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GERARD M. WAITES (DC & PA)

PHYLLIS C. BORZI  
OF COUNSEL

4748 WISCONSIN AVENUE, NW  
WASHINGTON, DC 20016  
(202) 362-0041  
FAX (202) 362-2640

9 NORTH ADAMS STREET  
ROCKVILLE, MD 20850  
(301) 251-0929

CONSTITUTION PLACE  
SUITE 515  
325 CHESTNUT STREET  
PHILADELPHIA, PA 19106  
(215) 629-4970



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(1930-1979)  
JOSEPH P. BOYLE  
(1954-1998)

October 24, 2007

**Via E-Mail Filing and Overnight Delivery**

Mr. Lester Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW  
Washington, D.C. 20570

Re: **CNN America, Inc. and Team Video Services, LLC, Joint Employers,**  
**Case Nos. 5-CA-31828, 5-CA-33125**

Dear Mr. Heltzer:

This office represents one of the Charging Parties—National Association of Broadcast Employees - Communications Workers of America, Local 31 (“NABET Local 31”)—in the above captioned matters. Please accept for filing by e-mail a copy of “Charging Party NABET Local 31’s Memorandum in Opposition to the Motion for Summary Judgment.”

In accordance with the Board’s rules, NABET Local 31 is providing the original and seven copies (for a total of 8 copies) by overnight mail. NABET Local 31 has also included an extra copy for date stamping. Please date-stamp that copy and return it in the self-addressed stamped envelope.

If you have any question or need additional assistance, please feel free to contact me at (202) 362-0041. Thank you for your assistance in this matter.

Sincerely,

Keith R. Bolek  
Counsel for NABET Local 31

Enclosures

cc: Via Overnight Mail (w/encl.)  
Thomas McCarthy, NLRB Region 5  
Carol Baumerich, NLRB Region 5  
Lowell Peterson, Meyer Suozzi (Local 11)  
Peter Chatilovicz, Seyfarth Shaw (TVS)  
Zachary Fasman, Paul Hastings (CNN)

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,  
Joint Employers,

and

Case 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES  
& TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 31, AFL-CIO,

and

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,  
Joint Employers,

and

Case 5-CA-33125

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES  
& TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 11, AFL-CIO.

**CHARGING PARTY NABET LOCAL 31'S  
MEMORANDUM IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT**

National Association of Broadcast Employees & Technicians - Communications Workers of America, Local 31, AFL-CIO ("NABET Local 31" or "Local 31") respectfully submits this Memorandum in Opposition to the Motion for Summary Judgment filed by Respondent Team Video Services, LLC ("TVS").

**I. INTRODUCTION**

On October 10, 2007, Respondent TVS filed a motion for summary judgment with the National Labor Relations Board ("Board"). The Respondent contends in its motion that, "[t]he record in this case shows that there are no genuine issues of material fact regarding the General Counsel's claims against Respondent TVS, and that TVS is entitled to summary judgment as a

matter of law.” (Resp. TVS Mot. for Summ. Jud. [“TVS Mot.”] at 1.) It further asks the Board to dismiss the General Counsel’s Amended Complaint with respect to TVS. (TVS Mot. at 11.)

In the context of a summary judgment motion, the Board construes all controverted factual allegations in light of the non-movants, *i.e.*, the General Counsel and the Charging Parties. *Lakeview Convalescent Ctr.*, 307 NLRB 563, 564, n.7 (1992). When the Board considers the disputed factual allegations along with the undisputed facts, the Board should find that TVS is not entitled to summary judgment. Accordingly, the Board should deny TVS’s motion for summary judgment.

