

**WPIX, Inc. and Newspaper Guild of New York
Local 3, the Newspaper Guild, AFL-CIO, CLC.
Case 2-CA-23432**

August 23, 1990

DECISION AND ORDER

**BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT**

On November 16, 1989, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions, a supporting brief, and a motion to strike supplemental information contained in the Union's brief and letter of clarification. The General Counsel filed an answering brief to the Respondent's exceptions and a motion to strike Exhibit 1 attached to the Respondent's brief. The Charging Party filed an answering brief to the Respondent's exceptions, a letter of clarification, and a response to the Respondent's motion to strike.

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 exceptions¹ and briefs² and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On February 28, 1989, the Board issued a Decision and Order³ in which the Board found that the Respondent had violated Section 8(a)(5) and (1) of the Act when, on April 1, 1987, it prematurely declared an impasse in its negotiations with the Union and unilaterally implemented its last offer. On April 9, 1987, the Respondent provided the Union with the new terms and conditions of employment it had put into effect. One of those terms, the mileage-reimbursement rate paid to employees who use their own automobiles, was reported as 20 cents per mile, the identical rate set forth in the Re-

spondent's most recent contract with the Union, which ran from June 25, 1983, through June 24, 1986.

On January 1, 1987, however, the Respondent had actually increased the rate to 21 cents per mile. In October 1987, the Respondent further increased the rate to 22.5 cents per mile. On December 8, 1988, the Respondent notified its employees that, effective January 1, 1989, the rate would increase to 24 cents per mile. The Respondent did not notify the Union of any of these changes. The Union was unaware that the Respondent had made these changes until shortly before Christmas 1988, when Union Representative O'Meara, by chance, noticed an interoffice memorandum to employees. The memorandum stated that as of January 1, 1989, the reimbursement rate would change from 22.5 cents per mile to 24 cents per mile.

On learning of this change, the Union did not request to bargain with the Respondent over this issue. O'Meara testified that there were several reasons he did not contact any of the Respondent's officials. First, the Respondent was not honoring the grievance-arbitration procedure provided for in the previous contract. Second, O'Meara was recently told by the Respondent's officials that the Respondent was going to do what it wanted and that "no union was going to tell them what to do." Third, he had attempted to meet with the Respondent's general manager in late November or early December to discuss other issues. O'Meara testified that this attempt involved a call to the general manager's office in which he was "rebuffed" by a secretary. The general manager never returned his call. O'Meara also noted that in December 1988 relations between the Union and the Respondent were in limbo, and that there were no negotiations going on, as the parties were awaiting the Board's decision in the previous case. Finally, O'Meara testified that it was close to the holidays and he was in "guild training" when he learned of this change. He therefore decided to wait until after the holidays before investigating the matter and consulting with the Union's attorneys and other union officials.

The judge found that the increase in the mileage-reimbursement rate constituted a unilateral change in a material term and condition of employment. Further, relying on *Armour & Co.*, 280 NLRB 824 (1986), the judge found that the Union did not waive its right to bargain collectively over this issue, as any such request would have been futile. Thus, the judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the mileage-reimbursement rate.

¹ Because the material in Exh. 1 attached to the Respondent's brief was not made part of the formal record, the General Counsel's motion to strike is granted. See *Consolidated Casinos Corp.*, 266 NLRB 988 (1983), *Today's Man*, 263 NLRB 332 (1982).

² In its supporting brief, the Respondent asserts that subsequent to the occurrences that led to the Board's finding in *WPIX, Inc.*, 293 NLRB 10 (1989), enfd. 906 F.2d 898 (2d Cir. 1990), the Union filed two unfair labor practice charges against the Respondent. In its answering brief, the Union requests that the Board take judicial notice of the fact that the Union had filed four subsequent charges rather than the two noted by the Respondent. On February 2, 1990, the Respondent filed a letter with the Board opposing the taking of judicial notice and moving to strike the supplemental information concerning the two additional charges. On February 8, 1990, the Union filed a response to the Respondent's motion to strike. The subsequent charges constitute mere allegations of unlawful conduct, not findings of fact. Therefore, we do not rely on any reference to charges that were filed subsequent to the events involved in *WPIX, Inc.*, supra.

³ *WPIX, Inc.*, supra.

