This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act when, for reasons related to the COVID-19 pandemic, it allowed non-unit talent (reporters and on air personnel) to broadcast from home, use handheld portable cameras in the field, and record interviews using Zoom on their personal computers, all of which allegedly encroached upon the unit’s work in operating the broadcast equipment. We conclude that the effects of these operational changes on the unit were de minimis in terms of any transfer of work or impact on terms and conditions of employment, and therefore the Employer did not engage in any unlawful unilateral changes.

Fox Television Stations, LLC (the Employer) and Locals 794 and 819, IATSE (the Union) were parties to a collective-bargaining agreement from October 16, 2008 through October 14, 2011, that covered employees who operate, maintain, repair, modify and re-install broadcast and related equipment at the Employer’s Washington, D.C. and New York stations. Although the parties have been engaged in negotiations for a successor agreement since May 2012, they have not reached a successor agreement or extended the expired agreement.

On March 31, 2020, due to the COVID-19 pandemic, the Employer and Union entered into a waiver agreement that provided the Employer with relief from any grievances/claims filed by the Union regarding jurisdiction, staffing, unilateral changes, and premium payment issues. In exchange for that relief, the Employer provided unit employees a premium COVID-19 payment of $75 per day for any unit employee who performed work away from their home. The initial duration period for the waiver agreement was from March 16 to April 12 but it provided for an extension by mutual consent, which the parties exercised to extend the agreement to June 15.

After entering into the waiver agreement, the Employer implemented two operational changes for the purpose of maintaining employee health and safety during the pandemic. First, it had unit employees install technical equipment in its talent’s homes at predetermined settings so that the talent could go on air from home just by switching the equipment on. Pushing the button activated a robotic camera and other equipment that transmitted the signal back to the stations, where unit employees ensured that the signal was transmitted on air. This eliminated the need to adjust the equipment on a daily basis. The Union asserts that if bargaining unit technicians had to set up the equipment daily at the talent’s homes, it would require a minimum of two hours to perform. The Employer also permitted reporters to conduct interviews using Zoom on their personal computers instead of using a camera crew since conducting in-person interviews was problematic due to social distancing guidelines.

On May 22, the Employer informed the Union that it would terminate the
waiver agreement on June 15. The Union did not object to the termination of the agreement but took the position that the Employer would be expected to return to the status quo under the terms of the expired collective-bargaining agreement. On June 15, the parties met to discuss the transition of work from talent’s homes back to the stations. The Union proposed that either unit employees go to talent’s homes to operate the installed equipment, the talent return to the stations, or the Employer continue the premium COVID-19 payments. The Employer counter-proposed that it would pay the four bargaining unit photographers assigned to the field $37.50 per day as long as a handful of talent remained at home. The Union rejected the Employer’s offer and the parties failed to reach an agreement over the issue. The Employer continued to allow some talent to broadcast from home and to use Zoom.

In *Bottom Line Enterprises*, the Board held that where negotiations are in progress, an employer must refrain from unilateral changes “unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” 302 NLRB 373, 374 (1991), *enforced mem. sub nom, Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). An employer is only excused from this obligation where a union has engaged in dilatory tactics to avoid reaching an agreement as a whole, or an economic exigency exists. *Id.* In order to establish that a unilateral change has occurred, however, the General Counsel bears the burden of demonstrating that the change was a material, substantial and significant one affecting the terms and conditions of employment of bargaining unit employees. *Matson Terminals, Inc.*, 367 NLRB No. 20, slip op. at 1 n.2 (Oct. 17, 2020).

We conclude that any transfer of work from unit employees to non-unit talent was de minimis and therefore lawfully implemented notwithstanding that the parties were apparently still in the midst of overall contract negotiations. With respect to broadcasts from talent’s homes, unit employees set up the necessary equipment in the homes and unit employees in the control room were still responsible for transmitting the home broadcasts on air. The only arguable transfer of work pertains to the talent’s pressing a button to activate the equipment. The Union argues that this action amounts to non-unit personnel operating the equipment, in other words, performing unit work. However, we find that, at best, permitting the talent to press the activation button amounts to a negligible transfer of unit work. Likewise, with respect to the use of Zoom, the talent’s operation of a personal computer to run the application is an insignificant operation of equipment. Thus, we conclude that neither operational change resulted in an unlawful transfer of unit work to non-unit employees. See *Ironton Publications*, 321 NLRB 1048, 1048 n.2, 1066-67 & n.25 (1996) (no unlawful transfer of unit work where employer unilaterally removed camera work from pressroom unit and reassigned it to non-bargaining unit employees because the unit only lost 23 minutes of work per week).

