

The Evening News Publishing Company and North Jersey Newspaper Guild, Local 173, The Newspaper Guild, AFL-CIO-CLC. Cases 22-CA-4436 and 22-CA-4529

April 24, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On January 4, 1972, Trial Examiner Frederick U. Reel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 Trial Examiner's Decision in light of the exceptions and brief¹ and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, The Evening News Publishing Company, Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

¹ The Employer's request for oral argument is hereby denied because the record and brief adequately present the issues and the positions of the parties.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

FREDERICK U. REEL, Trial Examiner: This proceeding,¹ heard at Newark, New Jersey, on October 13 and 14, and November 4 and 8, 1971, and at Washington, D.C., on November 19, 1971, pursuant to charges filed April 23, May 19, and July 9, 1971, and a complaint issued September 8, 1971, presented questions whether Respondent, herein called the Company, violated Section 8(a)(3) and (1) of the Act by withholding vacation payments from employees because they participated in a strike, and violated Section 8(a)(5) and (1) of the Act in two major respects: (a) by refusing in the course of bargaining negotiations with the Charging Party, herein called the Guild, to furnish it with

¹ The caption of the proceeding has been amended to reflect a correction in the name of the Charging Party

the data as to the Company's financial condition on which the Company was relying; and (b) by changing certain alleged conditions of employment without affording the Guild an opportunity to bargain with respect thereto. After the close of the hearing, however, upon representations by the Charging Party that the first two issues had been amicably disclosed of or had otherwise become moot, General Counsel moved to withdraw the allegations of the complaint pertaining thereto. This motion was granted, and this Decision deals only with the last issue listed above.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and by the Company, I make the following:

FINDINGS OF FACT

I THE BUSINESS OF THE COMPANY AND THE LABOR ORGANIZATION INVOLVED

Respondent, a New Jersey corporation engaged at Newark in publishing a newspaper, subscribes to various interstate news services, advertises nationally sold products, has annual gross revenue in excess of \$200,000, and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Guild is a labor organization within the meaning of Section 2(5) of the Act.

II THE UNFAIR LABOR PRACTICE

Few propositions are better established than that an employer whose employees have selected a collective-bargaining representative may not change their terms or conditions of employment without giving that representative notice and an opportunity to bargain over the proposed change. In the instant case, the Guild won an election on February 19, 1971, and was certified as the bargaining representative of the Company's editorial news department employees on March 1. General Counsel alleges that among the conditions of employment of the employees who selected the Guild as their representative were arrangements under which they regularly received expense money for expenses not incurred and overtime payments for hours not worked, and that the Company "unilaterally" deprived them of these benefits without notice to, or bargaining with, the Guild. To this the Company interposes a series of defenses, contending (1) that the Company changed the expense and overtime practices because of economic pressures; (2) that the Company bargained with the Guild about the changes; (3) that the alleged "conditions of employment" were so contrary to sound public policy that the Board should not find, and at the very least should not issue a remedy for, the alleged violations; and (4) that the changes in those conditions were made prior to the dates specified by General Counsel, so as to create a fatal variance between pleading and proof.

A. The Conditions of Employment

1. Expense accounts

General Counsel established through the testimony of several witnesses that it was common practice at the Company over a number of years to consider "expense account money" as part of salary and to claim it every week although both management and the employee were aware that such expenses had not been incurred. Richard Barkhorn testified that, when he, as state editor from 1958 to

1961 and as suburban editor from 1961 to 1966, interviewed and hired prospective employees, they would frequently complain that the basic salary he offered them "was somewhat lower than most basic salaries in the industry around here." Barkhorn would then assure them that in addition to that low salary they "would get a generous expense account," which "worked out to a level of about fifteen or twenty dollars more than you would expect them to be able to justify." The following further pertinent excerpts from Barkhorn's testimony round out the picture:

TRIAL EXAMINER: Mr. Barkhorn, I'm not sure I understand either.

Did you give these new employees as you hired them a statement that they would in addition to their regular salary get an expense allowance each week of exactly so much whether they spent it or not? Is that the way you put it to them?

