” and, further, that all bargaining proposals not previously implemented had been unlawfully implemented on March 20 and 30, 1989.

All parties have been afforded full opportunity to appear, to include evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Intermountain Rural Electric Association (Respondent), has been engaged in business as a public utility and supplier of electricity, with an office and place of business in Sedalia, Colorado. In the course and conduct of those business operations, Respondent annually derives gross revenue in excess of \$250,000; annually sells and ships goods, materials, and services valued in excess of \$50,000 directly to Colorado enterprises that are directly engaged in interstate commerce; and annually purchases and receives goods, materials, and services valued in excess of \$50,000 directly from points and places outside the State of Colorado. Therefore, I conclude, as admitted in the answer, that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, International Brotherhood of Electrical Workers, Local 111 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Despite the existence of subsidiary issues, analytically this case primarily presents issues of whether or not unlawful unilateral changes occurred at two different stages of the bargaining process: during negotiations but prior to impasse and separately, after there had been a declaration of impasse. For over a decade, Respondent and the Union have been parties to collective-bargaining contracts, the latest of which was effective from December 1, 1987, through November 30, 1988. It covered an admittedly appropriate bargaining unit of all production and maintenance employees employed by Respondent at its Sedalia, Strasburg, Woodland Park, and Conifer, Colorado facilities, but excluding office clerical employees, and all guards, professional employees, managerial employees, confidential employees and supervisors as defined in the Act, and all other employees. It is not disputed that the union has retained the support of a majority of the employees in that bargaining unit and, at all times material, has been the exclusive representative of all employees in that unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Pursuant to article 44, section B of the latest contract, each party supplied the other with an effective notice of “desire to modify or terminate [the] Agreement” on September 30, 1988. The Union’s notice was accompanied by a list of proposed changes in the then-existing contract. Similarly, along with its reopening letter, Respondent submitted a list of proposed changes, in the form of redrafted contract articles. Prior to expiration of the contract on November 30, 1988, the parties participated in negotiating sessions on October 7, 14, 21, 28, and 31; and on November 8, 18, 22, and 28. All parties agree that no impasse had been reached as of November 30, 1988. Thereafter, only four negotiating sessions were conducted: on December 21, 1988, and on January 9, February 1, and March 20, 1989. At that last session, Respondent declared an impasse and, according to a stipulation of the parties, implemented the terms and conditions spelled out in its last and final offer.

As it turned out, two of Respondent’s initial proposals became permanent obstacles to ultimate agreement between the parties. First, Respondent proposed that the management-rights provision, article 2, be amended to allow unrestricted subcontracting, without regard to its effects on the layoff or demotion of unit employees, and to specifically provide that this entire article would not be subject to the grievance and arbitration procedure. Second, Respondent proposed changes in articles 8 and 9 to eliminate length of service as a criterion for layoffs or demotions and, further, to make final and binding Respondent’s decisions in making layoffs, demotions, transfers, and promotions. Negotiators for both sides agreed that the differences arising as a result of these particular proposals led to the impasse in negotiations that resulted on March 20, 1989.

The General Counsel does not allege that Respondent’s proposals had been unlawful ones. Nor does the General Counsel contend that Respondent had conducted negotiations

concerning them in other than good faith and with a sincere desire to reach agreement. In fact, the General Counsel concedes that negotiations had reached impasse with respect to those subjects. However, the General Counsel contends that, as a matter of law, no valid impasse could have been reached on March 20, 1989, because at earlier points in time Respondent made assertedly unlawful unilateral changes concerning other subjects: medical and dental insurance premium payments, method of selecting employees for overtime assignments, and method of calculating overtime hours. For the reasons set forth *post*, I conclude that a preponderance of the evidence does support the conclusion that Respondent made unlawful unilateral changes in call-out and standby selection procedures, but that it does not support the other allegations in the complaint.

B. *The Alleged Unilateral Changes*

1. Medical and dental insurance premiums

Insurance carriers annually reevaluate their programs and premiums, putting revisions into effect on December 1 of each year. It is undisputed that, to allow for renegotiation of premium payments, Respondent and the Union have historically pegged the contract year to that insurance year, allowing their collective-bargaining contracts to expire on November 30 so that, if agreement can be reached, updated premium payments by Respondent, as well as other changes, can be implemented at the start of the insurance year.

However, premiums are not negotiated in a vacuum. Instead, they have been negotiated as part of a total package whereby all economic items are negotiated collectively, thereby permitting tradeoffs among particular items (e.g., wage rates, holidays, vacations, insurance premiums, and pensions) so that a total economic increase is achieved, regardless of the differing proportions proposed and agreed on in component elements. For example, it is uncontroverted that in prior years the Union has rejected health plan improvements so that projected premium increases could be allocated to wages, thereby securing an increase in the latter within the overall increase in the total economic package. The General Counsel does not allege that this practice is an unlawful one.

