WE WILL NOT in any other manner restrain or coerce employees in the right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization, as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL make Clayton I. Hart and Al Fast whole for any loss of earnings either may have suffered by reason of our denial of membership to them.

All artists, engaged as employees, are free to become or remain, or to refrain from becoming or remaining, members of American Guild of Variety Artists, AFL–CIO, except to the extent this right may be affected by an agreement, where lawful, requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

AMERICAN GUILD OF
VARIETY ARITISTS,
AFL–CIO
(Labor Organization)

Dated By
(Representative) (Title)

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706 Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 228–7711.

Taft Broadcasting Co., WDAF AM–FM TV *and* American Federation of Television and Radio Artists, AFL–CIO, Kansas City Local. Case 17–CA–2800.

March 20, 1967

DECISION AND ORDER

On July 13, 1966, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Respondent filed exceptions to the Trial Examiner's Decision together with supporting briefs. The Respondent also filed an answering brief.[1]

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

The Respondent excepts to the Trial Examiner's conclusion that it violated Section 8(a)(5) and (1) of the Act by unilaterally changing existing terms and conditions of employment while negotiating with the Charging Party, hereinafter called the Union, for a new collective-bargaining agreement. In reaching this conclusion, the Trial Examiner found that the parties had not bargained to an impasse on the issues encompassed by the Respondent's changes.

The record shows the following facts:

On April 1, 1964, Respondent, Taft Broadcasting Co., acquired ownership of WDAF AM–FM TV and assumed its predecessor's collective-bargaining agreement with the Union. In May 1965, the Respondent sent the Union a notice of termination of the aforementioned agreement effective October 1, 1965, and requested bargaining for a new contract. Pursuant to this request the parties met for the first time on June 4, 1965. Neither side had proposals ready. At their second meeting, which was held on June 24, the Respondent furnished the Union its proposal for a new contract. Apparently, this proposal, which was discussed at the third meeting of the parties on August 24, represented a substantial departure from the agreement then in effect. The Company wanted complete interchangeability with respect to categories of employees and between broadcasting media without the limitations imposed by the existing agreement. The Company also stated that it wanted no limitation on the amount of prerecording of broadcast material. Under the old agreement prerecording was limited to not more than 5 hours per medium (AM, FM, TV) per broadcast day.

The parties next met on September 9, 1965. At that time the Union furnished the Company its proposal for a new agreement which was, essentially, a carryover of the old contract with increases in wage rates and fringe benefits and with certain deletions in the duties of artists. The parties met three more times during September. Some agreement was reached on disputed issues (e.g., preparation time, outside employment) where no change in the contract was involved. However, there was no agreement on or discussion of those terms of the Company's proposal dealing with interchange

[1] The Respondent has requested oral argument. As the record, the Trial Examiner's Decision, and the exceptions and briefs adequately set forth the issues and positions of the Respondent, its request is hereby denied.

between categories and between media, or of prerecording without limitation. On September 30, the parties extended the current contract by an agreement which provided for a 15-day termination notice.

From that time through October 22 the parties held six more bargaining sessions without reaching agreement on the major issues which separated them. They did agree to continue the existing policy of permitting general managers and program directors to broadcast station editorials. However, with respect to the Company's proposal concerning interchange between categories, discussions were fruitless. Further, the Respondent advised the Union that it considered "director-coordinators" to be encompassed within its proposal for employee interchange between categories. The status of negotiations at this stage was summed up by the Union's executive secretary and chief negotiator in his October 26 report to employees: "Following these 13 bargaining sessions I can only report to you that *no* progress has been made. On the contrary in many areas we are further apart now than when the negotiations started." And again on November 5: ". . . we have held two more bargaining sessions and still we have no progress." The Union, in this communication, called for a strike vote. Apparently, the only agreement reached in this period concerned the union-shop provision.

The parties conducted bargaining sessions 14 through 20 in the period November 3 through 19, 1965. Some progress was made when the Company agreed to longer rests between workweeks in accordance with the union proposal and also agreed to withdraw its proposed changes in meal periods. However, the Company maintained in its discussions that it would not accept restrictions on the assignment of employees, including director-coordinators, within categories even after the Union modified its position to permit more latitude to announcers doing newscasts. Further, the Respondent rejected the Union's demand that it take certain staff employees off the air after the Board, in a unit clarification proceeding, had found them to be supervisors and therefore excluded them from the contractual unit.[2] At this stage in negotiations, on November 19, 1965, the Union gave the Respondent notice of its intention to terminate the contract extension agreement.

At the 21st meeting of the parties, which was held on November 23 with a Federal mediator in attendance, the Respondent agreed to the Union's proposal regarding an increase in minimum overtime. The parties also agreed to return to the termination provision in the old contract. They agreed further that future meetings would be held at the office of the Federal Mediation and Conciliation Service. Bargaining continued on November 24 at which time the Company furnished the Union a new proposal entitled "INTERCHANGE BETWEEN CATEGORIES," which included, among other things, the following provisions:

> Any artist covered by this Agreement may perform in any category in or out of this Agreement upon payment only of the appropriate in-shift fee provided by this Agreement, if any, not to exceed hours per week per artist.
>
> *Staff Directors and Coordinators:* (Old contract provision carried over, with certain deletions, including the following deletion: "A Producer Director shall be assigned to every live 'on-camera' program in addition to a coordinator.")

The session ended, however, when the Union refused to continue negotiating because of the presence of a company stenographer.

At the 23d meeting, which was held on November 29, agreement was reached on only one issue when the Company dropped its demand for a provision concerning discharge without cause. At this meeting the Company furnished the Union a "summary of positions" which reviewed, among other things, the progress of the parties on the following issues:

> *Interchange between media:* Union rejects the Company's proposal for dropping time and number restrictions;
>
> *Pre-recording:* Union rejects the Company's proposal to drop restrictions. In its summation the Company stated that it would be willing to consider time limits on AM and TV but not on FM;
>
> *Supervisors:* Union rejects the Company's proposal to continue the broadcasting duties of certain employees after these employees were excluded from the unit by the Board in the aforementioned UC proceeding, with the exception of certain editorial broadcasts mentioned above;
>
> *Wages:* The Company noted the Union's proposal for increases in the weekly base salary ranging from $5.50 to $7.50.

