

The New York Times Company and Newspaper Guild of New York, Local 3, The Newspaper Guild, AFL-CIO, Cases 2-CA-18303, 2-CA-18800, 2-CA-19251, and 2-CA-19559

19 June 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 13 December 1983 Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief.¹ The General Counsel filed a brief in reply to the exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The New York Times Company, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the position of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's characterization of the date employee Stephen Benis received his appraisal when he was told by his supervisor that he spent too much time on union activities. Benis testified it was in 1978 or 1979. Union representative Dan Bacheller testified it was in 1979 or 1980. The judge's findings are inconsistent as to this fact. We find the exact date immaterial as the information request was for all performance evaluations for Benis.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on April 26 through 29 and on September 6 and 7, 1983.

On August 31, 1981, and May 13, 1982, the Newspaper Guild of New York, Local 3, The Newspaper Guild, AFL-CIO, herein called the Union, filed charges in Cases 2-CA-18303 and 2-CA-18800, respectively, alleging that the New York Times Company, herein called Respondent, had violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with certain information requested by the Union. Thereafter, a complaint issued and the cases were consolidated for hearing on

July 19, 1982, before Administrative Law Judge William A. Gershuny. During the course of this hearing Judge Gershuny severed the cases and postponed Case 2-CA-18800 indefinitely, with instructions to the Union and Respondent to meet and negotiate further. On August 3, 1982, he issued a decision wherein he dismissed Case 2-CA-18303. Thereafter, the General Counsel and the Union filed exceptions to this decision. On November 10, 1982, the Board issued a decision in which it reversed Judge Gershuny and remanded the case for a hearing *de novo*. On November 18, 1982, the Union filed a charge in Case 2-CA-19251 against Respondent alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide information requested by the Union. Thereafter a complaint issued. Pursuant to a motion filed by the General Counsel, Cases 2-CA-18303, 2-CA-18800, and 2-CA-19251 were consolidated. On April 26 through 29, 1983, a hearing was held in connection with these cases. On April 8, 1983, the Union filed an additional charge against Respondent alleging a further refusal to supply the Union with information requested in violation of Section 8(a)(1) and (5). On May 23, 1983, subsequent to the close of the hearing, but prior to the issuance of a decision, a complaint issued on the above charges. In view of the substantive similarity of the issues presented by this complaint and the issues already litigated, Respondent moved that the hearing be reopened and the cases consolidated. Such motion was granted and on September 6 the hearing reopened. The hearing on the additional issues presented concluded on September 7, 1983.

Briefs were filed by the General Counsel and counsel for Respondent.¹ On consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York corporation with an office and place of business in New York, New York, where it is engaged in the publication, circulation, and distribution of a daily newspaper, The New York Times, throughout the States of the United States and in various countries abroad. In the course and conduct of this operation Respondent derives annual gross revenues in excess of \$200,000, holds membership in, or subscribes to various interstate news services, including the Associated Press, and advertises various nationally sold products. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Collective-Bargaining History

Since 1940, the Union has represented all employees employed by Respondent in its news and editorial de-

¹ I found both briefs to be extremely well written and well researched. They were most helpful to me in analyzing the issues presented in this case.

partments, including all editors and reporters and various other classifications, not relevant in this proceeding, totaling about 40 separate classifications. In 1943, pursuant to a consent election agreement, this unit was expanded to include "watchmen." Over the next 20 years the unit has been substantially expanded to include various other departments, and to cover a multitude of employee classifications. These additions to the unit were memorialized by various written memorandum of agreement and letters which were incorporated in successive collective-bargaining agreements since 1940 by reference. At the present time the bargaining unit covers approximately 1500 employees of which approximately 30 are alleged by Respondent to be "guards" within the meaning of Section 9(b)(3) of the Act.

In 1978 Respondent filed unit clarification petitions in Cases 2-UC-131 and 2-UC-135. One of the issues presented by these petitions was whether the classification of "watchmen," added to the unit in 1943 were guards within the meaning of Section 9(b)(3) and should be excluded from the unit.²

At present, Respondent and the Union are parties to a collective-bargaining agreement effective as of March 31, 1981, and expiring on March 30, 1984. The unit in the current agreement, as in the past agreements, incorporates the various memorandum of agreements and letters described above.

With the limited exception of the guard classification, which is in issue in the pending UC petitions, Respondent conceded during the hearing that the Union currently represents, as the collective-bargaining representative, all the classifications set forth and described in the current collective-bargaining agreement.

Moreover, in its answer filed on July 16, 1982, prior to the hearing before Judge Gershuny, Respondent admitted the unit was appropriate except for certain supervisory, managerial, and confidential classifications pending in the UC petitions described above.

Request for Benis' Performance Appraisal

Stephen Benis is employed by Respondent in its general accounting department as a payroll checker. He has held various positions in this department since 1966.

Benis became a member of the Union shortly after his employment in 1966. In 1971 he served the Union in the capacity of shop steward and continued to act in that capacity through 1979.

Respondent has an established procedure since 1977 of evaluating the performance of its employees annually. Such evaluation is documented in a "written performance appraisal." The employee's supervisor prepares the appraisal and orally reviews it with the employee involved. Following this interview the employee is provided with a copy of his appraisal.

