

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 98-1599, 99-1111, 99-1112, 99-1163, 99-1180

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DETROIT TYPOGRAPHICAL UNION, NO. 18, ET AL.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

DETROIT NEWSPAPER AGENCY, d/b/a DETROIT NEWSPAPERS, ET AL.,

Intervenors.

(Case No. 98-1599)

NATIONAL LABOR RELATIONS BOARD,

Petitioner/Cross-Respondent,

and

DETROIT TYPOGRAPHICAL UNION, NO. 18, ET AL.,

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Respondents/Cross-Petitioners.

(Case Nos. 99-1163, 99-1180)

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ON PETITIONS FOR REVIEW AND  
CROSS-APPLICATIONS FOR ENFORCEMENT OF ORDERS OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petitions of the Detroit Newspaper Agency, d/b/a Detroit Newspapers ("the Agency"), the Detroit News ("the News"), and Detroit Free Press ("the Free Press") (collectively, "the Newspapers") and the Detroit Typographical Union No. 18 ("DTU No. 18"), Graphic Communications International Union Local 289 ("GCIU Local 289"), Graphic Communications International Union Local 13N ("GCIU Local 13N"), Detroit Mailers' Union Local 2040 ("Mailers Local 2040"), Teamsters Local 373, and the Newspaper Guild of Detroit

Local 22 ("the Guild") (collectively, "the Unions") to review, and the cross-applications of the National Labor Relations Board ("the Board") to enforce, three orders of the Board against the Newspapers. The Board's orders issued on August 17, 1998 and March 4, 1999, and are reported at 326 NLRB No. 64, 326 NLRB No. 65, and 327 NLRB No. 146.<sup>1</sup> The Board had subject matter jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's orders are final orders under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Unions filed their petition for review on September 4, 1998, the Board filed its applications for enforcement on March 17, 1999, and April 26, 1999, and the Newspapers filed their petitions for review on September 19, 1998, and March 18, 1999. All filings were timely; the Act imposes no time limit on such filings.

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<sup>1</sup> Pursuant to this Court's order, "A" references are to the printed Joint Appendix filed by the Newspapers. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Newspapers violated the Act.

2. Whether substantial evidence supports the Board's findings that the News violated Section 8(a)(5) and (1) of the Act by refusing to provide information regarding its merit pay and overtime proposals.

3. Whether substantial evidence supports the Board's findings that the News violated Section 8(a)(5) and (1) of the Act by unilaterally implementing proposals regarding merit pay and television assignments in the absence of a valid impasse.

4. Whether substantial evidence supports the Board's findings that a strike by employees of the Newspapers was an unfair labor practice strike and, therefore, that the Newspapers violated Section 8(a)(3) and (1) of the Act by refusing immediately to reinstate the strikers upon their unconditional offer to return to work.

5. Whether the Board had a rational basis for concluding that the Agency did not violate the Act by implementing its proposal permitting the assignment to nonunit employees of work that DTU No. 18 traditionally performed.

PERTINENT STATUTES AND REGULATIONS

An addendum to the Newspapers' brief sets forth all pertinent statutes and regulations.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The News and the Free Press are daily newspapers in Detroit, Michigan. Since 1989, the News and Free Press have been operating pursuant to a Joint Operating Agreement ("JOA"). Under the JOA, the News and Free Press parent corporations jointly created the Agency, a new corporation, for the purpose of providing all business and production services for both the News and Free Press. The editorial departments of the News and Free Press remained separate and independent of one another. (A 2, 32; 147.)

The Agency employed employees represented by the printing trades unions, as well as janitors represented by the Guild. (A 2, 33; 148-51.) The News and the Free Press each employed separate units of editorial staff, including such classifications as reporters, and columnists, who were represented by the Guild. (A 33, 60; 148.)

Historically, the Guild's collective-bargaining agreements with the News established minimum rates of pay for editorial staff unit members, and a ladder of wage increases awarded according to experience. In addition, each of the Guild's

successive collective-bargaining agreements with the News included a "direct dealing waiver," permitting employees to bargain individually for wages or working conditions better than those set forth in the agreement. (A 60; 155, 433.)

Beginning in 1989, the News and the Guild included in their agreements a provision permitting the News to conduct annual performance reviews of editorial unit members that could be used as a basis for negotiating individual merit increases pursuant to the direct dealing waiver. The Guild could grieve and arbitrate the performance reviews on behalf of unit members dissatisfied with the outcome of their reviews. (A 60; 155-56, 174-75, 375-80, 433.)

In 1989, the Unions formed the Metropolitan Council of Newspapers Unions ("the Council"). In 1989 and 1992, representatives of the Council participated in negotiations with the Newspapers. (A 152-53.)

In November 1994, the News entered into an agreement with a local television station to broadcast discussions with News reporters regarding the reporters' breaking stories. On November 23, the News informed the Guild that it would require Guild members to appear on those programs without compensation, pursuant to the management rights clause of the current collective-bargaining agreement. (A 68; 200-02, 739.) Shortly thereafter, the Guild filed an unfair labor practice charge

against the News for its implementation of the television appearance proposal, and the Board's General Counsel subsequently filed an unfair labor practice complaint against the News. (A 69; 729.)

On February 20, 1995, the News presented the Guild with a 14-point proposal for a successor contract, in which it proposed to allow professional employees to apply annually to be salaried and exempt from overtime regulations (Proposal No. 7); to modify its management rights clause specifically to include the authority to assign employees to participate in television and radio news projects (Proposal No. 8); and to base all future pay increases on merit, "utilizing the [News'] performance appraisal system" (Proposal No. 11). (A 60-61; 460.)

Also in February, the Agency made its first bargaining proposal to its typographical union, DTU No. 18. That proposal included a provision that would have allowed nonunit employees to perform unit work. (A 6, 45; 847.)

On March 22, the Guild and News conducted their first bargaining session for a new collective-bargaining agreement. Donald Kummer, the Guild's administrative officer, served as the Guild's chief spokesperson. John Jaske, Gannett Corporation senior vice president for labor relations, served as the News'

chief spokesperson.<sup>2</sup> (A 33, 61; 162-65.) At the second bargaining session, the parties discussed the Guild's general concerns about merit pay. Guild representative Kummer told Jaske that the Guild believed that the News' overtime proposal was unlawful under existing minimum wage and overtime laws. (A 61; 165-67.)

On April 25, the parties discussed the substance of the News' merit pay proposal for the first time. News representative Jaske explained that the News would create a pool of money that would be distributed based on the result of performance appraisals, that employees would receive a one percent across-the-board increase each year of the contract, and that the pool available for the across-the-board and merit increases would total four percent of the base rate of each classification the first year of the contract and three percent in the second and third years. (A 61; 168-69, 741.)

Kummer asked Jaske a number of questions about the News' proposal, and sought more information about the amount of money in the pool and how the merit pay system would operate. Kummer requested that Jaske put the proposal's details in writing.

(A 61-62; 169-74.) Also on April 25, the News created an internal document that projected how much money would be in the

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<sup>2</sup> Jaske also served as the Agency's chief spokesperson in negotiations with the Unions. (A 33; 146.)

merit pool for each of the proposed contract years. (A 63; 889.)

On April 26, the News distributed a memo to all Guild-represented employees describing its merit pay proposal. (A 525.) The memo explained that all employees would receive at least a one percent raise each year and that all raises above one percent would be based on an employee's most recent evaluation, unless the employee or manager requested a reevaluation. The memo also stated that the average of all increases would be four percent in the first year and three percent in the second and third years. (A 525.) On April 27, the News provided the Guild with a written description of the merit pay proposal. It was essentially the same as the memo distributed to employees, except that it specified that evaluations and the timing and amounts of merit increases would be grievable, but not arbitrable. (A 62; 526.) Guild representative Kummer did not receive any other response to the questions he had raised. (A 174-75.)

On April 30, the Guild membership held a strike authorization vote. Prior to the vote, the Guild leadership discussed with the membership the News' merit pay proposal and whether the members were willing to strike over the issue. Each of the three Guild units-- the News unit, the Free Press

editorial unit, and the Agency janitorial unit--voted to authorize a strike. (A 75; 272-79.)

At a May 3 bargaining session, the parties again discussed merit pay, but did not make any progress in reaching agreement. (A 62; 176-77.) On May 3 and 10, the News sent additional memos to employees accusing the Guild of "flatly" rejecting the News' merit pay proposal and of refusing to bargain over merit pay. (A 62; 529, 530.)

