

Amphlett Printing Company and San Francisco-Oakland Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO. Case 20-CA-12016

August 25, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND TRUESDALE

On August 15, 1977, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief in support thereof, and Respondent filed an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

In 1946, the Board certified the Union in a unit of editorial department employees at Respondent's San Mateo Times newspaper, excluding, *inter alia*, correspondents. Later, as Respondents expanded its operations, the contract unit was revised to cover approximately four editorial employees at the publisher's San Bruno location, with the continued exclusion of correspondents.¹

In preparation for a new bargaining contract, the Union made a written request to the San Mateo Times in August for the names of and amounts paid to "non-bargaining unit persons" for each editorial product produced by them "published in your newspaper," during the 3-month period, May through July 1976. It expressed a need for this data as follows:

¹ The Administrative Law Judge defined "correspondents" as "persons employed by Respondent who perform editorial work and are not represented by the Union." They write special interest columns and local community news items and some merely furnish raw news data such as high school sports scores. Correspondents are not included on Respondent's payroll and receive no employee fringe benefits. They are paid out of accounts payable as they render bills, and these records are destroyed after an unspecified length of time. Since 1971 the contracts have included a clause to the effect that all work duties "presently or normally performed" would continue to be performed by unit employees, as well as additional work "requiring similar skills and serving a similar purpose for which employees covered by this contract normally are employed by the Publisher." In the 1973 negotiations the Union proposed a minimum wage for correspondents plus contributions for retirement, health, and welfare benefits—items again urged in the negotiations here being considered—which were rejected by Respondent as making continued employment of correspondents too expensive. In 1976 the Union filed two grievances contending that two individuals were unit members rather than correspondents.

[to] evaluate present contract provisions designed to protect bargaining unit work and be in a position to negotiate as to further provisions to protect bargaining unit work and negotiate as to minimum terms for non-employee work.

In response to that request, Respondent—in October—provided the Union with a list naming 34 correspondents who had contributed articles and received a stipend during the last year, and the type of work each had done for Amphlett Printing Company, but it refused to divulge the amounts paid, relying on the fact that correspondents were specifically excluded from the contract, and also referring to the requested information as "privileged" and not requisite to the Union.²

In December the Union reiterated its request, somewhat expanded, and Respondent declined to furnish the information on the ground that "the amounts paid to any individual not within your bargaining unit is not relevant to any legitimate bargaining purpose"

As he did in *Times-Herald, Inc.*,³ the Administrative Law Judge initially found that the Union's proposed contract provision for minimum wages for nonunit personnel did not "vitaly affect" unit employees, and, accordingly, was not a mandatory subject of bargaining. Hence, he concluded that Respondent was not obligated to supply the wage information as requested for that purpose.⁴ We agree.

Then, also as in *Times-Herald*, the Administrative Law Judge considered the Union's request from the standpoint of its need for formulation of wage proposals for unit employees, a basis not advanced as such until the hearing in this case.⁵ However, unlike *Times-Herald*, the Administrative Law Judge concluded here that the Union is not entitled to the information, and recommended that the complaint be dismissed. For the reasons set forth below, as well as

² At the time of the certification election, there were approximately 5 to 7 unit employees, and 12 to 15 correspondents. At the time of the hearing herein, there were 38 unit editorial employees and an apparent total of 34 correspondents (a count that included 1 who had left the Times and 1 who was deceased). The record discloses that approximately 16 of the correspondents were acquired through Respondent's purchase of additional weekly newspapers. Approximately 16 of the correspondents did not, at the time of the hearing, report to the San Mateo Times. Though Union Representative Cuthbertson did mention the Union's reaction upon getting "this list of 34 such people," the tenor of the testimony as a whole is that the Union is chiefly concerned with the compensation paid correspondents to the San Mateo Times, consistent with its initial written request.

³ 237 NLRB 923 issued this day.

⁴ In this regard, the Administrative Law Judge noted the steady increase in unit employees since the 1946 certification, as contrasted with the lack of any contention that any correspondent had done work previously done by a unit employee.

⁵ The Administrative Law Judge inadvertently referred to Respondent's being first apprised of this reason for the Union's request during cross-examination of Union Representative Cuthbertson, who actually asserted it at the end of direct examination.

those set forth in our Decision in *Times-Herald, supra*, we conclude, contrary to the Administrative Law Judge, that Respondent is obligated to furnish the Union with the requested information.