Under the 1987–1988 contract, Respondent had been paying the full amount of premiums for employees' medical and dental insurance coverage, pursuant to article 27 of the contract. Thus, with respect to medical insurance, Respondent had agreed "to keep in full force and effect during the terms of this Agreement the medical insurance coverage currently in effect for its permanent, full-time employees covered by this Agreement." However, this commitment was accompanied by the contractual restriction that Respondent's "maximum contribution to any of the medical insurance plans in effect for its employees covered by this Agreement shall not exceed one hundred percent (100%) of the Blue Cross and Blue Shield Insurance Company premiums." Respondent's commitment to pay dental insurance premiums was more open-ended. As was true of medical insurance, Respondent agreed to "keep in full force and effect during the term of this Agreement the Delta Dental Plan of Colorado," but it further agreed to "pay one hundred percent (100%) of the premiums for the employees covered by this Agreement."

When negotiations commenced, Respondent advised the Union that it had received notice that there would be premium increases for both medical and dental insurance on December 1, 1988. The exact figures were provided to the Union at the session on October 28, 1988. Meanwhile, Respondent had initially proposed that there be a specific dollar limitation placed on the amounts of its own premium, contributions for both programs. As negotiations progressed, the specific proposed limitations were increased until, at the session of November 28, 1988, Respondent proposed revised amounts that would cover fully the carriers' increased premiums. While that particular proposal satisfied the Union, it was not satisfied with other aspects of Respondent's total economic proposal. As a result, when the Union rejected Respondent's proposed economic package, it effectively rejected the insurance premium proposal, as well.

There is no evidence that there had ever been a situation where a contract had expired with no succeeding contract having been negotiated. Thus, there is no evidence concerning the parties' practice with respect to payment of insurance premiums during a hiatus between contracts. Throughout the negotiations, Respondent had informed the Union that if there was not complete agreement on a new contract by expiration of the then-existing one, the employees would have to pay the difference in increased premiums for health and dental insurance that would become effective on December 1, 1988—that Respondent intended to continue paying only the amounts that it had been paying for insurance premiums. So far as the record discloses, the Union never took issue with that assertion. Nor did it attempt to bargain concerning interim coverage after the contract expired. Rather, with reference to one such remark by Respondent's chief negotiator, during the session on November 28, 1988, the union's chief negotiator testified that he had not responded, "because I felt that it was a done deal . . . it was not a bargaining proposal. It was simply a statement made of what was going to happen."

With the contract expiring on November 30, 1988, Respondent issued a memorandum to the employees, notifying them of the increased premium amounts for the different types of medical and dental coverage and, further, that, "Deductions for increased hospitalization and dental coverage will be subtracted from your 20th of the month check, beginning with the December 20th check." At no point during the negotiations had Respondent advised the Union of the procedure it intended to follow—payroll deduction—for having employees pay for the increase. The only mention of that subject had occurred at one of the earlier sessions when an employee-member of the Union's committee had asked if the excess premiums would be handled through payroll deductions. In reply, Respondent's chief negotiator said, "If that's how you'd like it set up."

It is not disputed that, after November 30, 1988, the Union made no attempt to bargain with Respondent regarding either the latter's failure to continue paying the full premium or its newly instituted deduction of the increased amount from employees' paychecks. By way of explanation, the Union's chief negotiator testified that the 1987–1988 contract required Respondent to pay 100 percent of the premiums and, further, that, he had regarded as threats the precontract expiration statements that Respondent would not pay the in-

creases unless the parties had reached agreement by November 30, 1988.

At other points, the Union's chief negotiator also testified that he had not felt that Respondent would be willing to discuss the subject because of the charge in Case 27-CA-10711. Prior to the negotiating session on December 21, 1988, a separate unfair labor practice charge, not consolidated with the charges involved in this proceeding, had been filed concerning a new personnel policy involving employee-dissemination of confidential information. At that session the Union had attempted to discuss that policy, commenting that the problem posed by it "could go away if [the parties] could discuss it." However, Respondent's chief negotiator admittedly declined to discuss that subject, because the Union had filed a charge regarding the policy and "he felt the appropriate forum to discuss it further was in—in arbitration." Because, testified the Union's chief negotiator, "I also had a Board charge filed relative to the changes made in the medical and the dental plan . . . I felt if he's not going to discuss one, he's not going to discuss any." Yet, there is no evidence to support the conclusion that Respondent's chief negotiator would have been unwilling to negotiate about these interim premium increases, had the Union but made an effort to do so.

Nonetheless, the parties did continue to discuss the medical and dental insurance premium payments in succeeding negotiating sessions. For example, Respondent increased the amounts of premium payments that it was willing to make for medical and dental insurance at the sessions on December 21, 1988, and February 1, 1989. Similarly, the Union proposed, apparently orally, that the parties add a provision to article 27 requiring negotiation of future medical changes before their effective date. Further, it is not disputed that, at the session on January 9, 1989, the Union proposed that Respondent retroactively pay for the employees' full premium costs in return for the Union's agreement to a wage freeze. Ultimately, Respondent began paying the full amount of health and dental benefits when it implemented its last and final offer in March 1989.