On May 11, the Agency implemented its proposal to allow nonunit employees to perform the work of employees in the unit represented by DTU No. 18. (A 6; 381-83.) On May 24, News representative Jaske sent Guild representative Kummer a letter asserting that negotiations were deadlocked over merit pay. (A 62-63; 532.) On June 2, Kummer responded, asserting that the parties were not deadlocked and requesting another bargaining session. (A 63; 533.)

On June 14, the Guild and the News met again. Kummer requested information about how much money would be in the merit pay pool, when the money would be distributed, and how decisions regarding distribution would be made. Jaske did not answer those questions. (A 63; 178-86.) The News and the Guild also discussed the News' overtime proposal. Guild bargaining committee members inquired as to who would be eligible for salary in lieu of overtime, who would make the eligibility

determinations, how the salaries would be determined, and how overtime work would be distributed between employees who chose salary and those continuing to receive hourly overtime. Kummer proposed that the parties submit questions regarding employees' eligibility for professional status to the Department of Labor for advisory rulings. Jaske rejected the proposal. (A 63; 186-88, 189(a)-(c).) Kummer requested a list of all bargaining unit members who would qualify as professionals pursuant to the overtime proposal. (A 63; 187-88.)

On June 25, GCIU Local 13N, a graphics union, held a membership meeting to seek final authority to strike against the Agency. At the meeting, the GCIU Local 13N leadership stressed, among other issues, the problems with the merit pay proposal made by the News to the Guild. The leadership also stressed the importance of maintaining unity among the Unions in case of a strike. (A 75; 301-04.)

On June 28, the News distributed a memo to employees informing them that almost 90 percent of the unit would qualify for merit increases, that those receiving evaluation ratings of "commendable" or "outstanding" would be eligible for a merit raise, and that the Guild was unwilling to bargain over the merit pay proposal or to meet with the News. (A 64; 536.)

Beginning in late June, the News prepared evaluations of bargaining unit members. Publisher Robert Giles drafted letters

to be distributed to employees upon implementation of the merit pay proposal. The News did not seek input from the Guild in any merit pay determinations. (A 65; 336-47.)

Also in late June, GCIU Local 289, another graphics union, took a final vote to authorize a strike against the Agency. The GCIU Local 289 shop chairmen discussed with members the Newspapers' alleged unfair labor practices, including the News' merit pay proposal. Following the discussion, employees voted to strike. (A 75; 285-86.)

On June 29, Guild representative Kummer faxed a letter to Jaske asking for a meeting on July 6 or 7, and reiterating his request for a list of names of employees who would qualify for the News' salary-in-lieu-of-overtime proposal. (A 64; 539.) Shortly after 8:00 p.m. on Friday, June 30, Jaske faxed a letter to Kummer denying Kummer's request for a list of eligible employees. Jaske also requested a bargaining session at 10:00 a.m. on Monday, July 3. (A 64; 540, 748.) Because Kummer was away from his office, he did not see the letter on Friday or Monday. When Kummer saw Jaske at a meeting on Monday afternoon, Jaske did not mention the proposed 10:00 a.m. meeting. (A 64; 191-93.)

On July 5, the News implemented several of its proposals, including its merit pay proposal, salary-in-lieu-of-overtime proposal, and the February 1995 television assignments proposal.

The News distributed a memo to its employees stating that because the Guild had failed to appear at bargaining sessions and refused to negotiate a wage plan, the News was implementing its merit pay proposal. The memo informed employees that they could have Guild representation in meetings with supervisors to discuss their individual merit pay increases, if they wished.

(A 65; 541.)

Later on July 5, Jaske faxed Kummer a letter informing him that the News was implementing its merit pay offer and that pay raises would be made promptly. Kummer responded by letter informing the News that the Guild expected bargaining as to the timing and amounts of merit increases before the News awarded the increases. (A 65; 544, 746.)

Between July 5 and July 11, the News awarded merit pay increases to approximately 170 bargaining unit employees in one-on-one meetings with the employees. The News did not give the Guild notice of the meetings or the increases awarded. (A 65; 195-99, 348-51.) In those meetings, the News gave each employee a letter stating the employee's evaluation rating and amount of merit pay increase. The letters explained that employees rated "outstanding" or "commendable" received an increase based on that rating, and that employees rated "acceptable" or below were ineligible for merit pay. (A 65; 553, 689, 718.)

On July 6, Teamsters Local 372 held membership and executive board meetings at which they discussed the principal issues driving the considerations to strike against the Agency, including the News' imposition of merit pay for Guild members. (A 75; 269-70, 292-93.) Also on July 6, the Unions' Council held a meeting. Guild Officer Kummer brought Council members up to date on the News' implementation of merit pay, and requested that the Council set a strike deadline of July 13. The Council discussed the importance of the members remaining supportive of each other. (A 75; 260-63.)

On July 10, the News and the Guild held their next bargaining session. Guild Attorney Duane Ice began the meeting by stating that the parties were not at impasse. Ice asked whether the News was using a formula to determine merit pay increases, whether specific percentage increases were associated with each evaluation rating, whether job classification was a factor, and whether there were other factors. Ice informed the News that the Guild was requesting bargaining over each merit increase awarded. (A 65-66; 221-24.)

Ice also asked what procedure the News was using to identify applicants for participation in the salary-in-lieu-of-overtime program, and reiterated the Guild's request for a list of employees who would be eligible for the program. Ice also asked specific questions about the proposal, such as how past

overtime would be considered and whether a formula for predicting future overtime would be used. Ice reiterated the Guild's proposal that the parties submit employee eligibility questions to the Department of Labor for advisory rulings. He also proposed that the News give employees who did not opt for salary in lieu of overtime preference when making overtime assignments. (A 66; 215-21.)

On July 11, at the next bargaining session, the News provided few answers to the Guild's questions and proposals. News representative Jaske stated that salary for those opting out of overtime would be calculated by looking at base pay, past overtime, and anticipated overtime. He rejected the Guild's proposals for modifying the proposal. He also told Ice that there was no formula for calculating merit pay, that management looked at each individual's contributions and capabilities, and that higher performance ratings would yield higher raises. Ice again asked for more information about the overtime proposal and the Guild reiterated in writing its request for the names of employees eligible to participate in the overtime proposal. (A 66-67; 224-35, 546.)

On July 11, the News sent another memo to employees about merit pay, informing them that approximately 80 percent of the unit had received increases, and discussing average increases. (A 67; 547.)

On July 12, the Unions' Council met to sign a document expressing their commitment to each other in the case of a strike by any one of the units. The Council discussed the various unfair labor practices they believed the Newspapers had committed, including those relating to the Agency's reneging on the joint bargaining ground rules, the DTU No. 18 jurisdiction issue, and the News' implementation of its merit pay proposal for the Guild. (A 75-76; 264-68.) The Unions' principal officers signed a pact stating that the Newspapers had engaged in antiunion conduct, negotiated in bad faith and reneged on the promise to bargain jointly over economic issues. They pledged to strike and honor each other's strikes in protest of the Newspapers' unfair labor practices. (A 76; 854.)

On July 12, News Managing Editor Christina Bradford removed union fliers from employees' bulletin boards and mail slots. (A 74; 254-56, 257-59.)

On July 13, at 8:00 p.m., the strike began against the Newspapers. (A 271.) Most of the strikers' picket signs made reference to unfair labor practices, and the strikers distributed handbills to the public describing the strike as a protest against the Newspapers' unfair labor practices. (A 76; 280-81, 287-88, 289-90, 291, 294, 299, 857, 871, 872, 873, 888.)

On July 14, a Board administrative law judge issued a decision and recommended order finding that the News had

violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its November 1994 television appearance proposal.

(A 69; 729.) On October 12, the Board affirmed the administrative law judge's decision in the November 1994 television appearance implementation case. (A 69; 729.)

On August 4, Guild representative Kummer reiterated in writing his request for a list of names of employees eligible for the overtime exemption. (A 67; 726.) The Guild also requested in writing that the News rescind the July 5 implementation of its television appearance proposal, remedy its November 4, 1994 unlawful implementation of that proposal, and bargain in good faith with the Guild regarding compensation for television appearances. (A 67; 739.)

On September 11, the Unions' attorney Sam McKnight requested that the Newspapers provide information regarding all permanent replacement employees hired after July 13, including any documents that memorialized the relationship between the Newspapers and those employees. (A 78; 851.) The Newspapers did not provide the Unions with statements signed by each replacement worker asserting that they understood that they were permanent replacements for striking employees and would not be terminated in the event the Unions sought to return to work. (A 79; 308-13, 874.)

