

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 25, 2006

TO : Celeste Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: ABC, Inc. 530-6050-0100-0000
Cases 2-CA-37150, 2-CA-27151, 530-6050-0800-0000
and 2-CA-37303 530-6067-4000-0000
530-6067-4001-1700
530-6067-6000-0000

These cases were submitted for advice as to whether the Employer, during the course of negotiations for a successor contract, violated Section 8(a)(5) and (1) by: 1) making four unilateral changes to employees' work assignments without prior notice to and bargaining with the Union; 2) conditioning agreement on the inclusion of a proposal that would remove unit employees from the unit to work as managerial producers; and 3) refusing to provide the Union with information requested pertaining to the Employer's proposal to remove unit employees from the unit.

We conclude that, the charges should be dismissed, absent withdrawal, because: 1) the Employer's unilateral changes to the employees' assignments did not result in a material change to terms and conditions of employment and there is no evidence that unit work has been removed from the unit; 2) it is not necessary to decide whether the Employer's proposals to remove unit employees from the unit to work as managerial producers constitutes a mandatory or permissive subject of bargaining because there is insufficient evidence that the Employer has conditioned agreement on the inclusion of such proposals and because the parties have not reached impasse; and 3) the evidence adduced does not demonstrate that the Employer has failed to meet its Detroit Edison v. NLRB¹ obligation in violation of Section 8(a)(5) and the parties' exchange of modified proposals since the filing of the information request charge demonstrate that further bargaining would not be futile.

¹ 440 U.S. 301 (1979), on remand to NLRB v. Detroit Edison Co., 595 F.2d 365 (6th Cir. 1979).

Factual Background

ABC, Inc. (Employer) provides nationwide commercial radio and television broadcasting services. The Writers Guild of America, East (Union) represents employees at the Employer's radio and television operations in Washington, D.C. and New York. The parties have had a collective bargaining relationship for the past 50 years and their most recent collective bargaining agreement was effective from February 1, 2002 through January 31, 2005.²

The agreement consists of the main agreement, appendices, and various sideletters. Article I or the Recognition and Warranty provision of the main agreement describes the bargaining unit as follows:

- A. The Company hereby recognizes the Union as the sole and exclusive collective bargaining agent for all employees of the Company in the units listed below...

NEW YORK	WASHINGTON
1. NY Staff Radio & TV News Editors	1. Washington DC Staff TV Assignment Editors
2. NY News Writers	2. Washington News Writers
3. Continuity Writers	3. Washington DC Desk Assts. & Production Assts.
4. WABC-TV Researchers	4. Washington DC Graphic Artists
	5. Washington DC Researchers

Appendices A through I contain definitions of the units/classifications listed above by geography and include other terms and conditions of employment specific to that classification. The two classifications at issue are News Editors and News Writers. Appendix A, Paragraph A, defines "News Editors" as:

All persons employed on salary who are in direct charge of the news or assignment desk and of the coverage of the news and its output. The duties of News Editors shall include the writing of news material as defined in Appendix B, Paragraph A.

Appendix B, Paragraph A defines "News Writers" as:
 All persons employed on the staff of the Company ...on salary to write news material designed for broadcasting on live or recorded (film or tape)

² All dates hereafter occurred in 2005, unless noted otherwise.

new programs or news inserts on programs, or special events when such person regularly does ordinary news writing work or auditions therefore.

The term "write" is further defined as:

...re-writing, condensing or otherwise treating news material secured by the Company from news associations and from the Company's own and other sources such as teletype, newspapers, magazines, personal interviews, etc.

In addition, under the agreement, news writers may be assigned by the Employer to perform as an "acting editor" and both news writers and news editors may be assigned "producing duties." Additional compensation is paid when employees are assigned these duties (Appendix A, Paragraph H; Appendix B, Paragraph B, subsection 3; and Appendix D, Paragraph H). The Employer assigns acting editor duties or producing duties at its sole discretion and nothing in the agreement requires the Employer to make these assignments. Under the agreement, assignment schedules which include acting editor and producing duties are posted every three weeks for the following three weeks. The parties recognize such schedules are tentative due the changing demands inherent in news programming.

