Gannett Rochester Newspapers, a Division of Gannett Co., Inc. ***and*** **Newspaper Guild of Rochester, Local 17** ***and*** **Rochester Newspaper Pressmen's Union No. 36.** Cases 3–CA–16218 and 3–CA–16403

September 29, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On December 21, 1992, Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed a brief in answer to the General Counsel's exceptions, and the General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] as modified and to adopt the recommended Order as modified.

FACTS

Due to a severe ice storm, local officials banned nonessential travel in the Rochester, New York area on March 4, 1991.[2] Severe weather conditions and travel restrictions continued on March 5. As a result, a number of the Respondent's employees, both represented and nonrepresented, missed work. The employee handbook provided that if travel was banned by a legal authority, the Respondent would pay nonrepresented employees for the work time lost. According to the handbook, ''[f]or represented employees the provisions of the contract, if any, will prevail.'' The Respondent paid most of the nonrepresented employees who missed work on March 4 and/or 5 for those days. On March 8, representatives of both the Guild and the Pressmen's Union received the following memorandum from Hector Rodriguez, the Respondent's director of human relations:

> In compliance with contractual agreements, for those employees who were not at work on Monday, 3/4/91, and/or Tuesday, 3/5/91, the following will apply:
>
> Employees may use a personal day, if available, in order to be compensated for the day.
>
> If employees choose not to use a personal day, they will not be compensated for the day.

Analysis

We adopt the judge's findings that the Respondent did not violate Section 8(a)(3) of the Act by paying nonrepresented employees (but not represented employees) for days of work missed due to a weather emergency. We agree with the judge, for the reasons stated by him, that the Respondent did not have a past practice of paying its represented employees for time lost due to a weather emergency, and thus Respondent did not unilaterally change any practice when it refused to pay unit employees for lost worktime on March 4 and 5.[3] The judge, however, failed to address the separate complaint allegation that the Respondent applied the policy to the represented employees ''without having afforded either union an opportunity to negotiate and bargain.'' We find, for the reasons stated below, that the Respondent violated Section 8(a)(5) and (1) by unilaterally promulgating and implementing a policy requiring the Pressmen's bargaining unit employees, who missed work on March 4 or 5, either to take a personal day or not be compensated. For the reasons stated below in footnote 4, however, we adopt the judge's dismissal of the similar 8(a)(5) allegation involving the Guild unit.

The Respondent's collective-bargaining agreement with the Pressmen expired on December 31, 1990, and the parties were in the process of negotiating a new agreement in March 1991, when the ice storm occurred. The judge found generally that the parties were still operating under the terms of the expired contract, although without any express extension agreement. The expired contract did not contain any provision regarding pay for time lost due to inclement weather or legally imposed travel bans. The expired contract did not provide for personal days, per se, but provided each employee with a day off for his or her birthday and employment anniversary date. These days could be taken on a date other than the designated date, with the permission of the employee's foreman. As noted by the judge, some employees used their birthday and/or employment anniversary date days off to avoid the loss of compensation in accordance with the policy announced in the Respondent's March 8, 1991 memorandum.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of his employees.'' Section 8(d) of the Act defines ''to bargain collectively'' as the mutual obligation of the employer and the union ''to meet at reasonable times and to confer in good

[1] As we affirm the judge's finding that the Respondent had no past practice of paying represented employees who miss work due to weather conditions or legally imposed travel bans, we find it unnecessary to rely on the judge's statement that, if a past practice had existed, he could not find that the zipper clause in the Respondent's contract with the Guild was a waiver of the Guild's right to bargain regarding its elimination.

[2] All dates refer to 1991 unless otherwise specified.

[3] We reject as irrelevant and unsupported, the Respondent's assertion that because of the nature of its business, it was determined early on that it was an essential service not restricted from travel.

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faith with respect to wages, hours, and other terms and conditions of employment.''

It is clear that compensation for lost time due to a weather emergency is an element of wages and is thus a mandatory subject of bargaining. As noted, at the time of the events, there was no contract in effect. During such ''non-contract'' periods, all mandatory subjects are, of course, subject to the duty to bargain.[4] Thus, it follows that the matter of compensation in connection with weather emergencies was subject to the duty to bargain.

We recognize that the Pressmen never formally requested bargaining on the subject. That was because, however, the Respondent presented the Pressmen with a fait accompli by its announcement on March 8.

Inasmuch as Respondent acted unilaterally with respect to a mandatory subject, we conclude that it violated Section 8(a)(5) of the Act.[5]

Having found that the Respondent violated Section 8(a)(5) and (1), as described above, we shall modify the recommended Order and notice accordingly.

