Watsonville Newspapers, LLC, d/b/a Watsonville Register-Pajaronian *and* San Jose Newspaper Guild, Local 98, affiliated with The Newspaper Guild. Case 32–CA–15035

March 24, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On March 7, 1996, Administrative Law Judge William L. Schmidt certified his Bench decision, including his Order Correcting and Modifying Transcript of Bench Decision, and Bench Decision Supplement, in this proceeding. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in opposition to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

This case poses the question whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by requiring that its display ad employees be out of the office from at least 10 a.m. to 3 p.m. on a daily basis. This requirement was imposed without prior notice to San Jose Newspaper Guild, Local 98, affiliated with The Newspaper Guild (the Union) and without affording the Union an opportunity to bargain about the requirement and its effects. The affected employees previously had discretion to arrange their schedule regarding when they were going to be out of the office making sales, and when they were going to be in the office performing other duties.

In its answer the Respondent admits that it made the change, that the change involved a mandatory subject of collective bargaining, and that it made the change without prior notice to the Union and without affording the Union an opportunity to bargain about the change and its effects. The Respondent asserted, inter alia, as an affirmative defense, that the new rule was "mere compliance with the Fair Labor Standards Act." The Respondent also asserted at the hearing that its implementation of the rule was a permissible exercise of supervisory control to improve efficiency.

The judge dismissed the complaint, and the General Counsel excepts. We find merit to the General Counsel's exceptions and, for the reasons discussed below, find that the Respondent violated Section 8(a)(5) and (1) of the Act.

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

I. FACTS

The Respondent purchased the Watsonville Register-Pajaronian in early 1995. Nancy Moors has been the advertising director of the newspaper since July 3, 1995. On August 3, 1995, Moors informed the display ad employees that she expected them to spend the period between 10 a.m. and 3 p.m. each day out in the field calling on customers, unless the employees obtained specific permission from her. This was a change from the past practice of allowing the display ad employees discretion in scheduling their work.

The General Counsel alleged that this conduct was unlawful under Section 8(a)(5). In support of an affirmative defense, the Respondent submitted into evidence the job description for the display ad employees. That job description shows that the employees' official title is "outside sales representatives," and indicates that their primary responsibility is to sell and service "retail or classified display advertisements, lay-out ads, and provide general good will" towards customers.

The job description shows a checkmark by the notation "exempt." Under the Fair Labor Standards Act (FLSA) an employer is not required to compensate its exempt employees for overtime worked and is not required to maintain certain records that are required for nonexempt employees.

Under FLSA Section 541.5, an exempt outside sales employee is defined as an employee:

> (a) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:
>
> (1) making sales within the meaning of Section 3(K) of the Act; or
>
> (2) obtaining orders or contract for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (b) whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the work week by non-exempt employees of the employer. Provided work performed identical to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as non-exempt work.

The display ad employees here also perform a number of other duties (at least some of which are included in the job description) which are connected with their sales duties. These other duties include collecting ad copy and material from clients, writing and otherwise building the ad copy, calculating ad costs and repeat costs, securing ad photos, handling customers' billing problems, preparing sales account profiles for future sales purposes, and researching old ad copy to obtain current sales prospects. The display ad employees also receive and make phone

calls to clients in connection with selling advertisements. These employees are additionally required to attend sales meetings held each morning and afternoon by their supervisor, at which they are to submit their daily sales plans and other written reports.

II. THE JUDGE'S DECISION

As stated above, the judge dismissed the complaint. He first noted that the Respondent contends that it had no duty to bargain about the change because the change was designed to conform with the Fair Labor Standards Act requirements for exempt employees. The judge concluded that:

> [A]s Respondent has historically classified its display ad employees as exempt from the overtime and record keeping requirements of the FLSA, it has a duty to assure compliance with that law. Considering the loose past practice, I find that the 10:00 to 3:00 rule to be a reasonable effort in this regard.

And that Respondent was at liberty to impose it unilaterally.

The judge relied on the decision of the administrative law judge in *Murphy Oil*, 286 NLRB 1039, 1042 (1987). He reasoned that the OSHA-compelled ban in *Murphy Oil,* "against eating in the toxic chemical storage area . . . and [the] Respondent's unilateral action here are analogous in that both situations reflect a reasonable exercise of supervisory control to achieve compliance with a federal regulatory scheme."

Second, the judge found that the implementation of the rule here was only the exercise of supervisory control to ensure that the "employees were doing what they were supposed to be doing under the longstanding job description," citing, *Trading Port, Inc.,* 224 NLRB 980, 983 (1976).

