

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 31, 2006

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Philadelphia Newspapers, Inc.
d/b/a The Philadelphia Inquirer 530-6067-4000-0000
and The Philadelphia Daily News 530-6067-4055-3500
Case 4-CA-33952 530-8045-3725-5000
530-8049-0000-0000
530-8054-0100-0000
530-8054-0133-0000

This case was submitted for advice as to whether the Employer, a newspaper company, violated Section 8(a)(5) and (1) when it unilaterally implemented a new online initiative that requires its employees to participate in various types of interactive media on the Employer's website including, inter alia, Q & A sessions, blogging, and podcasting. The Employer claims, in part, that it was privileged to unilaterally implement the online initiative, under the parties' Memorandum of Agreement regarding online work.

We conclude that, the Employer was privileged under First National Maintenance Corp. v. NLRB¹ to implement the online initiative. However, a complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain with the Union over the "effects" of the decision because of its significant impact on the employees' terms and conditions of employment and, under current Board law, the Union did not "clearly and unmistakably" waive its right to bargain about the change.

Complaint is particularly appropriate in the instant case, as it would give the Board the opportunity to discuss whether its continuing application of its extant "clear and unmistakable" waiver standard in unilateral change cases should be modified. As to the defense based on the Employer's contractual privilege claim, the Region should be prepared to advocate the General Counsel's view that the Board should modify its "clear and unmistakable" waiver standard in favor of interpreting the contract at issue, i.e. the Memorandum of Agreement, under all relevant

¹ 452 U.S. 666 (1981).

factors, including: (1) the wording of the proffered sections of the agreement at issue, regardless of whether the language is general, specific, or even in some way ambiguous; (2) the parties' past practices; (3) the relevant bargaining history; and (4) and other provisions in the collective-bargaining agreement or in the other bilateral arrangements that may shed light on the parties' agreement to determine if the employer has a valid defense.² [FOIA Exemptions 2 and 5

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FACTS

Philadelphia Newspapers, Inc. (Employer) produces two daily newspapers: The Philadelphia Inquirer and The Philadelphia Daily News. The Newspaper Guild of Greater Philadelphia, Local 10 (Union), represents a unit of about 1000 of the Employer's reporters, photographers, columnists, and nonsupervisory editors. The parties' have had a collective bargaining relationship for the past 20 years and are currently operating under a collective-bargaining agreement that is in effect from September 1, 2000 through August 31, 2006.

In 1995, the Employer established its website (www.Philly.com). The website was produced by the Employer's Online Department, which was staffed by unit employee "producers" who wrote and edited content that

² Stanford Hospital & Clinics and Lucile Packard Children's Hospital, Case 32-CA-21170-1, Advice Memorandum dated October 14, 2005, involved a Section 8(a)(5) allegation against the employer for unilaterally changing an extra-contractual past practice with regard to providing health and welfare contributions to employees. The General Counsel advocated the view that in unilateral change cases involving an employer's claim of contractual privilege, the Board should modify its "clear and unmistakable" standard in favor of interpreting the relevant contract(s) at issue under these relevant factors, particularly given the conflict among the Circuit Courts regarding the application of the "clear and unmistakable" and "contract coverage" standards.

appeared exclusively on the Employer's website. In addition, some unit employees from both newsrooms were assigned to generate exclusive online content.

On August 25, 1995, the parties entered into a Memorandum of Agreement (MOA) regarding "online service." The MOA reads, in relevant part:

In view of the Employer's effort to explore new ways to stimulate business beyond the traditional newspaper and its desire for flexibility in launching experimental projects, and the [Union's] desire to participate in the process, the Employer cedes jurisdiction over the Online Service Department (or subsequent title); subject to the following understandings, including modifications of the Collective Bargaining Agreement. The provisions of this MOA shall apply only to this electronic information department....

7. The [Union] recognizes the company's need for flexibility in the start-up of an experimental department....In the event of a conflict between the terms of the CBA and this memorandum, the terms of this memorandum will prevail.

9. [The Employer] may assign [unit] employees to perform work for the Online department, provided, (1) they shall be given adequate training and time to perform any added or new duties, and (2) their competency shall be judged only on their primary skills and not on special skills required for the Online department.

