

Woodland Clinic, a Medical Practice Foundation and Engineers and Scientists of California, MEBA, AFL-CIO. Cases 20-CA-25680-3, 20-CA-26011, 20-CA-26987-1, and 20-CA-26987-2

July 12, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

Upon charges filed¹ by Engineers and Scientists of California, MEBA, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued an amended consolidated complaint (complaint) on March 26, 1997, against Woodland Clinic, a Medical Practice Foundation (the Respondent) alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charges and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On July 10, 1997, the Union, the Respondent, and the General Counsel filed with the Board a Joint Motion to Transfer Proceedings to the Board and Stipulation of Facts. They agreed that the stipulation, with attached exhibits, constitutes the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. On October 7, 1997, the Executive Secretary, by direction of the Board, issued an order approving the stipulation, and transferring the proceeding to the Board. The Respondent and the General Counsel thereafter filed briefs.

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

On the entire record in the case, the Board makes the following findings of fact and conclusions of law and issues the following remedy and Order.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Woodland, California is engaged in the operation of a medical clinic providing outpatient medical care. The Respondent, in the course and conduct of its business operations during the calendar year 1995, derived gross revenues in excess of \$250,000, and purchased and received at its Woodland, California facility products, goods, and materials valued in excess of \$5000, which originated from points located outside the State of California.

¹ The charge and amended charge in Case 20-CA-25680-3 were filed, respectively, on October 18, 1993, and January 11, 1994. The charge and amended charge in Case 20-CA-26011 were filed, respectively, on April 4 and May 27, 1994. The charges in Case 20-CA-26987-1 and in Case 20-CA-26987-2 were filed on October 25, 1995.

nia. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act. The parties have further stipulated, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issues presented are whether the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) failing to timely comply with the Union's request for the home telephone numbers of unit employees; (2) failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility; (3) insisting to impasse on a dues-checkoff proposal that allegedly discriminated against bargaining unit members by charging a 4-percent service fee;² (4) insisting to impasse on a pay-for-performance wage system that allegedly provided for direct dealing between the Respondent and unit employees;³ (5) in the absence of a lawful impasse, implementing the pay-for-performance wage system and discontinuing paying employees according to the wage step provisions of the expired collective-bargaining agreements; and (6) in the absence of a lawful impasse, discontinuing subsidies for Jazzercise classes attended by unit employees, discontinuing free coffee service for unit employees, reducing the cafeteria discount available to unit employees, and changing its health insurance carrier, thereby causing changes in the health insurance benefits to unit employees. For the reasons set forth below, we find that the Respondent violated the Act as alleged in numbers (1) and (2) listed above. We further find, as set forth below, that the remaining allegations must be dismissed.

A. Factual Background

Since about 1980, the Union has been recognized by the Respondent as the exclusive representative of the following two appropriate bargaining units of the Respondent's employees:

All employees in the Respondent's Laboratory and X-Ray Departments in Woodland and Davis, California, and the Laboratory and X-Ray Departments at Woodland Memorial Hospital, which are operated by the Clinic; excluding Transcribers and the Receptionist in the X-Ray Department, the Histotechnicians and Cytotechnologists in the Laboratory, confidential employees, guards and supervisors as defined in the Act. [Unit I.]

² The complaint alleges that this proposed contract clause is prohibited by Sec. 8(a)(3) and (1) of the Act.

³ The complaint alleges that this is a permissive subject of bargaining.

All registered nurses, medical assistants, receptionists, licensed vocational nurses, librarians and clerical employees in the Respondent's Clinic in Woodland and Davis, California, excluding X-Ray employees, optometrists, physicians, audiologists, guards and supervisors as defined in the Act [Unit II.]

This recognition has been embodied in successive collective-bargaining agreements for each unit. The most recent agreements for each unit were effective from August 9, 1991, to August 8, 1993. At all times since at least 1980, the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in each unit.