Contrary to the judge, we find that the record fails to establish that a request to bargain would have been futile. The reasons O'Meara relied on are not sufficient to excuse the Union from its obligation to request bargaining over the change. O'Meara's first reason, that the Respondent was refusing to honor the grievance-arbitration procedure, does not preclude the Union from making a request to bargain, nor does it indicate whether the Respondent would agree to bargain over this issue. The Respondent's adherence to the grievance-arbitration procedure was not necessary to set the mileage-reimbursement rate. The issue concerns establishing a term and condition of employment, not interpreting a contract.

O'Meara's second reason was that the Respondent's officials told him that they would do what they wanted and that "no union was going to tell them what to do." O'Meara's testimony with regard to these statements indicates that these were simply comments made in general conversations, these statements were not made in response to specific requests for bargaining nor did O'Meara attribute them to a specific individual or to a specific time or place. Under these circumstances, this statement is not tantamount to a refusal to bargain. At most, these statements indicate an unwillingness to allow the Union to run the Respondent's business. These statements do not compel the conclusion that the Respondent would refuse to discuss the mileage-reimbursement issue with the Union.

O'Meara's third reason that he was "rebuffed" by a secretary and that his call was never returned is not persuasive. The general manager's failure to return one call could have been due to a variety of reasons and does not, by itself, demonstrate an unwillingness to bargain.

O'Meara's next reason that relations with the Respondent were in limbo pending the outcome of the Board's decision in the previous case also does not excuse the Union from its obligation to request bargaining. The Respondent had not withdrawn recognition of the Union, and its actions in the case (premature declaration of impasse) did not justify the Union in making the assumption that the Respondent would refuse to bargain over future issues such as the mileage-reimbursement rate involved here.

O'Meara's last reason for not requesting bargaining was that he was in "gild training" and it was close to the holidays. This has no bearing on the Respondent's willingness to bargain. The Union cannot excuse itself from its duties merely because they occur at an inconvenient time.

The judge's reliance on *Armour & Co*, supra, and his finding with respect to waiver and futility,

is misplaced. In that case, the union had specifically requested the employer to discuss the allocation of severance and vacation pay to employees affected by a future plant closing. The employer never responded to the union's request. Three months later, and one week after the plant had closed, the union discovered that the employer had already allocated the pay. The Board found that the union's failure to request bargaining once it discovered the allocation did not constitute a waiver. Adopting the findings of the judge, the Board agreed that a second request to bargain over this issue would have been futile because the plant had already closed and the payments had been made.

Unlike the union in *Armour*, the Union here received actual notice of the change more than a week prior to the implementation of the new reimbursement rate. Additionally, there is no evidence that the Respondent, like the employer in *Armour*, had refused any requests by the Union to bargain over this issue in the weeks preceding this change. The Respondent here made no specific statement, nor took any specific action, which reflected a refusal to bargain with the Union in December 1988.

In addition to his reliance on *Armour*, the judge also relied on the fact that the Respondent had previously bypassed the Union in making prior changes in the mileage-reimbursement rate. Contrary to the judge, we do not believe that the Respondent's previous unilateral action necessarily means that the Respondent would continue to act unilaterally in the future if requested to bargain. Although the circumstances here suggest that relations between the Respondent and the Union were strained, we cannot conclude that a timely request to bargain over the change would have been futile. The General Counsel simply has not established facts sufficient to excuse the Union from its obligation to request bargaining over a change in working conditions of which it had actual notice. See *Ventura County Star-Free Press*, 279 NLRB 412, 420 (1986), *City Hospital of East Liverpool*, 234 NLRB 58, 59 (1978), cf *Lauren Mfg Co*, 270 NLRB 1307 (1984) (union's request to bargain over change in health insurance would have been futile because the employer had refused to recognize the union).⁴

⁴ The General Counsel and the Charging Party argue that the Respondent presented the change as a fait accompli. We disagree. In *Inter-systems Design Corp.*, 278 NLRB 759 (1986), the Board found that the union was presented with a fait accompli when the employer unilaterally laid off employees without notifying the union in advance of its decision to do so and without first giving the union an opportunity to bargain over the effects of that decision. In support of this finding, the Board noted that subsequent to the layoffs, the employer's vice president wrote a letter to the union's business manager stating that the employer had no obligation to bargain with the union concerning these layoffs. In the instant case, however, the record lacks any evidence of any such state-

We find, therefore, that the Union, by failing to request bargaining once it had notice of the forthcoming change in the mileage-reimbursement rate, acquiesced to this change. In these circumstances, we conclude that the Respondent did not violate Section 8(a)(5) and (1) of the Act. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS, dissenting

Unlike my colleagues, I agree with the administrative law judge's conclusion that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the mileage-reimbursement rate for employees' work-related use of automobiles without notifying the Union or providing it an opportunity to bargain. I reach this conclusion because, under all the circumstances, I would find that when Union Representative O'Meara by chance learned of the change he could reasonably believe it was a fait accompli.

