

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

CNN America, Inc, and Team Video Services, LLC,
Joint Employers,

Respondents

and

Case No. 5-CA-31828

National Association of Broadcast Employees &
Technicians, Communications Workers of America,
Local 31, AFL-CIO,

Charging Party

and

CNN America, Inc. and Team Video Services, LLC,

Respondents

and

Case No. 5-CA-33125
(formerly 2-CA-36129)

National Association of Broadcast Employees &
Technicians, Communications Workers of America,
Local 11, AFL-CIO,

Charging Party

GENERAL COUNSEL'S BRIEF IN REPLY TO CNN'S ANSWERING BRIEF

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I. INTRODUCTION

Counsel for the General Counsel replies as follows to CNN's Answering Brief to General Counsel's Cross-Exceptions and Local 31's Partial Cross-Exceptions.¹

II. JOINT EMPLOYER ISSUES

A. The General Counsel's Cross-Exceptions Regarding the ALJ's Joint-Employer Finding Were Intended Only To Correct the ALJ's Incomplete Articulation of the Basis of That Finding

The ALJ cited numerous factors in support of his joint-employer finding. CNN's continued insistence that the finding was based on a single factor denies reality. CNN apparently believes that, if it can treat these factors *ad seriatim*, it can then dismiss each factor as the "only" one that supports the joint-employer finding. The ALJ relied on the totality of the evidence as establishing the joint-employer finding, and the General Counsel urges the Board to do the same.

Contrary to CNN's assertion that the General Counsel "mistakenly cites alleged evidence of indirect control," (CNN Ans. Brief 2), the General Counsel has provided copious examples of CNN's direct control over job assignment and supervision, discipline, wages, benefits, collective bargaining negotiations and other terms and conditions affecting Team employees. (*See* GC Ans. Brief 22-57.) There is no undisputed evidence supporting CNN's argument.

¹ CNN America, Inc. shall be referred to herein as "CNN." Team Video Services LLC shall be referred to as "TVS," "Team" or "Team Video." TVS, separately at each bureau location, may be referred to as "TVS DC" and "TVS NY." NABET CWA Locals 31 and 11 shall be referred to independently as "Local 31" and "Local 11," and collectively as the "Unions" or "Union." The Decision and Recommended Order of the Administrative Law Judge (the "ALJ") shall be referred to as the "ALJD." References to the ALJD shall be "ALJD [page number:line numbers]" or "ALJD [page number]". References to the transcript shall be "[Witness name] [page number]" or "Tr. [page number]". References to the record exhibits shall be "GC [page number], CNN [page number] or "TVS [page number]." References to CNN's Answering Brief to General Counsel's Cross-Exceptions and Local 31's Partial Cross-Exceptions shall be "CNN Ans. Brief [page number], and CNN's Brief in Support of Exceptions shall be "CNN Ex. Brief [page number]". General Counsel's Answering Brief to CNN's Exceptions shall be GC Ans. Brief [page number], and General Counsel's Brief in Support of Cross-Exceptions shall be "GC Cross-Ex. Brief [page number]".

B. CNN Meaningfully and Continuously Directed and Controlled the Work of TVS Employees

Were CNN's directions to Team employees as limited and routine as CNN would have the Board believe, there would be no evidence of interaction between TVS Unit employees and CNN assignment desk personnel, producers and directors. Team employees would need only be told what location to report to and what event or show was scheduled. In its Answering Brief and Brief in Support of Cross Exceptions, General Counsel has set forth in copious detail the pervasive and direct role CNN played in managing TVS employees and co-determining their terms and conditions of employment. (GC Ans. Brief 22-56, 146-153; GC Cross-Ex. Brief 2-13).

In support of its erroneous position that Team alone controlled the terms and conditions of employment, CNN relies on cases in which the work performed was routine, and required little direct supervision. By contrast, the work performed by Team employees compelled CNN to provide constant creative interaction and direction on complex equipment.² CNN also cites cases in which the client instructed the contractor's employees as to what work to perform and the location of the assignment, rather than how the work should be performed.³ In the instant case, as has been detailed in General Counsel's Answering and Cross-Exceptions Briefs, CNN exerted direct control over the way in which Team employees performed their jobs. In citing to cases in which the putative joint employer provided the most perfunctory supervision, CNN attempts to make its point by comparing apples and oranges.

² *Laerco Transp. and Warehouse*, 269 NLRB 324 (1984) (supervision of trucking employees limited and routine because the employees did not need to be told what to do); *Flav-O-Rich, Inc.*, 309 NLRB 262 (1992) (unskilled painting and labor which required little supervision); *AM Property Holding Corp.*, 350 NLRB 998 (2007) (work performed by cleaning employees in commercial properties).

³ See *G. Wes Ltd., Co.*, 309 NLRB 225 (1992) (asbestos company's supervisory personnel told contractor's employees where to work and with whom to work, but not how to do the job); *Island Creek Coal*, 279 NLRB 858 (1986) (mine operator's engineers instructed contractor's employees as to the type and location of assignment; the manner in which the assignment was completed was left to the contractor).

CNN also errs in arguing that the ALJ's Decision and General Counsel's position depend on CNN's having contracted out an essential rather than ancillary portion of its primary business. While both the ALJ and the General Counsel have pointed out that this is true, no one has argued that a company that contracts out a portion of its core business is necessarily a joint employer. Rather, General Counsel has emphasized the centrality to Team's services to CNN's business as part of General Counsel's demonstration that instructions given by CNN to Unit employees were not limited and routine. In the context of the production of a complex and creative product, CNN's instructions to TVS employees shaped the manner in which the contractor provided its service and directly impacted everything TVS employees did. The cases cited by CNN, in which the Board declined to find a joint-employer relationship even where a central function was contracted out, are inapposite because, in each of these cases, the direction to employees was limited and routine despite the centrality of the contracted function. Further, none of the cases cited by CNN stand for the proposition that the integration of the function contracted out to the employer's overall business is irrelevant, as CNN contends. The cases simply stand for the proposition that this factor by itself is not dispositive.

For example, in *Airborne Freight Co.*, 338 NLRB 597 (2002), the Board failed to find a joint-employer relationship even where the customer had contracted out its central function of shipping. However, in *Airborne Freight*, the contractor worked at a remote location from the putative joint employer, the equipment was owned by the contractor with one or two exceptions, and the employees received their direction from the contractor. These facts are in sharp contrast to the instant facts, in which CNN personnel worked alongside Team employees and gave them instructions on a continuous basis.⁴

⁴ Compare also the facts herein to the following cases cited by CNN: *G. Wes Ltd. Co.*, 309 NLRB at 226 (asbestos removal company which contracted out asbestos removal work was not a joint employer where the instructions given to the contractor's employees, notwithstanding the similarity of the businesses, were limited and routine); *Chesapeake Foods, Inc.* 287 NLRB 405 (1987) (a chicken processor who contracted out chicken catching was not a joint employer of the contractor's employees where the customer's instructions to the chicken catchers was limited and routine); *Laerco Transportation*, 269 NLRB 324 (1984) (trucking operator which contracted out

In sum, CNN sets up a straw man and then knocks it down. General Counsel does not dispute that, even where an employer contracts out a function that is central to its business, the Board may still find the evidence insufficient to establish a joint-employer relationship. In this particular case however, the evidence is not insufficient. Despite CNN's efforts to separate itself from Team employees by erecting formal barriers, the centrality of the function performed by CNN's workers to broadcasting the news, combined with the complexity, creativity and highly integrated nature of the endeavor, compelled CNN to instruct and direct Team's employees in a meaningful way and on a constant basis.

