

McClatchy Newspapers, Inc., Publisher of The Sacramento Bee and Graphics Communications Union District Council No. 2, Local 60C. Case 20-CA-22087

May 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On January 23, 1991, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, and the Respondent filed briefs opposing their exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

1. We agree with the judge that because the Respondent's press operators are statutory supervisors the Respondent did not violate the Act by removing them from the bargaining unit on June 22, 1988. We rely on the undisputed evidence that, prior to June 22, the press operators possessed the authority to assign work to employees in their crews and responsibly directed them in their work—indicia of supervisory status within the meaning of Section 2(11). We also rely on certain, undisputed secondary criteria which set the press operators apart from other unit employees and further indicated that they were statutory supervisors prior to June 22: their pay differential, eligibility for substantial bonuses based on waste-reduction efficiency, attendance at management meetings and training sessions, and access to supervisory offices. In view of the above, we find it unnecessary to pass on disputed fac-

¹ The Respondent's motion to strike the Union's brief in support of exceptions, alleging the brief's lack of compliance with the Board's Rules and Regulations, is denied. Although not conforming exactly to the requirements of Sec. 102.46, the brief is not so deficient as to warrant striking.

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

² The General Counsel 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,A, and sec. II,B(i) of his decision, the judge refers to "June 28, 1988" and "June 28, 1989," respectively, as the date the Respondent implemented its final bargaining offer. The correct date is June 22, 1988. These inadvertent errors do not affect the result in the case.

tual assertions concerning other Section 2(11) indicia with regard to the press operators.

2. We affirm the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) by the posting of its no-strike proposal as part of the bargaining proposals it was unilaterally implementing. In relevant part, this proposal stated that "The Union agrees that it will not authorize, condone, approve or participate in and no employee will encourage or participate in any strike, boycott, or sympathy strike against McClatchy Newspapers." Although it is undisputed that the Union never agreed to this proposal, and therefore any suggestion that the Union had waived Section 7 rights or that the proposal could be implemented was a misrepresentation, we do not find that the Respondent has thereby interfered with, restrained, or coerced employees in their exercise of the Section 7 right to strike. Because the proposal did not include any language suggesting that employees would be discharged or otherwise disciplined for striking, it did not contain any threat of reprisal or promise of benefit that would bring it within the scope of Section 8(a)(1).³ See *Adolph Coors Co.*, 235 NLRB 271, 276-277 (1978).

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER RAUDABAUGH, dissenting in part.

I dissent from my colleagues' conclusion that the Respondent acted lawfully when it posted its no-strike proposal as being in effect. My colleagues concede that the Respondent could not unilaterally place into effect a no-strike proposal. However, they conclude that the notice was lawful because it did not expressly threaten employees with reprisal if they struck.

I do not think that the reasoning will withstand analysis. If an employer posted a notice containing an overly broad prohibition on union solicitation activities, the notice would be unlawful, even in the absence of an express statement that breach of the notice would result in discipline. The notice interferes with and literally restrains Section 7 activity. Similarly, if an employer posts a notice saying that employees cannot ex-

³ Contrary to our dissenting colleague, we do not agree that the Employer's posting of its no-strike proposal is unlawful because of its chilling effect on the Sec. 7 right to strike. Unlike overly broad no-solicitation rules, to which the dissent erroneously draws an analogy, such proposals are not inherently unlawful. Indeed, no-strike agreements are frequently included in collective-bargaining agreements, thereby lawfully waiving the represented employees' right to engage in strike activity. At most, therefore, the Respondent in this case misrepresented that the Union had agreed to such a waiver. Where such attempted waivers are not inherently unlawful (compare *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974)), and where there is no indication that employees would be sanctioned for disregarding the asserted waiver, we find that the misstatement is not per se unlawful.

ercise their Section 7 right to strike, that notice should also be unlawful, even in the absence of a threat of discipline. The notice interferes with and literally restrains a Section 7 exercise.¹ Concededly, a lawyer would know that the posted no-strike proposal cannot legally be in effect. But, lay employees would reasonably understand that strikes are prohibited.

It is no answer to say, as does the judge, that the Union could respond by assuring employees that strikes are still permitted. Since the Respondent has direct control over the employment of the employees, it is likely that the employees would listen to the word of the Respondent rather than the assurance of the Union. In short, the notice has a chilling effect on the Section 7 right to strike.²

¹My colleagues fault my analogy to an overly broad no-solicitation rule by asserting that a no-strike clause is lawful if it is agreed to by the Union. However, the essential point in the instant case is that the no-strike clause was not agreed to by the Union.

²*Adolph Coors Co.*, 235 NLRB 271, 276-277 (1978), is distinguishable. In that case, the posted proposal did not deal with the exercise of a Sec. 7 right.