In the beginning of 1981 Benis received his appraisal for his 1980 work performance. During the appraisal meeting his supervisor told him in connection with his

work performance that he spent too much time on union activities.

Benis testified that between 1978 and 1981 he applied for various posted positions which would have resulted in a promotion and a raise in pay but that he had failed to receive such promotion. Benis further testified that as a result of his last appraisal and the statement made by his supervisor concerning his union activities he believed his activities as a union shop steward might have had something to do with his failure to receive a promotion.

About March 1981, and as a result of his supervisor's comment, Benis contacted Dan Bacheller, union grievance chairperson, and told him that during a meeting with his supervisor concerning his 1981 performance appraisal his supervisor had made an unfavorable reference to his union activities as they related to his work. He told Bacheller that he believed Respondent had probably been discriminating against him in the past by denying his promotions because of his activities in the capacity of shop steward.

Benis had received a copy of his 1981 appraisal but had discarded it by the time he met with Bacheller. He did not have copies of his prior appraisals.

Bacheller discussed Benis' complaint with Union Representative William Montes. On June 19, 1981, Montes wrote a letter to Joseph Eisenberg, Respondent's labor relations manager, wherein he set forth as follows:

The Guild requests copies of all performance evaluations contained in The Times files for Steven Benis of Payroll Accounting.

This information is necessary for the Guild's administration of the parties' collective bargaining agreement with respect to promotions and non-discrimination.

On June 24, 1981, Eisenberg responded by letter to the Union's request as follows:

I am in receipt of your June 19, 1981 letter requesting copies of all Performance Evaluations of Steven Benis. Our records reflect no grievance or complaint by either Mr. Benis or the Guild concerning a promotion or some alleged form of discrimination. However, the information you request is available to you from Mr. Benis, who should have a copy of all his Performance Evaluations and we would assume he would share them with you.

Bacheller testified that there is an agreement between the Union and Respondent that performance appraisals may not be introduced as evidence in an arbitration concerning the performance of an employee. However, such appraisals were useful to the Union in an investigation of an employee complaint and in aiding the Union in determining whether to file a grievance. Bacheller testified that it was for this purpose that the Union needed the information requested.

Thereafter on August 31, 1981, the Union filed an unfair labor practice charge concerning Respondent's refusal to supply the Benis appraisals.

² Other issues were raised concerning the inclusion of alleged supervisory, managerial, and confidential employees which are not relevant to this case.

On July 19, 1982, during the hearing on these cases Judge Gershuny requested that Respondent provide Benis with copies of all his performance appraisals and that Benis provide them to the Union. On July 20, Respondent turned over such appraisals to Benis who in turn turned them over to the Union.

On August 3, 1982, Judge Gershuny issued his decision in connection with this matter.³ Judge Gershuny's decision⁴ concluded that since the Union was in possession of the performance appraisals (solely as the result of Judge Gershuny's request described above) the Union had "equal access to the information" sought and "its subsequent demand under Section 8(a)(5) lacks the essential element of good faith."

On November 10, 1982, the Board issued a decision reversing Judge Gershuny and ordering a hearing de novo.⁵ The Board in its decision held:

To the extent that dismissal of the complaint is grounded on the alleged availability of the requested information from other sources, the Administrative Law Judge erred as a matter of law. *The Kroger Company*, 226 NLRB 512 (1976). The fact that employees may have the information and may be or are willing to give it to the union does not relieve an employer of its obligations under Section 8(a)(5) of the Act. See *Bel-Air Bowl, Inc.*, 247 NLRB 6 (1980). Cf. *The Proctor & Gamble Manufacturing Company*, 603 F.2d 1310 (8th Cir. 1979), enfg. 237 NLRB 747 (1978).

The Compu Serve, On Line, and Videotex Requests

The remaining issue in this case concerns the Union's request for information relating to Compu Serve, On Line, and Videotex services.

All three services are private, computerized news services which distribute news to their subscribers by means of a video display terminal (VDT). News stories are written by the writer entering the story into a computer through a computer keyboard. The story or news report is then edited in an abbreviated manner suitable for display over a VDT. Subscribers to the service can then receive the condensed news reports over their VDT's by making appropriate requests into their computer keyboards.

Gordon Thompson employed by Respondent as assistant to the metropolitan editor, and the union chairman of the electronic journalism committee testified that he read an article in the May 22, 1981, issue of the Guild Reporter (the Union's newspaper) entitled "Technology Seeking a Market." That article described the Compu Serve system and stated that The New York Times and five other newspapers were presently available to its subscribers. Thompson additionally read advertisements in The New York Times which said: "Stories for the Times, specially edited and transmitted to Compu Serve are

available by telephone each evening to your home terminal"

Thompson testified that as a result of reading the above article in the Guild Reporter and the advertisement in the Times he became concerned that writing and/or editing work, which was unit work, was being performed by nonunit personnel. Thompson discussed the matter with union representatives and on August 20, 1981, Edwin R. Egan, union executive, sent a letter to John H. Martinez, Respondent senior vice president. The letter in pertinent part set forth as follows:

As you know, during the recent bargaining we agreed to put over discussion of issues relating to electronic journalism until after agreement was reached on the contract. *We are now ready to resume these discussions.* [Emphasis added.]

