JD–27–06
MUNCIE, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WGE FEDERAL CREDIT UNION

and CASE 25–CA–29712

LOCAL 1, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL–CIO

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for the General Counsel.
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(Olgetree, Deakins, Nash, Smoak & Stewart, P.C.),
of Indianapolis, Indiana,
for the Respondent.
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for the Charging Party.

DECISION

Statement of the case

IRA SANDRON, Administrative Law Judge. The complaint stems from unfair labor practice charges filed by Local 1, Office and Professional Employees International Union, AFL–CIO (the Union) against WGE Federal Credit Union (Respondent), alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Indianapolis, Indiana, on February 2, 2006, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and Respondent filed helpful posthearing briefs that I have duly considered.

Issue

As stipulated at the outset of trial, the sole issue is whether Respondent's post-impasse implementation of its final offer on August 1, 2005,[1] specifically its proposal that the Compease computerized software program (Compease) be used for calculating employee wages, removed the Union from the process of determining wages and thereby contravened the Board's holding in *McClatchy Newspapers, Inc.(II) (McClatchy)*, 321 NLRB 1386 (1996), enfd., 131 F.3d 1026 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998).

[1] All dates are in 2005 unless otherwise indicated.

The General Counsel does not allege as unlawful Respondent's conduct during negotiations or its declaration of impasse. Indeed, the General Counsel concedes that Respondent was privileged to insist to impasse on its wage proposal but not to actually implement it. In light of this, I need not detail each and every communication on the subject of wages that took place during negotiations. Moreover, since only Respondent's implementation of wages based on Compease is alleged as unlawful, I need not address its other proposed provisions relating to pay.

Facts

Two witnesses testified: Karen Perryman, the Union's president, and Julie Eskew, Respondent's chief executive officer. They both appeared candid, and their testimony was generally quite consistent on major points. Accordingly, no credibility issues require resolution.

Respondent, a not-for-profit financial cooperative engaged in the extension of consumer credit and general banking business to its members, operates four branch facilities located in Muncie, Indiana. Respondent has admitted it comes under the jurisdiction of the Act, and I so find.

On November 1, 2003, the Union was certified as the exclusive collective-bargaining representative of a unit of Respondent's employees consisting of all full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives (MSR's), receptionists, and bookkeepers, at its four branch offices; excluding all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

An initial meeting on ground rules took place on December 2003. Thereafter, approximately 28 bargaining sessions were held from January 2004 until on about May 24. The first 10 or so sessions addressed noneconomic matters. By letter of June 28, 2004, Respondent, through counsel, suggested negotiations on wages and other economic terms.[2] To put the parties' subsequent positions in context, an understanding of Compease is necessary.

Compease

Respondent's Exhibit 14 sets out an overview and description of Compease, a software package or program sold by Koker Goodwin and Associates. The program analyses a variety of salary surveys to compute market-based salary ranges for credit unions, reflecting the labor market (geographical and industrial) in which the credit union competes for labor. The Indiana Credit Union League, of which Respondent is a member, has endorsed its use.

Each employee's position or classification is evaluated based on eight compensable factors: education, experience, management scope, interpersonal skills, operational latitude, mental process, impact on results, and organizational latitude. Benchmark jobs (standards in the industry) are used to evaluate positions; adjustments can be made to tailor the evaluation to the particular organization. At the end of the evaluation process, Compease assigns each position a grade. The "midpoint" or middle of the range for a position is based on the grade. Midpoints are adjusted annually, using new survey data.

[2] R. Exh. 4.

An individual employee's employment information is entered into the system and compared with the midpoint. His or her hourly rate is given as a percentage of the midpoint. An employee who is fully qualified and performing satisfactorily should be paid at or near the midpoint of his/her salary range.

Salary increases are determined by three categories:

1. Merit increases — based on national labor statistics and what the employer has budgeted for salaries.
2. Performance level — there are five levels (ranging from unsatisfactory to outstanding), with increases as the level ascends.
3. Position in range — employees below the midpoint (100 percent for the particular position) will receive a higher percentage raise to bring them within range.

"CompRatio" is given as a percentage and compares the employee's wage rate with the market range of the position.[3]

In sum, wages increases are not fixed but are percentages based on an employee's wage rate as a percentage of the 100-percent midpoint for his or her position, and his/her job performance rating. Thus, the more an employee's wage rate is below the midpoint, the greater the increase for the same performance rating, and vice versa.

Negotiations Over Wages

The Union's first wage proposal, presented on July 12, 2004, provided that all employees receive $.50/hr. wage increases every six months from September 1, 2004 to September 1, 2007.[4] Respondent presented its first wage proposal on August 3, 2004.[5] In relevant part, it provided (Article 14, Section 1):

> During the term of this Agreement, the Company shall continue to set the hourly rates of pay of employees utilizing the Compease program and annual performance reviews. Employees whose current hourly rate of pay exceeds 100% of the midpoint for their job classification under Compease criteria will be "red circled"[6] until their hourly rate falls below the midpoint,

Throughout negotiations, the Union continued to propose straight $.50/hr. increases bi-annually, and it never agreed to the use of Compease. Similarly, the Company consistently proposed using Compease to set pay increases. Respondent presented its final proposed agreement in late May.[7] It contained no effective dates, and the record does not otherwise establish its duration. Therefore, no ending year was specified for the implemented wage provisions, which theoretically could have remained in effect ad infinitum.