AMENDED CONCLUSION OF LAW

Add the following as Conclusion of Law 2 and renumber the last Conclusion of Law accordingly.

''2. By unilaterally promulgating and implementing a policy regarding compensation for worktime lost due to inclement weather conditions, without giving the Rochester Newspaper Pressmen's Union No. 36 prior notice and an opportunity to bargain, the Respondent has violated Section 8(a)(5) and (1) of the Act.''

AMENDED REMEDY

Having found that the Respondent acted unlawfully in unilaterally promulgating and implementing a policy regarding compensation to employees represented by the Rochester Newspaper Pressmen's Union No. 36 for days missed due to inclement weather conditions, we shall order the Respondent to restore personal days for those unit employees who took such days in order to avoid a loss of compensation in accordance with the policy announced in the Respondent's March 8, 1991 memorandum, and to make whole those unit employees who did not take personal days and who thereby suffered a loss of compensation. We shall also order the Respondent, on request, to bargain with the Pressmen's Union regarding the policy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gannett Rochester Newspapers, a Division of Gannett Co., Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph as 1(c).

''(b) Unilaterally promulgating and implementing a policy regarding compensation for work time lost due to weather conditions for the bargaining unit represented by Rochester Newspaper Pressmen's Union No. 36, without giving the Union prior notice and an opportunity to bargain.''

2. Add the following as paragraphs 2(b), (c), and (d) and reletter the subsequent paragraphs accordingly.

''(b) Rescind, as to the bargaining unit represented by the Pressmen's Union, the policy announced in the Respondent's memorandum of March 8, 1991.

''(c) Restore personal days for those unit employees who took such days in order to avoid a loss of compensation in accordance with the policy announced in the Respondent's March 8, 1991 memorandum, and make whole those unit employees who did not take personal days and who thereby suffered a loss of compensation.

''(d) On request, bargain with the Rochester Newspaper Pressmen's Union No. 36 regarding the policy announced in the Respondent's memorandum of March 8, 1991.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

WE WILL NOT fail or refuse to bargain in good faith with the Newspaper Guild of Rochester, Local 17, by failing or refusing to furnish it with requested information which is relevant and necessary to the perform-

[4] During contract periods, a ''zipper'' clause may operate to privilege a refusal to bargain on uncovered subjects for the life of the contract. See *NLRB v. Tomco Communications*, 567 F.2d 871 (9th Cir. 1978). Because the contract here had expired, we need not decide whether sec. 27 of the contract was a ''zipper'' clause in this sense of the word or constituted a waiver if the contract had continued in effect.

With respect to the Guild unit, the contract was in effect at the time of the events. That contract contained a ''zipper'' clause in the aforementioned sense of the word. Thus, the judge correctly dismissed the 8(a)(5) allegations regarding the refusal to bargain on request as to that unit.

[5] The Respondent cannot successfully claim that its action was a mere continuation of extant conditions. Although there was no practice of paying wages in weather emergencies, neither was there a practice of not paying wages. Thus, the Respondent's failure to pay was not simply the continuation of a past practice.

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ance of its obligations as the bargaining representative of the appropriate bargaining unit.

WE WILL NOT fail or refuse to bargain with the Rochester Newspaper Pressmen's Union No. 36 by unilaterally promulgating or implementing policies relating to compensation for time lost from work due to weather related emergencies, for members of the appropriate bargaining unit, without giving the Union notice and an opportunity to bargain.

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

WE WILL furnish the Newspaper Guild of Rochester, Local 17, as the exclusive bargaining representative of our employees in the appropriate unit, with the following information which the Guild requested: all written policies governing snow days and weather emergencies, including all policies that existed before March 3, 1991, and all those created subsequent to that date, covering all of the departments in our Rochester, New York facility.

WE WILL rescind, as to the bargaining unit represented by the Pressmen's Union, the policy announced in the Respondent's memorandum of March 8, 1991.

WE WILL restore to members of the bargaining unit represented by Rochester Newspaper Pressmen's Union No. 36, any personal days taken in order to avoid a loss of compensation in accordance with the policy announced in the Respondent's March 8, 1991 memorandum, and will make whole those unit employees who did not take personal days and who thereby suffered a loss of compensation.

WE WILL bargain, on request, with Rochester Newspaper Pressmen's Union No. 36, regarding the policy announced in the memorandum of March 8, 1991, and, if an understanding is reached, take the appropriate action.

GANNETT ROCHESTER NEWSPAPERS, A DIVISION OF GANNETT CO., INC.