The agreement also includes sideletters which confirm the parties' agreement on other various issues. Sideletter G allows certain supervisors, including executive producers and senior producers of their own programs, to edit copy provided that such supervisors are primarily performing managerial or supervisory duties.

The parties began negotiations for a successor agreement on January 5 and have continued albeit with some long breaks, for over fifteen months with the last known negotiation session taking place on June 29, 2006.³ The parties have not reached a final agreement. However, neither party has asserted that negotiations are at an impasse.

³ For various reasons, no bargaining sessions were held during May, June, and July.

I. Unilateral Change Allegations

FACTS

On August 8, the Union filed a charge in Case 2-CA-37151 alleging that the Employer made unilateral changes without giving the Union notice or an opportunity to bargain by eliminating the following unit positions: 1) the acting editor position on the overnight shift at the Employer's network television operations in New York (network television); 2) a news writer position on the overnight shift at network television; 3) a rim editor position at the Employer's radio operation in New York (New York radio); and 4) the afternoon senior editor position at the Employer's radio operation in Washington, D.C. (D.C. radio). The alleged changes reduce to: the April changes at network television (allegations 1 and 2); the July change at New York radio (allegation 3); and the July change at D.C. radio.

A. Network Television (Allegations 1 and 2)

The overnight shift at network television produces three shows: Good Morning America, World News Now, and World News This Morning. Prior to April, the overnight shift was staffed with seven news writers, with one of the news writers assigned to work exclusively as an editor. The overnight shift editor performs fact checking and copy editing, and is the final authority on whether copy submitted by news writers will be used.⁴

From December to April, employee Cherry Key, a news writer on the overnight shift, had been assigned to work as the overnight acting editor.⁵ Beginning in April, the Employer ceased assigning a news writer to perform as acting editor on the overnight shift at network television. Also around this time, one news writer was terminated and another news writer resigned. With these changes, the number of news writers on the network television overnight staff was reduced from seven to five.

⁴ "Editor" used to be a bargaining unit classification until it was eliminated. Thereafter the job was performed by news writers who were paid "acting editor" fees. It is unclear when this change took place.

⁵ Key received approximately \$400 to \$500 more per week in gross pay than she did as a news writer due to the additional "acting editor" fee and overtime.

The Employer concedes that the overnight news writer staff has decreased but contends there is less writing work because it now uses repurposed material for one of the three shows produced during this time. Since April, the remaining five news writers have performed the fact checking and copy editing duties previously performed by acting editor Key. The final editorial authority previously exercised by overnight editor Key has since been performed by the three shows' senior producers, respectively.

B. New York Radio (Allegation 3)

The Employer's radio operations are headquartered in New York. New York radio operates 24-hours a day, seven days a week. Newscasts, which last about one to five minutes each, are issued seven times per hour. At New York radio, news writers may be assigned and receive the acting editor fee to work as rim editors, senior editors, tape/ops editors, and/or assignment editors. Each assignment works on different phases of newscasts. For example, a tape/ops editor works on the front end of the process by editing soundbites that may be used in the newscasts while a rim editor works on the back end of the process as the final checkpoint for scripts used by on-air newscasters.

Prior to the change in July, there were four overlapping shifts at New York radio and each shift was staffed by: one senior editor, one rim editor, and two tape/ops editors. In July, the Employer eliminated four hours' worth of rim editor assignment from 12 a.m. - 4 a.m. and rearranged the remaining rim editor shifts.⁶ The Employer maintained the same staffing levels but assigned one less news writer to the rim editor function. The Employer contends it decided not to assign a fourth news writer to the rim editor function because only three newscasts are produced during the 12 a.m. to 4 a.m. shift, whereas, seven newscasts are produced the rest of the day.