In order to be better prepared for same, we need information about The Times' involvement in Compu Serve, the electronic news-dissemination project. The information being requested is:

The names, job titles, departments and salary groups of all Times' employees currently involved performing work related to The Times' involvement in Compu Serve. Please identify separately those employees, if any, who have been hired by the Times specifically because of the Compu Serve project.

A description of the work functions attributable to the Compu Serve project that are being performed by such employees.

The reference in the above letter to "the recent bargaining" referred to the 1981 contract negotiations which resulted in the current collective-bargaining agreement. During the 1981 negotiations the parties were unable to reach agreement concerning jurisdiction over "Electronic" or computerized journalism and so they agreed to in effect table the issue. As a result a memorandum of agreement was entered into dated May 7, 1981, which provided inter alia:

2. *Electronic Journalism*

. . . (T)he following issues (other than health and safety) will be referred for discussion to a joint Times/News/Guild sub-committee at the conclusion of negotiations; 1. Reprint Rights, 2. Exempts' use of VDT's, 3. Tracing.

During the negotiations, and at all times thereafter, the Union took the position that all writing and editing, whether for the newspaper or computerized news services which Respondent was engaged in, was unit work.

On October 2, 1981, in response to the Union's May 7 letter, Joseph Eisenberg, Respondent labor relations manager replied by letter as follows:

Please be advised that we have carefully investigated and reviewed your requests with respect to employees in the bargaining unit represented by the

³ As previously noted he had severed Case 2-CA-18800 from this case.

⁴ JD-12-82.

⁵ 265 NLRB 353.

Guild. The New York Times Company at a corporate level is engaged in a preliminary experiment with Compu Serve and other companies in the communication field.

There are no Times employees in the bargaining unit represented by the Guild involved in or effected by the preliminary experiment nor do we contemplate they will be involved or effected in the future. In view of the nature of the situation as we have outlined it to you and *particularly noting the absence of any effect on, or involvement by bargaining unit personnel in this preliminary experiment, there is no relevant information to be provided as to your request.*

If there are any questions concerning this matter please do not hesitate to contact me. [G.C. Exh. 6, Tr. 76.]

On December 8, 1981, Union Representative Harry Fisdell wrote to John Mortimer, Respondent's vice president. He took exceptions to Respondent's contention that there was "no relevant information to be provided." Fisdell, referring to the Compu Serve article appearing in the Guild Reporter, stated that:

All of the work functions described in this process are Guild bargaining-unit work functions as defined by the Preamble to the Guild-Times contract. If The Times' involvement in Compu Serve is even roughly similar to that of The Examiner, then according to your October 2 letter, contract violations are now taking place in that non-bargaining-unit employees are performing bargaining unit functions.

In addition Fisdell quoted from the July 1981 issue of "Inforum," the newsletter of the Times Information Service, a wholly owned subsidiary of Respondent and stated in pertinent part:

Information Service mentions on page 2 that "The New York Times Information Service (referring to On-Line) has established a special staff of editors and indexers who devote their time exclusively to the task of gathering and processing New York Times stories for on-line retrieval." Again, editing and indexing are bargaining-unit work functions as defined in the Preamble to the Guild-Times contract.

Accordingly, we are renewing and updating our request for information. For purposes of negotiating the issue of Guild representation in Times electronic journalism endeavors, we ask the following:

The names, job titles, departments and salary groups of all Times employees currently involved in performing work related to both Compu Serve and the New York Times On-Line.

A description of the work functions attributable to both CompuServe and The New York Times On-Line being performed by such employees.

A description of the procedure by which The Times receives revenue for its participation in CompuServe and for The New York Times On-Line.

If either CompuServe or The New York Times On-Line are experimental in that it is not generating revenue for The Times at present, a description of those procedures now under consideration for attributing and collecting revenues in the future.

By letters on January 26 and February 24, 1982, Fisdell repeated his request for the information described in his December 8, 1981 letter.

On March 19, 1982, Eisenberg by letter responded to the Union's requests of December 8, January 26, and February 24, in pertinent part as follows:

As you are well aware our 1981 negotiations with the Guild were concluded after the Guild strike with an agreement on May 7, 1981, later reduced to a Memorandum of Agreement of that date and ratified by the Guild on June 5, 1981. The agreement contains no provision to negotiate the question you now base this request for information on and further both parties agreed to reincorporate in the contract Article XVI, Section 2.

In any event since you have now clarified or amended to reflect the true purpose in requesting this information and such purpose as you now express it is clearly one which we did not agree to, we must respectfully decline to furnish the information requested.

Eisenberg testified that Respondent interpreted the reference in the May 7 memorandum which provided that the issue of "electronic journalism will be referred for discussion" (emphasis added), as an agreement to permit the Union to express their views rather than an agreement to negotiate. He emphasized such distinction was made because of the use of the word "discussion" rather than "negotiation," in the agreement.

On July 7, 1982, Union Representative Fisdell sent Eisenberg another letter requesting the information requested in the Union's August 20 and December 8, 1981 letters but broadening the scope of the request to include Respondent's affiliates or subsidiaries. The letter set forth in pertinent part as follows:

Please be advised that the Guild requests the information itemized in the letters of August 20, 1981 and December 8, 1981, whether or not the persons performing the work on the Compu Serve and On-Line operations are employees of The New York Times Company, an affiliate or subsidiary of The New York Times Company, or of a company with some other relationship to The New York Times Company.