At this meeting, according to the testimony of Robert Wormington, a negotiator for the Company, the Union's chief negotiator expressed dissatisfaction with the state of negotiations as they then existed, stating that the Company's proposal with respect to interchange between categories was no more acceptable than the one offered at the beginning of negotiations. Further discussion of that issue was dropped. The Company made its first money proposal, offering to grant employees covered

[2] *Taft Broadcasting Company*, Case 17-UC-3 (Regional Director's Decision dated October 13, 1965)

by the contract a $7 across-the-board increase in weekly base pay retroactive to October 1, 1965, with an additional $7 increase on the anniversary date of the contract, assuming it to be for a 2-year term. The Union stated that it would accept the Respondent's offer if the latter would also agree to a continuation of the old agreement. The Company rejected this counterproposal. At this point the parties were split up by the Federal mediators. On November 30 the parties met in separate session, but no bargaining took place.

On the following day, the Union issued a third communication to employees advising them of the issues still in dispute after 24 bargaining sessions. The Union stated that 99 percent of the issues still outstanding "stem from Company demands for regressive changes in the current contract." With respect to the Company's proposal to combine the use of prerecording with the elimination of categories and its proposal to continue broadcasting by employees removed from the bargaining unit, the Union stated that "such anti-union weapons we can not place in the hands of the Company."

At approximately the same time the Union established a mobile office in the immediate vicinity of the Respondent's radio station and orders were placed for picket signs. The signs were painted on December 1, 2, or 3, 1965.

On December 3 the parties met in separate session. On that date, the Company informed the Union that it would put certain changes into effect the next day. David Schnabel, the union spokesman, asked the Respondent's attorney "if it was the Company's position that we had bargained to an impasse on all items." The attorney replied "not necessarily" or as he himself subsequently testified "not necessarily on each and every issue but on the contract." Thereafter the parties went into joint session and, among other things, discussed the prerecording issue. The Union offered the Company unlimited prerecording on FM if the Company would accept an absolute prohibition against prerecording of AM and TV. The Company rejected this offer noting that as it broadcasts independently on FM only 8 or 9 hours per day the total amount of prerecording offered by the Union would be less than that permitted under the old contract.

The parties met again the next day, December 4, at which time the Company furnished the Union a list of changes it planned to put into effect at 5 o'clock that afternoon.[3] The issues encompassed by the announced changes, however, were not discussed at this meeting, although the parties did agree to a subsequent bargaining session. At the hearing, John McClay, executive vice president of Taft, and chief negotiator for the Respondent at the time the above changes were announced, testified that the imposition of these changes was considered by the Company to be the most appropriate means of breaking the deadlock in negotiations which it believed had occurred. Other company representatives testified variously that the Company instituted the aforementioned changes in order to get some of the relief it had been seeking in negotiations, that there was no intent to bypass the Union in an appeal directly to employees, and that, by December 3, the Company had everything out that it knew to put out "at that point."

The parties met four times between December 6 and 10, 1965. In this period some agreement was reached on issues unrelated to the changes announced by the Respondent. They included a pension plan provision, an increase in the rate for contract artists, and a continuation of the old contract provision with respect to vacations. The Company rejected, however, proposals made by the Union concerning the duties of newscasters and announcers. At the meeting of December 10 the Company furnished the Union its "final" position on the major issues still in dispute. Its position did not vary from that taken in the earlier bargaining sessions except that it stated its willingness to accept a 70-hour prerecording limitation on AM and TV provided no limitation was placed on FM, and it also offered some modification of its earlier proposal regarding the duties of announcers and newscasters and, as the Respondent's announced changes had by that time been put into effect, the Union gave 24-hour strike notice. The strike began on December 12. More than 10 meetings between the parties occurred between that date and the date of hearing herein without the parties coming to an agreement on the major issues outstanding. A contract was negotiated, however, and the strike was terminated subsequent to the hearing but prior to the date of the Trial Examiner's Decision.[4]

The Trial Examiner found that the parties had not reached an impasse on the prerecording issue at the time the Respondent announced the changes discussed herein, as evidenced by its subsequent offer to accept the 70-hour limitation on AM and TV which was not made until after the unilateral changes were announced. He also found that an impasse had not occurred on the question regarding signed duties (elimination of the double manning requirement of the old contract), of director-coordinators, or for that matter on the question of their inclusion in the unit. He did find that the parties had reached an impasse in negotiations concerning the interchange of employees between categories and between media.

The Trial Examiner held, however, that the changes imposed by the Company should be viewed as a single interlocking issue: "whether the

[3] A copy of the Respondent's notice announcing these changes is attached marked "Appendix" to this Decision and Order

[4] The Respondent excepts to the Trial Examiner's ruling denying its motion to reopen the record for receipt of evidence relating to the strike settlement We hereby adopt the ruling made by the Trial Examiner for the reasons set forth in his Decision

Employer in exchange for the $7 across-the-board wage increases should be permitted the freedom to assign its artistic personnel without regard to the categories and media which had theretofore existed and without paying the additional fee required under the terms of the preexisting contract, and the freedom to prerecord additional material." On this issue the Trial Examiner found no impasse. Further, he found that, at least insofar as prerecording is concerned, the unilateral changes first announced on December 4 and subsequently implemented do not meet the requirement that they be no greater than those previously proposed to the Union. We disagree with these ultimate findings of the Trial Examiner.

An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment.[5] On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.[6]

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Applying the foregoing standards to the instant case, we believe that the parties here reached an impasse in negotiations. As found by the Trial Examiner, there is no evidence that the Respondent engaged in bad-faith bargaining. The Respondent wanted certain changes in working conditions which would give it greater flexibility in the assignment of its personnel. As viewed by the Union, this meant serious loss to its members. Both parties took strong positions. Both parties bargained in good faith with a sincere desire to reach agreement. However, after more than 23 bargaining sessions, progress was imperceptible on the critical issues and each believed that, as to some of those issues, they were further apart than when they had begun negotiations. Viewed in this light and from the vantage point of the parties on December 4, when the Respondent announced the changes here involved, we are unable to conclude that a continuation of bargaining sessions would have culminated in a bargaining agreement. Of course it is true that, by December 4, other issues had been resolved by the parties. But, in this respect, an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.

In these circumstances we find that an impasse in contract negotiations had occurred when, on December 4, 1965, the Respondent announced the changes here in question. We find further that these changes were reasonably comprehended within the Respondent's proposals which preceded impasse. We hold, therefore, that the Respondent, having taken the unilateral action discussed above, did not thereby violate Section 8(a)(5) and (1) of the Act. Accordingly, we shall dismiss the complaint herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondent, Taft Broadcasting Co., WDAF AM–FM TV, Kansas City, Missouri, be, and it hereby is, dismissed.