## II. STATEMENT OF FACTS

Respondent TVS has been engaged in the business of providing technical labor and management—including field, studio, maintenance and engineering technicians—and specialized video services to television broadcast networks, such as Respondent CNN America, Inc. (“CNN”). (Amended Complaint [“Am. Compl.”] ¶ 2(d).) On September 18, 1997, TVS entered into an Electronic News Gathering Services Agreement (“ENG Agreement”) with CNN, whereby TVS would provide field, studio, and engineering technicians for CNN’s Washington, D.C. studio. (TVS Mot., Ex. 1. *See also* Am. Compl. ¶ 2(g).) The field, studio and engineering technicians (along with technical directors) at the Washington, D.C. bureau constitute a bargaining unit for which NABET Local 31 is the exclusive bargaining representative. (Am. Compl. ¶¶ 5(b), 6(b).) On or about February 28, 2002, TVS entered into a memorandum of understanding with CNN with respect to another ENG Agreement, whereby TVS would provide field, studio and engineering technicians for CNN’s New York, N.Y. studio. (TVS Mot., Ex. 3. *See also* Am. Compl. ¶ 2(g).) The field, studio and engineering technicians at the New York,

N.Y. studio constitute a bargaining unit for which NABET Local 11 is the exclusive bargaining representative. (Am. Compl. ¶¶ 5(a), 6(a).)

At all material times, Respondents TVS and CNN shared the authority to determine matters that govern the essential terms and conditions of employment of the employees in the bargaining units at the Washington, D.C. and New York, N.Y. bureaus. (Am. Compl. ¶ 2(h).) TVS and CNN also administered a common labor policy with respect to the employees in these two bargaining units. (*Id.*) Therefore, TVS and CNN constitute joint employers of the employees represented by NABET Local 31 in the bargaining unit at the Washington, D.C. studio, as well as the employees represented by NABET Local 11 in the bargaining unit at the New York, N.Y. studio. (Am. Compl. ¶ 2(k).)<sup>1</sup>

Respondent CNN announced on September 29, 2003, that it would be terminating its ENG Agreements with TVS covering the Washington, D.C. and New York, N.Y. bureaus. (TVS Mot., Ex. 4.) As explained by CNN's Executive Vice President, Cindy Patrick, "[t]his change will not occur immediately and [TVS] will continue to support our two bureaus for the next several months while CNN fills the positions created by this change." (*Id.*) Ms. Patrick added, "[b]ecause we expect to fill nearly as many new positions at CNN as currently filled by [TVS], there will be a significant number of job openings posted shortly." (*Id.*)

Since on or about September 29, 2003, Respondent CNN established recruitment and hiring procedures, as well as applied those procedures, in a discriminatory fashion to avoid the

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<sup>1</sup> In its motion for summary judgment, "TVS strongly maintains that it was never a joint employer with CNN during the course of its contractual relationship with CNN and NABET." (TVS Mot. at 6, n.1.) TVS further asserts, "the General Counsel cannot establish the requisite sharing or codetermination of essential terms and conditions of employment that would allow the Board to find a joint employer." (*Id.*) Given TVS has denied it is a joint employer with CNN, the facts relating to the joint employer allegation are construed in the light most favorable to the General Counsel and Charging Parties. *Lakeview Convalescent Ctr.*, 307 NLRB at 564, n.7.

hiring of a majority of bargaining unit employees at either the Washington, D.C. or the New York, N.Y. bureaus. (Am. Compl. ¶ 17(a).) CNN also expanded the historic bargaining units at the Washington, D.C. and New York, N.Y. bureaus in order to avoid a successorship obligation to recognize and bargain with Local 31 and Local 11. (Am. Compl. ¶ 17(b).)

During the hiring process, TVS managers at the New York, N.Y. bureau made certain statements to bargaining unit employees. For example, on or about November 13, 2003, the Director of Engineering for TVS, Ed DeLauter, “told TVS engineers, applying for jobs with CNN, that they were just numbers during the interview process and that CNN would hire less than 50% from the TVS staff in order to avoid the Union.” (Am. Compl. ¶ 9(d).)<sup>2</sup>

Absent the discriminatory hiring and recruitment procedures, as well as the expansion and packing of the bargaining units, the bargaining unit employees would have comprised a majority of the employees in the historic bargaining units at the Washington, D.C. and New York, N.Y. bureaus. (Am. Compl. ¶ 18.) Moreover, even under CNN’s hiring and recruitment procedures, CNN unlawfully failed and refused to hire (or delayed in the hiring) of 17 bargaining unit employees at the Washington, D.C. bureau and 22 bargaining unit employees at the New York, N.Y. bureau. (Am. Compl. ¶ 19(a).) CNN also failed or refused to hire (or delayed the hire) of 6 bargaining unit employees at the Washington, D.C. bureau and 3 bargaining unit employees at the New York, N.Y. bureau because of their activities as union members, union activists or shop stewards. (Am. Compl. ¶ 20.) Absent the foregoing discriminatory conduct, CNN would have hired a majority of bargaining unit employees for the units at both the Washington, D.C. and New York, N.Y. units. (Am. Compl. ¶ 19(b).)