As a result of the change, Gavin Sutton, the fourth news writer who previously performed rim editor work, has been assigned to work as a tape/ops editor. Prior to July, Sutton had been assigned to the overnight rim editor shift for over three years. Since July, the work previously

⁶ Prior to July, there were four overlapping rim editor shifts which were: 5 a.m. to 9 a.m.; 8:30 a.m. to 3:30 p.m.; 3 p.m. to 10 p.m.; and 10 p.m. to 5 a.m. After July, there were three rim editor shifts: 4 a.m. to 11 a.m.; 10:30 a.m. to 5:30 p.m.; and 5 p.m. to 12 a.m.

performed by the rim editor has been absorbed by the two overnight senior editors.⁷

C. D.C. Radio (Allegation 4)

D.C. radio operates as a news gathering and correspondent office to New York radio. Only two radio newscasts are produced and anchored live in D.C. between 5:30 a.m. to 11 a.m. daily. D.C. radio operates from 5 a.m. to 8:30 p.m., five days a week; and from 7 a.m. to 3:30 p.m. on weekends.

Prior to July, the D.C. newsroom was regularly staffed by: one senior editor, one assignment editor, two desk assistants, one production assistant, and various news writers and news editors. News writers assigned to work as senior editors were paid the acting editor fee. There were two senior editor shifts: the afternoon shift (12 p.m. to 7 p.m.) and the morning shift (5 a.m. to 1 p.m.)

The senior editor monitors breaking news, supervises the editorial process, and assigns news writers to cover news events. Additionally, the senior editor arranges the reporting and audio requested by New York radio and communicates the minute-by-minute activities of the D.C. newsroom to the New York newsroom.

From April to July, news writer James Kane was assigned to the afternoon senior editor position at D.C. radio. Prior to that, Kane had worked as the morning senior editor for three years.⁸ In July, Kane was promoted to the position of assistant bureau chief, a nonunit managerial position. The Employer contends that when it promoted Kane, it determined it no longer needed to assign two senior editors at D.C. radio. Rather, it was more efficient to have senior editors in New York communicate directly with the news writers in the D.C. newsroom with respect to assignments, the approval of audio tapes, the review of scripts, and the coordination of activities which is the procedure at D.C. radio on weekdays after 7 p.m. and

⁷ No evidence has been uncovered showing that the senior editors' hours have increased due to the absorption of the rim editor functions.

⁸ Kane's predecessor had held the afternoon senior editor assignment for over twenty years before his retirement.

on weekends.⁹ The Employer followed this procedure for about two weeks before the duties of the former senior editor were distributed among unit employees in both the D.C. and New York newsrooms. Specifically, the duties of communicating between the D.C. and New York offices and coordinating D.C. correspondents with New York anchors were assigned to the desk assistant at D.C. radio.¹⁰ The senior editor in New York performs the editing previously performed by the afternoon senior editor.

As to these four unilateral change allegations, the Union argues that the Employer's actions amounted to the unilateral elimination of unit positions in violation of Section 8(a)(5) and (1). The Union argues that even if the acting editor, rim editor, and senior editor functions are not considered unit positions, the Employer's actions then amounted to the unilateral elimination of assignments. The Employer contends that the acting editor, rim editor, and senior editor functions are not separate unit positions but are solely news writer assignments for which employees were paid a contractual premium and could be unilaterally changed every three weeks. The Employer has provided one year's worth of weekly assignments. Such evidence does not show frequent changes to acting editor assignments, however, other assignments were regularly and unilaterally changed. Further, the evidence demonstrates that while the employees' schedules overall were fairly constant, the Employer also frequently adjusted the employees' start times to accommodate for news events, assigned employees to temporary details, and changed schedules due to events such as vacation, illness, termination, or resignation.

ACTION

We conclude that, the charge should be dismissed, absent withdrawal, because the Employer's unilateral changes to the employees' assignments did not constitute a material change to the terms and conditions of employment

⁹ The Employer maintained the morning senior editor function because of the two live newscasts that are produced and anchored in D.C. during the morning hours.

¹⁰ There is no evidence with regard to the degree, if any, that the desk assistant's work hours have increased due to the absorption of some of the former duties of the afternoon senior editor. Nor, is there evidence disclosing whether the desk assistant is receiving the acting editor fee and/or overtime.

in violation of Section 8(a)(5) and there is no evidence that unit work has been removed from the unit.