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[5] *N L R B* v *Benne Katz, etc., d/b/a Williamsburg Steel Products Co*, 369 U S 736

[6] *N L R B.* v *Intracoastal Terminal, Inc., et al*, 286 F 2d 954 (C A 5)

APPENDIX

NOTICE TO ALL ANNOUNCERS, NEWSMEN, DIRECTOR-COORDINATORS AND FLOOR MANAGERS

Effective immediately the following changes in operating procedures and compensation will take place:

1. Wages for all employees within the bargaining unit represented by AFTRA will be increased by $7.00 per week.
2. Announcers may be required to interchange between media without limitation on a number of times per day or the period between appearances.
3. Use of prerecording may be increased to a maximum of 70 hours per week per medium on AM and TV and without limit on FM.
4. The Company proposal with respect to changes in the duties section of the contract will be in effect with the following specific changes to be instituted immediately:

   a. Announcers may be required to do news, weather and sports in shift for the applicable in-shift fee.

   b. Newsmen may be required to do sports in shift for the applicable in-shift fee.

   c. The assignment of two director-coordinators to live programs will be at the Company's discretion, as will be the assignment of a director-coordinator to station breaks.

   d. Other services may be required out-of-category, but in shift, up to ten hours per artist per week.

Dated, December 4, 1965.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

PAUL E. WEIL, Trial Examiner: Upon a charge filed December 2, 1965, amended December 15, 1965, and again on January 31, 1966, a complaint was issued on February 2, 1966, on behalf of the General Counsel by the Regional Director of Region 17. The complaint alleges that Taft Broadcasting Co., WDAF, AM–FM TV, hereinafter called the Respondent or the Employer, had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. Respondent filed an answer denying that it had engaged in the unfair labor practices alleged. I held a hearing in Kansas City, Missouri, on April 5, 6, and 7, 1966. All parties were present and were afforded a full opportunity to be heard. Oral argument was waived and briefs were filed by the General Counsel and Respondent.[1]

Respondent, after the hearing, filed a motion to reopen the record to receive a copy of a purported strike settlement agreement and contract, and copies of alleged resignations of five members of the unit. General Counsel filed a response thereto joining in the motion and moving further that oral testimony be taken regarding the effect of the documents, and the manner in which they were obtained. I issued an Order giving each party an opportunity to submit argument and authority in support of their motions. In response thereto both parties submitted argument which I have duly considered.

Respondent contends that the evidence is relevant if I find the unfair labor practice was committed as alleged, and that the strike is or was an unfair labor practice strike, and further it is relevant in framing an order, in relation to an order of reinstatement of the unfair labor practice strikers, General Counsel appears to contend that the evidence offered, and further oral testimony relating thereto, is relevant to a determination of the employer's good faith in instituting the unilateral changes and to a determination of the strikers' status.

The complaint herein is very narrowly drawn; there is no allegation of general bad faith on the part of Respondent, nor of a failure to reinstate unfair labor practice strikers upon demand. There is no allegation of an 8(a)(3) violation in regard to the purported resignations, although the General Counsel, by his responses to the motion appears to cast doubt on the manner in which they were secured. No motion to amend the complaint has to date been filed, nor, to my knowledge, has a new complaint issued with regard to these items. Under the pleadings as they exist, and in view of my disposition of the issues with which I am faced by the complaint, hereinafter set forth, the motions are denied. See *Waukesha Sales & Service, Inc.*, 137 NLRB 460, 461.

Upon consideration of the entire record including the briefs and upon my observation of the demeanor of the witnesses appearing before me, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Delaware corporation, engaged in commercial radio and television broadcasting with facilities in various States of the Union, including the facilities herein involved at Kansas City, Missouri, operating under call letters, WDAF, AM–FM and TV, during the past calendar year, derived a gross income in excess of $100,000 from sales of its services of which in excess of $50,000 was received from customers located outside the State of Missouri. During the same period, the employer purchased interstate news service valued in excess of $10,000 and broadcast materials and rental films valued in excess of $5,000 from points outside the State of Missouri for use at its Kansas City facility.

Respondent is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that American Federation of Television and Radio Artists, AFL–CIO, Kansas City Local, herein called the Union, is and at all times relevant hereto, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

Three issues are raised by the pleadings: (1) whether since on or about December 3 and 4, 1965, Respondent failed to bargain in good faith with the Union in an appropriate unit for purposes of collective bargaining by unilaterally changing existing wage rates, hours, and other terms and conditions of employment; (2) whether the unit is appropriate; and (3) whether the strike which commenced immediately after the announcement of the unilateral changes is an unfair labor practice strike.

B. *Background*

On or about April 1, 1964, Respondent purchased from Transcontinent Television Corporation the three broadcasting stations involved, WDAF AM–FM and TV, assuming the then existing contract between the Union and Transcontinent Television Corporation. The contract by its terms covers the unit of all radio and television announcers, newscasters, sportscasters, floor managers, director-coordinators, and other talent or artists, excluding news director, assistant news director, farm director, production manager, and other employees and supervisors as defined in the Act. This is the unit alleged by the General Counsel to be appropriate for purposes of collective bargaining.

On May 20, 1965, Respondent, by a letter signed by the general managers of the television station and the radio stations and addressed to the Union, served notice of termination of the existing collective-bargaining agreement effective October 1, 1965, and expressed the Respondent's desire to commence negotiations by June 1, 1965.

After a preliminary meeting on June 4, the Respondent submitted to the Union on June 24 its proposal for a new contract which provided for a number of changes and particularly for a unit change excluding the director-coordinators.

Thereafter, on July 26, 1965, Respondent filed with the Regional Office in Kansas City a unit clarification petition (Case 17–UC–3), in which the Respondent proposed a unit

[1] After the hearing counsel for the Respondent and for the General Counsel filed a motion and stipulation to correct the transcript in various respects. It appearing proper, the motion is granted and the record is corrected as prayed.

including radio and television announcers, newscasters, sportscasters, and floor managers employed by the three stations, and excluded all other employees including the news director, assistant news director, production manager, and television director-coordinators, and any other supervisors as defined by the Act.

No bargaining took place between June 24 and August 24, 1965. On the latter date the parties met and the Union commenced asking questions from a prepared list of 38 pages concerning the Employer's proposal. After going through some 28 pages of the prepared questions, the Employer declined to continue the discussion claiming that the Union was not engaging in collective bargaining inasmuch as it was not agreeing or disagreeing with any of the Employer's proposals. The Union through Schnabel, who represented the Union at all stages of the negotiations, asserted that the Company's proposal was so different from the preceding contract that it was necessary for the Union to have answers to its questions before it could intelligently negotiate. The Employer caucused and its representatives left the meeting.