Boren Chertkov, Esq., with *Paula R. Katz, Esq.*, on brief, for the General Counsel.

Allen W. Teagle, Esq. and *Judy S. Coffin, Esq.* (*Littler, Mendelson, Fastiff & Tichy*), of San Francisco, California, for the Respondent.

David Grabhorn, of La Habra, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on March 13 through 16, 1990. On December 5, 1988, Graphics Communications Union District Council No. 2, Local 60C (the Union) filed the charge alleging that McClatchy Newspapers, Inc., Publisher of the Sacramento Bee (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On January 31 and May 31, 1989, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and amended complaint respectively, against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed timely answers to the complaints, denying all wrongdoing.

On July 22, 1990, counsel for the General Counsel filed a motion to reopen the record and to consolidate this case with an outstanding complaint in Case 20-CA-23343. While that motion was pending, on July 24, Respondent filed a Motion for Summary Judgment with the Board in Case 20-CA-23343. A decision in the instant case was stayed pending a Board ruling on the Motion for Summary Judgment. On August 21, 1990, the Board issued an order denying the Motion for Summary Judgment. Case 20-CA-23343 is now awaiting trial. On three occasions, the most recent of which was January 11, 1991, I denied motions by the General Counsel to reopen the record in the instant case and to consolidate this case with Case 20-CA-23343.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,¹ from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Sacramento, California, where it is engaged in the publication of a daily newspaper. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of \$200,000 while holding membership in or subscribing to various interstate news services, publishing variously syndicated features, and advertising nationally sold products. Annually, Respondent purchases and receives goods and products valued in excess of \$5000 directly from sellers or suppliers located outside the State of California. Accordingly, 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.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent publishes a daily newspaper in Sacramento, California. It has had a collective-bargaining relationship with the Union since at least 1914. The most recent collective-bargaining agreement was effective from January 1, 1984, until December 31, 1985, and "thereafter until a new Contract has been settled by negotiation or conciliation" (the 1984-1985 Agreement). The bargaining unit covered by the 1984-1985 Agreement is composed of Respondent's pressroom employees, including journeymen pressmen, flymen, and apprentices.

Between December 30, 1985, and June 21, 1988, the parties met in bargaining sessions in an unsuccessful attempt to negotiate a new contract. The parties did not reach agreement and the Respondent insisted to impasse on its last offer. On June 28, 1988, Respondent implemented its final offer.

Within this factual framework, the General Counsel alleges, in a narrowly drafted complaint, that Respondent unlawfully: (1) bargained to impasse on various contractual proposals that are inherently destructive of the bargaining unit; and (2) on or about June 22, 1988, implemented its last offer to the Union. The General Counsel argues that since Respondent insisted to impasse unlawfully, it follows that no legally cognizable impasse existed. The General Counsel argues that Respondent unlawfully implemented a merit pay proposal that precluded the Union from bargaining as to the timing and amount of merit pay increases. Finally, the Gen-

¹On July 5, 1990, counsel for the General Counsel filed a motion to correct transcript. As the motion is unopposed, I grant the motion and incorporate the corrections as ALJ Exh. 1.

eral Counsel argues that Respondent unilaterally removed 13 press operators from the bargaining unit.²

Respondent admits that it insisted to impasse on its final proposal and that it implemented that proposal after the impasse. Respondent contends that it could lawfully do so. Respondent admits that it removed the 13 press operators from the bargaining unit in accordance with its final proposal. However, Respondent contends that these press operators were supervisors within the meaning of Section 2(11) of the Act. Thus, Respondent argues that it could voluntarily include the press operators in the unit, as it had done in the past, but could not be compelled to include them in the unit.

B. The Impasse

By definition, an impasse occurs whenever negotiations reach “that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.” *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 fn.5 (1988). After an impasse has been reached on one or more subjects of bargaining, an employer may implement any of its preimpasse proposals. *Western Publishing Co.*, 269 NLRB 355 (1984). Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices. An employer may not “parlay an impasse” resulting from its own misconduct. *White Oak Coal Co.*, 295 NLRB 567 (1989); *Wayne’s Dairy*, 223 NLRB 260, 265 (1976). However, in *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), the existence of an impasse was held not to have been precluded by the employer’s “unvacated, unlawful unilateral changes” where “there was no causal connection between [those unremedied changes] and the subsequent deadlock in negotiations.”

In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court held that insistence to impasse is available to a party only with respect to a mandatory subject of bargaining. Insistence to impasse on a permissive subject of bargaining violates the statutory duty to bargain in good faith.

The parties agree that Respondent insisted to impasse on proposals involving the grievance and arbitration procedure, jurisdiction, merit pay, apprentices, the pressroom manager doing unit work, assignment of work, a no-strike clause, management rights, nondiscrimination, and removal of press operators from the bargaining unit. Each of these proposals will be discussed below.

