

The Baltimore Sun Company and Washington-Baltimore Newspaper Guild, Local 35, AFL-CIO, CLC. Case 5-CA-28862

August 27, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On January 31, 2001, Administrative Law Judge Richard H. Beddow Jr., issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The Respondent filed a reply brief and a supplemental submission.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Baltimore Sun Company, Baltimore, Maryland, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Refusing to apply the extant collective-bargaining agreement to the Brand Builders Department employees accreted to the unit and, instead, insisting on bargaining for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement.

¹ The Respondent submitted a slip opinion of the U.S. Court of Appeals for the Fourth Circuit's decision in *Baltimore Sun Co. v. NLRB*, 257 F.3d 419 (2001). The court denied enforcement of the Board's Order which required the Respondent to bargain with the Union concerning a previously separate group of "SunSpot" employees as part of an established unit represented by the Union. The Board found that the "SunSpot" employees were an accretion to the established unit. The Court disagreed with the Board's accretion finding.

² We have clarified the judge's recommended Order and notice to reflect that issues "unique" to employees of the Brand Builders Department are those not covered by the existing contract.

We have also modified his recommended Order and notice to delete time limitations that are inapplicable to certain remedial provisions, to reflect the correct formula for the computation of backpay, and to provide a full description of the unit at issue in the affirmative bargaining provisions.

We have also modified the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

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

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

(a) Honor the collective-bargaining agreement with Washington-Baltimore Newspaper Guild, Local 35, AFL-CIO, CLC, apply the terms and conditions of the agreement and give the agreement retroactive effect with respect to the employees in the Brand Builders Department accreted into the unit by the final decision of the Board on October 22, 1999. The unit is:

All employees employed in the editorial departments, news departments, commercial departments, and library, including all employees in the job classifications set forth in Article 5, Section 5.1 of the contract, but excluding all employees employed in the positions set forth in Article 1, Section 1.8 of the agreement, guards, management personnel, confidential personnel and supervisors as defined in the Act.

The current unit is clarified to include all employees employed in the promotions and events department (Brand Builders Department), including the design manager, but excluding all professional employees, guards, the director, the creative manager and all other supervisors as defined in the Act.

(b) Make the employees of the Brand Builders Department whole for any losses they may have suffered by reason of the Respondent's failure to timely honor the existing collective-bargaining agreement in accordance with the method set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Reimburse the Union for any dues lost as a result of the Respondent's failure to apply the existing collective-bargaining agreement to these employees.

(d) Bargain with the Union concerning how to apply the existing collective-bargaining agreement to the employees in the Brand Builders Department, including the slotting of job titles into the existing wage scales, and any issues that are "unique" to employees of the Department, in the sense that these issues are not covered by the extant collective-bargaining agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an

electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Baltimore, Maryland facilities copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and job applicants customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees, former employees employed by Respondent's Brand Builder Department, and all employees employed at its Baltimore facility at any time since October 22, 1999.

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

(h) Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

³ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to apply the extant collective-bargaining agreement to the Brand Builders Department employees accreted to the unit or insist on bargaining for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement.

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

WE WILL honor the collective-bargaining agreement with Washington-Baltimore Newspaper Guild, Local 35, AFL-CIO, CLC, apply the terms and conditions of the agreement, and give the agreement retroactive effect with respect to the employees in the Brand Builders Department accreted into the unit by the final decision of the Board on October 22, 1999. The unit is:

All employees employed in the editorial departments, news departments, commercial departments, and library, including all employees in the job classifications set forth in Article 5, Section 5.1 of the contract, but excluding all employees employed in the positions set forth in Article 1, Section 1.8 of the agreement, guards, management personnel, confidential personnel and supervisors as defined in the Act.

The current unit is clarified to include all employees employed in the promotions and events department (Brand Builders Department), including the design manager, but excluding all professional employees, guards, the director, the creative manager and all other supervisors as defined in the Act.

WE WILL make the employees of the Brand Builders Department whole for any losses they may have suffered by reason of the Respondent's failure to timely honor the existing collective-bargaining agreement in the manner set forth in the Order.

WE WILL reimburse the Union for any dues lost as a result of the Respondent's failure to apply the existing collective-bargaining agreement to these employees.

WE WILL, on request, bargain with the Union concerning how to apply the existing collective-bargaining agreement to the employees in the Brand Builders Department, including the slotting of job titles into the existing wage scales, and any issues that are "unique" to employees of that department in the sense that these issues are not covered by the existing contract.