THE WITNESS: No. In a range that was, as I say, we tried to put it to them politely. We said it would be generous. If he tried to pin you down and say what would my expenses run for this job, I would, if I knew what job he was going to have and knew what the level was in that office, I would say approximately twenty-five dollars, knowing that this was an office in which he would not have to travel very far, would not have to make an awful lot of phone calls, probably couldn't justify more than five or six dollars.

TRIAL EXAMINER: What you did tell them then was that when they had expenses, they would be expected to claim and would be paid a sum of fifteen to twenty dollars more than what the actual expenses were, is that it?

THE WITNESS: Yes.

On cross-examination Barkhorn again emphasized that the expense allowance was a basic part of the wage structure. He testified:

Q. Let's find out what your testimony was. I think you testified that on the expense account when you interviewed a person, did they inquire of you whether they would be allowed expenses, or did you take the initiative in that respect?

A. Generally, as I say, when the salary figure was offered they expressed disappointment that it was so low, and I responded, the exact way they responded might be in the form of a question, well, is there any other money involved or they might say, gee, that's awfully low. Anyway I would respond with this set explanation about expenses and overtime available.

Asked on cross-examination as to whether the editor of the newspaper was aware of the practice, Barkhorn testified:

THE WITNESS: In other discussions about our general wage policy which we had periodically, the question of the spread in expenses and the guaranteed overtime was fairly freely discussed between the editor and me.

TRIAL EXAMINER: Are you telling us by that that he knew that you were offering these fellows the opportunity to claim more expenses than they actually incurred?

THE WITNESS: He knew there were expenses higher than could be fully justified and that the overtime was being assigned liberally.

Q. You say he knew.

MR. REITMAN: I don't know whether the witness finished.

TRIAL EXAMINER: Go ahead.

THE WITNESS: Well, as I say, these discussions usually took the form of one of us—when I say one of us, we are four or five people who at one time or another

worked at that same level. Some times we'd get together. Some times one of us would go in by himself. And we regularly proposed that the basic salary level at the News be increased substantially and the excuse for it always was, then we can wipe out this overtime and expense dubiousness.

Asked on cross-examination about his own experience as an employee, Barkhorn replied that for the first week he worked after he was hired in 1946 he—

turned in an expense account for what I had, in fact, spent that week which was, I think, a dollar and a quarter and the office manager handed it back to me and said, what are you trying to do, wreck the system.

Q. So how much did you put in for?

A. So I put in—well, in those days—this is twenty-five years ago. I said, well, how much should it be. And he said, Oh, somewhere near ten dollars. So I probably put in for eight fifty that week and got it up to ten or twelve within a month.

Barkhorn's general testimony (and he hired from 30 to 40 people) was confirmed by the experience of other employees who were called as witnesses. Joseph Rosenberg testified that when he was hired in 1958 the man who hired him, Suburban Editor Robert Mason, told him his salary would be \$85 a week and that "there would be added expenses" of "about twenty-five dollars a week." Rosenberg was not told how he was to claim the expenses, and testified that the first week when he turned in his expense statement to office manager Swanson (now state editor) "it was for around five dollars." Rosenberg's testimony continues:

Q. And to whom did you submit it?

A. To Mr. Swanson.

Q. And what, if anything, did he say?

A. He looked at it, sort of chuckled and gave it back to me and said, make it for twenty-five dollars.

Q. And what did you do?

A. I did that.

Q. Did you continue to submit expense statements while you were at the Elizabeth office?

A. Yes, continually, each week they were done.

Q. And in what amount?

A. Ranging in the area of twenty-five dollars.

Q. You say ranging, could you give us a specific example, what you mean by ranging?

A. Well, we were told to vary the amount occasionally, so it ranged maybe twenty-four fifty to twenty-five fifty, or thereabouts.

Rosenberg testified that he continued to claim expenses in this amount at various jobs until he transferred to the Newark city room where he worked under the city editor, Harry Anderson, and later the financial editor, Edward Anderson. To quote Rosenberg:

A. In the city room I discovered that twenty-five dollars was on the short side of expenses and over the year, as the year went on, I slowly raised it to thirty-five a week.