1. The grievance and arbitration procedure

The 1984–1985 Agreement provided that “any employee who believes he has cause for grievance shall contact his pressroom manager along with or through his chapel chairman to discuss the grievance.” Respondent proposed to delete the words “along with or through his chapel chairman” from step 1 of the grievance procedure. Respondent further sought to amend the grievance procedure by deleting the requirement that Respondent maintain the status quo during the

²The complaint did not include allegations by the Union that Respondent engaged in table or surface bargaining, or that the parties had not reached an impasse in their bargaining. Because the complaint did not include these allegations made by the Union in the underlying charge, I did not permit litigation of these allegations at the hearing. I hereby reaffirm those rulings.

pendency of a grievance; reducing the time a written grievance must be filed from 30 days to 5 days; and reducing Respondent’s liability for a backpay award under the arbitration procedure. During negotiations Respondent changed the time period for filing a grievance to 15 days and increased the time period for a backpay award. The final offer which Respondent implemented on June 28, 1989, contained Respondent’s proposals as amended during the negotiations.

The parties agree that the grievance and arbitration clause is a mandatory subject of bargaining. See, e.g., *U.S. Gypsum Co.*, 94 NLRB 112 (1951); *United Electrical, Radio & Machine Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969), enfg. 164 NLRB 563 (1967). Realizing that nothing in Respondent’s proposals regarding the grievance and arbitration provision amounts to bad-faith bargaining or evidence of bad-faith bargaining, the General Counsel argues that in combination with other proposals, particularly the proposals regarding the press operators and merit pay, the Respondent’s proposals are “designed to frustrate agreement on a collective bargaining agreement.” Respondent, on the other hand, argues that it had a legitimate business reason for its grievance and arbitration proposals, as well as for its other contract proposals.

General Counsel argues that the restrictions imposed on the filing of grievances are more stringent than those contained in other collective-bargaining agreements between Respondent and other labor organizations. Assuming, arguendo, that the instant proposal is more restrictive than the grievance and arbitration clause in Respondent’s other agreements, it does not follow that the proposal was made in bad faith or that the employer could not insist on its proposal to impasse. The evidence reveals that Respondent was seeking to obtain an arbitration clause more to its liking and that the Union sought to retain the current provision. Both sides adhered to their positions.

2. The hiring hall provision

In the 1984–1985 Agreement the Union agreed to furnish “at all times . . . the number of competent journeymen web pressmen required by the Publisher.” The Union and the General Counsel contend that the above language made the Union the exclusive source of referrals for all journeymen pressmen to Respondent. Respondent, even during the term of the agreement, maintained the position that it had the right to hire pressmen from any source. Thus, Respondent proposed modifying the language of the contract to conform to its position. Under Respondent’s proposal the Union would furnish journeymen “if requested by” Respondent. Respondent’s final proposal read as follows:

Notwithstanding the Union’s obligation to furnish competent journeymen, [Respondent] may at its option hire any employee, deemed competent by [Respondent], from any source. Nothing in this contract shall be construed to prevent or limit the right of [Respondent] to hire employees from any source it chooses.

Both the General Counsel and Respondent agree that this is a mandatory subject of bargaining. See, e.g., *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5th Cir. 1965); *Pattern Makers (Michigan Pattern Mfrs.)*, 233 NLRB 430, 435–436 (1972),

enfd. in pertinent part 622 F.2d 267 (6th Cir. 1980). It follows that Respondent could insist to impasse on this provision. Again, the General Counsel argues that Respondent's position on merit pay and press operators shows an attempt to frustrate bargaining.

3. Merit pay proposal

The 1984–1985 Agreement provided for minimum wage scales for journeymen pressmen. It also set forth minimum scales for apprentices and flymen based on a percentage of the journeymen rate. There was also a past practice of paying certain premiums to the journeymen that served as foldermen, press operators, and reelmen.

Respondent proposed to initiate a merit pay plan. Respondent's initial proposal called for all employees, including apprentices and flymen, to be paid merit pay at Respondent's discretion, and provided that premiums for foldermen and reelmen be eliminated. Journeymen and flymen would be reviewed annually, and apprentices would be reviewed semi-annually. As explained in negotiations, this proposal deleted the wage scale for all employees, all guaranteed wage increases, and the contract provisions that apprentices and flymen receive a percentage of the journeymen rates. Fuller Cowell, Respondent's negotiator, assured the Union that no bargaining unit employee's pay would be reduced as a result of the imposition of Respondent's proposed merit pay plan. He explained that the plan would be similar to the merit pay plan in effect in nonunion departments and in other bargaining units. Cowell said that in his experience virtually every person in the bargaining unit would get an increase in pay under the proposed merit pay plan. The merit pay plan included an internal appeal procedure. The merit pay plan would not be subject to the grievance and arbitration clause of the contract. The Union objected to the merit pay plan on the ground that it took away the Union's right to bargain over wages.