During October and November, in discussions with the Guild over merit raises not yet awarded, News representative Jaske explained that under its newly implemented merit pay system, only an employee could initiate a reevaluation--not the Guild. The Guild, according to Jaske, had to first show good cause why an employee needed a reevaluation. (A 68; 236-41, 749, 753.)

On November 5, several members of IBEW, Local 58, employees of the Agency, joined the strike in sympathy. (A 89; 1257-64.)

During the parties' discussions regarding a second round of merit pay increases, Jaske informed the Guild that performance ratings were not tied to specific percentage increases. When questioned about employees with commendable ratings who received greater increases than employees who received outstanding ratings, Jaske asserted that the News based the amount of increases on management's judgment rather than any general rules or formulas. (A 68; 384-88.) Jaske stated that an employee who received an outstanding rating could receive an increase from 0 to 20 percent and that employees rated acceptable were eligible for merit pay increases. (A 68; 388-93.)

In mid-February 1997, the Unions made unconditional offers to return to work on behalf of the strikers. (A 89; 1173, 1174-80.) The Newspapers refused to reinstate the strikers immediately and, instead, placed them on a recall list to vacancies as they came available. (A 89; 1181.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found that the Agency violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to bargain in good faith with the Unions by refusing the Unions' request to provide letters signed by striker replacements; Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to offer strikers who had made unconditional offers to return to work immediate and full reinstatement; and Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by informing employees who were involved in an unfair labor practice strike that they had been or would be permanently replaced. (A 9, 92.)

The Board also found that the News violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Guild by unilaterally implementing merit pay and television assignment proposals without reaching a valid impasse and by failing and refusing to provide information requested by the Guild regarding merit pay, the overtime proposal, and letters signed by striker replacements; Section 8(a)(3) and (1) of the Act by failing to offer strikers who had made unconditional offers to return to work immediate and full reinstatement; and Section 8(a)(1) of the Act by informing employees who were involved in an unfair labor practice strike that they had been or would be permanently replaced, and by

removing Guild information from editorial office bulletin boards customarily reserved for Guild use and from employee mail slots. (A 9-10, 92.)

The Board found that the Free Press violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Unions by refusing to provide letters signed by striker replacements; Section 8(a)(3) and (1) of the Act by failing to offer strikers who had made unconditional offers to return to work immediate and full reinstatement; and Section 8(a)(1) of the Act by informing employees who were involved in an unfair labor practice strike that they had been or would be permanently replaced. (A 10; 92.)

The Board's order requires the Newspapers to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A 9-11, 92.)

Affirmatively, the order directs the News to bargain in good faith with the Guild concerning its television appearance policy, merit pay plan, and all merit raises granted under the plan and, upon request, to rescind all merit raises unilaterally granted, to make all employees whole for their television appearances and to furnish the Guild with the information it requested. (A 10.) The order also directs the Free Press and

the Agency, upon request, to furnish the Guild and the Unions respectively, with the information they requested. (A 9-10.) Finally, the order requires the Newspapers to offer immediate reinstatement to employees who joined the strike and made unconditional offers of reinstatement, to make them whole for any losses suffered, and to post remedial notices. (A 9-11, 92.)

#### SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the News violated Section 8(a)(5) and (1) of the Act by refusing to provide information regarding its merit pay and overtime-exemption proposals. The Guild repeatedly asked for specific information about many details of the News' merit pay proposal, including the criteria to be used for making merit pay determinations. The Guild also requested particular information about the News' overtime-exemption proposal. The News failed to fulfill its statutory obligation to provide that undisputedly relevant information requested by the Guild.

Substantial evidence also supports the Board's finding that the News violated Section 8(a)(5) and (1) of the Act by implementing its merit pay proposal. Under this Court's decision in McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026 (D.C. Cir. 1997), the News was not privileged to implement its merit pay proposal, even if the parties reached impasse in

negotiations, because it failed to offer any substantive criteria for awarding merit pay. Moreover, the record evidence shows that the parties had not reached a good-faith impasse at the time the News implemented its proposal. The News could also not lawfully implement its television assignment proposal, because it had not remedied its prior unlawful implementation of the same proposal.

The Board reasonably found that the Unions were motivated to strike by the News' unfair labor practices, and the Newspapers' refusal to offer the strikers immediate reinstatement upon their unconditional offers to return to work therefore violated the Act. The Newspapers' contention that the strike was unprotected--because the strikers struck in order to force the Newspapers to engage in joint bargaining--is not properly before the Court, and is unmeritorious in any event.

The Board had a rational basis for concluding that the Agency did not violate the Act by implementing its proposal to permit the assignment to nonunit employees of work that DTU No. 18 traditionally performed. The Agency's proposal was a mandatory subject of bargaining, which it properly implemented after reaching a good-faith impasse with DTU No. 18. DTU No. 18's argument that the proposal was actually a mid-term modification of an existing agreement, and thereby merely a

permissive subject of bargaining that could not be unilaterally implemented, is not properly before this Court.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE NEWSPAPERS VIOLATED THE ACT

The Board found (A 9-10) that the Newspapers violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by informing employees that were engaged in an unfair labor strike that they had been or would be permanently replaced, and Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to comply with the Unions' request for striker replacement letters. The Board also found (A 10) that the News violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by removing union communications from employee bulletin boards and mail slots.

The Newspapers' brief to this Court does not contest those findings. Accordingly, the Board is entitled to summary enforcement of the portion of its order remedying those uncontested violations. See Int'l Union of Petroleum & Indus. Workers v. NLRB, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992); Corson & Gruman v. NLRB, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE NEWS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE INFORMATION TO THE GUILD REGARDING MERIT PAY AND OVERTIME-EXEMPTION PROPOSALS

A. Applicable Principles

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." The Board, with judicial approval, has long held that an employer's duty to bargain in good faith includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties," including information relevant to negotiations. NLRB v. Acme Indus. Co., 385 U.S. 432, 435-37 (1967).

This duty to provide information arises because "[a] party to good-faith collective bargaining . . . cannot reasonably expect the other party to buy a pig-in-the-poke." Beyerl Chevrolet, Inc., 221 NLRB 710, 721 (1977). Accord Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB, 598 F.2d 267, 273 (D.C. Cir. 1979) (refusal to provide crucial information precluded other party's "intelligent evaluation" of proposals); San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 866 (9th Cir. 1977). The key question in determining whether information must be produced is one of relevance. Information that pertains to unit employees' terms

and conditions of employment, such as wages and hours, "is presumptively relevant and must be disclosed to the union unless the employer proves a lack of relevance." Oil, Chemical & Atomic Workers Local Union, 711 F.2d 348, 359 (D.C. Cir. 1983).

The Board's determinations regarding information requests may not be disturbed on review unless they have no reasonable basis in law or are predicated upon factual findings not supported by substantial evidence. Id. at 360 & n.31. We now show that, tested by those principles, the Board's unfair labor practice findings here are entitled to affirmance.

B. The News Unlawfully Refused To Provide the Guild with Relevant Information Regarding the News' Merit Pay and Overtime-Exemption Proposals

1. Information relevant to the News' merit pay proposal

It is undisputed that throughout negotiations with the News, the Guild repeatedly asserted the need for information about the News' merit pay proposal. Thus, at bargaining sessions on April 25 and June 14, Guild representative Kummer asked numerous questions, such as when the money would be distributed, how much money would be in the merit pay pool, what criteria would be used to determine who would receive merit pay, and how much they would receive. Kummer made clear to News representative Jaske that he would have a difficult time selling any merit pay proposal to the Guild membership, but that it

would be impossible for his members to accept the employer's proposal without more information. (A 176-77.)

The News steadfastly declined to provide the requested information. Indeed--because, far from answering the Guild's questions about the News' merit pay proposal--its July 5 implementation raised even more questions, Guild Attorney Ice again asked at the July 10 bargaining session for more information about the proposal. Ice asked for specifics about such issues as the use of formulas for determining eligibility for and the amount of merit increases, the relationship between specific evaluation ratings and percentage increases, the effect of job classification on merit pay determinations, and what other factors, if any, the News used in making merit pay determinations. (See pp. 14-15, above.)