The MOA is incorporated in the parties' most recent collective-bargaining agreement, which does not contain a management rights clause and is otherwise silent with regard to online initiatives. Pursuant to the MOA, in 1997, the Employer published its first online Q & A chat on its website wherein readers submitted questions to a unit reporter who responded in real-time.

In March 2000, the Employer's parent company, Knight Ridder Digital, took over many functions formerly performed by the Employer's Online Department. Knight Ridder Digital's online department now was staffed by nonunit employees who only performed transactional services. Online content continued to be generated by unit employees from both newsrooms.

In 2000, the Employer also began to experiment with interactive media, including publishing unit reporters' and columnists' email addresses at the end of their articles in an effort to facilitate communication between writers and their readers. From 2000 to 2001, online Q & A chats were generated by eleven unit employees from both newsrooms. In March 2003, the Employer began publishing blogs³ on its website produced by unit employees.

On June 1, 2005,⁴ the Employer's executive editor sent a memorandum to the senior editors at The Philadelphia Inquirer about the Employer's plans to launch an online initiative. The memorandum outlined the following three "key steps" in implementing the Employer's initiative: (1) develop radio-style programming; (2) deputize readers to provide self-generated content and to interact with the Inquirer staff; and (3) expand and improve the Employer's breaking news coverage. In connection with the first key step, the memorandum stated that in the immediate future, beginning at 7:00 a.m., Monday through Friday, the Employer would establish time slots for reporters and others to "chat" with readers by listing a topic each hour. The reporters would interact with the audience by text, audio, video, Q & A chats, podcasting, or "other innovations not yet established." As to the second key step, the memorandum stated the Employer's desire to become the "local aggregator of blogs" and to build ten new individual websites a week until the entire staff had their own sites. With regard to the third key step, the Employer planned to feature "breaking news" daily from 8 a.m. to noon and to purchase more equipment to enable staff to directly post information, such as photographic images, on the website. The Union president received a copy of the memorandum from an unknown source later that day.

The next day, the Union president and unit chair met with the executive editor about the June 1 memorandum. The Union made its first request for bargaining over the Employer's new online initiative. The executive editor responded that the Employer has a right to assign such work as would be performed during normal work hours. The meeting ended without resolution.

On June 3, the executive editor sent an electronic message to the staff. The message referred to the

³ Web blogs are short online pieces that cover a specific topic and usually contain a hyperlink allowing readers to respond to various entries.

⁴ All dates are 2005, unless noted otherwise.

Employer's online initiative as outlined in the June 1 memorandum and stated, "none of the things we are trying are brand new...what's new is our commitment to get as many people as possible involved in these activities." The message referred to a new job posting of website "host" who would be responsible for announcing the schedule of bloggers and "talking" to readers about upcoming shows during the day. The same day, the Employer distributed a press release introducing and describing its new online initiative and noting that, "these changes [will] require Inquirer staff to develop new skills."

On June 10, one of the Employer's agents sent an electronic message to employees entitled "online thoughts," which stated that the Employer was working on a more complete policy and would be providing training and other resources to employees in connection with the new online work. In late June, the Employer's senior vice president and vice president of labor relations met with the Union president to discuss the impact the new online initiative had on employees. The senior vice president chastised the Union for requesting that employees receive more compensation for the online work at a time when the Employer was having difficulty meeting its profit margins. The meeting adjourned with the parties agreeing to meet again on July 19.

At the July 19 meeting, the Union again expressed its concern over the new online initiative's impact on employees. The parties discussed potential effects including, inter alia, the employees' increased exposure to liability due to the instantaneous nature of online work. After the meeting, the Union's unit chair sent a follow-up letter to the Employer's managing editor summarizing the parties' discussions at the July 19 meeting. The letter stated it was not the Union's intent to block the Employer's efforts at growth and success, and agreed with the Employer that the new online opportunities are vital to the Employer's future.

On August 5, the Employer issued a set of new job descriptions which reclassified five employees as "Online Liaisons" with various departments. For example, one unit employee who was employed as a Photo Design Specialist was reclassified as the Online Liaison with Photography/Sports. In this new classification, the employee would be responsible for assigning a number of new projects to the Sports Department staff, although previously he neither was an assigning editor nor had any responsibilities in connection with the Sports Department. None of the five affected employees had had written job descriptions prior to this reclassification.

