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NYP Holdings, Inc., d/b/a The New York Post *and* Newspaper & Mail Deliverers' Union of New York and Vicinity.[1] Case 2–CA–37729

December 24, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On February 2, 2007, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.[2]

The National Labor Relations Board[3] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[4]

[1] The caption was amended at the hearing to correct the name of the Charging Party, which was erroneously listed in the complaint, answer, and stipulation of facts as "*Newspapers* & Mail Deliverers' Union of New York and Vicinity" (emphasis supplied).

[2] There are no exceptions to the judge's failure to defer this matter to arbitration or to the judge's use of the "clear and unmistakable waiver" standard.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] We agree with the judge that the Union waived its statutory right to obtain the galleys outside the parameters of memorandum of understanding (MOU) II, which provides for review of the galleys by the circulation growth committee and circulation monitor (the committee and monitor). In doing so, we do not rely on the Union's failure to seek changes to the prior MOU when it was renegotiated in 2006. We also do not rely on the judge's finding that the MOU negotiations satisfied whatever obligation the Respondent had to seek an accommodation with the Union regarding the Respondent's claim of confidentiality.

Although not entirely clear, portions of the Charging Party's brief appear to contend that, at a minimum, the Respondent was statutorily required to provide copies of the galleys to the committee and monitor, if not to the Union's representatives outside the committee process. But we need not pass on that theory, because the General Counsel did not clearly allege or litigate it.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 24, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ruth Weinreb, Esq., for the General Counsel.
Elliot S. Azoff, Esq. and *Todd A. Dawson, Esq.,* for the Respondent.
Lowell Peterson, Esq., for the Charging Party.

DECISION[1]

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York, on December 4, 2006.[2] Newspaper & Mail Deliverer's Union of New York and Vicinity (NMDU or the Union) filed the charge in this proceeding on June 23, and the complaint issued on September 29. The complaint alleges that NYP Holdings, Inc., d/b/a The New York Post (the Respondent), violated Section 8(a)(1) and (5) of the Act by failing and refusing, since about April 2006, to furnish the Union with information it requested. The specific information at issue consists of "the galleys showing the locations to which and the number of newspapers delivered by combined and/or alternate delivery."

On October 12, the Respondent filed its answer to the complaint denying the unfair labor practice allegation and raising several affirmative defenses. The Respondent asserted, inter alia, that its obligation to the Union with regard to the information at issue was governed by a memorandum of understanding (MOU) executed by the parties, that the Respondent had complied with its obligations under that agreement, that any dispute as to compliance should be deferred to the grievance procedure contained in the MOU and that the Union had waived any statutory right it had to the information by entering into the MOU. The Respondent also asserted that the information in question was third party confidential and proprietary in nature.

At the hearing on December 4, the parties submitted a stipulation regarding the facts, together with joint exhibits, which the parties agreed would constitute the record in this case. All parties waived the right to offer testimony from witnesses. On January 8, 2007, the parties filed briefs. On the entire record, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

[1] The name of the Union was amended at the hearing.

[2] All dates are in 2006, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business at 900 East 132 Street, Bronx, New York, is engaged in the publication, distribution, and sale of a daily newspaper, i.e., The New York Post. The Respondent annually derives gross revenues in excess of $200,000, holds membership in and subscribes to interstate news services, publishes nationally syndicated features, and advertises various nationally sold products. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The relevant facts, as stipulated by the parties, are as follows:

The Respondent and NMDU have had a collective-bargaining relationship for many years. Their most recent collective-bargaining agreement, executed on October 29, 2003, is effective through September 30, 2010. The NMDU represents a unit of drivers who deliver the newspapers, as well as utility persons, dispatchers, machine operators, and clerks. The Respondent also has collective-bargaining agreements with eight other unions. Ken Chiarella is the Respondent's director of distribution responsible for overseeing the daily delivery of the newspaper. He enforces the collective-bargaining agreement and handles labor relations with NMDU. He is the Respondent's supervisor within the meaning of the Act and its agent acting on its behalf.

Retail establishments in the metropolitan New York area outside of the five boroughs, with the exception of Hoboken, New Jersey, receive their New York Post from wholesalers and independent delivery services whose employees may or may not be members of the Union. All of the Respondent's newspapers are delivered to these wholesalers and independent delivery services from the Respondent's Bronx production facility by union-represented employees of the Respondent.

