

**The Knoxville News Sentinel Company and Knoxville Newspaper Guild Local 76, AFL-CIO.** Case 10-CA-29069

February 23, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
HURTGEN AND BRAME

The issue in this case<sup>1</sup> is whether the judge erred in recommending dismissal of the complaint alleging that the Respondent unilaterally altered the scope of the bargaining unit in violation of Section 8(a)(5) of the Act.

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,<sup>2</sup> and conclusions and to adopt the recommended Order.

ORDER

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

*Jeffrey D. Williams, Esq.*, for the General Counsel.

*John H. M. Fenix, Esq. (Baker & Hosteltler)*, of Cleveland, Ohio, for the Respondent.

*Kevin Fox, Esq.*, of Knoxville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an unfair labor practice case prosecuted by the National Labor Relations Board's (the Board) General Counsel acting through the Regional Director for Region 10 of the Board following an investigation by Region 10's staff. The Regional Director for Region 10 issued a complaint and notice of hearing (complaint) on March 25, 1996, against the Knoxville News-Sentinel Company (the Company) based on a unfair labor practice charge filed on February 12, 1996, by Knoxville Newspaper Guild, Local No. 76, AFL-CIO, CLC (the Union). I heard the case in trial in Knoxville, Tennessee, on June 5, 1996.

Specifically, the complaint, as amended at trial, alleges the Company, on or about October 4, 1995, unilaterally altered the scope of the bargaining unit without the Union's consent by removing the special publications work and the unit employees who performed such work from the unit in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

<sup>1</sup> On August 29, 1996, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel and the Charging Party Union filed exceptions and supporting briefs. The Respondent filed an answering brief. The Charging Party filed a reply brief.

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

<sup>2</sup> The General Counsel and the Charging Party have 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 its answer, as amended, to the complaint, the Company admits the Board's jurisdiction is properly invoked,<sup>1</sup> and that the Union is a labor organization.<sup>2</sup>

The Company denies violating the Act in any manner set forth in the complaint. The Company asserts the Union "consented" to and/or alternatively "acquiesced in" the alleged removal of the work and employees from the bargaining unit. Further, the Company, as an affirmative defense, asserts the Union has "waived" its right to bargain over the "special publications" employees and the work at issue herein. The Company at trial moved that the matter should be deferred to arbitration.<sup>3</sup>

I have studied the whole record,<sup>4</sup> the parties' briefs, and the authorities they rely on. Based on more detailed findings and analysis below, I conclude and find the Company has not violated the Act in any manner alleged in the complaint. I shall therefore recommend that the complaint be dismissed in its entirety.

I. FINDINGS OF FACT

In attempting to establish or defend against the allegations set forth in the complaint, the parties presented 15 joint exhibits, with Joint Exhibit 15 consisting of 26 numbered factual stipulations. In addition thereto, counsel for the General Counsel (the Government) called one witness, Roland Julian, president of the Union (Union President Julian).

The Company publishes a daily and Sunday newspaper under the name The News Sentinel in Knoxville, Tennessee, with distribution in, among other locations, upper east Tennessee. The Company and Union have been parties to a number of successive collective-bargaining agreements for many years.<sup>5</sup> The collective-bargaining agreement in effect during material times expired on January 9, 1995.<sup>6</sup> On January 31, 1996, the parties agreed on a collective-bargaining agreement effective by its terms from February 5, 1996, to February 4, 1998.

The Union is the collective-bargaining representative of all employees in certain job classifications in the editorial depart-

<sup>1</sup> The Company admits, and I find, it is a Tennessee corporation with an office and place of business in Knoxville, Tennessee, where it is engaged in the business of publishing news publications. The Company further admits that during the 12 months prior to the issuance of the complaint herein, a representative period, it derived gross revenues from its business operations in excess of \$200,000 and during the same period published a newspaper which carried advertisements of nationally sold products. It is alleged in the complaint, the parties admit, the evidence establishes, and I find, that at all times material, the Company is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

<sup>2</sup> It is alleged in the complaint, the parties admit, the evidence establishes, and I find, the Union is, and has been at all times material, a labor organization within the meaning of Sec. 2(5) of the Act.