Beginning in September, the Employer started to maintain a schedule of weekly one-hour online Q & A chats with writers. About 15 or more staffers per week participated in Q & A chats which now occur three to four times a day throughout the workweek. On October 1, the Employer featured its first online podcast⁵ covering a sports event.

The Employer asserts that employees have been preparing exclusive online copy in some form since the launching of its website in 1995, including emailing readers, participating in Q & A chats, and blogging, and that the initiative is just an expansion of its previous online work. In the alternative, the Employer argues that, to the extent there was an obligation to bargain, the Union had waived its right to bargain based on its prior acquiescence and/or the parties' MOA. Finally, the Employer raises a Section 10(b) defense and argues that the Union's charge was not timely filed because the unit employees have been participating in similar online activities since 1995.

ACTION

We conclude that complaint is warranted, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain with the Union over the "effects" of the decision to implement the new online initiative in light of its substantial impact on the employees' terms and conditions of employment, and because under extant Board law, the Union did not "clearly and unmistakably" waive its right to bargain about the effects of the change either by its conduct or under the MOA.

We further conclude that absent settlement, the Region should be prepared to advocate the General Counsel's position that in cases such as this, which involve an employer's claim of contractual privilege to act unilaterally, the Board should modify its "clear and unmistakable" standard in favor of interpreting the contract at issue under the analysis discussed below.
[FOIA Exemptions 2 and 5

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⁵ A podcast is a method of publishing audio broadcasts through the internet that are similar to radio broadcasts. The half-hour sessions are taped, edited to 15-20 minutes, and placed on the website where listeners are linked to the podcast by clicking on an icon.

[FOIA Exemptions 2 and 5, cont'd.

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I. The Employer's unilateral change violated Section 8(a)(5)

In First National Maintenance, the Supreme Court categorized management decisions and bargaining obligations as follows:⁶ category one - decisions having only an indirect and attenuated effect on the employer-employee relationship such as promotions and advertisement, product designs or financial arrangements, which does not require mandatory bargaining; category two - decisions directly affecting the employer-employee relationship such as recall and layoff rights, work rules and quotas, which does require bargaining upon request; and category three - decisions that directly impact employment but the focus and concern of which is profit, wholly apart from the employment relationship, which does not require bargaining over the decision but does require bargaining over its effects.⁷

Applying the principles in First National Maintenance, the Board in KIRO, Inc.,⁸ a unilateral implementation case, found that the employer, a television station, did not violate Section 8(a)(5) when it failed to bargain with the union about the decision to produce an additional half-hour regular news program for broadcast on an independent television station. The Board concluded this decision was a "choice of product type" or "method of product distribution," and thus was a category three type decision which did not require bargaining.⁹ The Board noted that the

⁶ 452 U.S. at 676-677.

⁷ Id. at 677 n.15. Although the Court held that the employer had no obligation to bargain with the union about its decision to end a contract with a customer, it was required to bargain over the effects of that decision.

⁸ 317 NLRB 1325 (1995).

⁹ Id. at 1327.

reasons behind the employer's decision, i.e., increased presence in the news market during prime time, and increased viewership and advertising, were matters over which the union had no control. Thus, bargaining over the decision would not have been fruitful.¹⁰ However, the Board further noted that the effects from the decision to produce the 10 o'clock show "resulted in increased hours, increased workload, split shifts, and greater productivity demands for certain unit employees."¹¹ Since these effects constituted changes in working conditions which were "material, substantial, and significant," the employer was required to bargain over them with the union.¹²

The Employer's decision to launch an online initiative is similar to the programming decision in KIRO which the Board found to be a "category three" decision. The decision to start an online initiative involved "choice of product type" or "method of product distribution" and as such, was not a mandatory subject of bargaining. Further, the Employer here had similar reasons for launching a new online initiative as the employer in KIRO. That is, the Employer wanted to expand its online presence to increase readership, circulation, advertising, and profits. Further, both parties recognized the initiative as vital to the Employer's effort to keep up with technological advances in order to stay competitive in a market place where readers were increasingly receiving their news and information from the internet. Like in KIRO, the Employer's relationship with its readers, advertising, and profits are not matters over which the Union has control, and are not amenable to bargaining. Thus, under First National Maintenance the Employer was privileged to decide to institute the online initiative without bargaining with the Union.¹³