On August 23, 1982, Union Representative Fisdell sent a letter to Eisenberg requesting the financial information relating to the reprint clause in the collective-bargaining

agreement which requires Respondent to pay its writers a percentage of revenues received for stories reprinted elsewhere. The letter set forth in pertinent part as follows:

A description by headline, date, page, and author of all stories written by Times-Guild unit employees which were disseminated through the CompuServe Network.

The amount of revenue, if any, received by The Times for each story disseminated.

Total revenues received by The Times for stories disseminated.

Copies of all contracts between The New York Times Company and CompuServe.

Purpose: The parties' collective bargaining agreement, Article III, Section 11 requires that fees received through reprints of editorial material requested by other publishers will be shared evenly [sic] with the employees involved. The Guild maintains that this provision covers electronically-disseminated editorial material. The Guild requires the above-cited information to administer this provision in the agreement.

In addition, the parties agreed in the May 7, 1981 Memorandum of Agreement, page 7, "Other Matters" (Section 2, Electronic Journalism) to discuss the issue of "reprint rights" in the context of the electronic dissemination of editorial material. For the purpose of preparing for discussion of this issue, the Guild needs the above-cited information.

On September 23, 1982, Eisenberg responded by letter, advising Fisdell that Respondent has terminated its experiment with Compu Serve, thereby mooted the request for information relating thereto. He further called the Union's paragraph 2(a) of its August 23 request "burdensome." He further contended that whether or not article III, section 11 would apply to CompuServe was a threshold question which must itself be arbitrated before the information request would be considered.

Thereafter, there have been no further communication between the parties on this issue, and no information was ever provided by Respondent to the Union.

In October 1982, a New York Times article described a CBS-American Telephone and Telegraph Company experiment in Ridgewood, New Jersey, involving a two-way video service. The article included the following sentence: "One of the many information providers is the New York Times." This article came to the attention of union representatives. Accordingly, Fisdell sent Eisenberg a letter dated November 15, 1982, requesting the following:

1. The names, job classifications, hours of work, and work functions of any employees of The New York Times Co. or of its subsidiaries who are performing work on New York Times copy in conjunction with the videotex operation.

PURPOSE: To enable the Guild to determine whether and to what extent The Times is violating the jurisdiction language of the Preamble to the parties' collective bargaining agreement.

2. The revenues, if any, The Times has received from the videotex operation, including a breakdown for revenues received by story used and author involved.

3. A copy of any contracts The Times has with other parties pertaining to revenues received from the videotex operations.

PURPOSE: To enable the Guild to determine whether and to what extent Section 11 of Article 14, "Reprints," of the parties' collective bargaining agreement is being violated by The Times.

On December 24, 1982, Respondent, by letter of Eisenberg to Fisdell, declined to provide the above-described information. Eisenberg stated that there was no work being performed by any unit employees. He continued that despite the Guild's contentions that its jurisdiction was being violated or that the "reprint clause" was applicable, "we quite frankly do not see that the information you request is relevant at this time." Eisenberg then reiterated Respondent's contention that an initial determination must first be made by an arbitrator, that the jurisdiction and reprint clauses are applicable, before the information requested could be considered relevant.

Fisdell responded to Eisenberg in a letter dated March 23, 1983, in which he reiterated the Union's demand of November 24, 1982, for the information regarding the videotex experiment. Respondent did not respond.

Eisenberg testified that sometime following the Union's initial November 15, 1982 request for videotex information described above he informally advised Fisdell in a telephone conversation that videotex was experimental and had generated no revenues. Fisdell could not recall this conversation.

I do not credit Eisenberg's testimony in this connection. His testimony is inconsistent with his written response dated December 24, 1982, described above. Moreover, it is inconsistent with his responses and positions taken throughout the union requests for similar information in relation to Compu Serve and On-Line.

There has been no further communication between the Union and Respondent concerning videotex.

Analysis and Conclusions

Respondent contends that the 8(a)(5) violation must fail because the General Counsel has failed to establish that the Union represents an appropriate unit for bargaining.

The complaint alleges as the appropriate unit for bargaining the unit described in the 1981-1984 collective-bargaining agreement, which incorporates by reference a series of letters and memorandum of agreements providing numerous additional classifications over a 43-year bargaining history, including the addition of the "watchmen" classification in 1943.

Respondent's contention that the unit alleged in the complaint is an inappropriate unit is based on its allegation that the unit includes "guards" as defined by Section 9(b)(3) of the Act. Section 9(b)(3) provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in

exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. [29 U.S.C.A. Sec. 159(b) (1973).]

Respondent, however, has embarked upon a procedure to determine whether the 30-odd individuals employed in a unit of 1500 employees are guards within the meaning of the Act, namely by filing the pending UC petitions. It is for this reason that Respondent moved before me to adjourn this trial until there is a final decision in the UC petition. This motion was denied. The General Counsel for purposes of this case concedes that the 30 individuals are guards within the meaning of the Act.

In order to determine the merits of Respondent's contention, several factors must be considered.

First, it must be recognized that whatever the outcome of the UC petition, the Board will certify the present contractual unit as an appropriate unit for bargaining within the meaning of the Act. The only question is whether such certified unit will include the 30 individuals alleged by Respondent as guards. If the Board ultimately concludes they are guards within the meaning of the Act it will certify the present bargaining unit excluding the guards. The result of this will be that the Union will represent in an appropriate unit 1470 out of 1500 employees. Therefore, Respondent could not contend that the UC petition could result in a substantial destruction of the unit.