In response, the News provided a single document, which revealed only the most basic elements of the proposal, such as that the merit pay pool would average four percent the first year and three percent in the second and third years of the contract; it provided no information concerning how individual merit pay determinations would be made. (See p. 9, above.) Nor did the News provide much more information during bargaining sessions. For example, the News provided no information regarding the total amount of money projected to be in the merit pool, despite the fact that as of April 25, it possessed an

internal document showing precisely that information. (A 889.) Indeed, until June 14, the News did not even specify whether the percentage increases referenced the contract scale wage rates or actual salaries, despite the fact that the News had known since April 27 that it intended to use actual salaries. (See pp. 10-11, above.)

In addition, the responses that the News did provide gave the Guild incomplete and inaccurate information regarding the News' criteria for making merit pay determinations. For example, in letters the News provided to employees, it stated that employees rated "outstanding" or "commendable" would receive merit pay (A 718). The record shows, however, that other, unstated factors affected the determination as to whether an employee received merit pay. Indeed, at a bargaining session in spring 1996, News representative Jaske told Guild Attorney Ice that an employee with an outstanding rating might not receive any merit pay. (A 388.) Nevertheless, Jaske failed to elaborate on what other factors the employer intended to take into account.

Similarly, although the employees' merit pay letters stated that employees rated "acceptable" would not be eligible for merit pay, the record shows that other factors also affected whether those employees received merit pay. (A 689.) Thus, in the first round of increases, employee Diane Hofsess was rated

"acceptable" but received a merit increase. (A 1166.) Again, the News failed to articulate how it determined which "acceptable" employees would get increases.

Moreover, the Board reasonably found (A 7) any information actually provided regarding how merit pay determinations were made came too late to enable the Guild to bargain intelligently. For example, although the proposal was implemented on July 5, 1995, News representative Jaske revealed in late fall 1995 for the first time that employee classification affected merit pay determinations. Thus, he told the Guild that reporters would be favored under the merit pay system, because they were the "lifeblood" of the newspaper. (A 239-40.) During discussions about the second round of increases, Jaske informed the Guild for the first time that individual performance ratings were not tied to specific percentage increases, nor would a higher rating necessarily result in a higher percentage increase. (A 387-88.) Not until May 1996, almost one year after implementing its merit pay proposal, did the News reveal to the Guild that employees rated "acceptable" were eligible for merit increases. (A 390-92.) In addition, the Guild learned only at the hearing before the Board that the News used such factors as whether an employee undertook additional responsibilities during the review year, showed recent improvement, or was being recruited by another employer. News Publisher Giles conceded that the News never

informed the Guild of the existence of those factors despite the Guild's repeated requests for information. (A 328-32.)

In response to this plethora of evidence that the News failed to provide accurate, timely information about its merit pay proposal, including information regarding the criteria used for making merit pay determinations, the News offers no defense. The Guild's inquiries concerned the basic features of the News' merit pay proposal. As such, they were presumptively relevant inquiries (see p. 25, above), and the News' failure to provide the requested information constitutes a violation of the Act.

The News challenges only the Board's findings that its failure, until June 14, 1995, to specify whether it was using contract wage scales or actual wages as the basis for the merit pool, and its failure to provide its cost estimate for the pool constitute violations of the Act. Even that limited defense, however, is without merit. Regarding the basis for the merit pool, the News asserts that Guild representative Kummer allegedly rejected an offer on April 27 to explain its proposal. The News contends (Br 37) that had Kummer merely requested an explanation, Jaske would have explained then that the News had modified its proposal to use actual wages, instead of contract wage scales, as the basis for the merit pool. There was nothing on the face of the then-pending proposal, however, to alert

Kummer to the fact that it contained such a major modification about which he needed to inquire.<sup>3</sup>

2. Information relevant to the News' overtime-exemption proposal

Guild requests for information about the overtime-exemption proposal addressed another important element of employees' compensation, as well as their hours. Because those requests were, like the information sought regarding merit pay, presumptively relevant, the Board reasonably found (A 8) that the News' failure to respond violated Section 8(a)(5) and (1) of the Act.

Thus, on June 14, the Guild first requested information about the News' proposal to exempt certain employees from overtime pay, including a list of eligible employees and more detailed information about how the proposal would work. Because it received no further information about the mechanics of the proposal, Guild Attorney Ice later reiterated the request both orally and in writing. Ice and Kummer made clear to the News that the Guild was seeking information that would give some definition to the scope and impact of the proposal. In response, the News belatedly provided the Guild with a list of

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<sup>3</sup> Also without merit is the News' contention (Br 37) that it was justified in failing to provide its internal cost estimate for the merit pay proposal because Kummer never requested it. The evidence shows that at the April 25 bargaining session, Kummer

job classifications that might include employees eligible for the overtime exemption, but no information about how the News would calculate salaries, determine who in fact was eligible, or who would make eligibility determinations. On August 4 and October 16, the Guild reiterated its request for more information about the proposal, including a list of eligible employees, but never received any response. Accordingly, the Board reasonably found (A 8) that the News' failure to provide requested information was unlawful.

There is no merit to the News' contention (Br 35-36) that it was relieved of responsibility to provide the requested information because the Guild allegedly refused to bargain over the overtime-exemption proposal by making "bad faith" counterproposals. (See A 8.) It is true but irrelevant that the Guild expressed its opinion that the News' proposal was illegal: credited evidence shows that at the June 14 and July 10 bargaining sessions, the Guild made good faith counterproposals, in part designed to address elements of the proposal it believed to be in conflict with minimum-wage and overtime laws. (Above, pp. 11, 15.) Indeed, even a cursory examination of the Guild's counterproposals shows that they constituted a meaningful attempt to address the very aspect of

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inquired how much money would be in the merit pool. (See p. 8, above.)

the News' proposal that made it so unpalatable. Thus, the Guild simply proposed seeking advisory rulings from the Department of Labor about whether particular employees were exempt from overtime compensation requirements, in contrast with what it believed were unlawful determinations by the News.

Nor is there merit to the News' contention (Br 37) that it satisfied its obligation to provide information about its overtime exemption proposal by giving the Guild a list of job classifications. The Guild made clear that it requested the information it did (for example, the list of eligible employees) in order to appreciate the scope and impact of the News' proposal. The News' list of job classifications, covering almost the entire bargaining unit, plainly failed to satisfy the Guild's need for information. Moreover, as the Board found (A 8), even if a list of potentially eligible employees did not exist, the News was not absolved of its responsibility to provide the Guild with the information it indisputably possessed that was responsive to its requests.<sup>4</sup>

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<sup>4</sup> The Board reasonably found (A 8) not credible the News' assertion that no such list existed. Indeed, the Free Press, which made a similar proposal, provided such a list. (A 905.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE NEWS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING PROPOSALS REGARDING MERIT PAY AND TELEVISION ASSIGNMENTS IN THE ABSENCE OF A VALID IMPASSE

A. Applicable Principles and Standard of Review

As discussed above, Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the collective-bargaining representative of its employees. For an employer to change terms and conditions of employment without affording the union an opportunity for adequate consultation both "minimizes the influence of organized bargaining" and emphasizes to the employees "that there is no necessity for a collective bargaining agent." May Department Stores Co. v. NLRB, 326 U.S. 376, 385 (1945). Thus, unilateral action with respect to any mandatory bargaining subject is proscribed. NLRB v. Katz, 369 U.S. 736, 743 (1962).

Notwithstanding the general prohibition against unilateral changes, the Board has, with judicial approval, consistently held that where the union and employer have bargained to a bona fide impasse, the employer typically has a limited right to implement unilateral changes in mandatory bargaining subjects, so long as those changes are reasonably comprehended within its pre-impasse proposal to the union. Taft Broadcasting Co., 163

NLRB 475, 478 (1967), enforced sub nom., AFTRA Kansas City Local v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

In order to preserve the integrity of the collective-bargaining process, however, the Board has recognized "a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals . . . that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay." McClatchy Newspapers, Inc., 321 NLRB 1386 (1996) ("McClatchy"), enforced, 131 F.3d 1026 (D.C. Cir. 1997)). The Board concluded in McClatchy that a merit pay proposal giving an employer complete discretion to determine the timing, amount, and criteria for awarding merit pay would, if implemented, be "inherently destructive" of the fundamental principles of collective bargaining. 321 NLRB at 1391. In enforcing McClatchy, the Court agreed with the Board that "where the employer has advanced no substantive criteria for its merit pay proposal[,] . . . implementation might well irreparably undermine [the union's] ability to bargain," and that implementation of such "inherently destructive" proposals could be prohibited by the Board even in the face of a genuine bargaining impasse. McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026 (D.C. Cir. 1997).

