

The Detroit News, Inc. and Local 22, the Newspaper Guild of Detroit, the Newspaper Guild, AFL-CIO-CLC. Case 7-CA-36657

October 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND TRUESDALE

On July 14, 1995, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed an exception and a supporting brief.

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 exception and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, the Detroit News, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

“(b) Rescind the policy on ‘on site’ television broadcasts and return to the status quo ante with respect to the unit employees’ terms and conditions of employment.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

¹The General Counsel has excepted solely to the judge's failure to order a status quo ante remedy. Pursuant to the Board's established policy, in cases such as this involving a violation of Sec. 8(a)(5) based on an employer's unilateral alteration of terms and conditions of employment, it is customary to order restoration of the status quo ante to the extent feasible. See *Allied Products*, 218 NLRB 1246, 1246 (1975). Accordingly, we find merit in the General Counsel's exception and shall modify the judge's Order and substitute a new Order accordingly.

319 NLRB No. 40

WE WILL NOT fail or refuse to bargain in good faith with Local 22, the Newspaper Guild of Detroit, the Newspaper Guild, AFL-CIO-CLC as the exclusive collective-bargaining representative of employees in the following unit, about members of that unit performing onsite television work.

All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and employees of Detroit News Washington, D.C. Bureau, and employees of other departments.

WE WILL NOT unilaterally change the terms and conditions of our employees by assigning members of the editorial bargaining unit to onsite television work prior to reaching agreement or impasse with the Guild.

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

WE WILL bargain collectively, on request, with the Guild as the exclusive representative of the employees in the editorial bargaining unit concerning the assignment of employees to onsite television work and embody any understanding reached in a signed agreement.

WE WILL rescind the policy on onsite television broadcasts and return status quo ante with respect to the unit employees' terms and conditions of employment.

THE DETROIT NEWS, INC.

Tinamarie Pappas, Esq., for the General Counsel.
John Jaske, Esq. and *John A. Taylor, Esq.*, of Detroit, Michigan, for the Respondent.
Donald Kummer, of Detroit, Michigan, for the Charging Party.

DECISION

I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, the Detroit News (the News), is a newspaper. Its reporters and other members of its editorial staff are represented by the Charging Party, Local 22, the Newspaper Guild of Detroit, the Newspaper Guild, AFL-CIO-CLC (the Guild).¹ At issue is whether the News, in its dealings with the Guild and the members of the News' editorial bargaining unit in the autumn of 1994 violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). (All events to which I refer in this decision occurred in 1994 unless otherwise noted.)

In late September the News entered into an arrangement with a Detroit television station, Channel 50. Under this ar-

¹The News admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the National Labor Relations Act and that the Guild is a labor organization within the meaning of Sec. 2(5) of the Act.

rangement Channel 50 would install a television camera “on-site” in the News’ newsroom. Channel 50 would then from time to time incorporate into its coverage of news stories presentations, from the News’ newsroom, by the News’ journalists who had been handling those stories for the News.

The News announced this arrangement publicly on October 2 and, a short time later, asked interested members of its staff to volunteer for a short training course “to provide some on-camera skills.”

The News did not notify the Guild about this arrangement. As the News’ management saw things, the management-rights clause of its collective-bargaining agreement with the Guild gave management the right to assign employees to the kind of television work called for by the News-Channel 50 arrangement and, in any event, the television work was to be voluntary.

The Guild, however, asked to bargain about this onsite television work. The News agreed to meet with the Guild, and the News and the Guild held three bargaining sessions. The News ended the bargaining without any agreement having been reached. The Guild responded by asking its members not to appear before the onsite camera. The News followed by advising its staff that “we will assign staffers to present their work on TV50” and by, thereafter, ordering several reporters to appear on camera.

My conclusion is that the News violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Guild and by implementing new terms of employment without having reached either agreement or impasse with the Guild.

II. WAS THE NEWS OBLIGATED TO BARGAIN WITH THE GUILD ABOUT THE ON-CAMERA WORK

When a union represents an employer’s employees, the employer may not materially alter employees’ duties prior to reaching agreement or impasse with the union unless the union has waived this bargaining obligation. E.g., *Christopher Street Owners Corp.*, 294 NLRB 277 (1989); *Bundy Corp.*, 292 NLRB 671, 678 (1989).

The News’ editorial bargaining unit includes numerous classifications ranging from reporters, nonsupervisory editors, and photographers to messengers and clerks.² But the record shows that the News’ management expects most of the on-site, on-camera, work to be handled by reporters. And it is to the nature of the reporters’ work that I now turn.