The factors on which I principally rely are the following. First, the statement that the change would be made was communicated directly to the unit employees without even an advance warning to the Union that this would be done. Second, the Respondent had previously made two such changes without notifying the Union. Third, as a consequence of litigation over the legality of an impasse in contract negotiations that the Respondent had declared in April 1987 (a declaration ultimately

ments that the Respondent was firmly committed to implementing the change regardless of the Union's desire to bargain over this issue.

Our dissenting colleague argues that a finding of a fait accompli is proper, and relies on the fact that the Respondent presented the change directly to the employees, that the Respondent had previously made two similar changes without notifying the Union, that the Respondent was not honoring the grievance procedure, and that the Respondent's officials told O'Meara that they would do what they wanted and that "no union was going to tell them what to do." As discussed above, the Respondent's remarks to O'Meara and its refusal to adhere to the grievance procedure are actions that do not relate to the mileage-reimbursement issue and thus do not indicate whether the Respondent would have refused the Union's request to discuss this issue. Nor are we persuaded by the other factors relied on by our dissenting colleague. These factors also do not warrant finding that had the Union requested bargaining once it learned of the proposed change, the Respondent would have nonetheless refused and implemented the change.

Additionally, we find our colleague's reliance on *Central Illinois Public Service Co.*, 139 NLRB 1407, 1416 (1962), enfd 324 F.2d 916 (7th Cir. 1963), and *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd 722 F.2d 1120 (3d Cir. 1983), to be misplaced. In *Central Illinois*, the union, prior to the implementation of the change, had put the employer on notice that it opposed the change, considered it to be a subject for collective bargaining, and desired an opportunity to consult with the employer concerning it. In *Ciba-Geigy*, the union immediately requested additional information and additional time to study the employer's proposed change. The employer had not provided the union with the information at a meeting 6 days later, and had already implemented the change. In the instant case, the Union did nothing to communicate its concern or its desire to bargain over the proposed change in mileage reimbursement

found unlawful by the Board and a reviewing court),¹ the collective-bargaining relationship, was in limbo and the Respondent was not even honoring the grievance procedure established in the 1984-1986 contract. Finally, according to Union Representative O'Meara's credited testimony, the Respondent's officials had told him that they "would do what they wanted and no union was going to tell them what to do."² Although there are undoubtedly circumstances in which indirect notice to a union will trigger an obligation to request bargaining or face a finding of waiver by inaction, this is not such a case.

These circumstances present a striking contrast to the cases relied on by the majority. In *Ventura County Star-Free Press*,³ the employer provided direct notice to the union's bargaining representative of the proposed change in pay step increases and the union stood mute for 4 months during which time actual bargaining sessions on other subjects took place between the parties (*Ventura* at 420). Here, the Union never received direct notice and the parties' bargaining relationship was in limbo, *supra*.

Similarly, in *City Hospital of East Liverpool*,⁴ relied on by the majority, there was an ongoing bargaining relationship between the parties, and the employer announced its proposed changes over 3 weeks before they were to become effective and "explicitly requested discussion on the proposed changes" (*City Hospital* at fn 8).⁵

¹ *WPIX, Inc.*, 293 NLRB 10 (1989), enfd 906 F.2d 898 (2d Cir. 1990).

² In fact, the Respondent still appears to take the position that increases in the mileage-reimbursement rate are not mandatory subjects of bargaining if the increases are fairly small and only a few unit employees are immediately affected, hence, it believes it has no obligation to consult the Union about such increases. This position not only disregards the fact that it cannot be simply assumed that affected employees would regard the amounts of increases as of no significance, but it also denigrates the Union's role as bargaining representative. In the collective-bargaining negotiations that were aborted by the Respondent's premature declaration of impasse, the Union had unsuccessfully sought a system in which the reimbursement rate would be linked to schedules regularly published by the Internal Revenue Service. Against that background, the Respondent's direct announcements to employees of its unilateral decisions to raise rates make it appear that benefits flow from the Employer alone and that the Union has no legitimate role in negotiating them.