Q. How much of that thirty-five a week were actual expenses?

A. At this point practically none.

Q. To whom did you submit the expense claim?

A. Ed Anderson again, weekly.

Q. Did he approve it?

A. Yes, he did.

Q. In Ed Anderson's job, would he be aware of what you are actually—what your actual expenses were in your job?

A. Yes. He knew where I was going and what I was doing every day.

Similar testimony was given by employee Alastair Fraser, who when employed at the Metuchen office normally claimed expenses of \$75 per week, which was substantially in excess of his actual expenses. In April 1967 Fraser received a \$28 raise in weekly salary. He testified to the following discussion he had at the time with his bureau chief, Richard Haver:

A. Initially it was his understanding that we would get the raise, in my case a twenty-eight dollar increase, and only actual expenses incurred or overtime worked. But subsequent to that he said he had—in a telephone conversation he told me he had, quote, almost official approval of a project which would restore what would have been a reduction in take-home pay, and he subsequently handed each of those in his office a slip of copy paper with our name and a basic overtime rate and a basic expense account rate which we were to submit weekly.

Q. And you received one of these slips, is that correct?

A. I received one.

Q. What was on your slip of paper as far as overtime was concerned?

A. Four hours.

Q. And what was on the slip as far as expenses were concerned?

A. Forty-five dollars.

Q. Subsequent to that, did you make a claim—

TRIAL EXAMINER: Just a minute. This was a sharp reduction from the expenses you had been claiming, is that right?

THE WITNESS: Yes, sir, it was a thirty dollar reduction on the expenses I had been claiming.

TRIAL EXAMINER: Was it still in excess of expenses incurred from time to time?

THE WITNESS: Yes, it was.

Q. How much expenses did you claim after this conversation with Mr. Haver when he gave you the piece of paper?

A. It stayed pretty much the same until I pointed out to Mr. Haver, I compared take-home figures on checks and pointed out to him that I had taken a loss with the twenty-eight dollar-raise in my actual take-home and I increased my expenses to about sixty dollars.

Q. When was this?

A. I would say in the fall of 1967.

Q. And in that amount of sixty dollars, how much of that was for the expenses actually incurred?

A. At that point very little of it.

Employee Joseph Yeninas testified that in April 1969 he asked his supervisor, Al Beissert, for a raise, but Beissert declined. Yeninas' testimony continued:

So I was pretty mad about the whole thing and so when Friday came, talking to a couple of friends of mine, disgusted with the whole thing, on my expense account sheet I am going to put in lieu of raise fifteen dollars.

So after Mr. Beissert checked the green expense sheet and he gave them back to Mr. Denny, who handles our expense and pay records, he just keeps a note of what your expenses were and the overtime, and I said what did Al put after what I had in lieu of raise, and he erased the in lieu of raise and the fifteen dollars and he put Saturday expenses, seven fifty. So that that time on I got myself a seven dollars and fifty cents raise, along with my three dollars and seventy-five cents which I was claiming.

Q. Now, the seven fifty, did you continue to claim it every week after that?

A. Yes.

Q. When you submitted your claim each week after that, did you submit it to Mr. Beissert?

A. Yes.

Q. Did he approve it?

A. Yes.

Q. Is Mr. Beissert still with the paper?

A. Yes.

Q. You testified you had an arrangement for Saturday expense that you would put on there, on your claim. Did you actually work on those Saturdays?

A. No. Maybe out of a year maybe I may work about two or three Saturdays.

Employee Harold Crystal also testified to an arrangement he had with Al Beissert. Crystal in 1959 asked Beissert for a raise, and the latter told him "it was impossible to get one for me at that time but to go ahead and add some time on my overtime and/or add some additional monies to my expense account." Crystal, like the employees whose testimony is detailed above, turned in expense claims each week substantially in excess of expenses actually incurred,² a fact well known to supervisors who approved his claims. To similar effect is the testimony of employee Jeffrey Grambs, who was hired by Barkhorn in 1963, employed at the Montclair office under Bureau Chief Kenneth Brief, and moved to Orange, headed by William McTernan in 1964, and in each instance was told that his expense account each week was expected to be substantially in excess of his actual expenses. Finally, the testimony of employee Bernard Mitchell described his early experience with expense accounts as follows:

A. The first expense account I made as a reporter was \$5.85.

Q. And, what if anything happened when you made this claim?

A. It was rejected by the city editor, Henry Coit.

Q. And why did he reject it?

A. Well, he said—well, he didn't say; I got it back from Jack Scully that the boss said that I can't ruin it for everybody else there and that I have to have expenses that have to total at least \$20.00. So, he tore it up and had me make up one for \$20.85.