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<sup>2</sup> Once again, TVS denied the factual allegations pertaining to the statement by Mr. DeLauter and, therefore, for purposes of the Respondent’s motion, the statements are construed in the light most favorable to the General Counsel and the Charging Parties. *Lakeview Convalescent Ctr.*, 307 NLRB at 564, n.7.

The ENG Agreements between TVS and CNN terminated in late 2003 and early 2004. (Am. Compl. ¶¶ 2(i), 13(a) & 13(b).) The ENG Agreement covering the Washington, D.C. bureau terminated on December 29, 2003. (TVS Mot., Ex. 6 at 1.) However, TVS ceased its operations at the Washington, D.C. bureau and the two Respondents terminated the bargaining unit employees at that bureau on December 5, 2003. (*Id.*) The ENG Agreement covering the New York, N.Y. bureau terminated on February 26, 2004. (*Id.*) Once again, TVS ceased its operations at the New York, N.Y. and the two Respondents terminated the bargaining unit employees on January 16, 2004, more than a month before the termination date. (*Id.*)

Before the ENG Agreements were terminated, CNN, as a joint employer with TVS, transferred the work previously performed by the bargaining unit employees to CNN's newly hired employees, transferees and/or managers. (Am. Compl. ¶¶ 13(a) & (b).) CNN also unilaterally changed the wages, benefits and other terms and conditions of employment covering the employees at the Washington, D.C. and New York, N.Y. bureaus. (Am. Compl. ¶¶ 14(a) & 14(b).) These changes include, but are not limited to, changing the scope of the bargaining units; changing the job descriptions of bargaining unit employees; changing the status of employees to "at will"; changing the wages and fringe benefits for bargaining unit employees; and reducing or eliminating various differentials, bonuses and other premiums paid to bargaining unit employees. (*Id.*) Respondent CNN made these changes in terms and conditions of employment, which were mandatory subjects of bargaining, without providing notice and an opportunity to bargain to NABET Locals 31 and 11. (Am. Compl. ¶ 16(b).)

The General Counsel has filed an amended complaint alleging, *inter alia*, that TVS and CNN, as joint employers, have violated Sections 8(a)(5), (3) and (1) of the National Labor Relations Act ("Act") by terminating the ENG Agreements, discharging the bargaining unit

employees, and transferring the work to newly-hired CNN employees. (Am. Compl. ¶¶ 13(a), 13(b), 16(a).) The General Counsel has further alleged that CNN violated Sections 8(a)(5), (3) and (1) by establishing and applying discriminatory hiring procedures to avoid hiring a majority of bargaining unit employees and by making unilateral changes in terms and conditions of employment without providing notice and a reasonable opportunity to bargain to either NABET Local 31 or NABET Local 11. (Am. Compl. ¶¶ 14(a), 14(b) & 16(b).) Respondents CNN and TVS have each filed an answer to the Amended Complaint.

TVS has also filed a motion for summary judgment. In this motion, the Respondent asserts that, “[t]he General Counsel has failed to establish that there is any basis to hold TVS liable for the alleged unfair labor practices committed by CNN after it terminated the ENG Agreements with TVS.” (TVS Mot. at 5 (emphasis in original).) Citing the Board’s decision in *Capitol EMI Music, Inc.*, 311 NLRB 997 (1993) (“*Capitol EMI*”), *enf’d, per curiam*, 34 F.3d 399 (4th Cir. 1994), TVS also claims that “the General Counsel cannot impute liability to TVS because TVS was not a knowing participant in any unlawful acts by CNN to discriminate against NABET members through the unlawful termination of the ENG Agreements, nor did it otherwise acquiesce in the effectuation of an unfair labor practice by failing to take any action that was within its powers.” (TVS Mot. at 7.)