The collective-bargaining agreement between the News and the Guild does not spell out reporters’ duties. Past practice accordingly governs. See, e.g., *Ironton Publications*, 313 NLRB 1208, 1211 (1994). And as a matter of past practice, with limited exception all of the reporters’ output for the News has been the written word as displayed in a newspaper.

That limited exception, as testified to by the News’ chief executive is that—

Reporters have been participating in an audio text service that the News and Ameritech have, wherein we

record for a telephone dial up customer movie reviews, sports scores or an account of the game, or a summary of a reporter’s commentary, and so on. Reporters are now helping the News develop on on-line project in which they are translating the information that’s gathered into . . . information that can go . . . on the internet.

As the record contains no further explication of the reporters’ role for the audio text service, it is unclear whether, even there, the reporters provide anything beyond written materials.

It is true that a number of the News’ reporters have appeared on television. That has occurred in two ways. In one, the reporter, on his or her own, has entered into an arrangement with a television station. In the other, a television station has contacted the News’ “speakers bureau,” which then referred the television station to one of the News’ reporters. In either case, however: (1) the reporter was under no obligation to the News to perform the television work; (2) the reporter’s television appearance did not amount to employment by the News; and (3) the reporter received a fee from the television station. (On several occasions at least 8 years ago, the News’ management asked a reporter to appear on radio shows. The reporter agreed, even though he was not compensated for these appearances either by the News—beyond the reporter’s usual remuneration—or by the radio stations. There is no indication that the News required the reporter to perform this work and, as just indicated, the radio appearances in question took place years ago.)

Given the complete absence in the past of the News employing its reporters to appear on television, it seems evident to me that the onsite on-camera work constitutes a material addition to the reporters’ duties. If the reporters’ work in connection with the Channel 50 arrangement was merely to write copy for someone else to use on camera, one might argue that the change was not a significant one. But that is not the case. And appearing on camera is wholly unlike anything previously called for in the reporters’ work for the News.

There remains the fact that on-camera appearances are unlikely to amount to more than 10 or 15 minutes a month for any one reporter—a tiny fraction of a reporter’s work, even adding to that time the work preparing for the on-camera appearances. But it is “the nature of the unilateral change, and not the frequency of its performance, [that] triggers the bargaining obligation.” *Christopher Street Owners Corp.*, supra.

I conclude that, absent waiver by the Guild, the News was obligated to bargain with the Guild about the on-camera work that resulted from the News’ arrangement with Channel 50.

III. THE COLLECTIVE-BARGAINING AGREEMENT

The management-rights clause of the collective-bargaining agreement, article XIII, reads—

The Employer reserves the right to manage the business in all its phases and details, including but not limited to the right to assign work in accord with its requirements, to establish work schedules, to transfer employees and to take such other legitimate business actions, not limited by the Agreement, as it may deem nec-

²The bargaining unit is:

All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and employees of Detroit News Washington, D.C. Bureau, and employees of other departments.

essary to improve efficiency or the quality of the editorial product.

The News' contention is that the assignment of employees to onsite on-camera work is covered by this provision.

I will assume that the provision gives the News' management wide-ranging authority to assign members of the bargaining unit to any bargaining unit task ordinarily associated with newspaper work. But there is no evidence that, during contract negotiations, the News and the Guild ever discussed the application of the management-rights clause to the assignment of employees to television work—to on-camera appearances. In fact, given that the News' first direct connection with on-camera work resulted from its arrangement with Channel 50 in the fall of 1994, it is plain that neither the News nor the Guild could have given any thought to the application of the collective-bargaining agreement to such work when they entered into the agreement a year earlier, in October 1993.

I conclude, therefore, that the management-rights clause does not constitute an express, clear, unequivocal, and unmistakable waiver by the Guild of its statutory right to bargain about the News' assignment of editorial unit employees to on-camera work. That being the case, the clause does not permit management, acting unilaterally, to assign such employees to such work. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *St. Luke Lutheran Home for the Aging*, 317 NLRB 575 (1995); *Hi-Tech Corp.*, 309 NLRB 3, 4 (1992).

On brief, the News refers to article XV of the collective-bargaining agreement, which reads:

Should the employer create a new classification or alter an existing classification to the extent that materially greater skills and responsibilities are required, the Employer will meet with the Guild to negotiate the appropriate minimum in relation to other classifications. If the agreement on an appropriate minimum cannot be reached, the Guild can submit the dispute to final and binding arbitration under Article IX. The new minimum shall be effective upon the date the job was created or changed.