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951). The Board's conclusions of law are entitled to acceptance if they are based on a reasonably defensible construction of the Act. See NLRB v. Iron Workers Local 103, 434 U.S. 335, 350 (1978); Lucile Salter Packard Children's Hosp. v. NLRB, 97 F.3d 583, 588 (D.C. Cir. 1996).

B. The Board Reasonably Found that the News  
Unlawfully Implemented Its Merit Pay Proposal

1. The News unlawfully implemented its ill-defined merit pay proposal

There is no dispute that on July 5, 1995, the News implemented its merit pay proposal. As we show below, the Board reasonably found (A 7) that implementation violated Section 8(a)(5) and (1) of the Act under the principles discussed above.

The Board reasonably found (A 7) in the instant case that "even if the parties had reached good-faith impasse, the unilateral implementation of [the merit pay] proposal, without definable objective procedures and criteria, was inherently destructive of the statutory collective-bargaining process" under the principles in McClatchy. Thus, as in McClatchy, the News proposed a "standardless" system for awarding merit pay. 321 NLRB at 1391. The News' description of its proposal failed

to specify any objective criteria for awarding merit pay.

(Above, p. 10.)

Moreover, the record is replete with examples of the News, in response to requests for specifics, readily acknowledging to the Guild that it had utilized no formulas or criteria in determining who would receive merit increases. At discussions concerning the second round of merit increases, News representative Jaske fended off the Guild's attempts to discern any criteria by insisting that merit pay decisions--whether to award it and in what amount--were solely the result of management's judgment, and utilized no formula. (A 370-71, 385.) And when questioned at the hearing, News Publisher Giles specifically denied the existence of any such formula. Giles even acknowledged in testimony, under the merit pay proposal, the News could give the entire merit pay pool to a single employee if it chose to do so. (A 326, 327, 333.)

Significantly, the facts of the instant case also hew closely to those in McClatchy concerning the Guild's exclusion from the actual merit pay process. In McClatchy, the union was not invited to participate in making merit pay determinations and was notified of those determinations after the fact; in addition, the union could participate in review of the decisions only at the employees' request, in a nonbinding proceeding. 131 F.3d at 1027-28. Similarly here, the News informed the Guild of

the July 5 merit increases only after it had notified the recipients. The Guild was also excluded from discussions between employees and their supervisors regarding merit pay awards unless the employee requested Guild representation at the meeting. Id. See also Royal Motor Sales, 329 NLRB No. 71 at 21 (1999) (where there are no objective standards for merit pay, the right to grieve results is meaningless).

There is no merit to the News' attempt (Br 31-34) to distinguish the facts of the instant case from those in McClatchy. Contrary to the News' contention (Br 33), it is not legally or factually significant that the News' proposal stated in dollar amounts the average totals for the amount of money in the merit pay pool, while the McClatchy proposal did not. The proposal here might as well not have stated any amount, because it was always subject to unilateral change. Thus, Publisher Giles admitted that, under the News' proposal, if the merit pool money had been exhausted but he still wanted to give someone a greater increase, he had the discretion simply to increase the dollar amount of the pool. (A 356.) In any event, the News retained complete discretion over all critical considerations, including who would receive increases and how much each would receive. News representative Jaske and Publisher Giles asserted that under the News' proposal, the News had the discretion to award an employee with an outstanding rating either no merit pay

increase, a 20 percent increase, or the entire merit pool.  
(A 333, 388-93.)

The News is simply wrong in contending (Br 33) that the fixed timing of its merit pay increases distinguishes its proposal from the one at issue in McClatchy: one of the two employer proposals at issue in McClatchy expressly included a fixed time for merit pay determinations. 131 F.3d at 1028. The Court upheld as reasonable the Board's determination that an employer could not implement a merit pay system after impasse if it lacked both fixed criteria and fixed timing. Id. at 1035 n.8.

Finally, there is no merit to the News' contention (Br 33-34) that its merit pay proposal contained objective criteria because it was tied to each employee's annual performance review. Again, the record shows that the News disclaimed any relationship between the results of those reviews and the factors involved in awarding merit increases. Thus, News representative Jaske candidly acknowledged to Guild attorney Ice that performance ratings took a back seat to the "judgment of management" in determining percentage increases. (A 385.) Indeed, Jaske acknowledged that merit pay determinations were strictly a judgment of management. Similarly, Publisher Giles testified that "[t]he performance appraisal program [is] one of

many factors . . . that are considered in arriving at a merit pay recommendation." (A 348.)

Ultimately, a proposal that purports to tie merit pay determinations to a performance review process, but which lacks any true connection or objective criteria, is as inherently destructive of the bargaining process as a proposal that permits the employer to award merit pay without any performance review. See McClatchy, 131 F.3d at 1028 (Modesto Bee could not implement proposal that tied merit pay to annual review process lacking objective criteria); Royal Motor Sales, 329 NLRB No. 71 at 21 (1999) (proposal under which wage increases are tied to periodic performance review cannot be implemented because no objective criteria incorporated in review). The News has never identified any objective criteria employed in its performance review process.<sup>5</sup>

In sum, and contrary to the News' contention (Br 34), both the amount of and basis for wage changes under the News' implemented proposal were subject to unfettered management discretion. Therefore, under the Board's and this Court's decisions in McClatchy, the News' implementation of its merit

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<sup>5</sup> The News' contention (Br 33 n.45) that its merit pay proposal was unobjectionable because it utilized a bargained-for performance evaluation system is disingenuous. The record shows that prior to the implementation of the News' merit pay proposal, performance evaluations were rare. (A 156-57.)

pay proposal was unlawful, regardless of whether the parties reached a bargaining impasse.

2. The Board also reasonably found that, even assuming that the News' merit pay proposal was not inherently destructive, its implementation was unlawful because the parties were not at a valid impasse

As discussed above (p. 24), it is an unfair labor practice for an employer to refuse to bargain with the collective-bargaining representative of its employees. An employer fails to meet its statutory obligation to bargain when, absent either agreement or a good-faith impasse in negotiations, it changes employees' terms and conditions of employment. NLRB v. Katz, 369 U.S. 736, 742-43 (1962); Teamsters Local Union No. 639 v. NLRB, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

It is settled that, where a party has not bargained in good faith, it may not declare a bargaining impasse or act unilaterally. See United Packinghouse Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1131 (D.C. Cir. 1969). In particular, where, during negotiations, an employer refuses to furnish relevant requested information about its bargaining proposals, a valid impasse cannot exist. Cone Mills Corp. v. NLRB, 413 F.2d 445, 448 (4th Cir. 1969). See also Rivera-Vega v. Conagra, Inc., 70 F.3d 153, 162 (1st Cir. 1995).

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Publisher Giles conceded that the implemented process was a significant departure from the status quo. (A 357.)

The burden of proving that a valid impasse existed rests with the party asserting it to justify a unilateral change in employee terms or conditions. See, for example, PRC Recording Co., 280 NLRB 615, 635 (1986), enforced sub nom., Richmond Recording Corp. v. NLRB, 836 F.2d 289 (7th Cir. 1987).

Moreover, as this Court has emphasized, whether a valid impasse exists "is a question of a fact involving the Board's presumed experience and knowledge of bargaining problems," and "few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems." Steelworkers Local 14534 v. NLRB, 983 F.2d 240, 246 (D.C. Cir. 1992).

Here, as shown above, the News failed to provide critical, relevant requested information. That failure, without more, justifies the Board's decision that the parties here did not bargain to impasse. See Korn Industries, Inc. v. NLRB, 389 F.2d 117, 120-22 (4th Cir. 1967) (no valid impasse where employer refused to provide information relevant to merit pay proposal).

The record abounds with other evidence of the News' bad faith. First, as the Board found (A 7), the News intentionally misrepresented the Guild's position on merit pay to employees. In his May 5 memo to employees, Publisher Giles told employees that the Guild had flatly rejected merit pay. The News cannot,

however, point to a single instance of the Guild flatly refusing, or refusing to bargain over, merit pay. To the contrary, the Guild's continued efforts to inquire about the proposal, which went unanswered, strongly support the Board's finding that additional bargaining was not futile.