### III. ARGUMENT

#### A. Respondent TVS’ Argument Concerning Liability for CNN’s Unlawful Actions After the Termination Lacks Merit and Should be Rejected

Respondent TVS asserts that, “[t]he General Counsel has failed to establish that there is any basis to hold TVS liable for the alleged unfair labor practices committed by CNN after it terminated the ENG Agreements with CNN.” (TVS Mot. at 5.) The Respondent premises this argument upon a misunderstanding of the Amended Complaint. TVS contends that, “the

General Counsel alleges that TVS, as joint employer with CNN, violated Section 8(a)(1) and (5) of the Act, because CNN failed to adhere to the terms of the collective bargaining agreements with NABET” for the Washington, D.C. and New York, N.Y. bureaus “after December 6, 2003 and January 16, 2004.” (*Id.* (citing Am. Comp. ¶¶ 12(b), 12(d) & 25) (emphasis in original.)

Paragraphs 12(b) and 12(d) of the Amended Complaint provide as follows:

(b) Since on or about December [5], 2003, Respondent TVS and CNN, as joint employers have failed to continue or adhere to the terms of the collective bargaining agreement described above in paragraphs 6(b) and 12(a) with regard to the DC Unit, *by terminating the collective bargaining agreement.*

\* \* \*

(d) Since on or about January 16, 2004, Respondent TVS and CNN, as joint employers have failed to continue or adhere to the terms of the collective bargaining agreement described above in paragraphs 6(b) and 12(a) with regard to the NY Unit, *by terminating the collective bargaining agreement ....*

(Am. Compl. ¶¶ 12(b) & (d) (emphasis added).) These allegations relate to the unlawful termination of the ENG Agreements, and the subsequent termination of the bargaining unit employees and their collective bargaining agreements. Paragraph 25 of the Amended Complaint simply summarizes the violations by Respondents TVS and CNN with respect to the failing and refusing to bargain collectively with the Charging Parties in violation of Section 8(a)(5) and (1) of the Act. (Am. Compl. ¶ 25.)

By contrast, the General Counsel has proffered additional averments in the Amended Complaint that relate to unfair labor practices allegedly committed by CNN (but not TVS) after the termination of the ENG Agreements, the discharge of the bargaining unit employees and the repudiation of the collective bargaining agreements. (*See, e.g.*, Am. Compl. ¶¶ 14, 15, 16(b), 17(b).) These allegations relate, *inter alia*, to CNN’s alleged unilateral changes in terms and conditions of employment at the Washington, D.C. and New York, N.Y. bureaus *after* TVS was

no longer on the scene. (*See, e.g.*, Am. Compl. ¶¶ 14(a) & 14(b).) There are no allegations that TVS is liable for alleged unilateral changes after the dates that the ENG Agreements terminated, *viz.*, December 29, 2003 in Washington, D.C. and February 26, 2004 in New York, N.Y. (*Id.*)

Therefore, the Board should reject Respondent TVS' argument that the General Counsel has "failed to establish" TVS' liability for alleged unfair labor practices after the termination of the ENG agreements, because the General Counsel has not alleged any such liability in the Amended Complaint.

**B. The Board Should Deny TVS' Motion for Summary Judgment with Respect to Issues Relating to Joint Employer Liability**

**1. The Standard for Joint Employer Liability in *Capitol EMI Music, Inc.***

Generally, one joint employer is jointly and severally liable for the unfair labor practices committed by the other joint employer. *See Whitewood Maintenance Co.*, 292 NLRB 1159, 1162 (1989), *enf'd*, 928 F.2d 1426 (5th Cir. 1991). In *Capitol EMI*, the Board created a limited exception to this general rule. This limited exception applies in cases involving alleged discrimination in violation of Section 8(a)(3) of the Act where one joint employer merely supplies employees to the other joint employer, without participating in the oversight of these employees and without having any representative at the workplace. *Capitol EMI*, 311 NLRB at 1000. In such cases, the Board decided that "we will find both joint employers liable for an unlawful employee termination ... only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it." *Id.*

With respect to proving these inferences, the Board announced the following standard:

The General Counsel must first show (1) that the two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, *if* it knew, it took all measures within its power to resist the unlawful action.