During the negotiations, Respondent proposed a 2-percent raise, which later was increased to 3.5 percent, for the first year, to be followed in the second year by merit pay. Respondent's last offer proposed "the scale of wages for journeymen pressmen will be increased by 3.5%." Thereafter, a merit pay system would be in effect. The proposal posted and implemented by Respondent stated the employees would receive the wage scale, reflecting the 3.5-percent increase for the first year and after 1 year, the employees would receive merit increases, based on performance at Respondent's discretion.

4. Apprenticeship training

The 1984–1985 Agreement set up a joint apprentice committee to establish and recommend a plan of apprentice training for the approval of Respondent and the Union. It also provided that an apprentice who had completed a 4-year apprenticeship would receive a vacant journeyman position. Respondent proposed deleting the language which provided for the joint apprentice committee. Respondent proposed that it retain sole discretion to decide whether an apprentice should fill a journeyman vacancy.

According to Cowell, the committee had completed its work and had disbanded.³ More important, as a result of a grievance, an arbitration award issued which held that Respondent could not promote an apprentice before the completion of 4 years' training even if the apprentice had achieved the requisite skills. Thus, Respondent sought to eliminate the contract language which formed the basis for the arbitration decision.

There is no contention that the apprentice training system was not a mandatory subject of bargaining. See *Flambeau Plastics*, 167 NLRB 735 (1967), enfd. 401 F.2d 128 (1968), cert. denied 396 U.S. 1003 (1969).

5. Pressroom manager's right to do unit work

Under the 1984–1985 Agreement, the pressroom manager could only do bargaining unit work if he was a member of the Union. Respondent's proposal deleted that restriction and provided that "The publisher or his designated representatives may do unit work."

Cowell testified that the purpose of the proposal was to allow the pressroom manager to participate in training, emergencies, trouble shooting, and production situations. Cowell explained that because the pressroom managers are the most skilled and knowledgeable persons regarding the expensive presses, Respondent wanted them to be able to do unit work. The General Counsel concedes that this is a mandatory subject of bargaining. See, e.g., *Crown Coach Corp.*, 155 NLRB 625 (1965).

6. Assignment of work

Under the 1984–1985 Agreement, pressroom employees could only be assigned work "pertaining to the operation, usual maintenance, cleaning and upkeep of the presses in the building." Respondent proposed to change this section to read: "All employees of the pressroom shall perform any work assigned by the pressroom manager." Cowell testified that the purpose of this proposal was to give Respondent the flexibility to assign pressmen to do menial work on the presses, or to do different jobs on the presses. Respondent wanted to be able to require unit employees to do all press-related work, even if they had not normally performed that particular task in the past. This too is a mandatory subject of bargaining. *Storer Communications*, 295 NLRB 72 (1989); *Almeida Bus Lines*, 142 NLRB 445 (1963).

7. No-strike clause

The 1984–1985 Agreement provided that there would be no strikes, boycotts, sympathy strikes, or lockouts. Respondent proposed to extend the prohibition on strikes to include "its related enterprises in the circulation area of the Sacramento Bee." Cowell explained that the purpose of this proposal was to prevent the Union from engaging in any prohibited activities against any unorganized operation of Respondent in Sacramento, such as print shops, television or radio stations, or a cable network. Respondent had been subjected to a 9-1/2-year strike by a different union in which there was picketing against the Sacramento Bee and related entities. Al-

³The Union disputes Cowell's claim that the committee had been disbanded. Resolution of this factual dispute is not necessary for resolution of this case.

though the Union did not honor that strike, the 9-1/2-year strike was a reason for Respondent to propose strengthening its no-strike clause. The General Counsel concedes that this is a mandatory subject of bargaining. See *Indianapolis Power Co.*, 291 NLRB 1039 (1988); *Independent Slave Co.*, 175 NLRB 156 (1969).

8. Management rights

The 1984–1985 Agreement did not contain a management-rights clause. The final proposal implemented on June 22, 1988, contained a clause granting Respondent the “sole and exclusive right to exercise all the authority, rights and functions of management . . . except as the terms of this Agreement specifically limit said authority, rights, and powers.” Cowell explained that Respondent proposed the management-rights clause to protect itself from future arbitration awards further eroding management prerogatives. The General Counsel concedes that this is a mandatory subject of bargaining but takes the position that the substances of Respondent’s proposal evidences bad faith. See *Boaz Carpet Yarns*, 280 NLRB 40 (1986).