The newspaper is delivered by three methods, as set forth in the collective-bargaining agreement. The first method of delivery, called direct delivery, involves the delivery of newspapers from the publisher by unit employees represented by NMDU directly to the retail dealer who then sells the newspaper to the public. Combined delivery is the delivery of the newspapers from the Bronx facility by NMDU-represented unit employees to independent wholesalers who are signatories to a collective-bargaining agreement with NMDU. The wholesaler then delivers the newspapers to retail accounts. Alternate delivery involves the transportation of the newspapers from the Bronx facility by NMDU-represented unit employees who deliver them to independent wholesalers who do not have a collective-bargaining agreement with NMDU. Employees of those companies then deliver the newspapers to their final destination.

The 2003–2010 collective-bargaining agreement, for the first time, contained a memorandum of understanding (MOU I) that provided that up to 24,000 newspapers could be delivered by combined and alternate delivery to retail establishments in the direct territory of the Respondent, which encompasses the five boroughs of New York and an H-1 route in Hoboken, New Jersey, and that this arrangement "may continue unaltered," subject to certain conditions or to "change made by mutual agreement of the parties."

The parties, in MOU I, established a circulation growth committee comprised of three members appointed by the Respondent and three members appointed by the Union to oversee the implementation of MOU I. MOU I, at paragraph 5, also obligated the Respondent to obtain "galleys" from the wholesalers and news companies comprising the alternate and combined delivery of the 24,000 newspapers to retail establishments in the five boroughs and Hoboken, showing all deliveries made and to provide these galleys to the circulation growth committee.

Shortly after execution of the collective-bargaining agreement containing MOU I, the Respondent obtained the galleys and made them available to members of the circulation growth committee. Committee members were not permitted to photocopy or take the galleys out of the Respondent's building. The Union objected to these restrictions. In March 2004, representatives of the Respondent told representatives of the Union that these restrictions would remain in place despite the Union's protestation because of what the Respondent asserted was the confidential and proprietary nature of the documents.

In June 2004, the Respondent and the Union began discussing modifications of the collective-bargaining agreement that, inter alia, would increase the permissible alternate and combined delivery in the five boroughs and Hoboken. Subsequently, agreement was reached over multiple issues, but the Union refused to execute the new agreement.[3] After the parties reached agreement, but before the Union signed it, the Union's then business agent, Tom LoDico, requested the Respondent provide him with copies of the galleys shared with the circulation growth committee pursuant to MOU I that documented the 24,000 limit contained in MOU I so that LoDico could show them to the Union's executive committee as part of his efforts to secure the executive committee's approval of the negotiated modifications to the agreement.[4] The Respondent permitted LoDico to take copies of the galleys to show to the Union's executive committee pursuant to a confidentiality agreement signed by LoDico and Chiarella on August 24, 2004. The confidentiality agreement provides, in its entirety:

> 1. The NMDU Business Representative has requested galleys documenting the 24000 alternate delivery in the five Burroughs [sic], information shared with the Circulation Growth Committee, to show to the NMDU's Execu-

[3] Unfair labor practice charges over this refusal led to a hearing before an administrative law judge in August 2005. The judge found that the Union had unlawfully refused to execute the agreement and ordered that it do so. The Board affirmed this decision and order in *Newspaper & Mail Deliverers' Union of New York and Vicinity,* 348 NLRB 312 (2006).

[4] The parties have stipulated, as found by the judge in *Newspaper & Mail Deliverers' Union of New York and Vicinity*, supra, that LoDico was an agent of the Union at the time.

tive Committee in order to demonstrate his knowledge as to where the alternate delivery is going.

2. The Post has stressed the proprietary nature of the information, which the Business Representative has acknowledged.

3. The Post is giving the galleys to the Business Representative based on his representation that no additional copies will be made, that he will show them to the Executive Committee, will allow no copying and then will collect and return them to a New York Post representative.

After the administrative law judge's decision was issued, on November 9, 2005, the Union and the Respondent entered into an agreement dated January 10, 2006, which modified the collective-bargaining agreement and resolved a number of open issues between the parties that were the subject of the unfair labor practice case. As part of this agreement, the parties entered into a revised memorandum of understanding (MOU II) that, inter alia, increased the number of daily and Sunday newspapers that could be delivered to retail establishments in the five boroughs and Hoboken by combined and alternate delivery to 50,000 and revised the joint labor-management committee, i.e., the circulation growth committee, that had been created to monitor the program. The Union, pursuant to MOU II, appointed a unit employee to serve in the new role of circulation monitor, to review the manifests and galleys on the Union's behalf to ensure that the Respondent did not exceed the 50,000 limit. The Respondent, pursuant to MOU II, pays the monitor one straight time day's pay per month to review the galleys.