<sup>3</sup> I denied the Company's motion, without prejudice, to renew same in its posttrial brief. The Company did not renew its motion.

<sup>4</sup> On August 8, 1996, the Union filed a motion to supplement the record in which it asked that Arbitrator James Giblin's award of July 12, 1996, in a related matter (the arbitrability issue) be made part of the record herein. On August 15, 1996, the Company filed an opposition to the motion. I grant the motion and Arbitrator Giblin's award is made ALJ Exh. 1 hereto.

<sup>5</sup> Union President Julian testified he has been involved in various contract negotiations with the Company for the past 30 years.

<sup>6</sup> The terms and conditions of the expired collective-bargaining agreement remained in effect during negotiations for the parties' most recent collective-bargaining agreement.

ment. The recognition clause of the applicable collective-bargaining agreement is as follows:

The Company recognizes The Guild as the exclusive bargaining representative for all non-supervisory employees in the Editorial Department (except the Editor's secretary, editorial writers, and Nashville correspondent) in the following job classifications: journalists, editorial assistants, sports editorial assistant.

"Journalists" are defined in the applicable collective-bargaining agreement as:

Any employee who contributes to the editorial content of the newspaper either by writing or editing copy including employees classified as reporters, copy editors, artists, photographers, and librarians.

Prior to August 1992, the Company published special sections in the advertising and marketing department and published special projects in the editorial department.<sup>7</sup> Around October 1992, special publications was established as a department in the editorial department, and the employees working on special publications were bargaining unit employees covered by the collective-bargaining agreement. At that time, all the special sections produced in the advertising and marketing department were transferred to special publications together with certain of the special projects being produced in the editorial department.

On September 28, 1995, the Union filed a grievance protesting an issue concerning pagination.<sup>8</sup> In the grievance, filed by Union President Julian and addressed to Company Managing Editor Vince Vawter (Managing Editor Vawter), the Union contended:

[S]ome paginators are encouraged by supervisors to adjust ad space when sizes of ads have been miscalculated or changed by advertising department layout personnel . . . . We believe this does not follow contract language specifically the description of a journalist . . . .

It is the [Union's] contention that ads or the space designated for ads are not editorial content. The [Union] also contends that handling of advertising material by bargaining-unit employees has not been past practice.

A grievance meeting concerning the Union's September 28, 1995, pagination grievance was conducted on October 4, 1995. After the Union presented the grievance, Company Director of Human Resources Bill Redding (Director of Human Resources Redding) stated the Company agreed with the Union's position and the Company called a caucus. After the caucus, Director of Human Resources Redding presented the Union with a letter dated October 4, 1995, which letter follows:

Roland Julian  
President Knoxville Newspaper Guild  
Knoxville, Tennessee

Dear Mr. Julian

<sup>7</sup> While special sections were being produced in the advertising and marketing department prior to August 1992, the Union did not challenge the performance of that work outside of the bargaining unit.

<sup>8</sup> Union President Julian described "pagination" as:

It's an electronically means of designing newspaper pages, and actually applying the content that stores the pictures, and so forth by computer, and sending it directly to what they call plate making now.

Re: Guild's grievance G 95-2

We agree that the handling of advertising material has never been bargaining unit work. The grievance is therefore allowed.

Consistent with our understanding that the handling of advertising material has never been bargaining unit work, the Company will, effective immediately reassign Special Publications as a department reporting to the General Manager.

The Company is willing is discuss the effects of this decision on the three affected bargaining unit employees.

Sincerely,

/s/ Bill Redding

Bill Redding

Human Resources Director  
Knoxville News Sentinel Company

cc: Bruce Hartmann  
Harry Moskos  
Vince Vawter

Director of Human Resources Redding told the Union to let the Company know if they wanted to bargain over the effects that the change was being done right then. Union President Julian asked Redding, "Are you saying that these people will be handling no editorial-type material and would be working with advertising material only?" Redding responded, "Yes," and added, "If you want to bargain over it, holler at us."<sup>9</sup> The Company identified the unit employees (by name) working special publications at the time and stated it intended to assign them to Company General Manager Hartmann in a nonunion department.