It is critical to this case that the information requested by the Union relates to that portion of the unit and to unit classifications which will certainly, under any determination, be found appropriate by the Board.

To uphold Respondent's contention would produce an anomalous result. I would have to conclude that the present contract unit is not an appropriate unit for bargaining notwithstanding the certainty that the Board will ultimately find such unit with or without guards to be an appropriate unit and issue a certification to that effect. Moreover, such a finding by me would lead to the ludicrous result that pending a final determination by the Board in the UC petition, Respondent could otherwise violate with impunity, Section 8(a)(5) of the Act, contending each time an unfair labor practice charge was filed such charge must be dismissed or held in abeyance for an indefinite period because an appropriate unit cannot presently be alleged. A finding consistent with Respondent's contention would encourage industrial strife and subvert the purpose of the Act.

Moreover, Respondent in its July 16, 1982 answer, filed in connection with the trial before Judge Gershuny, Respondent admitted the unit with the exception of supervisors, managerial and confidential employees was an appropriate unit. It was not until April 20, 1983, following the Board's decision reversing Judge Gershuny and remanding the case for a trial de novo, that Respondent raised this unit contention. Further, Respondent during the instant hearing explicitly admitted that the Union does indeed represent all unit classifications described in the current collective-bargaining agreement with the exception of the guards whose status is currently the subject of the pending UC petitions.

It should further be noted that Section 9(b)(3) of the Act does not prohibit voluntary recognition of a mixed guard—nonguard unit. It merely provides that the Board will not certify such unit.

Respondent relies entirely on *Supreme Sugar Co.*, 258 NLRB 243 (1981), as authority for its unit contention. However, I find the instant case clearly distinguishable from *Supreme Sugar*.

In *Supreme Sugar*, the judge held that the Employer did not violate Section 8(a)(5) by unilaterally changing working conditions of guards in a mixed guard and nonguard unit. In so finding, the judge, affirmed without opinion by the Board, concluded that the status of the individuals who were the subject of the 8(a)(5) complaint were guards within the meaning of Section 9(b)(3). He therefore concluded that the General Counsel had failed to establish an appropriate unit within the meaning of the Act and dismissed the complaint.

I believe the holding in *Supreme Sugar* is clearly distinguishable from the instant case. In *Supreme Sugar* the complaint related to unilateral changes in a classification, namely, guards that the Board could find in a UC petition that the Union had no right to represent. In the instant case, whatever the outcome of the pending UC petition the Board will issue a certification in a unit encompassing the classifications for whom Respondent has failed to supply the information requested by the Union.

In *Wallace-Murray Corp.*, 192 NLRB 1090 (1971), the Board considered the effect a UC petition would have on a unit which included "watchmen" who had been recognized as part of a unit since 1943, some 28 years prior to the UC petition. The Board found that the Regional Director therein had erred by excluding the guards during the life of the contract, as it would not serve the purposes of the Act. Primary to the Board's decision to leave the status quo was the long term voluntary inclusion of guards by the Employer in the existing unit with full knowledge that the Union did not exclusively represent guard employees. The Board stated "to entertain the Employer's petition for clarification at this time, in these circumstances, would, in our view, be disruptive of a bargaining relationship voluntarily continued by the Employer when it executed the existing contract with the Union.

It is significant that the Board was so conscious of the disruptive effect such a midterm modification would have on the 28-year voluntary relationship between the parties. The Board apparently did not want to adversely

affect the rights of those employees in the middle of a contract. So too, in the instant case, the guards have been a part of each and every collective-bargaining agreement between Respondent and the Union from 1943 through 1978, when the instant UC was filed. Moreover, they have remained in the unit since 1978 during the pendency of the UC petition. In *Supreme Sugar*, the Judge distinguished *Wallace-Murray*. He considered significant the Employer's lack of knowledge that the watchmen were guards within the meaning of Section 9(b)(3) and therefore they did not have to be voluntarily included in the unit. While the judge in *Supreme Sugar* distinguished *Wallace-Murray*, such distinction cannot be made here, where Respondent had full knowledge that the employees were guards and took the appropriate steps by filing a UC petition to exclude them.

In *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980), the Board found a refusal to bargain where an employer withdrew recognition and made unilateral changes alleging that the unit included supervisors who had been voluntarily included by the employer. The Board citing *NLRB v. Borg Warner Corp.*, 356 U.S. 342 (1958), held that after a certification or voluntary recognition, the unit may not be unilaterally attacked. The Board noted that it would not entertain a UC petition during the mid term of a contract where supervisors had been voluntarily included in the unit, nor would it then permit the far more disruptive practice of unilaterally modifying the contract covering such unit.

The only difference between the unit issue in the instant case and *Arizona Electric Power* is that the former case involves guards and the latter one involves supervisors. The same holding as in *Arizona Electric* is appropriate here. The parties voluntarily continued the guards in the unit from 1943 through 1978 without complaint. Since 1978, the parties have continued to apply the contract and in fact negotiated a renewal agreement in 1981, retaining the same inclusions. The Board's reasoning in *Arizona Electric* is equally appropriate herein where stability is essential.