Although the Union couches its allegations in terms of an unlawful transfer of unit work, the crux of its position is that the Employer unlawfully eliminated certain work ordinarily performed by unit employees. By placing equipment in
talent’s homes and filming at preset positions, the Employer streamlined the production of its broadcasts. Daily equipment adjustments were no longer necessary and close-up shots and artistic photos were dispensed with, effectively eliminating some work performed by technicians, floor managers, and steady camera operators. Similarly, having reporters conduct interviews over Zoom meant that photographers who ordinarily accompany reporters to film in-person interviews were cut out of the process. However, we are aware of no precedent supporting the proposition that the mere elimination of unit work—in contrast to the transfer or subcontracting of unit work—constitutes a unilateral change absent a significant impact on unit employees’ terms and conditions. See Matson Terminals, 367 NLRB No. 20, slip op. at 1 n.2 (unlawful transfer of barge menu work notwithstanding no impact on employee compensation); Mi Pueblo Foods, 360 NLRB No. 116, slip op. at 1099 (June 11, 2014) (unilateral subcontracting of deliveries unlawful where no layoffs or significant impact on wages and hours because when bargaining unit work is assigned to outside contractors, the bargaining unit is adversely affected).

Here, there is insufficient evidence that the COVID-related operational changes affected unit employees’ terms and condition of employment after the waiver agreement expired on June 15. Although one might expect to see a reduction in hours or even layoffs when unit work is eliminated, here the Employer took no such actions. The unit technicians continued to perform the same duties in the control room to ensure the home broadcasts were transmitted on air, just as they did pre-COVID when the talent worked in the station. Payroll records indicate a two percent reduction in hours over the whole unit (from June 15 to July 15 as compared to that same period in 2019) and two per diem employees experienced a diminution of their work, but there is no evidence tying these reductions to the operational changes challenged here as opposed to the overall decrease in work caused by the pandemic. See North Star Steel Co., 347 NLRB 1364, 1367-68 (2006) (no duty to bargain over transfer of work involving .006 percent of one month’s production of steel where no causal connection between minimal transfer of work and reduction in hours or layoffs). Similarly, the use of Zoom to record interviews had little impact on the unit members’ terms and conditions of employment since, like with the broadcast, the editors continued to edit, the control room employees continued to transmit the interviews, and the photographers have not experienced a significant reduction in hours. Thus, we conclude that the overall impact of the Employer’s decision to allow the talent to broadcast from home and to use Zoom to record interviews had only a de minimis impact on unit members’ terms and conditions of employment. Therefore, the Employer did not implement any unlawful unilateral changes in adjusting operations in light of the pandemic during the timeframe at issue. Accordingly, the Region should dismiss the charge, absent withdrawal.

This email closes the case in Advice as of today. Please feel free to contact us with questions or concerns

(b) (6), (b) (7)(C)
Contrary to the allegations in the charge, there is no evidence that reporters are using handheld portable cameras in the field. Thus, we do not further analyze this issue.

In light of this conclusion, we need not decide whether the pandemic amounted to either kind of economic exigency, one excusing bargaining altogether or a lesser exigency permitting piecemeal bargaining over a matter that requires prompt action. See *RBE Electronics of S.D.*, 320 NLRB 80, 81-82 (1995).

Although the decision to institute these operational changes was driven by health and safety concerns rather than labor costs and, thus, was not subject to a bargaining obligation under the framework set forth in *Dubuque Packing Co.*, 303 NLRB 386, 392 (1991), enforced in relevant part sub nom. *UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), the effects of that decision would still be a mandatory subject of bargaining. See *Allison Corp.*, 330 NLRB 1363, 1365 (2000).