Q. And did you re-submit that expense claim?

A. Yes, sir.

Q. In what amount?

A. \$20.85, I believe.

Q. Subsequent to that, did you submit expense claims?

A. Yes, sir.

Q. In what amounts?

A. Varying amounts, always including the guarantee of extra expenses to compensate for salary, as described by Jack Scully on behalf of Henry Coit.

Q. Could you give us the amounts?

A. Well, \$15.00 a week is what it amounted to.

Q. Of that \$15.00 approximately how much of that was actual?

TRIAL EXAMINER: As I understand what you're saying, Mr. Mitchell, it was always \$15.00 above the actual expenses approximately?

THE WITNESS: Approximately, yeah.

² The weekly excess ranged from \$20 to \$25 in his early days of employment, but had reached to over \$50 by the time of the events here in question.

2. Payment for overtime not worked

Except for Barkhorn the same witnesses who testified as to the expense accounts also testified to arrangements under which they regularly received overtime payments for hours they did not work. Thus, to return to Rosenberg's testimony:

Q. I direct your attention to late 1959 or early 1960. Did you have occasion at that time to request a raise?

A. Yes, I did.

Q. To whom did you speak about the raise?

A. At that time Mr. Swanson was replaced by Emmett Nathan, who was then bureau chief. And I asked him for a raise. My year had been up. I thought I deserved one.

Q. What, if anything, did Mr. Nathan say?

A. He apparently tried to get a raise and told me that it wasn't available, that instead I should put in a couple of hours extra of overtime in lieu of a raise since it was not available to me.

Q. And after this, did you put in for a couple of hours overtime?

A. Yes, I did.

Q. When you say you put in for a couple of hours overtime, suppose you actually worked four hours overtime during a week, how much overtime would you put in for that week?

A. I would then put in six or seven. Again, it was varied.

Rosenberg testified that from time to time he received similar "raises" in the form of increased "overtime" for hours not worked, and finally by the time he became head of the Elizabeth office he was paid for 8 hours each week that he did not work. His testimony concerning the overtime payments establishes that the practice was widespread:

Q. Was there any reason why you would put in for eight hours?

A. I had discussed it with the suburban editor then, who was Walter O'Toole, and I pointed out that I would be bound to the desk for the regular office hours, that if I lost the overtime I would in effect take a pay cut, so he suggested the eight hours I had been putting in I continue.

TRIAL EXAMINER: When you say putting in, you mean putting in on your report not putting in at work?

THE WITNESS: That's right.

TRIAL EXAMINER: You did not work eight hours of overtime?

THE WITNESS: That's right.

Q. Is Mr. O'Toole still with the Newark News?

A. Yes.

Q. In what capacity?

A. He is still suburban editor.

Q. Now, you were the bureau chief in the Elizabeth Bureau, is that correct?

A. That's correct.

Q. During that time, did you have any discussions with Mr. O'Toole concerning raises for employees in that bureau?

A. Yes. There are people there whose anniversary date, that is, the year had gone by since they had last received a salary increase and they approached me for added money. I, in turn, passed the request on to Mr. O'Toole. Again, he tried to get more money for them and told me that it was impossible for him to do it and suggested that these qualified people be given added overtime.

Q. What do you mean by added overtime?

A. Add another two or three hours to their regular overtime in lieu of a pay increase.

Q. Did you follow these instructions of Mr. O'Toole?

A. Yes, I did.

Later Rosenberg was transferred to the financial desk in Newark, and again his testimony shows that the payment for overtime not worked was part of his regular salary:

A. Well, here again I discussed with Harry Anderson and Ed Anderson the fact that in this assignment there would be less overtime. I was told there might be four hours. Harry assured me that there would be no loss in pay and Ed Anderson said to put in eight hours a week regardless of how many hours I worked overtime, if it was below that.

Q. Well, did you put in for eight hours overtime each week?

A. Yes.

Q. Whether you worked it or not you put in for eight hours?

A. Yes.

Q. To whom did you submit your overtime claim.

A. To Ed Anderson.

Q. Did he approve it?

A. Yes, he did.

Finally, Rosenberg's testimony is unequivocal that the overtime arrangements were in lieu of wage increases:

TRIAL EXAMINER: Apart from the timing, let's back-track to make sure we haven't got a confused record here. These added increases of overtime, were they in response to requests that you made for salary increases?