One could read this provision as applicable to members of the unit who perform onsite, on-camera, work. But neither the News nor the Guild nor the General Counsel contends that article XV applies. And, certainly, the News did not "meet with the Guild to negotiate the appropriate minimum." In any event, nothing in the record suggests that article XV was intended to cover television appearances.

IV. THE NEWS' FAILURE TO BARGAIN IN GOOD FAITH ABOUT APPEARANCE FEES

On October 21 the Guild's administrative officer, Donald Kummer, asked the News' director of labor relations, John Taylor, to bargain about the proposed onsite, on-camera work. Taylor agreed, even though, as far as the News was concerned, the News had no duty to bargain about that work since (as discussed earlier) the collective-bargaining agreement's management-rights clause gave management the right to assign employees to the on-camera work. The News nonetheless was willing to meet with the Guild on this matter be-

cause management preferred to operate in this matter with the Guild's and the employees' cooperation.

Bargaining began on November 4. A second meeting was held on November 10. The third and last meeting on the subject was held on November 29. Bargaining ended when, at the November 29 meeting, the News' representatives voiced the view that the most recent of the Guild's proposals were regressive in that they were pulling the parties apart rather than drawing them closer and that, accordingly, the News was going to move under the contract's management-rights clause to make assignments for on-camera work.

There is no doubt that during the period November 4 through 29 management listened to the Guild's proposals and, in some respects, tried to tailor a response that met the Guild's concerns. But that was not true in one respect. From the outset the Guild proposed that employees be paid an appearance fee for appearing on camera. At no time was the News willing to consider the possibility of such fees. The News' representatives went into the bargaining certain that they were under no duty to bargain with the Guild on the subject of the on-camera work and equally certain that employees who were assigned to such work would receive no fees for the work (apart from possible overtime pay that would result from the normal workings of the collective-bargaining agreement). And at each of the three meetings Taylor (for the News) responded to discussions by the Guild of appearance fees by saying that no fees would be paid for the on-camera work, or by saying that management was "not interested in any type of fee arrangement," and the like. As Taylor testified, the News "maintained" that position "from the get go" (Tr. 175).

Under Section 8(d) of the Act the News was entitled to enter negotiations' planning not to agree to appearance fees and with the point of view that such fees were not warranted. And the Act does not require the News to have backed down from that position. On the other hand, the Act requires each party to collective bargaining to participate in the bargaining with an open mind and a desire to reach agreement. E.g., *Borden, Inc. v. NLRB*, 19 F.3d 502, 512 (10th Cir. 1994). The News' management maintained no such open mind about the Guild's proposal that employees be paid appearance fees. To the contrary, management was entirely closed to the possibility of any sort of fee, in any amount. Indeed, given the News' position from the outset that the News had no duty to bargain with the Guild about the assignment of employees to the onsite television work, coupled with its view that appearance fees were not warranted, it would have been surprising had the News' management been able to maintain the requisite open mind. See *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (1st Cir. 1953).

I conclude that the News failed to bargain in good faith about appearance fees and that the News thereby violated Section 8(a)(5) of the Act.

The General Counsel contends that the News failed to bargain in good faith in other respects as well—for example, by allegedly failing to submit meaningful proposals. But given my conclusion about the News' lack of good faith in bargaining about appearance fees, no purpose would be served by discussing such matters.

V. IMPASSE

The News contends that as of the end of the third bargaining session it and the Guild had reached impasse and that the News was accordingly entitled to implement the last proposal.

But I have found that the News failed to bargain in good faith. And “an impasse may be arrived at only when the parties have reached their disagreement after bargaining in good faith.” *Northampton Nursing Home*, 317 NLRB 600 (1995).

Even ignoring the News’ lack of good-faith bargaining, moreover, the News failed to show that there was any impasse. See generally *Taft Broadcasting Co.*, 163 NLRB 475 (1967), *enfd. sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The parties had held only three bargaining sessions. The Guild had not said that it was absolutely wedded to any of its own proposals and at the last bargaining session Kummer, for the Guild, said, “I think there’s room for movement.” At that bargaining session the News neither asked the Guild to modify its position (apart from asking whether the Guild had “any further proposals to present”) nor advised the Guild that the News’ representatives considered the situation to be one of impasse. Instead, a negotiator for the News announced that “it didn’t appear that we were going to [reach agreement] and that, therefore, we were prepared and [were] going to move, under the management rights clause, to make assignments.”