From about June 3 to October 18, 1993,⁴ the Respondent and the Union engaged in negotiations for collective-bargaining agreements to succeed the agreements for both bargaining units set to expire on August 8. Between June 3 and October 18, the parties met and bargained on 14 dates, 9 of which occurred prior to the expiration of the agreements, and exchanged numerous written proposals. About October 8, the Respondent presented to the Union its last, best, and final contract offer (final offer) for units I and II, which included its proposals discussed, *infra*, regarding dues-checkoff and the pay-for-performance wage system. At the close of the October 8 bargaining session, the parties had in fact met and bargained concerning their contract proposals, had not reached agreement on the terms of successor collective-bargaining agreements for units I and II, and had concluded the prospect of reaching an agreement on that date. The Respondent, adhering to its final offer for each unit, declared impasse at the close of the October 8 bargaining session. By letter dated October 18, the Respondent's counsel notified the Union of its intent to implement, and in fact implemented, certain provisions of its final offers, as further discussed below. The General Counsel and the Union contend that the October 8 impasse was not a valid impasse, because it was tainted by the Respondent's allegedly unlawful bargaining conduct concerning its dues-checkoff and pay-for-performance proposals.

Subsequently, the parties engaged in additional bargaining on the following topics more fully discussed below: (1) discontinuation of subsidies for Jazzercise classes attended by unit employees; (2) reduction in the cafeteria discount available to unit employees; (3) discontinuation of free coffee service for unit employees; and (4) change of the Respondent's health insurance carrier and resulting modification of certain health benefits available to unit employees. All the complaint allegations arise from the course of the parties' negotiations for successor collective-bargaining agreements for units I and II, and the parties' subsequent bargaining on the latter four topics. We shall address each complaint allegation in turn.

⁴ All dates hereafter are in 1993 unless otherwise noted.

B. Discussion

1. The Union requests information

Approximately midway through the course of the parties' negotiations, the Union requested by letter dated August 16 that the Respondent provide it with the home telephone number of every employee in units I and II. The Union explained in its letter that it desired this information in order to "fulfill its obligation to communicate" with unit employees. The Respondent did not respond to the Union's August 16 letter until September 7. By letter of that date, the Respondent informed the Union that "[w]e are reviewing your request and will provide you with information in the near future." The Respondent on that same date distributed a memorandum to all unit employees notifying them of the Union's information request, and stating in part that "the law requires us to comply with the Union's request We will be sending this information to [the Union] on September 24, 1993."

The Respondent failed to do so, however. Rather, at the parties' bargaining session held on September 30, the parties discussed the Union's information request, including the Respondent's asserted concerns about matters raised by several employees. The Union inquired as to the nature of the concerns. The Respondent declined to specify these concerns. The Respondent instead proposed that it would distribute the Union's literature directly to employees. The Union rejected this proposal. The Respondent then agreed to provide the Union with the requested information. The Respondent did not, however, furnish the requested information to the Union until about October 7. At the parties' bargaining session held the very next day, October 8, the Respondent presented its final contract offers for units I and II, and declared impasse.

The complaint alleges, and we find, that the Respondent violated Section 8(a)(5) and (1) by failing to timely comply with the Union's information request. It is axiomatic that an employer has an obligation to furnish to a union, on request, information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); and *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). An employer must respond to the information request in a timely manner. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

The parties in this proceeding have stipulated that the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of units I and II. An employer has a duty to timely furnish such information absent presentation of a valid defense. See, e.g., *Mary Thompson Hospital*, 296 NLRB 1245 fn. 1

(1989), enfd. 943 F.2d 741 (7th Cir. 1991); and *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377–1378 (7th Cir. 1991), enfg. 296 NLRB 715 (1989). The Respondent appears to argue that it delayed in providing the information to protect the privacy interests of its employees. The burden is on the employer to demonstrate a “legitimate and substantial” confidentiality interest. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). The Respondent has failed to sustain that burden.