III. SUCCESSORSHIP ISSUES

A. CNN Continues to Misstate the Law and Facts Regarding the Appropriate Unit

Page 36 of General Counsel's Brief in Support of Cross-Exceptions states: "Save for the minor errors set forth above, the ALJ correctly concluded that the Historical Units were 'appropriate.' (ALJD 113:38-47.)" However, in its Answering Brief, CNN magically transforms this straight-forward sentence to mean that "General Counsel further admits that Judge Amchan did not find that the 'Historical Units' were appropriate." (CNN Ans. Brief 16.)

As set forth in the ALJD, General Counsel's Answering Brief and Cross-Exceptions Brief, CNN brazenly misstates the law governing appropriate units in successorship situations. (ALJD 113:38-47, GC Ans. Brief 183-88, Cross-Ex. Brief 36-38.) Although the law is clear that only compelling circumstances may disturb an historical unit in the successorship context (*see* GC Ans. Brief 185-86), CNN maintains its meritless argument that the Board should follow

some trucking functions was not a joint employer where the contractor's employees did not have to be told what to do). General Counsel is at a loss to explain why CNN cited *Osco Drug, Inc.*, 294 NLRB 779, 788 (1989), *enf'd* 902 F. 2d 37 (7th Cir. 1990) among cases in which the putative joint employer contracted out a central portion of its business. *Osco Drug* was a chain of retail drug stores that contracted out ancillary delivery functions. It was not a shipping company as CNN contends. Similarly, the putative joint employer, Crown Zellerbach, in *TLI, Inc.*, 271 NLRB 798 (1984), was a manufacturer of corrugated boxes. The delivery function performed by its contractor TLI was clearly an ancillary though obviously an important function.

community-of-interest principles applied in representation cases (*e.g.*, CNN Ans. Brief 16-23; CNN Ex. Brief 100-04). In this vein, CNN, not content to rely solely on a non-existent Board “presumption” that “only a wall-to-wall production unit is appropriate in the broadcast industry” (CNN Ans. Brief 16; CNN Ex. Brief 96), cites seven additional cases arising outside the broadcasting industry as analogous support to its misapplied legal analysis (CNN Ans. Brief 17 n.14.) All of these cases are initial unit determinations in representation cases, to which the community-of-interest standard is applied without the required weight given to bargaining history arising in successorship cases. (*See* GC Ans. Brief 183-88; GC Cross-Ex. Brief 36-38.)

To the extent that CNN acknowledges the correct standard to determine appropriate historical units in successorship cases, it has not factually met its heavy burden to show that the Historical Units here are not appropriate. What has CNN shown? Only that the introduction of server-based technology made access to digitized content quicker and easier, but did nothing to render the Historical Units inappropriate.

Record evidence, especially employee witness testimony, disproves any contention by CNN that the slight changes in Historical Unit positions after insourcing render the Units inappropriate. Evidence that there was no material change in Unit positions is detailed in General Counsel’s Answering Brief at 109-29. Furthermore, the record, especially employee witness testimony, does not support a showing that the post-TVS non-unit positions (Lines Coordinators, TPMs, Electronic Graphics Operators, Editor/Producers, Scenic Coordinators, Tape Evaluators) were any more or less integrated with Historical Unit positions after insourcing than before insourcing. Evidence that the clear distinctions, especially in terms of job functions and skill sets, between Historical Unit and non-unit positions, remained intact is detailed in General Counsel’s Answering Brief at 121-29.

Instead of meaningful proof, CNN attempts to meet its burden by mere repetition of conclusory assertions that employees occupying non-Unit positions “work with,” “interact with,” “are integrated with,” and work “side by side” Historical Unit employees. (*E.g.*, CNN Ans. Brief

18, 19, 24..) CNN also emphasizes the immaterial fact that Unit and non-Unit positions were all part of the same “production process.” (*E.g.*, CNN Ans. Brief 18, 24.) Whereas this might be community-of-interest evidence in a representation case, it does not meet the burden required in successorship cases.

The evidence in this case shows that those occupying Historical Unit positions have different and distinct skill sets from those in non-Unit positions, as they did before the insourcing. It matters not, in this successorship context, that these differently-skilled employees may have sat near each other under one roof, and may have coordinated their work with other employees during shows or special projects. The commonalties between Unit and non-Unit employees do not destroy the separate identity of the Historical Unit, and CNN has cited no case or fact to the contrary.

CNN’s evidence of “integration” has little-to-no relevance. For example, CNN proves no relevant “interaction” between Unit and non-Unit positions by citing to the discredited testimony of Robert Fox that non-Unit Editor/Producers ask Unit Media Coordinators ask where something is on the server. (Fox 12242, cited at CNN Ex. Brief 112.) It is further irrelevant that Editor/Producers were “the final step in the production process.” (CNN Ans. Brief 18.) The Board has never held that all members of a production process have to be in the same unit; otherwise, craft units could never exist. Furthermore, that some photojournalists in the field at times edited pieces in addition to their primary function of field photography, audio and lighting, does not require disturbing the historical separation of field functions from those of CNN Editor/Producers, whose distinct primary functions were, before and after insourcing, editing and producing at the bureau. (GC Ans. Brief 109-14.) CNN in fact admits that Editor/Producers, as “craft editors,” used much more sophisticated equipment to edit than a Photojournalist’s G4 laptop. (CNN Ex. Brief 111 (stating that Editor/Producers use “G5 desktop computers and Pinnacle Blue Non-Linear and Harris Velocity editing systems”).) There is also no authority supporting CNN’s argument that Unit and non-Unit employees must be in the same unit because

they all wear headsets and communicate with each other during shows. (*See* CNN Ans. Brief 18, 19-20, 23-25; CNN Ex. Brief 109, 114-119.)

Equally unpersuasive are CNN's contentions about the "interaction" between BIT Support Engineers and other positions (Unit or non-Unit). (*See* CNN Ans. Brief 19-20; CNN Ex. Brief 119-22.) That control room employees may call in a Support Engineer to install or fix a piece of equipment does not mean that maintenance and other employees must be in the same unit because of "interaction." CNN also makes too much of the Engineer-in-Charge function (CNN Ans. Brief 19-20.), which, as General Counsel has established, does not show any meaningful integration of IT and engineering functions. (GC Ans. Brief 121 n.173.⁵) It does not meet CNN's burden to state that IT Specialists in the BIT Department worked on projects with non-IT Support Engineers. This argument is as unpersuasive as requiring that one bargaining unit cover the laborers, electricians, plumbers and painters who may work closely on the same "project" of taking down a wall, rewiring it, installing new pipe and restoring it. CNN proves only the unremarkable point that a piece of technology in a CNN bureau may contain both software and hardware. None of the projects or other evidence cited by CNN shows that the primary job of IT Specialists encompassed working on hardware maintenance, or that maintenance engineers had any primary responsibility for software. General Counsel has detailed the distinction between IT employees and engineers in General Counsel's Answering Brief at 119-21. CNN's burden is also not met through scant evidence of cross-training. In fact, CNN management testified that IT Specialists and Support Engineers were trained separately and, to the extent that BIT employees were successfully re-trained outside their area of expertise, this happened well after the date of successorship, which is the point in time at which job functions must be evaluated. (Polikoff 8187 ("Just the support engineers" received the training

⁵ For example, CNN's IT manager admitted that the EIC could be a Support Engineer who had to call the IT "side of the house" if a superficial troubleshooting could not solve a problem; conversely, she testified that, for hardware problems, an IT EIC had to "get the expert on the subject" from the engineering side. (Lackey 7890, 7932, 7938.)

in Pinnacle systems), 12681 (retraining “takes a while”).) And, of course as CNN cannot deny, the IT Specialists and Support Engineers were supervised by different managers, an inconvenient fact which CNN tries in vain to cure by stating that the IT specialist manager and Engineer manager both reported to the same person. (CNN Ex. Brief 120.)⁶

Finally, the logic of CNN’s wall-to-wall argument fails because CNN never explains, based on CNN’s own standards, why producers and correspondents and editorial personnel should not also be part of a production unit. Did not these employees also represent “steps in the production process” and “interact” with Unit and non-Unit employees to get the news on the air? CNN therefore argues for an arbitrary unit. By contrast, the Historical Units not only have the logic of history to support them, but they were created by CNN itself when it decided which functions to contract out. (*See* CNN Ex. Brief 98 (“the historical units under Team . . . were the product of CNN’s decision to contract to Team only certain production functions”).)