A. Yes, that's right.

TRIAL EXAMINER: How many times was it, once, twice?

MR YAUCH: How many times prior to the time that he went to—that you came to Elizabeth? Fix a period of time—so we can fix a period of time.

THE WITNESS: I don't recall how often it was.

TRIAL EXAMINER: However, each time, no matter how many times it was, each time you asked for a wage increase and told you couldn't get it, Mr. Nathan said, tell you what I can do, add a couple of hours of overtime in addition to what you work?

THE WITNESS: It wasn't just Mr. Nathan. It was different office heads I worked under.

The testimony of Fraser, Yeninas, Crystal, Grambs, and Mitchell all supports that of Rosenberg that payments for overtime not worked were a regular part of the weekly income of the employees. As previously noted, Fraser's regular 4-hour overtime pay was recognized when the Company made an abortive attempt in 1967 to eliminate the fiction at a time it gave a wage increase. Yeninas testified to a similar experience at the same time. Crystal, as we have seen, was told that in lieu of a raise he could add some overtime or expense money and he thereafter received from 2 to 4 hours pay a week for overtime not worked. Grambs testified that when he became assistant bureau chief at Orange he had the following discussion with Alfred DePoto, the bureau chief:

A. As I recall, I asked him when I was made assistant bureau chief whether I could get a raise; and I believe he told me that there was not enough money for it at the moment. I'm not certain really the status of that, but I do remember he told me to put in for four hours overtime whether or not I had worked it as compensation for the editing job.

Q. And did you follow those instructions and put in?

A. Yes sir.

Q. You say four hours overtime is what you put in for?

A. Four hours, as compensation for being assistant bureau chief.

Q. And, the four hours you put in, would that be for overtime you actually worked?

A. No, this was for overtime not worked.

Q. Suppose you had worked four hours overtime during the week, how much overtime would you put in for?

A. Eight hours.

Q. And to whom would you submit your claim for overtime?

A. To Alfred F. DePoto.

Q. And did he approve it?

A. Yes.

Q. Would Mr. DePoto be in a position to know whether you actually worked that overtime or not?

A. Yes, because we discussed it.

DePoto, called as a witness by the Company, denied making such an arrangement. I credit Grambs' testimony, and I note that DePoto himself apparently received a guaranteed payment of a certain number of hours of overtime when he wrote a special column on which he might or might not work the number of hours in question.³ This arrangement was not too dissimilar from that of Bernard Mitchell, who ran the Newton bureau from his home "and won an agreement from the state desk to originally get three hours of guaranteed overtime as compensation for the office in the house." Mitchell further testified to a later arrangement with his bureau chief John Rae under which to quote Mitchell:

A. . . . I was guaranteed four hours overtime; and if I worked six hours overtime, actually work six hours, that's all I got; but if I only worked two hours, I could put in for four; if I worked none, I could put in for four.

Q. Always put in at least four hours?

A. I always got at least four.

Q. And, the bureau chief, was he the one who had to approve this overtime?

A. He had to initial approval on it, yes, sir.

On one occasion when Mitchell was absent all week because of a death in the family he was still paid for four hours of "overtime."

B. Company Knowledge

The evidence detailed above establishes not only that a substantial number of employees regularly received as part of their earnings "expense" money for expenses not incurred and "overtime" payments for hours not worked, but also that these practices were known to, acquiesced in, and in some instances even initiated by, management representatives. Although the Company changed hands in May 1970, many of the supervisory personnel who knew of these arrangements for compensation continued in their former capacities. Moreover, I credit the testimony of Mitchell and Fraser that at a meeting in late October or November 1970, the practice as to overtime and expenses was specifically

³ DePoto was the only direct supervisor of employees whom the Company called as a witness, although several other supervisors whom General Counsel witnesses identified as approving, or intiating expense or overtime payments are still in the Company's employ (e.g., Swanson, O'Toole, Harry Anderson, Haver). As noted, even DePoto's testimony did not fully support the Company. It is fair to infer from the failure of the Company to call these other supervisors that their testimony would have been adverse to the Company. See *N.L.R.B. v. Walkick*, 198 F.2d 477, 483 (C.A. 3, 1952); note, 5 A.L.R. 2d 893, 896, 907-908, 909-911.