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[3] See GC Exh. 6 at 3.
[4] GC Exh. 6; R. Exh. 5.
[5] R. Exh. 6.
[6] This means frozen at their current pay.
[7] GC Exh. 2; R. Exh. 24.

Article 14 (wages) provided in relevant part:

> During the term of this Agreement, the Company shall continue to set the hourly rates of pay of employees utilizing the Compease program and annual performance reviews. Employees whose current hourly rate of pay exceeds 105% of the midpoint for their job classification under Compease criteria will be "red circled" until their hourly rate falls below the midpoint . . . .
>
> Under this program, the following mid-points will be used [dollar amounts representing 100% or the midpoint for each grade]:
>
> Grade 5 = 10.91
> Grade 6 = 12.11
> Grade 7 = 13.45
> Grade 8 = 14.99
> Grade 9 = 16.72
>
> The Merit increase used in Compease will be determined each year by using Projected Average Salary Increases received from Koker Goodwin and Associates. Their information is based on the World at Work Salary Budget Survey.
>
> 1% will be used for Performance Level
> 2% will be used for Position in Range

The proposal proceeded to set out a grid chart for wages in 2005, providing a sliding scale for wage increases depending on performance evaluation and the CompRatio, as earlier described. Specific pay rates were set out.

In addition, the proposal assigned job grades to the various positions: tellers, grade five; back-up head teller, receptionist/MSR, loan clerk/MSR, and loan writer, grade six; head teller, accounting assistant, MSR, senior loan writer, and collector, grade seven; loan officer, loan officer/collector, and bookkeeping assistant, grade eight; and mortgage loan officer, grade nine.

By letter dated July 29, Respondent, through counsel, put the Union on notice that it would implement various provisions of its final offer, including Article 14, wages.[8] Respondent did so on August 1.

Legal Analysis

The parties agree that *McClatchy,* supra, is the starting point for determining the legality of Respondent's action in implementing Compease on August 1.

[8] GC Exh. 3.

In *McClatchy*, the Board carved out an exception to the normal rule that an employer can insist to impasse and then implement a proposal on a mandatory subject of bargaining. It held unlawful an employer's implementation of a proposal for unlimited management discretion in setting the amounts and timing of merit pay increases, without providing the union any participation in either the initial determination of merit increases granted to particular employees, or afterward. As the Board stated, allowing such unfettered discretion without established standards or criteria would undermine the integrity of the whole collective-bargaining process. The Board explained that nothing in its decision prevented an employer from implementing merit wage determinations "if definable objective procedures and criteria have been negotiated to agreement or to impasse." 321 NLRB at 1391,

In *Woodland Clinic*, 331 NLRB 735, 741 (2000), in discussing the rationale behind *McClatchy*, the Board emphasized that an employer may not upon valid impasse implement a merit pay proposal without objective procedures and criteria, since that would give the employer unlimited managerial discretion in the formulation of future pay increases about which the union could not bargain knowledgably. The Board dismissed an allegation of unlawful implementation of a pay proposal because Respondent's pre-impasse proposal had set forth explicit and fixed amounts.

Respondent contends that the situation here is governed by the District of Columbia Circuit's decision in *Detroit Typographical Union No.18 v. NLRB*, 216 F.3d 109 (2000). The court determined that the Board erred in finding unlawful the employer's implementation of a merit increase proposal that provided for raises that would "average" four percent in the first year and three percent in the second and third years, based on the annual employee evaluation process, and that gave employees the right to grieve the amounts of their pay increases. The court recognized that the proposal carried a great deal of managerial discretion but pointed out that "any merit pay system inherently carries much employer discretion . . . . " 216 F.3d at 118.

However, since this matter arises under the jurisdiction of the Seventh Circuit Court of Appeals, the above case does not have a direct bearing on the legal precepts to be applied. In contrast, the underlying Board decision, in *Detroit Newspapers*, 326 NLRB 700 (1998), does. The Board found that the elements set out above failed to constitute "definable objective procedures and criteria" (326 NLRB at 706) and that the employer committed a *McClatchy* type of violation.

In sum, the *McClatchy* line of cases proscribes post-impasse implementation of a wage proposal which lacks specific and definite criteria and provides the employer with such discretion that the union, during negotiations, could not have known what future pay increases were being proposed. In such circumstances, the union has been deprived of the ability to bargain effectively over them.