CNN’s citation to successorship caselaw is distinguishable and off point. (*See* CNN Ans. Brief 20-23.)⁷ For example, in *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973), the jobs of twelve former Teamster truck mechanics were insourced into a pre-existing historical plantwide, multicraft unit of approximately 400 Steelworkers that, over the years, had integrated into the unit new employee classifications as the employer’s operations expanded. *Border Steel*, 204 NLRB at 819, 820-21. After the insourcing, the Teamster mechanics no longer worked exclusively on trucks, but rather their “prime job” changed to cover the entirety of the employer’s mobile equipment, including non-truck equipment which had been previously maintained by employees in the multi-craft Steelworker unit. *Border Steel*, 204 NLRB 819, 820.

⁶ IT manager Michelle Lackey consistently described the IT specialists in the BIT Department as “my side of the house” and the support Engineers as “Jeff Gershgorn’s staff.” (Lackey 7931-32.)

⁷ CNN’s exposition of correct caselaw is typically misleading when it states, “Even if there is a presumption that the prior unit continues to be appropriate in a successorship setting, that presumption is rebuttable” (CNN Ans. Brief 20.) There is no “if” about the rebuttable presumption of the appropriateness of an historical unit. That is simply the law (*e.g.*, *Banknote Corporation*, 315 NLRB 1041, 1044 (1994), which CNN, through its incessant repetition of incorrect law, would wish the Board to ignore. CNN has not argued for abandonment of the longstanding presumption.

Although the truck mechanics would still work on trucks, “their duties were expanded by [r]espondent and to a meaningful degree their jobs were functionally integrated with the other employees in the Steelworkers bargaining unit[, and] [i]n some areas their work overlaps with the 50 to 60 employees in the mill maintenance department.” *Border Steel*, 204 NLRB at 819-20, 821-22. Unlike in the instant case, in *Border Steel* the Board found that jobs of the Teamster mechanics had so changed, and were so similar to those performed by the Steelworker mechanics, that they had lost their identity as a separate classification.

CNN’s citation to *Turner Indus. Group, LLC*, 349 NLRB 428 (2007) is misplaced. (CNN Ans. Brief 20-21.) *Turner Indus.* was an RC case in which the Board specifically faulted the regional director’s reliance on successorship caselaw. *Turner Indus.*, 347 NLRB at 431; *see* GC Cross-Ex. Brief 38 n.45.

CNN’s reading of *Banknote Corp. of America*, 84 F.3d 637 (2d Cir. 1996) suffers from a fatal flaw: CNN misquotes the case. The *Banknote* court stated that it would consider as irrational the Board’s creation of a rebuttable presumption of appropriateness of historical units only if the respondent in that case (successor BCA) had shown evidence that pre-successorship industry changes over time under the predecessor (ABN) had made the long-established units obsolete. In its block quotation of *Banknote* at CNN Ans. Brief 22, CNN incorrectly substitutes “successor” for “predecessor,” and, as a result, misreads the case as if it stated that application of the presumption would be irrational if the respondent demonstrated significant changes post-successorship. The case does not so state, and thus, CNN is wrong in proposing in its Brief that post-successorship changes renders the presumption irrational. As explained by the *Banknote* court, post-successorship changes “would not cast doubt upon the rationality of applying the presumption” and would instead only “demonstrate that the presumption has been overcome in this case.” *Banknote Corp.*, 84 F.3d at 648 n.6. *Deferiet Paper Co. v. NLRB*, 235 F.3d 581 (D.C. Cir. 2000) stands for a similar proposition that a successor can overcome its burden by putting forth evidence that the historical units were inappropriate before, as well as after,

successorship. In this case, CNN has set forth no argument or evidence that the Units under TVS were inappropriate, except perhaps to the extent that the Units were less than “wall-to-wall.” (See CNN Ans. Brief 97.) In the instant case, technological changes in the broadcast industry under predecessor TVS and prior contractors had no impact the viability of the Historical Units before successorship, just as changes in technology under CNN after successorship had no impact on the appropriateness of the Historical Units.

B. CNN Fails To Establish That Freelancers Were Not Members of the Bargaining Unit Under TVS

CNN reiterates its argument that it is inappropriate to use the formula approved by the Board in *DIC Entertainment, L.P.*, 328 NLRB 660 (1999) and urged by the General Counsel for the purpose of establishing which of the freelance⁸ employees employed by TVS were included in the bargaining unit at the time CNN cancelled the ENGAs and hired unit employees directly. It also asserts that the formula used by the Board in *Davison-Paxon Company*, 185 NLRB 21 (1970), commented on by the ALJ, does not apply. (CNN Ans. Brief 27.) Rather, CNN contends that the only appropriate test to determine whether the freelance employees were members of the bargaining unit in a successorship situation is the “community-of-interest” test used by the Board when *initially* determining which groups of employees should be included in a

⁸ The term freelance employee is meant to include other terms sometimes used during this case, including “daily hire” and “per diem” employees. In footnote 31 on page 37 of its Answering Brief, CNN contends that the hours for freelance employees in New York on General Counsel’s Appendix B are not accurate. Several employees are named who allegedly did not work any hours in at least one payperiod where they are represented to have worked. This may be true but is irrelevant. When the General Counsel has asserted that these employees had worked the required hours in, for example, payperiods 1 through 10, that means that these employees reached the required threshold for the number of hours (120) under the *DIC Entertainment* standard during the time period covered by payperiods 1 through 10. The General Counsel does not mean that the employees worked hours during each of those then pay periods. As the ALJ noted, many of the employees continued to accumulate even more hours later on, after the payperiod in which they met the threshold. (ALJD 110-11.) CNN does not and cannot contend that any of the employees listed on either General Counsel’s Appendix A or B did not work at least 120 hours.

bargaining unit appropriate for voting on the question of representation by a union. (CNN Ans. Brief 29.)

An overriding flaw in CNN's argument is that this is not an initial attempt by a labor union to represent a unit of employees, where the Board's expertise is applied to determine which classifications of employees or which individual employee should be included in the unit. Rather, this is an established bargaining unit with undeniable evidence that freelance employees were covered by the terms of the collective bargaining agreements while performing work that is identical to that performed by bargaining unit employees.

It is important to determine which freelance employees are properly included in the Unit for three reasons. First, if they were in the TVS Unit at the time of the mass layoff, they are discriminatees based on their layoff. Second, if they were TVS unit members who were not hired into Historical Unit positions after applying for jobs, they are discriminatees. Third, if they were members of the TVS bargaining Units and were hired, they should be counted towards the Unions' majority status after CNN began operating at the Washington and New York Bureaus with its own workforce.