The Administrative Law Judge concluded that the Union is not entitled to the requested information "because the Union failed to adequately inform the Respondent as to the basis of its request for information or of the Respondent's obligation to honor such request," quoting from the Board's opinion in *Rodney and Judith Adams, d/b/a Adams Insulation Company*, 219 NLRB 211 (1975). We view *Adams Insulation* as distinguishable. In that case, the Union's trust fund asked to audit the books of two companies, one run by Mr. Adams and one by his wife, only the former having a collective-bargaining agreement with the union. Although the union demanded the right to audit all of the books of the second company as well, it did not inform the respondent in that case of its reasons for the request, which the Board found lacking in both "specificity and clarity," particularly as there were no pending negotiations which would have alerted the respondent to the union's intent and purpose. The Board therefore found that no obligation attached to the respondent to furnish the books and records of the second company, "absent a collective-bargaining agreement [with the second company], or a specific request accompanied by the reasons and basis upon which such request was founded." That Decision makes clear, however, that the Board was not negating the right to such information under "any" circumstances. In the instant case, as Respondent was party to a collective-bargaining agreement with the Union making the request, relevance of the information is apparent inasmuch as Respondent utilizes the material of the correspondents as well as that of the unit employees. Further, Respondent has been furnished at the hearing with reasons indicating the potential relevance of the information to the Union's framing of unit wage proposals. We thus deem the *Adams Insulation* case inapposite to the present proceedings.⁶

Finally, the Administrative Law Judge concluded that, even assuming that he had misapplied *Adams Insulation*, the record in his opinion did not establish that the requested information was relevant to the Union's wage proposals covering unit employees. With this view we cannot agree.

The "assumption" of the Union that correspondents were paid significantly less than unit employees, stressed by the Administrative Law Judge, is in

⁶ We disagree, of course, with the Administrative Law Judge's conclusion, at fn. 7 of his Decision, that application of *Adams Insulation* rendered incorrect his prior Decisions in *Brown Newspaper Publishing Co.*, Case 20 CA 12013 [238 NLRB No. 187 (1978)], and *Press Democrat Publishing Company*, Case 20 CA 12015 [237 NLRB 1335].

our view considerably offset by Cuthbertson's testimony, also quoted by the Administrative Law Judge, that "the amount of money the employer is spending per individual and/or for an editorial budget" is necessarily of value in framing wage demands.⁷

Cuthbertson's concession that the methods of compensation of correspondents and unit employees were concededly different—flat sums not being translatable into hourly pay—is likewise offset by the Union's interest in the total editorial budget, minus syndicated columns and wire services, alternatively but specifically expressed by Cuthbertson.

We conclude that the Administrative Law Judge has, by his emphasis of minor inconsistencies in the Union's position in this case, failed adequately to consider the applicable test for determining whether Respondent was obligated to provide the requested information. Thus, the appropriate inquiry is simply whether the information was "potentially relevant" to the Union in connection with bargainable issues then being pursued. That the information appears unnecessary to an employer is obviously an inadequate ground for refusal, particularly when (as here) the employer possesses clearly useful comparative wage data and the union does not. Here, the Union requested information concerning the compensation paid to nonunit correspondents who furnish editorial material and perform editorial functions for the same employer—work virtually identical to that performed by the editorial employees within the represented unit. In our view, information about such compensation is indeed potentially relevant.⁸

Therefore, contrary to the Administrative Law Judge, we conclude that Respondent violated Section 8(a)(5) and (1) by refusing to provide the requested information. Accordingly, we shall order that it furnish the Union, upon request, information as to that portion of the editorial budget expended for nonunit correspondents for the San Mateo Times.⁹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

Cuthbertson testified that the San Francisco publishers "have given" the Union the pay of correspondents. This is not disputed. He admitted that at the San Mateo papers the Union had achieved parity with the San Francisco papers without being furnished the pay of correspondents now being sought, but not "this year." Cuthbertson asserted that the Union did not need the information to achieve parity. Alternatively, the Union is interested in the percentage of the total editorial budget (less wire services and syndicated columns) that goes to nonunit correspondents. Cuthbertson viewed that information as enabling the Union to reevaluate the situation, and either increase, or possibly relax, its demands.

⁸ See our discussion of *Northwest Publications, Inc.*, 211 NLRB 464 (1974), in *Times-Herald, Inc.*, 237 NLRB 922 (1978). Compare *Temple-Eastex, Incorporated, et al.*, 228 NLRB 203, 204 (1977), where the relevancy requirement was discussed, and applied in a context of unit erosion.

⁹ See fn. 7, *supra*.

lations Board hereby orders that the Respondent, Amphlett Printing Company, San Mateo, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with San Francisco-Oakland Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, by refusing to supply relevant information upon request.