The News also refused to bargain--and hence precluded impasse--by misrepresenting the level of the Guild's willingness to attend bargaining sessions. On June 28, Publisher Giles told employees in a memo that the Guild was unwilling to meet to bargain over merit pay. In fact, at that time, the News had a request from Guild representative Kummer for a bargaining session in the first week of July. Days later, the News partially justified unilateral implementation of its proposal by misrepresenting to employees the reasons for the Guild's failure to meet with the News on July 3. Thus, the News failed to inform employees that it was the News' own fault that the Guild did not show up for the July 3 bargaining session because the News made sure that the Guild did not receive notice of a meeting scheduled for that date until after the proposed meeting time. (See p. 12, above.)

The News also evidenced its bad faith by giving information to employees that it withheld from the Guild, despite the Guild's repeated requests for that information. For example, the News gave employees statistics concerning how many employees

it anticipated would receive merit increases, how many did receive merit increases, and what the range of increases was in relation to employees' performance ratings, without providing any of that information to the Guild. While telling the Guild that there were no formulas or criteria for the award of merit pay, the News told its employees that employees had to have "outstanding" or "commendable" ratings to be eligible for merit pay. (See pp. 13-14, above.)<sup>6</sup>

There is also no merit to the Newspapers' contention (Br 39) that the merit pay negotiations had reached impasse because of the Guild's intransigence. At the last bargaining session prior to implementation (p. 13 above), the Guild continued to ask questions about the proposal and Guild representative Kummer denied the absence of a deadlock. Indeed, as of the time of implementation, the parties had discussed the

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<sup>6</sup> There is no merit to the News' contention (Br 35-36) that its own duty to bargain (and hence its obligation not to make unilateral changes) was "suspended" by the Guild's alleged bad faith with respect to the News' overtime-exemption proposal. As discussed in detail above (pp. 31-32), the record fully supports the conclusion that the Guild never refused to bargain over the overtime-exemption proposal. Nor is there merit to the News' contention (Br 38-39) that it was improper for the Board to rely upon the News' communications with its employees as evidence of the News' bad faith, because those communications were assertedly privileged under Section 8(c) of the Act (29 U.S.C. § 158(c)), which protects an employer's noncoercive expression of views. The Board did not find unlawful the News communications with employees; rather, it found unlawful the

News' merit pay proposal in detail at only two bargaining sessions. (Above, pp. 8, 10.)

C. The Board Reasonably Found that the News Unlawfully Implemented its Television Assignment Proposal Because of the Absence of a Valid Impasse

The Board reasonably found (A 7 n.17) that the News also unlawfully implemented its television news assignment proposal. The Board had before it an earlier unilateral implementation (in November 1994) of a requirement that News reporters be available for television interviews, without compensation, on subjects they covered for the News. In the negotiations for a new contract, the News again proposed that it be given discretion under the contract to require reporters to participate in television interviews without any additional compensation.

(A 433.) The Guild's unfair labor practice charge regarding the November 1994 policy was pending at the time. (A 201, 729.)

Nevertheless, on July 5, the News implemented the new proposal.

(A 203, 545.) The Board later issued an order finding that the November 1994 implementation constituted a violation of Section 8(a)(5) and (1) of the Act. Detroit News, 319 NLRB 262 (1995).

This Court recently upheld the Board's position that, where the existence of unremedied unfair labor practices contributes to a deadlock in subsequent negotiations over the same issue, no

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News' failure also to communicate with the Union. Thus, Section 8(c) is not implicated here.

valid impasse can be reached, and the proposal cannot be implemented. Alwin Mfg. Co., Inc. v. NLRB, 192 F.3d 133, 141 (D.C. Cir. 1999) ("Alwin"). Here, as in Alwin, the existence of an unremedied unfair labor practice contributed to the parties' deadlock on a bargaining proposal. Indeed, the News does not dispute that its failure to remedy its unlawful November 1994 implementation of the television assignment proposal increased friction at the bargaining table and provided the News with an advantage in bargaining over that issue, thus reducing the likelihood of an agreement.<sup>7</sup> As this Court found in Alwin, the determination of whether or not the unremedied unfair labor practice affected the negotiations "is a quintessential question of fact which is appropriately left to the Board to resolve in each case in light of its expertise." Id. at 139. Accordingly, the Board appropriately found (A 7 n.17) that "the fact that negotiations took place in the context of an unremedied unfair labor practice did preclude good-faith impasse."

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<sup>7</sup> The News' only response (Br 34) to the Board's finding that its July 1995 television assignment implementation was unlawful is to question how the television assignment proposal differed from its other proposals that the Board did not find unlawfully implemented. The News' suggestion that there are no differences between the proposals is disingenuous. The television assignment proposal obviously differs in that the News previously had unlawfully implemented the same proposal.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE STRIKE WAS AN UNFAIR LABOR PRACTICE STRIKE AND THAT THE NEWSPAPERS THEREFORE VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING IMMEDIATELY TO REINSTATE THE STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Applicable Principles

A strike caused or prolonged at least in part by an employer's unfair labor practice is an unfair labor practice strike. See General Indus. Employ. Union Local 42 v. NLRB, 951 F.2d 1308, 1311 (D.C. Cir. 1991). The Board's determination that a strike is an unfair labor practice strike is a factual issue on which the Board's findings are conclusive if supported by substantial evidence on the record as a whole. Id. at 1312; Allied Indus. Workers, Local No. 289 v. NLRB, 476 F.2d 868, 883 (D.C. Cir. 1973).

Unfair labor practice strikers retain their status as employees and, unlike purely economic strikers, are entitled to immediate reinstatement upon their unconditional offer to return to work. NLRB v. International Van Lines, 409 U.S. 48, 50-51 (1972). Employers are required to discharge replacement workers, if necessary, to make room for the reinstatement of unfair labor practice strikers.<sup>8</sup> See George Banta Co. v. NLRB,

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<sup>8</sup> In contrast, purely economic strikers are entitled to preferential hiring rights once they offer to return; that is, they are entitled to positions occupied by strike replacements as they become available. See Laidlaw Corp., 171 NLRB 1366, 1369-70 (1968).

686 F.2d 10, 20-21 (D.C. Cir. 1982). Failure to reinstate unfair labor practice strikers immediately upon their unconditional offer to return to work violates Section 8(a)(3) and (1) of the Act. Teamsters Local No. 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990).

In determining whether an employer's unfair labor practices had a sufficient causal connection to the employees' reasons for striking to render them unfair labor practice strikers, it is required only that unlawful conduct be a contributing cause, not necessarily the sole or principal cause. See Northern Wire Corp., 291 NLRB 727, 727 n.4 (1988). Statements made during pre-strike union meetings are particularly relevant to establishing causation. Generally, if unfair labor practices were discussed meaningfully at such meetings, they are considered to have been at least a partial cause of the strike. See Northern Wire Corp. v. NLRB, 887 F.2d 1313, 1320 (7th Cir. 1989); Larand Leisurelies, Inc., 213 NLRB 197, 197 n.3 (1974), enforced, 523 F.2d 814, 820-21 (6th Cir. 1975).

Section 7 also protects employees "honoring strikes by employees in which they are not directly involved whether or not such strike is accompanied by picketing, whether or not the sympathy striker is represented by the same union as the one on strike, and whether or not the strike is at another employer." Supermarkets General Corp., 296 NLRB 1138, 1142 (1989). See

General Tire & Rubber Co. v. NLRB, 451 F.2d 257, 258-59 (1st Cir. 1971); Allbritton Communications, Inc., 271 NLRB 201, 205, 231 (1984), enforced, 766 F.2d 812 (3d Cir. 1985).

B. The News' Unfair Labor Practices Were  
a Contributing Cause of the Strike

The Board reasonably found (A 8) under the foregoing principles that the News' unfair labor practices contributed to the employees' decision to strike. The merit pay issue dominated the Guild's pre-strike discussions. (Above, pp. 8-16.) Indeed, the Newspapers do not dispute that the Guild employees, those directly affected by the News' unfair labor practices, were motivated to strike by the News' unlawful refusal to provide information and its implementation of the merit proposal. Accordingly, assuming that the Court concurs in the Board's determination that the News' implementation of its merit pay proposal was unlawful, the striking employees represented by the Guild were motivated by unfair labor practices and the ensuing strike was an unfair labor practice strike.

As discussed more fully below, the Board reasonably found (A 8, 77) that not only the Guild-represented employees, but also employees in the other units who struck to support them, were unfair labor practice strikers. Prior to calling the strike, all members of the Unions' Council pledged to strike and

honor each other's strike in protest of the DNA/Detroit Newspapers (including the News and Free Press) anti-union conduct and unfair labor practices. (Above, p. 16.) Moreover, the Newspapers point to no evidence undermining the Unions' assertion in their pre-strike unity pact that they were genuinely dedicated to supporting each other's strikes. Accordingly, either as primary or sympathy strikers, the strikers were motivated to strike by unfair labor practices, and, consequently, were unfair labor practice strikers.<sup>9</sup> See cases cited above, pp. 47-48.