*Capitol EMI*, 311 NLRB at 1000. While the Board initially limited the standard in *Capitol EMI* to situations where one joint employer merely supplies employees to another one, it has since applied the standard in a case involving the replacement of the represented employees of one joint employer with the unrepresented employees of the other joint employer. *Le Rendezvous Restaurant*, 332 NLRB 336, 336-37 (2000).

However, the Board has not applied the *Capitol EMI* standard to alleged violations of Section 8(a)(5). See *Gary Noren Productions*, Case No. 19-CA-28312, 2003 NLRB GCM LEXIS 92, at \*13 (Div. of Advice Jun. 30, 2003) (recognizing Board has not applied *Capitol EMI* to cases involving Section 8(a)(5) allegations and that Board "continues to hold joint employers jointly and severally liable in refusal to bargain cases"). Rather, the general rule that joint employers are joint and severally liable for violations of Section 8(a)(5) remains the current law. *Branch Int'l Svcs.*, 327 NLRB 209, 219 (1998) (stating "[w]hen entities are joint employers, each is jointly and severally liable for the other's refusal to bargain in good faith").

2. **The Board Should Deny the Motion for Summary Judgment Because there are Genuine Issues of Material Fact under *Capitol EMI***

In its Motion for Summary Judgment, TVS fails to distinguish between the alleged violations of Section 8(a)(5) and the alleged violations of Section 8(a)(3), apparently arguing that the Board's standard in *Capitol EMI* applies to both sets of allegations. As noted in the previous section, the Board holds joint employers jointly and severally liable for violations of Section

8(a)(5), and, thus, TVS may be held jointly and severally liable with CNN for violations of Section 8(a)(5) that occur prior to the termination of the ENG Agreements. With respect to the alleged violations of Section 8(a)(3), for which the standard in *Capitol EMI* applies, NABET Local 31 respectfully submits that the Board should deny TVS's motion for summary judgment because there are genuine issues of material fact as to the knowledge of TVS with respect to CNN's unlawful conduct and the actions taken by TVS to resist that unlawful conduct.

a. *There Are Genuine Issues of Material Facts as to TVS' Knowledge of CNN's Unlawful Conduct*

Respondent TVS brazenly asserts that "there is no evidence even suggesting that TVS had any knowledge that CNN's decision to terminate its ENG Agreements with TVS was anything other than a legitimate business decision to move its ENG services in-house." (TVS Mot. at 8.) In making such a sweeping assertion, TVS overlooks certain controverted allegations in the Amended Complaint, such as the allegations in Paragraph 9. In that paragraph, the General Counsel alleges that managers of TVS made certain statements concerning the allegedly unlawful conduct of CNN. For example, the General Counsel alleges in Paragraph 9(d) of the Amended Complaint that, on November 13, 2003, Director of Engineering for TVS, Ed DeLauter, allegedly told bargaining unit employees, who were applying for jobs with CNN, "that they were just numbers during the interview process and that CNN would hire less than 50% from the TVS staff in order to avoid the Union." (Am. Compl. ¶ 9(d).)

Comments by an agent of the non-acting employer (*i.e.*, TVS) acknowledging the potentially unlawful activity of the acting joint employer (*i.e.*, CNN), such as the statement allegedly uttered by Mr. DeLauter, are more than sufficient to establish that TVS knew or should have known of the unlawful reason for CNN's action in terminating the ENG Agreement covering the New York, N.Y. bureau, causing the termination of the bargaining unit employees,

and transferring the unit work to non-union, newly hired CNN employees. *See Le Rendezvous Restaurant*, 332 NLRB at 337 (finding nonacting employer knew or should have known about acting employer's unlawful activity, manager of nonacting employer wrote response to acting employer's memorandum urging acting employer not to hire union-represented employees). The General Counsel has alleged that TVS managers made these statements and TVS has denied the General Counsel's allegations. The alleged facts surrounding Mr. DeLauter's statement, which go directly to TVS' knowledge and which are disputed by TVS, present a textbook example of a genuine issue of material facts.