called to the attention of Bruce Mair, the new president of the Company, who at that time referred to it as "degrading" or "demeaning." Mair, called as a witness, denied that he had been apprised of the practice at the meeting in question or indeed at any time prior to March 1971. As just noted, I do not credit his denial, and can only account for it by the fact that he had many, and perhaps more important, matters on his mind. In any event even if Mair was personally unaware of the situation (and I find he was not), the Company is chargeable with the knowledge possessed by its supervisors.

C. The Change in the Practice

In March 1971 the Company instituted certain changes in its procedures, requiring that thereafter overtime be specifically authorized in advance and approved, and that expense reports be accurate, detailed, and documented. The immediate effect of these changes was to eliminate the overtime and expense practices described above, under which employees derived substantial sums each week for overtime not worked and expenses not incurred. The official actions of the Company are contained in memoranda dated March 5, effective March 8, as to overtime, and March 17, effective March 22, as to expenses. Earlier word of the changes apparently reached the affected employees, for as early as March 10, well before the changes were actually reflected in their paychecks, a number of employees complained of the losses to Edna Berger, the representative of the newly certified Guild. She in turn on March 10 or 11 telephoned the company president, Bruce Mair, to discuss the matter, explaining to him that these "expenses" and "overtime" payments had been part of the employees' regular wages. Mair told her that he would have his labor negotiator, David Winkworth, call her to arrange for a meeting. To quote Mair's testimony:

And she, at this time, asked for a meeting; and I told her that Mr. Winkworth was my contract negotiator and suggested that if she desired I would have Mr. Winkworth call her and have a meeting but that I saw no course to pursue but the course I was pursuing and I had to go ahead with it.

* * * * *

The reason I said I would ask Mr. Winkworth to call her was because it was a way to terminate the conversation since I had said what I had to say and had no expectation to solve it anyway, or to reverse my course which she was asking me to do.

* * * * *

I wasn't in the position to do this. I had told her this, and when she asked for a meeting, I found this to conveniently to terminate the conversation by telling her that I would ask Mr. Winkworth to call her; and that was the end of the conversation.

Mair also testified that he then told Winkworth to take the position with Mrs. Berger that Mair "could not and would not alter my plans as far as overtime and expenses were concerned."

Winkworth and Mrs. Berger met on March 15. Their testimony as to what transpired is in substantial agreement. She reiterated that the employees had been enjoying these emoluments "for a very, very long time," and asked him "to please restore the cuts, make the people whole until such time as we negotiated a contract at which point all these matters would be resolved." Winkworth asked for a list of

the affected employees, which Mrs. Berger agreed to supply.

On March 22, Mrs. Berger gave the Company a partial list containing not only the names of the employees and the overtime losses they had suffered, but also the names of the supervisors who had allegedly approved the arrangement under which the employees had theretofore been employed. Mair then obtained reports from the named supervisors, but only one of them admitted paying one man for overtime not worked, although another stated that the employees were aware "that so long as expense and overtime remained within reasonable bounds, no questions would be raised by me." The other supervisors denied promising the overtime as claimed in Mrs. Berger's list.⁴

On April 6, Mrs. Berger met with Mair and again urged him to restore the pay cuts, as she viewed them, pending negotiation of a contract, but he responded by emphasizing the economic difficulties the paper was in. Mair agreed to give her an answer the next day at a regular negotiating session which had been scheduled. That afternoon Mrs. Berger submitted at Mair's request a further list of affected employees, this time including "expense" losses as well as "overtime" losses. The next day the Company brought Mair's answer: he would give the employees a 7-per cent raise (but not to exceed \$10 per week) to compensate them for losses they may have suffered because (as Mair saw it) of curtailments of overtime and "tightening up" on expenses, in return for which the Guild was to drop its demand for a union-security clause. The Guild rejected the suggestion, and this litigation ensued.