Linda Harris Crovella, Esq., for the General Counsel.
William A. Behan, Esq., of Arlington, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. This case was tried in Buffalo, New York, on September 17, 18, and 19, 1991,[1] based on unfair labor practice charges filed on April 1, by the Newspaper Guild of Rochester, Local 17 (the Guild), and on June 20, by the Rochester Newspaper Pressmen's Union No. 36 (the Pressmen's Union), as amended on July 1, and a complaint issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board), on May 9, as amended and consolidated on July 11.

[1] All dates hereinafter are 1991 unless otherwise specified.

The complaint alleges that Gannett Rochester Newspapers, a Division of Gannett Co., Inc. (GRN or Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by discriminating between employees represented by unions and those who were not so represented in the payment of compensation for time lost due to a weather emergency, by unilaterally changing a past practice respecting such payments, by refusing to furnish the Guild with information relating to such past practices and policies which was necessary and relevant to the Guild's performance of its statutory functions, and by refusing to negotiate with the Guild concerning payment to employees in the Guild unit who were unable to come to work during an officially declared state of emergency. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the witnesses and their demeanor, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNIONS' LABOR ORGANIZATION STATUS

GRN, a Delaware corporation, with an office and place of business in Rochester, New York, is engaged in the publication, circulation, and distribution of a morning and an evening newspaper, the ''Democrat and Chronicle'' and the ''Times-Union,'' respectively. Over the course of the last 12 months, GRN has derived gross revenues in excess of $200,000 and has held membership in interstate news services, published nationally syndicated features, and advertised nationally sold products. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Guild and the Pressmen's Union are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Collective-Bargaining History*

1. The Guild

Since at least November 1979, GRN has recognized the Guild as the collective-bargaining representative of its employees in the following unit, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time employees of the news and editorial departments, as described in the collective bargaining agreement between the parties, employed at the Employer's 55 Exchange Boulevard, Rochester, New York facility; excluding all individuals described as exempt in Article 1 of the collective bargaining agreement, all managerial employees, confidential employees, guards and supervisors as defined in the Act.

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GRN and the Guild have been parties to successive (although not continuous) labor agreements; the term of the agreement pending at the time of the events ran from September 25, 1989, to September 24, 1992.

The Guild contract contains no express language respecting pay for time lost due to inclement weather or legally imposed travel bans. In the most recent negotiations, neither party had proposed such language and there was no discussion of when or if employees would be paid under those conditions. The contract does provide each unit member with 2 personal days to be used when and as the employee determines. That provision was a negotiated change from the prior agreement that had provided that unit members had an additional vacation day on or around the employee's birthday and employment anniversary date.

The GRN-Guild contract contains the following ''zipper'' clause (art. XXV, sec. 4):

> 4. The contract entered into on September 25, 1989 between the [Guild] and the [newspapers] constitutes the sole and entire agreement between the parties, and supercedes all prior agreements, commitments, and practices, whether oral or written between the Company and the Union and any covered employee or employees.
>
> No matter or matters shall be the subject of collective bargaining negotiations during the term of this agreement, even though such matters may not have been negotiated upon previously nor within the knowledge or contemplation of either or both of the parties hereto at the time of negotiations for this contract.

This same language, but with the date of that contract's execution, has appeared in each of the agreements; the parties updated this provision in the current agreement by insertion of the new date, as proposed by GRN's negotiator.

Other than the change in effective date, no changes in the zipper clause had been proposed by either party. There had, however, been discussion of that clause in the course of negotiations in connection with a proposed merger clause that had included its own zipper language. The Guild's negotiator suggested that this ''mini-zipper'' was unnecessary in light of the contractual zipper clause, quoted above, and it was agreed that the ''mini-zipper'' clause be deleted from the merger clause language.

Since the current agreement was executed, GRN has twice requested that the Union bargain with it over changes in contract language, notwithstanding the zipper clause. In 1989, it requested that the Guild bargain over its proposal to modify vacation language; in 1990, it requested negotiations on direct deposit of payroll. In each case, the Guild acceded to its request.

Wendell Van Lare, GRN's director of labor relations, and its chief negotiator, testified that there was a clear understanding that the zipper clause cut off all past practices, or at least those that a party does not wish to maintain. It was acknowledged, however, that certain noncontractual practices and benefits have remained in effect for all of GRN's employees, regardless of whether they were covered by a collective-bargaining agreement. Included are such benefits as life insurance, a stock purchase plan, and discounts on newspaper subscriptions, classified advertising, and obituaries. Other benefits enjoyed by the unrepresented employees, such as a 401(k) plan or long-term disability insurance, are not provided to the represented employees.