Statements by TVS managers also provide a sufficient basis to draw a reasonable inference that TVS knew or should have known of the unlawful reasons for CNN's termination of the ENG Agreement covering the Washington, D.C. bureau, causing the termination of the bargaining unit employees, and transferring the unit work to non-union, newly hired CNN employees. In the summary judgment context, the Board may draw all reasonable inferences from the evidence in favor of the non-movants, *i.e.*, the General Counsel and the Charging Parties. Moreover, even without direct evidence, the Board may use simple logic to infer unlawful motive and/or knowledge. *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1261-62 (D.C. Cir. 1980). In this case, the evidence submitted by TVS in support of its motion for summary judgment clearly reveals that CNN terminated the ENG Agreements at the Washington, D.C. and New York, N.Y. bureaus as part of a common endeavor that CNN called the "Bureau Staffing Project." (TVS Mot., Ex. 5 (Affidavit of CNN Vice President Cindy Patrick).) If TVS managers in one of the two bureaus affected by the Bureau Staffing Project (*i.e.*, the New York, N.Y. bureau) knew of CNN's unlawful objectives (*e.g.*, to circumvent any potential successor obligations), then simple logic permits the Board to infer that TVS managers

at the other bureau affected by the Project (*i.e.*, the Washington, D.C. bureau) knew or should have known of CNN's illicit objectives. In other words, if TVS knew or should have known that CNN was engaged in discriminatory practices at the New York, N.Y. bureau, it could not have been so naïve as to think that CNN was not engaged in the same practices at the Washington, D.C. bureau. *Soft Drink Workers Union Local 812*, 657 F.2d at 1262.

Finally, unlike the Federal Rules of Civil Procedure, the Board's Rules and Regulations do not provide for discovery. Thus, there has been no exchange of interrogatories and/or requests for the production of documents, with the resulting disclosures of information and documents. The exchange of documents in the unfair labor practice context occurs, if at all, at the beginning of the unfair labor practice hearing. The Charging Party is especially hindered in this regard because whatever statements or documents that were turned over to the General Counsel as part of the investigation have not been shared with the Charging Party. While TVS has provided an affidavit from the former president of TVS, that affidavit is self-serving with conclusory statements. (*See, e.g.*, Affidavit of Larry D'Anna ¶ 22 (stating "TVS had no knowledge which would suggest that CNN's decision to terminate the ENG Agreements were motivated by anti-union animus or was otherwise implemented for any reason other than business decision [*sic*] to move its ENG services in-house".)) In considering a motion for summary judgment, the Board should evaluate the need for cross-examination, access to proof by the opposing party, and the desirability of fully exploring a case at the hearing. *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 54 (D.C. Cir. 1984). In this case, these considerations strongly outweigh a self-serving affidavit provided by a respondent seeking to escape liability for unlawful conduct. The Board should require a full hearing on all of the issues, including the liability of TVS for the alleged unfair labor practices committed by itself and CNN as a joint

employer, with the exchange of documents at the beginning of the hearing and cross-examination during the hearing.

Accordingly, for the foregoing reasons, NABET Local 31 respectfully submits that there are genuine issues of material fact concerning the issue of whether TVS knew or should have known about CNN's unlawful motives in terminating the ENG Agreements, thereby causing the discharge of the bargaining unit employees and the transfer of unit work to non-union employees. These issues are particularly ripe for full exploration at trial, beginning with the exchange of documents pursuant to subpoenas, followed by the introduction of evidence, and continuing with the cross-examination of witnesses.