D. Concluding Findings

The heavy preponderance of the evidence establishes, and I find, that a number of employees in the bargaining unit regularly received as part of their weekly pay "expense" money for expenses not incurred and "overtime" pay for hours not worked. I further find, in accordance with the evidence, that these payments frequently originated in lieu of wage increases or to furnish additional compensation for what would otherwise have been an abnormally low starting salary. To be sure, the details of the amounts varied from employee to employee, and it may be that not every employee had some special arrangement of this type. I find, however, that the practice was sufficiently widespread so that it must be considered a condition of employment affecting a substantial part, if not all, of the employees in the bargaining unit.⁵

I find further that the Company was aware of this practice, in that its supervisory employees participated in it from the outset, and that the new owners, who took over the paper in May 1970, were chargeable with this knowledge by March 1971, particularly as the matter had been brought directly to Mair's attention the preceding fall.

I find further that the Company abrogated these conditions of employment without notice to or bargaining with the statutory bargaining representative. The Company

points out that Mair and Winkworth met with Mrs. Berger before the new policies actually affected any paychecks. But Mair's own testimony shows that his mind was closed on the subject, that he used a promised meeting with Winkworth only as a sop to get rid of an unwelcome conversation, and that he not only had no intention of bargaining in good faith on the matter, but expressly so instructed Winkworth. It is not a discharge of the statutory obligation to go through the motions of bargaining after a final determination has been arrived at unilaterally. *Stark Ceramics, Inc. v. N.L.R.B.*, 375 F.2d 202, 206 (C.A. 6). Moreover, insofar as the Company insists that it instituted the changes in an effort to curtail operating losses and to improve its bad financial condition, the short answer is that the Company's good faith and economic motivation furnish no defenses to unlawful unilateral action. *N.L.R.B. v. Katz*, 369 U.S. 736, 742-743.⁶ An employer, whatever his financial straits and economic motivation, cannot institute a wage cut without bargaining with the statutory representative. Indeed, an employer who has been contemplating a wage cut before the employees have a statutory representative cannot, after they have selected a representative, implement such a change without bargaining. The Company argues in its brief that there were so many different arrangements it could not have bargained meaningfully as to each one. But it could have and should have retained the *status quo* until it bargained over changes which might have led to some general substitute or possibly even to complete abrogation *after good-faith bargaining*.

The Company urges that the expenses and overtime arrangements were "thievery," "phony," "a conspiracy," "illegal," or so offensive to morality that there was no duty to bargain about them and the Board should not prescribe a remedy for their abrogation. Common judgment may concur with the remarks attributed to Mair that the presentation of an inflated expense account is "demeaning" or "degrading." Still, I doubt whether it is for the Board to pass a moral judgment on a practice joined in by employer representatives as well as by the employees. If we are to embark on a discussion of morals, is it a higher morality to fix starting wages so low that one can attract employees only by offering them the opportunity to pad expense accounts, or to permit an employer suddenly to pocket a raise he had previously given in the guise of guaranteed overtime? As to morals, I think the Board must leave the parties where they placed themselves. A closer question may be raised with respect to the failure of the parties to report the "expense" surpluses as income. As was held in a somewhat related context, we function here in the public interest to redress unfair labor practices, and can leave to the tax authorities redress for any transgressions in their area. *Liberty Scrap Materials, Inc.*, 152 NLRB 480, 485, enf'd. 64 LRRM 2686 (C.A. 6). The situation here differs substantially from that in *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31, 46, where the Court by a narrow majority held that a strike on board a vessel away from home port did not enjoy statutory protection under the National Labor Relations Act because it violated the mutiny provisions of the Criminal Code. In the instant case the payments were lawfully made and were part of the employees' wages. There is no more reason in this case than in any other to inquire whether the employee has paid his taxes before deciding to reimburse him for wages unlawfully withheld. Even assuming that the employees erroneously did not regard the payments as wages for tax purposes, their error in this regard would not change either the character of the payments or the violation of the Act inherent in their employer's discontinuance of these

⁴ Only one of these supervisors, DePoto, was called to testify. See fn 3 *supra*.