THE BALTIMORE SUN COMPANY

Gabriel A. Terrasa, Esq., for the General Counsel.
Jeremy P. Sherman and Joshua L. Ditelberg, Esqs., of Chicago, Illinois, for the Respondent.
Robert E. Paul, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW Jr., Administrative Law Judge. This matter was heard in Baltimore, Maryland, on October 23, 2000. Subsequently, briefs were filed by all parties. The proceeding is based upon a charge filed March 7, 2000, by Washington-Baltimore Newspaper Guild, Local 35, AFL-CIO, CLC. The Regional Director's complaint dated August 24, 2000, alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to apply the extant collective-bargaining agreement covering the unit of its employees represented by the Union to the Brand Builders Department employees accreted to the unit and instead insisting in bargaining for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a newspaper publisher with an office and place of business in Baltimore, Maryland. During the 12-month period preceding the issuance of the complaint, the Respondent, in the conduct of its business operations, derived gross revenues in excess of \$200,000, and during this same period, it held memberships in, or subscribed to, various news services including the Associated Press and advertised various nationally sold products. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and it also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent has recognized the Union as the exclusive collective-bargaining representative of the employees in the unit described below since 1949 and this recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective by its terms from June 23, 1999, to June 24, 2003. The status of the unit of employees represented by the Union recently was affirmed as an appropriate unit by the Board in *Baltimore Sun Co.*, 330 NLRB No. 167 (2000) (not reported in bound volume).

On December 11, 1997, a decision and clarification of bargaining unit issued in Cases 9-UC-429 and 9-UC-430 (formerly Cases 5-UC-344 and 5-UC-348), in which the unit was clarified to include "all employees employed in the promotions and events department (the name thereafter was changed to the Brand Builders Department), including the design manager, but excluding all professional employees, guards, the director, the

creative manager and all other supervisors as defined in the Act."¹

On December 22, 1997, the Union requested to bargain over the Brand Builders' employees, a request renewed on January 11, 1998. Its letter noted that the employees were in the bargaining unit and stated:

The Guild is now interested in meeting with the Sun to address issues relating to certain terms and conditions of employment for these employees.

On January 12, 1998, the Respondent rejected the Union's request and subsequently, filed a request for review of the Regional Director's decision and clarification of bargaining unit.

On July 9, 1998, the Union filed a charge in Case 5-CA-27814 alleging that the Respondent was refusing to bargain with the Union over the Brand Builders' employees in violation of Section 8(a)(1) and (5) of the Act (the charge also alleged refusal to bargain over the SunSpot Department employees).

On October 22, 1999, the Board denied the Respondent's request for review of the Regional Director's decision and clarification of bargaining unit and by letter of October 28, the Union renewed its request to bargain over the Brand Builders Department employees. By letter dated November 12, the Respondent replied that it would bargain over the Brand Builders' employees, but not over the SunSpot employees. The letter also notes:

However, we are not certain what you mean when you request to bargain "additional" terms and conditions of employment for these added employees. Any and all substantive contractual terms we agree upon covering these added employees will be the result of collective bargaining.

The Union then withdrew the charge in Case 5-CA-27814 as to the Brand Builders Department.

On January 24, 2000, the Respondent sent an information request to the Union that read in part:

The company is in the process of preparing for the upcoming bargaining process precipitated by the Guild's accretion of the Brand Builder's department. To that end, The Sun needs to know how the union will ratify this new contract? Specifically, for example, will it be a membership vote of the entire union? Of those voting, will it be a voice vote or a secret ballot? What is the number required for approval of the contract?

The Union replied by letter of February 7, stating:

We will keep all employees we represent at the Sun fully informed as to the progress and results of the forthcoming talks. The result of which will not be as the Sun's January 24 letter suggests a "new contract." Rather, the existing Guild-Sun contract will be applied to employees of the department.

¹ The Regional Director's decision also clarified the unit to include the employees in the SunSpot Department. The accretion of the SunSpot Department employees to the unit is the subject of a separate matter, which was decided by the Board (*Baltimore Sun Co.*, supra), which is pending before the United States Court of Appeals for the Fourth Circuit, is not at issue in the present case.