9. Nondiscrimination clause

The 1984–1985 Agreement contained a nondiscrimination clause affirming the parties’ intention “to adhere to and support a policy which affords equal opportunity to qualified individuals regardless of their race, creed, color, national origin or age (as established by law).” Respondent’s initial proposal deleted this provision entirely. Cowell explained that this clause was unnecessary and redundant because both the state and Federal laws prohibited this discrimination. In response to the Union’s objection to deletion of the clause, Respondent agreed to keep it in the contract but to exclude it from the grievance and arbitration clause. Respondent’s position was that the state and Federal agencies gave employees multiple avenues of relief with better remedies. Respondent did not want to provide arbitration as an additional forum. Again the General Counsel concedes that this is a mandatory subject of bargaining but contends that the substance of the proposal evidences bad faith. *Packing House Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), enfg. 169 NLRB 290 (1968).

10. Removal of press operators from the bargaining unit

There is no dispute that the press operators were covered by the 1984–1985 Agreement. Respondent’s first proposal did not propose to remove the press operators from the bargaining unit as supervisors. However, by September 17, 1986, Respondent’s written proposals excluded the press operators from the bargaining unit on the ground that they were statutory supervisors. Respondent’s final offer, implemented on June 22, 1988, contained that exclusion. The major thrust of General Counsel’s case is that the press operators were not statutory supervisors, and, thus, could not be excluded from the bargaining unit without the Union’s consent. The issue of supervisory status must be determined before the legality of bargaining can be examined.

C. The Supervisory Issue

1. The facts

Respondent publishes the Sacramento Bee 7 days a week. At the time it implemented its final offer, Respondent was operating three presses. Respondent now operates four presses. Each of the presses is three stories high, and pressmen work on each press at each level. On the lowest level is the reel room, where the “reel men” load paper into the press. After the paper is loaded into the press, it runs up through the press into the middle level, where the printing plates are located and where ink and color are added by the “color men.” The paper then goes through the press to the top level, where the “folder man” operates the folder, which folds and collates the paper.

The crew for each press also includes a press operator, who is responsible for coordinating the press crew on each of the three floors. The pressroom manager or his designee determines the size of the crew on each press, which varies from five to eight pressmen according to how many pages will be in the newspaper.

The pressroom manager is responsible for the entire pressroom operation, including the assignment of work. When the pressroom manager was absent, the name of his designated representative was posted. The assistant pressroom manager works Tuesday through Saturday nights. The assistant pressroom manager has the responsibility for the entire pressroom operation on the night shift. The assistant manager had a “floorwalker” or “floor supervisor” who acted for the assistant manager when the assistant manager was not present. The floorwalker did not operate a press; rather he coordinated production and ensured consistent quality among each of the presses. The floorwalker worked with the press operators to maintain consistency among the presses and to correct problems with the presses.

A press operator is responsible for running his press and crew. The press operators prepare for a press run and oversee the operation of their presses. A press operator’s job duties take him to each level of the press. The press operator assigns the pressmen to the various positions on the press at the beginning of each shift. Respondent contends that the press operators have complete discretion in assigning work to crewmembers. The evidence shows that traditionally the assignments were made by the press operators on the basis of seniority. The press operator oversees the work of the pressmen, corrects work, and trains employees. In training apprentices, the press operator would usually assign the apprentice to the journeyman pressman working the position for which training was required.

The press operator is responsible for the ink density readings and reports after each shift. The press operator usually delegates the filling out of the form to the employee working closest to the density meters. However, the press operator is held responsible for seeing that the appropriate level of ink is utilized and that the appropriate quality of newsprint is produced.

During the printing of the newspaper there are numerous occasions when the presses need to be stopped or slowed down. The press operators must decide whether to stop the press immediately, wait for a more convenient time, wait

until the press run is completed, or slow down the press in the meantime. The consequences of such a decision is that several other departments and employees are affected. The stopping of the press by the press operator can result in overtime for employees in the platemaking department and mail/distribution center as well as employees working on the presses. These decisions to stop the presses also affect the quality of the newspaper which ultimately reaches the public. If a press breaks down, the pressroom manager or his designated representative works with the press operators to determine how long the press will be down and whether or how the work would be reassigned. The General Counsel argues that this decision-making reflects only the routine exercise of work judgment by experienced senior journeymen "rather than the independent judgment required for a finding of supervisory status."

The press operators do not have the authority to hire or fire employees. Respondent's witnesses Cowell and Smith testified that the press operators had the authority to call in extra pressmen or replacements as needed. Both testified that the press operators usually consulted with the pressroom manager or assistant manager, but had the authority on their own to call for more staff from the chapel chairman. The evidence indicates that no press operator has exercised such authority.