III. DISCUSSION AND CONCLUSIONS

As noted above, the judge concluded that the Respondent's rule was a reasonable attempt to qualify the employees for exemption from FLSA overtime requirements, and that the Respondent therefore was privileged to impose it unilaterally. We disagree. As the judge correctly noted, the Respondent had a duty to comply with the FLSA's overtime provisions. However, it does not follow that the Respondent was therefore "required" by the FLSA to change the work schedules of the display ad employees. What the FLSA requires is the payment of overtime to all employees except those that fall within one of the categories that are exempt under the statute from the overtime requirements. Although the statute allows an employer *not* to pay overtime to employees whose duties and work schedules are such that they are in an exempt category, it does not in any sense mandate that the job of any employee be structured so as to enable the employer to treat the employee as exempt. If, as the Respondent apparently believed, the display ad employees did not, because of their work schedules, qualify for a statutory exemption,[2] it could have complied with the law by simply paying them overtime. That the Respondent instead elected to change the working conditions of the display ad employees in an effort to satisfy one of the exemptions was not the result of any legal compulsion, and therefore did not insulate the Respondent from its obligations to bargain under the National Labor Relations Act. See *Keystone Consolidated Industries,* 309 NLRB 294, 297 fn. 7 (1992), and related text, reversed and remanded on other grounds 41 F.3d 746 (D.C. Cir. 1994); *Jones Dairy Farm*, 295 NLRB 113, 114–115 (1989), enfd. 909 F.2d 1021 (7th Cir. 1990). In the instant case, the number of hours worked in and out of the office is clearly a term and condition of employment. Thus, the Respondent had a duty to bargain with the Union over the proposed new rule.

Exxon Shipping Co., 312 NLRB 566 (1993), cited by the Respondent, is distinguishable from this case. The Board initially found that the employer there had violated Section 8(a)(3) by discriminatorily refusing to process employees' draw check orders made payable to the union for union dues and had violated Section 8(a)(5) by unilaterally imposing new restrictions on the use of the draw check order system. On remand from the United States Court of Appeals for the Third Circuit, the Board dismissed the complaint. It noted that to reaffirm the original decision "ordering the [r]espondent not to discriminate in its processing of draw check orders nor to change those procedures unilaterally would require the respondent to violate the Coast Guard's interpretation of 46 U.S.C.§ 10502(c) and be contrary to our acceptance of the remand." Thus, in *Exxon*, the Board's finding a violation and imposing a standard remedy would have required the employer to violate Federal law. In the instant case, ordering a return to the status quo ante and bargaining would not impose an unlawful condition on the Respondent. We recognize that it may cause these employees to be nonexempt, pending bargaining. However, that is not the same as requiring the Respondent to act illegally, as the FLSA does not require the Respondent to treat these employees as exempt.

The situation here is more akin to those in *Dickerson-Chapman, Inc.,* 313 NLRB 907, 942 (1994), and *Hanes Corp.,* 260 NLRB 557, 558, 561–563 (1982). In each of those cases the respondent had made changes in order to comply with statutes or regulations. The Board concluded in each case that the failure to provide the union

[2] It is unnecessary for us to determine, for purposes of our decision, whether the display ad employees were in fact properly treated as exempt from the overtime requirements of the FLSA either before or after the implementation of the change that is at issue in this case. As explained above, our point is simply that regardless of whether the change affected or was intended to affect the employees' status under the FLSA, it was not a change that the FLSA required the Respondent to make.

with notice and an opportunity to bargain regarding the change was not excused and was violative of Section 8(a)(5). In each case the Board found, in essence, that the actions taken by the respondents were not the only actions available to ensure compliance with the relevant law. Thus, the respondents could have bargained regarding the discretionary action taken to comply with the law.

In *Dickerson*, supra, the Board held that a respondent had an obligation to bargain over the identity of the employees who would perform "competent-person" functions. The Board adopted the judge's finding that, although OSHA regulations required the respondent to designate "competent persons," these regulations did not excuse the respondent from bargaining with the union regarding who would be designated as a "competent person." Id. at 942. Similarly, in *Hanes*, supra, the Board found that a respondent violated Section 8(a)(5) by refusing to bargain with the union regarding which respirators would be used to comply with an OSHA regulation requiring the use of respirators by employees. The OSHA regulations did not require the employees to use any specific respirators and in fact left open to employers "significant flexibility and latitude in implementing steps necessary for compliance." The Board noted that there were "a number of approved respirators to choose from" (the union contended that there were 119 respirators which had been approved) and ordered the respondent to cease and desist from refusing to bargain. Therefore, although the employer, without bargaining with the union, could require the employees to use respirators, it could not unilaterally determine which of the approved respirators would be used.[3]

In this case, like *Dickerson-Chapman, Inc.,* supra, and *Hanes Corp.,* supra, it was not necessary for the Respondent to take the specific action that it did to comply with the relevant statute. As noted, the FLSA does not require the Respondent to treat the affected employees as exempt. Therefore, the requirements of the FLSA did not excuse the Respondent's failure to provide notice and an opportunity to bargain to the Union regarding the discretionary new rule and its effects.