The January 10, 2006 agreement specifically provided that MOU I, contained in the 2003 collective-bargaining agreement, "shall be of no further force and effect and shall be replaced by" MOU II. In paragraph 3 of MOU II, the parties agreed that the circulation growth committee "shall be empowered to monitor (i) combined and alternate delivery to retail dealers within the direct territory of the Publisher and (ii) the practices delivering to unauthorized accounts within the direct territory of the Publisher and topping of retail dealers serviced by direct delivery." With respect to the galleys in dispute in this case, paragraph 6 of MOU II provided as follows:

> The publisher will continue obtaining from wholesalers and news companies comprising the combined and alternate delivery described in paragraph 1, current, up-to-date galleys showing all deliveries. Such galleys shall be kept current and shall be provided to the Committee. Within 45 days of engaging a new independent contractor, the Publisher shall send a letter to that contractor notifying the contractor of its intent to police the integrity of its direct territory in accordance with this Memorandum of Understanding and that enforcement may involve termination of delivery arrangements.

In paragraph 8, the parties agreed as follows:

> Through the Committee, the Publisher and Union will review galleys to monitor that the 50,000 Limitation is not being exceeded. Additionally, the Committee will investigate claims and allegations of topping off of accounts and delivering to unauthorized accounts. Any combined or alternate delivery company found to be topping off accounts will be warned in writing and requested to take immediate remedial action to halt the practice, including prohibiting the employees responsible from handling or delivering the Publisher's newspapers. Companies that are found by the Committee to be repeat offenders will be required to provide a written program of compliance satisfactory to the Committee. Subsequent violations determined by the Committee to be the responsibility of the company as opposed to individual employee(s) (who must be prohibited from delivering or handling the Publisher's newspapers) will result in remedial action by the Publisher, against the company up to and including total replacement of the company.

At paragraph 15, the parties agreed that the committee is empowered to investigate all issues relating to this memorandum and to enforce its terms. MOU II further provides, at paragraph 16, that "any complaints alleging violations of this Memorandum which cannot be satisfactorily adjusted through the grievance process, shall at the option of either party, proceed to arbitration expeditiously under the collective bargaining agreement." Finally, in paragraph 18, the parties agreed that MOU II "shall supersede and take precedence over any conflicting term in the collective bargaining agreement, side letter, or other understanding between the parties."

In compliance with its commitments detailed in MOU II, the Respondent obtained the galleys from several third-party wholesalers and independent news companies showing daily and Sunday stops and deliveries. These galleys list by route the name and address of each stop (i.e., the retail establishments) receiving newspapers and the draw (i.e., the number of newspapers delivered at each stop) for each day of the week. There are approximately 2200 stops. The galleys consist in aggregate of approximately 50 pages. The Respondent provided these galleys to the circulation growth committee but prohibited photocopying of the documents or taking the documents out of the Respondent's building. The Respondent did permit note taking and hand copying and review of the documents in the building at the convenience of committee members and the monitor. The Union has continued to object to these limitations.

In obtaining the galleys, representatives of the Respondent's circulation department gave third-party wholesalers and independent news companies verbal assurances that, while the documents would be shared with members of a union-management committee, the galleys would not be photocopied or be permitted to be taken out of the Respondent's facility. These assurances were never discussed during the negotiations of MOU II. After MOU II was signed, the Respondent never advised the Union that it needed to give the independent companies assurances before it could obtain the galleys. At one point, after the dispute involved in this proceeding arose, Chiarella told the Union that these assurances had been given to the companies.

On or about April 2006, the Union's business representative in charge of relations with the Respondent, Tom Bentvena, requested that the Respondent furnish the Union with copies of the galleys obtained by the Respondent pursuant to MOU II. The Union claims that it needs the information contained in the

galleys to determine whether or not the Respondent is exceeding the 50,000 limitation set forth in MOU II and in order to perform its duties as bargaining representative of unit employees. The Union also claims that it needs photocopies of the galleys because the information is so voluminous that it cannot accurately review the documents by visual inspection or by hand copying the information. The Union has stated that its representatives are willing to take photocopies of the galleys, review the documents, and then return the photocopies to the Respondent once they are done properly examining them.