Cowell testified that the press operators had the authority to issue written as well as oral discipline. Prior to June 22, the press operators would only inform a pressman that he was doing something improperly and instruct him how to do it properly. The press operators reported errors to management where they were recorded in a logbook. After June 22, the press operators were required to keep a factual record of performance errors. This policy was established in order to keep an accurate record for disciplinary purposes. If the performance problem is misplating, the press operator gives the employee a written warning after the second violation. Since June 22, the press operators have been required to give written commendations to employees who have performed well. Such written commendations are also given by supervisors in this and other departments.

The press operators fill out evaluation forms for each member of their crew. In making his annual reviews of employees, the pressroom manager consulted with the press operators and relied on their oral and written evaluations. It is not clear from the record what weight, if any, was given to the evaluation forms or the recommendations of the operators.⁴

The press operators have been referred to as the "man-in-charge." At times when the pressroom manager or assistant manager were absent, a press operator would substitute as the pressroom manager's representative. This would occur when the pressroom manager was on vacation and the assistant was filling in for him. In those weeks, a press operator would serve as the designated representative 2 nights a week. On those occasions, the designated press operator would not operate a press. It appears that only 2 of the 13 press operators substituted for the pressroom manager on a regular basis.

Prior to June 22, the press operators were paid 15 percent more than other pressmen. Since June 22, the press operators

have been placed on salary and are no longer paid overtime. Currently, the press operators are eligible to receive and have received substantial monthly bonuses based on efficiency and the elimination of waste. The press operators attend management meetings and dinners in which management policies are explained and discussed. The operators have also attended management training seminars not available to rank-and-file employees. Finally, the press operators have access to an office and computers. Rank-and-file employees do not enjoy these privileges.

2. Conclusions

The critical issue is whether the press operators were statutory supervisors. The evidence leads me to conclude that Respondent's position that the press operators were statutory supervisors was advanced in good faith and not for the purpose of undermining the Union's representative status. However, if the press operators were not statutory supervisors, a violation would be found even in the absence of bad faith. See *Salt River Valley Water Users' Assn.*, 204 NLRB 83 (1973), *enfd.* 498 F.2d 393 (9th Cir. 1974). An employer may not insist to impasse on the exclusion of employees from an existing bargaining unit. If Respondent was correct that the press operators were statutory supervisors, its refusal to include them in the unit would be justified.

In *Newspaper Printing Corp.*, 232 NLRB 291, 292 (1977), *enfd.* 625 F.2d 956 (10th Cir. 1980), *cert. denied* 450 U.S. 911 (1981), the Board found, *inter alia*, that an employer cannot lawfully insist to impasse on a modification of an existing bargaining unit description because the definition of an existing bargaining unit is not a mandatory subject of bargaining. The parties are free however to define their own lawful bargaining units by voluntary agreement. Thus, statutory supervisors may be included in a bargaining unit by mutual agreement. It should follow that once the contract expires, neither party is obligated to include the statutory supervisors in the succeeding agreement. Cf. *Salt River Valley Assn.*, *supra*, where a violation was found because the employees excluded from the unit by the employer were found not to be statutory supervisors. Presumably had the employer been correct that the excluded employees were supervisors, then no violation would have been found in the employer's refusal to include them in the bargaining unit. See also *Canteburg Gardens*, 238 NLRB 864 (1978), and *Newport News Shipbuilding*, 236 NLRB 1637 (1978).

The bargaining unit in this case predates the Act. The issue of whether the press operators were statutory supervisors is somewhat clouded by the long history of their inclusion in the unit and membership in the Union. Thus, the press operators relied heavily on union-administered seniority in making assignments and were reluctant to take adverse actions against fellow members and employees. The evidence establishes that Respondent did not increase the authority of its press operators after it removed them from the bargaining unit. However, after removing the press operators from the unit, Respondent required the more active and regular application of supervisory authority by the press operators.

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

⁴Neither the pressroom manager nor assistant manager testified in this proceeding.

reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of the powers enumerated in Section 2(11) is sufficient to establish supervisory status since the section is interpreted disjunctively. See, e.g., *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948); *Times Herald Printing Co.*, 252 NLRB 278 (1980). Based on all the facts concerning their employment, I find that the press operators are supervisors within the meaning of the Act.

The press operators assign work to the members of their crew. They have the authority to assign work based on their independent judgment. There are no directives to assign work based on seniority. The assignment of work results in premium pay for employees assigned to certain tasks. However, assignments have traditionally been made based on seniority. The press operators also assign apprentices to work and train with journeymen. These assignments must consider the abilities of the employees, job priorities, and Respondent's production and efficiency requirements.