With respect to *Murphy Oil*, we note that no exceptions were filed to the portion of the administrative law judge's decision in that case that the judge here relied on, and that the decision is therefore of no precedential value on that point.[4]

We now turn to the judge's other basis for dismissing the complaint. The Respondent contends that there "is no substantial evidence" that the "out-of-the-office" rule had significant impact on the employees. The Respondent further argues that the employees would benefit from the rule because it gives more structure to their workday and increases the likelihood of their making sales. The judge found that the rule had "no immediate impact on wages" but that "it probably did affect the hours and terms of employment which are usually mandatory subjects of bargaining."[5] Nevertheless the judge essentially agreed with the Respondent that the new "rule was an example of a more efficient means of monitoring and supervising the employees." The judge concluded that the implementation of the rule was "nothing more than the exercise of supervisory control to insure that the display ad employees are doing what they were supposed to be doing under the longstanding job description."

In reaching his conclusion that the Respondent's rule was within the area of management/supervisory control, the judge relied on *Trading Port,* 224 NLRB 980, 983 (1976). In that case, the Board had concluded that the respondent did not violate Section 8(a)(5) by unilaterally installing a timing device to measure employee productivity more accurately and by its related tightening of the application of existing disciplinary sanctions. Unlike the Respondent's actions here, the employer's actions in *Trading Port*, "did not entail the publication of new rules or revisions to published standards." Thus, it was concluded that the employer was privileged to act unilaterally to "revis[e] its own internal procedures for assuring that employees do their work energetically or face the consequences," if there was no conflict with plant practices evidenced from published standards, rules, or collective-bargaining agreements.

The holding in *Trading Port* was a narrow one. It cannot be read to justify unilateral changes that include, as here, the institution and publication of new rules affecting mandatory subjects of bargaining. That is, the change here involved the hours of outside versus inside work. The change was from a system of employee dis-

[3] Accord: *J. P. Stevens & Co.,* 239 NLRB 738, 742–743 (1978), enfd. in relevant part 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1070 (1981). In *J. P. Stevens*, the Board found that the respondent had violated Sec. 8(a)(5) by unilaterally determining what type of OSHA-approved respirator its employees would be required to use, although the General Counsel had conceded that, because the State's Department of Labor had issued citations to the respondent requiring employees to use OSHA-approved respirators, the institution of a rule requiring use of respirators did not violate the Act. See also *Blue Circle Cement Co.,* 319 NLRB 954 fn. 1, 958–959 (1995), enf. denied in relevant part in unpublished opinion 106 F.3d 413 (10th Cir. 1997). In that case the Board held that an employer could unilaterally prohibit employees from eating lunch in the shop because Federal regulations prohibited the consumption of food in an area where certain chemicals were present. However, the employer violated Sec. 8(a)(5) by failing to bargain about the effects of the change. The court denied enforcement on this point because the union never requested bargaining. Here, any union bargaining request would have been futile. At times material, the Respondent was challenging the Union's certification as the employees' collective-bargaining representative.

[4] *Murphy Oil,* supra at fn. 1. It is a well-established practice of the Board to adopt, as a matter of course, an administrative law judge's findings to which no exceptions are filed. Findings adopted under such circumstances are not, however, considered precedent for any other case. *Colgate-Palmolive Co.*, 323 NLRB 515 fn. 1 (1997); *Annniston Yarn Mills*, 103 NLRB 1495 (1953).

[5] We again note that the Respondent admits that the change involved a mandatory subject for collecting bargaining.

cretion to one of employer control. The governing standard is discussed in *Bath Iron Works Corp*., 302 NLRB 898, 901 (1991):

> When changes in *existing* [emphasis added] plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a "material, substantial, and significant" change. Only changes of this magnitude trigger a duty to bargain under the Act.[6]

Or as phrased recently by the Seventh Circuit, "So long as the new policy represents a material and significant change in working conditions, the Union has a right to bargain over it on behalf of its members." *NLRB v. Roll & Hold Warehouse & Distribution Corp*., 162 F.3d 513, 518 (7th Cir. 1998).