During the discussion in the above meeting, in reference to article VI of the Company's proposal on sick leave, which simply stated that the Company agrees to grant sick leave in accordance with the then current policy of the Company, the Union requested that it be furnished with a statement of the then current policy of the Company, as well as a statement of the policy of the predecessor company. This latter resulted from the fact that in the expiring contract the sick leave clause provided for sick leave in accordance with the policy existing at the time.

Additionally, Respondent's proposal as to pension and welfare provided that in lieu of all other company profit-sharing, pension, or welfare plans the Company will contribute to the AFTRA pension and welfare funds, etc. The Union requested that it be furnished a copy of Respondent's profit-sharing, pension, or welfare plans, so that it could negotiate whether to seek one or the other or both.

Respondent's proposal was silent as to director-coordinators and contained no monetary provisions Respondent at the hearing stated that this was deliberate, because of its position that director-coordinators do not belong in the unit and also because the Taft Company's negotiations strategy entailed making no offer on monetary items until late in the negotiations so that the Employer could assess the value of the contract as it shaped up.

After the August 24 meeting, the parties continued to meet and negotiate on various dates, 9 times in September, 7 times in October, and 11 times in November.

In the meantime, on October 13, 1965, the Regional Director issued his decision and clarification of the bargaining unit pursuant to the petition in Case 17–UC–3, excluding the news director, farm director, and production manager from the bargaining unit and including the director-coordinators. Respondent filed a request to the Board for review of the Regional Director's decision which was, on December 8, 1965, denied by the Board on the ground that it raised no substantial issues warranting review.

On September 30, 1965, because the contract expired at midnight of that day, the parties agreed to extend the contract indefinitely subject to termination on 15-day notice. Thereafter, on November 19 the Union notified the Respondent that it would terminate the contract effective December 4

On December 3 Respondent notified the Union that it would institute certain unilateral changes effective at 5 p.m., December 4, and asked the Union if it was planning to strike at that time. The parties met again on December 4 and discussed Respondent's decision to change working conditions unilaterally. They also discussed some contract issues without reaching substantial agreement. At 4 p m. on December 4 or shortly thereafter, Respondent's negotiating representative, McClay, telephoned the stations directing that a notice be posted detailing the unilateral changes.

The parties met again on December 6, 7, 9, and 10 On December 9, the Employer posted a notice of additional assignments made pursuant to the changed working conditions of which it had given notice to the Union on December 3 and 4. The Union met and resolved to strike in view of Respondent's unilateral changes in working conditions. On December 10, the Union gave 24-hour notice that the strike would commence.

Based upon their contention that the unilateral changes were unlawful and constituted a refusal to bargain, the Union and the General Counsel contend that the strike which resulted therefrom is an unfair labor practice strike.

Since the strike commenced the parties have continued to meet and negotiate with each other and the strike continued in existence at the time of the hearing.

C. *The Unit Issue*

The Employer contends that the Regional Director erred in his decision in the unit clarification proceeding by including the director-coordinators within the unit. Respondent attempted to introduce no new or previously unavilable evidence but rests on the record before the Regional Director in the UC case.

Section 102.67(f) of the Board Rules and Regulations, Series 8, as amended, provides that the denial by the Board of a request for review of a Regional Director's decision in a representation proceeding shall constitute an affirmance of the Regional Director's action and shall preclude relitigating any issues therein raised in any related subsequent unfair labor practice proceeding. Section 102.63(b) provides that all hearing and posthearing procedure relating to a unit clarification proceeding shall be in conformance with Section 102 68, whenever applicable, with certain exceptions not here relevant. Therefore, in consideration of 102 67(f) and in accordance with the Regional Director's decision I find that director-coordinators are properly part of the unit and that the unit is appropriate for purposes of collective bargaining. The unit is:

> All radio and television announcers, newscasters, sportscasters, floor managers, director-coordinators, and other talent or artists, excluding news director, assistant news director, farm director, production manager, and all other employees and supervisors as defined in the Act.

D *The Unilateral Changes*

The expired contract broke down the unit initially between radio and television, then, within the media, on the basis of announcers, sportscasters, newscasters, director-coordinators, floor managers, and freelance artists. These breakdowns generally are referred to as categories within the old contract. The old contract contained provisions for special fees to an employee who

worked out of his category or out of his shift. In addition, the preceding contract provided for the assignment of additional director-coordinators under certain circumstances and provided for a limitation in the amount of prerecording on each of the media to 5 hours air time daily.

By its proposed contract Respondent proposed unlimited prerecording in all media, and unlimited interchange between categories and media, making it possible to use talent either on television or radio or to use them in any capacity without the payment of additional fees. Respondent proposed also to eliminate the additional director-coordinators necessitated by the "double manning" requirement of the old contract and to eliminate expenditures for straight time and overtime required by the necessity of limiting prerecording on each of the media. In return for the benefits to Respondent, Respondent offered a wage increase across-the-board of $7 in base pay, for each of 2 years.

While there are numerous points of difference between the negotiating parties which were explored during the course of their many meetings, it is the elimination of the cost items described above that formed the main bone of contention.

It is clear that the imposition of the changes suggested by the Employer could result to the employees in substantial monetary losses although this would be to some extent compensated by a reduction in working time and by the increase in base pay. Thus, the first change effectuated resulted in an announcer presenting a sports insert in a television newscast from which under the old contract he would have been paid $20 but under the Employer's unilateral change he was to receive $2.

The second effected change resulted in the loss to an employee of overtime which he computed, without contradiction, amounted to some $30.

The law with respect to unilateral changes, in the context of existing negotiations, has been carefully explored by the Board and by the courts. Generally speaking, against a background of bad-faith bargaining, nothing would justify an employer in effectuating unilateral changes in wages, hours, or working conditions at a time when a duty exists to bargain with a union concerning those subjects. Unilateral action by an employer *without prior discussion with the Union* amounts to a refusal to negotiate even in the absence of a finding of overall subjective bad faith on the part of the employer. (*N.L.R.B.* v. *Katz, etc.*, 369 U.S. 736.) On the other hand, where the parties have engaged in bona fide negotiations but an impasse is reached, the employer may affect unilateral changes or make unilateral offers to the extent of its best offer to the union, so long as no greater inducement is offered to the workers than was offered to the union and there is notice to and consultation with the union. (*N.L.R.B.* v. *U.S. Sonics Corp.*, 312 F.2d 610, 615 (C.A. 1).)

In the instant case Respondent contends that an impasse was reached on each of the subjects in collective bargaining, upon which unilateral changes were made, and that the changes made, and the actions taken as a result thereof were precisely those changes embodied in the Employer's last proposal, which was rejected by the Union.