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ This case is distinguishable from Detroit News, Inc., 319 NLRB 262 (1995), where the Board found that the employer, a newspaper, was required to bargain over its decision to install an onsite camera from an unaffiliated television station in its newsroom and require reporters to appear on camera, in addition to their other duties. The Board adopted the ALJ's finding that "appearing on camera is wholly unlike anything previously called for in the reporters' work for the employer," and thus was a change in unit work. In marked contrast, the Employer decision here involved a widespread expansion of unit work in order to

However, where a privileged decision has a significant impact upon employee working conditions, i.e. has a bargainable effect, an employer violates Section 8(a)(5) and (1) of the Act by implementing such changes without bargaining with the union.¹⁴ Here, the new online initiative's effects on the employees' terms and conditions of employment, including the general addition of new duties and increase in work hours, required the Employer to bargain with the Union. Such effects resulting from the new online initiative include, but are not limited to: (1) the requirement that employees learn and participate in new technology, including podcasting, and to undergo intense training to adapt their skills to the new technologies; (2) the requirement that staff members have their own webpage to interact with readers, thereby essentially requiring every staff member to participate in online work to some degree; (3) the establishment of new policy guidelines and workplace rules regarding use of the new technologies; (4) the addition of producing and posting morning traffic, weather, news, and overnight stories beginning at 6 a.m. and breaking news daily from 8 a.m. to

produce a different kind of online product from which most of them had historically been involved. This decision is more akin to a choice of product type or product distribution rather than a narrow change of unit work. We recognize that podcasting is "wholly unlike" work previously performed by employees because it requires oral skills. However, while the employer's decision in Detroit News involved a single addition to unit work, podcasting here only constitutes a part of the Employer's initiative.

¹⁴ KIRO, supra; First National Maintenance, 452 U.S. at 677 n.15, 679-682; Bridon Cordage, 329 NLRB 258, 259 (1999); Litton Financial Printing, 286 NLRB 817, 819-821 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990). See also Holly Farms Corp., 311 NLRB 273, 278 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. granted on other grounds, 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996) (refusal to bargain over effects of nonmandatory merger of operations; new employment terms "were not an inevitable consequence of the functional integration of the transportation departments," but merely one of several responses to changed circumstances). Cf. King Soopers, Inc., 340 NLRB 628, 629-30 (2003) (although employer may not have been required to bargain over its decision to install scanners in its pharmacies, it was obligated to bargain over "zero tolerance" work rule implementing the decision that subjected employees to discipline).

noon on the Employer's website; and (5) the reclassification of five employees' job descriptions as "Online Liaisons" with added and new responsibilities, including the new job of "host." That the Employer itself has characterized its initiative as "new" and a change from past online work, in its communications to staff and through its press release to the public, also indicates that the Employer recognizes the impact such a decision has on employees. The above changes in workplace conditions are all matters that could have been addressed and ameliorated in effects bargaining. Therefore, the Employer violated Section 8(a)(5) when it failed to engage in effects bargaining with the Union over the new online initiative.

II. There was no clear and unmistakable waiver by the Union of its bargaining rights over the effects of the online initiative under extant Board law

Under current Board law, a waiver of a union's statutory right to bargain over changes in terms and conditions of employment "will not be lightly inferred" and must be "clear and unmistakable."¹⁵ A waiver may be found by specific language in a written agreement itself, the conduct of the parties (including past practice, bargaining history, and action or inaction), or a combination of the two.¹⁶ Further, "either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the Union consciously yielded or clearly and unmistakably waived its interest in the matter."¹⁷ Moreover, the Union's past acquiescence in an employer's unilateral action on a particular subject generally does not, without more, constitute a waiver by that union of any right it may have to bargain about future action by the employer in that matter."¹⁸

We first conclude that the Union did not clearly and unmistakably waive its right to bargain over the effects of

¹⁵ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

¹⁶ Courier-Journal, 342 NLRB No. 113, slip. op. 5 (2004).

¹⁷ Charles S. Wilson Memorial Hospital, 331 NLRB 1529, 1530 (2000) (quotations omitted), citing Metropolitan Edison, 460 U.S. at 708; Georgia Power Co., 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999).