In any event, substantial evidence supports the Board's conclusion that unfair labor practices motivated the strike by all the Unions. During their pre-strike meetings, the Unions discussed their many grievances against the Newspapers' bargaining conduct. Indeed, the discussions at those meetings

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<sup>9</sup> The Newspapers' suggestion (Br 31 n.43) that the other Unions' members cannot be deemed unfair labor practice sympathy strikers is not properly before the Court. As the Newspapers acknowledge (Br 29), under Section 10(e) of the Act (29 U.S.C. § 160(e)), this Court has no jurisdiction to consider arguments not raised to the Board. Woelke & Romero Training, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982). The Newspapers failed to except to the administrative law judge's finding that all the strikers were either primary or sympathy strikers. Nor did the Newspapers argue to the Board that, even if the Board affirmed the judge's finding that at least some of the strikers were unfair labor practice strikers, the Board should nevertheless find that sympathy strikers are not accorded the same rights as primary unfair labor practice strikers. Accordingly, those contentions are not before the Court.

evidenced a strong feeling among the union members that the Newspapers were not bargaining fairly. As the record shows, the strike-related meetings often became discussions of the laundry list of conduct that the Union believed violated Section 8(a)(5) and (1). (Above, pp. 12-14.) As such, the Unions' strike decisions were motivated not only by the desire to protest individual unfair labor practices that the Unions believed the Newspapers had committed, but also more generally against what the Unions' perceived as a pattern of disrespect for the bargaining process.

The News' unlawful implementation of its merit pay proposal, and its refusal to provide information during its bargaining with the Guild, fits squarely within that perceived pattern of disrespect for the bargaining process. Indeed, the fact that Vice President Jaske conducted both the Agency's and the News' bargaining reinforced the connection between the Unions' displeasure over the merit pay implementation and its concern about the Newspapers' pattern of unfair bargaining. The merit pay implementation was a powerful example of everything that was wrong with how the Newspapers were conducting the 1995 bargaining.

Moreover, the record provides strong support for the Board's finding that the other unions also were motivated specifically by the News' unlawful merit pay implementation.

The Unions repeatedly included the News' merit pay implementation in their lists of what they perceived as unlawful conduct to which the Newspapers had subjected them. (See p. 9, 11, 12, 14, above.) Moreover, the timing of the inception of the strike--July 13--in relation to the merit pay implementation--July 5--strongly supports the causal connection found by the Board. The merit pay issue, although confined in the 1995 bargaining to the News and Free Press, was of considerable concern to employees represented by other striking Unions. For, as William Kosta, a DTU No. 18 member, testified, without contradiction, the other Unions were upset by the News' merit pay implementation because they were afraid that the Agency would impose such a system on them next. (A 282-84.) On those facts, the Board reasonably found that the News' unlawful implementation of its merit pay proposal contributed to the Unions' decisions to strike. See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 130 F.2d 503, 505-06 (2d Cir. 1942).

The Company contends (Br 40-41) that the Unions were motivated solely by economic considerations, or, alternatively, by the Newspapers' conduct that the Board found not to constitute unfair labor practices. That contention reflects the Newspapers' misapprehension of the correct test for determining whether a strike is an unfair labor practice strike. Thus, in making that determination, the Board, with the approval of this

Court, does not attempt to ascertain whether the strike would have occurred "but for" particular unfair labor practices. As this Court has stated, the dispositive question is, rather, "whether the employees, in deciding to go on strike, were motivated in part by the unfair practices committed by their employer, not whether, without that motivation the employees might have struck for some other reason.'" Teamsters Local 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990) (quoting Northern Wire Corp. v. NLRB, 887 F.2d 1313, 1319-20 (7th Cir. 1989)). In short, as this Court has recognized, "if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike." General Drivers & Helpers Union, Local 662 v. NLRB, 302 F.2d 908, 911 (D.C. Cir. 1962).

As shown above, substantial evidence supports the Board's finding that the News' merit pay implementation was a motivating factor in the Unions' decision to strike. That, as the Newspapers contend (Br 41), there may have been other economic factors that also motivated the employees to strike, is irrelevant. Equally irrelevant is the Newspapers' contention (Br 41) that striking employees may have been motivated to strike because of other conduct that the Unions believed constituted unfair labor practices, including the Newspapers' failure to comply with the parties' bargaining "ground rules" agreement to engage in two-stage bargaining. Although it is

true that the Board found (A 5) that that conduct was not an unfair labor practice, the Board's finding does not undermine its concurrent finding that the Unions also were motivated by the News' unlawful refusal to provide information and by unilateral implementation of its merit pay plan.<sup>10</sup>

C. The Newspapers Unlawfully Denied Immediate Reinstatement to Returning Strikers

The Company does not dispute that it failed to reinstate the strikers upon their unconditional offer to return to work. The Board reasonably found (A 88) that the Newspapers violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to reinstate the strikers immediately, because it found (A 8, 88 n.3) that they were unfair labor practice strikers. See cases cited (above, p. 46).

There is no merit to the Newspapers' contention (Br 42) that the strikers do not have reinstatement rights because the

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<sup>10</sup> The Newspapers' contention (Br 41) that the Unions' only real motivation to strike was over the breach of the bargaining ground rules is unsupportable. As shown above (pp. 12-14), the record evidence shows that many of the Unions discussed the merit pay implementation at their pre-strike meetings. Implicit in the Newspapers' contention is an attack on the Board's decision (A 74) to credit the uncontradicted testimony of the union leaders that the merit pay issue was discussed and was a motivating factor. See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 130 F.2d 503 (2d Cir. 1942). The Court, however, will not overturn the Board's credibility findings absent a showing that they are "'hopelessly incredible' or 'self-contradictory.'" Elastic Stop Nut Div. Of Harvard Indus., Inc. v. NLRB, 921 F.2d 1275, 1281 (D.C. Cir. 1990) (citation

object of their strike was unlawful. The Newspapers devote much of their brief (Br 19-28) to a contention that the Unions struck in order to condition further bargaining about mandatory subjects on the Newspapers' return to joint bargaining, a nonmandatory subject of bargaining, and that the strike itself was therefore unlawful and unprotected. As the Board reasonably found (A 96), however, in rejecting that contention, the Newspapers failed to establish that the Unions in fact struck for that purpose.

First, as the Board observed (A 94), the Newspapers waived that contention by failing to raise it in a timely manner. Thus, they unequivocally argued at the hearing and in their brief to the administrative law judge that the strike was an economic strike, and did not contend that the strike was unlawful. (See A 138 ("Clearly, when the record is carefully reviewed, it is obvious that the strike is an economic strike.")) In their exceptions to the judge's decision, however, they claimed for the first time that the strike had an unprotected object and was therefore unlawful. (See Br 29-30.) See Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 116-17 (D.C. Cir. 1996) (failure to raise issue before ALJ constitutes waiver); U.S. Service Indus., Inc., 315 NLRB 285, 285 (1994),

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omitted). In the single paragraph (Br 41) addressing the issue, the Newspapers do not attempt any such showing.

enforced mem., 72 F.3d 920 (D.C. Cir. 1995) (failure to raise argument at proper time constitutes waiver). See also Local 594, UAW v. NLRB, 776 F.2d 1310, 1314 (6th Cir. 1985); Yorkaire, Inc., 297 NLRB 401, 401 (1989), enforced mem., 922 F.2d 832 (3d Cir. 1990).

There is no merit to the Newspapers' contention (Br 29-30) that they did not waive the argument because they complied with the express requirements of Section 10(e) of the Act (29 U.S.C. § 160(e)), by raising the issue to the Board prior to raising it to the Court. The waiver doctrine applied by the Board here is separate, and is aimed at preventing parties from raising new evidentiary matters after the evidentiary stage of an unfair labor practice case has concluded. As shown above, the Newspapers waived the argument that the strike was unprotected before the case even got to the Board itself. Raising the issue to the Board could not undo that waiver.