2. Call-outs and standby

The second allegedly unlawful unilateral change pertained to the method used for selecting Sedalia linemen for emergency work during evenings and nights, as well as on weekends and holidays—a procedure generally referred to as a call-out. So far as the record discloses, initially there had been no contractually prescribed method for call-outs. As a result, each of the offices—Conifer, Strasburg, Woodland Park, Sedalia—developed its own call-out procedure.

At Sedalia, an overtime committee was annually elected by bargaining unit employees. At the beginning of each calendar year, that committee would rank linemen in inverse order of overtime hours worked during the preceding year. That list would be provided to Respondent so that its dispatcher or supervisor, depending on complexity of the emergency that necessitated the call-out, would start the year by calling out linemen in ascending order, starting with the one who had worked the least number of past overtime hours. As the year progressed, the committee would provide a new list each Monday morning, revising the order of linemen for call-out in light of hours worked during the preceding week.

While collective-bargaining contracts did not prescribe a call-out procedure, they did provide—as did article 12, section F of the 1987–1988 contract—that "overtime shall be distributed as equitably as possible" and, moreover, did allow Respondent "to call a specialized crew whenever necessary." Moreover, at some point Respondent and Union agreed that weekend and holiday overtime should be contractually treated separately from call-outs during the week. As a result, they agreed to a separate contract article governing weekend and holiday overtime, which was denominated as standby. The practice contemplated that there would be a regular schedule of employees assigned to each weekend and holiday during the year. If an emergency arose during a given weekend or holiday, Respondent would then call out the corresponding employees on standby for that weekend or holiday.

As was true of call-outs generally, so far as the evidence shows, there never—was a contractually prescribed method for selecting specific employees for standby on particular weekends and holidays, at least not at Sedalia. However, article 13 of the 1987–1988 contract did permit Respondent to "require three (3) employees on standby duty at any one time at the Sedalia location" and, moreover, provided that,

institution of a standby duty schedule shall be at [Respondent's] option, and [Respondent] may discontinue standby duty at its option, and may resume the standby schedule, provided a written notice is given to the employees at least ten (10) calendar days prior to the change.

As a result, the practice developed in Sedalia of allowing employees, at the beginning of each calendar year, to select in seniority order holidays on which they would work. When the process of filling holiday standby for the year was completed, the employees would make a similar selection for weekends, following seniority order save for allowing employees who had selected particular holidays to work the corresponding Saturdays and Sundays in instances where there was a 3-day holiday weekend.

In its initial proposals, submitted to the Union on September 30, 1988, Respondent included one that would replace the entirety of the above-mentioned article 12, section F with the provision that "Overtime shall be designed by [Respondent]." In the ensuing negotiations, Respondent explained that this proposal was motivated by its desire to eliminate the frequent employee complaints about lack of equitable overtime distribution. The Union was unwilling to agree to the change, but Respondent adhered to its position that the equitable distribution requirement must be deleted. By November 28, 1988, negotiations concerning article 12, section F had reached the point where Respondent was proposing that it read:

Overtime shall be assigned by [Respondent]. For call outs, [Respondent] will attempt to call employees on an alphabetical rotational basis, but for outage purposes, consideration will be given to reasonable response time in restoring service. [Respondent] reserves the right to call out a specialized crew whenever necessary.

The Union continued to oppose any change, apparently in part because a straight rotation call-out system had been tried

earlier in the 1980s, but had been abandoned after about a month as unsatisfactory.

Significantly, Respondent made no proposal regarding article 13, the contract's standby provision. It concedes that, in response to an inquiry about the subject prior to November 28, 1988, it had told the Union that the overtime selection proposal was limited to call-outs and that it was not discussing standby at all. Yet, on December 14, 1988, Respondent conceding announced to the Sedalia linemen that an alphabetical rotation system would be followed for both call-outs, beginning on December 19, 1988, and standby, beginning with the Christmas holiday.

Following announcement of the change the only significant discussion of overtime selection occurred at the negotiating session on December 21, 1988. The Union pointed out that the change extended to standby and that Respondent had earlier said that standby was not affected by its proposal. At first Respondent denied having made such a statement. But later it agreed such a statement had been made, contending that there was no need for a proposal concerning that subject, because Respondent felt that article 13 allowed it to change standby selection without the need for negotiations. A similar approach was followed when the Union pointed out that, in light of the announcement, Respondent would no longer be using the overtime committee and its list at Sedalia, and asked how Respondent intended to handle call-outs. In the course of replying, Respondent's chief negotiator asserted that Respondent was doing what it had the right to do under the language of the just-expired contract. According to Respondent's principal witness concerning the substance of the negotiations, this exchange had concluded with the Union's chief negotiator saying, "'The Union thinks it [the contract] is clear the way [Respondent] has been practicing.' He said that without an agreement to change that practice, the Union would do what it has to."