On February 11, the Respondent confirming the scheduling of the first bargaining session for February 17, and noted:

Regarding the last sentence in your letter, we are not insisting on a contract for Brand Builders' employees separate from the existing Guild contract. But we are firm on the fact that the substantive terms and conditions that will be applied to Brand Builders' employees will be those which result from our upcoming bargaining.

The parties met on February 17 regarding the Brand Builders' negotiations. Present for the Union were Richard O. Ehrmann, Cet Parks, Connie Knox, Bill Salganik, Angie Kuhl, and Jim Jackson. Ehrmann acted as the Union's chief negotiator. Present for the Respondent were Jack Wilson and as chief negotiator, Mary Esmond, and Stephanie Little.

Ehrmann asked Wilson whether he had received an information request sent the previous day. Wilson had not seen it, but was given a copy. Wilson said that the Respondent had also made an information request regarding the ratification procedures for the agreement they were about to bargain. Ehrmann said that the Union had responded by letter of February 7, by Richard Ramsey, which stated that the Union was not bargaining for a new contract. Wilson asserted that he did not believe that the letter was responsive to the request. Ehrmann stated that the parties were not bargaining for a new contract but were there to negotiate how to apply the current contract to the Brand Builders Department, which essentially meant slotting their job titles into the wage scales of the existing contract. Wilson said that the Respondent did not agree with the Union's position and that the Respondent's proposal contained sections of the existing agreement that the Respondent was willing to agree to apply to the Brand Builders' employees as well as sections covering matters in which the Respondent believed that the Brand Builders' employees should be treated differently.

Wilson asked whether the Union was going to bargain about issues other than wages. Ehrmann replied that if there were unique issues having to do with the Brand Builders, the Union would hear them and respond based on what the Respondent presented. Ehrmann then asked for the Respondent's proposal. Wilson reiterated that the Respondent believed that it had the right to propose different terms and conditions for the Brand Builders' employees and handed the Union a two-page bargaining proposal. Wilson then went over a few of the sections in the Respondent's proposal, most of which listed those sections of the existing collective-bargaining agreement that the Respondent proposed to apply to the Brand Builders' employees, however, some important sections of the existing agreement were excluded from Respondent's proposal and it also had other proposals including a new jurisdictional clause, a new definition for workweek, a new definition for temporary employee, greater flexibility in outsourcing Brand Builders' work and the elimination of the union-security clause for the Brand Builders' employees. The proposal also stated that vacation and wage benefits proposals would be made in the future. Wilson also noted that, contrary to the extant collective-bargaining agreement, the Union would not have the right to grieve or arbitrate the Respondent's decisions on management exemptions from the unit. Ehrmann complained that the Respondent

was asserting on the one hand that it would follow "NLRB standards" in making its exemptions determinations and on the other hand it was proposing to exclude from the unit the design manager, a position that previously was litigated and specifically included in the unit by the Board's UC decision. Wilson stated that he was not familiar with that, but stated that the Respondent would not agree to cover the Brand Builders' employees under the extant collective-bargaining agreement's union-security clause.

The Union asked for a caucus and thereafter the parties decided to continue negotiations at a later date with the Union stating that it would respond to the Respondent's proposal and would bring a bargaining proposal at the next meeting.

On February 18, the Respondent sent two letters to the Union. In the first, the Respondent renewed its information request of January 24 concerning the ratification procedures for the new contract and asserted that the Union's February 7 letter to the Respondent did not constitute sufficient answer to the request. In the second, the Respondent proposed new days for bargaining meetings and asserted:

In our first bargaining session which occurred yesterday, the Company presented the Guild with its opening proposal regarding the substantive terms and conditions of employment to be applied to Brand Builders employees. The Guild stated that, other than "slotting" Brand Builders' employees into wage classifications, the existing Guild contract must be applied in its entirety to these employees. The sun [sic] rejects the Guild's proposal to apply the existing contract in its entirety to these employees.

The Sun requests additional days of bargaining to negotiate the substantive terms and conditions of employment that will govern these employees.

On February 25, the Union accepted March 3, for the next bargaining session and the Respondent confirmed by letter dated February 28, in which it noted that:

As your letter suggests, we will be expecting a response to the company's outstanding information request. Moreover, as we did on February 17th, the company will come prepared to negotiate a contract covering Brand Builders employees.