In *Womac Industries*, 238 NLRB 43 (1978), the Board reversed the judge's finding that requiring employees to furnish a doctor's excuse for absences due to illness constituted an "isolated exercise of general supervisory function" and did not violate the Act. The Board found that the new requirement represented a significant change from the prior practice of not requiring such an excuse. Thus, the Board concluded that the respondent violated the Act by implementing the change without notifying or bargaining with the union.

Further, as noted in *Safeway Stores, Inc*., 270 NLRB 193, 195 (1984), the language in *Trading Port,* supra, must be read in context and does not stand for the proposition that an employer's need for efficiency justifies any and all unilateral changes. Where a violation of the duty to bargain is alleged due to the respondent's unilaterally implementing a change in terms and conditions of employment, the Board does not assess whether the change makes the workplace better or worse. Rather, the issue is "whether the change is of legitimate concern to the union as the representative of employees, such that the union would be entitled to bargain about the change on behalf of the employees."[7]

Turning to this case, we note that there is nothing in the job description that indicates that the display ad employees are required to be out of the office any specific hours or even any number of hours. The judge apparently was referring to the Respondent's historic treatment of these employees as "exempt," and thus subject to FLSA requirements for exempt employees, in stating that the rule ensures that the employees are "doing what they were supposed to be doing under" the job description. Contrary to any implication by the judge, however, the record does not support a conclusion that the display ad employees were doing anything other than their assigned duties when they were in the office. Testimony by employee Jon Garst Stanger, as well as duties listed on the job description, show that the employees have a variety of duties that are performed in the office.

We recognize that the Respondent's change here may have been consistent with its written job description. However, terms and conditions of employment are based on what employees actually do, not on what a job description may say they do. In the instant case the Respondent unilaterally imposed a new rule that changed the actual terms and conditions of employment.

Contrary to the judge, requiring the display ad employees to be out of the office from 10 a.m. to 3 p.m. on a daily basis did not merely ensure that these employees were doing what was already required of them. Rather, the job requirements were changed in a manner that affected those employees' terms and conditions of employment.[8] The fact that the new rule completely changed the way the employees could arrange their work schedule is sufficient to find that it is materially, substantially, and significantly different from the previous practice.[9] In addition, the rule also contained the potential effect of requiring the employees to do the same amount, or more, in-office work in less time, and/or to extend their working hours in order to complete their in-office duties. We emphasize that we in no way suggest that the Respondent does not have a legitimate interest in restructuring its employees' hours in order to achieve its goals, including maintaining its exemption under FLSA. We hold here only that it is the Respondent's duty to notify and, upon request, bargain with the Union about these proposed changes.

---

[6] In the cases relied on by the Respondent here, the Board found that the employers' unilateral actions did not violate Sec. 8(a)(5) and (1). For example see *Allied Mechanical Services,* 320 NLRB 32 (1995) (clarification of existing overtime pay policy consistent with policy in employee handbook); *Litton Systems,* 300 NLRB 324, 331–332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991) (installation of a central clock and buzzer system to signify the beginning and ending of breaks); *Rust Craft Broadcasting*, 225 NLRB 327 (1976) (respondent substituting timeclocks for manual notations to record worktime); and *Wabash Transformer Corp*., 215 NLRB 546 (1974) (respondent's implementing discharge for violation of longstanding rule not a violation, as discharge was implicit as possible discipline for failing to comply with the rule). However, in all these cases, unlike the case before us, the respondents did not institute new rules that significantly affected employees' terms and conditions of employment. Rather, the respondents acted to monitor the enforcement of existing rules.

[7] See *Northside Center for Child Development*, 310 NLRB 105 (1993).

[8] See *Kendall College*, 228 NLRB 1083, 1086–1087 (1977), enfd. 570 F.2d 216 (7th Cir. 1978), where the Board rejected both the contention that class schedules did not have an effect on terms and conditions of employment of faculty members, and the contention that any such impact was insignificant or immaterial. In *Kendall* it was noted that the "class schedules had the potential, if not an actual, effect on the consecutive time or hours worked by the faculty members, their days off, and their ability to pursue other employment and personal interests."

[9] We note that Stanger's testimony indicates that before the "out-of-the-office" rule was implemented he arranged his schedule not only based upon his preference but also to accommodate clients' needs and to meet deadlines.

For the reasons discussed above, we find that the Respondent's implementation of a rule requiring its display ad employees to be out of the office from 10 a.m. to 3 p.m., without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this change in terms and conditions of employment and its effects, constitutes a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent 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, and is the exclusive representative under Section 9(a) for the following appropriate bargaining unit:

> All full-time and regular part-time employees employed in the Employer's business office, editorial department, advertising department, and ad service department; excluding all other employees, guards, and supervisors as defined in the Act.