The Union made no proposals concerning call-out and standby until March 21, 1989. Included among one of the two alternative proposals that it presented at the session that day was one for alphabetical rotation. No specific discussion of that subject took place and Respondent rejected both alternative proposals.

3. Exclusion of unworked paid time from overtime

The final allegedly unlawful unilateral change pertains to the method of calculating time worked to qualify for overtime pay. Historically, Respondent included all hours for which an employee was compensated, even those during which no work was actually performed due to such reasons as paid sick leave or paid vacation. An employee was entitled to premium pay for overtime once he/she had been paid for 8 hours during a day or 40 hours during a week. That practice was consistent with collective-bargaining contracts as they read prior to the one negotiated in 1980: "All hours worked outside of a basic work day shall be paid at the overtime rate; all hours worked outside basic work week shall be paid at the overtime rate."

Respondent became dissatisfied with this practice, feeling that it was deprived of the degree of control that it believed that it needed. As a result, during the 1980 negotiations there were discussions about requiring individuals to make up time lost due to paid sick, personal, or vacation leave before compensating them at the time-and-a-half rate. Agreement was

reached to change the overtime language in the 1980-1982 contract so that, consistent with Respondent's concern, it read: "All hours worked in excess of eight (8) hours per day or forty (40) hours per week shall be paid at the overtime rate." The language remained in all subsequently negotiated contracts, including the one that expired on November 30, 1988.

Nevertheless, in practice no change ever occurred. Two employees testified that during the 10 and 20 years, respectively, that they had worked for Respondent, premium pay had always been paid on the pre-1980 basis, regardless of hours actually worked. Indeed, no evidence was produced of any instance during that almost 10-year period when an employee was deprived of premium pay because of a failure to actually work 8 hours in a day or 40 hours in week. In late 1987 or early 1988, Respondent did attempt to apply the contractual restriction, but was confronted with a grievance. On January 15, 1988, Respondent sent a letter to the Union in which it agreed to resolve the grievance by continuing to pay overtime on the basis of hours paid, rather than worked, but "with the understanding that this entire matter will be a subject for discussion and negotiation at the next union contract negotiations." The letter continues by stating, "at the time of the next negotiations, we will inform the union that any benefits or any type of practices applicable to union personnel must be included in the union contract or in a mutually agreed upon side letter."

However, Respondent did not follow through on those statements when negotiations commenced on October 7, 1988. Instead, when it submitted its proposals, Respondent listed "No Change" in the overtime provisions of article 12 that included the above-quoted language specifying when an employee becomes eligible for overtime pay. In contrast the Union's initial list of proposed contract modifications included one that would modify that language "to include compensated time off to be considered as time worked." This proposal was renewed when the Union submitted its first actual written proposals on October 26, 1988: "Excused Absence with pay shall be considered as time worked for purposes of computing overtime."

Very little, if any, discussion was devoted to this particular proposal during the negotiations. One member of Respondent's negotiating team testified, with reference to the Union's list of proposed contract modifications, "they read a section of the letter that said they were going to make a proposal concerning the computation of overtime. There was some limited discussion of that. With reference to the proposal of October 26, 1988, another of Respondent's negotiators testified, "It was brought up, there was some discussion." Equally unilluminating was the testimony of the Union's chief negotiator. With reference to the list of proposed modifications, he agreed that, at the session on October 7, 1988, the parties had gone through each one and that Respondent had provided "a response on every one," but added that he did not recall that in most instances Respondent had rejected them. He further testified that at the session on October 26, 1988, there had been, "Little or no discussions" concerning the written overtime proposal submitted at that session. Similarly, another member of the Union's negotiating team testified that "while there was discussion on Article 12 and the company controlling overtime" during the morning on Octo-

ber 26, 1988, there had been no specific discussion of the Union's proposal concerning compensated time off.

Because Respondent had not followed through on the statements in its letter of the preceding January, after the morning session on October 26, 1988, the Union decided that its overtime proposal was addressing a nonissue. So it withdrew the proposal, without explanation, during the afternoon session that day. Thereafter, the subject remained a dormant one for 2 months.

At a meeting of employees on January 4, 1989, Respondent announced formally that employees would have to work the full number of straight-time hours before premium pay for overtime could be received. However, the employees apparently had become aware of that decision during the preceding month, since the subject was raised at the negotiating session on December 21, 1988. It is undisputed that the Union's chief negotiator said that he had heard that Respondent no longer intended to include excused absences in calculating overtime. He then stated that he did not understand why Respondent was implementing a subject that it had not claimed to be in issue before the Union had withdrawn its proposal and about which there had been neither discussion nor agreement during bargaining. Respondent replied that it had been including those hours in error and that the error was being corrected. Thereafter, the Union made no proposal concerning the subject nor demanded bargaining concerning it, because, testified the Union's chief negotiator, "It was not an issue. [Respondent] didn't open it. We withdrew it."