At the October 4, 1995 grievance meeting, the Union said nothing by way of agreement or disagreement with the Company's announced action and did not communicate with the Company in any manner regarding special publications until November 16, 1995.

The Union never at any time demanded bargaining.

Shortly after (approximately 2 hours) the October 4, 1995 grievance meeting ended, Director of Human Resources Redding met with the three special publications employees and informed them they were no longer part of the bargaining unit. The Union was not told the Company would be meeting with the three employees in question, nor was the Union asked to participate in the meeting. The three employees,<sup>10</sup> as well as the work of special publications, were transferred out of the bargaining unit as of October 4, 1995.

On November 16, 1995, Union President Julian met with Managing Editor Vawter and informed him the Union did not agree with the Company's unilateral removal of the three employees and special publications from the unit, and was considering challenging it.

<sup>9</sup> At trial, Union President Julian testified he understood the "it" of the Company's offer to bargain to mean bargaining the "effects" of the Company's actions not the decision. During cross-examination by Company counsel, Union President Julian acknowledged that according to his own notes Director of Human Resources Redding's statement, "If you want to bargain over it, holler at us" was made in response to a question by Julian that referred to "work" and not effects.

<sup>10</sup> The three were Patricia Williams, an editorial assistant and part-time librarian; Sally Govan, an artist; and Kevin Cowan, a copy editor and paginator.

On November 17, 1995, the Union filed a grievance regarding the unilateral removal of bargaining unit work and employees from the bargaining unit. The Union's grievance, in pertinent part, as set forth in its November 17, 1995 letter to Managing Editor Vawter follows:

Mr. Vince Vawter  
Managing Editor  
The Knoxville News-Sentinel Co.  
208 Church Ave.  
Knoxville, Tenn. 37901

Dear Mr. Vawter:

The News-Sentinel's letter of 10-4-95 agrees with our position that paginators are not to adjust ad space when the sizes of ads have been miscalculated or changed by advertising department layout personnel. However, your compliance with the contract does not allow you to remove journalists as defined in the contract from the bargaining unit.

.....  
In our conversation of Nov. 16, 1995, we discussed this issue. You suggested that because of potential problems similar to this possibly cropping up in newspapers across the country, that we go ahead and obtain a ruling from an impartial party, I agreed with you on that point.

If you would like to set up a meeting to discuss this, we are willing to meet at your convenience.

Sincerely yours

/s/ Roland Julian  
Roland Julian  
Knoxville Newspaper Guild  
President

Union President Julian stated at trial he waited until November 16, 1995, to meet with Managing Editor Vawter regarding the removal of special publications from the unit because the Company's action on October 4, caught him by surprise and:

at that point, I didn't want to make a statement because I didn't know what I might say, and it could be the wrong thing. I felt also that I needed to contact The Newspaper Guild which is our international in Washington to get recommendations, and also legal counsel.

On November 22, 1995, Managing Editor Vawter responded to Union President Julian's November 17, 1995 letter. Vawter's letter follows:

Mr. Roland Julian  
President  
Knoxville Newspaper Guild

Dear Roland:

It appears from your November 17 letter that you are confused about a number of things, including Special Publications, the basis on which we settled grievance G 95-2, and my alleged agreement to arbitrate the "issue," whatever the "issue" might be. Let me explain the situation.

By letter dated September 28, 1995, the Guild grieved the alleged adjustment of ad space by bargaining unit employees. In that letter, the Guild stated that

*It is the guild's contention that ads or the space designated for ads are not editorial content. The guild also*

*contends that handling of advertising material by bargaining unit employees has not been past practice.*

In its response, dated October 4, the Company stated its agreement with the Guild's position as set forth above and notified the Guild that, consistent with the parties' understanding that "the handling of advertising material has never been bargaining unit work, the Company will, effective immediately reassign Special Publications as a department reporting to the General Manager." In as much as special publications are unquestionably "advertising materials," and do not contribute to the editorial content of the newspaper, the Company was in agreement with the Guild that the work being done by the three employees on special publications was not bargaining unit work. The Company's letter concluded by offering to discuss "the effects of this decision on the three affected unit employees."