In any event, there is no merit to the Newspapers' contention (Br 19-28) that the strike had an unprotected object. In order to be unprotected, the strike would have to have constituted insistence to impasse on a nonmandatory subject of bargaining. The Newspapers incorrectly assume (Br 22-24) that because negotiations over a nonmandatory subject of bargaining--two-tiered bargaining--and the strike coincided, the strike

necessarily was an insistence to impasse over the nonmandatory subject and, therefore, was unprotected.

As the Board reasonably found (A 96), to the extent that the Newspapers' refusal to move to joint bargaining was one of the causes of the strike, the Unions were protesting by means of the strike the Agency's breach of its agreement to move to joint bargaining. Such an object is not unprotected. Indeed, it is well established that the breach of bargaining ground rules can be an unfair labor practice. See American Protective Services, Inc., 319 NLRB 902, 903-05 (1995), enforcement denied on other grounds, 113 F.3d 504 (4th Cir. 1997); Natico, Inc., 302 NLRB 668, 671 (1991). Because, at most, the Unions decided to strike partly in protest of what they believed was the Agency's unfair labor practice, as well as those committed by the News, the strike was protected.<sup>11</sup>

There is no merit to the Newspapers' challenge (Br 25-26) to the Board's finding (A 95-96) that by striking, the Unions were not insisting to impasse on a nonmandatory proposal. As the Board noted (A 95), "that a party is engaged in a

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<sup>11</sup> That the Unions were wrong in believing that the Agency's breach of the agreement constituted an unfair labor practice does not establish that the strike was unprotected. Where a union is wrong about whether the conduct it is protesting is an unfair labor practice, the strike simply becomes an economic strike, unless, as here, it has other causes, such as other unfair labor practices. See Pirelli Cable Corp. v. NLRB, 141

strike . . . does not, by itself, mean that the party has conditioned its willingness to enter into an agreement on acceptance of all its proposals, including those relating to nonmandatory subjects." See Swatts v. United Steelworkers of America, 808 F.2d 1221, 1222, 1226-28 (7th Cir. 1986) (where union raised expansion of bargaining unit, but then only engaged in coordinated bargaining, strike was not insistence to impasse on permissive subject); Chicago Tribune Co., 318 NLRB 920, 932 (1995) (strike not unprotected where union did not insist to impasse on permissive subject); Noblit Bros., Inc., 305 NLRB 329, 330-31 (1992) (where union raised, but did not insist to impasse on expansion of bargaining unit, strike was economic); IBEW, Local No. 12, 252 NLRB 245, 250 (1980) (strike not insistence to impasse on permissive subject of contributions to industry fund).

Further demonstrating that the strike did not constitute insistence to impasse over a permissive subject is the fact that the parties continued to bargain over mandatory subjects after the strike began. (A 83; 367, 845.) A recognized hallmark of insistence to impasse on a permissive subject is the conditioning of bargaining over mandatory subjects on acceptance of the permissive subject. See NLRB v. Borg-Warner Corp., 356

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F.3d 503, 519 (4th Cir. 1998) (where Court found no unfair labor practice, strike was economic strike).

U.S. 342, 349-50 (1958). The Newspapers, however, point to no evidence that the Unions ever refused to bargain over the Agency's proposals on mandatory subjects after the Agency began backtracking on its agreement to move to joint bargaining and began making contract proposals on topics that the parties had previously agreed would be reserved for joint bargaining. See Schaub v. Detroit Newspaper Agency, 154 F.3d 276, 279 (6th Cir. 1998) (noting these parties held scores of bargaining sessions during strike). Indeed, in their brief to the administrative law judge, the Newspapers stated that "generally no objections were raised by [the Unions] other than perhaps an occasional reminder that the issue was for joint negotiations" when the Agency raised joint bargaining topics during pre-strike negotiations. (A 137.)

Nor is there merit to the Newspapers' separate contention (Br 43) that the administrative law judge before whom the parties tried the reinstatement issues erred in relying on an earlier decision rendered by a different administrative law judge--and later affirmed by the Board (A 89)--that the strike was caused by unfair labor practices. The Board routinely litigates cases in this manner. See, for example, Columbia Portland Cement Co., 303 NLRB 880, 882 (1991), enforced, 979 F.2d 460 (6th Cir. 1992); State Bank of India, 273 NLRB 267 (1984), enforced, 808 F.2d 526 (7th Cir. 1986). As the judge in

the reinstatement case recognized (A 91), only the Board's decision as to whether the strike was caused by unfair labor practices was binding. His decision expressly stated that, should the Board agree with the Newspapers that the judge in the strike-causation case erred in finding that the strike was caused by unfair labor practices, the charges in the failure-to-reinstate case would have to be dismissed. In short, the Newspapers' demand that it be permitted to offer evidence in the second proceeding regarding whether the strike was caused by unfair labor practices constituted a demand that it be permitted to relitigate the issue. The Board had no obligation to honor such a request.

V. THE BOARD HAD A RATIONAL BASIS FOR CONCLUDING THAT THE AGENCY DID NOT VIOLATE SECTION 8(a)(5) AND (1) OF THE ACT BY IMPLEMENTING ITS PROPOSAL TO PERMIT THE ASSIGNMENT TO NONUNIT EMPLOYEES OF WORK THAT DTU No. 18 TRADITIONALLY PERFORMED

A. Applicable Principles and Standard of Review

As discussed above (p. 24), pursuant to Section 8(a)(5) and (1) of the Act, an employer has an obligation to bargain in good faith with the collective-bargaining representative of its employees. An employer is free, upon reaching a good-faith impasse in negotiations, to implement unilateral changes reasonably comprehended within its pre-impasse proposals. See AFTRA Kansas City Local v. NLRB, 395 F.2d 622, 624 (D.C. Cir. 1968).

Where the Board finds that challenged conduct does not violate the Act, and accordingly dismisses complaint allegations, judicial review is extremely limited. The Board's conclusion that a party did not violate the Act "'must be upheld unless it has no rational basis,'" (District 65, Distributive Workers of America v. NLRB, 593 F.2d 1155, 1164 (D.C. Cir. 1978) (citation omitted)), or unless the only inference that could be reasonably drawn from the record is one that "require[s]" the Board to find the violation. Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 334 F.2d 581, 581 (D.C. Cir. 1964).

B. The Parties Reached a Valid Impasse Regarding the Agency's Work Assignment Proposal; Accordingly, the Agency Lawfully Implemented Its Proposal

As discussed above (p. 7), the Agency opened its 1995 negotiations with DTU No. 18 by proposing that the jurisdictional descriptions in the collective-bargaining agreement be nonexclusive. As explained by the Agency, the effect of its proposal would be to allow employees of departments other than the composing room (where DTU No. 18 employees worked) to do work traditionally done by DTU No. 18 members. DTU No. 18 adamantly rejected the Agency's proposal. On May 11, after several bargaining sessions on the proposal, the Agency declared an impasse and implemented the proposal. (Above, p. 10.)

It is well established that proposals that affect work assignments are mandatory subjects of bargaining. See AMF Bowling Co., Inc. v. NLRB, 977 F.2d 141, 148 (4th Cir. 1992). Thus, the Agency's proposal to permit employees outside of the composing room to do work traditionally reserved for DTU No. 18 members was a mandatory subject of bargaining. Because DTU No. 18 does not dispute that the parties reached a good-faith impasse in negotiations over the proposal, the Board reasonably found (A 7) that the Agency "could lawfully implement its proposal."

There is no merit to DTU No. 18's contention (DTU Br 11-16) that the work assignment proposal could not be implemented because it impermissibly modified a continuing Memorandum of Agreement ("MOA") between DTU No. 18 and the Agency. Although it is well settled that a mid-term modification of a contract is a nonmandatory subject of bargaining and therefore cannot be implemented upon impasse (see UAW, Local 547 v. NLRB, 765 F.2d 175, 179-80 (D.C. Cir. 1985)), DTU No. 18's argument that the work assignment proposal was a mid-term modification of the MOA is not properly before this Court.

DTU No. 18 failed to except to the administrative law judge's finding that the Agency's work assignment proposal was a mandatory subject of bargaining. Accordingly, under Section 10(e) of the Act (28 U.S.C. § 160(e)), this Court has no

jurisdiction to consider DTU No. 18's contention to the contrary. See case cited above, p. 49 n.9. Because the parties are bound by the Board's determination that the Agency's proposal was a mandatory subject of bargaining proposal, and DTU No. 18 does not dispute that the parties bargained over it to impasse, the Court should affirm the Board's dismissal of this complaint allegation.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter denying the Newspapers' and Unions' petitions for review and enforcing the Board's orders in full.

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