It is well established that an employer may not unilaterally change the terms and conditions of union-represented employees without first giving the union notice and an opportunity to bargain over the change.¹¹ To constitute an unlawful unilateral change, the employer's action must effect a material, substantial, and significant change in terms and conditions of employment.¹²

Here, the evidence, on a whole, establishes that the three editorial functions were not separate unit job positions but rather were regular work assignments encompassed within the duties of a news writer. Accordingly, we conclude that the Employer's unilateral changes constituted privileged changes to assignments which did not materially effect the employees' terms and conditions of employment and further, that there is no evidence that as a result of the Employer's actions, bargaining unit work was removed from the unit.

The language of the contract demonstrates that the acting editor, rim editor, and senior editor functions were assignments and not unit positions. Article I of the expired contract defines the bargaining unit solely in terms of classifications and include news writers as one such classification. The contract permits the Employer to assign news writers on an acting basis to perform rim editor, senior editor, or editor duties for which they are paid a contractual premium. These assignments are made at the Employer's discretion and nothing in the contract requires the Employer to make these assignments. In addition, the contract provides that assignment schedules be posted every three weeks. Although a year's review of these schedules does not show frequent changes in the acting editor assignments, other assignments were regularly and unilaterally changed. Such evidence demonstrates that while overall the employees' schedules were fairly constant, the Employer also frequently adjusted the employees' start times to accommodate for news events,

¹¹ See, e.g., The Philadelphia Coca-Cola Bottling Co., 340 NLRB 349, 353 (2003), enfd. 112 Fed.Appx. 65 (D.C. Cir. 2004)(not published).

¹² See, e.g., Millard Processing Services, 310 NLRB 421, 425 (1993), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994).

assigned employees to temporary details, and changed schedules due to events such as vacation, illness, termination, or resignation. Thus, on balance, both the contract language and the evidence as a whole, support the conclusion that the acting editor, rim editor, and senior editor functions were assignments that the Employer could regularly and unilaterally change.

The Union further argues, however, that if an employer's unilateral change of an assignment has a substantial impact on the terms and conditions of employment, the employer is required to give notice to and bargain with the Union. In support of its proposition, the Union cites two Board decisions. We conclude, however, that these cases are readily distinguishable.

In Flambeau Airmold Corporation,¹³ all employees were classified as "production associates" although employees were referred to by their job functions, such as machine operator, material handler, or maintenance helper. The Board adopted the ALJ's findings and holding that the employer violated Section 8(a)(5) when it permanently reassigned two employees, who were formerly maintenance helpers, to the machine operator function.¹⁴ In finding that the permanent assignments substantially altered the duties of the employees affected, the ALJ noted that the skills required to operate a machine were significantly different from the skills required to work as a maintenance helper.¹⁵ Here, the unit employees are news writers who may write and edit news or may be assigned to work as different types of editors. However, all these assignments involve the same skill set, i.e., writing and editing news. Thus, the changed assignments here, unlike those in Flambeau Airmold, do not represent a material change in the employees' terms and conditions of employment.

In Lawson Printers, Inc.,¹⁶ the Board affirmed the ALJ's findings and conclusion that the employer violated Section 8(a)(5), 8(a)(3), and (1) when it unilaterally implemented a "mass reassignment" of pressroom employees by demoting employees to operate smaller and/or fewer machines

¹³ 334 NLRB 165, 171 (2001).

¹⁴ Id.

¹⁵ Id.

¹⁶ 271 NLRB 1279 (1984).

because of their support for the union. The ALJ concluded that such action was taken not only to discourage employees from supporting the Union but that additionally it constituted a major change in terms and conditions of the employees.¹⁷ Here, the Employer did not implement a downward "mass reassignment." Rather, it made singular changes to ordinary assignments at its radio and television operations in New York and Washington, D.C. which were permitted under the agreement.