The undisputed testimony establishes that the press operators responsibly direct the work of the bargaining unit employees on their crew. A press operator assigns, directs, instructs, and corrects employees as the individual in charge of a press and crew. I reject the General Counsel's argument that the press operators' assignment and direction of work are merely clerical and ministerial functions. The press operators must exercise independent judgment in supervising the operation of their presses by their crews. The press operators are charged with the responsibility of making decisions with respect to the operation of the press including the decision of whether to stop the press. Such decisions have significant consequences for the employer and its employees. The size of the operation and the cost of the equipment support the conclusion that the press operators are vested with significant responsibility. The press operators also fill out evaluation forms, issue warnings, and give commendations. The evidence establishes that both management and the bargaining unit employees reasonably regarded the press operators as supervisors and representatives of management.

The evidence of secondary criteria buttresses this conclusion. The press operators are paid more than rank-and-file employees. They are salaried and do not receive overtime. More important, they are eligible for substantial bonuses based on their effectiveness in operating efficiently and reducing waste. The press operators attend management meetings and training sessions. Press operators have access to supervisory offices and computers. While these secondary criteria do not establish supervisory status by themselves, I find that they lend support to the conclusion that the totality of circumstances requires a finding of supervisory status. *Times Herald Printing Co.*, 252 NLRB 278 (1980); *Typographical Union 101 (Washington Post)*, 207 NLRB 831 (1973); *Newark Newspaper Pressmen's Union 8 (Newark Star Ledger)*, 194 NLRB 566 (1971).

Analysis and Conclusions

The General Counsel and the Union contend that Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on bargaining proposals allegedly destructive of the Union's right to represent the employees. The General Counsel argues that Respondent implemented its last offer to the Union in the absence of a legally cognizable impasse. Further General Counsel asserts that even if the parties were at impasse, Respondent could not unilaterally implement its merit pay proposal.

Respondent argues that the parties lawfully reached impasse on mandatory subjects of bargaining and that it could, therefore, lawfully impose its last offer to the Union. Further, Respondent argues that the merit wage plan was a mandatory subject of bargaining and that it could lawfully insist on that plan to impasse. As to the implementation of the plan, Respondent argues that the record contains no evidence that it unilaterally granted merit pay. At implementation Respondent granted an across-the-board pay increase, the merit plan was not scheduled to go into effect until 1 year later. There was no evidence that the plan was implemented or how it was implemented. As earlier stated, I find that the press operators were supervisors and Respondent could lawfully refuse to include them in the bargaining agreement.

It is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement. *Rescar, Inc.*, 274 NLRB 1 (1985); *Reichhold Chemicals*, 277 NLRB 639 (1985) (*Reichhold I*); *Reichhold Chemicals*, 288 NLRB 69 (1988) (*Reichhold II*).

In *Reichhold II*, the Board stated it would not pass on the acceptability of each proposal made by the parties, but noted that insistence "on extreme proposals" could be part of the evidence considered in determining whether a demand was "designed to frustrate agreement on a collective bargaining contract." The Board held that "proposal content supports an inference of an intent to frustrate the agreement, where, the entire spectrum of proposals put forth by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible." *Id.* at 70. Recently, in *John Ascuaga's Nugget*, 298 NLRB 524 (1990), the Board found that the respondent hotel had engaged in bad-faith bargaining, with no real intent to reach agreement, based on a refusal to negotiate about work rules; an asserted inability to meet very regularly or for long periods of time; the repeated rejection of a hiring hall when the charging party-union was not even proposing one; an implication to the union that it wanted an election rather than continuing negotiating sessions; and its unilateral and peremptory scuttling of any further negotiations, all in conjunction with a refusal to even express a willingness to modify its total contract proposal and with an expressed determination that the union would have nothing to say about wage levels and seniority.

The first question presented is whether the bargaining proposals at issue were mandatory subjects of bargaining. General Counsel apparently concedes that all the bargaining proposals at issue are mandatory subjects of bargaining except the removal of the press operators from the bargaining unit. However, I have found no merit in this argument. The General Counsel contends that Respondent's merit pay proposal establishes bad faith and an intent not to reach agreement.

For the following reasons, I find no support for this argument.

In *McClatchy Newspapers*, 299 NLRB 1045 (1990) (the *Guild* case), the Respondent was found to have violated Section 8(a)(5) and (1) by unilaterally granting merit pay increases to bargaining unit employees without bargaining with the newspaper guild about the timing and amounts of the merit increases. In that case Respondent proposed that compensation be based solely on merit, including full employer discretion to establish starting salaries, not subject to bargaining or the grievance and arbitration procedure. The Guild rejected the Respondent's merit pay concept on the ground that it would undermine the Union's bargaining role as to wages. The Respondent later offered a revised merit pay proposal which set a minimum guaranteed starting salary. Respondent presented a "last, best, and final" offer containing the merit pay proposal as revised. After impasse, Respondent posted its merit pay plan along with other terms and conditions of employment contained in its final offer. Subsequently, Respondent granted merit pay increases to some unit employees without prior discussion with the Guild.