The Guild did not respond to the Company's letter. Accordingly, the Company went ahead and offered the three affected unit employees positions outside of the unit as an alternative to laying them off for lack of work. All three employees accepted the Company's offer and are now happily working under the same terms and conditions as other business office employees of the Company. Accordingly, your assertion that the Company "removed" journalists from the bargaining unit is incorrect.

As you can see, any "issue" concerning special publications was settled 6 weeks ago. The Guild cannot revive the issue merely because it wishes to reconsider its prior position regarding the handling of advertising material. Furthermore, the Guild cannot pick and choose as to the kind of work that it is willing to do. The Guild cannot grieve about doing advertising work and at the same time protest the assignment of such work elsewhere. Finally, there is no reason why the Company would agree to arbitrate when we are in the process of negotiating a new agreement.

I hope this clarifies the situation. Please feel free to see me if you have any questions

Sincerely,

/s/ Vince Vawter  
Managing Editor  
The Knoxville News-Sentinel

On November 24, 1995, Union President Julian wrote Managing Editor Vawter accusing the Company of living in a "world of fantasy" and declaring such was not intimidating the Union. In his letter, Julian contended the issue concerning the reassignment of three employees from the bargaining unit had not been settled by the parties some 6 weeks earlier as asserted by the Company. Julian contended the Union's earlier grievance simply involved paginators relaying advertisement space that had been inaccurately provided by the advertising department and further asserted the Union had in no way grieved the issue of the three employees being unilaterally moved from the bargaining unit. Union President Julian asserted further in his letter that the Union never agreed with the Company's contention that special publications work was not bargaining unit work. Julian informed the Company the Union could "grieve about doing advertising work and at the same time protest the assignment of such work elsewhere." Julian also noted in his letter that the Union was unaware of any time limit, within reason, to respond to the Company's October 4, 1995 action.

On December 1, 1995, Union President Julian again wrote Managing Editor Vawter requesting that “the grievance concerning the removal of three employees from the bargaining unit and unilaterally moving them ‘Special Publications’ under the supervision of the Company’s general manager” be moved ahead to step 3 of the grievance procedure. Julian noted the Union continued to disagree with the Company’s contention the grievance had been settled on October 4, 1995. The Union also requested the parties meet in an attempt to resolve the situation.

On December 1, 1995, Director of Human Resources Redding responded to Julian’s letter of that same date and stated he understood Julian’s letter to be “a grievance on special pubs.” Redding advised Julian of certain procedures to be followed if the Union wished to move the matter to the joint grievance committee. Redding further advised the Union the Company was taking the position the grievance is not “arbitrable” and advised that if the Union believed it was arbitrable, then the Union would have to file a grievance on the arbitrability issue.

By a second letter dated December 1, 1995, the Union again stated it was grieving the removal of the three employees as well as special publications from the bargaining unit.

The parties held a grievance meeting on December 7, 1995. The Union summarized the discussions of that meeting in a letter to the Company of that date and advised that the Union was grieving the arbitrability issue.<sup>11</sup>

Union President Julian and Director of Human Resources Redding held a number of one-on-one meetings in January 1996 relating to, among other things, the special publications grievance. A hearing<sup>12</sup> was held on the arbitrability issue on April 24, 1996.<sup>13</sup>

On January 31, 1996, at the parties’ last bargaining session that culminated in the most recent collective-bargaining agree-

ment, the Company attempted to resolve the special publications grievance through bargaining.

The parties in the factual stipulations noted certain testimony given by Union President Julian during cross-examination at the April 24, 1996 arbitration hearing. The noted portions of Julian’s testimony follows:

Q. And at that same meeting in which you stated that you had been caught off guard [by the Company’s October 4, 1995 letter] there was a discussion in which Mr. Redding made it clear to you that the Company didn’t think that arbitration was the way to go concerning Special Publications; is that correct?

A. I think he did.

Q. In fact, after you stated you had been caught off guard Company representatives stated to you in sum and substance, if not in express language, “If you feel you’ve been caught off guard by what was done on October the 4th let’s bargain it”; is that correct?

A. It very well could be.

....