2. The Pressmen's Union

Since at least 1976, GRN has recognized the Pressmen's Union as the collective-bargaining representative of the employees in the following unit, as described in the most recent collective-bargaining agreement:

> All web printing press employees employed in the Employer's pressroom producing any portions of the daily or Sunday newspapers.

Section 2(5) of that contract further provided that membership in the Pressmen's Union was optional for the day foreman, the night foreman, and their respective assistant foremen.

This unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b).[2]

GRN and the Pressmen's Union have had successive contracts since at least 1978. The last contract expired on December 31, 1990. The parties were still operating under its terms, although without any express extension agreement, and were engaged in negotiations when the events of this case transpired.

The last contract between GRN and the Pressmen's Union included, in section 27, the following zipper clause language:

> The rights and relations of the parties hereto are covered by the terms of this Agreement and there are no agreements or understandings past or present not set forth herein or attached.

No proposals to amend this language were made by either party in the current negotiations.

The expired contract did not provide for personal days. Rather, it provided each employee with a day off for his or her birthday and employment anniversary date, to be taken on that date or on another day with the permission of the foreman.

As with the Guild-represented employees, those in the Pressmen's unit shared some noncontractual benefits with the nonrepresented employees but did not enjoy strict parity with them on all benefits.

B. *Relevant Policies and Practices*

Respondent's 1990 employee handbook, in effect in March 1991, contains the following inclement weather policy:

> In the event that government agencies declare a snow emergency, the company will adhere to the following:
>
> 2. All regular full time, non-represented employees who are scheduled to work and do not work any por-

[2] Implicit in this unit is the exclusion of statutory supervisors, managerial, and confidential employees and guards. The Employer asserts that the following is the appropriate unit:

> All web printing press employees employed by the Employer in the pressroom at the 55 Exchange Boulevard, Rochester, New York facility, excluding all individuals agreed by the Employer and the Pressmen's Union as exempt, all managerial employees, confidential employees, guards and supervisors as defined in the Act.

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> tion of their shift will not be paid for the unworked shift unless a legal authority bans travel in their area during work hours for bona fide emergencies.
>
> Employees may not use vacation, personal or holiday time in order to receive pay for the day. For represented employees the provisions of the contract, if any, will prevail.

This handbook, which was distributed to the nonrepresented employees, also provided:

> The programs and benefits described in this handbook may or may not apply to members of a bargaining unit, depending on whether the union has bargained for them. Union employees should consult their collective bargaining agreement for programs applicable to them.

Prior to this, on January 29, 1985, the then personnel manager, Chris Landauer, had issued a memorandum to various department heads which stated GRN's ''*revised* policy on snow days.'' It stated:

> If a legal authority *bans travel* during working hours except for bona fide emergencies, employees will be paid for such days.
>
> Otherwise, employees who report to work will be paid for the day. . . . Employees who do not (or cannot) report to work will *not* be paid. Employees may *not* use vacation or holiday eligibility in this case. [Emphasis in original.]

The department heads to whom this memorandum was directed included those who supervised the pressroom and the newsroom; under their supervision were both represented and nonrepresented employees. The Landauer memorandum made no distinction between those classes of employees. It was posted in both the pressroom and the newsroom for some period of time but had been removed long before March 1991.

According to Hector Rodriguez, GRN's director of human relations, the Landauer memo was a revision of the policy that had been set forth in the 1979 edition of the supervisors policy manual.[3] That policy was essentially identical to the 1991 statement set forth above, except that it specifically stated: ''For represented employees, the specific provisions of the union contract, if any, will prevail.''

The 1979 policy did not mention personal days; there is no indication whether such a benefit existed for either the represented or unrepresented employees at that early date.

Like the Guild-represented employees, the nonrepresented employees now have 2 personal days per year that they may take for any purpose.

Several days prior to the issuance of the Landauer memorandum, Rochester had a heavy snow storm. No official ban on travel, however, was announced. Nonetheless, at least one employee in each of the represented units involved missed work as a result of that storm and was paid for the day.

C. *The Events of March 1991*

Beginning on Sunday, March 3, Rochester experienced a severe ice storm that continued into the late morning of March 4. Travel was severely impacted by the ice and downed trees and power lines. An official ban on nonessential travel was announced.

As a result of the storm, a number of Respondent's employees, both represented and nonrepresented, were unable to get to work. Of the Guild-represented newsroom employees, 17 missed work on March 4 or 5 and 2 were out both days. Four pressroom employees missed work on March 4.