Thus, on the cases, it would appear that three determinations must be made prior to a consideration whether the unilateral changes herein involved were unlawful: first, that the context of bargaining must be one of good faith; second, that the parties must have reached an impasse in negotiation; and third, that the changes instituted shall have been no greater than those previously submitted to the Union.

Good Faith

The General Counsel appears to contend that Respondent had established a pattern of bad-faith bargaining. His contention is not alleged in the complaint but was stated during the course of argument at the commencement of the hearing. (The contention was not made in so many words. However, General Counsel cited as a factor to the violation an alleged delay by the Employer in supplying certain information to the Union, citing *Bonham Cotton Mills, Inc.*, 121 NLRB 1235, in which case the Board found a violation of Section 8(a)(5) in that Respondent therein did not bargain in good faith, but merely entered into sterile discussions with the Union. I do not find that the delay was unreasonable.)

I have carefully reviewed the evidence, and I cannot conclude that there is any showing that, prior to the unilateral imposition of the changes in working conditions, Respondent bargained in bad faith. It is true that the negotiations continued over a long period of time. This may very well have resulted from the fact that Respondent was seeking major changes in the contract apparently in the hope of bringing it more nearly in line with the contracts, wages, and working conditions of Respondent's employees in its other broadcasting facilities, in other parts of the country. The Union was stubbornly resisting these changes obviously in part because they would have resulted in less take-home pay to its members, diminution of the unit because fewer employees would be needed with increased prerecording and interchange and in part probably because the negotiations with this Employer and other major employers in the Kansas City area set a pattern for contracts with the other employers whose employees are represented by this Union. It is clear from the record that the parties met frequently and without untoward delay attributable to the Respondent and that they bargained, at least in some regards, fruitfully over a large number of conditions, some of them minor and some apparently of major significance. I am convinced and I find that the record as a whole will not support the conclusion that Respondent failed to bargain in good faith prior to its announcement of the unilateral changes.

Impasse

As the District of Columbia Circuit Court stated in *Dallas General Drivers, Warehousemen and Helpers, Local 745 (Empire Terminal Warehouse Co.)*,[2] "the problem of deciding when further bargaining on an issue is futile is often difficult for the bargainers and is necessarily so for the Board." The court went on to say:

> Where good faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted. see *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, . . . (1965), and perhaps sometimes even required, *cf. N.L.R.B.* v. *Intracostal Terminal, Inc.*,

[2] 355 F.2d 842 (C A D.C.)

286 F.2d 954 (5th Cir. 1961), to make a determination that an impasse existed.

> There is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations which arise in the field of industrial bargaining. Nor is there a rigid formula for assessing so subtle an issue as the precise time when an impasse occurs: but the fact that the parties resume discussions on issues other than wages after the date of the wage cut is not incompatible with a finding that an impasse on the wage issue had been reached by that date.

The Charging Party appeared both at the hearing and from the context of the negotiations to be contending that before an employer can unilaterally change wages or working conditions during negotiations an impass *on all issues* must be present. I do not believe that this is the law. In *Empire Storage*, for instance, the Board[3] found that no impasse existed as to some issues, some of which had not been touched upon in the bargaining but found that an impasse in discussion of wages did exist and that no violation resulted from the employer's unilateral reduction of its wage rates therein after bargaining with the Union to an impasse on such a wage reduction.

Accordingly, we need consider whether an impasse exists only in those issues in bargaining related to the changes made by the Employer. These are (1) wages, (2) the appropriateness of including director-coordinators in the unit, (3) the use of prerecording, (4) interchange between categories and between media, and (5) the assignment of additional director-coordinators for live screening on television.

1. The Union in its first proposal of September 7, 1965, had requested wage increases in varying amounts between $5 50 and $10 for various categories of employees. The Employer maintained that it would not submit a wage proposal until late in the negotiations, and following this procedure, on November 29, the Respondent finally presented a wage proposal (larger than the Union's, for the most part) of $7 for the first year and $7 for the second year of a 2-year contract

The Union offered to take the wage increase proposed by Respondent and the old contract as it stood and settle on that basis but the Employer declined, telling the Union "its your move." Admittedly, this was not simply an exhibition of largesse on the part of the Employer; its position was clearly enunciated that it wanted substantial changes in the contract and was prepared to pay what it considered to be a reasonable price therefor. The $7-wage increases were to be offset by more favorable terms on the other disputed items, particularly, the prerecording and the interchange between categories and media. As a result in my opinion, to find an impasse in existence as to wages requires a finding that impasse existed as to the other changes requested by Respondent. Viewed separately, the wage offer had been accepted, and then withdrawn or made conditional.

2. The inclusion of the director-coordinators in the unit was a substantial bone of contention between the parties until after the unilateral changes had already been made. Respondent had originally made no offer as to director-coordinators, contending that they did not belong in the unit. It had submitted the issue to the Board by way of the unit clarification action and was awaiting the Board's determination thereof. When the Regional Director's decision issued on October 13, 1965, the Union pressed Respondent to come forward with an offer.

Respondent's reaction was initially that director-coordinators could be mentioned in the contract but that no duties and no wages would be spelled out for them. This of course, amounted, as the Union correctly put it, to no provisions at all for the director-coordinators. Thereafter, in Respondent's November 29 resume of the then existing situation, the Employer advised the Union that its position and proposals with relation to the director-coordinators was contingent on Board action on their request for review of the Regional Director's decision. When review was requested is not disclosed by the record

Ultimately, on December 6, after the promulgation of the unilateral changes, McClay, negotiating for Respondent, advised the union negotiator that the Employer would drop its insistence on the contingency provision and bargain for director-coordinators with separability in the event the final judgment on the UC was to declare them supervisors. Assuming the validity of the distinction apparently made and accepted by both parties between contingent negotiating and negotiating with a separability provision, it cannot be said that a good-faith impasse was reached on December 4 as to the inclusion of director-coordinators in the unit. Moreover, I cannot infer that the Employer had ceased insisting on the exclusion of director-coordinators from the unit by reason of its inclusion of unilateral changes relating to them in its notice posted on December 4 The changes undertaken are equally consistent with a changed position by the Employer that director-coordinators are in the unit and, on the other hand, with the theretofore firm position by the Employer that director-coordinators were not in the unit but that it should have a right to assign director-coordinators to unit work if it was so disposed.