1. Freelance Employees Were Not Temporary Employees

In its brief, CNN repeatedly refers to the freelance employees as temporary employees, apparently hoping that the use of a term which was never used to refer to freelance employees in this proceeding will persuade the Board to exclude them from the bargaining Units. General Counsel does not agree that they were temporary employees. For many years, the Board has recognized certain criteria that need be present to exclude one as a "temporary" employee from a bargaining unit. An employee employed for only one job, or for a specified duration or who are notified that they have no expectation of continued employment, are generally excluded from bargaining units as temporary employees. *Indiana Bottled Gas Co.*, 128 NLRB 1441 n. 4 (1960); *Owens Corning Fiberglass Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc.*, 125 NLRB 619 (1959); *E.F. Drew & Co.*, 133 NLRB 155 (1961).

The foregoing criteria do not apply to the freelance employees who had worked for TVS. CNN has not presented any evidence that any of these employees were told they were working for one job only, or for a specified duration, or that any of them were told that they had no expectation of continued employment with TVS. The great majority of those freelance employees who met the *DIC Entertainment* formula worked for TVS on many occasions - often for several consecutive days - during the year prior to the date CNN hired the employees directly. CNN cannot confer temporary employee status on them by merely using the "temporary" employee term.

2. CNN Misstates Board Law in Successorship Situations

While it criticizes the use of the *DIC Entertainment* formula, CNN cites no Board authority for the proposition that a community-of-interest standard should be used to determine whether freelance employees used by the predecessor were in the unit for successorship purposes. According to CNN, "in several decisions, the Board has specifically stated that temporary employees should not be considered for determining majority status under *Burns*." It states that in the cases it cites the Board found that the employees in question were not temporary employees and that they should be included for successorship purposes. (CNN Ans. Brief 28-29.)

CNN does not cite any quotation or page in any of the three decisions it relies on which supports the proposition that temporary employees should not be considered for determining majority status under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). CNN's claim that in these decisions that Board has "specifically stated" that temporary employees should not be counted for successorship purposes is misleading at best.

In *Houston Building Service*, 296 NLRB 808 (1989), the employer got the contract to provide maintenance service at a military base. It hired a number of the predecessor's unit employees, but claimed to do so only on a temporary basis until some of its work crews could get security clearances. The Board found that they were not temporary employees of the

successor, finding that they had never been told they were temporary, or that they would eventually be laid off. *Houston Building*, 296 NLRB at 808 n 2. If anything, the case stands for the rule that you cannot avoid a successorship finding by calling regular full-time employees temporary employees, and not that temporary employees do not count in successorship situations.

CNN cites a comment by the administrative law judge in *Harbert International Services*, 299 NLRB 472 (1990) that temporary employees are not eligible for inclusion in a bargaining unit and thus should not be counted for successorship purposes. The Board, contrary to the judge, found the employees in question to be regular full time employees and included in the unit. *Harbert*, 299 NLRB at 473, 477. The Board itself made no comment as to whether or not temporary employees should be counted for successorship purposes.

Finally, CNN cites the Board's decision in *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007). There, like *Houston Building Service*, the successor hired a number of the predecessor's unit employees, but told them they were being hired temporarily in order to assess their skills and abilities for 90 days and that it would hire those who passed a "review" at that time. The judge found that the employees were "not hired to temporarily supplement the work force or assist in the completion of a special project, nor were they given a definite termination date." *Windsor*, 351 NLRB at 976, 978. The Board agreed and counted them in the successorship analysis. Nowhere does the Board specifically say that temporary employees should not be counted for successorship purposes. CNN's attempt to label the freelance employees as temporary employees, and claim that Board case law requires that they be excluded from any successorship analysis, should be rejected.

3. Freelance Employees Were Members of the TVS Bargaining Units

CNN argues that freelance employees were not Unit employees under TVS for three reasons: (1) freelancers were not included in the initial certification; (2) their rights under the

collective-bargaining agreements were not precisely the same as fulltime employees; and (3) freelancers thought their work was temporary. All three arguments are entirely without merit.

The first argument contradicts longstanding caselaw allowing parties to change a unit's definition, scope or composition post-certification without rendering the units inappropriate. *See Lever Bros. Co.*, 96 NLRB 448 (1951); *Douds v. Longshoreman (ILA)*, 241 F.2d 278 (2d Cir. 1957); *Antelope Valley Press*, 311 NLRB 459 (1993); *see also* GC Ans. Brief 184 n.241.

CNN's second argument is without merit because the work-preservation provisions cited by CNN, which benefit fulltime at the expense of freelance employees, no more separate freelance from fulltime employees than do seniority provisions (found in almost every union contract) that benefit senior at the expense of junior employees. (CNN Ans. Brief 32-33.)

With respect CNN's third argument, contrary to CNN's contention, freelance employees had a reasonable expectation of employment. CNN contends that the only test that should be applied to determine whether freelance employees were members of the bargaining unit is whether they had a "substantial expectancy of continued employment" or a "reasonable expectation of permanent employment within the bargaining unit." Citing *Catholic Healthcare W.S. Cal.*, 339 NLRB 127 (2003), it argues that the applicable test is "whether the employee's tenure of employment remains uncertain. Only then would the employee be eligible to vote." (CNN Ans. Brief 40.) This approach wrongly assumes that the freelance employees are temporary employees. Assuming *arguendo* that this test might apply, the evidence that CNN relies on indicates that freelance employees did have an expectation of continued employment.

Former TVS DC freelancer McMichael testified that he had an arrangement with the TVS assignment desk that he called a "right of first refusal" agreement. By this he meant that TVS would call him first if they needed a freelancer, and that he would call them first and give them the right to use his services if he got an offer to work for another network. (McMichael 15980-81.) This begs the question of why McMichael would have such an arrangement with TVS if he had no reason to believe he would ever work for them in the future. The answer is

clear. He worked for TVS 25% of the time, so of course he would want such an arrangement. Like other freelance employees, McMichael had every reason to believe that he would be contacted about work by TVS over and over again.

Former TVS NY freelancer Smith testified that he followed a procedure where he called TVS each Tuesday and told them of his availability the following week, and if TVS knew right then that they would need him when he was available, they would book him. If they did not need him right then, they would let him know in the future. (Smith 9822.) Why would Smith call TVS on the same day every week and let them know when he was available the following week if he did not have an expectation of being employed again? The answer is quite obvious. Like McMichael and the other freelance employees, Smith had an expectation of future employment. In the case of many freelance employees, this employment was regular and frequent. The fact that each assignment was of a limited or fixed duration (the length of the job for which they were called) is not evidence of no future expectation of employment. Every job for which they are called has some limited duration. They were continually hired for a number of assignments with limited duration. They had a regular expectation of future employment.

C. Even If The Board Adopts All or Part of CNN's Arguments to Determine Which Employees Populated Historical Unit Positions, There Would Still Be a *Burns* Majority

Successorship in the instant case is determined in part by a numerical analysis to determine which employees working in the Historical Units were former TVS unit employees. Preliminarily, this requires two numerical counts: (a) the total number of employees in each relevant unit after insourcing; and (b) the number of employees within the relevant units who were former union-represented TVS unit employees. Each count requires that the Board identify which employees in particular occupied the relevant unit positions, based on the evidence and the caselaw. After these two numbers are determined, one must calculate whether the number of former TVS employees constitutes a majority of the relevant unit. *See, generally, Burns, supra..*

General Counsel and CNN disagree on which classifications should comprise the relevant unit. GC argues that the Historical Units are the relevant units (GC Ans. Brief 176); CNN argues that the relevant units are comprised of most of the positions in the Historical Units and certain non-unit positions (CNN Ans. Brief 16-17; CNN Ex. Brief 99.) However, should the Board adopt the Historical Units as the relevant *Burns* units, CNN cannot disprove a *Burns* majority based on any of its arguments regarding the total number of Historical Unit employees and regarding which particular employees should be counted towards a *Burns* majority.

CNN makes only three arguments should the Board adopt the Historical Units as the relevant units.