On March 7, Rodriguez and David Mack, GRN's publisher, discussed how to pay the employees who missed work as a result of the storm. While both testified that they decided to follow the policies of the 1990 handbook, Mack's notes indicate that, on March 8, he decided to:

> stick to '85 policy for non-rep[resented]. Pay for day travel banned. Represented policy: Use a holiday or vac[ation].

According to Mack, nonrepresented employees would be compensated if they provided their managers with a reasonable explanation for their absence. Represented employees, however, were bound by the terms of their agreements and, since those agreements were silent on the subject, he believed that the Employer was precluded by law from unilaterally conferring a new benefit upon them, i.e., paying them for the day. He decided to permit them to use a personal day for compensation if they so chose.

On March 8, representatives of both the Guild and the Pressmen received the following memorandum from Rodriguez:

> In compliance with contractual agreements, for those employees who were not at work on Monday, 3/4/91, and/or Tuesday, 3/5/91, the following will apply:
>
> > Employees may use a personal day, if available, in order to be compensated for the day.
> >
> > If employees choose not to use a personal day, they will not be compensated for the day.

Pursuant to that policy, the represented employees either took personal leave or were not paid for the lost time. Nonrepresented employees were, in the main, paid for their time lost due to the storm.[4]

D. *The Guild's Grievance, Its Information Request, and Bargaining Demand*

On receipt of Rodriguez' March 8 memorandum, the Guild filed a grievance, dated March 12, protesting the denial of compensation to Guild members unable to come to work during the state of emergency ''under the policy promulgated unilaterally by management.'' That grievance, filed under article XVII of the agreement, asked that Rodriguez contact John Riley, the grievance chairman, particularly to explain what ''contractual provisions'' management was relying on.

[3] Rodriguez was not employed by GRN in Rochester in either 1979 or 1985.

[4] Respondent's records concerning who was paid, for what days, and on what basis, are somewhat confused. For the purposes of this decision, however, the conclusion stated above is both accurate and sufficient. I note that any disparate treatment between employees (whether represented or not) and supervisors, such as Patricia Rissberger, is irrelevant to the issues of this case.

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On the same date, Guild President Steven Orr submitted a written request for bargaining ''over the company's policy of failing to pay employees who have been unable to come to work during an officially declared state of emergency.'' Orr referred to GRN's actions as ''unilateral changes in terms and conditions of employment without benefit of collective bargaining.''

On the following day, Orr made the following information request:[5]

> So that the Guild can properly prosecute the grievance filed yesterday, so that it can prepare for the bargaining requested yesterday, and for the purposes of general administration of the collective bargaining agreement, please forward to us copies of all written policies governing snow days and weather emergencies. This request includes all policies that existed before last week's ice storm and those created subsequent to it, and that cover the various departments in the building.

Rodriguez replied to Orr's letters on March 22, asserting ''that Gannett Rochester Newspapers made no unilateral changes in terms and conditions of employment.'' The letter continued:

> Article XXV (4) of the current collective bargaining agreement [the zipper clause] is specific about the contractual obligations of both parties. The [Guild] did not negotiate any benefit covering emergencies, and it would not be appropriate or legal for the Company to unilaterally create such a benefit.
>
> While the issue of pay during emergencies is a subject of bargaining, we decline to do so during the term of the contract. We would be happy to take up the matter when we negotiate a successor agreement in 1992.
>
> Your request for Company policies covering nonbargaining unit employees in reference to this matter is respectfully denied because you have not established any relevance of such policies to your grievance.

The Guild made no effort to further explain to GRN why the requested information was relevant. At the hearing, however, Orr testified that he made the request for several reasons. One was that he had heard that there had been a posting regarding weather emergencies in several departments; he had no copy of that posting and sought it. Further, inasmuch as he understood that unrepresented employees were being treated differently, he wanted to verify whatever policy was being applied to them. It was his intention, he claimed, to use such information to formulate bargaining demands for immediate and/or future use, and to muster arguments to be used in prosecuting the grievance to show that the Guild employees were being treated unfairly.

Guild and GRN representatives met on the grievance on March 29. Referring to the Landauer memorandum of January 29, 1985, Riley asked why GRN was treating its represented and nonrepresented employees differently. Rodriguez claimed that he had first seen the Landauer memo that week, when Production Director Monscour referred it to him. He had a copy of that memo with him, together with a cover sheet which, he claimed, established that the Landauer memo merely clarified pay policies that were in existence for nonrepresented employees. Riley asked to see that cover, which was a copy of the applicable page from the 1979 handbook. Rodriguez refused to show it to him but read the sentence stating: ''For represented employees, the specific provisions of the union contract, if any, will prevail.''