The Respondent declined to specify, when queried by the Union, the nature of any concerns regarding the requested information. Nor has the Respondent identified in its brief any evidence in the record that supports its asserted claim of confidentiality. A claim of confidentiality is an insufficient defense to a request for relevant information where, as here, there was no evidence presented to support such a claim. *Engineers Local 12*, 237 NLRB 1556, 1559 fn. 9 (1978); *Illinois-American Water Co.*, 296 NLRB at 724.

We further find without merit the Respondent’s contention that its delay of approximately 7 weeks in providing the requested information was minimal, and is thus insufficient to support an unfair labor practice finding. Absent evidence justifying an employer’s delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch “[a]s the Union was entitled to the information at the time it made its initial request, [and] it was Respondent’s duty to furnish it as promptly as possible.” *Pennco, Inc.*, 212 NLRB 677, 678 (1974). The Respondent has presented no evidence justifying its delay in furnishing the requested information. The Respondent indeed acknowledged on September 7 that it was required by law to furnish the information. Yet it failed to do so until one additional month had elapsed, only 1 day before the Respondent declared impasse in bargaining. This sequence of events severely diminished the usefulness to the Union, at the time it was provided, of the requested information. The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). The Respondent’s failure to do so is violative of Section 8(a)(5) and (1) of the Act.⁵

2. The Respondent closes its materials management department

Prior to about November 5, the Respondent maintained a materials management department, which provided mi-

nor maintenance and repairs to the Respondent’s physical plant. Prior to October 18, two employees were working in that department, Burnie Row and Clyde Cook. Employees Row and Cook were covered by the unit II collective-bargaining agreement. About November 5, the Respondent closed the materials management department, and transferred the bargaining unit work of that department to the maintenance department at the adjacent hospital, which is a nonunion facility. The Respondent thereupon laid off and/or terminated employee Row, and laid off employee Cook. The Respondent caused Cook to be transferred to the hospital, resulting in the reduction of his pension benefits.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by failing to afford the Union an opportunity to bargain with respect to the effects of the transfer of unit II work outside the bargaining unit. We find, for the reasons set forth below, that the Respondent violated the Act as alleged.⁶

The Respondent notified the Union by letter dated October 18 that it intended to lay off employees Row and Cook as of November 5. By letter dated October 21, the Union asked the Respondent to bargain regarding the impact of the proposed layoffs. The Union further requested that the Respondent provide it with certain information concerning the proposed layoffs. The Respondent, by letter dated October 27, provided the Union with the requested information. The Respondent did not, however, make any response to the Union’s request to bargain regarding the impact of the proposed layoffs. The Respondent indeed provided no response to the Union’s request for effects bargaining, until a letter to the Union dated November 2, merely 3 days before the Respondent’s stated November 5 deadline for the layoff of employees Row and Cook. The Respondent’s November 2 letter inquired of the Union whether it desired to conduct the effects bargaining separately or as part of the parties’ overall negotiations. The Respondent on November 5 closed the materials management department, laid off employee Cook, and laid off and/or terminated employee Row.

It is well established that an employer is obligated under Section 8(a)(5) to bargain in a meaningful manner and at a meaningful time over the effects on employees of a decision to close part of its operations. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); and *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). The Respondent’s dilatory response to the Union’s request for effects bargaining precluded such bargaining from occurring at a meaningful time: before the closure was implemented. The Respondent failed to respond to the Union’s October 21 request to bargain until its letter dated November 2,

⁵ See, e.g., *Bundy Corp.*, 292 NLRB 671 (1989) (2-1/2-month delay unlawful); *Engineers Local 12*, supra, 237 NLRB at 1559 (6-week delay unlawful).

The Respondent has filed a motion to strike portions of the brief by the General Counsel concerning the purported effect on the parties’ contract negotiations of the Respondent’s failure to timely provide the requested information. It is unnecessary to pass on the Respondent’s motion to strike, because the General Counsel’s reply to the motion withdraws the portions of his brief at issue.