The Board requires an appropriate unit for the issuance of a bargaining order, but that may certainly include voluntarily agreed-upon units which may not be certified by the Board. This proposition of law was clearly enunciated by the Board in *Chemtron Corp.*, 258 NLRB 1202 (1981). In *Chemtron*, the Board, citing *Arizona Electric Power*, supra, held that the "Board may appropriately issue a bargaining order covering a unit which it could not have initially certified under the Act, but concerning which the parties have knowingly and voluntarily bargained." The instant case is stronger than *Chemtron*, where it is certain that the Board in the pending UC petition will certify a unit, whether it finds the disputed employees to be guards, which includes all other employees, all 1470 of them, as an appropriate unit for bargaining.

I therefore conclude that the General Counsel has established an appropriate unit for bargaining. Whether guards as defined by the Act will ultimately be included in such unit is a question that will ultimately be resolved by the Board in the pending UC petition.

An employer has a duty to provide on request information relevant to bargainable issues. The law in this area is clear and well settled. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Where the requested information concerns wage rates, job descriptions, and other information relating to employees in the bargaining unit, the information is presumptively relevant to bargainable issues. *Fawcett Printing Corp.*, 210 NLRB 964 (1973); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965); *Timkin Roller Bearing Co.*, 138 NLRB 15 (1962), enfd. 325 F.2d 746, 750 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964). Where the request is for information concerning employees outside the bargaining unit, the union must show the requested information is relevant to bargainable issues. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Rockwell-Standard Corp.*, 166 NLRB 124 (1967), enfd. 410 F.2d 953 (6th Cir. 1969); *Curtiss-Wright Corp.*, supra. In determining whether the information requested by the Union is relevant, the general approach has been to apply a liberal discovery type standard to the issue of relevancy in evaluating each case on its facts. *Brazos Electric Power Cooperative*, 241 NLRB 10 (1979); *Acme Industrial Co.*, supra. The Board has held in establishing relevancy that the information is relevant if the information sought is reasonably necessary in order to administer a collective-bargaining agreement, detect infractions of its terms, and intelligently counsel the employees whom it represents. In this connection, the Board has held that a union is entitled to information requested which bears on the union's determination to file a grievance or is helpful in evaluating the propriety of going to arbitration. *Brooklyn Union Gas Co.*, supra; *Boeing Corp.*, 182 NLRB 421 (1970).

Respondent contends the Union's request relating to Benis failed adequately to set forth the relevancy of the information requested.

I find, contrary to Respondent's contention, that the Union's June 19, 1981 written request for "copies of all performance evaluations . . . for Steven Benis" clearly set forth the reason for the request. The stated reason is as follows: "the information is necessary for the Guild's administration of the parties' collective-bargaining agreement with respect to promotions and non-discrimination." It does not require any special knowledge or imagination to recognize that the information requested by the Union related to a complaint by Benis to the Union concerning his failure to receive a promotion, and that at least one basis for his complaint was some alleged discrimination. That Respondent was able to perceive this was evidenced by its reply which set forth that its records reflected "no grievance . . . by either Mr. Benis or the Union or the Union concerning a promotion or some alleged form of discrimination." Respondent then concluded that Benis should have a copy and that Respondent assumed he would share it with the Union. I therefore find the Union's request for information and the reason such information was requested was specifically set forth by the Union.

Respondent refused to furnish the Union the information requested based on its interpretation of an agreement

which provides that appraisals could not be used by either side in grievance proceedings. However, such appraisals are clearly relevant to the Union in the investigation of such complaint by an employee, in order to determine whether to file a grievance. Bacheller testified, this is precisely the reason the Union wanted the information. As set forth above, the Board has held a union is entitled to information requested which bears on its determination to file a grievance, *Brooklyn Union Gas Co.*, supra. I therefore find Respondent's contention that the Union was not entitled to the information without merit. Respondent's contention that Benis could supply the Union with the appraisal was found to be without merit by the Board when it reversed Judge Gershuny's decision, *New York Times Co.*, 265 NLRB 353 (1982), citing the *Kroger Co.*, 226 NLRB 512 (1976), and *Bel-Air Bowl, Inc.*, 247 NLRB 6 (1980).

Respondent additionally contends that the Union is not entitled to the information requested because of the confidentiality of such information within the meaning of the Supreme Court decision in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

The union in *Detroit Edison* requested that the employer turn over to it the test battery, answer sheets, and test scores of certain employees relating to a psychological aptitude test given employees to determine whether they were qualified for a particular position. Ten employees sought the position and took the test, but were rejected on the ground that none received an "acceptable" score on the test. The union filed a grievance on behalf of the rejected employees, claiming that the testing procedure was unfair and that the company bypassed senior employees in violation of the collective-bargaining agreement. The company refused to supply the information the union sought on the grounds that complete confidentiality of the materials was necessary to insure the future integrity of the tests and to protect the privacy interests of the examinees. In this connection the employer's psychologists who administered the tests gave the test applicants express commitments that the scores would be confidential. The tests and scores were kept in the psychologists' office who deemed themselves ethically bound not to disclose the numerical test scores, even to management representatives. In the course of an arbitration proceeding, after the filing of an unfair labor practice charge, the company offered to turn over the test scores of employees who would sign a waiver of confidentiality; however, the union declined to seek such releases. The Board upholding the administrative law judge ordered the employer to turn over the information to the union. The Court of Appeals for the Sixth Circuit upheld the Board's order. The Supreme Court reversed the Board and the circuit court. The court took judicial notice of the sensitivity of any human being to the disclosure of such psychological information that may be taken to bear on his or her basic confidence, the court held that:

In light of the sensitive nature of testing information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of evidence that the Company

had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities, we are unable to sustain the Board in its conclusion that the Company, in resisting an unconsented-to disclosure of individual test results, violated the statutory obligation to bargain in good faith.