At the start of the March 3 meeting Ehrmann acknowledging the Respondent's letter of the 28th and said that the letter made it clear that when the Respondent says it is prepared to negotiate a contract covering Brand Builders' employees, it showed a fundamental misconception as to what the parties were there to do. Ehrmann stated that a unit clarification required the parties to apply the existing contract to the accreted employees. The Respondent said it did not agree and Wilson asked in what sense the Union felt that the parties had a contract covering the accreted group. Ehrmann responded that the Board had accreted the Brand Builders into the existing unit, which is covered by an existing collective-bargaining agreement, ratified and in effect. Wilson argued that the Union's position was inconsistent with the law, that the Respondent was not required to accept every term of the contract for the Brand Builders' employees, and that the Respondent was proposing to accept many of the terms of the existing contract for the Brand Build-

ers' employees but was also proposing certain different terms. Wilson asked if the Union was going to respond to any of the Respondent's proposals. Ehrmann replied that the proposal went far beyond the scope of bargaining for a unit clarification then said that the Union would respond by presenting its own proposal, which contained the items that the Union believed were appropriate for bargaining in this accretion context.

Ehrmann then addressed Wilson's information request saying that there would not be a ratification vote or process as the applicable collective-bargaining agreement had already been voted on and ratified by the parties and gave Wilson a letter dated March 3, confirming the Union's answer to the information request.

Wilson asked if the Union would talk about exclusions. Ehrmann said yes and Wilson asked if the Union's proposal represented the sum total of what the Union would bargain about. Ehrmann responded that the Union would discuss sections dealing with wages and exclusions and would address any other issue that was unique to Brand Builders. Ehrmann testified that Wilson responded that he would define "unique" as anything not included in section 1.8 or article 5 of the collective-bargaining agreement, however, Wilson denied this or any use of the word "unique."² Wilson said, "we have a proposal on jurisdiction and I am assuming that the Union is willing to talk about exemptions." Ehrmann said yes. Wilson asked, how about workweek. Ehrmann responded that the Union would not negotiate over any items that would change the terms of the existing contract. Wilson asked whether the Union was proposing to discuss only exclusions and wages. Ehrmann said yes.

The Respondent caucused and thereafter Wilson said that the parties had a fundamental difference in their bargaining positions and that in the Respondent's view, the Union was refusing to bargain. Wilson argued that the Union's position was not defensible, that bargaining was not an exercise in slotting wages, and that there was no reason to continue negotiations that day. Ehrmann responded that the Union felt strongly about their position and that it probably made sense to resolve the dispute in another forum and the meeting ended.

That afternoon, the Respondent sent the Union a letter stating:

² Stephanie Little was the note-taker for the Respondent at the bargaining session. Little took notes in shorthand and later transcribed the notes to the form in which they are in GC Exh. 8. According to the Respondent's own notes, Wilson stated: "Let's talk about unique issues. Our proposals: unique issues in [sic] any issue that is not included in Article 1.8, or in any part of section 5. There is a proposal on jurisdiction and I am assuming you are willing to talk about exemption [sic]." The Union's bargaining notes taken by Bill Salganik reflect an almost identical statement from Wilson, which is also consistent with Ehrmann's testimony: "let's talk abt our ppsl—I'll define unique as any issues not in 1.8 or Art. 5—our ppsl: jurisdiction—willing to talk about exemptions?" Another set of the Union's bargaining notes taken by Cet Parks reflect a similar statement from Wilson: "Let's talk about unique issues in our proposals. I am assuming you are willing to talk about exemptions." Respondent's own notes corroborate Ehrmann's testimony regarding Wilson's statement and I find that Ehrmann's recollection is the most plausible and should be credited.

This letter is to confirm the Guild's position with respect to Brand Builders' negotiations. During our meeting today, the Guild stated that, with the exception of slotting certain Brand Builders positions into wage classifications and listing other positions as exemptions in the existing contract, the Guild will not negotiate with the Sun over any other terms and conditions of employment regarding Brand Builders' employees. The Guild's position is that the existing Guild contract must be applied to these employees without negotiation.

The Sun disagrees with your position and requests that the Guild negotiate with the Sun over the terms and conditions of employment identified in its opening proposal.

If our understanding is incorrect, please let us know.

On March 7, the Union filed the charge in the present matter and on March 10, the Union also responded to the Respondent's letter of March 3. The Union's letter states:

As you know, the Sun's firm position regarding Brand Builders left the Guild with little choice than to file an unfair practice charge with the NLRB. For the record, it is not the "Guild's position . . . that the existing Guild contract must be applied to these employees without negotiation."