Respondent argues that *McClatchy* was not violated because its Compease proposal provided for "almost completely objective procedures" in setting employees' merit pay and delegated that role to a third party, thereby essentially stripping Respondent of all discretion in formulating annual midpoints for such increases.[9]

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[9] See R. Br. at 6. Eskew also testified that wage increases are solely determined by Compease. In its brief (at 4 fn. 4), the General Counsel contests this, pointing to the language in Respondent's Compease summary that merit increases are "based on national labor statistics **and what is budgeted for salaries**" (emphasis added)). Either way, Respondent does not disagree that the Union would have no part in determining merit increases.

However, whether the computation of future pay increases will vest in Respondent or in Compease is not the fundamental question. Rather, what is critical is whether the Union has been foreclosed from fulfilling its role as a collective-bargaining representative in negotiating wages.

As the General Counsel concedes, Respondent's wage proposal for 2005 set out specific wages for each position, as determined by Compease, and implementation of such was not impermissible.[10]

I now turn to Respondent's proposed pay increases for subsequent years, continuing to use Compease. True, Compease was to utilize objective criteria to calculate midpoints and merit increases after 2005. However, since those calculations were to be based on future market salary surveys, the Union could not have ascertained or even approximated what those figures would be. Without such information, the Union essentially had to operate in a vacuum in trying to meaningfully negotiate over future raises and, as a result, could not effectively represent unit employees.[11] This problem was exacerbated by the fact that Respondent provided no fixed time frame for the effective dates of its wage proposals.

Accordingly, I conclude that Respondent's implementation of its wage proposal on August 1, by delegating to Compease the computation of key factors in determining pay increases after the year 2005, and without having provided any specific amounts to the Union for such increases, fell afoul of *McClatchy* and therefore violated Section 8(a)(5) and (1) of the Act. Although the implemented pay increases for 2005 were lawful, they were an integral part of a larger wage proposal that must be viewed in its entirety since use of Compease was the basis for all post-impasse wage increases. For that reason, I do not deem it appropriate to sever the implementation of the 2005 pay increases from those of subsequent years.

The General Counsel asserts that Respondent's unlawful implementation of its wage proposal renders unlawful its entire implementation on August 1, citing *Eddy Potash, Inc.*, 331 NLRB 552 (2000).[12] However, reliance on that case is misplaced since, as distinct from the instant matter, the employer there unilaterally implemented its final offer <u>without</u> reaching a lawful impasse.

Additionally, although the complaint alleged that Respondent violated the Act by its unilateral implementation of a large number of enumerated final proposals, the stipulated issue on the first day of hearing was specifically limited to Respondent's implementation of its final Compease proposal. Respondent, therefore, was not afforded the opportunity of fully litigating its implementation of other provisions.

For these reasons, I reject the General Counsel's contention that Respondent's violation should be broadened to include all of the provisions it implemented.

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[10] See GC Br. at 8 at fn. 6.

[11] Had Respondent's wage proposal afforded the Union an opportunity in the years after 2005 to review and then negotiate over proposed midpoints and merit increases once Compease calculated them annually, Respondent's implementation might have passed muster. Under that scenario, the Union would have been able to negotiate in later years with the benefit of knowing the specific amounts of proposed wages. Such was not the case.

[12] GC Br. at 11-12.

Conclusions of Law

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

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

3. By implementing the terms of its final wage proposal relating to Compease on August 1, 2005, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

Remedy

Because Respondent has engaged in unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As per the Board's remedy in *McClatchy Newspapers(I)*, 299 NLRB 1045 (1990). Respondent must bargain with the Union on the amounts of employee wage increases. Further, Respondent must, on the Union's request, cancel the changes in wages granted to employees through Respondent's unilateral action. Nothing in this Order shall be construed as requiring Respondent to cancel any wage increase without such a request from the Union.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[13]

ORDER

Respondent, WGE Federal Credit Union, Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting wage increases to employees without bargaining about their amounts with Local 1, Office and Professional Employees International Union, AFL-CIO (the Union).

(b) 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.

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

(a) On request, bargain with the Union about the amounts of wage increases for employees the Union represents, prior to granting any wage increases.

(b) If the Union requests, cancel wage increases unlawfully granted to employees through Respondent's unilateral action.

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[13] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facility in Muncie, Indiana, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by Respondent 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 1, 2005.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 18, 2006.

Ira Sandron
Administrative Law Judge

[14] 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 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT grant wage increases to you without bargaining with Local 1, Office and Professional Employees International Union, AFL-CIO (the Union) about the amounts of such increases.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act, as set forth at the top of this notice.

WE WILL, on request, bargain with the Union about the amounts of wage increases you receive.

WE WILL, if the Union requests, cancel the wage increases we unlawfully granted to you through our unilateral action.

WGE FEDERAL CREDIT UNION
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Federal Building, Room 238
Indianapolis, Indiana 46204-1577
Hours: 8:30 a.m. to 5 p.m.
317-226-7382.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 317-226-7413.