C. Analysis

As set forth in section III, A, above, the General Counsel argues that an unlawful unilateral change occurred when, before impasse, Respondent refused to continue paying the full amount of medical and dental insurance premiums for unit employees and, instead, began deducting from their paychecks the amounts of premium increases that had become effective on December 1, 1988. To support that argument, the General Counsel points to the fact that Respondent had been paying the full amounts of those premiums during the term of the 1987-1988 contract. Accordingly, argues the General Counsel, Respondent was obliged to increase the amounts of its premium contributions, to continue fully paying health and dental insurance premiums after November 30, 1988, because those payments had become "an existing term and condition of employment reestablished by the recently expired collective-bargaining agreement. It is axiomatic that such a condition of employment survives the expiration of a collective-bargaining agreement and cannot be altered without bargaining." *Struthers Wells Corp.*, 262 NLRB 1080, 1081 (1982), enf. denied on other grounds 721 F.2d 465 (3d Cir. 1983).

There are two problems in attempting to apply that holding to the facts of the instant case. First, in *Struthers Wells* there was a contract requirement obliging the respondent to make cost-of-living adjustments. Here, there is no similar specific contractual obligation to pay increases in insurance premiums, despite the fact that when the contract had been negotiated, the parties obviously understood that there would likely be increases in insurance premiums on December 1, 1988, just as there had been on December 1 of preceding years. Furthermore, article 27 of the expiring contract imposes no obligation with respect to the amount of medical in-

surance premium payments, other than to provide that Respondent's maximum contribution shall not exceed 100 percent of Blue Cross and Blue Shield premiums. In other words, the contract imposes a ceiling, not a floor, for Respondent's payments of medical insurance premiums.

In contrast, the contract does require Respondent to pay the full amount of dental insurance premiums. Of course, collective-bargaining contracts are not governed by strict rules of contract construction and interpretation. Given the history of contract negotiations between the Union and Respondent, as set forth in section III, B, above, it might well be argued that in agreeing to that particular provision, the parties understood that change in dental insurance would become effective on December 1, 1988, and that the entire subject, particularly the contribution amounts, would have to be reconsidered and renegotiated at that time, as part of a total economic package, in light of the carriers' changes.

Yet, in the final analysis, it is not necessary to reach or to decide that issue because of the second problem in applying the *Struthers Wells* holding to the facts in this case. Prior to making a change in employment terms, an employer, whose employees are represented, must bargain to impasse agreement before implementing it so that the bargaining agent is afforded the opportunity to bargain on the employees' behalf before changes are made in their employment terms. See, e.g., *Rose Arbor Manor*, 242 NLRB 795, 798 (1979), and cases cited therein. Such prior notification to the bargaining agent "facilitates open discussion of the specific changes." *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 (1988).

However, a bargaining agent is not required to request negotiations whenever it receives notice of an employer's proposed change—is not obliged to engage in "open discussion of the specific changes" proposed. Id. If no bargaining request is received following adequate notification, the employer is free to make the change. "If, however, a union has sufficient notice of a contemplated implementation and does not request bargaining, it waives the right to bargain and no 8(a)(5) violation flows from the implementation." *Emhart Industries*, 297 NLRB 215 (1989). For, when no request for bargaining is received, there is no objective basis upon which the employer can conclude, or even suspect, that the bargaining agent desires "to submit [the employer's] proposals to the give and take of the bargaining process in which the [bargaining agent] had the right to play an active role in determining whether such changes were desirable during negotiations or whether they should have been bargained for in exchange for other benefits." *M. A. Harrison Mfg. Co.*, 253 NLRB 675, 676 (1980), enf. 682 F.2d 580 (6th Cir. 1982).

In the context of the instant case there is one exception to the rule that allows employers to make employment changes after notice and bargaining about them has occurred. That exception arises where, as here, parties are in the process of bargaining for a collective-bargaining contract. In that situation, "the employer's obligation to refrain from such unilateral changes extends beyond the mere duty to give adequate advance notice and an opportunity to bargain; it encompasses the duty to refrain from implementation at all, unless and until an overall impasse has been reached on all bargaining subjects." *Gresham Transfer*, 272 NLRB 484, 485-486 (1984). This exception best promotes the overall process of negotiating collective-bargaining contracts. For, that proc-

ess would be at least diminished if, before overall *impasse*, employers were allowed to implement piecemeal changes each time agreement could not be reached in a particular subject: "By utilizing this approach with respect to various employment conditions *seriatim*, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the bargaining representative of its employees and itself." *Winn-Dixie Stores*, 243 NLRB 972, 974 (1979).