3. In regard to prerecording, as of November 29, the Employer's offer was to abolish all restrictions on prerecording insofar as FM broadcasting was concerned but to consider some time limitation on AM and TV prerecording The expired contract provided for prerecording at the Company's option for a period of not more than 5 hours per medium per broadcast day. The Company's initial proposal provided for unlimited prerecording on all media. The Union rejected any proposed changes in the prerecording provision of the expired contract. At some undisclosed time the Union changed its position to permit unlimited prerecording on FM if the Employer would "drop off" prerecording on AM and TV. This position was apparently reiterated through the mediator on December 3, before the Employer's announcement of the unilateral changes. The Employer found this unacceptable and contends that it actually could have worsened the Employer's position from that provided in the expired contract but it was not until December 6, in a "package" offered the Union, that the Employer informed the Union of the time limit on AM and TV which it had indicated on November 29 it was willing to consider. On December 6, the Employer proposed that there would be no restriction on the use of prerecorded material up to 70 hours per week each in AM and TV. Presumably the Employer in making this offer as part of a package concluded that agreement had been reached on December 3 to eliminate any limitation on prerecording in FM. Thereafter, in the negotiations that followed after December 6, the Employer reduced its limitation on hours

[3] 151 NLRB 1359

of prerecording from 70 to 56 and later to 50 but received no dispositive agreement or disagreement from the Union.

From the whole record I cannot conclude that an impasse existed on the prerecording issue, if it were to be viewed separately. The parties had made proposals and counterproposals back and forth and at the time of the unilateral change the Employer had indicated its willingness to change its position without indicating in what respect it was willing to change it. This is not a situation such as that in *Empire Terminal* where the Board found that both parties had adamantly adopted a position and there was nothing further to be said until one party or the other changed its position. Here, Respondent had indicated it was changing its position and had not yet indicated what change it was prepared to make. Accordingly, I find that no impasse existed as to prerecording at the time the unilateral change was instituted.

4. From its initial proposal to the date when the unilateral changes were announced, Respondent's position on interchange between media was that it would accept no restriction on the right to require employees to perform any necessary consistent duties while on base or overtime. Respondent's original proposal carefully excised from the contract any restrictions on interchange between media or categories. The Union, from the beginning, maintained that such restrictions should continue. The Company's position in no way changed at any time during negotiations Although the November 24 so-called duties proposal was purportedly changed, I can see no real change in this regard between the effect of the language in the November 24 proposal and the language in the Employer's initial proposal. On the other hand, the Union never adopted the Employer's proposal; on the contrary at all times the Union sought special fees for artists working out of shift or out of category. In its proposal of September 7, the Union proposes to delete the section of the contract providing for out-of-shift or out-of-category fees for staff artists and replace it with a provision for making a local freelance rate applicable to such performances. This is not particularly helpful to me inasmuch as it appears that the Union proposed at all times to renegotiate the Local Freelance Code on which the local freelance rate is based. Accordingly, whether the Union's position amounted to an increase in the out-of-shift/out-of-category fees or a decrease cannot be ascertained. The fact, however, is that at all times the Employer maintained its position that the restrictions should be abolished and at all times the Union maintained its position that the restrictions should be maintained. I find nothing in the record to indicate that at the time the unilateral changes were announced, the Employer had any reason to believe the Union would have changed its position or that the Employer had in any way indicated to the Union that the Employer was prepared to change its position. Accordingly, I believe that an impasse existed as to interchange in categories and media on December 4.

5. Finally, on the assignment of the director-coordinators, requiring that an additional director-coordinator be assigned when "live" material was being transmitted, I cannot find an impasse, as I indicated above in my discussion of the issue concerning the inclusion of director-coordinators. At the time of the announcement of the changes, the Employer was still contending that director-coordinators were, at best, to be bargained about only tentatively. There was no good-faith attempt to reach an agreement. On the contrary, the obvious intent was to avoid spending time in negotiating as to them until the Board ruled on the Regional Director's decision that they were to be included in the unit. I find that there was not real exploration of the issue of whether the limitation on the assignment of the director-coordinators was to be abolished as the Employer's position demanded or retained as the Union's position demanded. In the absence of a conscious exploration of the issue, I cannot see how it can be said that an impasse arose.

Viewed as separate negotiating issues, as I have above, the changes announced by the Employer on December 3, cannot be said all to have involved matters concerning which the parties had reached an impasse. But I question whether they should appropriately be viewed separately as individual issues It appears to me that they more appropriately may be viewed as a single issue, i.e., whether the Employer in exchange for the $7 across-the-board wage increases should be permitted the freedom to assign its artistic personnel without regard to the categories and media which had theretofore existed and without paying the additional fees required under the terms of the preexisting contract, and the freedom to prerecord additional material.

Throughout the protracted negotiations, until December 6, both parties continued to bargain on the separate contract terms in which their demands were expressed, and because of the nature of the issue, advancement in any of the terms, or a change in any of the terms, resulted in lessening or increasing the pressure on the other terms. Thus, for instance, any expressed limitation on prerecording with necessity would have an impact on the value of the wage increase offered. Similarly, any limitation on the free interchange of talent would affect both the wage offer and, conceivably under some circumstances, the prerecording terms. The reduction in the use of director-coordinators in their direction and coordination duties would presumably be followed by their use as announcers, or other types of on-camera talent or as stage managers which in its turn would have an impact on the value of the wage offer as well as on the interchangeability rules as between various categories. Both parties appear to have recognized during the negotiation that these various items were interlocking but apparently each was unable to bring itself, or the other, to bargain on the package as a whole rather than on the individual facets of the package as contained in the sundry contractual changes under discussion. This led to what appeared to be desultory bargaining, but was in fact cautious exploration on both parts to determine the weak spots in their opponents, and I think both parties recognized this to be the case.

The result was, or course, that the negotiations were prolonged and must have appeared exasperatingly slow to the participants. To speed up negotiations, each party took steps to "shake up" the other by various means. Thus the Union gave notice that it was terminating the interim agreement effective December 4 and thereafter engaged in a discreet campaign of "saber rattling" to remind the Employer that a strike could result. The Employer accepting the saber rattling at face value, concluded that the unilateral imposition of some of the changes which it had proposed would get the negotiations off balance. Respondent does not contend that the unilateral changes were necessitated by economic considerations. The decision was purely tactical. Respondent then, following his implementation of the unilateral changes, presented a package proposal and the Union "picked the goodies out of the package" without accepting the package as a whole.

To increase the pressure Respondent further implemented its unilateral changes and the strike commenced.

I find no impasse in the central issue as I have defined it above. There was room to move and the parties were moving, albeit very slowly. No doubt at all times the parties were skirting an impasse, but I believe that neither was prepared to enter it. Accordingly, I find that, at least in part, the subjects of the imposition of the changes, of the limitation of the assignment of director-coordinators, the inclusion in the unit of director-coordinators, and, the time limitation on prerecording in the various media, viewing the issues separately, or, viewing them as facets of a single issue, remained issues under negotiation, without an impasse having been reached.