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

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

(a) Furnish, upon request, to San Francisco-Oakland Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, that portion of Respondent's editorial budget for the San Mateo Times expended for correspondents supplying editorial product published in the San Mateo Times during the period from May through July 1976.

(b) Post at its office and place of business where notices to employees represented by the aforesaid Union in the bargaining unit hereinabove noted are customarily posted by Respondent, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including, as described above, all places where notices to employees, employed in the appropriate bargaining unit are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁰ In the event that 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."

APPENDIX

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

WE WILL NOT refuse to bargain collectively with the aforesaid Union by refusing to supply relevant information, upon request, needed by

said Union to represent the editorial employees it represents.

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

WE WILL, upon request, furnish San Francisco-Oakland Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, information as to that portion of our editorial budget expended for correspondents supplying editorial product published in the San Mateo Times during May through July 1976.

AMPHLETT PRINTING COMPANY

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case held on July 11, 1977, is based upon charges filed on October 7, 1976, by the San Francisco-Oakland Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, herein the Union, and a complaint issued April 6, 1977, on behalf of the General Counsel of the National Labor Relations Board, by the Regional Director of the Board, Region 20, alleging that Amphlett Printing Company, herein the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, Amphlett Printing Company, is a California corporation which publishes newspapers at its plant located in San Mateo, California. During the past year Respondent, which receives gross revenues in excess of \$200,000 from the sale of its newspapers and advertising therein, subscribed to interstate news services and published nationally syndicated features in its newspapers. Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union, San Francisco-Oakland Newspaper Guild, Local 52, The Newspaper Guild, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE QUESTION PRESENTED

The ultimate question presented for decision is whether, in the circumstances of this case, Section 8(a)(5) and (1) of the Act obligates Respondent to supply to the Union, upon request, information about the amount of compensation Respondent pays persons, who are not represented by the Union, for performing work similar to the work performed by Respondent's employees who are represented by the Union.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In 1946 the Board certified the Union to represent Respondent's editorial department employees and since that time Respondent and the Union have entered into a series of collective-bargaining contracts covering these employees, the most recent contract having been effective from January 1, 1974, through December 31, 1976.¹ As of the date of the hearing in this case, July 11, 1977, the parties had not succeeded in negotiating a new contract.

The Union's certification and the parties' recent contract specifically exclude from the bargaining unit represented by the Union persons who perform editorial work, known as correspondents.² There is no difference in the kind of work performed by the correspondents and unit employees. They do the same type of work. Since at least 1953, Respondent, with the Union's knowledge, has continuously employed correspondents.

In 1976 the Union filed contract grievances involving Respondent's use of correspondents. The grievances, the first ones of their kind ever filed by the Union, involved two correspondents, Burmister and Masyk, and in substance contended that their work was unit work which must be performed by unit employees. In connection with the Burmister grievance an arbitrator concluded Burmister was an independent contractor and that the parties' collective bargaining contract, article III(b), did not require Respondent to assign the work performed by Burmister to a unit employee. There is no evidence of the disposition of the Masyk grievance.

In 1971, during the negotiations which resulted in the parties' 1971-73 contract, the Union proposed a broad jurisdictional clause which it felt would preclude Respondent from continuing to use correspondents. Respondent refused to accept it, instead the parties entered into a contract which included a provision, which appears to constitute an agreement by Respondent to maintain the status quo, as it then existed, with respect to its use of correspondents. This provision, which was carried over into the parties' most recent contract, as article III(b), reads as follows:

¹ The parties' most recent contract covered the Respondent's commercial department as well as its editorial department. The issues in this case, however, relate solely to the editorial department employees and the evidence introduced was limited to this group of employees. Accordingly, the phrases "unit Employees" or employees "represented by the Union" or "covered by the contract," as used in this Decision, refer to the employees represented by the Union who perform editorial work.

² Whenever "correspondent" or "correspondents" are used herein they refer to persons employed by Respondent who perform editorial work and are not represented by the Union.

All work duties presently or normally performed by employees covered by this contract shall continue to be performed by employees covered by this contract, as shall any additional work requiring similar skills and serving a similar purpose for which employees covered by this contract normally are employed by the publisher.

Also, during the negotiations which resulted in the most recent contract, to discourage the employment of correspondents the Union proposed that for each published story supplied by a correspondent that Respondent pay the correspondent the contract's top minimum weekly salary and pay into the contract's retirement and health and welfare funds the same contributions that would be paid that week for a unit employee. Respondent rejected this proposal stating it would make the continued employment of correspondents too expensive. During the negotiations which started in December 1976 for a new collective-bargaining contract to replace the one scheduled to terminate December 31, 1976, the Union renewed its aforesaid minimum wage proposal which reads as follows:

For each published story . . . concerning subject matter in Northern California and acquired from a non-employee, the Employer should pay the non-employee not less than one week's schedule A top minimum, and shall pay to the Retirement Fund and Health & Welfare Fund the same contributions that would be paid that week for a full-time employee.