Q. And is it your position that the Company was under a duty to bargain about the removal of those three individuals with the Guild?

A. We believe that it should have either been bargained or certainly not done in a unilateral manner.

Q. Now, directing your attention to what has been marked as Guild Exhibit 3, which is Mr. Redding’s October 4, 1995 letter to you, do you have that document in your hand?

A. Yes, I have.

Q. And I direct your attention to the last paragraph of the letter and you can read it to yourself.

A. Okay.

Q. And I would ask you, what is your understanding of what that last sentence says?

A. That they are willing to discuss the effects of the decision, which means that the Company had already made a unilateral move and that’s the way they would bargain over this thing.

Q. And you asked them to put the employees back into the unit, didn’t you?

A. Yes, sir, we did.

Q. And when did you do that?

A. I don’t recall the exact date, but Mr. Redding and I had a conversation. I had stopped by his office when we were having some bargaining problems. We were pretty much stalled and not moving and I had stopped by his office and I had offered what I considered to be a solution. And the solution I felt so that the Company could benefit, we could benefit, was that—

Q. Just let me stop you there because I didn’t ask you what your solution was.

....

Q. Now, the Guild during these negotiations with respect to Special Publications never offered to bargain over the issue, did they?

A. No, sir.

Q. In fact, bargaining over the issue, Mr. Julian was the last thing you wanted in these negotiations. Is that not true?

A. You meant bargain over the effects or bargain over the issue?

<sup>11</sup> It is stipulated that the Company took the position that the grievance over removal of special publications is not arbitrable pursuant to art. IV, sec. 1 of the collective-bargaining agreement.

<sup>12</sup> At the arbitration hearing, Union President Julian testified (during cross-examination) as follows:

Q. Now, it’s correct, Mr. Julian, is it not, that in or about January of 1996, this year, you and Mr. Redding had a number of private, one-on-one meetings?

A. Yes, we did.

Q. And at one of those meetings Mr. Redding suggested that the Guild drop the grievance involving Special Publications; is that correct?

A. That along with two other grievances.

Q. Okay. I just didn’t want to get those involved. And I accept what you’re saying, there was more in those discussions than that. I’m not trying to portray them as specifically related to Special Publications.

A. Okay.

Q. But Mr. Redding did suggest to you that the Guild drop this grievance?

A. Yes, he did.

Q. And Mr. Redding also suggested to you that the proper resolution would be for the parties to bargain the entire issue, did he not?

A. I don’t know whether he said the entire issue or whether he said the effects. I couldn’t say.

Q. And I think, just to be fair, Mr. Redding’s words more accurately were to resolve the matter through bargaining.

A. He might have.

<sup>13</sup> As noted elsewhere in this decision, Arbitrator Giblin’s award is made a part of the record herein and he concluded the issue was “not arbitrable.”

Q. Either.

A. No, we didn't want to bargain.

Q. In fact, you wanted to arbitrate, right?

A. We wanted a solution but we didn't want to have to bargain over it.

Q. You didn't want to have to bargain over the reassignment of the work; is that correct?

A. I didn't want to have to bargain over it, no.

Q. And you didn't want to have to bargain over the alleged removal of employees either, did you?

A. Not to bargain, no, sir.

On May 31, 1996, the Company posted a "Posting of Jobs" for three special publications positions, namely "copy editor/designer," "graphics designer," and "administrative assistant" for which employees could make application for by transfer or promotion or by "new hires."

At all times after being transferred out of the bargaining unit, the three employees in question herein have been performing essentially the same work they performed when they were a part of the bargaining unit. The employees in question continue to sit at the same desks in the same location and supervised by the same supervisors. Other than pagination work, they perform essentially the same work that was performed when special publications was a part of the marketing and advertising department.

By letter dated June 3, 1996, the Company informed the Union the three employees at issue herein were being immediately placed back into the bargaining unit.