¹⁸ Johnson-Bateman, Co., 295 NLRB 180, 184 (1989).

the new online initiative by its prior conduct. The Employer notes that since launching its website in 1995, the Union has not challenged the Employer's unilateral implementation of new online technologies, such as Q & A chats and blogging. The Employer thus argues that the Union has waived its right to bargain over the subject of online work by its acquiescence to such previous changes. However, the Employer's new online initiative includes marked and broad sweeping changes that depart significantly from previous changes to online work.¹⁹ Further, the Board has consistently held that the union's failure to demand bargaining in the past, without more, does not amount to a waiver if it does not unmistakably show that the union intended to permanently give up its right to bargain about the matter in the future.²⁰ Thus, the Union's alleged acquiescence with regard to prior unilateral changes did not privilege the Employer to unilateral implement the new online initiative, particularly when it represented a marked departure from any of its previous changes.

We further conclude that under extant Board law, the Union had not waived its right to bargain over changes to online work under the MOA, and the Employer was not otherwise contractually privileged to implement the online initiative pursuant to the MOA. The provision most at issue here is Section 9, or the assignability provision, of the MOA, which reads, in part:

[The Employer] may assign [unit-covered] employees to perform work for the Online department, provided, (1) they shall be given adequate training and time to perform any added or new duties, and (2) their competency shall be judged only on their primary skills and not on special skills required for the Online department.

As an initial matter, we note that although the MOA is incorporated in the parties' current collective-bargaining agreement, it is unclear given the language and history of

¹⁹ Owens-Corning Fiberglas Corporation, 282 NLRB 609, 613 (1987), holding where there is such a departure from past changes, "it is reasonable to assume that a union's desire to negotiate will understandably be based on the particular facts of a case in deciding whether to press for a chance to bargain; and no overall waiver can be inferred from such circumstances."

²⁰ National Steel Corp. v. NLRB, 324 F.3d 928, 933 (7th Cir. 2003), enfg. 335 NLRB 60 (2001).

the MOA whether it remains applicable and effective. Specifically, when the parties entered into the MOA, both recognized the "experimental" nature of the Online Department and online work. By its terms, the MOA applies only to unit-covered employees. The MOA may well no longer be applicable because in 2000, the Employer's Online Department was eliminated and replaced with nonunit employees who performed all transactional tasks.

Assuming, *arguendo*, that the MOA is still applicable, the MOA lacks the specificity required to constitute a clear and unmistakable waiver of the Union's right to bargain over the subject of online work. As discussed, when the MOA was first entered into, the Online Department was recognized as "experimental;" it was staffed with unit employee producers; and some unit employees from both newsrooms were assigned to generate exclusive online copy. Under the new online initiative, all unit employees will be required to perform online work as part of their regular duties. Since the MOA as originally executed was intended to be an experimental venture to assign some employees to exclusively perform online work, it does not specifically support the Employer's claim that the MOA privileges it to assign online work to every employee. Further, while the MOA may allow the Employer to assign to unit employees "added or new duties," the MOA is otherwise silent regarding the extent to which the Employer may increase the employees' working hours or workload when adding these "new duties." The MOA thus lacks the specificity required to constitute a clear and unmistakable waiver on these subjects.²¹ Finally, the MOA assignability provision is silent with regard to work that may require abilities other than written skills, such as podcasting which requires oral skills. Again, the assignability provision lacks the specificity to allow the Employer to assign wholly different podcasting work.²² For the reasons above, we conclude that under extant Board law, there was no clear and unmistakable waiver by the Union, and the Employer was

²¹ See, e.g., KIRO, Inc., 317 NLRB at 1328 (management rights clause allowed employer to "schedule" and "assign" work, but was silent as to the extent the employer could increase working hours or workload and therefore, lacked specificity, and did not constitute clear and unmistakable waiver).

²² See, e.g., Detroit News, 319 NLRB at 263 (ALJ rejected employer's claim it was privileged under assignability clause to assign reporters, who had previously only performed written work, to appear on camera since clause did not specifically address television work).

required, as we concluded above, to bargain with the Union over the effects of its decision.