In denying the Guild's grievance, Rodriguez echoed Mack's assertion that it would have been illegal for GRN to have unilaterally granted the represented employees the benefit of paid leave for weather emergencies when no such benefit had been negotiated.

Sometime before March 15, Pressmen's Union's president, Kenneth Short, had met with Production Director Michael Monscour to discuss the pay issue. At that meeting time, Short gave Monscour a copy of the Landauer memorandum, which Short had retained in union files since its posting in 1985. Purportedly, Monscour had not previously been aware of that memorandum. Monscour rejected the Pressmen's payment request by similarly contending that it would have been illegal for GRN to pay the represented employees for the lost time.

On March 15, Monscour sent Short a memorandum setting forth the Employer's position that the Landauer memorandum was merely ''an explanation of company policy for nonbargaining unit employees.'' Monscour referred Short to Rodriguez' March 8 memo explaining the procedures for represented employees and again denied the request for payment. The 1979 policy was attached to his answer, with a reference to the paragraph concerning union contracts.

E. *Analysis*

1. Existence of a practice

The starting point for any discussion is whether Respondent had a practice of paying both nonrepresented and represented employees for time lost due to weather emergencies. The record is less than crystalline on this point, in part because such occasions were rare, notwithstanding Rochester's frequently harsh winter weather.

Unquestionably, GRN has an established policy, dating back to at least 1979, of compensating its nonrepresented employees for such lost time. The 1979 supervisor's handbook, the 1985 Landauer memorandum, and the 1990 employee handbook all so provide.

In January 1985, when a ''blizzard'' hit Rochester, some employees were unable to come to work. No official travel ban was declared. Nonetheless, at least one employee in each of units involved was paid for the day without the necessity of taking a day of leave. In what may have been a response to those payments having been made in contravention of stated policy, then Personnel Manager Landauer published a memorandum setting forth a ''revised'' policy on snow days. That ''revision'' reasserted the position that such pay was only to be granted when legal authority banned travel. It made no distinction between represented and nonrepresented employees, thus appearing to extend the policy to all employees.

The foregoing, I find, is insufficient to meet the General Counsel's burden of establishing a past practice. *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *Whirlpool Corp.*, 281 NLRB 18 (1986). Although the reference to it being a ''revision'' tends to indicate that some change in policy was in-

[5] The exhibit, G.C. Exh. 4, was mistakenly dated February 13.

tended, the memorandum is otherwise ambiguous.[6] It neither expressly included nor expressly excluded represented employees. See *Ithaca Journal-News, Inc*., 259 NLRB 394, 396 (1981), wherein the Board held that a single ambiguous memorandum was insufficient to prove the existence of an ''established past practice.'' The distribution and posting of this memorandum (by persons who have not been identified) adds little inasmuch as it reached both classes of employees and their supervisors. Similarly, the compensation of two represented employees for lost time some 6 years earlier, with no evidence that such payments have continued, fails to prove the practice. These instances are ''too remote in time and too intermittent in their occurrence to demonstrate an established practice.'' *Exxon Shipping*, supra at 493.[7] Arguably, as those employees were compensated when there had been no legal ban on travel, apparently in violation of existing policies, it could be contended that those payments prompted the publication of the Landauer memorandum as a clarification, as Rodriguez described it on March 29.

Neither can I find a practice to have existed simply because the language of the employee handbooks provides that represented employees would enjoy the benefits provided in their collective-bargaining agreements, ''if any,'' or that they should consult those agreements to determine their benefits. Contrary to the General Counsel, I do not find it implicit in such language that, if there are no specified contractual benefits, the policies applicable to the nonrepresented employees would prevail. A more reasonable interpretation, particularly in light of the zipper clauses in the contracts (present and expired), is that the represented employees have such benefits only if they are set forth in their contracts.

2. Discrimination

The General Counsel contends that GRN's failure to compensate the represented employees, while paying those who were unrepresented, for absences due to the weather emergency was inherently destructive of the employees' Section 7 rights and violative of Section 8(a)(3) under the general language of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). This argument is expressly and necessarily conditioned upon the presence of an established policy to pay both for such lost time. As I have found insufficient evidence to establish the required practice, I shall recommend that this allegation be dismissed.[8]

Moreover, even if I were to have found the practice to have existed as suggested by the General Counsel, I would be compelled to dismiss the 8(a)(3) charge. Adducing no evidence of union animus, the General Counsel argues this allegation under *Great Dane*, supra. The disparate treatment, it is argued, was so ''inherently destructive'' of Section 7 rights as to require no proof of illegal motivation. The Board, however, has considered similar cases under traditional 8(a)(3) concepts, and dismissed them where, as here, proof of discriminatory motivation was lacking.