3. By implementing a new rule requiring its display ad employees to be outside of the office performing sales functions from at least 10 a.m. to 3 p.m. each day without prior notice to the Union and without affording the Union an opportunity to bargain about the requirement and its effects, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that the Respondent on August 3, 1995, by implementing a requirement that its display ad employees make sales outside of the office from at least 10 a.m. to 3 p.m. each day without prior notice to the Union and without affording the Union an opportunity to bargain about the requirement and its effects, violated Section 8(a)(5) and (1), we shall order the Respondent to cease and desist, and to give prior notice to the Union and an opportunity to bargain to the Union as the exclusive representative of the employees in the appropriate unit before adopting and implementing changes in terms and conditions of employment of unit employees. We shall also order the Respondent to rescind the rule announced on August 3, 1995.

ORDER

The National Labor Relations Board orders that the Respondent, Watsonville Newspapers, LLC, d/b/a Watsonville Register-Pajaronian, Watsonville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Adopting and implementing changes in terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain about the changes and their effects.

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

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

(a) Rescind the requirement, implemented on August 3, 1995, without prior notice to the Union and without affording the Union an opportunity to bargain about the requirement and its effects, that its display ad employees be outside of the office performing sales functions from at least 10 a.m. to 3 p.m. each day.

(b) Within 14 days after service by the Region, post at its facilities located in Watsonville, California, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 3, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, concurring.

I concur in the result. However, I wish to make it clear that this case does not involve any contention that the Respondent had an obligation to bargain about its entrepreneurial decision to have its employees exempted from the overtime provisions of the FLSA. Rather, that deci-

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sion was a given. The Respondent simply had a concern that its work practices may have been out of compliance with the requirements of the exemption. The Respondent therefore instituted the "10 a.m. to 3 p.m." change, in an effort to achieve compliance with the requirements of the exemption. There was no suggestion (or even contention) that the "10 a.m. to 3 p.m." change was the only means of achieving such compliance. In these circumstances, I conclude that the Respondent had an obligation to bargain about the particular change that it instituted.

APPENDIX

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

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

WE WILL NOT adopt and implement changes in terms and conditions of employment of unit employees without giving prior notice to the San Jose Newspaper Guild, Local 98, affiliated with The Newspaper Guild and without affording the Union an opportunity to bargain about the changes and their effects.

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

WE WILL, rescind the requirement, implemented on August 3, 1995, without prior notice to the Union and without affording the Union an opportunity to bargain about the requirement and its effects, that the display ad employees be outside of the office performing sales functions from at least 10 a.m. to 3 p.m. each day

WATSONVILLE NEWSPAPERS, LLC, D/B/A WATSONVILLE REGISTER-PAJARONIAN

Sharon Chabon, Esq., for the General Counsel.
Allen W. Teagle, Esq. (Littler, Mendelson, Fastiff, Tichy & Mathiason), for the Respondent.
Mr. Luther Jackson, for the Charging Party.

BENCH DECISION

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this matter on February 22, 1996, at Oakland, California. Following oral argument at the hearing and the submission of supplemental written argument on February 23, I delivered a bench decision and recommended Order by telephone conference commencing at 3 p.m. on February 23 as provided in Section 102.35(a)(10) of the Board's Rules and Regulations. My bench decision recommends dismissal of the complaint.

For purposes specified in Section 102.45 of the Board's Rules and Regulations, transcript page 209, line 11, through page 222, line 7, shown in Appendix A attached, reflects the bench decision delivered on February 23. My order correcting and modifying the bench decision is attached as Appendix B. [Omitted from publication. Errors in the transcript have been noted and corrected.] My supplement to the bench decision is attached as Appendix C. The specified portion of the transcript in Appendix A, as corrected, modified, and supplemented in Appendices B and C, accurately reflects and constitutes my complete bench decision and recommended Order in this case.[1]

SO CERTIFIED.

Dated: March 7, 1996

APPENDIX A

209

P R O C E E D I N G S

JUDGE SCHMIDT: This is a continuation of the hearing in Case 32–CA–15035. In an off-the-record discussion, I inquired as to whether General Counsel had submitted General Counsel's Exhibit 3 as a part of the record yesterday. To the extent that the record is not clear, that General Counsel's Exhibit 3 will be received as an extension of the General Counsel's argument in this case.

I now am going to turn to my decision in this matter.