³ 279 NLRB 412, 420 (1986).

⁴ 234 NLRB 58, 59 (1978).

⁵ I also note the majority's "cf" cite to *Lauren Mfg Co.*, 270 NLRB 1307 (1984), and its distinguishing remarks on *Intersystems Design Corp.*, 278 NLRB 759 (1986). Those two cases involve clear violations, i.e., in *Lauren* the employer had unlawfully refused to recognize the union and in *Intersystems*, the employer's president wrote a letter to the union specifically stating that the employer had no obligation to bargain with the union concerning the layoffs. I do not construe the majority's citation to those cases as indicating that the majority would require an unlawful refusal to recognize or an explicit statement of futility concerning the subject in question before it would find sufficient evidence to warrant excusing a union from its obligation to request bargaining over a proposed change in working conditions of which it had notice.

In sum, I find that the evidence does not establish that the Union waived its right to notice and an opportunity to bargain over the mileage-reimbursement rate. Instead, the circumstances as a whole show that the Union, when it discovered, by chance, the Respondent's announcement that business use of personal automobiles "will be reimbursed" at a different rate "as of January 1, 1989," was faced with a fait accompli and a request to bargain would have been futile.⁶ Accordingly, as I would find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the mileage-reimbursement rate, I dissent.

⁶ See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enfd* 722 F.2d 1120 (3d Cir. 1983), *Central Illinois Public Service Co.*, 139 NLRB 1407, 1416 (1962), *enfd* 324 F.2d 916 (7th Cir. 1963). Although in *Ciba-Geigy* the union protested the proposed change after it was announced and requested information on it, the opinion adopted by the Board noted that the "most important factor" supporting the finding of fait accompli was that the employer, after extensive study of the matter, "notified all employees that it intended to change the attendance and absentee procedure. No special notice was given the Union." 264 NLRB at 1017. In *Central Illinois*, the employer announced in a bulletin to employees that it was discontinuing a practice of providing a discount on gas for employees who used gas for space heating purposes and that it had, that day, filed a revised rate schedule with the State's rate-making commission, which, if unopposed, would take effect 30 days later. The Board rejected the employer's argument that this did not constitute unlawful unilateral action because, during the 30-day period, the union could either have sought to negotiate with the employer over the possibility of abandoning the rate change request or have filed its own protest with the State commission. The employer's failure to bargain in the face of the union's postannouncement protest was treated as merely an alternative ground for the decision. 139 NLRB at 1416.

Finally, I do not agree with my colleagues that because not all the factors I rely on as indicative of the Respondent's intent to act unilaterally on the matter of the mileage rates relate specifically to the subject, we must find that the Union could not reasonably conclude that a request to bargain over this subject would have been a futile ritual.

Rhonda E. Gottlieb, Esq. and *James Paulson, Esq.*, for the General Counsel

Steven L. Loren, Esq., *Richard L. Marcus, Esq.* and *Susan Benton-Powers, Esq.* (*Sonnenschein, Carlin, Nath & Rosenthal*), of Chicago, Illinois, for the Respondent
Stuart E. Baucher, Esq. (*Vladeck, Waldman, Elias & Engelhard, P.C.*), of New York, New York, for the Union

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: The complaint alleges that WPIX, Inc. (Respondent), in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) had unilaterally increased the mileage rate paid to employees represented by Newspaper Guild of New York, Local 3, the Newspaper Guild, AFL-CIO, CLC (the Union) from 20 to 24 cents when they used their own cars while working. The amended answer filed by Respondent admits that it increased the mileage rate without formal negotiation with the Union. The answer also avers that the Union had waived its right to bargain as to the increase and also that the incre-

ment was so insubstantial that Respondent had no obligation to bargain thereon.