Finally, there is no evidence that the Employer's actions resulted in the removal of bargaining unit work from the unit. As to the first two allegations, the five remaining news writers are performing the fact checking and copy editing duties previously performed by the acting editor. And the final editorial authority has been shifted to the three shows' senior producers as permitted under Sideletter G. As to the third allegation, the evidence demonstrates that the work previously performed by the rim editor has been absorbed by the two news writers assigned to the overnight senior editor function. Finally, as to the fourth allegation, the evidence demonstrates that the work previously performed by the afternoon senior editor has been absorbed by unit employees at both D.C. radio and New York radio. Specifically, the duties of communicating between the D.C. and New York offices and coordinating D.C. correspondents with New York anchors is being performed by the desk assistant at D.C. radio, and the editing previously performed by the afternoon senior editor is performed by the senior editor in New York. Thus, even with the change in assignments, a decrease in staff levels in some instances, and a change in shifts, there is no evidence that unit work has been removed from the unit as a result of the Employer's actions.

II. The Employer's Producer Proposals

FACTS

On October 27, the Union filed a charge in Case 2-CA-37303 alleging the Employer conditioned a final agreement on the inclusion of proposals that would allow the removal of unit employees from the unit to work as managerial producers on a noncovered basis (producer proposals).¹⁸

¹⁷ The employer referred to the mass reassignments as moving the employees "downward"; the employees and the ALJ characterized the reassignments as "demotions." Id. at 1285.

¹⁸ The Employer's producer proposals provide:

Notwithstanding any provisions in the National Agreement or its appendices, practices, sideletters, arbitration awards, grievances, or settlements to the contrary, the following shall apply to WGA-represented news writers performing full-time, five (5) day per week show producing functions and up to five (5) WGA-represented news writers performing segment and special project producing functions at WABC-TV:

1. At the Company's sole discretion, such individuals may be offered the opportunity to continue to be employed by the Company as a producer not covered by this Agreement.
2. In the event the Company does not give the producer the aforementioned offer, or if the producer declines the offer, then the Company, in its sole discretion, may:
 - a. Elect to assign such employee as a producer under the terms of the Agreement; or
 - b. Assign such employee to perform the duties of a news writer as set forth in this Agreement.
3. If the transfer of a producer back into a news writer position as the direct result of the implementation of 2(b) above results in a surplus of employees performing news writing duties, as determined by the Company, the Company will not lay off any news writer without first offering a buyout on the following basis:

The amount of the buyouts will be calculated as follows:

Employees with at least (6) months, but less than three (3) years of seniority in the news writer unit will receive six (6) weeks base pay.

Employees with at least three (3) years of seniority in the news writer unit will receive ten (10) weeks base pay, plus one week of base pay for each year of seniority in the news writer unit.

The producer proposals concern only the news writers at network television. There are 50 news writers at network television, 22 of which are assigned to work as show, specialty, and segment producers. These news writers negotiate personal service contracts with the Employer and receive additional compensation for "producing duties."¹⁹ Since about 1981, it has been the Employer's practice to assign news writers to work as show, segment, and specialty producers. There are no show, segment, or specialty producers that are not in the unit. At the time the Employer introduced the proposals, there were seven full-time show producers, six full-time segment producers, and three full-time specialty producers.

Under the producer proposals, the Employer would have the sole discretion to offer seven full-time show producers and up to five full-time segment and specialty producers the opportunity to work as producers on a noncovered basis. If the employee accepts the offer, the Employer would

The Company reserves the sole right to select from among the applicants those employees who will be accepted for this buyout.

Employees offered and who elect to receive this buyout will be required to sign an Agreement and General Release prepared by the Company.

4. In the event the number of applicants acceptable to the Company is not sufficient, the Company shall layoff pursuant to the terms of this Agreement. Any employee so laid off shall have the option of electing to sign an Agreement and General Release prepared by the Company in which event he or she shall receive two (2) weeks of severance pay for each year of seniority in the news writer unit in lieu of any other severance pay required under this Agreement.

¹⁹ A show producer is responsible for the entire production of one or more news shows, including content and presentation, and performs a minimal amount of writing incidental to his producing duties. A segment or specialty producer produces shorter segments on a specialized subject and spends about a quarter of their time writing. These functions are not encompassed within the contractually defined duties of a news writer.

negotiate a personal service agreement (PSA) with the employee. If the employee declines, the Employer may choose to either have him continue to perform producing and writing duties or assign him exclusively to news writing duties. The producer proposals contain buyout and severance provisions in the case that there is a surplus of news writers.