## II. THE PARTIES' POSITIONS

### A. *The Government*

The Government's position centers around a few simple facts and legal theories. The Government notes the Union was, and for sometime had been, the collective-bargaining representative of the special publications employees (Williams, Govan, and Cowan). The Government asserts that notwithstanding the above-noted facts, the Company on October 4, 1995, by letter "effective immediately" and without notice or opportunity for bargaining unilaterally "reassigned" the special publications employees (as well as the work they performed) to nonbargaining unit positions. The Government notes the employees in question "continued to perform the same work as before, sitting at the same desks, and reporting to the same supervisor." The Government asserts a transfer with no corresponding change in tasks, job locations, or immediate supervision violates Section 8(a)(5) and (1) of the Act both as to the employee component of the transfer as well as the work component. The Government argues that where, as it asserts was the case herein, an employer presents a decision to a union as a matter already accomplished, a union under such circumstances has no opportunity or obligation to bargain. The Government contends the general rule that a union must request and seek to engage in bargaining on learning about a proposed change or waive its right to do so is not applicable herein and that no obligation to demand bargaining was necessary because objective evidence demonstrates bargaining would have been futile. Stated differently, the Government argues the Union had no obligation to demand bargaining or to bargain because the Company notified the Union of immediate changes which had not previously been discussed. The Government strongly urges that the Company's implementing the changes at the same time it informed the Union (and employees) clearly constitutes a violation of Sec-

tion 8(a)(5) and (1) of the Act. The Government does acknowledge that prior to October 4, 1995, the parties had "touched on the broad issue of unit employees performing advertising work" but asserts "there was no discussion specifically about the special publications until the [Company] presented the 'reassignment' to the Union as a fait accompli." The Government asserts the violations herein occurred "there and then" on October 4, 1995, when the Company dealt directly with the employees by informing them they were no longer in the bargaining unit.<sup>14</sup>

### B. *The Company*

The Company asserts three points in its defense. First, it contends it did not unilaterally reassign the work or transfer the employees in question. The Company argues that even if it unilaterally reassigned the work and transferred the employees in question, the Union did not want to bargain over either the reassignment of the work or the effects thereof. In that regard, the Company points to Union President Julian's testimony at a related arbitration proceeding, and acknowledged at trial herein, that the Union did not want to bargain about the Company's decision to reassign the work or about the effects thereof. Accordingly, the Company asserts it was relieved of whatever, if any, bargaining obligation it may have had regarding special publications and did not violate the Act by implementing the changes it proposed and presented to the Union at the parties' October 4, 1995 grievance meeting.

Second, the Company asserts the Union consented to, or alternatively, acquiesced in the alleged removal of the work and employees from the unit. The Company argues the only logical explanation for the Union's silence at the October 4, 1995 meeting was that it consented or acquiesced to the changes particularly in light of the Company's indication the changes were to be effective immediately. The Company argues that even if the Union was caught off guard by the Company's actions, it could have, but did not, ask that the status quo be preserved. The Company notes the Union even remained silent for 6 additional weeks thereafter. The Company argues that the Union's consent and/or acquiescence is a complete defense to any related unfair labor practice allegations.

Third, the Company asserts that even if the Union did not consent to, or acquiesce in, the proposed and implemented changes it waived its right to bargain over such by not demanding bargaining. The Company argues the Union had ample opportunity to demand bargaining but simply declined to do so. The Company denies it presented the Union with a fait accompli. It notes the Union admitted it never wanted to bargain over special publications at any time. The Company argues the Union's silence at the October 4, 1995 meeting was occasioned by Union President Julian's admission that he did not know what to say rather than that the Union was presented with a "done deal." The Company also argues it did not bypass the Union when it announced the changes to the three employees in question noting it had already notified the Union of the proposed changes before such was implemented. Finally, the Company argues there is no evidence it adopted a "fixed position to implement the changes announced" especially when viewed in light of its initial offer to bargain coupled with its renewed offers to bargain over the entire matter. The Company asserts

<sup>14</sup> In a posttrial filing, the Union adopted the positions taken by the Government in its posttrial brief.

its offers to bargain negate any suggestion of intransigence on its part.

### III. ANALYSIS, DISCUSSION, AND CONCLUSIONS

The issue framed by the pleadings is did the Company, on October 4, 1995, unilaterally alter the scope of the bargaining unit without the Union's consent by removing the special publications work and the unit employees who performed such work from the unit in violation of Section 8(a)(5) and (1) of the Act?