Thus, in *Harvard Folding Box*, 273 NLRB 841, 852 (1984), where the employer had provided insurance coverage to nonrepresented employees without charge, but had charged the represented employees for that same coverage, the Board stated:

> [I]t is well established that an employer's grant of benefits to unrepresented employees which are withheld from represented employees does not violate Section 8(a)(3) of the Act absent proof of discriminatory motive.

Of similar import is *Ithaca Journal-News*, supra at 396, where the Board noted that even if a past practice (of raising mileage rates equally for represented and nonrepresented employees) had be established, ''the evidence fails to prove that Respondent's motivation in discontinuing it was discriminatory.''

3. The Guild's information request

The Guild, having filed a grievance and demanded bargaining over the denial of compensation for time lost due to the weather emergency, requested copies of Respondent's policies concerning snow days and weather emergencies. The request sought all those policies which were applicable throughout the facility. The request explained that the information was needed in order to prosecute the grievance, prepare for bargaining, and for general contract administration. At the hearing, Orr further explained that he wanted to see the policy statement which he believed to have been posted and wanted to determine whether there had been disparate treatment. He repeated his argument that the information was necessary to process the grievance and for bargaining, then and in the future. Respondent denied the request, claiming that the Guild had not established relevance.

Respondent's position cannot withstand scrutiny for several reasons. The first is that the policies, to the extent that they applied to the Guild members, were clearly relevant. Information pertaining to the working conditions of unit employees ''is presumptively relevant and must be disclosed unless it 'plainly appears irrelevant.''' *Western Massachusetts Electric Co*., 228 NLRB 607 (1977), enfd. 573 F.2d 101 (1st Cir. 1978); *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1951); *WCCO Radio, Inc*., 282 NLRB 1199 (1987), enfd. 844 F.2d 511 (8th Cir. 1988). The burden of establishing that it is not relevant falls upon the employer. *WCCO Radio*, supra. Respondent has not met this burden.

Respondent, however, argues that information pertaining to the unrepresented employees was not relevant and therefore its refusal to furnish such information was privileged. I disagree. The Guild was clearly entitled to such information in order to prepare for a grievance that was based on alleged disparate treatment between the represented and nonrepresented employees. *Associated General Contractors of California*, 242 NLRB 891, 893 (1979). Moreover, information

[6] If, as it stated, that memorandum was a revision, and not merely a restatement, of the 1979 handbook, the extension of such benefits to the represented employees was the only substantive change made to existing policies.

[7] I would also note that if, in fact, the Landauer memorandum was intended to extend the snow emergency policy to the represented employees, it would potentially have been a unilateral change in violation of Sec. 8(a)(5).

[8] The General Counsel's contention that the policy should have been applied to the members of the Pressmen's unit because they had no contract similarly must fall. While they had no current agreement, they were continuing to work under the terms of their expired agreement. They did not become nonrepresented and subject to the terms of the policies for such employees merely because their contract had expired.

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is not irrelevant merely because it pertains to nonunit employees. A union is entitled to such information for the preparation of future proposals. *WCCO Radio, Inc*., supra at fn. 6; *Times-Herald, Inc*., 237 NLRB 922 (1978). The Guild wanted to bargain about weather emergency compensation and what it believed to be a unilateral change in policy. Orr professed to want it in preparation for future negotiations, as well. Those are sufficient reasons to mandate disclosure of benefits paid to nonunit employees. Orr adequately explained the Guild's purposes in seeking such information, both in his letter and at the hearing.

The information which the Guild sought was relevant, the Guild gave adequate explanations to establish its relevance, and I find that Respondent's refusal to furnish the information violated its duty to bargain in good faith. *NLRB v. Acme Industrial*, 385 U.S. 432 (1967).

4. Refusal to bargain

a. *Alleged unilateral action*

I have found that there was no past practice whereby GRN paid its represented employees for time lost due to a weather emergency. It follows that it engaged in no unilateral change of any practice when it refused to pay unit employees such time on March 4 and 5. Accordingly, I shall recommend that this allegation be dismissed.

b. *The refusal to meet and bargain with the Guild*

GRN contends that the zipper clause contained in its agreement with the Guild both vitiates any preexisting practice with respect to weather emergency compensation and relieves it of any burden to bargain in midterm concerning such compensation.