The court also pointed out that the company had a legitimate concern that the secrecy of the questions comprising the test would be comprised by turning over the test and scores to the union and that the test, which was of considerable importance to the company, would be rendered valueless.

It is clear that *Detroit Edison* represents an exception to the long-established liberal policy of the Board, the circuit courts, and the Supreme Court in requiring an employer to furnish a labor organization information requested which is necessary in order to administer its collective-bargaining agreement. *Truitt Mfg. Co.*, supra; *Acme Industrial Co.* supra; *Curtiss-Wright Corp.*, supra; *Timkin Roller Bearing Co.*, supra; and *Brooklyn Union Gas Co.*, supra.

The Board recently held in *PPG Industries*, 255 NLRB 296 (1981), that an employee's work evaluation report, called "rating sheets," were relevant in the union's collective-bargaining role even where the employees involved may not be included in the unit. In *LaGuardia Hospital*, 260 NLRB 1455 (1982), the administrative law judge was affirmed by the Board with respect to his order calling for the production of employees' personnel files. The administrative law judge found that the personnel files in question were those of two competing employees for a promotion, and therefore would be relevant to the grievance of the employee who had been denied the promotion.

In *J.P. Stevens & Co.*, 239 NLRB 738 (1978), a union's request for employee "efficiency" ratings was found by an administrative law judge, with subsequent Board approval, to be relevant to the union's performance of its statutory duty.

I conclude that the material requested in the instant case is no different from that in *PPG*, *LaGuardia Hospital*, and *J.P. Stevens & Co.*, supra.

The facts of *Detroit Edison* are unique and clearly distinguishable from the facts of the instant case. In the instant case the appraisal itself is not so secretive so that disclosure of an employee's appraisal would render valueless further appraisals. Unlike *Detroit Edison*, employees were not expressly advised as to the confidentiality of the appraisal, nor did they contain any material where it could reasonably be assumed an employee would be sensitive to such disclosure. Indeed, there is no evidence that Benis was opposed to the Union obtaining copies of his appraisals, or that Respondent believed he was so opposed. Moreover, Respondent in its response to the Union's June 19 request never raised the issue of confidentiality.

Accordingly, I conclude Respondent's claim of confidentiality is pretextual. I further conclude that based on the facts of the instant case and on the authority of the above-cited cases, the Union was entitled to the informa-

tion requested in its June 19 letter, and that by failing to provide such requested information, directly to the Union, Respondent violated Section 8(a)(1) and (5).

The evidence established that as a result of reading various articles, described above, Gordon Thompson, union representative, became aware of Respondent's participation in Compu Serve, On-Line, and Videotex. He recognized someone had to be performing editing and formatting work for these services and that such work was unit work. He discussed his concern that nonunit employees might be performing unit work with other union representatives. The Union had no way of knowing based on the articles read by Thompson who was performing such editing or formatting work and so by various letters it requested such information.

The information requested in the various union requests described above may be summarized as follows: the names, job classifications, description of work functions of all employees employed by Respondent (including its subsidiaries and affiliates) performing work in connection with the above services, and the revenues received by Respondent in connection with these services.

The basis for the request was set forth in the same series of union requests and may be set forth as follows. The information was needed to enable the Union to bargain in connection with the May 7, 1981 memorandum of agreement which provided that issues relating to electronic journalism would be subject to future "discussion." Further, such information was needed to enable the Union to determine whether, and to what extent, nonunit employees employed by Respondent (or its subsidiaries and affiliates) were performing unit work. The financial information was requested to determine what if any revenues were due to employees performing unit work pursuant to the reprint clause in their agreement.

Respondent's response to the Union's requests may be summarized as follows. There were no unit employees performing any work on the above-named computerized services. Eisenberg refused to provide further information concerning the Union's request for the purpose of negotiating pursuant to the May 7 memorandum of agreement because Respondent contended such agreement was an agreement to "discuss" rather than "negotiate" and therefore such information was not necessary. Eisenberg refused to provide further information concerning the Union's request for the purpose of determining whether unit work was being performed by nonunit employees, and whether the reprint clause was being violated because Respondent through Eisenberg's responses took the position that before Respondent was required to furnish such information there must be an initial determination made by an arbitrator that the Union was entitled to the editing and formatting work in connection with the Compu Serve, On-Line, and Videotex services.

The issue to be resolved is whether the information was relevant for the purposes stated by the Union.