We have previously indicated our position on this matter at each of the bargaining sessions. On both occasions, we were prepared to negotiate. However, the Sun's insistence on negotiating each of the terms and conditions of employment identified in your opening proposal, instead of honoring the contract and the Board decision, is in our view contrary to the law.

On March 22 the Respondent filed a mirroring charge in Case 5-CB-9033. The charge was dismissed by the Region on August 23 and, after an appeal, the dismissal was upheld on October 3.

Discussion

There is little dispute over the factual background and the abortive bargaining that occurred after the Board's decision of October 22, 1999, which affirmed the Regional Director's decision and clarification of bargaining unit, which resulted in the inclusion of all employees in the Brand Builders Department in the unit. The Respondent, however, essentially contends that it is entitled to bargain over the terms and conditions of employment for the employees newly included in the unit regardless of the existing collective bargaining agreement covering the entire unit and it asserts that its conduct in adhering to this position does not constitute a refusal to bargain in good faith.

In support of its position it made the following four affirmative defenses:

1. The National Labor Relations Board improperly applied, in Case No. 9-UC-429 (formerly Case No. 5-UC-344), the legal standard governing accretions (both with respect to the timeliness of the petition and the merits of the case).
2. The National Labor Relations Board's decision in Case No. 9-UC-429 (formerly Case No. 5-UC-344) vio-

lates the Section 7 rights of employees in the SunSpot Department to choose whether or not to be union represented.

3. The Guild violated Section 8(b)(3) of the Act by failing and refusing to bargain with the Sun about terms and conditions of employment (except those relating to wage rates) for Brand Builders' employees newly accreted to the bargaining unit by the clarification petition in Case No. 9-UC-429 (formerly Case No. 5-UC-344).

4. Respondent's good faith bargaining cannot be tested in the face of the Guild's bad faith.

These defenses were the subjects of a motion to strike by the General Counsel. The matters were argued at the commencement of the hearing and the judge then ruled that each affirmative defense be stricken.

On brief the General Counsel argues that the affirmative defenses were properly stricken. The record shows that after the Regional Director issued his decision clarifying the existing unit to include the employees of the Brand Builders Department the Union requested bargaining. The Respondent rejected the Union's request and it filed a request for review of the Regional Director's accretion decision. The Union then filed a charge alleging the Respondent's refusal to bargain over both the Brand Builders and SunSpot employees. The Board denied Respondent's request for review, the Union renewed its request to bargain over the Brand Builders' (and SunSpot) employees. The Respondent agreed by letter to bargain over the Brand Builders' employees (but not over the SunSpot employees) and on December 13, 1999, the Respondent submitted a position statement to the Region asserting that it would bargain over the Brand Builders' employees (but not over the SunSpot employees). Otherwise, it failed to seek any further review of the Board's accretion decision.

Here, the employer initially contested the validity of the Regional Director's decision regarding the accretion of the Brand Builders' employees. It also knew that it had the right to test certification via the charge in Case 5-CA-27814. Under these circumstances, the employer's actions induced the Union and the Region to believe that it was accepting the Board's decision regarding the accretion of the Brand Builders but its affirmative defense attempts to refute its prior actions. The Respondent affirmatively stating in letters to the Union and the Region that it was accepting the Board's decision as to the Brand Builders Department and its employees. It also began to engage in bargaining with the Union over the Brand Builders' employees. The Union and the Region relied on the Respondent's representation to their detriment by withdrawing, and approving the withdrawal, of the charge in Case 5-CA-27814 as to the Brand Builders. The General Counsel urges that the facts meet the principles of equitable estoppel, citing *Red Coats, Inc.*, 328 NLRB 205 (1999), and *R.P.C., Inc.*, 311 NLRB 232 (1993), in which the Board affirmed and elaborated upon my decision which found that the employer was not free to raise the validity of the union's status as an affirmative defense and was not justified in its refusal to bargain. Here, the Union in its letter of December 22, 1997, asked to meet "to address issues relating to 'certain terms and conditions of employment' for the Brand Builders' employees" (emphasis added). Its following letter of

January 11, also expressed its desire to meet with the Respondent "to address issues relating to *certain* terms and conditions of employment." Also, in its October 28, 1999 letter to the Respondent, the Union again expressed its desire to "engage in good-faith negotiations over any *additional* terms and conditions of employment covering the employees." Thus, it appears that the Respondent was aware of the Union's position when the Respondent communicated to the Union that it was accepting the Board's unit clarification decision as to the Brand Builders' employees.