⁵ The absence of precise proof as to the number and amounts involved is not fatal to General Counsel's case. Issues of that sort may be left to subsequent compliance negotiations and, if necessary, to formal proceedings. *N.L.R.B. v. Kariarik*, 227 F.2d 190, 192-193 (C.A. 8). See cases involving discrimination against a named employee "and others similarly situated," such as *N.L.R.B. v. Gaynor News Co.*, 197 F.2d 719, 721 (C.A. 2), *aff'd*, 347 U.S. 17, 34, fn 30. Cf. *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561, *Story Parchment Co. v. Peterson Parchment Paper Co.*, 282 U.S. 555, 562, *Bigelow v. RKO Radio Pictures*, 329 U.S. 251, 265-266.

⁶ The cases involving the shutting down of a business, on which the Company relies, are inapposite.

payments without bargaining with the Guild over the matter.

Finally, the Company argues that the evidence shows that the cuts in overtime and expenses were made before the dates alleged in the complaint and the bill of particulars, which specified the dates of the memoranda dealing with those subjects. The Company further states that the memoranda in question merely set forth sound business practice and do not attempt to abrogate any specific "deals" concerning "phoney or guaranteed overtime and/or expenses." The record warrants the conclusion, however, that the memoranda in question merely set forth detailed procedures for accomplishing formally what had already been determined upon and indeed communicated to the employees: namely, that prior arrangements for paying part of their regular weekly wages were being eliminated by company fiat. That is the unfair labor practice with which this litigation was concerned, a fact which has been clear from the opening of the hearing. Any variance between pleading and proof is nonprejudicial.

CONCLUSIONS OF LAW

The Company by changing, without notice to, or good-faith bargaining with, the Guild, the practices under which employees received as part of their weekly earnings money for expenses not incurred or for overtime not worked engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

I shall recommend an order directing the Company to cease and desist from its unfair labor practices, and, affirmatively, to reimburse the employees, with interest, for sums lost due to the unilateral changes in "expense" and "overtime" practices, up to May 26, 1971, the date the employees went on strike, at which point, all parties agree, any liability terminated. Interest shall be computed under the formula of *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁷

The Respondent, The Evening News Publishing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Changing any terms or conditions of employment without notice to, and bargaining in good faith with, North Jersey Newspaper Guild, Local 173, the Newspaper Guild, AFL-CIO-CLC, as representative of Respondent's employees in the following appropriate unit:

All employees in the Respondent's editorial-news department at its locations in Newark, New Jersey and suburban New Jersey, including employees employed at the Respondent's Morristown, Elizabeth, Metuchen, Belmar and Trenton bureaus, news editor, art department employees, home and family department employees, sports department employees, copy boys, wire room attendants, editorial auditors, reporter-trainees, proof sorters and file room employees, excluding employees employed in all other departments, receptionists, professional employees, editorial page editor, managerial employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with the efforts of the above-named Union to represent the employees in the above-described unit.

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

(a) Reimburse employees in the above-described unit, in the manner described in The Remedy section of the Trial Examiner's Decision, for sums lost as a result of the cessation in March 1971 of prior practices relating to payments for expenses not incurred and overtime not worked.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary to analyze and compute the amount of backpay due under the terms of this recommended Order.

(c) Post at its plant at Newark, New Jersey, and at its locations in Morristown, Elizabeth, Belmar, Metuchen, and Trenton, New Jersey, copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.⁹

⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

⁸ In the event that the Board's 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁹ In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

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

WE WILL reimburse employees represented by the Newspaper Guild, Local 173, for the period from March 1971 until May 26, 1971, for losses they sustained from the discontinuance of arrangements under which they had been employed governing expense accounts and overtime.

WE WILL NOT change the terms or conditions of employment of employees represented by the Newspaper Guild, Local 173, without giving the Guild notice and opportunity to bargain.

WE WILL NOT in any like or related manner interfere with the efforts of the Guild to represent them and bargain in their behalf in the unit heretofore certified by the Board which embraces:

All employees in the editorial-news department at

our locations in Newark, New Jersey and suburban New Jersey, including employees employed at our Morristown, Elizabeth, Metuchen, Belmar and Trenton bureaus, news editor, art department employees, home and family department employees, sports department employees, copy boys, wire room attendants, editorial auditors, reporter-trainees, proof sorters and file room employees, excluding employees employed in all other departments, receptionists, professional employees, editorial page editor, managerial employees, guard and supervisors as defined in the Act.

THE EVENING NEWS PUBLISHING
COMPANY

		(Employer)	
Dated	By	(Representative)	(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any question concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-2100.