The hearing was held in New York City on July 17, 1989. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the Acting General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I JURISDICTION AND LABOR ORGANIZATION STATUS

On February 28, 1989, the Board issued a Decision and Order in a case which involved the same parties and closely related legal issues. See *WPIX, Inc.*, 293 NLRB 10 (1989). There, the Board adopted Judge MacDonald's findings, including her determinations that Respondent operates radio and television broadcasting stations, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization as defined in Section 2(5) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

A Background

Judge MacDonald's decision sets forth the essential background material.

Briefly, the Union represents the news department employees of Respondent. Its last contract with Respondent for that unit ran from June 25, 1983, to June 24, 1986. Respondent and the Union met on various dates between July 1, 1986, and April 1, 1987, to negotiate a successor contract. Respondent declared an impasse on April 1, 1987, and unilaterally implemented its last offer. The Board agreed with Judge MacDonald's finding that Respondent had prematurely declared impasse and had violated Section 8(a)(1) and (5) of the Act by its unilateral action and also by having failed to pay wage-step increases required under the 1983-1986 agreement.

B The Present Case

On May 22, 1986, the Union submitted its demands respecting the terms of a contract to succeed the 1983-1986 pact. One of those demands called for Respondent to reimburse employees for mileage based on the amount allowed by the Internal Revenue Service for income tax purposes. Respondent rejected all those demands on July 1, 1986. At the August 13, 1986 negotiating session, Respondent presented a package of its proposals, one of those referred to the mileage rate and read, "change 'Twenty cents per mile' to 'the applicable IRS rate'." The Union advised Respondent that the package of proposals was inadequate. As noted above, Respondent and the Union thereafter had further discussions. None, however, specifically concerned the mileage rate. In the course of the continued negotiations, Respondent advised the Union to forget the package of proposals Respondent had presented on August 13, 1986. Respondent declared impasse on April 1, 1987, as noted earlier and implemented its final offer the next day. It provided the Union, on April 9, 1987, with the new terms and conditions it put into effect. One of the terms pertained to the mileage

rate and that rate was identical to the rate under the 1983-1986 contract, i.e., 20 cents per mile

On January 1, 1987, Respondent had increased the rate to 21 cents, in October 1987, the rate was further increased to 22-1/2 cents, and on December 8, 1988, it notified its employees that the rate would increase to 24 cents a mile, effective January 1, 1989

Respondent has never sent the Union any notice of those increases Respondent's vice president and news director testified that the reason Respondent did not give the Union notice was that the rate was increased, not decreased

The Union's local representative, William O'Meara, has duties analogous to those of a business agent He testified that he had worked in Respondent's news department from 1982 to July 1988 and had never known until late December 1988 that Respondent had changed the mileage rate Respondent's vice president, John Corporon, testified that Respondent changed the rate, at the times noted above, in accordance with directives it received from its corporate headquarters in Chicago and that it put notices thereof on the company bulletin boards at its facility in New York City It appears that Respondent also distributed circulars to its employees advising of those mileage rate changes

The Union's local representative, O'Meara, visited the news department just before Christmas 1988 and he, by chance, saw a "memo from management to all employees," which stated that the mileage rate would be increased to 24 cents per mile He testified credibly that this was the first time he was aware of any change in the mileage rate and also that he inquired of and learned from individuals who had preceded him as the local representative that none of them had ever received notification of changes in the mileage rate

Respondent adduced evidence that there have been 27 to 30 employees in the unit involved in this case and that only one presently uses a personal car while working That employee, in the first 6 months of this year, drove 224 miles for which she was reimbursed by Respondent A former employee in the unit had driven a total of 4469 reimbursed miles in the period from July 1, 1988, to June 30, 1989 Those two employees were earning \$25,000 to \$30,000 a year

O'Meara was asked why he did not seek bargaining with Respondent when he found out in late December 1988 of the mileage rate increase to 24 cents effective January 1, 1989 He explained that he had been told several times by officials of Respondent that they were going to do as they choose He testified further that, on one occasion after he was elected local representative on November 14, 1988, he tried to meet with Respondent's general manager He related that his call was not returned and that in another effort to meet with him he "was rebuffed" O'Meara further testified that, as of late December and in the early part of 1989, he was undergoing guild training in his duties as local representative and wanted "to check things out before [he] ran into somebody's office half-cocked"

C Analysis

Respondent's first contention is that the change in the mileage rate was de minimis and that the complaint should therefore be dismissed General Counsel and the Union assert that Respondent's unilateral action in setting the rate warrants remedial attention by the Board