The Board found that the parties had reached impasse. It rejected the General Counsel's argument that the merit pay proposal constituted bad faith or evidence of bad faith. As the subject of merit pay was a mandatory subject of bargaining, the Board held that Respondent could lawfully insist to impasse on its merit pay proposal. However, the Board citing *Colorado-Ute Electric Assn.*,⁵ held that to the extent that implementation of a merit pay plan also involves discretion in determining the timing and the amounts of increases, it is a matter for consultation with the bargaining agent. The Board found that Respondent's merit pay proposal set no criteria for the amounts or timing of merit increases, and failed to provide for Guild participation either in the initial determination of merit increases granted to particular employees or afterwards through the grievance procedure. The Board held that Respondent "was in reality seeking the [Guild's] waiver of its statutory right to be consulted over those matters under Section 8(a)(5) and (1) of the Act." The Board found that the Guild had not waived such rights. Thus, the Board found Respondent had a lawful right after impasse unilaterally to consider employees for merit increases; however, it still had a duty to bargain with the Guild about the timing and amounts of the merit increases prior to granting any such increases.

In the instant case, as in the *Guild* case, Respondent lawfully insisted to impasse on its merit pay plan. I cannot find evidence of bad faith from the proposal or from Respondent's insistence to impasse. Under the proposal that was implemented on June 22, 1988, the employees received a wage increase consistent with that offered to the Union and on which impasse was reached. The merit increases were not to be placed into effect until 1 year later. There is no evidence in this record regarding what actually took place in June 1989.⁶ There is no evidence showing that Respondent granted merit pay increases without prior consultation with the Union. Thus, there is no factual basis for a finding of a violation under the *Guild* or *Colorado-Ute* cases.

⁵ 295 NLRB 607 (1989).

⁶ The General Counsel has not explained his failure to offer evidence on this critical point.

Next, I find the contents of Respondent's other proposals do not establish that Respondent was intent on frustrating agreement on a new collective-bargaining agreement. I have examined the proposals at issue and find no objective factors which show that Respondent engaged in bad-faith bargaining or had an unlawful intent. Respondent's proposals concerned mandatory subjects of bargaining and Respondent offered a reasonable purpose for each proposal. There was no showing that any of the proposals were "extreme." Whether the Union or the General Counsel agreed with Respondent's reasoning is beside the point. Nothing in the record suggests that Respondent's reasoning is any less valid than the Union's. I do not see why Respondent should be found to have advanced its proposals in bad faith. Both Respondent and the Union were engaged in hard bargaining.⁷ Neither side made substantial movement on its proposals. While it could be argued that Respondent's proposals were predictably unacceptable to the Union, it could just as easily be argued that the Union's proposals were predictably unacceptable to Respondent. I find there is insufficient evidence to establish that either side was engaged in bad-faith bargaining. I reject the argument that Respondent's failure to make concessions in this agreement, which it had made in previous agreements, is evidence of bad faith. Obviously, both sides are free to try and bargain for more advantageous terms. Neither side is obligated to continue to make concessions. I, therefore, recommend dismissal of the refusal-to-bargain allegation of the complaint.

At the trial, I dismissed an allegation of the complaint which alleged that Respondent violated Section 8(a)(1) of the Act by not notifying employees that the no-strike clause in its implemented final offer was ineffective without the Union's agreement. In his brief, General Counsel asks that this complaint allegation be reinstated and that a violation of Section 8(a)(1) be found. For the following reasons, I reaffirm by earlier dismissal of this allegation.

Absent a waiver by the Union, the bargaining unit employees retain the right to strike. See, e.g., *Indianapolis Power Co.*, 291 NLRB 1039 (1988). Obviously, Respondent could not unilaterally implement the no-strike clause of its final proposal. See, e.g., *Calmat Co.*, 283 NLRB 1103 (1987); *Arizona Portland Cement Co.*, 281 NLRB 304 (1986). The General Counsel apparently contends that Respondent was required to notify the employees of their right to strike. Neither at trial nor in his brief could the General Counsel cite any authority for this proposition. I note that nothing prevented the Union from notifying the employees of their right to strike or from engaging in a strike. I believe it would not further the purposes of the Act to require an employer that is posting conditions after an impasse to notify employees of their right to strike. An employer should not bargain directly with its employees but rather should deal through the exclusive bargaining representative. The requirement of a notice of the right to strike would tend to aggravate rather than improve the relationship between the parties. It would seem more prudent to leave the discussion of a strike to the exclusive bargaining representative of the employees.

⁷ The General Counsel did not allege that Respondent engaged in surface bargaining.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The complaint is dismissed in its entirety.

⁸If 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.