It is true that at the last bargaining session the Guild proposed contract terms that increased the distance between the positions of the Guild and of the News. Additionally, some mixup in communication in the course of the session led the News’ representatives to conclude that the Guild was asking for even larger appearance fees than previously proposed by the Guild even though the Guild intended to propose reduced fees. But again, this was only the third bargaining session. The situation at the meeting called for something approximating point-by-point negotiations, but the News’ termination of bargaining precluded that. The News, that is to say, failed “to exhaust ‘all reasonable expectations of compromise.’” *Bottom Line Enterprises*, 302 NLRB 373, 379 (1971), quoting *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989). Accord: *Quik Park Garage Corp.*, 315 NLRB 111, 112 (1994).

It is also true that the News had made it clear to the Guild that the newspaper was in a hurry to implement the onsite television plan and that the third bargaining session was delayed by a week or two because two Guild officials were unavailable (unavoidably so). But it was the News, not the Guild, that delayed the start of bargaining. In any case, absent something akin to a business emergency, the desire on the part of an employer to implement a change does not excuse an aborting of the bargaining process. See *Herman Bros.*, 307 NLRB 724 (1992); *E. I. du Pont & Co.*, 303 NLRB 631 (1991); *Maietta Contracting*, 265 NLRB 1279, 1285-1286 (1982), *enfd. mem.* 729 F.2d 1448 (3d Cir. 1984).

VI. THE DIFFERENCE BETWEEN THE NEWS’ FINAL PROPOSAL AND THE ONSITE ARRANGEMENT AS IMPLEMENTED

According to the News’ final proposal to the Guild, “the decision [by bargaining unit members] to appear on-camera

is voluntary” and there would be “no retaliation against any employee who declines.”

As touched on earlier, when the bargaining ended without agreement, the Guild urged its members to “just say no to Channel 50.” The News responded by telling the bargaining unit members that “we will assign staffers to present their work on TV50” and, thereafter, by ordering individual reporters to do so. The News thereby violated the Act since, “assuming arguendo the existence of an impasse, it is well established that an employer can only make unilateral changes in working conditions consistent with its rejected offer to a union.” *Caravelle Boat Co.*, 227 NLRB 1355, 1358 (1977); see also, e.g., *Quik Park Garage*, *supra*.

The News argues that the onsite television work was voluntary since it assigned to the on-camera work only employees who had volunteered for the on-camera training session (in October). But that is an altogether frivolous contention. When the News announced the training session, it did not advise that employees who signed up for the training were thereby agreeing to make on-camera presentations. And the News at no time during bargaining said anything like that to the Guild.

As a last matter, the News’ final proposal included declarations that employees who performed on-camera work on an overtime basis would receive a minimum of 1 hour’s overtime pay and that the News would not jeopardize employees’ arrangements with other radio or television stations. The General Counsel argues that when the News began assigning on-camera work to bargaining unit members, it failed to tell the employees about these terms and, for that reason too, the News violated the Act. But there has been no showing that employees performed any on-camera work on overtime, or, if they did, that they did not receive at least an hour’s overtime pay. Nor has there been any showing that the News (or Channel 50) in any way interfered with any employee’s arrangements with any other television or radio station.

VII. REMEDY

The recommended Order requires the News to cease and desist from its unlawful acts, to bargain in good faith with the Guild concerning the onsite on-camera work, and to post a notice advising its employees of the Board’s Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, the Detroit News, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Local 22, the Newspaper Guild of Detroit, the Newspaper Guild, AFL-CIO-CLC about members of the News’ editorial bargaining unit performing onsite television work.

(b) Unilaterally changing the terms and conditions of its employees by assigning members of the editorial bargaining

³If 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.

unit to onsite television work prior to reaching agreement or impasse with the Guild.

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

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

(a) Bargain collectively, on request, with the Guild as the exclusive representative of the employees in the following appropriate unit concerning the assignment of employees to onsite television work and embody any understanding reached in a signed agreement. The appropriate unit is:

All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and employees of Detroit News Washington, D.C. Bureau, and employees of other departments.

(b) Post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by a representative of the News, shall be posted by the News immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to Editorial Department employees are customarily posted. Reasonable steps shall be taken by the News to ensure that the 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 the Respondent has taken to comply.

⁴If 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."