The San Jose Newspaper Guild, Local 98, affiliated with the Newspaper Guild instituted this proceeding by filing an unfair labor practice charge against the Watsonville Newspapers, LLC, d/b/a Watsonville *Register-Pajaronian* on October 16, 1995. That charge was subsequently amended on December 13, 1995, and on January 10, 1996, the Regional Director for Region 32 of the National Labor Relations Board issued the complaint in this case, alleging that the Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent, a California corporation with an office and place of business in Watsonville, California, is engaged in the publishing of a daily newspaper called, "The Watsonville *Register-Pajaronian*." Respondent admits that it meets the discretionary gross revenue standard established

210

by the Board for exercising its statutory jurisdiction, and that its direct inflow is in excess of a de minimis amount. Accordingly, I find that the Board has jurisdiction to resolve this labor dispute, and that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I further find that Local 98 is a labor organization within the meaning of Section 2(5) of the Act.

Only the Respondent's operations at its Watsonville *Register-Pajaronian* are involved in this case. At issue in the case is whether the Respondent's admittedly unilateral change which required its display ad employees represented by Local 98 to be out of the office making sales calls between 10:00 a.m. and 3:00 p.m. each work day violated the bargaining requirements of Section 8(a)(5).

Respondent imposed this requirement on August 3, 1995, approximately two weeks after the NLRB election in which Local 98 was selected as the bargaining representative for a group of employees that includes the display ad employees. Following that election, Respondent filed objections to the election on July 28th, and the Regional Director for Region 32

[1] 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.

subsequently issued a report and recommendation on the objections dated August 17, in which he recommended that the union be certified. Respondent filed exceptions to that report and

211

recommendation with the Board, and following its 2 consideration of the matter, the Board rejected the Respondent's exceptions and certified Local 98 on December 4, 1995. Since that certification, Respondent has refused to bargain with Local 98, in order to test the validity of the certification. That matter is presently pending before the Board in another unfair labor practice case, 32–CA–15182.

The principal function of Respondent's employees involved in this case is to sell display advertising for its daily newspaper, a telephone book and television booklet which it publishes, and leaflets for promotions which its clients conduct. Respondent's Exhibit 3, the job description applicable to the display ad employees, reflects that the official title of the position is "outside sales representative," and indicates that the primary purpose of the position is to sell and service retail or classified display advertisements, lay-out ads, and provide general good will towards customers in the assigned territory, under general supervision. This position description which has been in effect since January 1984 designates the position as exempt under the Fair Labor Standards Act. As such, Respondent is not required to compensate its display ad employees for overtime worked, and is not

212

required to maintain certain pay records which it otherwise is required to do for its non-exempt employees. See 29 USC §207 and §213; 29 CRF §516.2 and §516.3.

Display ad employee Peter Stanger testified without any essential contradiction that apart from the basic function of selling the advertising, the display ad employees perform a number of attendant duties. Those duties, to mention only a few, include collecting ad copy and material from clients, writing and otherwise building the ad copy, calculating ad costs and repeat costs, securing ad photos where necessary, handling customers' billing problems, occasionally collecting cash from clients and processing those payments back at the newspaper office, prepairing sales account profiles for future sales purposes, and researching old ad copy to obtain current sales prospects.

With some degree of frequency, the display ad employees will receive and make phone calls to clients in connection with selling advertising, or otherwise dealing with the details of the advertising arrangement. In addition, the display ad employees are required to attend daily sales meetings, held each morning and afternoon by their supervisor, the advertising manager, at which time they are expected to submit their daily sales plan and submit other written reports concerning their activities.

The six display ad employees are grouped together in a

213

separate office at the newspaper plant where they perform nearly all of their in-office work. During a typical work day, the display ad employees will also meet with customers at the customer's business establishments, soliciting sales, or otherwise reviewing ad copy with clients. The crux of this matter concerns the amount of time Respondent expects the display ad employees to be out of the office, making such sales calls.

Respondent acquired the Watsonville *Register-Pajaronian* from the Scripps chain in February 1995. Subsequently, Patrick Duffy, Respondent's corporate ad director, served as the acting advertising manager at the *Register-Pajaronian* until Respondent hired Nancy Moors, who has 29 years of experience in the industry, as the permanent advertising manager on July 3, 1995.

After orienting herself to Respondent's operation for a couple of weeks, Moors took full control of the advertising operations and Duffy left. On August 3, 1995, Moors instructed the display ad employees that she expected them to spend the period between 10:00 a.m. and 3:00 p.m. each day out in the field calling on customers unless they obtained specific permission from her to be working in the office. As Respondent normally allows a one-hour lunch period, this policy effectively required the display ad employees to

214

spend four hours engaged in soliciting new business and taking care of old business in the field.

This new policy represented a clear change from the past practice, inasmuch as it removed the discretion which the display ad employees previously exercised in determining when they would call on customers and when they would be in the office. Thus Stanger testified without contradiction that he frequently would be in and out of the office in the period between 10:00 and 3:00 during his normal work day. Moreover, Stanger testified that he usually accomplished his field work in a two and a half to three-hour period, and only occasionally spent as much as four hours in the field. On some days, Stanger said it was necessary for him to spend the entire day in the office in order to complete his ad work and other asundry duties normally performed at the office.