On August 5, 1976, the Union wrote Respondent that it was preparing for contract negotiations and needed certain information to assist it in the negotiations. In pertinent part the Union requested the following information pertaining to "non-bargaining unit persons":

A list of all persons, whether employees or not, outside the bargaining unit whose editorial products were published in your newspaper during the three months May through July 1976 excluding only persons whose copy was supplied to you by wire services or syndicated services.

With this list of non-bargaining unit persons, the following data:

* * * * *

c. Identification of each item from such person published during the three-month period, giving enough detail to enable one to locate it in the newspaper.

d. Amount(s) paid to the person for, or in connection with her/his production of, each item.

The relevance of this request was explained to the Respondent in these terms:

This non-bargaining unit data is needed so that the [Union] may evaluate present contract provisions designed to protect bargaining unit work and be in a position to negotiate as to further provisions to protect bargaining unit work and negotiate as to minimum terms for non-employee work.

In reply, by letter of October 4, 1976, Respondent supplied

the Union with the names of 34 correspondents who, during the last year, worked for Respondent and were paid "a stipend." The type of editorial work each correspondent performed was described. However, Respondent refused to furnish the amounts paid to the correspondents on the grounds they were specifically excluded from the contract bargaining unit and Respondent considered the information privileged and outside the Union's jurisdiction or "requirements."

The Union, by a letter to Respondent dated December 17, 1976, in effect, reiterated its request for the aforesaid information and asked for additional information. In response Respondent by letter dated December 22, 1976, indicated to the Union it did not believe it was obligated to supply the Union with information concerning its correspondents since they were expressly excluded from the bargaining unit represented by the Union and because Respondent believed the requested information was not relevant to the Union's bargaining demands. Regarding the Union's request for the amounts of money paid to the correspondents, Respondent specifically told the Union it would not furnish this information because, "the amounts paid to any individual not within your bargaining unit is not relevant to any legitimate bargaining purpose and we are declining for this reason, among others, to furnish such information."

B. Discussion and Ultimate Findings

It is well settled that an employer has a statutory duty to provide relevant information needed by a union for the proper performance of its duties and that the employer's failure to meet this duty constitutes a refusal to bargain, in violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). The sole criterion for determining whether information must be produced is its relevance or reasonable necessity for the Union's proper performance of its representative role. This is true whatever the nature of the material sought, though the manner in which relevance is to be ascertained varies. Information directly related to wages, hours or other terms and conditions of unit employees is presumptively relevant to the union's representative duties, while information concerning employees outside the unit must be shown to be "relevant to bargainable issues." *N.L.R.B. v. Rockwell-Standard Corporation, Transmission and Axle Division, Forge Division*, 410 F.2d 953, 957 (C.A. 6, 1969). In other words, "[w]hen a union requests information which is not ordinarily relevant to its performance as bargaining representative, but which is alleged to have become so because of peculiar circumstances, the courts have quite properly required a special showing of pertinence before obliging the employer to disclose." *The Prudential Insurance Company of America v. N.L.R.B.*, 412 F.2d 77, 84 (C.A. 2, 1969). "Where the request is for information concerning employees outside of the bargaining unit, the Union must show that the requested information is relevant to bargainable issues." *San Diego Newspaper Guild, Local No. 95, etc. v. N.L.R.B.*, 548 F.2d 863, 867-868 (C.A. 9, 1977). The burden of proof is thus different but "the ultimate standard of relevancy is the same in all cases." *The Prudential Insurance Company,*

supra at 84. See *Curtiss-Wright Corporation, Wright Aeronautical Division v. N.L.R.B.*, 347 F.2d 61, 69 (C.A. 3, 1965). It is only necessary for the union to demonstrate the "probability that the desired information (is) relevant, and that it (will) be of use to the Union in carrying out its statutory duties and responsibilities." *N.L.R.B. v. Rockwell-Standard, supra* at 957, quoting from *N.L.R.B. v. Acme Industrial Co., supra* at 437; *The Torrington Company v. N.L.R.B.*, 545 F.2d 840, 842 (C.A. 2, 1976).