(1) CNN argues that the Board should identify employees, not exclusively by their payroll start dates, but also by whether they attended orientation after successorship and/or were interviewed and offered a job through the BSP process before successorship, despite starting sometime after successorship. (See CNN Ans. Brief 44-45; CNN 554, 706.)

(2) CNN argues that those who had been freelancers in unit positions should not be counted towards a *Burns* majority. (See CNN Ans. Brief 26-41; supra, § III.B.)

(3) CNN argues that the Board should not include former TVS Unit shift supervisors towards calculating a *Burns* majority. (See CNN Ex. Brief 106-09.)

By contrast, General Counsel argues the following.

(1) Unit employees should be identified by using CNN's own payroll records (CNN 543-44; GC 580, 582), which show whether an employee was working on the dates of successorship (December 6, 2003, in D.C. and January 7, 2009, in New York). (See GC Ans. Brief 181-83.) General Counsel has further argued that the Board uses election-eligibility principles to determine which employees should be deemed included and excluded from the count. (See GC Ex. Brief 27-29; GC Ans. Brief 180-81.) In other words, the standard for identifying the employees in the Historical Unit is not whether an employee was merely promised a job before the dates of successorship; rather, an employee should only be included in

the count if s/he in fact started working as of the successorship dates, and should be excluded from the count if s/he started working – based on CNN’s own payroll records – sometime after the successorship dates. Furthermore, it does not matter that an employee may have quickly quit the job or was terminated after starting work on the successorship dates; if s/he was employed on the successorship dates, the employee should be included in the count.

(2) Former TVS freelancers should be included in the *Burns* majority count based on the standard set forth in *DIC Entertainment*. (See GC Ans. Brief 19-21, 188-89.)

(3) Former TVS shift supervisors should be included in the count because they were not § 2(11) supervisors. (See GC Ans. Brief 17-19, 190-96.)

General Counsel’s list of former TVS unit employees in the Historical Units are contained in Appendices T & U of General Counsel’s Answering Brief. Below are calculations which show that, even if CNN’s numerical arguments are accepted regarding the Historical Units, there would still be a *Burns* majority in the Historical Units.

1. The Inclusion of CNN’s Proposed Additional Hirees to the Total Number of Historical Unit Employees Does Not Affect Majority Status

New York Historical Unit. General Counsel argues that 77 out of 119 Historical Unit employees were former TVS unit employees, yielding a majority of 64.7%. (GC Ex. Brief 38-39; GC Ans. Brief App. U.) Using CNN’s proposed standard of identifying the population of the New York Historical Unit, there would be a total of 122 Historical Unit employees because CNN would add non-former TVS employees Neil Hallsworth, Pelin Sidki and Neal Rivera in the count due to their alleged attendance at orientation and/or hiring pursuant to the BSP. (See CNN 544; CNN Ans. Brief 48.) As noted above, General Counsel argues that these three did not start working until after the successorship dates, and therefore should not be counted. (See GC Cross-Ex. Brief 27-29, GC Ans. Brief 180-81.) Nevertheless, their addition would not affect majority status in New York because 77 former TVS unit members out of 122 is a 63.1% majority.

Washington D.C. Historical Unit. General Counsel argues that 48 out of 83 Historical Unit employees were former TVS unit employees, yielding a majority of 57.8%. (GC Ex. Brief

38-39; GC Ans. Brief App. T.) Using CNN's proposed standard of identifying the population of the Historical Unit, there would be a total of 89 employees because:

- (a) CNN would add Sr. PJ McMichael (former TVS unit employee);⁹
- (b) CNN would add PJs Tillis and Britch (not former TVS unit employees);¹⁰
- (c) CNN would add Studio Operator McKinley (former TVS unit employee);¹¹
- (d) CNN would add TD/Director McCloskey (former TVS unit employee);¹²
- (e) CNN would add Transportation Facilities Specialists Davis and Tipper (both former TVS unit employees);¹³ and
- (f) CNN would subtract PJ Appleman (not a former TVS unit employee).¹⁴

(See CNN 706; GC Ans. Brief App. A; CNN Ans. Brief 44-45.) Because of the membership in the former TVS unit of some of these additions and subtractions, 53 out of 89 employees would be former TVS unit members, thus yielding a *Burns* majority of 59.5%. Alternatively, if being interviewed during the BSP and later hired were the standard for unit inclusion, former TVS unit employees Dennis Faulkner (start date 12/22/03 per CNN 544; GC 582), David Jenkins (start date 2/4/04 per same), Adilson Klyasu (start date 1/15/04 per same), Mark Marchione (start date 1/5/04 per same) and Aaron Webster (start date 4/10/04 per same) should be added, yielding a still stronger *Burns* majority (58 out of 93 = 62.3%).

⁹ The evidence establishes McMichael started after the D.C. successorship date. (GC Ex. Brief 29.)

¹⁰ General Counsel argues that Tillis and Britch did not start unit after the D.C. successorship date. (GC Ex. Brief 29.)

¹¹ McKinley did not start working until after the D.C. successorship date. (CNN 544; GC 582.)

¹² McCloskey did not start working until after the D.C. successorship date. (CNN 544; GC 582.)

¹³ For the purposes of this section, General Counsel does not address the merits of CNN's arguments regarding the inclusion of Transportation Facilities Specialists in the D.C. Historical Unit.

¹⁴ Appleman is a PJ with a start date of 12/6/03, based on CNN 544 and GC 582. General Counsel does not know why CNN argues to exclude him from the unit, based on CNN 706.

2. There Is Still A *Burns* Majority Even If One Includes CNN's Proposed Additional Hirees in the Total Number in the Historical Unit Employees, and Subtracts Former TVS Freelancers

New York Historical Unit. CNN argues to exclude eight former TVS freelancers from the New York Historical Unit: Floor Directors Conroy, Lishawa and Weber; Media Coordinator O'Beirne; Studio Operators Baum, Ioannu and Reis; and TD/Director Greenstein.¹⁵

Using GC's Total Count of Historical Unit Employees

- 77 out of 119 (including former TVS freelancers) = 64.7%.
- 69 out of 119 (subtracting 8 former TVS freelancers) = 57.9%

Using CNN's Total Count of Historical Unit Employees

- 77 out of 122 (including former TVS freelancers) = 63.1%
- 69 out of 122 (subtracting 8 former TVS freelancers) = 56.5%

D.C. Historical Unit. The former TVS DC freelancers whom CNN would have the Board exclude number four: Studio Operators Raeshawn Smith, Tawana Smith and Kenneth White; and PJ Samuel McMichael.¹⁶

Using GC's Total Count of Historical Unit Employees

- 48 out of 83 (including former TVS freelancers) = 57.8%.
- 45 out of 83 (subtracting 3¹⁷ former TVS freelancers) = 54.2%.

Using CNN's Total Count of Historical Unit Employees

- 53 out of 89 (including former TVS freelancers) = 59.5%
- 49 out of 89 (subtracting 4¹⁸ former TVS freelancers) = 55%

-- alternatively --

¹⁵ CNN opposes the inclusion of freelancers generally and does not specifically name the freelancers it wants to exclude. Therefore, the former TVS freelance employees named in this subsection are those whom General Counsel has included in the Historical Unit, and the inclusion of which it is assumed CNN opposes. *Compare* GC Ans. Brief App. A (identifying TVS DC freelancers) to GC Ans. Brief App. T (naming which of those freelancers were hired by CNN in D.C.), and *compare* GC. Ans. Brief App B (identifying TVS NY freelancers) to GC Ans. Brief App. U (naming which of those freelancers were hired by CNN in NY).

¹⁶ See footnote immediately above.