As the Supreme Court put it, in *N L.R.B.* v. *Benne Katz, supra*, " an employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal."

Relation of the Unilateral Changes to the Employer's Prior Proposal

The third determining factor is whether the changes instituted were consistent with or greater than those previously submitted to the Union. In resolving this factor it is my opinion that we must consider the changes announced in the notice posted on December 4, rather than the assignments made pursuant thereto. The notice is the "impact document" relied upon by the Employer to stir up the negotiations; having promulgated the unilateral changes it is not determinative to what extent assignments were made and actions were taken pursuant to the changes

The first item in the notice, wages, was precisely that proposed by the Employer. Obviously, therefore, the wages meet this test. The second item, requiring interchange between media without limitation for announcers, was again precisely within the Employer's demands up to the time the notice was posted. The third presents a problem. It provides: "Use of prerecording may be increased to a maximum 70 hours a week per media on AM and TV and without limit on FM." As I have pointed out above, the Employer in its resume of negotiations of November 29, stated its position as "drop restrictions on prerecording, willing to consider time limit on AM and TV but not FM." The time limit of 70 hours was apparently not mentioned by the Employer in negotiations until the actual terms of the notice were discussed with the Union after 4 o'clock on December 4. Thereafter, the first "negotiation" with regard thereto took place on December 6. The discussion on December 4 could not be deemed a negotiation in my opinion. All parties who testified concerning it indicated that it amounted to nothing more than an exploration by the Union of the consequences of the adoption of the unilateral changes. No offer as such was put forward by the Employer. No counteroffer or any other type of negotiation appears to have been instituted by the Union. The previous limitation had been 5 hours for each medium. The FM station was independently programmed for an average of 8 hours a day and the Employer proposed apparently to prerecord all FM presentations. The FM and TV prerecording was exactly double that previously afforded the employer and based as it was on a weekly figure rather than on the daily figure permitted greater flexibility in the use of the hours so proposed. The change is certainly substantial both in consideration of the prior *practice* and in consideration of the last preceding offer which was unlimited prerecording on all media (I do not deem the language "willing to consider time limit" as an offer, especially not in the context of the negotiations herein involved.) I find, therefore, that with respect to prerecording the test is not met.

With respect to the duties section of the change, the first three subparagraphs requiring announcers to do news, weather, and sports in shift, newsmen to do sports in shift, and director-coordinators to be assigned to live programs at the Company's discretion are well within the Company's last preceding offer. The fourth, "other services may be required out of category but in shift up to 10 hours per artist per week" is ambiguous. It would appear that this section provides complete interchangeability among all unit employees, but for a limited time weekly, and not necessarily in unit work. In the light of the discussions that had taken place with regard to interchangeability with regard to work within the unit prior to the promulgation of the notice, the notice seems to exceed the Company's last prior position. However, because of its ambiguity and because of the probability that its meaning was explicated in the discussion with Schnabel prior to the posting of the notice, I do not find that this change exceeds in scope the position taken by Respondent prior thereto.

I find that at least insofar as prerecording is concerned, the unilateral changes, announced by the Employer on December 4, do not meet the requirement that the changes instituted shall be no greater than those previously submitted to the Union.

Respondent appears to contend that ample opportunity was given the Union to negotiate concerning the changes between the December 3 announcement and the December 4 posting and therefore Respondent's bargaining duty was met, I cannot so find in the context of the negotiations which had preceded the promulgation of the unilateral changes. There is a conflict in the testimony as to whether on December 3, when Respondent's negotiators informed the Union's negotiator that they would institute unilateral changes, the Union's negotiator, Schnabel, asked what the changes were and was told by Willard that Respondent had not decided. Willard and McClay testified that the Union did not ask about the changes. I credit the testimony of Schnabel that he did. I find it improbable that, faced with the statement that the Company would institute "some changes," he would not have inquired what changes were in contemplation and I find further that inasmuch as the Company did not decide what changes were to be made until December 4 the answer imputed to Attorney Willard is consistent with the facts and probable under the circumstances.

Thereafter, it was not until sometime after 4 p.m. on December 4 that a copy of the notice which set forth the changes was furnished the Union's negotiators. At that time, Schnable and McClay had a private conversation during which Schnable asked what changes would be put into effect that night Schnable told McClay that he didn't think he could keep his people at work in the face of the changes and asked McClay to rescind them. McClay ascertained what changes would be put into effect that night and informed Schnabel that there were four such changes. The two negotiators went over the impact of each of the changes and Schnabel obviously came to the conclusion that the changes were of a nature that could be remedied by the payment of additional fees. The parties went back into negotiation as groups with the Union

requesting the Employer not to initiate the changes and stating that none of the issues had been bargained to a deadlock and that some of them had not been bargained at all. The Employer pointed out to the Union that the time was running out.[4] In view of the circumstances as I have set them forth above, I cannot find that the Union had an adequate opportunity to bargain about the imposition of the changes or about those matters which were not at impasse during the short period between 4 and 5 o'clock on December 4, when they finally had knowledge what changes were in Respondent's contemplation.

The Effect of the Unilateral Changes

With the exception of the wage increase each of the unilateral changes instituted by the Employer were of such a nature that they changed working conditions which the Union was fighting hard to preserve. This is not like the situation as in *Bradley Washfountain Co.*, 89 NLRB 1662, where the union demanded a wage increase greater than the employer was prepared to make but the employer granted a wage increase greater than he had offered. Even in that case the Board found a violation, which was subsequently denied enforcement by the United States Court of Appeals for the Seventh Circuit, 192 F.2d 144, on the stated ground that the effect of the wage increase would, if anything, enhance the union's prestige. Here, with the Union vigorously contending against the changes, the effect could only be a derogation of the Union's position and consequently an obstruction to the collective-bargaining process.[5] In *N.L.R.B.* v. *Benne Katz, supra*, the Supreme Court stated:

> but the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.

I find that by its actions herein, Respondent obstructed and inhibited the process of discussion, although in the light of all the circumstances I cannot find that the Respondent's action reflected a cast of mind against reaching agreement.

Accordingly, I conclude and find that the Respondent, by unilaterally changing the working conditions of its employees, at a time when it had a duty to bargain with their collective-bargaining representatives, in a unit appropriate for collective bargaining, failed and refused to bargain in violation of Section 8(a)(5) and (1) of the Act

The Nature of the Strike

The complaint alleges, the answer denies, and the parties litigated and argued whether the strike, which commenced on December 10 was an unfair labor practice strike, or an economic strike. Inasmuch as I have found that the Employer engaged in unfair labor practices in its unilateral changes in working conditions announced December 4, it is necessary only to determine whether the strike resulted therefrom, or merely followed them.