Respondent, as described in detail *supra*, refuses to supply the Union with the amounts of money it pays its correspondents for editorial material used in Respondent's newspapers. It is for its refusal to furnish this information that the Respondent has been charged with violating Section 8(a)(5) and (1) of the Act. The ultimate question presented is whether Section 8(a)(5) of the Act obligates Respondent, under the circumstances of this case, to supply the Union with information about the compensation Respondent pays its unrepresented correspondents for performing the same kind of work performed by the workers employed by Respondent represented by the Union. The applicable principles of law, set forth *supra*, indicate that as a rule the answer to this question depends upon whether the request for information is supported by a showing of probable or potential relevance.

Cuthbertson, the Union representative who made the written requests for the information concerning the compensation paid by Respondent to its correspondents for performing editorial work, testified that the Union desires this information for two separate reasons: (1) The information is relevant to the Union's contract proposal seeking a minimum rate of pay for editorial work performed by unrepresented persons; and (2) The information is relevant to the Union's wage proposal covering the unit employees.⁵ I shall determine whether a proper showing of relevance has been demonstrated in connection with one or both of the purposes for which the information is being sought and whether the Union's request for the information was deficient in some other way.

Insofar as the Union's request for information pertains to its contract proposal that Respondent pay the unrepresented correspondents the contract's minimum rate of pay and contribute into the contract's health and retirement funds on their behalf, the threshold question is whether the proposal is a mandatory subject of bargaining. The statutory obligation to bargain, though normally concerned pri-

⁵ The Union's August 5, 1976, request for information set forth a third reason why the Union needed the information, namely, it was relevant to contract provisions designed to protect bargaining unit work. However, Cuthbertson, the Union official who drafted the request, did not offer this as a reason for requesting the information, when he testified during the hearing, but testified that the only reasons the Union wanted the information are the two set forth above in the text. This was not simply an oversight on his part, inasmuch as he gave the identical testimony in three other cases (*Brown Newspaper Publishing Co., Press Democrat Publishing Co., Times-Herald, Inc.*) concerning the same subject. Under these circumstances I believe it would be improper for me to disregard Cuthbertson's testimony and speculate about other possible ways that the requested information about non-unit persons might be relevant to the Union in its role as the bargaining representative of the unit employees. It is for this reason that I have not considered whether the information is relevant to Union contract proposals designed to protect unit work, other than the above-described contract proposal dealing with minimum wages for the correspondents.

marily with working conditions of employees in a particular bargaining unit, also encompasses matters involving individuals outside the unit which affect employees within the unit. *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al. v. Oliver, et al.*, 358 U.S. 283 (1959). *Oliver's* holding that the terms of employment of those outside the bargaining unit can be mandatory subjects of bargaining has been limited to situations in which those terms "vitally affect" the unit employees. *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157, 178-179 (1971). In the instant case, the Union cannot require Respondent to bargain about the correspondents' compensation absent evidence that their wages vitally affect the terms of employment of the editorial workers that the Union represents. See *Sperry Systems Management Division, Sperry Rand Corporation v. N.L.R.B.*, 492 F.2d 63, 69-70 (C.A. 2, 1974). There is no such evidence. There is no evidence that unit employees have been laid off,⁴ replaced, suffered a loss of earnings or suffered a loss of working time or that terms and conditions of employment have otherwise been adversely affected by Respondent's employment of correspondents.⁵ In fact since the Union's 1946 certification as the unit employees' collective-bargaining representative, to the present date, the number of unit employees has progressively increased despite the Respondent's continued use of correspondents.⁶ All of these circumstances persuade me that the General Counsel has failed to establish that the amount of compensation received by the correspondents vitally affects the terms and conditions of employment of the employees represented by the Union. See *Sperry Systems Management Division, Sperry Rand Corp. v. N.L.R.B.*, *supra*. It is for this reason that I conclude the Union's proposal that the correspondents be paid the contract's minimum wage rate is not a mandatory subject of bargaining, hence, insofar as the Union's request for information about the correspondents' compensation is based upon the Union's need to intelligently consider this proposal, the Respondent is not obligated to supply the information.

The other reason for which the Union requested the disputed information—it was necessary to formulate a wage proposal for the unit employees—was advanced for the first time at the hearing through Union Representative Cuthbertson's testimony. Neither Cuthbertson nor any other Union representative had previously informed Respondent that the Union needed the information for its bargaining unit wage proposal nor do the circumstances indicate Respondent reasonably should have realized that this was the Union's intent in seeking the information. To the contrary, when Cuthbertson requested the information

⁴ There is no evidence that even one unit employee has been laid off due to a lack of work during the Union's 30 years as bargaining representative. To the contrary, it is undisputed that since at least 1953 not one unit employee has been laid off or lost work due to a reduction in the work force.