Finally, we conclude, in agreement with the Region, that the Employer's Section 10(b) defense should be rejected. The triggering event for Section 10(b) purposes occurred when the Employer announced its new online initiative on June 1 and not, as the Employer claims, in 1995 when unit employees started participating in online activities at the time the Employer launched its website. On June 2, the Union requested bargaining over the Employer's initiative because of its marked departure from previous changes to online work. On June 16, after the Employer had refused the Union's repeated requests to bargain, the Union filed the instant charge which is well within the Section 10(b) period.²³

III. Contract interpretation analysis

Thus far, we have only analyzed the Employer's contractual privilege claim under the Board's current "clear and unmistakable" waiver standard. However, as the General Counsel discussed in Stanford Hospital, supra, some circuit courts and individual Board members have criticized or rejected the clear and unmistakable waiver standard, arguing instead that a "contract coverage" analysis must be applied.²⁴ In order to avoid conflicts with several circuit

²³ To the extent that the Employer's Section 10(b) defense asserts that the online initiative produced no material changes, we have already concluded to the contrary.

²⁴ Premised on Section 8(d), contract coverage analysis holds that once a matter is "covered by" the labor agreement, "the union has exercised its bargaining right and the question of waiver is irrelevant." See, e.g., NLRB v. U.S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993), denying enforcement to 306 NLRB 640 (1992); Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992), denying enforcement to 304 NLRB 495 (1991). See also Department of Navy v. FLRA, 962 F.2d 48 (D.C. Cir. 1992) (same analysis under federal service labor-management relations statute); Gratiot Community Hospital v. NLRB, 51 F.3d 1255 (6th Cir. 1995) (denying enforcement in unilateral change case where Board had applied clear and unmistakable waiver standard, but not clearly rejecting the Board's approach in all such cases).

However, other courts, including the Third Circuit, have approved the Board's use of the clear and unmistakable waiver standard in unilateral change cases involving a claim of contractual right. See, e.g., Bonnell/Tredegear

courts that apply a contract coverage analysis and to clarify its occasionally inconsistently applied contractual waiver standard, it is the General Counsel's position that in unilateral implementation cases involving an employer's claim of contractual privilege, the Board should interpret the parties' agreement at issue. In so doing, it should take into account all relevant factors, including: (1) the wording of the proffered sections of the agreement(s) at issue, regardless of whether the language is general, specific, or even in some way ambiguous; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions in the collective-bargaining agreement or in other bilateral arrangements that may shed light on the parties' agreement concerning the change at issue.²⁵

Applying that position here, there is insufficient evidence to determine whether the MOA privileged to Employer's refusal to bargain about the effects of its online initiative. The first factor, agreement wording, does not appear to support the Employer's position that the parties agreed to allow its changes. The language of the MOA indicates that it was intended to cover only unit covered employees in the Employer's "experimental" Online Department. In light of the department's reorganization in 2000, the MOA arguably is currently inapplicable. Further, although Section 9 appears to allow the Employer to assign unit employees to perform work for the online department, the plain language of the MOA does not specify the extent and type of online work the Employer may assign. The only current evidence with regard to the second factor, past practice, is that the Employer had previously assigned, and a relatively small number of unit employees had previously participated in, online work, including Q & A chats and blogging. There is no evidence of the content of any discussions between the Union and Employer regarding past changes before they were implemented. There is no evidence with regard to the third factor, the parties' bargaining history. [FOIA Exemptions 2 and 5

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Industries, Inc. v. NLRB, 46 F.3d 339 (4th Cir. 1995); NLRB v. U.S. Postal Service, 18 F.3d 1089 (3d Cir. 1994); Olivetti Office USA v. NLRB, 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991); NLRB v. United Technologies Corp., 884 F.2d 1569 (2d Cir. 1989).

²⁵ See Stanford Hospital, supra, for fuller discussion regarding the need to clarify the Board's waiver standard in light of the conflict among the circuit courts on the issue.

FOIA Exemptions 2 and 5, cont'd. .] The last factor, other provisions or arrangements, appears to be irrelevant here. The parties' current collective-bargaining agreement has no management rights clause and is otherwise silent with regard to online initiatives or online work.

In sum, while we have concluded under extant Board law that absent settlement, a Section 8(a)(5) complaint should issue alleging that the Employer unlawfully implemented its new online initiative without engaging in effects bargaining with the Union, and that the Union had not "clearly and unmistakably" waived its right to bargain about the effects of such change, [*FOIA Exemptions 2 and 5*

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B.J.K.