On January 11, the Employer introduced the producer proposals; and the parties had their first negotiations over the proposals on February 9. Since then, the parties have discussed the producer proposals at thirteen bargaining sessions from January 11 to April 7, 2006. On October 27, the Union filed this charge alleging the Employer insisted on the inclusion of the producer proposals - a permissive subject of bargaining - as a condition to reaching an overall agreement. The Region later dismissed the charge.²⁰ Thereafter, the Union requested an opportunity to submit additional evidence based on the parties' negotiations on April 6 and 7, 2006. The Union contends the Employer's conduct at these sessions support its charge that the Employer has conditioned final agreement on the inclusion of the producer proposals.

At the April 6, 2006 negotiations, the Union for the first time at the bargaining table stated that it believed the producer proposals concerned a permissive subject of bargaining and requested the Employer remove the proposals from the table. The Employer disagreed that the producer proposals constituted a permissive subject of bargaining and refused to take the proposals off the table. The parties met again the next day and exchanged written proposals on other issues. At the end of the session, the Union asked the Employer to take the producer proposals off the table. The Employer's negotiator responded by asking for the Union's availability for future negotiations.

By letter dated May 1, 2006, the Employer stated that although it believed its producer proposals constituted a mandatory subject of bargaining, it was not conditioning

²⁰ The Region dismissed the charge after concluding that the evidence was insufficient to establish the Employer had conditioned agreement on the inclusion of the producer proposals because the Union had never tested the Employer's claim. More precisely, despite certain Employer statements that no agreement would be reached absent the Union's acceptance of the producer proposals, the Union had never tested that claim by refusing to bargain about that proposal.

final agreement upon the Union's acceptance of the proposals.

On June 16, 2006, the Employer withdrew its producer proposals. On June 28 and 29, 2006, the parties met for negotiations and at that time, Employer introduced new producer proposals. During these sessions, the Employer explained its new proposals, however, the Union did not engage in discussions over the new proposals.

ACTION

We conclude that, the charge should be dismissed, absent withdrawal, because whether the Employer's producer proposals constitute a mandatory or permissive subject presents a close and difficult issue, which need not be decided because there is insufficient evidence that the Employer has conditioned final agreement on the inclusion of the proposals in violation of Section 8(a)(5) and the parties have not reached an impasse in negotiations.

[FOIA Exemptions 5 and 7(A)

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²³ [FOIA Exemptions 5 and 7(A).]

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²⁵ [FOIA *Exemptions 5 and 7(A).*]

²⁶ [FOIA *Exemptions 5 and 7(A).*]

²⁷ [FOIA *Exemptions 5 and 7(A)*

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³⁰ [FOIA Exemptions 5 and 7(A).]

³¹ [FOIA Exemptions 5 and 7(A).]

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³³ [FOIA Exemptions 5 and 7(A).]

³⁴ [FOIA Exemptions 5 and 7(A).]

³⁵ [FOIA Exemptions 5 and 7(A).]

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We conclude, it is not necessary at the present time to resolve these issues because there is insufficient evidence to conclude that the Employer has conditioned agreement on the inclusion of the producer proposals³⁶ and since the parties have not yet reached impasse, it is not necessary to determine whether the Employer's producer proposals constitute a mandatory or permissive subject.³⁷

III. The Union's Information Request

³⁶ Even assuming the proposals concern a permissive subject, we note that the Board has held that a party may repeatedly propose a change in the unit scope without unlawfully insisting on that proposal to impasse because it does not appear conceptually possible for a party to unlawfully insist on a permissive subject while negotiations continue. Reading Rock, Inc., 330 NLRB 856, 856 (2000). That the Employer has not conditioned insisted to impasse over the producer proposals is further supported by the fact that since the filing of the charge, the Employer has withdrawn the proposals and has introduced new proposals. Further, as recently as June 28 and 29, 2006, the parties have met and the Employer has discussed its new proposals.

³⁷ See, e.g., Taft Broadcasting, Co., 274 NLRB 260 (1985) (irrelevant whether the subject of bargaining in this Section 8(a)(5) and (1) case is a mandatory or permissive subject as the employer did not insist to impasse on the proposal).