I will first consider the information requested for the purpose of determining if unit work was being performed by nonunit personnel. In view of Respondent's response that unit personnel was not performing the disputed work, the question is raised whether the Union is entitled

to the information concerning nonunit personnel. The Board and the courts have held where the request is for information concerning nonunit employees the union is entitled to such information if it can show the information is relevant to bargainable issues. *Brooklyn Union Gas; Rockwell-Standard Corp.; Curtiss-Wright Corp.*, supra. See also *Press Democrat Publishing Co. v. NLRB*, 629 F.2d 1320 (9th Cir. 1980). However, the Board and court approach in determining relevancy has been to accord the union liberal discovery on a good-faith showing of same relevance. *Brazos Electrical Power Cooperative; Acme Industrial Co.*, supra. In *Newspaper Guild, Local 95 v. NLRB*, 548 F.2d 863, 868 (9th Cir. 1977), the court stated:

When [a] union asks for information which is not presumptively relevant, the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation. . . . Conversely, however, to require an initial, burdensome showing by the union before it can gain access to information which is necessary for it to determine if a violation has occurred defeats the very purpose of the "liberal discovery standard" of relevance which is to be used. Balancing these two conflicting propositions, the solution is to require some initial, but not overwhelming, demonstration by the union that some violation is or has been taking place.

The Board and courts have found requests for information relevant where the information is reasonably necessary in order to administer a collective-bargaining agreement and determine whether there are infractions of said agreement. *Brooklyn Union Gas Co.; Newspaper Guild*, supra.

Applying such rationale to the facts of this case, it is clear that the Union's request for information as it relates to nonunit employees was most relevant. The Union was aware that editing and formatting work was being performed in connection with services in which Respondent was involved. Editing and formatting work are unit work, and it is clearly relevant to the Union in the administration of its contract and in detecting violations thereto, whether such work is being performed by non-unit employees.

I find no merit in Respondent's contention that before it has an obligation to furnish the information requested by the Union, the issues of whether the Union is entitled to such "electronic" journalistic work under the collective-bargaining agreement's jurisdiction clause and the financial data under the reprint clause, must first be determined by an arbitrator. Nor is it the function of the Board to make such determination. This is the equivalent of putting the cart before the horse. As the Supreme Court stated so clearly in *Acme Industrial Co.*, supra at 437-438: "This discovery-type standard decide[s] nothing about the merits of the Union's contractual claims" since their eventual rejection by an arbitrator "would clearly not be precluded by the Board's threshold determination

concerning the potential relevance of the requested information." See also in this connection, *Boeing Corp.*, supra.

In connection with the Union's request for the information for the purpose of negotiating the issues relating to electronic journalism as set forth in the May 7 memorandum of agreement it is obvious that the information requested would be necessary for the Union to engage in meaningful negotiations concerning electronic journalism. For example, the number and duties of employees engaged in editing and formatting work in connection with the electronic systems described above would be basic information necessary for the Union to bargain intelligently as to whether such work falls within their jurisdiction. Respondent's contention that the agreement does not require "negotiation" is not for the Board to decide but rather for an arbitrator, after the Union has received the information requested. Once again Respondent places the cart before the horse. Accordingly, I reject Respondent's argument. *Acme Industrial Co.; Boeing Corp.*, supra.

I therefore conclude that by failing to provide the Union with the information requested as set forth in its letters dated August 20 and December 8, 1981, and July 7 and November 15, 1982, Respondent has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

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

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

3. At all times material herein, the Union has been the exclusive representative of all editorial and news department and other employees as set forth in their current collective-bargaining agreement effective from May 1981 through May 1984.⁶

4. By refusing to furnish the Union with the information requested by the Union concerning employee Steven Benis and described by the Union's letter to Respondent dated June 19, 1981, and by refusing to furnish the Union with the information requested by the Union concerning Compu Serve, On-Line, and Videotex, as described by the Union's letters to Respondent dated August 20 and December 8, 1981, and July 7 and November 15, 1982, Respondent has refused to bargain with the Union and thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

5. By the foregoing conduct, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

⁶ As set forth above there is presently pending two UC petitions, Cases 2-UC-131 and 2-UC-135. In issue are certain classifications described in the parties' collective-bargaining agreement including certain supervisory, managerial, and confidential classifications and approximately 30 watchmen. The appropriate unit herein shall be modified to the extent, if any, as determined by the Board in the ultimate determination of said petitions.

THE REMEDY

Having found that Respondent has committed an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act, I will recommend it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. Specifically, I will recommend that Respondent be ordered to provide to the Union the information requested by it in its letters dated June 19, August 20, and December 8, 1981, and July 7 and November 15, 1982, as set forth and described above.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended⁷

ORDER

The Respondent, The New York Times Company, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish Newspaper Guild of New York, Local 3, The Newspaper Guild, AFL-CIO, with the information specifically set forth and contained in the Union's letters to Respondent dated June 19, August 20, and December 8, 1981, and July 7 and November 15, 1982 as set forth and described above.

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

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

(a) Furnish the Union in writing that information requested by the Union in its letters to Respondent dated June 19, August 20, and December 8, 1981 and July 7 and November 15, 1982.

(b) Post at its New York, New York facilities copies of the attached notice marked "Appendix."⁸ Copies of said notice on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT refuse to furnish Newspaper Guild of New York, Local 3, The Newspaper Guild, AFL-CIO with the information specifically set forth and contained in the Union's letters to us dated June 19, August 20, and

December 8, 1981, and July 7 and November 15, 1982, as set forth and described in the Decision.

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

WE WILL furnish the Union in writing that information requested by the Union in its letters to us dated June 19, August 20, and December 8, 1981, and July 7 and November 15, 1982.

THE NEW YORK TIMES COMPANY