⁶ The General Counsel does not contend that the Respondent had an obligation to bargain about the decision to close the materials management department and transfer the unit work of that department to a nonunion facility.

even though the Respondent had notified the Union that it would implement the decision on November 5. The Union's right to discuss with the Respondent how the closure of the department impacts unit employees requires that bargaining occur sufficiently before actual implementation so that the Union is not confronted at the bargaining table with a *fait accompli*. *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). The Respondent's belated November 2 offer to bargain was no substitute for a timely response to the Union's effects bargaining request, which would have permitted good-faith bargaining to occur before the actual closure of the department on November 5. *Metropolitan Teletronics*, *supra*, 279 NLRB at 959. The parties have indeed stipulated that the Respondent transferred the materials management department unit work "without affording the Union an opportunity to bargain with Respondent over such conduct, and/or the effects thereof, *in advance of such actions*." (Emphasis added.) We accordingly find that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility.⁷

3. The Respondent's dues-checkoff proposal

The parties' previous collective-bargaining agreements for units I and II contained provisions for dues checkoff. The parties during their negotiations exchanged various proposals to replace the expired provisions. The Union proposed, *inter alia*, maintaining the existing dues-checkoff system. The Respondent on October 6 proposed a new dues-checkoff system under which the Respondent

would check off union dues and remit the dues to the Union, but would charge the Union a service fee of "8% of such monies collected in consideration of service rendered." The Respondent subsequently reduced its proposed service fee to 4 percent.

The parties have stipulated that they discussed their various proposals on dues checkoff at their bargaining sessions. No agreement was reached, however, and the 4-percent service fee proposal was included in the Respondent's final offers for units I and II, presented at the October 8 bargaining session. The Respondent, adhering to its final offers, declared impasse at the close of that session. By letter dated October 18, the Respondent notified the Union of its intent to implement, and in fact implemented, certain provisions of its final offer. The service fee proposals were not implemented by the Respondent, however, because it had ceased checking off union dues on expiration of the prior collective-bargaining agreements. On January 10, 1994, the service fee proposal for both units was withdrawn by the Respondent entirely.

The parties have stipulated that the Respondent has not charged any type of service fee for the payroll deductions it makes for employee contributions to the United Way charitable organization, health and pension trust funds, 401(k) plans, credit union, or wage garnishment. The General Counsel contends that the Respondent has violated the Act by insisting to impasse on a payroll deduction proposal that discriminates between union dues deductions and deductions for these other entities, by charging a service fee for the former but not the latter.

The complaint thus alleges that the Respondent's dues-checkoff proposal would have discriminated against unit employees because they were represented by the Union, which is prohibited by Section 8(a)(3) and (1) of the Act, and thus the Respondent violated Section 8(a)(5) and (1) by bargaining to impasse over the proposal.

We find that the General Counsel has not proven that Respondent insisted to impasse on a payroll deduction proposal which discriminated against union dues deductions. In order to prove discrimination it must be shown that the Respondent charges a service fee for union dues checkoff, while allowing payroll deductions without a service fee for similar, nonemployee entities, other than the Union. See *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996), *enfg.* 318 NLRB 433 (1995). In contrast, an employer does not discriminate against union activity by charging a service fee for union dues checkoff while making without charge payroll deductions that are related to an employer's fringe benefits package offered to its employees, such as health care insurance plans or tax sheltered annuity plans. Payroll deductions for such employee fringe benefits are integrally related to an employer's necessary business functions and are not deemed evidence of discrimination. See *Lucile Salter Packard Children's Hospital v. NLRB*, *supra*, 97 F.3d at 588-589; *Price Chopper v. NLRB*, 163 F.3d

⁷ We find meritless the Respondent's assertion that substantial effects bargaining took place via correspondence between the parties. Much of that correspondence occurred after the closure of the department on November 5, which confirms our finding that the Respondent unlawfully failed to bargain at a meaningful time. We also reject the Respondent's contention that it was permitted to layoff or terminate Row and Cook by the terms of the management functions clause, and assignment of work clause, that it implemented on October 18. We have reviewed the terms of each of the clauses, and neither clause waives the Union's right to effects bargaining. *Challenge-Cook Bros.*, 282 NLRB 21, 27 (1986), *enfd.* 843 F.2d 230 (6th Cir. 1988); and *Borg Warner Corp.*, 245 NLRB 513, 518-519 (1979), *enfd.* 663 F.2d 666 (6th Cir. 1981), *cert. denied* 457 U.S. 1105 (1982).