Chiarella refused Bentvena's request for copies of the galleys, stating that, according to MOU II, the galleys were to go only to the circulation growth committee and the circulation monitor, and that the information in the Respondent's possession had been produced to those entitled to review the information in accordance with the MOU II. Chiarella stated that the limitations imposed by the Respondent on access to the documents by the committee and the monitor were reasonable given the proprietary and confidential nature of the documents. Chiarella also referred to the assurances the Respondent had given to the third parties from whom it obtained the galleys.

On June 27, Bentvena filed a grievance over the Respondent's failure to give free and unfettered access to the galleys. On July 11, Chiarella responded to the grievance and sought to schedule a joint board meeting, which would have been the next step prior to arbitration. The Union has neither scheduled nor requested a joint board meeting on its grievance. However, during discussions concerning the grievance, the Union has offered to enter into some form of confidentiality agreement in order to obtain photocopies of the galleys. In that discussion, Chiarella told Bentvena that the Respondent's lawyer was working on such a document. In the context of the Chiarella—Bentvena discussion, the Respondent's general foreman, Ed Francione, an admitted supervisor and agent of the Respondent, told Bentvena that he was confident that the Union would receive copies of the documents. Later that day, Chiarella advised Bentvena that the Respondent would not give the Union copies of the galleys. In his July 11 response to the Union's grievance, Chiarella stated that the Respondent was declining the Union's offer to execute a confidentiality agreement because the Respondent believed it had complied with MOU II and, therefore, such an agreement was not warranted or necessary.[5]

On July 21, the Respondent advised the Board's Regional Office in writing that it was willing to arbitrate the issues involved in production of the galleys and waive any procedural deficiencies with respect to the grievance.

B. Should the Complaint be Deferred to Arbitration?

As previously noted, the Respondent raised as an affirmative defense that the complaint allegations should be deferred to the parties' contractual arbitration procedures pursuant to the Board's *Collyer* deferral policy.[6] Counsel for the General Counsel, at the hearing and in her brief, also requested that I recommend, as an "alternative remedy" for the alleged unfair labor practice, that the Board reconsider its policy regarding deferral in information request cases and defer this matter. The Charging Party opposes deferral.

As the parties concede, the Board has historically declined to defer allegations regarding a union's request for information to contractual grievance procedures. *Team Clean, Inc.,* 348 NLRB 1231 fn. 1 (2006), and cases cited therein. The Board has taken this position even where, as here, the contract contains specific provisions regarding a union's right to information. *United Technologies, Inc.,* 274 NLRB at 505. The Board's rationale has been its unwillingness to institute a "two-tiered arbitration process" whereby a request for information relevant to a grievance and then the grievance itself would have to be resolved by an arbitrator. Id. In *Team Clean,* supra, the Board recently reaffirmed this position although three Board members suggested that the policy may be ripe for reconsideration.

Until such time as the Board decides to revise or abandon its current policy regarding deferral of information requests, I am bound to follow the current policy. Although the instant case contains a contractual provision regarding the information in dispute and a grievance-arbitration provision broad enough to cover the dispute, I shall leave it to the Board to decide if this is the case certain members had in mind where deferral would be appropriate. Accordingly, I shall reject the Respondent's affirmative defense, and decline the General Counsel's alternative request, that the complaint be deferred to the parties' grievance-arbitration procedures.

C. The Merits

It is well established that an employer has an obligation to supply requested information which is reasonably necessary to the exclusive collective-bargaining representatives' performance of its duty to represent employees. *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). This includes information that is necessary to processing grievances and administering a collective-bargaining agreement. *United Technologies Co.*, supra. The Board has held that an actual grievance need not be pending and that the information at issue need not be of the type that would clearly dispose of any grievance. *Ohio Power Co.,* 216 NLRB 987, 991 (1975). Information that relates directly to unit employees' terms and conditions of employment has been deemed presumptively relevant and must be furnished upon request. Although a union must demonstrate the relevance of other information, such as that related to third parties, the Board has applied a liberal discovery-type standard of relevance to such information requests. *Postal Service,* 337 NLRB 820, 822 (2002); *Brazos Electric Power Co-Op., Inc.*, 241 NLRB 1016, 1018 (1979).

As the parties' stipulation makes clear, there is no dispute regarding the relevant facts. The Union, which has been the employees' 9(a) representative for years, made a request, in April, for copies of the galleys obtained by the Respondent from third-party newspaper distributors that would show the locations to which and the number of newspapers delivered by combined and/or alternate delivery. There is no question that this information directly relates to the 50,000 paper limitation

[5] The parties have stipulated that MOU II is the only document between the parties currently in effect that relates to the production of galleys.