If there were no limitation to the foregoing exception, there might well be merit to the General Counsel's argument that Respondent's unwillingness to continue paying, at least, full dental insurance premiums constituted an impermissible unilateral change, because all parties agree that no overall *impasse* occurred until March 20, 1989. But such a limitation does exist. The above-described waiver principle applies with respect to changes proposed during negotiations whenever the bargaining agent fails to request bargaining about them. "Thus, the representative can waive its right to bargain about changes in fringe benefits established by a collective-bargaining agreement which has expired." *General Tire & Rubber Co.*, 274 NLRB 591, 592 (1985). Indeed, the Board was careful to recognize that very fact in *Struthers Wells*, supra: "An employer is permitted to institute a unilateral change where the union has waived bargaining on the issue." This is no less true where the proposed change involves withholding economic increases scheduled for implementation after a contract expires. "We rely on [the bargaining agent's] waiver of any right it may have had to bargain over the Respondent's withholding of those increases by failing timely to demand bargaining [in finding no violation of the Act]." *Ventura County Star-Free Press*, 279 NLRB 412 fn. 2 (1986).

The rationale for that limitation is obvious. If there is no request to bargain about the proposed change, there is no basis for the employer or the Board to conclude that the bargaining agent feels the subject of the change is that desirable for negotiation or that it is a change that should be "bargained for in exchange for other benefits." *M. A. Harrison Mfg. Co.*, supra.

That is, referral of implementation does not promote the overall bargaining process of negotiating a contract, because the bargaining agent has not indicated a desire to include the change in the give-and-take of negotiating, and, consequently, the change does not affect the overall process of collective bargaining. Consequently, nothing is gained by requiring the employer to wait for completion of the process before allowing implementation. This limitation applies in the instant case with respect to the increased amounts of insurance premiums that were payable after November 30, 1988, as well as with regard to the exclusion of unworked, paid time in calculating the point at which daily and weekly overtime would become effective. In the case of the former, the parties were negotiating for contract to succeed the one that expired on November 30, 1988. One of the subjects of those negotiations was the amount that Respondent would pay for medical and dental insurance premiums. Virtually from the beginning of negotiations Respondent had made plain that premiums would increase on December 1, 1988, and that employees would have to pay the amounts of the increases if there was not full agreement on the terms for a new contract by that date—an agreement which, of course, would include an understanding with regard to premium pay-

ments during its term. Consequently, Respondent did give ample notice of its proposed course of action. Respondent did not express unwillingness to negotiate about these interim increases. However, the Union did not attempt to bargain about them. Indeed, so far as the record discloses, it did not even protest Respondent's unwillingness to pay the increases that would become effective on December 1, 1988. Nor did it object to Respondent's repeated pronouncements that the employees would have to pay the amounts of the increases until, in effect, agreement on the terms of a contract was reached. In these circumstances, the Union waived "any right it may have had to bargain over the Respondent's withholding of [whatever insurance premium increases it might otherwise have been obliged to pay] by failing timely to demand bargaining." *Ventura County Star-Free Press*, supra.

Nor did Respondent violate the Act by deducting the amounts of those increases from employees' paychecks. It had given timely notice that the employees would be obliged to pay the amounts of premium increases. In these circumstances "the use of some procedure [for payment] was implied." *Emhart Industries*, supra at 215. Indeed, as described in section III,B,1, above, one of the Union's negotiators had asked specifically whether payroll deductions would be the procedure utilized for employees to make the premium increase payments. Yet, despite the obvious awareness of the need for a procedure shown by this question, neither bargaining demand nonproposal were forthcoming from the Union. Therefore, I conclude that the Union waived its right to bargain about the means to be used for employees to pay those increases and that Respondent did not violate the Act by instituting a payroll deduction method of doing so.

A similar result is warranted with regard to elimination of unworked, paid time from daily and weekly overtime calculation. That change was announced to the employees on January 4, 1989. So far as the evidence shows, it had not been implemented prior to that date. But the Union had known about it prior to that date. In fact it had been in response to the Union's inquiry about the change that the parties had discussed it during the negotiating session of December 21 1988. Yet, admittedly the Union did not request bargaining about the change—neither during that session nor during the 2-week period that elapsed between then and the announcement to employees of the change.

From Respondent's point of view the significance of that inaction becomes more pronounced in light of the events that occurred during and prior to the negotiating session of October 28, 1988. As described in section III,B,3, above, in light of Respondent's letter of the preceding January, the Union had proposed specifically that unworked, paid time be included in calculating overtime. However, contrary to its statements in that letter, Respondent made no proposal regarding that subject. Moreover, there is no evidence that it objected to the Union's proposal. As a consequence, the Union withdrew its own proposal. Of course, that withdrawal does not suffice to constitute a waiver of the Union's statutory right to bargain about including unworked, paid time in overtime calculations. But it is significant when viewed in connection with the Union's subsequent silence after having been notified that Respondent did, in fact, intend to exclude such time in calculating the 8 hours per day and 40 hours per week requirement for receiving overtime pay.