Member Hurtgen notes that the contract expired on August 3. Thus, although he disagrees that a "waiver" analysis is appropriate, he concurs in the result.

Member Brame notes that the management-rights and assignment-of-work clauses on which the Respondent relies were not contained in the expired agreement but instead were unilaterally implemented by the Respondent on October 18. The Respondent does not contend that its failure to engage in effects bargaining was authorized by any provision of the expired agreement. In these circumstances, Member Brame agrees with his colleagues that the unilaterally implemented management-rights and assignment-of-work clauses do not justify the Respondent's failure to engage in effects bargaining. He finds it unnecessary to pass on whether the language in the disputed clauses could, under other circumstances, be read to "waive" the Union's right to effects bargaining, or on whether such clauses, if included in the expired agreement, could be found to survive that agreement's expiration.

1177, 1183 (10th Cir. 1998), enf. 325 NLRB 186 (1997). The parties' stipulation shows that the payroll deductions for employee health and pension trust funds, and employee 401(k) plans are without dispute intimately related to the fringe benefits that the Respondent offers its employees, and thus do not constitute evidence of discrimination. With respect to the credit union, the Respondent argues that it is also an employee fringe benefit, not an "outside business." The General Counsel, who has the burden of proving discrimination, has failed to adduce any evidence to the contrary. Therefore, we find that the payroll deductions for the credit union similarly do not constitute evidence of discrimination.

The Respondent's payroll deduction for the United Way charitable organization also does not establish discrimination. The Board has long recognized that an employer does not discriminate against union-related solicitation by permitting a small number of isolated charitable or "beneficent" acts as a narrow exception to an absolute no-solicitation rule. See, e.g., *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982); *Emerson Electric Co.*, 187 NLRB 294 fn. 2 (1970). The Respondent by proposing a dues-checkoff service fee likewise has not discriminated against deductions for union dues, merely because it permits one single instance of charitable payroll deduction without a service fee. We further observe that the Respondent is required by law to carry out court-ordered wage garnishment, and the Respondent's fulfillment of that obligation does not constitute discrimination. In sum, the General Counsel has not shown that the Respondent has sought to charge a service fee for union dues checkoff, while at the same time permitting deductions without a service fee for similar entities. We accordingly find without merit the complaint allegation that the Respondent's dues-checkoff proposal is unlawfully discriminatory. The Respondent was thus privileged to bargain to impasse over its dues-checkoff proposal, a mandatory subject of bargaining,⁸ and we shall dismiss the complaint allegation that it violated Section 8(a)(5) and (1) by doing so.⁹

4. The Respondent's pay-for-performance wage proposal

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by insisting to impasse on a pay-for-performance wage system which provided for direct dealing between the Respondent and the unit employees and, in the absence of a lawful impasse, implementing the pay-for-performance wage system, including

the discontinuation of paying employees according to the wage step increase provisions of the expired collective-bargaining agreements. For the reasons set forth below, we shall dismiss these complaint allegations.

The parties' expired collective-bargaining agreements for units I and II provided employees, by job classification, with annual wage step increases during each of the first 4 years of their employment. The expired agreements did not provide for any pay-for-performance or merit pay increases. During the parties' negotiations for successor contracts, the Respondent advanced several different versions of a pay-for-performance wage proposal.

The Union was adamant in its objection to the Respondent having the freedom to implement any pay-for-performance wage system that did not provide the Union an opportunity to engage in collective bargaining concerning the criteria, procedures, timing, and amounts of wage increases under such system. In response, the Respondent proposed to set parameters which addressed the Union's concerns, and modified its proposal to state that any pay-for-performance system shall meet certain minimum conditions concerning the appeal and evaluation process.