¹⁷ General Counsel's total unit count excludes former freelancer McMichael because he started working after the date of successorship. Thus, General Counsel subtracts only the 3 other freelancers when recalculating the unit majority based on General Counsel's total count.

¹⁸ All four former freelancers are subtracted because McMichael (in contrast to General Counsel's total) is included in the total count under CNN's proposed standard.

- 58 out of 93 (including former TVS freelancers (and including all former TVS unit employees hired pursuant to the BSP)) = 62.3%
- 54 out of 93 (subtracting 4 former TVS freelancers (and including all former TVS unit employees hired pursuant to the BSP)) = 58.0%.

3. There Is Still A *Burns* Majority Even If One Includes CNN's Proposed Additional Hirees in the Total Number in the Historical Unit Employees, and Subtracts Former TVS Freelancers, and also Subtracts Former TVS Shift Supervisors

New York Historical Unit. In New York, CNN argues that the following four employees were former TVS shift supervisors and should not be counted in a *Burns* majority calculation: Media Coordinators Finnegan and Leitner; and Sr. BIT Support Engineers Greene and Scholl. (CNN Ex. Brief 106-09.)¹⁹ Excluding these four employees from the count towards the New York *Burns* majority has no affect on the majority outcome.

Using GC's Total Count of Historical Unit Employees

- 77 out of 119 (including former TVS freelancers and shift supervisors) = 64.7%.
- 65 out of 119 (subtracting 8 former TVS freelancers and 4 shift supervisors) = 54.6%

Using CNN's Total Count of Historical Unit Employees

- 77 out of 122 (including former TVS freelancers and shift supervisors) = 63.1%
- 65 out of 122 (subtracting 8 former TVS freelancers and 4 shift supervisors) = 58.0%²⁰

¹⁹ In CNN 554, received into the record as CNN argument, CNN does not identify Edward Scholl as a former TVS shift supervisor, and admits that he was a TVS unit employee. Thus, to the extent that CNN argues in its briefs that he was a former TVS supervisor, it is inconsistent and unsupported. In fact, Scholl's own testimony established that he had not served as a shift supervisor for quite some time before the insourcing. (Scholl 13082-84, CNN 502.) Other hirees which CNN identified as former "TVS Supervisor[s]" in CNN 554 were not argued as such in CNN's briefing before the Board, namely Media Coordinator Holmes and Studio Operators Van Patten and Walden. (See CNN Ex. Brief 106-09.) CNN's arguments on these employees should be appropriately waived and, in any event, the record does not support the conclusion that these employees were statutory supervisors.

²⁰ As shown below, there is a *Burns* majority in D.C. under any scenario. There is only one scenario in the New York Unit which falls short of a *Burns* majority: if one subtracts Edward Scholl and the three other hirees for whom CNN makes no argument on supervisory status (see footnote immediately above), there would be no *Burns* majority (65-4 = 61 out of 122 = 50%). Therefore, to find that the Union did not have a *Burns* majority in the New York Unit, the Board

D.C. Historical Unit. In D.C., CNN argues that PJ/Lighting Specialists Parker and Robertson were former § 2(11) supervisors under TVS. (CNN Ex. Brief 106-09.)²¹ Excluding these two employees from the count towards the *Burns* majority has no affect on the majority outcome.

Using GC's Total Count of Historical Unit Employees

- 48 out of 83 (including former TVS freelancers and shift supervisors) = 57.8%.
- 43 out of 83 (subtracting 3 former TVS freelancers and 2 former shift supervisors) = 51.8%.

Using CNN's Total Count of Historical Unit Employees

- 53 out of 89 (including former TVS freelancers and shift supervisors) = 59.5%
- 47 out of 89 (subtracting 4 former TVS freelancers and 2 shift supervisors) = 52.8%

-- alternatively --

- 58 out of 93 (including former TVS freelancers and shift supervisors (and also including all former TVS unit employees hired pursuant to the BSP)) = 62.3%
- 52 out of 93 (subtracting 4 former TVS freelancers and 2 shift supervisors (and also including all former TVS unit employees hired pursuant to the BSP)) = 55.9%

In sum, the foregoing majority calculation scenarios show that CNN's arguments identifying the employees in the Historical Units have no effect on the *Burns* majority. Nonetheless, the General Counsel respectfully urges the Board to find that General Counsel's standards for inclusion in and exclusion from the Historical Units be adopted in full.

D. A Representative Complement Analysis Establishes The Washington Successorship Date of December 6, 2003, and the New York Date of January 17, 2004

In its Answering Brief at 42-44, CNN urges the Board to reject the General Counsel's reliance on *Banknote Corp. of America v. NLRB*, 84 F.3d 637 (2d Cir. 1996) for determining the successorship dates, and instead to use a representative-complement analysis. However, as the

would have to rely on excluding four individuals about whom CNN makes no argument on supervisory status and for which there is no factual support in any event.

²¹ In CNN 706, CNN names hiree Carolyn Stone as a former "TVS Supervisor." CNN has made no argument in its Exceptions Brief to support this assertion, CNN cited no evidence to support this assertion, nor does the record support it.

General Counsel has demonstrated in GC's Answering Brief at 170-71 (*see also* GC Cross-Ex. Brief 20-21), a representative-complement analysis would yield the exact same successorship dates as would a *Banknote* analysis: December 6, 2003, in D.C., January 17, 2004, in New York.

IV. CNN'S DISCRIMINATORY CANCELLATION OF THE ENGAs

CNN violated §8(a)(3) of the Act by cancelling the ENGAs and discharging the unit employees (GC Cross Ex. 2). CNN makes the following arguments against General Counsel's argument in support of its Cross-Exception 2: (1) the Cross-Exception should be dismissed because of lack of citations to evidence in the record; (2) General Counsel's contention regarding the cancellation of the ENGAs is based on a false premise that CNN was a joint employer with Team, which it was not; and (3) in canceling the ENGAs, CNN was not motivated by anti-union animus. For the reasons set forth below none of these arguments is persuasive.

A. CNN's Procedural Argument Is Without Merit

CNN does not cite any authority for its contention that General Counsel's Cross-Exception No. 2 should be rejected for lack of citation to the record. Indeed, as far as General Counsel knows, there is none. Section 102.46(b)(1) of the Board's Rules and Regulations requires that each exception shall set forth with particularity the point to which exception is taken, and the designation of the precise portion of the record relied upon and the grounds for such exception.²² However, the Board does not demand slavish adherence to these requirements, particularly when they are inapplicable to the point a party is making, or where they are amply

²² Section 102.46(c)(1)-(3) sets forth the specifications for the brief in support of exceptions, including a clear and concise statement of the case containing all that is material to the consideration of the questions presented; a specification of the issues presented with specific reference to the exceptions to which they relate and an argument presenting the points of law and fact relied upon with specific page references to the record and the legal or other material relied upon. Clearly there is some overlap between the requirements of § 102.46 (b) and (c), and the Board does not necessarily require duplication of effort. *See Zurn Nepco*, 316 NLRB 811, 811 n.1 (1995) (Board rejected the respondent's motion to reject the General Counsel's Brief on the grounds that the exceptions did not specifically refer to portions of the record; the Board noted that the General Counsel brief sufficiently referenced the record).

provided for elsewhere in documents submitted to the Board. *See Embassy Suites Resort*, 309 NLRB 1313, 1313 n.1 (1992) (Board rejected respondent's motion to strike General Counsel's brief; although the General Counsel's brief did not conform in all its particulars, it was not so deficient as to warrant rejection).