As a consequence of this new rule, it has been necessary for Stanger, and apparently some other display ad employees, to reorder their entire work day. In addition, Stanger claims that he and his colleagues have been required to work added overtime on a more regular basis than was the case in the past in order to complete their daily work.

In support of this latter claim, Stanger extrapolated his daily work hours which he normally recorded for his own

215

purposes on his daily sales plan to demonstrate the amount of added overtime he has had put in since August 3. See General Counsel's Exhibit 2. Stanger further testified that some of his colleagues have obviously been put in the same boat because he sees them at work while he is there after 5:00 p.m. Moreover, Stanger believes that some incoming calls from his customers between 10:00 to 3:00 have been shifted to Respondent's telemarketing operation with the result that his productivity in terms of credit and sales have been reduced. Advertising Manager Moors confirms that this could well occur.

Both Moors and Doug Leifheit, the publisher of the Watsonville *Register-Pajaronian*, testified that the 10:00 to 3:00 rule was instituted in order to comply with the Fair Labor Standard Act's rules relating to the exempt status of outside sales employees, and to improve the efficiency of the display ad employees.

In essence, Moors and Leifheit testified that their expectations about efficiency will occur if the display ad employees plan their sales calls sufficiently in advance to allow the completion of the office detail work in the more restricted time now allowed. In addition, Moors feels that the added personal contact with potential customers will result in added sales. Nevertheless, Moors testified that the August 3 rule has not

216

been rigidly enforced, as there have been occasions when display ad employees have been granted permission by her to remain in the office during that time period where they have justified the arrangement in advance with her. Regardless, Leifheit concedes that Respondent gave no advance notice of the 10:00 to 3:00 to Local 98, so that it would have an opportunity to request bargaining about he rule, primarily because Respondent was contesting the election result and is presently contesting Local 98's certification.

Based on these facts, General Counsel argued at the hearing that Respondent violated Section 8(a)(5) by unilaterally imposing the 10:00 to 3:00 rule. In this connection, General Counsel correctly contends that even though the Board's certification of Local 98 did not issue until December 4, Respondent's duty under the Act to bargain with Local 98 arose on July 21 with the election results. See *Livingston Pipe & Tube,* 303 NLRB 873 at 879 (1991).

Let's be off the record.

(Off the record.)

JUDGE SCHMIDT: Very well, I'm going to start again. See *Livingston Pipe & Tube*, 303 NLRB 873 at 879 (1991), and the cases there.

Aside from this general duty to bargain, General Counsel, citing *Boland Marine and Manufacturing*, 225 NLRB

217

824 (1976) argues that the 10:00 to 3:00 rule instituted on August 3 represents a "material, substantial, and significant change" from prior practice sufficient to trigger Respondent's obligation to give Local 98 prior notice of the change and an opportunity to bargain over that matter. In this connection, the General Counsel calls attention to evidence showing that the display ad employees were effectively required to work added overtime, that is, after 5:00 p.m., that the rule effectively reduced the time during the regular work day when they could perform their creative work in the office, and that the rule likely reduced their credited productivity by missing incoming sales calls in the period at issue. However, General Counsel makes no claim that this change has had any immediate impact on the wages of the display ad employees.

Finally, General Counsel contends that this case is distinguishable from the situation found in *Rust Craft Broadcasting*, 225 NLRB 327 (1976), cited by Respondent in a pre-complaint position paper, where the Board held that an employer did not violate the Act by installing a time clock to replace a hand method of recording in and out time.

General Counsel's supplemented the argument at the hearing with a letter of February 23, 1996, and I have considered that additional supplement, which cites additional cases

218

along the same line as those argued at the hearing.

Respondent contends that it had no duty to bargain about the change involved here, as the change was designed to conform with Fair Labor Standard Act requirements for outside sales employees and because the General Counsel failed to provide reliable evidence that the change had significant impact. With respect to this latter argument, Respondent contends that Stanger, General Counsel's sole witness, exhibited a considerable tendency to be argumentative and evasive while testifying, and, hence, his testimony related to the impact of this change should not be credited.

Additionally, Respondent contends that it had no duty to bargain because of the flawed certification. I rejected this latter argument in the course of the hearing, and again affirmed that I am bound in this matter by the Board's certification in the prior representation case, even though Respondent is currently contesting that certification.

Respondent, likewise, submitted a timely supplement to its oral argument at the hearing dated February 23, 1996, and I have carefully considered that supplement to its oral argument.