Under these circumstances, I conclude that the estoppel doctrine is applicable and I reaffirm my decision to grant the General Counsel's motion to strike Respondent's affirmative defenses (1) and (2).

On March 22, 2000, the Respondent filed a charge in Case 5-CB-9033 alleging that the Union had violated Section 8(b)(1) and (3) of the Act by insisting on applying the extant collective-bargaining agreement to the Brand Builders' employees. The Region dismissed the charge on August 23 and the Respondent appealed the decision to the Office of the General Counsel, Office of Appeals, which denied the Respondent's appeal on October 3. The Respondent's argument in affirmative defenses 3 and 4 that the Union violated Section 8(b)(3) of the Act or otherwise bargained in bad faith, came before the General Counsel in Case 5-CB-9033, and the General Counsel, exercising his exclusive authority under Section 3(d) of the Act, refused to issue a complaint on the allegations. It appears, however, that the Board's policy is to consider such an affirmative defense notwithstanding the General Counsel's consideration of the same evidence and a refusal to issue a complaint, see *South Alabama Plumbing*, 333 NLRB 16 (2001).

I now have considered defenses (3) and (4) and I conclude that they are more in the nature of a collateral attack on the prior rulings and, otherwise, they are not mutually inconsistent with the issues raised by the complaint in the present case that alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to apply the extant collective-bargaining agreement to the Brand Builders Department employees accreted to the unit and instead insisting in bargaining for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement. This is especially true in that the Respondent specifically accepted the UC decision and in this case as contrasted with the CB case, there is no refusal to bargain or bad-faith allegation that arguably could open the door for an excuse for the employer's own conduct. Here, any considerations of the Union's asserted conduct (adequately described in the parties stipulated facts), is not relevant to the narrow and specific issue of whether the Respondent is obligated to apply the existing agreement of the accreted employees and, otherwise, I find that of these defenses does not demonstrate that the Charging Party was not acting in good faith or acting in a manner that would excuse the Respondent from the obligation otherwise found to have been created by the Board's accretion decision.

The Respondent asserts that it and the Union never have bargained over the terms and conditions for the Board Builders' employees and that it therefore is entitled to bargaining over all the elements of the contract. The Charging Party and the Gen-

eral Counsel, on the other hand, contend that the accretion of these employees into an existing unit, whose terms and conditions of employment previously were bargained over and endorsed in an existing and current collective-bargaining agreement, has provided the necessary bargaining and that the only matters that require any further bargaining are the slotting of jobs into the wage scales or other possible issues "unique" to the newly included department.

Applicable law provides that when a group of employees is accreted to an existing bargaining unit, the Employer and the Union are required to apply the terms and conditions of the parties' existing collective-bargaining agreement to the accreted employees. See *Progressive Service Die Co.*, 323 NLRB 183 (1997). Here, I find that the Regional Director's clarification of the bargaining unit constitutes an accretion to the existing bargaining unit and I find that under the later decision, the existing collective-bargaining agreement covering the existing unit must be applied to the Brand Builders Department employees, see also *Universal Security Instruments, Inc.*, 250 NLRB 661 (1980), and *Westinghouse Electric Corp.*, 206 NLRB 812 (1973), cited by the General Counsel.

Otherwise, to allow Respondent to bargain a separate agreement for the Brand Builders' employees in effect would create two separate units with two separate contracts, a result that would render meaningless the Regional Director's and the Board's finding that the Brand Builders' employees "cannot constitute an appropriate unit separate from the existing bargaining unit." Accordingly, application of the extant collective-bargaining agreement to the Brand Builders' employees is the only result that would effectuate the Board's accretion doctrine and I find that the Respondent violated Section 8(a)(1) and (5) of the Act, as alleged, by refusing to apply the extant collective-bargaining agreement to the Brand Builder Department employees accreted to the unit and by otherwise insisting that the Union bargain for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement.