It is clear that the Union had been, as I earlier characterized it, "rattling the saber" and that the Employer was concerned whether a strike would ensue. The Union could have engaged in a strike at any time after 5 p.m. on December 4, but that Schnabel agreed that he would not undertake a strike without at least 24 hours' notice to the Employer, and such notice had not been given. I find no evidence that the Union was in fact prepared to strike on that date, or on any certain date. When Schnabel was informed of the unilateral changes that the Employer was putting into effect, he pleaded with the Employer not to post the notice stating that it would be hard to hold the men if they were infuriated by the changes; the Employer nevertheless posted the notice. A strike did not ensue. It was only after he was informed that the Employer was putting more changes into effect, that Schnabel determined that a strike would be necessary. He called the unit together, although this was not necessary under the circumstances that he had been given authority to call a strike whenever he deemed it necessary. At the meeting he told the men that Respondent was effectuating more of the changes that it had promulgated. After a discussion lasting some hour and a half the meeting broke up with the consensus that a strike was necessary, and Schnabel gave Respondent 24 hours' notice that a strike would commence.

It is clear and I find that Respondent's promulgation of the changes in the working conditions and its successive actions in effectuating them precipitated the strike. Whether there would have been a strike in the absence of Respondent's unfair labor practices is questionable. I believe that the Union was unwilling to commence a strike at that time, but it was certainly contemplating strike as a possibility thereafter. Accordingly, I find that the strike was in its inception, an unfair labor practice strike.

Respondent contends that even if the strike were viewed as having been caused by unfair labor practices, it was converted thereafter into an economic strike by its offer, on January 15, of a strike settlement agreement providing for an immediate termination of the strike resumption of operations under the expired contract, subject to 24 hours' termination, revocation of the unilateral changes, with provision for 24 hours' notice of any subsequent changes, suspension of any disciplinary actions instituted by the Union during future negotiations, and immediate resumption of the negotiations. Respondent relies on the decision in *Nelson B. Allen*, 149 NLRB 229, in which case employees who struck because the employer discriminatorily discharged them and refused to negotiate with their newly selected union were deemed unfair labor practice strikers. Upon the employer reinstating the discharged employees, and commencing good-faith bargaining, the Trial Examiner, with Board approval, found that their status changed to that of economic strikers, since the employer was by that time meeting its statutory bargaining obligtion. I find the *Allen* case distinguishable. There the unfair labor practices had ceased by the reinstatement of the dischargees, and the subsequent bargaining, and the Trial Examiner found as a matter of fact that the employees continued to strike only

[4] Apparently both parties considered that 5 o'clock was a deadline before which time the Union would have to take some step to avert the imposition of the changes What steps might have been effective in this regard are not explicated on the record

[5] I do not rely in so finding on the fact that the Employer entered into the unilateral change for the express purpose of putting pressure on the Union in negotiations rather than for reasons of its own convenience or economics I am not unaware of the language of the United States Supreme Court in *N L R B* v *Benne Katz, supra*, speaking of its decision in *N L R B* v *Insurance Agents Union*, 361 U S 477 " . congress had not in Section 8(b)(3), the counterpart of Section 8(a)(5) empowered the Board to pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations " In view of my findings above, I do not find it necessary to consider or decide whether under all the circumstances this is a legitimate economic weapon used in support of genuine negotiations

for economic motives. In the instant case, on the other hand, Respondent's proposal to the Union amounted only to a proposal to cease its unfair labor practice; in effect it offered to bargain on the terms under which it would do so. There is no evidence that Respondent ever informed the Union that it had rescinded its unilateral changes, or that it would not reinstitute them again 24 hours after the strike was over, in accordance with the terms of its offer.[6] I believe that the facts of the instant case are more akin to those in *D'Armigene, Inc.*, 148 NLRB 2, where the Trial Examiner found, with Board approval, that in the absence of a complete cessation and full remedying of the unfair labor practices which gave rise to the strike, its character continued.

> I find that the strike was an unfair labor practice strike in its inception, and continued to be an unfair labor practice strike at least until the time of the hearing. Inasmuch as it appears that the strike has been settled, and a contract may have been entered into between the parties, and no motion to amend the complaint to allege a violation of Section 8(a)(3) in regard to the reinstatement of the strikers has come to my attention, I see no necessity to provide any remedial provisions with regard to the character of the strike; if such exists it may be left to subsequent proceedings if such there be.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce and the Union is a labor organization within the meaning of the Act.
2. All radio and television announcers, newscasters, sportscasters, floor managers, director-coordinators, and all other talent or artists employed by the Employer at its facilities in Kansas City, excluding news director, assistant news director, farm director, production manager, and all other employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. At all times material the Union has been the exclusive representative for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act, of all the employees in the aforesaid appropriate unit.
4. By the unilateral imposition of changes in wages, hours, and working conditions on December 4, 1965, and by the implementation of such changes thereafter, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
5. By the aforesaid refusal to bargain with the Union, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Board customarily holds that where an employer effectuates unlawful unilateral action, he must not be permitted to retain the fruits of such unfair labor practices and must be required to restore the *status quo ante*. *John W. Bolton & Sons, Inc.*, 91 NLRB 989; *Herman Sausage Co., Inc.*, 122 NLRB 168, enfd. 275 F.2d 229 (C.A. 5). On the other hand in fashioning a remedy here, account should be taken of the possibility that subsequent to the hearing the matters involved in the unilateral changes have been settled through negotiations with the Union, the restoration order in this instance should be conditioned upon the desires of the employees in the unit as expressed through their collective-bargaining agent. *Herman Sausage Co., Inc., supra, Beacon Dyeing and Finishing Co., Inc.*, 121 NLRB 953. Accordingly, the order will require that if the employees through their Union desire the restoration of the *status quo ante* this shall be done. It appears from the record that to the extent that the unilateral changes were initiated they could be remedied by the payment of money under the terms of the then existing Free Lance Code of Greater Kansas City or other terms or conditions of the recently expired contract. I so recommend.

[Recommended Order omitted from publication.]

[6] The other cases cited by Respondent, relating to the validity of offers of reinstatement to discriminatees are distinguishable on their facts In *Central Illinois Public Service Company*, 139 NLRB 1407, the unusual finding relating to rolling back the unilateral action was called for by the peculiar facts of that case, as the Trial Examiner carefully pointed out; such facts are not here present

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Atlas Engine Works, Inc. *and* Teamsters, Chauffeurs, Warehousemen and Helpers Local #20, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Cases 8–CA–3990, 8–RC–6028, and 8–RM–428.

March 20, 1967

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On September 14, 1966, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and