The Union also complained during negotiations that the Respondent's proposed pay-for-performance plan was "undefined," because the Respondent did not have a final, detailed proposal to present. In response, the Respondent modified its pay-for-performance proposal to require that the Respondent bargain with the Union prior to implementation of any pay-for-performance system.

About October 8, the Respondent presented to the Union its final offer for units I and II, which included the following pay-for-performance wage proposal:

(A) The wage rates set forth in Appendix A are minimums. The [Respondent] may pay any amount in excess of those minimums in its sole discretion. The [Respondent] shall have the right to develop and implement a pay-for-performance system of its own choosing Prior to implementing such pay-for-performance system the [Respondent] shall notify the Union of the proposed system and, upon request, meet and confer with the Union prior to implementation no later than three (3) weeks prior to the proposed implementation date.

(B) Any pay-for-performance system implemented shall meet the following minimum conditions:

....

4. Any employee who disagrees with his performance evaluation may file an appeal in writing within 10 days of notification of the results of the evaluation. While the appeal process shall be determined by the [Respondent], it will provide for the right to be heard and the employee may be accompanied by an employee of his/her own choosing. The final decision regarding the performance review and the pay rate

⁸ See, e.g., *CJC Holdings*, 320 NLRB 1041, 1046 (1996), affd. mem. 110 F.3d 794 (5th Cir. 1997).

⁹ The General Counsel additionally argues in his brief that the Respondent's allegedly discriminatory dues-checkoff proposal is evidence of bad-faith bargaining. See *Alba-Waldensian, Inc.*, 167 NLRB 695, 716-717 (1967), enf. 404 F.2d 1370 (4th Cir. 1968); and *Atlas Metal Parts Co.*, 252 NLRB 205, 220 (1980), enf. denied in pertinent part 660 F.2d 304 (7th Cir. 1981). In light of our finding that the General Counsel has not shown discrimination, however, we find no merit in the General Counsel's contention.

shall be with the [Respondent], and shall not be subject to the grievance and arbitration procedures herein.

(C) Scale—see attached minimum scales.

During the term of this Agreement, no employee on the payroll as of October 8, 1993 shall have his/her rate of pay reduced below his/her October 8, 1993 level, so long as the employee remains in their [sic] same classification.

The Respondent insisted as a condition of reaching collective-bargaining agreements for units I and II, that the Union agree to the Respondent's final contract offer, which included the pay-for-performance proposal.

As set forth above, the Respondent declared impasse at the close of the October 8 bargaining session. The Respondent thereafter implemented those portions of its final offers for units I and II that do not depend on the existence of a collective-bargaining agreement to be enforceable, including the wage provisions set forth in the pay-for-performance proposal. The Respondent upon implementation thus abandoned the step increase system of the prior contracts, resulting in what the parties have termed a wage freeze. Employees hired after October 18 were compensated under the terms of the Respondent's proposal according to the wage schedule attached to the final offers as Appendix A. The General Counsel acknowledges that at no time did the Respondent ever grant merit pay increases pursuant to its pay-for-performance proposal.

The Board holds that a merit wage increase proposal that confers on an employer broad discretionary powers is a mandatory subject of bargaining on which parties may lawfully bargain to impasse. *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998).¹⁰ The pay-for-performance proposal here, which reserves substantial discretionary power to the Respondent, is similar to the merit pay increase proposal at issue in *McClatchy Newspapers*.

The General Counsel, however, contends that the Respondent's pay-for-performance proposal differs from that at issue in *McClatchy*, and constitutes a permissive subject of bargaining which the Respondent could not lawfully have pressed to impasse, because it permits the Respondent to deal directly with employees to the exclusion of the Union. The General Counsel argues that under the conditions set forth in the proposal, no role is provided for the Union with regard to the procedures for determining employee performance evaluations, or the merit pay consultation and appeal process. The General Counsel thus asserts that the Respondent's decision on merit pay increases would be based on direct consultation with employees, rather than with the Union as the employees' exclusive collective-bargaining representative.