As described above, when a bargaining agent does not demand bargaining on being notified of a change, there is no objective basis for the employer to determine that bargaining is desired concerning that change. That determination is but reinforced where the bargaining agent's inaction occurs against a background of an earlier request to bargain—through submission of a contract proposal—in response to a prior statement of intent to make that same change. With passage of time conditions change, sometimes leading parties to view the same situation in a different light. Given the occurrence of five bargaining sessions between October 28 and December 21, 1988, there was no objective basis for Respondent to perceive that this was not what had occurred here—that, through its silence the Union simply no longer viewed inclusion of unworked, paid time in calculating overtime to have the significance that had been attributed to that subject 2 months earlier.

Therefore, I conclude that, by its inaction, the Union waived its statutory right to bargain about payment of increases in medical and dental insurance premiums that became effective on December 1, 1988, and, further—about exclusion of unworked, paid time when calculating hours worked to qualify for overtime pay. However, a contrary result is warranted with respect to Respondent's change to an alphabetical system for call-out and standby at Sedalia.

No system for making call-outs had been spelled out in past contracts. But a practice for making them had developed at Sedalia and had been in force there for almost the entirety of the preceding decade. It is well settled that "a practice not included in a written contract can become an implied term and condition of employment by mutual consent of the parties *Riverside Cement Co.*, 296 NLRB 840 (1989). Prior to the change, the parties had been negotiating, without resolution, about the subject of call-outs. Accordingly, there is no basis upon which it can be said that the Union had waived its right to bargain about that subject and Respondent was not free to make a change prior to overall impasse. *Gresham Transfer*, supra. Moreover, prior to December 14, 1988, when the change was announced, Respondent had given no notice to the Union of intent to change the longstanding practice while negotiations were in progress. Nor, for that matter, was the change that it did make consistent with its last proposal to the Union. For, Respondent changed to a strict alphabetical system in the face of an outstanding proposal to merely "attempt to call employees on an alphabetical rotation." (Emphasis added.)

Unlike the unworked, paid time change in calculating overtime, there is no evidence that the Union had learned independently of the change before it occurred in sufficient time to request bargaining about it before implementation. Although the Union did not request bargaining about the change in call-out procedure after it had occurred, "failure to request bargaining after the changes were implemented [does] not constitute a waiver." *Cisco Trucking Co.*, 289 NLRB 1399 (1988). See also *NLRB v. Merrill & Ring, Inc.*, 731 F. 2d 605, 609 (9th Cir 1984).

In the area of standby, not only had Respondent made no proposal whatsoever concerning that subject, but when questioned during negotiations, had assured the Union that it was not proposing any change in standby procedures. As was true of the change in call-out procedure, the Union first learned of the standby change only after implementation. Respond-

ent's lone defense to this particular allegation of unlawful unilateral change, aside from the absence of a postchange request for negotiations about it, is that it was added belatedly by amendment at the hearing and is not encompassed by the charges underlying the consolidated complaint.

As discussed in the Statement of the Case, supra, the charge in Case 27-CA-10890 alleged an unlawful change in overtime distribution for call outs. As described in section III,B,2, above, standby is but an outgrowth of weekend and holiday call-out procedure. Further, the same alphabetical system was applied to both call-out and standby procedures and the change in both was announced at the same meeting of employees on December 14, 1988. Accordingly, the factual circumstances pertaining to the change in call-out procedure are closely related to those involving the standby procedure change. Moreover, both are governed by application of the same legal theory: that the changes occurred during negotiations, without affording the Union an adequate opportunity to bargain about them and without a waiver by the Union of its right to bargain about the changes. Therefore, the charge in Case 27-CA-10890 is sufficient to support the allegation amended to embrace the change in standby selection procedure and Respondent violated the Act by unilaterally changing call-out and standby selection procedures.

This leaves for consideration the changes made following Respondent's declaration of impasse March 20, 1989. Of course, "after an impasse had been reached on one or more subjects of bargaining, an employer may implement any of its preimpasse proposals, even if no impasse has occurred as to those particular proposals which are put into effect." *Western Newspaper Publishing Co.*, 269 NLRB 355 (1984). Here, the General Counsel argues generally that no impasse was possible because Respondent had not bargained in good faith. However, there is no allegation that Respondent conducted its negotiations in bad faith, i.e., without a sincere intent to each agreement on the terms for a new contract. And the General Counsel does not make such an argument. Instead, the General Counsel argues that, "Respondent's lack of good faith in negotiations is evident from its multiple unilateral changes blatantly implemented during negotiations in total disregard of its statutory obligation to bargain." Accordingly, the crucial issue in this respect is whether it can be said that Respondent's unlawful unilateral changes in call-out and standby procedure tainted the bargaining to such a degree that, in fact, no legitimate impasse could have occurred.