FACTS

On August 8, the Union filed the charge in Case 2-CA-37150 alleging the Employer has refused to provide information the Union requested in order to evaluate the producer proposals. Specifically, at issue is the Employer's refusal to provide the personal service agreements (PSAs) of nonunit producers employed at its Chicago, Los Angeles, and San Francisco locations.

At the February 9 bargaining session, the Employer's representatives presented arguments for the producer proposals and stated, among other things, that every unit employee that became management would get a PSA and would be "satisfied." One of the Employer's representatives, Dave Davis,³⁸ further stated that everyone at the Philadelphia station he once managed had PSAs. Davis invited the Union to ask those people if they were satisfied.

At the parties' February 15 negotiations, the Union requested, among other things, the PSAs and record of hours worked by the Employer's producers employed in San Francisco, Los Angeles, and Chicago.³⁹ The Employer maintains that the Union has not demonstrated the relevance of the information requested and further asserts that the economic information contained in the PSAs is confidential, and that if its competitors receive such information, they will use it to lure its employees away. The Union maintains such information is relevant and responsive to the Employer's claims made at the parties' February 9 negotiations, i.e., that it needs the information to verify the accuracy of the Employer's claims and to properly evaluate the producer proposals. Since the Union made its information request, the parties have bargained and traded various proposals/counterproposals on the issue despite maintaining opposite positions regarding the relevant nature of the information requested.

On April 22, prior to the filing of the unfair labor practice charge, the Employer offered to make certain salary information available for the nonunit producers in Los Angeles, San Francisco, and Chicago if the Union

³⁸ Davis is currently the general manager at the Employer's network television operations.

³⁹ The Union also requested the PSAs of the unit employees employed in New York (which the Employer eventually provided) and for the PSAs of employees who worked while Dave Davis was a manager.

executed a confidentiality agreement and the information would only be viewed by the Union's two main negotiators. At the parties' April 27 negotiations, the Union rejected the Employer's April 22 proposal and the Employer requested the Union propose modifications.

On July 28, the Union proposed modifications to the Employer's confidentiality agreement and agreed to, among other things, accept the PSAs without individual names if allowed to share the information with the Union's negotiating committee and its executive staff.

On August 8, the Union filed the instant charge. Since then, the parties have continued to trade proposals and counterproposals over the issue. On August 26, the Employer proposed to provide certain salary information of nonunit producers with individual identities redacted if such information was limited to the Union's two main negotiators. By letter dated February 27, 2006, the Employer stated it "did not believe that additional discussions would be futile" and noted that at the time the Union filed this charge, the Union had just made its first counterproposal to the Employer's confidentiality agreement. On March 8, 2006, the Employer made another proposal where it offered to identify the ranges of salaries and specify the number of producers with current salaries falling within each range and for purposes of verification, the specific names and their respective salaries would be submitted to a third party. On March 10, 2006, the Union responded to the Employer's March 8 offer and stated it would agree to a confidentiality agreement that would provide for the Union staff, members of the bargaining committee, and the producers affected to view the information, and that names could be redacted but that it wanted the exact salary and hours each employee worked.

ACTION

We conclude that the charge should be dismissed, absent withdrawal, because the evidence does not demonstrate that the Employer has failed to meet its Detroit Edison obligation in violation of Section 8(a)(5) and the parties' exchange of modified proposals since the filing of the information request charge support that further bargaining would not be futile.

As a threshold matter, whether the Employer's producer proposals concern a mandatory or permissive subject of bargaining directly bears on the Employer's duty to furnish the requested information. If the producer proposals concern a mandatory subject, the Board has held that the "duty to furnish information stems from the underlying

statutory obligation imposed on employers and unions to bargain in good faith with respect to mandatory subjects."⁴⁰ In contrast, there is no duty to furnish information concerning a nonmandatory subject and "parties do not have the power to alter this result merely by reaching agreement on the terms of a nonmandatory subject."⁴¹

Assuming, arguendo, that the information request pertains to a mandatory subject, a party engaged in collective bargaining generally has a statutory obligation to provide, upon request, information which is relevant for the purpose of contract negotiations.⁴² The burden is on the union to show the relevance of wage information requested for nonunit employees. Relevance is based on "broad discovery" standard.⁴³

The Supreme Court has recognized a limited exception to the duty to provide relevant information that is truly confidential in Detroit Edison v. NLRB.⁴⁴ Under Detroit Edison, where a respondent has raised a "legitimate and substantial" claim of confidentiality, the Board is required to balance the need for information against such interest. If the employer satisfies this burden, it has a duty to bargain in good faith over an accommodation of its confidentiality concerns.