[6] *Collyer Insulated Wire,* 192 NLRB 837 (1971); See also *United Technologies Corp.,* 274 NLRB 504 (1985).

for such deliveries in the parties' MOU II and that such information would be of use to the Union in determining whether the Respondent has exceeded the limits or otherwise violated the commitments made in that agreement. The Respondent, while denying the Union's request for copies of the galleys, has not refused all access to this information. On the contrary, in its response to the Union, the Respondent has cited the MOU II, pursuant to which it has consistently furnished these galleys to a joint labor-management committee and a union-appointed monitor who are charged with overseeing the MOU II.[7] There is no dispute that the Respondent has placed restrictions on access to the galleys by the committee members and the monitor, asserting confidentiality. The issue presented here is whether Respondent's compliance with its obligations under the MOU II has satisfied its statutory obligations to the Union or whether the Union is entitled to receive copies of the galleys outside the parameters of the MOU II.

In the absence of the MOU II, I would find that a refusal by the Respondent to furnish documents related to its use of outside delivery companies to perform work customarily performed by bargaining unit members violated the Act. The Board has consistently held that a union is entitled, upon request, to information relevant to issues such as subcontracting that have a tendency to erode unit work. See *Garcia Trucking Service,* 342 NLRB 764 (2004), and cases cited therein. The Board has also held that, where information requested by a union is in the possession of third parties with whom an employer has a business relationship, such as a subcontractor, the employer is obligated to make a good-faith, reasonable effort to obtain the information from such parties. *Fireman & Oilers,* 302 NLRB 1008 (1991); *United Graphics,* 281 NLRB 463, 466 (1986). See also *Pittston Coal Group, Inc.,* 334 NLRB 690, 693 (2001) (Board, while reaffirming this principle, found that employer need not threaten to terminate a contractual relationship with its subcontractor in order to obtain information requested by a union). Where, as here, an employer asserts that information requested by a union is confidential, the Board has held that the employer must demonstrate the confidential nature of the information and seek an accommodation with the union before its refusal to furnish the information will be found lawful. *Exxon Co. USA,* 321 NLRB 896, 898 (1996), and cases cited therein. Under well-established precedent, a blanket refusal by the Respondent to furnish the Union with copies of the galleys it had obtained from its combined and alternate delivery contractors would clearly be an unfair labor practice.

The facts stipulated by the parties demonstrate, however, that the Respondent did not simply refuse to provide the galleys requested by the Union. Rather, Chiarella cited the MOU II and the procedures contained therein in response to Bentvena's information request, asserting that these procedures satisfied whatever obligation the Respondent had to provide this information to the Union. Since there is no claim that the Respondent has not consistently provided the galleys to the joint labor-management committee and the Union's designated monitor under the terms of the MOU II, nor any evidence that the procedures outlined in the MOU II were not working as intended, the real question here is whether the Union has waived any statutory right it had to the information by agreeing to the MOU II. *American Broadcasting Co.,* 290 NLRB 86 (1988). See also *Budd Co.,* 348 NLRB 1223 (2006).

The Board and courts have held that a union may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983); *American Broadcasting Co.,* supra; *United Technologies Corp.,* 274 NLRB at 507. Under Board law, a waiver "can occur in one of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. The language of a collective bargaining agreement will effectuate a waiver only if it is 'clear and unmistakable' in waiving the statutory right." *Chesapeake & Potomac Telephone Co. v. NLRB,* 687 F.2d 633, 636 (2d Cir. 1982), cited many times by the Board. See, e.g., *American Broadcasting Co.,* 290 NLRB at 88. In this case, the Respondent contends that the Union waived its right to the galleys by negotiation of the MOU II and establishment of the circulation growth committee and the circulation monitor as the mechanism for enforcement of the contractual limitation on combined and alternate deliveries.

The parties' stipulation establishes that, in 2003, the Respondent and the Union agreed for the first time that the Respondent could deliver a limited number of papers using the combined and alternate method of delivery. In order to police this agreement, the parties created a joint labor-management committee with the power "to investigate all issues relating to [the MOU] and to enforce its terms." In order to facilitate the committee's tasks, the Respondent agreed to obtain from its contractors, and provide to the committee on a regular basis, "current, up-to-date galleys showing all deliveries." The parties further agreed that any complaints alleging violations of the MOU that could not be resolved by the committee would be subject to the contractual arbitration provision. Finally, it was agreed that the MOU superseded and would take precedence over "any conflicting term in the collective bargaining agreement, side letter, or other understanding between the parties." In 2006, the parties negotiated a new MOU which increased the number of papers that could be delivered by combined and alternate delivery, made changes to the composition of the committee, and created a new position, circulation monitor, to be appointed solely by the Union. The committee continued to be tasked with monitoring compliance with the MOU and enforcing its terms. The Union now had its own representative, the monitor, as further assurance that the Respondent would comply. The new MOU also established a mechanism for sanctioning violations of the MOU by the outside delivery companies. As with the initial MOU, the Respondent obligated itself to obtain the galleys necessary to determine compliance and agreed to make those available to the committee and the monitor. MOU II retained the provisions designating the committee as the entity charged with resolving disputes under the MOU and providing for arbitration of any disputes the parties are