In the context here presented, and as explained below, I am persuaded the Company did not engage in any unilateral action that would violate the Act in any manner alleged in the complaint.

Historically, it appears the work in question, or at least portions thereof, has at various times been performed as nonunit work while at other times the work has been performed by unit employees. It was this troubling question related to what work would be performed by which employees that led the Union to file a grievance on September 28, 1995, regarding unit employees performing, what it considered nonunit pagination-type work. The Union, in its grievance, asserted such work assignments (pagination work) did not "follow contract language, specifically the description of a journalist" and contended advertisements, or the space designed for advertisements, were not bargaining unit editorial content type work. The Union further contended in its September 28, 1995 grievance "that handling of advertising material by bargaining-unit employees . . . has not been past practice." It was against this backdrop that the Company, in an effort to settle the September 28, 1995 work-related grievance, agreed with the Union "that the handling of advertising material has never been bargaining unit work" and advised the Union that based on that agreement and understanding it would "effective immediately" reassign "special publications as a department reporting to the general manager [outside the bargaining unit]." Further, in its effort to settle the September 28, 1995 grievance, the Company agreed in writing to bargain about "the effects of this decision on the three affected bargaining unit employees." The Union's only response on October 4, 1995, to the proposed resolution of its September 28, 1995 work-related grievance, was to seek through Union President Julian the following clarification, "are you saying that these people will be handling no editorial-type material and would be working with advertising material only?" Company Director of Human Resources Redding assured Union President Julian that was the case and added, "if you want to bargain over it, holler at us."

I am persuaded from the above-outlined facts that the Company did not act in an unlawful unilateral manner. The Company simply agreed with the Union's position as advanced in its September 28, 1995 grievance and informed the Union it would be taking action to implement its agreement with the Union. Such does not constitute unilateral action on the part of the Company. This is particularly so viewed in light of the Company's offer first to bargain over the effects of the change and

immediately thereafter to bargain over the entire matter.<sup>15</sup> In this regard, I note Union President Julian testified the Union simply did not want to bargain about the decision or its effects. It appears this is an example of where the saying "be careful what you ask for you might just get it" applies. The Union did not want bargaining unit employees to perform certain work and filed a grievance related thereto to which the Company agreed and took action in furtherance of that agreement.<sup>16</sup>

I am also fully persuaded the above demonstrates the Company did not present the Union with a fait accompli but rather openly expressed flexibility throughout the resolution of the September 28, 1995 work-related grievance. The fact that Union President Julian in particularly was caught off guard by the Company's agreement with the Union related to the September 28, 1995 work-related grievance does not alter or impact the outcome herein. The Union's failure at the October 4, 1995 meeting to raise any objection to the Company's action and for 6 weeks thereafter to remain silent compels the conclusion, as urged by the Company, that the Union consented to, or acquiesced in, the solution of the Union's September 28, 1995 work-related grievance.<sup>17</sup> Union consent to the Company's action serves as a defense to any "scope of the bargaining unit" or "representational" issue herein.<sup>18</sup>

For all the reasons explained above, I recommend the complaint be dismissed in its entirety.

### CONCLUSIONS OF LAW

1. The Company is an employer engaged in 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 Company has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire records, I issue the following recommended<sup>19</sup>

### ORDER

The complaint is dismissed.

<sup>15</sup> I do not credit, or give weight to, Union President Julian's trial explanation that he understood the bargaining about "it" to constitute effects bargaining only.

<sup>16</sup> I note the employees in question accepted offers to perform the "non-unit work" rather than be laid off from the unit for lack of work.

<sup>17</sup> Union President Julian's explanation that he not did say anything at the October 4, 1995 meeting (or for 6 weeks thereafter), because he did not want to say the wrong thing is simply an acknowledgment by him that if he had objected, he could have voiced such. In this regard I note Union President Julian did not even ask for, or seek to have the Company continue the status quo until he had additional time to reflect on the matter or to seek legal counsel.

<sup>18</sup> I need not reach the issue, raised by the Company, of whether the Union waived its right to bargain.

<sup>19</sup> 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.