**b. *There Are Genuine Issues of Material Facts as to the Self-Proclaimed "Innocence" and "Powerlessness" of TVS***

Apparently aware of the possibility that the Board may find TVS knew or should have known about CNN's unlawful objectives in terminating the ENG Agreements, TVS contends that it "was an 'innocent party' that was powerless to take any meaningful action to resist the alleged unlawful termination by CNN." (TVS Mot. at 8.) Citing and quoting the decision of the United States Court of Appeals for the Sixth Circuit, which modified the Board's decision and order, TVS contends that it cannot be held liable for the unfair labor practices in this case because it was an "entirely innocent and unconscious instrument" of CNN. (*Id.* (citing and quoting *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985), *enforcing and modifying in part, Pacemaker Driver Svc., Inc.*, 269 NLRB 971 (1984).) TVS claims that, once CNN provided notice that it was terminating the ENG Agreements, TVS had "no contractual or other rights" that it could have utilized "to rectify the alleged unlawful act by CNN." (TVS Mot. at 9.)

The evidence submitted by TVS in support of its motion for summary judgment strongly suggests otherwise. On December 4, 2003, which was several weeks after a TVS manager made

a statement evincing knowledge of CNN's unlawful objectives (*see supra*), TVS entered into an agreement with CNN concerning "financial arrangements in connection with termination" of the ENG Agreements. (TVS Mot., Ex. 6.) This agreement offered TVS an opportunity to rectify the allegedly unlawful act of CNN. For example, TVS could have insisted that, as part of the agreement, CNN place the bargaining unit employees on a preferential hire list.<sup>3</sup> TVS could have opposed the transparent and discriminatory hiring process used by CNN to bypass qualified and experienced bargaining unit employees. In sum, as a co-equal party in a contractual relationship, TVS had the power to take action with meaning, such as to negotiate contractual provisions in the agreement on financial arrangements connected to the termination of the ENG Agreements, that could rectify the harms and injuries caused by CNN's unlawful conduct.

Rather than utilize its power to oppose, mitigate or prevent CNN's scheme to destroy the statutory rights of the employees and their union, TVS negotiated an agreement with CNN that provided cover for the wrongdoing Respondent. TVS and CNN stuffed the agreement (TVS Mot., Ex. 6) with statements clearly intended as a defense against the unfair labor practice charges in this case. For example, the Respondents included a provision that states:

[t]he parties specifically recognize and agree that TVS is the sole employer of its workforce in Washington and New York, that TVS and [CNN] are not joint employers and that [CNN] shall have no liability to TVS employees by virtue of this agreement, or by virtue of the underlying ENG agreements or the cessation of operations conducted pursuant to such agreements.

(TVS Mot., Ex. 6 at 1.) This provision is a transparent attempt to manufacture a defense against potential unfair labor practice charges, such as the charges that initiated these proceedings.

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<sup>3</sup> It should be noted that TVS could have requested that its bargaining unit employees be given preferential consideration at an earlier point in CNN's hiring process; however, after learning of CNN's unlawful motives, the Board's decision in *Capitol EMI* required TVS to take action, *i.e.*, TVS could have insisted upon such preferential treatment to rectify CNN's unlawful conduct.

Respondent TVS negotiated additional provisions into this agreement that purports to insulate CNN from any liability for its conduct. For instance, TVS further excused CNN from providing anything to the bargaining unit employees, by agreeing to provisions such as, “[CNN] shall have no obligation to pay any severance pay or any accrued unused benefits which TVS may be required to pay as the sole employer of its workforce in Washington, D.C. and New York.” (*Id.* at 2.) TVS also agreed to indemnification provisions that would make TVS, which now claims it is defunct (*see infra*), “fully and exclusively liable for any and all actual, potential or threatened claims or litigation brought by or on behalf of its managers or employees for all events occurring prior to the Termination Dates, including but not limited to any claims for violation of federal, state or local laws regulating the workplace.” (TVS Mot., Ex. 6 at 4.) Rather than opposing or rectifying the unlawful acts of CNN, TVS agreed to insulate the wrongdoing Respondent from the legal and financial consequences of its unlawful conduct. Under such circumstances, TVS has failed to take any measures, let alone all measures, within its power to resist CNN’s unlawful actions; instead, TVS simply aided and abetted CNN’s attempt to insulate itself from any potential liability for those actions. *Skill Staff of Colorado*, 331 NLRB 815, 816 (2000) (finding that, rather than protesting unlawful conduct, one joint employer assured wrongdoing joint employer that it was “doing its best” to help wrongdoer “in keeping union members off its jobs”).