In the instant case General Counsel's Cross-Exception 2 and Brief in Support does conform to the Board's Rules and Regulations. Cross-Exception 2 does not take issue with a single factual finding made by the ALJ; nor does the Cross Exception fault the ALJ for failing to make factual findings. In fact, General Counsel specifically notes that the ALJ correctly found that the decision to cancel the ENGAs was motivated by animus. (*See GC Cross-Ex. Brief 14-15*). General Counsel instead disagrees with the ALJ's failure to draw the legal conclusions that naturally flowed from his factual findings. Therefore, support for General Counsel's difference with the ALJ cannot be found in the record, but in legal principles and caselaw, which General Counsel articulated and argued in its Exceptions and Brief in Support.²³ With respect to General Counsel's contention that the ALJ correctly found the cancellation of the ENGAs was motivated by animus, the General Counsel provided a multitude of citations to the record in appropriate places in the Answering Brief and Brief in Support of Cross-Exceptions. (*See GC Ans. Brief 57-106; GC Cross-Ex. Brief 40-63*).

B. General Counsel's Argument Regarding the Discriminatory Termination of the ENGAs Rests on a Joint-Employer Finding

With remarkable predictability CNN once again builds an argument by creating a straw man. Citing to *Plumbers Local 447 (Malbaff)*, 172 NLRB 128 (1968), CNN points out that finding a § 8(a)(3) violation by cancelling the ENGAs requires a finding that CNN was a joint employer with TVS. (CNN's Ans. Brief 48.) General Counsel has never argued otherwise. The very first sentence of General Counsel's section on the discriminatory cancellation of the

²³ *Cf. BCE Contractors, Inc.* 350 NLRB 1047 (2007) (Board rejected respondent's exceptions where Respondent failed to articulate the errors it contended required reversal of the judge's decision, but merely stated that the decision was contrary to the evidence adduced at the hearing and the law).

ENGAs in its Cross-Exceptions Brief states, “The Board has held that a joint employer violates §§ 8(a)(3) and (1) of the Act when it discriminatorily substitutes a contractor with which it has a joint employer relationship in retaliation for the union activities for the contractor’s employees.” (GC Cross Ex. Brief 14) (emphasis added here). However, contrary to CNN, the cases cited by General Counsel in support of its contention that CNN violated the Act by cancelling the ENGAs are entirely on point because, as General Counsel has argued and the ALJ has found, CNN was a joint employer with Team.²⁴

C. The Record Amply Supports the ALJ’s Finding that CNN Cancelled the ENGAs As a Result of Animus Against the Unions and the Employees They Represented

With respect to CNN’s final point that CNN did not cancel the ENGAs based on Union animus, palpable anti-union animus permeated this case from start to finish, as is evidenced by the following examples. New York Bureau Chief Karen Curry revealed in meetings with employees that CNN was getting rid of Team and the Union in order to have more direct control over its workforce. (Morrisey-Marquez 10878; GC 515.) White House Executive Producer Danielle Whelton told field technician Tim Garraty that there would not be any Union. (Garraty 13750-13775.) DC Bureau Chief Kathryn Kross told Local 31 President Mark Peach that the employees would not need a union because they would be so happy working for CNN alone. (Peach 1223.) When discussing overtime and penalty costs, Senior Director of Operations Lew Strauss said that these (Union-mandated costs) would soon no longer be an issue. (Cummings 8683-84). Strauss also told Team applicant Jon Ford that it was safe to assume that the Union would not be representing the employees at CNN after insourcing. (Ford 10984-85, 10992-25.) Executive Vice-President of Technical Operations Cindy Patrick told the new CNN workforce not to pay any attention to flyers distributed by the Union and asked for the opportunity to show the employees that they didn’t need a Union. (Shine 9554.) All of these statements by highest-

²⁴ See *Computer Associates Int’l*, 324 NLRB 285 (1997); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1164-66 (1989), enf’d sub nom, *Texas World Service Co. v. NLRB*, 928 F. 2d 1426, 1434-36 (5th Cir. 1991); *Syufy Enterprises*, 220 NLRB 738 (1975).

level Bureau managers are overt evidence of CNN's intention to rid itself of the Unions by cancelling the ENGAs.

Respondent takes issue with General Counsel's cited cases, particularly *Syufy Enterprises*, 220 NLRB 738 (1975), *Whitewood Maintenance Co.*, 292 NLRB 1159 (1989) enf'd. sub. nom. *Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991) and *W. W. Grainger, Inc.*, 286 NLRB 94 (1987), enf. denied on other grounds, 860 F.2d 244 (7th Cir. 1988). CNN distinguishes *Syufy* on the grounds that, in that case, the employer replaced a union contractor with a non-union contractor, whereas CNN brought the work in house and hired many of the Union contractor's (TVS's) employees. However, as General Counsel has exhaustively set forth in its Briefs, CNN selectively hired Team's employees in an effort to avoid a bargaining obligation. (*E.g.*, GC Ans. Brief 61-101, 161-67.)

CNN distinguishes *Whitewood* only by emphasizing that evidence of animus in *Whitewood* was different from the animus evidence in the instant case. Although many of the particulars of the animus evidence differs from the instant case, in both cases the record supports the inference of animus from pretext. Just as the ALJ in the instant case found that CNN's technology defense was pretextual (*e.g.*, ALJD 8:10-13), the Board in *Whitewood* found that the proffered reason for terminating the contractor was pretextual, and from that inferred animus. *Whitewood*, 292 NLRB at 1166. General Counsel's Answering Brief sets forth how the record does not support CNN's contention that technology motivated its cancellation of the ENGAs and discharge of the technical workforce. (GC Ans. Brief 61-62, 145, 161-63.) The evidence of pretext, together with the other evidence of animus in the record, clearly reveals CNN's unlawful motive.²⁵

²⁵ CNN cites to *W. W. Grainger, Inc.*, 286 NLRB 94 (1987), enf. denied on other grounds, 860 F.2d 244 (7th Cir. 1988) in which the Board declined to find a §8(a)(3) violation because there was evidence that labor costs motivated the employer's actions. As set forth above, unlike in *W. W. Grainger*, the reasons CNN advanced for cancelling the ENGAs are simply unbelievable.

V. CNN'S ANTI-UNION ANIMUS AND INDIVIDUALIZED DISCRIMINATION

A. The Coercive Statements Of Kross and Strauss Violated § 8(a)(1) of the Act.

CNN contends (CNN Ans. Brief 57-58) that Kross's statement to Local 31 President Peach -- that there would no union after the insourcing -- did not violate the Act because Peach is not an employee. However, the Board has found a § 8(a)(1) violation for coercive statements made to a non-employee where the speaker believed that the recipient of the statement was a conduit who could be depended upon to relay the unlawful message. *Medin Realty Corp.*, 307 NLRB 497 (1992); *Walgreen's*, 206 NLRB 124 (1973) (coercive statements made to spouse who is used as conduit to employee). In the instant case, Peach met with Kross in a representative capacity. It is inconceivable that Kross did not know that her statements would be relayed to employees.²⁶ Contrary to CNN's contention (CNN Ans. Brief 59), Kross's statement that there was not going to be a union because the employees would be too happy was not a prediction of employee sentiment. Rather, Kross made a plain statement of fact that CNN would not have a union and coupled it with what could only generously be described as CNN's wishful thinking. This is clear because other supervisors similarly stated to other people that CNN would be non-union. (*See* GC Ans. Brief § II.F.)

With respect to Louis Strauss's comment -- that overtime and penalty costs would not be an issue much longer -- CNN raises three points: (1) Strauss was not referring to costs associated with the collective-bargaining agreement; (2) Strauss's comment is not unlawful even if referring to the collective-bargaining agreement because he referred only to the employer's right to set initial terms; and (3) Strauss could not have made the statement because he heavily favored TVS employees in the hiring process.