⁵ The number of correspondents used by Respondent in its various newspapers has increased as Respondent has grown, but it is undisputed that during the time material herein not one of these correspondents has performed work previously done by a unit employee.

⁶ Eight unit employees were employed in 1946, 9 in 1956, 26 in 1966, and 38 at the time of the hearing in 1977.

he specifically told Respondent that the Union needed it to consider contract proposals designed to protect bargaining unit work and to negotiate about the minimum terms for nonemployee work. Also, during the current contract negotiations, Cuthbertson indicated to Respondent's negotiators that Respondent's refusal to supply the requested information made it impossible for the Union to intelligently propose a minimum wage proposal for the nonunit editorial workers, but did not mention that the lack of information interfered with the Union's ability to formulate a wage proposal covering the unit workers. It was not until the day of the unfair labor practice hearing, during the hearing, that Respondent was informed that the Union considered the information relevant for formulating a wage proposal for the employees it represented. Under the circumstances, I find that the Union failed to adequately inform the Respondent as to the basis of its request for the information or of the Respondent's obligation to honor such request, hence, I conclude that regardless of whether the information was relevant for formulating the Union's bargaining unit wage proposal, that Respondent was not obligated to furnish the information.⁷ See *Rodney and Judith Adams, d/b/a Adams Insulation Company*, 219 NLRB 211, 214 (1975), where the Board held that a union was not entitled to information concerning nonunit employees because "the Union failed to adequately inform the Respondent as to the basis of its request for information or of the Respondent's obligation to honor such request." In reaching this result the Board explained, "no obligation attached to [Respondent] to furnish the books and records of [respondent's nonunit employees], absent . . . a specific request accompanied by the reasons and the basis upon which such request was founded At no time, however, did the Union set forth the reasons or basis for its request." Cf. *Ohio Power Company*, 216 NLRB 987, 994-995 (1975), where in concluding that a respondent-employer was obligated to supply a union with certain information concerning nonunit workers, the Board noted "the circumstances were such as to inform the Respondent fully as to the relevance of the requested information." I recognize the Respondent's general manager on cross-examination testified that Respondent did not believe that the requested information was needed by the Union to formulate a wage proposal for unit employees and further testified Respondent would not turn over the information to the Union for this purpose. I am of the opinion, however, that Respondent is entitled to an opportunity to *carefully consider* the Union's request and its obligation to honor said request, rather than to be abruptly confronted with the request and its obligation, on a witness stand during cross-examination.

Even assuming I have misapplied *Adams Insulation*, I am of the opinion that the record does not establish that the requested information is relevant to the Union's wage proposal covering unit employees.

In the instant case, "the request is for information concerning employees outside of the bargaining unit, [thus] *the*

This conclusion is inconsistent with the resolution of the identical issue in *Brown Newspaper Publishing Co., Inc.*, Case 20 CA 12013, and *Press Democrat Publishing Company*, Case 20 CA 12015, wherein the significant facts were substantially the same as in the instant case. In these cases,

Union must show that the requested information is relevant to bargainable issues . . . [and] the showing by the Union must be more than a mere concoction of some general theory which explains how the information would be useful to the Union To hold otherwise would be to give the union unlimited access to any and all data which the employer has." *San Diego Newspaper Guild, Local No. 95, etc. v. N.L.R.B.*, 548 F.2d 863, 867-868 (C.A. 9, 1977).⁸ "Conversely, however, to require an initial, burdensome showing by the Union before it can gain access to information which is necessary for it to" "intelligently perform as bargaining representative" defeats the very purpose of the 'liberal discovery standard' of relevance which is to be used." *Id.* at 868-869. Guided by these principles I am persuaded the record fails to establish a probability that the desired information is relevant to the Union's bargaining unit wage proposal. This conclusion is based upon the following considerations.

The Union did not notify Respondent that the requested information was necessary to formulate a wage proposal for the unit employees, instead the Union informed Respondent the information was only necessary for its contract proposals designed to protect bargaining unit work and to negotiate about minimum terms for nonunit persons. If the information was relevant to the Union's bargaining unit wage proposal I am convinced it would have told this to Respondent, just as it told Respondent the information was relevant for certain other proposals.⁹