Finally, TVS asks the Board to insulate the Respondent from the legal and financial consequences for its silence and inaction, as it watched CNN engage in a course of conduct that led to the termination of hundreds of employees, as well as the evisceration of negotiated wages, hours and other terms and conditions of employment. TVS asserts that it no longer exists as a business entity and that its parent company, Asgard Entertainment Group (“Asgard”), “a small

video production company with modest resources,” has spent “significant amounts of money defending a decision over which it had absolutely no control...” (TVS Mot. at 10, n.5.) “It is well settled that mere discontinuation in business does not moot issues of unfair labor practices alleged against a respondent.” *East Dayton Tool & Die Co.*, 239 NLRB 141, n.1 (1978) (quoting *Armitage Sand & Gravel, Inc.*, 203 NLRB 162, 166 (1973), *enf’d in part, per curiam*, 495 F.2d 759 (6th Cir. 1974)). The fact that TVS may have discontinued its business does not moot the issues of whether that respondent is liable for unfair labor practices committed against its employees. *East Dayton Tool & Die Co.*, 239 NLRB at 141, n.1. Furthermore, the “innocent” parent company, Asgard, currently touts TVS’ experience as the contractor for CNN at the Washington, D.C. and New York, N.Y. bureaus to market not only itself, but also its other subsidiaries.<sup>4</sup> As Asgard continues to profit from TVS’ experience as the contractor at CNN’s bureaus, it must also bear the cost of, not only TVS’ silence in the face of CNN’s unlawful conduct, but also TVS’ own unfair labor practices.

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<sup>4</sup> For an example of Asgard Entertainment using TVS’ experience at CNN’s Washington, D.C. and New York, N.Y. bureaus to promote Asgard, see <http://www.icommag.com/december-2004/december-page-8.html> (last visited Oct. 18, 2007) (stating, in December 2004 press release involving Asgard’s acquisition of New River Media that Asgard, “known in the marketplace as ‘TEAM’” first “entered the ‘people management’ field in 1997 when the Cable News Network (CNN) hired the company to employ and manage technicians in CNN’s Washington, DC bureau”). For an example of one of Asgard’s subsidiaries using TVS’ experience for marketing to prospective customers, see [http://www.teampeople.tv/clients\\_cnn.html](http://www.teampeople.tv/clients_cnn.html) (last visited Oct. 18, 2007) (stating, *inter alia*, “both of these CNN units operated under collective bargaining agreements, and TeamPeople excelled at negotiating mutually beneficial contracts and maintaining cooperative relations between labor and management”). See also <http://www.teamgroup.tv/> (last visited Oct. 18, 2007) (website for Team Group, which identifies CNN as a “client”).

**IV. CONCLUSION**

Accordingly, for the foregoing reasons, NABET Local 31 respectfully requests that the National Labor Relations Board deny the motion for summary judgment filed by Respondent Team Video Services, LLC.

Respectfully submitted,

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By: Brian A. Powers / KRB  
Brian A. Powers  
Keith R. Bolek  
O'DONOGHUE & O'DONOGHUE LLP  
4748 Wisconsin Avenue, NW  
Washington, D.C. 20016  
(202) 362-0041

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Counsel for NABET Local 31

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this 24th day of October 2007, a true and correct copy of the foregoing "Charging Party NABET Local 31's Memorandum in Opposition to the Motion for Summary Judgment" was served by UPS overnight delivery, on the following:

Thomas McCarthy, Esq.  
Carol Baumerich, Esq.  
NATIONAL LABOR RELATIONS BOARD  
REGION 5  
1099 14th Street, Suite 5530  
Washington, D.C. 20016

Lowell Peterson, Esq.  
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.  
1350 Broadway, Suite 501  
New York, NY 10018

Zachary Fasman  
Kenneth Willner  
PAUL, HASTINGS, JANOFSKY & WALKER, LLP  
75 East 55th Street  
New York, NY 10022

Peter Chatilovicz  
SEYFARTH SHAW  
815 Connecticut Avenue, N.W., Suite 500  
Washington, D.C. 20006

  
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Keith R. Bolek