¹⁰ Member Brame finds it unnecessary to pass on whether *McClatchy Newspapers* was correctly decided on its facts, as he agrees that it is distinguishable from the facts presented in this case.

Contrary to the General Counsel's contention, we find that the Respondent's proposal does not mandate direct dealing. Rather, it mandates that bargaining with the Union take place prior to implementation of any pay-for-performance system and prior to any employee being given a wage increase pursuant to such a plan. The Union at such negotiations would be free to propose that it be more directly involved with wage determinations than set forth in the Respondent's proposed *minimum* conditions, and to bargain for and achieve a more extensive role in merit pay determinations. The Union may indeed at negotiations veto the proposed minimum conditions, including the provision that the Respondent meet directly with employees concerning merit pay determinations. We thus find meritless the General Counsel's contention that the Respondent's proposal constitutes a permissive subject of bargaining because it excludes the Union from any role in the determination of merit wage increases.

Accordingly, for these reasons, we find that the Respondent's pay-for-performance proposal is a mandatory subject of bargaining, and we shall dismiss the complaint allegation that the Respondent unlawfully bargained to impasse over it.

We shall also dismiss the complaint allegation that the Respondent unlawfully *implemented* merit wage increases under its pay-for-performance system. The well-settled general rule is that an employer may, on bargaining to a valid impasse, unilaterally implement changes in mandatory subjects that are reasonably comprehended within its preimpasse proposals.¹¹ There are certain limited exceptions to the implementation-after-impasse doctrine, however, including a merit pay proposal which confers on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in employees' rates of pay. The Board has explained that such unlimited managerial discretion over future pay increases, without explicit standards or criteria, would leave the union unable to bargain knowledgeably on the determination of employee wage rates and unable to explain to unit employees how such rates were formulated. Because such a circumstance would serve to destroy rather than further the bargaining process, an employer is obligated, prior to the actual implementation of such merit wage increases, to negotiate to agreement or to impasse "definable objective procedures and criteria" governing raises under a merit pay proposal.¹² Here, the General Counsel concedes that the Respondent never actually implemented or granted

¹¹ See, e.g., *Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968), *affg.* *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967); *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), *enfd. mem.* 559 F.2d 1201 (1st Cir. 1977).

¹² See *McClatchy Newspapers*, *supra*, 321 NLRB 1391 ("[I]t is not the Respondent's [merit pay] bargaining proposal that [is] inimical to the policies of the Act, but its exclusion of the [union] at the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan[.]") (Emphasis added.)

any merit pay increases pursuant to its proposal. Absent evidence that the Respondent actually granted merit wage increases to unit employees, there is no basis for finding a violation of the Act under *McClatchy*.¹³

We further find without merit the General Counsel's additional contention that the Respondent was not privileged upon impasse to implement the wage freeze proposal because it was "inextricably related" to the pay-for-performance proposal. We have explained above that an employer may not, even upon valid impasse, implement a merit pay proposal without definable objective procedures and criteria, because to do so would leave the employer with unlimited managerial discretion in the formulation of future pay increase about which the union would be unable to bargain knowledgeably in future negotiations. These vices are not implicated by the implementation of the wage freeze provision by the Respondent, however. There are no discretionary elements to the wage freeze provisions. Rather, the stipulated record shows that the amounts of the Respondent's implemented wage schedule under Appendix A are fixed for each job classification, and explicitly set forth in the Respondent's pre-impasse proposal. We shall accordingly dismiss the complaint allegation that the Respondent unlawfully implemented its wage freeze proposal.