Although I, too, found Stanger to be argumentative and evasive at times, for purposes of this decision I have assumed that the impact of the unilaterally-imposed rule

219

change at issue here is essentially as he described it. I nevertheless find that Respondent had no duty to bargain over this particular change, even though it probably did affect the hours and terms of employment which are usually mandatory subjects of bargaining.

At issue in this case, as I perceive it, is this Employer's fundamental right to configure its work force so as to achieve the advantages allowed by law, here, the Fair Labor Standards Act. As noted, the display ad employees historically have been designated as exempt employees under the FLSA, and by so designating them, Respondent obtains the advantage of avoiding overtime pay and certain record keeping with respect to them. Clearly, it is entitled to do so, but only so long as it conforms to the FLSA requirements concerning outside sales employees.

Under 29 CFR §541.500, an outside sales employee is defined as any employee, (a), who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of Section 3(K) of the Act; or

(2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid

220

by the client or customer; and

(b) whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the work week by non-exempt employees of the employer: *Provided,* That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as non-exempt work.

In my judgment, Respondent could justifiably be concerned about the lawful continuance of the outside sales exemption under the pre-August 3 work arrangement described by Stanger, and could lawfully take steps to correct that situation without bargaining with Local 98 in order to avoid potential liability under the Fair Labor Standards Act. I find the 10:00 to 3:00 rule imposed by Respondent which supplanted the practice of giving employees discretion about engaging in outside sales work to be a reasonable attempt to conform to the requirements of the Fair Labor Standards Act in order to maintain the exemption historically claimed. This is so, I believe, even though there's no evidence that it was under immediate scrutiny by the Department of Labor over the conduct of its display ad employees. However, I find that it need not await trouble with the

221

Department of Labor before acting to ensure compliance.

Hence, I conclude that as Respondent has historically classed its display ad employees as exempt from the overtime and record keeping requirements of the FLSA, it has a duty to assure compliance with that law. Considering the loose past practice, I find that the 10:00 to 3:00 rule to be a reasonable effort in this regard and that Respondent was at liberty to impose it unilaterally. See *Murphy Oil,* 286 NLRB 1039, at 1042 (1987).

Accordingly, I will recommend dismissal of the complaint in its entirety.

Based on these findings, I make the following conclusions of law:

1. Respondent 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, and is the exclusive representative under Section 9(a) for the following appropriate unit of employees:

All full-time and regular part-time employees employed in the Watsonville *Register-Pajaronian* business office, editorial department, advertising department, and ad services department; excluding all other employees, guards, and supervisors as defined in the Act.

222

3. By instituting the 10:00 to 3:00 rule on August 3, Respondent did not engage in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

Based on the foregoing findings, conclusions of law, and the record in its entirety, I hereby issue the following recommended order:

The complaint is dismissed in its entirety.

With that I now close the hearing.

(Whereupon, the proceedings concluded at 3:45 o'clock 10 p.m.)

APPENDIX C

BENCH DECISION SUPPLEMENT

WILLIAM L. SCHMIDT, Administrative Law Judge. Insert the following supplemental paragraphs to my bench decision of February 23, 1996, following the paragraph which ends at transcript page 221:

"In my judgment, the employer's unilateral ban against eating in the toxic chemical storage area in the *Murphy Oil* case and Respondent's unilateral action here are analogous in that both situations reflect a reasonable exercise of supervisory control to achieve compliance with a Federal regulatory scheme. More specifically, when Respondent elected to treat its display ad employees as exempt from the FLSA overtime regulations, it became obliged to supervise their work to insure compliance with FLSA's outside sales exemption. Stanger's complaint that the requirement imposed by Moors could cause him to lose sales to the telemarketing department (where the employees are undoubtedly nonexempt) because of his absence from the office only underscores the problem which Respondent faces in controlling the nature of the work performed by the display ad employees. If in fact a significant portion of Stanger's sales amount to nothing more than inside sales by telephone, then Respondent's designation of the display ad employees as exempt from FLSA's overtime requirements becomes highly questionable.

"As I perceive Moors' August 3 directive, it is nothing more than the exercise of supervisory control to insure that the display ad employees are doing what they were supposed to be doing under the longstanding job description for that position. The dominate element of supervisory control which is at the core of this change becomes quite evident when consideration is given to the fact that the display ad employees are permitted to work in the office if they obtain her prior approval. For these reasons, I am satisfied that Respondent had no obligation to bargain with Local 98 concerning this legitimate managerial directive issued by Moors on August 3. *Trading Port*, 224 NLRB 980, 983 (1976).''

Dated: March 7, 1996