The conclusion that the desired information is not relevant to the Union's unit wage proposal is bolstered by Union representative Cuthbertson's vague, evasive, and inconsistent testimony on this subject. Cuthbertson testified, "I don't know," when asked why his August 5 information request did not state that the information was relevant to the Union's bargaining unit wage proposal. He admitted that when the Union initially asked for the information on August 5, 1976, it did not feel it was relevant for this purpose. Cuthbertson further testified that the Union subsequently came to the conclusion that Respondent might be paying the correspondents more money than the unit employees, so, at that point, decided the information was also relevant to its unit wage proposal. However, Cuthbertson was unable to describe the particular incident or happening which led the Union to conclude Respondent was paying the correspondents more than the editorial workers represented by the Union. When pressed about this, Cuthbertson gave a nonresponsive answer. Then, inconsistent with his previous testimony, he admitted that at all times the

however, I failed to consider the Board's reasoning in *Adams Insulation, infra*, and am now of the opinion that *Brown Newspaper Publishing and Press Democrat Publishing* were incorrectly decided. In those cases, as in the instant case, insofar as the requested information pertains to the union's non-unit wage proposal, the union failed to adequately inform the respondent-employers as to the basis of its request or of the respondent-employers' obligation to honor the request.

⁸ Also see *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967) (even where information is sought solely for "discovery" purposes, there must be a showing of "probability that the desired information was relevant"); *Curtis-Wright Corporation, Wright Aeronautical Division*, 145 NLRB 152, 157 (1963) (union had "good cause" to challenge company's handling of nonunit administrative employees but not confidential employees); *N.L.R.B. v. Rockwell Standard Corp.*, *supra* at 957 (union had "reasonable grounds" to question company's handling of nonunit work).

Union has assumed Respondent has been paying its correspondents significantly less than the unit employees and testified that nothing has ever occurred to cause the Union to change this opinion.

In summation, I am of the opinion that the Union's failure to notify Respondent that the requested information was relevant for its bargaining unit wage proposal, while stating that the information was relevant for certain other reasons, plus Union Representative Cuthbertson's vague, evasive, and inconsistent testimony when questioned about the matter, is strong evidence that the Union's claim that the information was relevant for its unit wage proposal, a claim made for the first time during the unfair labor practice hearing, is without substance.

In addition, the record establishes that the reason the Union failed to inform Respondent that the requested information is relevant for formulating its unit wage proposal is that that information is of no value for this purpose. It is undisputed that the unit employees are paid by the hour and the correspondents in general are paid by the article and that the Union knew this. The Union knew Respondent paid its correspondents for their work product, not for the time they spent working, whereas the unit employees are paid for the actual time spent working. Under the circumstances, information concerning the correspondents' compensation is of no value to the Union for formulating a unit wage proposal. There is no meaningful basis for comparing the correspondents' and unit employees' earnings. During the hearing Union Representative Cuthbertson acknowledged this. He testified:

Q. [Respondent's Attorney] If we should give you the information you are requesting, how will you be able to determine how much an hour or how much a week or how much a month these correspondents are getting?

A. [Cuthbertson] *I can't see any way to convert piece rate figures into amounts of money per hour.* [Emphasis supplied.]

* * * * *

Q. [Respondent's Attorney] But you won't know how many people the correspondent is writing for, what his total income is; you will not know how many hours he is working for us in producing his column. You will simply have a flat figure and you will have to guess how much time he spends.

A. [Cuthbertson] Well, if you gave us what we asked for, we would know that to produce a given piece of editorial material for one column, for example you paid so much money. It would be a figure intelligible by what it was that was paid for. *No, we would have no way to know how many hours that individual*

⁹ Also, when the Union presented its wage proposal covering the unit employees, Cuthbertson did not indicate to Respondent's negotiators that Respondent's refusal to supply the desired information had placed the Union at a disadvantage in formulating the proposal. In sharp contrast, when the Union presented its wage proposal covering the nonunit persons, Cuthbertson told Respondent's negotiators that the Union did not feel it was a satisfactory proposal because the Union needed the requested information to intelligently formulate such a proposal.

spent producing it; we would only know how much you paid for that editorial product. [Emphasis supplied.]¹⁰

When, as described above, Cuthbertson admitted it would be impossible to use the requested information to convert the correspondents' earnings into an hourly rate of pay, Respondent's Counsel asked him, in view of this admission, what value the information could have for the Union in formulating a wage proposal for the unit employees. Cuthbertson answered, "the value . . . goes to the amount of money the employer is spending per individual and/or for an editorial budget." He elucidated about this as follows:

. . . its relevance [referring to the requested information] to the Guild's wage goals is with respect to the bargaining unit. The Employer is putting out a given amount of money for editorial material on this newspaper, which, to us, represents a pie. When we see 33 people outside the bargaining unit, or 34, as opposed to only 32 people now in the bargaining unit, and they're sharing a piece of that pie, we are very concerned. We want to increase wages within the bargaining unit. If we can get that money that they're putting outside the bargaining unit now, it can affect our wage goals within the bargaining unit.