5. The bargaining over health insurance benefits, subsidies for Jazzercise classes, free coffee service, and cafeteria discount

Subsequent to the parties having reached valid impasse as to collective-bargaining agreements as a whole for units I and II on October 18, 1993, the Union and the Respondent engaged in bargaining on certain additional topics. This bargaining included the following four proposals by the Respondent to: (1) change its health insurance carrier thereby causing changes in health insurance benefits for unit employees;¹⁴ (2) discontinue subsidies for Jazzercise classes attended by unit employees; (3) discontinue free coffee service for unit employees; and (4) reduce the cafeteria discount for unit employees. The parties have stipulated that the Respondent provided the Union with advance notice of each of these proposals, that they met and bargained concerning each of the proposed changes as well as the effects of the changes, and that the parties had not reached agreement on these topics. The parties have further stipulated that they had exhausted the prospect of reaching an agreement concerning each of these subjects, and the Respondent declared that the parties were at impasse. The Respondent thereafter implemented its proposals on these four topics.

¹³ *Id.*

¹⁴ This proposal was prompted by notification from the Respondent's health insurance carrier of an increase in premium rates, which the parties have stipulated would have increased costs to both employees and the Respondent.

The parties have expressly stipulated that "the General Counsel and the Charging Party contend that the impasse on the [four topics] was not a valid impasse because it was tainted by Respondent's conduct" vis-a-vis dues-checkoff and pay-for performance. We have found above, however, that the Respondent's bargaining conduct with respect to these two topics was not unlawful. We accordingly must find that that conduct did not taint the parties' subsequent bargaining on the additional four topics. We further find that the General Counsel, by the plain meaning of the parties' stipulation, has asserted no other basis for finding the Respondent's conduct concerning the four topics to be unlawful. The Board has long held that a stipulation is conclusive on the party making it, and prohibits any further dispute as to the stipulated matters. See, e.g., *Kroger Co.*, 211 NLRB 363, 364 (1974). We shall accordingly dismiss the complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) changing its health insurance carrier; (2) discontinuing subsidies for Jazzercise classes; (3) discontinuing free coffee service; and (4) reducing the cafeteria discount.

CONCLUSIONS OF LAW

1. The Respondent, Woodland Clinic, a Medical Practice Foundation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. Engineers and Scientists of California, MEBA, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act: (1) failing to timely comply with the Union's request for the home telephone numbers of unit employees; and (2) failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility.

4. The Respondent has not otherwise violated the Act as alleged in the amended consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to close its materials management department and to transfer its work, the affected employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore,

cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects on unit employees of closing the materials management department and the transferring of its work, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the affected employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its employees employed in the materials management department at the time of its closure, backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects on unit employees of the closing of its materials management department and the transferring of its work; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union;¹⁵ (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed its materials management department, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the affected employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, in view of the fact that the Respondent has closed its materials management department, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees of the materials management department as of

November 5, 1993, in order to inform them of the outcome of this proceeding.¹⁶

ORDER

The National Labor Relations Board orders that the Respondent, Woodland Clinic, a Medical Practice Foundation, Woodland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

(b) Failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility.

(c) 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 concerning the effects on unit employees of its decision to close its materials management department and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay its former employees employed in the materials management department at the time of its closure their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects on unit employees of the closing of its materials management department and the transferring of its work; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from November 5, 1993, the date on which the Respondent closed its materials management department, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest, as set forth in the remedy portion of this decision.

¹⁵ *Melody Toyota*, 325 NLRB 846 (1998).

¹⁶ No affirmative remedy is necessary for the Respondent's unlawful failure to timely provide the Union with the requested information, because the stipulated record establishes that the Respondent ultimately supplied the information.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its place of business in Woodland, California, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 1993.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appendix" to the Union and to all former unit employees of the materials management department as of November 5, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsi-

ble official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

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

WE WILL NOT fail to timely furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

WE WILL NOT fail to bargain with the Union regarding the effects of our transfer of the bargaining unit work performed by the materials management department to a nonunion facility.

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

WE WILL bargain, on request, with the Union concerning the effects on unit employees of our decision to close our materials management department and to transfer its work, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay our former employees in the materials management department who were employed at the time we closed the department their normal wages for the period of time set forth in the decision underlying this notice to employees, with interest.

WOODLAND CLINIC, A MEDICAL PRACTICE
FOUNDATION

¹⁷ 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."