By definition, an impasse occurs whenever negotiations reach "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 589 (1988) (quoting from *Laborers Health & Welfare Trust v. Adv. Lightweight Concrete*, 779 F.2d 497, 500, fn. 3 (9th Cir. 1985)). In determining that an impasse exists, it is not necessary that negotiations be exhausted on every issue about which the parties have been bargaining. "We are not suggesting that impasse on a single critical issue cannot in some circumstances create deadlock in the entire bargaining process. Both the Board and the court's have found that it can." *Sacramento Union*, 291 NLRB 552, 555 (1988). As a result, when a single issue is of central importance and the parties have been unable to reach agreement concerning it, after ne-

gotiations conducted in good faith, “a finding of impasse is warranted irrespective of whether there was some movement in the parties’ position prior to the Respondent’s implementation of its proposals, or whether the deadlock was produced by differences either on one or on many significant issues.” *E. I. du Pont & Co.*, 268 NLRB 1075, 1076 (1984).

Here, as described in section III.A, above, two bargaining issues separated the parties throughout the negotiations: management rights and status of seniority. Both Respondent and the Union agreed that inability to resolve these issues led to failure to reach agreement by March 20, 1989. Moreover, both parties seemed to agree that resolution of those issues would have removed all further impediments to complete agreement. Yet, neither of those issues involved call-out and standby selection procedures. Further, there is no evidence that the latter subjects had any inherent relationship to the former ones, such that it can be concluded, on the basis of the evidence presented, that negotiation concerning call-outs and standby procedures would have either facilitated or impeded negotiations concerning management rights and length of service. In short, there was no nexus between the two sets of subjects.

“Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices. The Board has long held that an employer may not ‘parlay an impasse’ resulting from its own misconduct.” *White Oak Coal Co.*, 295 NLRB 567 (1989) (quoting from *Wayne’s Dairy*, 223 NLRB 260, 265 (1976)). Thus, an impasse will be deemed illegitimate only where it was generated by unfair labor practices. In contrast, where an issue is of such overriding importance that no agreement is possible without its resolution, and where there has been full and frank bargaining concerning it, a finding of impasse is warranted even if there existed unrelated factors that, in other circumstances, might evidence unlawful conduct. See, e.g., *R. A. Hatch Co.*, 263 NLRB 1221, 1222 (1982).

More specifically, the existence of an impasse was held not to have been precluded by the Employer’s “unvacated, unlawful unilateral changes” where “there was no causal connection between [those unremedied changes] and the subsequent deadlock in negotiations.” *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981). Although the General Counsel attempts to distinguish that case on the basis of the point in time when the changes occurred—before negotiations had commenced in that case—that difference is without distinction. In both cases, the effects of the unfair labor practices lingered at the time of impasse declaration. But in neither case was there a nexus between those effects and the impasse, such that it can be concluded that the former affected the latter. Therefore, I conclude that a valid impasse had been reached or March 20, 1989, and that the subsequent changes did not violate the Act.

Lest there be any doubt, the conclusion that I reach here should be construed quite narrowly. There is no allegation, nor evidence to support one were it now to be made, that Re-

spondent had conducted its negotiations in other than good faith. Concomitantly, there has been no contention, nor showing, that the call-out and standby changes had been intended to frustrate successful conclusion of negotiations for an agreement. Nor was there a showing of nexus between those unlawful unilateral changes and negotiations concerning the subjects that led to the deadlock on March 20, 1989: good faith was displayed in negotiations concerning the latter, the two issues were concededly of overriding importance to the parties, and the General Counsel concedes that, aside from the background of changes, there is no basis for challenging the validity of the impasse reached in negotiations regarding them.

Finally, where unlawful unilateral changes have occurred, the Board sometimes has adopted a modified restoration and backpay remedy, usually where those subjects were included in subsequent bargaining that led to a legitimate impasse. See, e.g., *Storer Communications*, 297 NLRB 296 (1989). Such a situation is not the usual one. “In the usual case, no substantial bargaining has occurred between the parties after the employer’s unilateral change. *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982). What is the situation presented by the facts of this case. No meaningful negotiations, nor effort to conduct any, occurred concerning call-outs and standby after December 14, 1988. Nor were these subjects naturally encompassed by the negotiations concerning management rights and length of service. Therefore, I shall order a full restoration and backpay remedy for the unlawful unilateral changes in call-out and standby procedures, and dismiss all other aspects of the complaint.

CONCLUSION OF LAW

Intermountain and Electric Association has committed unfair labor practices affecting commerce by unilaterally changing call-out and standby procedure, in violation of Section 8(a)(1) and (5) of the Act, but has not violated the Act in any other manner alleged in the consolidated complaint.

REMEDY

Having found that Intermountain Rural Electric Association engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to restore the procedures for call-outs and standby at its Sedalia, Colorado facility to the ones that existed prior to December 14, 1988, and to make whole any employees for any loss of pay they may have suffered as a result of the unlawful unilateral changes in those procedures made on that date, with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]