I note initially that Respondent itself appears to have viewed the mileage rate as one of substance It had first agreed in 1986 to the Union's mileage rate proposals but later retracted its acceptance In January 1987 it unilaterally and without notice to the Union increased the mileage rate to 21 cents, 4 months later in contract negotiations, it proposed a 20-cent-mile rate

I find no merit to Respondent's contention While the amounts of money involved are small, Respondent's repeatedly bypassing of the Union on a clearly bargainable subject is not a "trifle" with which the Board should have no concern In that regard, see *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988) See also *Florida Steel Corp*, 235 NLRB 941, 948 (1978)

Respondent has cited cases which, at first glance, can be construed to support its view but which, at length, reveal that the asserted unilateral changes discussed in those cases involved no real changes, were isolated matters or were rendered moot by assurances that there would be no repetitions of the assertedly unlawful acts¹ It is interesting to note that, in the lead Board case on the de minimis concept, *Peerless Food Products*, 236 NLRB 161 (1978), significant weight was given to a representation in the brief filed by the employer in that case which satisfied the Board that the alleged unilateral change would not impact on employee Section 7 rights

Had Respondent, in its brief, given the Union a similar assurance, I would nonetheless recommend issuance of a remedial order in view of the unilateral changes Respondent had made, as found in the decision reported at 293 NLRB 10 (1989), referred to above

Respondent has given no assurance that it will bargain collectively with the Union respecting changes in the mileage rate Rather, Respondent seeks, by its de minimis argument, to obtain from the Board approval of its practice of bypassing the Union on an obvious subject for collective bargaining I do not view that as de minimis

¹ Thus, Respondent cites *Alamo Cement Co*, 277 NLRB 1031 (1985) In that case, the Board noted that a unilateral change in an employee's classification was insubstantial inasmuch as his duties were not changed I also note that, in that case, a unilateral wage increase received by that employee was remedied pursuant to a separate finding that an across-the-board increase had been unlawfully implemented Similarly, Respondent's reliance on a holding in *La Mousse Inc*, 259 NLRB 37 (1981), is not persuasive There, an increase in the length of breaktimes was held to be insubstantial, however, the Board separately found that the breaktimes themselves had been unlawfully implemented Respondent also has cited *Weather Tec Corp*, 238 NLRB 1535 (1978) There, the issue under consideration was alleged surface bargaining In rejecting that allegation in toto, a panel majority dismissed, as insubstantial, alleged unilateral changes in a coffee policy and in certain notification procedures It observed, in connection with that dismissal, that the change in the coffee policy had been brought up at the bargaining table Another Board decision cited by Respondent is *United Technologies Corp*, 278 NLRB 306 (1986) I find that the holding there is not controlling, particularly as the change was found to have been of limited duration

Respondent's second contention is that the Union had waived its right to bargain as to the mileage rate, in that O'Meara did not request bargaining when he found out during Christmas week in 1988 that a 24-cent-a-mile rate was scheduled to go into effect at the New Year. O'Meara testified credibly that his efforts to discuss with Respondent other matters affecting unit employees had been "rebuffed." Further and as recounted above, Respondent had bypassed the Union repeatedly. In these circumstances and in overall context, I find that the Union did not waive the right to bargain collectively as to the mileage rate increase. As Judge Ries observed in *Armour & Co.*, 280 NLRB 824, 828-829 (1986), a union need not grovel or undertake apparently futile acts.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization as defined in Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: News editors, assignment editors, senior writers, news writers, sports specialist, senior assignment desk assistants, talent coordinators, gra-

pics artists, assignment desk assistants, graphics assistants, production assistants and telephone clerks in the news department of WPIX-TV.

EXCLUDED: All other employees in the News Department of WPIX-TV, including News Director, Executive Producer, Managing Editor, Producers, Metropolitan Editor, Graphics Director, Business Manager, administrative assistant (confidential secretary), all employees represented by other labor organizations, guards, watchmen and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive representative of all employees within the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By unilaterally increasing the mileage reimbursement rate as of January 1, 1989, Respondent has changed a material term and condition of employment of the employees in the unit described above and has thereby failed and refused to bargain collectively with the Union and has engaged in an unfair labor practice under Section 8(a)(1) and (5) of the Act.
6. The unfair labor practice described in paragraph 5 affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]