* * * * *

I said that we were concerned with how big a piece of the pie the non-bargaining unit people were taking out of the editorial budget. . . . If we know what their editorial budget is currently and what percentage they divide between unit and non-unit people, we can reevaluate, change, increase, maybe relax somewhat our demands for wages in the bargaining unit, depending on what we know.

The claim that information about the percentage of its editorial budget that Respondent spends to employ nonunit editorial workers is relevant to the Union's wage goals is not readily apparent.¹¹ Other than Cuthbertson's self-serving and conclusionary testimony the record lacks particulars as to why this is so. In my opinion Cuthbertson's testimony amounts to no more than "a mere concoction of some general theory which explains why the information would be useful to the union," without regard to the information's actual relevance to the terms and conditions of employment of the unit employees. See *San Diego Newspaper Guild, Local No. 95, etc. v. N.L.R.B.*, 548 F.2d 863, 867 (C.A. 9, 1977). Not only is the nature of Cuthbertson's testimony on this subject abstract, but in certain significant respects it does not ring true. His assertion that depending upon the percentage of Respondent's editorial budget al-

¹⁰ I reject Cuthbertson's further testimony that an experienced editorial worker can "within reason" determine the amount of time it takes for a correspondent to produce any piece of work. This testimony is not consistent with his early admissions, *supra*, "we would have no way to know how many hours that individual spent producing it" and "I can't see any way to convert piece rate figures into amounts of money per hour." Also, it is contradicted by the credible testimony of Virgil Wilson, the managing editor of Respondent's San Mateo Times who testified that editorial workers normally work at different speeds and that even among the unit employees there is quite a difference between the amount of time it takes for different workers to produce similar work.

lotted to nonbargaining unit personnel, that the Union might relax its minimum wage demands is implausible and contrary to his other testimony that the Union's minimum wage proposal for Respondent's editorial workers, as well as for those employed by the other suburban newspapers, is based upon the minimum wage scale negotiated by the Union with the metropolitan newspapers. Also, since the Union is not seeking the amount of money which Respondent pays its syndicated columnists and wire services, the information requested does not give the complete picture of Respondent's editorial budget and the percentage of the budget which is allotted to editorial work performed outside the unit.

Based upon all of the foregoing circumstances, I find the record contains insufficient evidence to establish the probability that the desired information is relevant for formulating the Union's bargaining unit wage proposal or is otherwise relevant in connection with the Union's wage goals for the unit employees.

I recognize that the aforesaid conclusion is not consistent with my resolution of the identical issue in *Brown Newspaper Publishing Co.*, Case 20-CA-12013, *Press Democrat Publishing Company*, Case 20-CA-12015, and *Times Herald, Inc.* (20-CA-12017). The facts in those cases, however, were significantly different. In only one of these cases, *Press Democrat Publishing Company*, was there an indication that the nonunit workers were compensated differently than the unit employees, and it was just that, an indication, the matter was not developed or even mentioned by the parties' post-hearing briefs. Nor was Cuthbertson questioned in the previous cases in any detail, as he was in the instant case, about the relevance of the requested information to the Union's wage proposal for unit employees. The only evidence in two of the previously decided cases—*Press Democrat* and *Brown Newspaper*—which detracted from the obvious connection between the requested information and the union's unit wage proposal was the union's failure to tell the respondent-employers that the information was relevant to the union's unit wage proposal.¹² This was insufficient to warrant a conclusion that the union in those cases had failed to meet its burden of establishing that the information was relevant in connection with bargainable issues.

[Recommended Order for dismissal omitted from publication.]

¹¹ Although information about the percentage of editorial work performed by nonunit workers or the percentage of Respondent's editorial budget allotted to such work does not appear to be relevant to the Union's wage proposal or wage goals for unit employees, this information might be relevant in determining whether the Union should propose contract provisions designed to sharply curtail or altogether prohibit Respondent from using nonunit persons to do editorial work. However, I will not speculate whether the information would be relevant to the Union for this purpose inasmuch as the Union, at the hearing, through its representative, specified the reasons it needed the information and this was not one of the reasons. Because of this, the Board's comment in *Northwest Publications, Inc.*, 211 NLRB 464, 466 (1974), that "[a]ll possible ways in which the information may become important cannot be foreseen in advance of negotiations," is not applicable to this case.

¹² In *Times-Herald, Inc.*, the union did communicate this to the respondent-employer.