As a threshold matter, whether the producer proposals concern a mandatory or permissive subject has not been resolved and such determination directly bears on the Employer's duty to provide the information requested. Even

⁴⁰ See Pieper Electric, Inc., 339 NLRB 1232, 1232 (2003).

⁴¹ Id. See also SEIU Local 535 (North Bay Development Disabilities Services, Inc.), 287 NLRB 1223, 1223 (1998), enfd. 905 F.2d 476 (D.C. Cir. 1990), cert. denied 498 U.S. 1082 (1991) ("To violate the Act, a refusal to supply information must, inter alia, pertain to a bargaining subject categorized as a mandatory one.")

⁴² See NLRB v. Acme Industrial Co., 385 U.S. 342 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-153 (1956); and Leland Stanford Junior University, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 472 (9th Cir. 1983).

⁴³ See, e.g., Pfizer, Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

⁴⁴ 440 U.S. 301 (1979).

assuming the information request pertains to a mandatory subject and the Union has demonstrated relevance, we conclude that there is insufficient evidence to indicate that the Employer has failed to comply with its obligations under Detroit Edison in violation of Section 8(a)(5) and that further bargaining would be futile. In support of this conclusion, we note that the Employer has raised a legitimate confidentiality concern and has bargained in good faith over an accommodation and that after the filing of the charge, the parties have continued to exchange modified proposals.

Since the Union first made its information request, and before filing the instant charge, the Employer made three proposals and the Union made two proposals. Since the filing of the charge on August 8, the parties have exchanged additional accommodating proposals. On August 26, the Employer proposed providing certain salary information with the identities redacted, to the Union's two main negotiators. On February 27, 2006, the Employer stated its willingness to continue negotiations over the matter, that it "did not believe that additional discussions would be futile," and that it was willing to make some additional adjustments to its proposed confidentiality agreement. On March 8, 2006, the Employer offered to provide salary ranges on a station-by-station basis, to specify the number of show, segment, and specialty producers with current salaries falling within each range, and for verification purposes, to present the specific names of the individuals and their respective salaries to a mutually agreeable third party. On March 10, 2006, the Union responded that the confidentiality agreement would need to allow more than two people to review the information, and that the Union needed the exact salary and exact hours that each employee worked.⁴⁵

The Employer has engaged in good faith bargaining over an accommodation over its confidentiality interest and the Union's need for the information as evidenced by its proposals. Further, the parties' continued exchange of proposals, even after the filing of the unfair labor practice charge, demonstrate that the parties are continuing to bargain over an accommodation and that further bargaining would not be futile. Thus, there is no evidence to date that the Employer has failed to comply

⁴⁵ Since the parties most recent exchanges of proposals on this issue, the Employer has since withdrawn its producer proposals and introduced new proposals. The parties met as recently as June 28 and 29, 2006 to discuss these new proposals.

with its Detroit Edison obligation in violation of Section 8(a)(5).

CONCLUSION

Accordingly, the cases should be dismissed, absent withdrawal, because: 1) the Employer's unilateral changes to the employees' assignments did not constitute a material change to the terms and conditions of employment and there is no evidence that unit work has been removed from the unit; 2) it is not necessary to decide whether the Employer's proposal to remove unit employees from the unit to work on a noncovered basis constitutes a mandatory or permissive subject of bargaining because there is insufficient evidence that the Employer has conditioned final agreement on the inclusion of such proposals and the parties have not reached an impasse in negotiations; and 3) the evidence does not demonstrate that the Employer has failed to meet its Detroit Edison obligation in violation of Section 8(a)(5) and the parties' exchange of modified proposals since the filing of the information request charge support that further bargaining would not be futile.

B.J.K.