Whether this zipper clause would permit GRn to unilaterally cease following a practice respecting weather emergency compensation is a question which need not be decided here, as I have found no such practice to exist.[9]

Whether this zipper clause excuses Respondent from midterm bargaining with respect to such compensation where no such practice exists, i.e., whether it may be interposed as a shield against such a bargaining demand rather than as a sword with which to eliminate existing noncontractual benefits, is a separate question. The Board clearly answered this question in *GTE Automatic Electric*, 261 NLRB 1491 (1982). In that case, the parties' agreement continued, without discussion, a waiver clause that had been in its successive agreements for many years. That clause provided, inter alia:

> [T]he Company and the Union, for the life of this Agreement, each voluntarily and unqualified waives the right to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

That language is the equivalent of the language that has consistently appeared in the GRN-Guild agreements.

In its initial decision, the Board found that this clause did not constitute a waiver of midterm bargaining as to benefits that were neither in existence nor proposed in the negotiations leading up to that agreement. On reconsideration, however, the Board expressly found that:

> Respondent may rely on the waiver contained in its contractual zipper clause [footnote omitted] . . . said clause clearly and unequivocally covers the Union's request to bargain concerning the implementation of a new benefit.

The Board went on to state:

> We are of the opinion that, by permitting Respondent to invoke the zipper clause as a shield against the Union's midterm demand for bargaining over a new benefit, and by giving literal effect to the parties' waiver of their bargaining rights, industrial peace and collective-bargaining stability will be promoted. [Footnote omitted.]

GTE Automatic, supra at 1491–1492. That case stands as the applicable precendent today. See *TCI of New York, Inc.*, 301 NLRB 822 (1991).

General Counsel's contention that GRN, by requesting midterm negotiations with the Guild, has somehow waived its right to use the zipper clause as a shield against such requests by the Guild is without merit. The principle underlying application of the zipper clause is that a party may not be required to engage in midterm negotiations, not that it may not seek, or participate, in them. Additionally, it could certainly be argued that inasmuch as wages, holidays, and paid leave were fully discussed in the course of the negotiations, the zipper clause would stand as a waiver of rights to midterm bargaining on a proposal for paid weather emergency leave even if the tests applied by *TCI of New York*, supra, and *Gannett Co*., supra, for bargaining over the elimination of existing benefits were to be applied here.

Accordingly, to the extent that the complaint alleges GRN's refusal to discuss weather emergeny compensation with the Guild in midterm as an unlawful refusal to bargain over a new benefit, I shall recommend that it be dismissed.

[9] Were I to reach this issue, I would be compelled to find that the zipper clause did not evidence a clear and unmistakable waiver of the Guild's right to notice and bargaining concerning the elimination of a preexisting practice. The Board has recently so held with respect to these parties and this zipper clause. *Gannett Rochester Newspapers*, 305 NLRB 906 (1991) enf. denied in relevant part 988 F.2d 198 (D.C. Cir. 1993). The administrative law judge therein noted that the parties had discussed the zipper clause in connection with the merger clause proposal; he and the Board noted that the zipper clause remained unchanged in language from the prior agreement. The Board concluded that ''no event put the union on notice that Respondent contemplated a change in the bargaining relationship'' and agreed with the judge ''that the Union did not clearly and unmistakably waive its right.'' Neither the judge nor the Board commented on the change in effective date of that clause from the prior to the current agreement; I cannot conclude that that change was so meaningful as to put the Guild on notice that Respondent might eliminate existing practices.

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CONCLUSIONS OF LAW

1. By failing and refusing to bargain in good faith with the Newspaper Guild of Rochester, Local 17, by failing and refusing to furnish it with requested information which was relevant and necessary to the performance by the Guild of its obligations as bargaining representative of Respondent's employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. Respondent has not, in any other manner alleged in the complaint, engaged in any unfair labor practices.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Gannett Rochester Newspapers, a Division of Gannett Co., Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Newspaper Guild of Rochester, Local 17, by failing and refusing to furnish it with requested information that was relevant and necessary to the performance by the Guild of its obligations as bargaining representative of Respondent's employees.

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

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

(a) Furnish the Newspaper Guild of Rochester, Local 17, as the exclusive representative of all its employees in the appropriate unit described here with the following information requested by the Guild: all written policies governing snow days and weather emergencies, including all policies that existed before March 3, 1991, and all those created subsequent to that date, covering all of the departments in Respondent's facility.

(b) Post at its facility in Rochester, New York, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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

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

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