During negotiations the Union took the position that it would bargain over wages (slotting), and exclusions from the unit and any other issues that were "unique" to the Brand Builders' employees that were not covered by the extant collective-bargaining agreement. Thus, the Respondent had the opportunity to attempt to identify possible "unique" conflicts between the Brand Builder employees and other unit employees. It did not do so but insisted (while agreeing that it would accept a number of provisions from the existing contract), that it was entitled to bargain over the entire contract, including proposals with different definitions for the "work week" and for temporary employees, and elimination of the union-security clause.

Parties to a collective-bargaining agreement are under a continuing duty to bargain, upon demand by the other party, over matters that "were neither discussed nor embodied in any of the terms and conditions of the contract," see *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683684 (2d Cir. 1952); enfg. 94 NLRB 1214 (1951). Accordingly, the Union had the right to demand application of the extant collective-bargaining agreement to the Brand Builders' employees while at the same time, demanding bargaining over certain matters not covered by the contract,

including how Brand Builders' job classifications and pay would be slotted into the existing contractual wage scales or pay groups (or into a new pay group for the Brand Builders' employees as provided by sec. 5.7 of the collective-bargaining agreement), and over what positions in the Brand Builders' department would be excluded from the unit, in accordance with the Board's unit clarification decision.

The current contract, does not contain any provision to cover the reopening of covered terms and conditions by either party during the duration of the contract nor does it contain any provision addressing the application of contract terms to newly accreted employees. The fact that these issues were not anticipated does not require a conclusion that there was no meeting of the minds on all material issues in the existing agreement. And as noted above, I find that the negotiation of the contract provided a valid basis for an agreement regarding the terms and conditions of all employees who would be included in the unit during the time frame covered by the agreement.

The Respondent otherwise attempts to justify its position by relying on a Board Advise Memorandum which cites the Board's decision in *Federal-Mogul Corp.*, 209 NLRB 343 (1974). The additions to the unit in the latter case were the result of self-determination election in which a group of unrepresented employees in a partially organized plant choose, via a secret ballot election, to be represented by a union rather than remain unrepresented. By contrast, in the case of an accretion, a group of unrepresented employees in a partially organized plant is found by the Board to share such a community of interest with an existing bargaining unit that does not have an identity separate and apart from that unit; the groups is thus included in the existing unit by operation of law without the holding of an election.

The General Counsel notes that since *Federal-Mogul* was decided in 1974, the case has not been applied to accretion cases and its holding has not been expanded beyond self-determination elections. The difference between accretion and self-determination elections with regards to the applicability of any existing bargaining agreements to the newly added employees was recognized by the United States court of appeals for the Fifth Circuit in *NLRB v. Mississippi Power & Light Co.*, 769 F.2d 276, 279-280 (1985), which noted that although employees added to an existing bargaining unit through a "fringe group election" are not covered by an existing bargaining agreement under *Federal-Mogul* and its progeny, employees added to a bargaining unit "by unit clarification" are covered by an existing agreement. Accordingly, I find that the *Federal-Mogul* case is distinguishable and I conclude that the Respondent's refusal to apply the existing contract to the accreted Brand Builders' employees and its insistence on bargaining for a new contract is shown to be in violation of Section 8(a)(5) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Washington-Baltimore Newspaper Guild, Local 35, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein Union Local 35 has been the exclusive representative of employees in the following appropriate clarified unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms of employment:

All employees employed in the editorial departments, news departments, commercial departments, and library, including all employees in the job classifications set forth in Article 5, Section 5.1 of the contract, but excluding all employees employed in the positions set forth in Article 1, Section 1.8 of the agreement, guards, management personnel, confidential personnel and supervisors as defined in the Act.

The current unit is clarified to include all employees employed in the promotions and events department (Brand Builders Department), including the design manager, but excluding all professional employees, guards, the director, the creative manager and all other supervisors as defined in the Act.

4. By refusing to apply the extant collective-bargaining agreement to the Brand Builder Department employees accreted to the unit and by, instead, insisting in bargaining for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement, the Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent also shall be required to apply, retroactively, the extant collective-bargaining agreement covering the

unit to the Brand Builders Department employees accreted to the Unit, and to make the Brand Builder Department employees whole for any losses they may have suffered as a result of the Respondent's failure and refusal to apply the existing collective-bargaining agreement to them, in accordance with the method in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³ and to make whole the Union for any dues moneys lost as a result of the Respondent's refusal to the terms apply the collective-bargaining agreement to the accreted employees.

Under these circumstances, it is not considered necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

[Recommended Order omitted from publication.]

³ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.