[7] There is no contention in this case that the Respondent has not fulfilled its obligation, under the MOU II, to provide the galleys to the committee or the monitor.

unable to resolve in the committee. The parties also agreed, as in MOU I, that MOU II would supersede the collective-bargaining agreement and all other agreements between the parties.

I find that the express language of the MOU clearly demonstrates the parties' intent that the committee and the Union's designated monitor would be the exclusive forum for investigating complaints regarding violations of the MOU and enforcing its terms, subject only to arbitration of any unresolved disputes. Although the MOU II does not specifically provide that the galleys would only be furnished to the committee and the monitors, the parties' practice under MOU I and II supports such an interpretation. Thus, although there is no dispute that the Union objected when the Respondent asserted that the galleys were confidential, and limited access to them to the committee, it did not seek any changes in the MOU when it was renegotiated in 2006.[8] Moreover, on the one occasion where the Respondent provided copies of the galleys to the Union's business representative, he signed an agreement expressly acknowledging the proprietary nature of this information and agreeing to restrictions on copying and use of the documents. Accordingly, I find that by agreeing to MOU II, the Union has relinquished whatever right it had under the Act to obtain the galleys outside the parameters of the MOU II.

In its brief, the Charging Party argues that the limitations imposed on the committee and the monitor with respect to use of the galleys makes it difficult, if not impossible, for the Union to police the agreement and enforce its terms. Even assuming that were the case, it would not persuade me to change my decision because the Union, in agreeing to the MOU II, made this bargain. If it is unhappy with the result of the negotiations, it cannot expand its rights under the MOU II by filing unfair labor practice charges. Moreover, I do not agree that limiting access to the galleys to the committee and the monitor prevents the Union from effectively representing the employees. There is nothing in the MOU II, or the parties' stipulation, that suggests the monitor and the union members of the committee would not be given whatever time they needed to review the galleys at the Respondent's facility. Although MOU II provides for 1-paid day a month for the monitor to perform his duties and one meeting a month for the committee, nothing in the agreement suggests that this is the only time the monitor and committee members would be permitted to review the galleys. Thus, if the Union believed the monitor needed more time, they are free to arrange for the monitor to review the documents without compensation from the Respondent. Moreover, under the terms of the MOU II, if the monitor, through even a cursory review of the galleys, believed there was a potential violation of the MOU II's limitations on combined and alternate delivery, he or she could invoke the mechanism under the MOU II to investigate further by bringing a complaint before the committee. There is no evidence in the record that, in the face of an actual complaint of noncompliance, or a request for arbitration of an unresolved complaint, that the Respondent would deny the Union's monitor and representatives on the committee access to the galleys needed to investigate such a complaint.[9]

Based on the above, I find that the Union has waived its right to obtain copies of the galleys outside the parameters of the MOU II that was negotiated by the parties and executed in January 2006. Accordingly, the Respondent did not violate Section 8(a)(1) and (5) of the Act when it refused Business Representative Bentvena's April 2006 requests for copies of the galleys that Respondent had furnished to the joint circulation growth committee and the circulation monitor pursuant to the MOU II. By complying with the terms of the MOU II for production of these records, the Respondent met its obligations to the Union.

CONCLUSION OF LAW

By refusing to furnish the Union's business representative, in response to his April 2006 request, with copies of the galleys showing the locations to which and the number of newspapers delivered by combined and/or alternate delivery, the Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 2, 2007.

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[8] As the Respondent points out in its brief, the negotiations over the MOU would appear to satisfy whatever obligation the Respondent had to seek an accommodation with the Union regarding production of information that the Respondent claimed was confidential. See *Exxon Co. USA,* supra.

[9] I also note, as pointed out by the Respondent, that the Union's business representative is an ex officio member of the committee with the right to attend meetings, thereby gaining access to the galleys.

[10] 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.