As to the first point, the context of the conversation, drawn from Cummings's testimony (Cummings 8684), clearly establishes that Strauss was talking about expenses directly derived

²⁶ Moreover, even if Kross's statement were not a violation, "this in no way diminishes the anti-union animus implicit in such a statement." *Basin Frozen Foods*, 307 NLRB 1406, 1412 n.28 (1992).

from the collective-bargaining agreement. As to the second point, CNN's additional spin that Strauss was merely asserting CNN's right to set initial terms is quite a stretch considering that CNN would still have to bargain about penalty costs and overtime, regardless of whether it set initial terms. *See Spruce Up Corp.* 209 NLRB 194, 197 (1974) (even where the employer could set initial terms employees still had the right to try and better those terms through collective bargaining). *enf'd*, 529 F.2d 516 (4th Cir. 1975). Of course, CNN's far-fetched interpretation of Strauss's comment is purely speculative because Strauss denied the comments and therefore never explained what he meant. (Strauss 10271-72.) CNN's third point is simply illogical because Strauss's statement reflected CNN's intent, rather than his own preferences in hiring. (In any event, as explained elsewhere, General Counsel does not agree that Strauss or any hiring manager favored the hiring of Team employees. (GC Ans. Brief 91-92, 167-69.))

B. CNN Had Knowledge of the Protected Activities of the Union Activists Named in Complaint Paragraph 20

CNN argues at length that it refused to hire certain notable union activists based upon their merits rather than because of their Union activities. These arguments are unsupported in the record and have been dealt with extensively by General Counsel elsewhere. (GC Cross-Ex Brief 45-63.) However, CNN's argument with respect to its purported lack of knowledge of the union activities of the alleged individual discriminatees is so legally off base, in addition to being unsupported by the record, that it requires a separate response.²⁷

CNN contends that General Counsel has failed to meet its burden under *Wright Line*²⁸ by failing to prove knowledge. (CNN Ans. Brief 64) This argument totally misconstrues the

²⁷ Smith is not included in the group of Union activists. General Counsel's theory with regard to him does not rest on his union activism, but on Kinney's bald admission that Smith was not hired because of his status as a TVS unit employee. Smith was named separately in Complaint ¶ 20 because he was not included in the group of former TVS employees that CNN discriminated against in hiring. (*See* GC Ans. Brief Apps. C and D.) Smith's discharge is dealt extensively in General Counsel Cross Exceptions Brief at 63-65.

²⁸ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd* 662 F. 2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982)

burdens placed on the parties under *Wright Line* and its progeny. As a general rule, a manager's or supervisor's knowledge of an employee's protected activity will be imputed to the employer. Only where it has been affirmatively established as a matter of fact that the decision-maker did not have knowledge will the Board refuse to impute knowledge by a lower-level supervisor or manager. An employer can establish that the decision-maker did not have knowledge with a credited denial. *Ellison Media Co.*, 344 NLRB 1112, 1122 (2005); *Dr. Phillip Megdal, DDS, Inc.*, 267 NLRB 82 (1983). Therefore, once General Counsel has established that some supervisor or manager knew about protected concerted activity, it is respondent's burden to affirmatively establish that the knowledge of that supervisor or manager was not communicated to the decision-maker. *See, e.g., United Rentals, Inc.*, 349 NLRB 190, 190 n.2 (2007) (the Board imputed knowledge to the employer where agents of the employer had knowledge and the decision-maker did not deny knowledge). *Quality Control Elec.*, 323 NLRB 238, 239 (1997) (“[r]espondent has failed to establish a case against attribution here.”)

In the instant matter, the case for attribution is strong. All the alleged discriminatees in Complaint ¶ 20 engaged in conduct that was open and notorious. (*See* GC Cross-Ex. Brief 46-47 (Kiederling), 51-55 (Crennan), 56-58 (Jenkins), 59 (Norman), 60-61 (Pacheco), 62-63 (Suissa).

More to the point, the evidence establishes that the aggressive union activities of each of these individuals were known to at least some managers or supervisors of CNN. In about 2000, Kiederling led Unit employees on a committee to address safety issues related to one-man bands and participated in meetings on this issue with CNN-then Bureau Chief Edith Chapin and Producer Barclay Palmer, and Kiederling also raised issues regarding Hazmat gear directly to Palmer and Chapin. (*See* GC Cross-Ex. 47.) Since Chapin and Palmer were actively involved in the Bureau Staffing Project, their knowledge of Kiederling's activities would be sufficient to establish CNN's knowledge as to his union activities. *See Quality Control Electric*, 323 NLRB at 238. (knowledge by an agent even tangentially involved in the hiring process supported an inference that the agent who made the hiring decisions had knowledge). Moreover, this principle

applies to other CNN managers who had first-hand knowledge of union activity and were also directly involved in the Bureau Staffing Project, such as Cindy Patrick (Crennan), Troy McIntyre (Crennan), Matt Speiser (Suissa) and Tu Vu (Norman).

It is crystal clear that Troy McIntyre, the hiring manager who interviewed Crennan was aware of his Union activities because Crennan brought them up with McIntyre during the interview. (*See GC Cross-Ex. Brief 51.*) McIntyre also commented negatively on Crennan's union activity in his interview notes on Crennan during the Bureau Staffing project. (*See GC Cross-Ex. Brief 51-52.*) Furthermore, Crennan had complained to CNN managers Sweet and Maltas about health issues in the studio, and to Maltas about CNN Director Cullen. (*See GC Cross-Ex Brief 53.*) Sweet brought these complaints to the attention of the Cindy Patrick and other participants in the Bureau Staffing Project. (*See GC Cross-Ex. Brief. 55.*)

Jenkins was a Union executive board member and was active in negotiations with TVS in 1998. During negotiations, Jenkins put a union tee-shirt on an Easter Bunny, which he used as a lighting model in full view of the news staff and the CNN managers offices in DC and Atlanta. He was told to take the bunny down. (*See GC Cross-Ex. Brief 56*) Jenkins also wore a toy ladder in support of the Union's position in negotiations, which he was questioned about by CNN managers, including Producers Brad White and Karla Crosswhite, as well as Assignment Editor Vito Maggiolo. (*See GC Cross-Ex. Brief 57.*) The fact that CNN management was well aware of Jenkins's activism was apparent in the casual elevator conversation between Jenkins and CNN Producer Steve Turnham, who referred to Jenkins as the "union guy." (*See GC Cross-Ex. Brief 58*).

Norman was also well known as a Union activist. When he needed time to represent employees, he would inform CNN's Tu Vu as well as the Team manager, leaving no doubt that a CNN manager was well aware of his activities. (*See GC Cross-Ex. Brief 59*). Tu Vu was a hiring manger, actively involved in interviewing DC engineers, including Norman. (*See GC Cross-Ex. Brief 59.*)

Pacheco provided un rebutted testimony that she regularly discussed contract issues with the Team's assignment desk editor in the presence of CNN Assignment Editor Diane Ruggiero. In 1998, she made announcements into a bullhorn in support of the Union's bargaining position at a party attended by some CNN producers and managers. (*See* GC Cross-Ex. Brief 60.) Around the same time, in a demonstration in front of CNN, Pacheco handed out leaflets and wore a red shirt, symbolic of her support for the Union, in front of then-Bureau Chief Frank Sesno and Deputy Bureau Chief Peggy Soucy. (*See* GC Cross-Ex. Brief 60.)

Suissa was not only a shop steward for twelve to fourteen years, but he was also assistant to the President of the Union for eight. He was Team's contact for exchanging correspondence and for notifying the Union about discipline of Unit employees. He served on the negotiating committee for both contract negotiations. (*See* GC Cross-Ex. Brief 63.) During negotiations in 1998, Suissa was approached by CNN then-Bureau Chief Frank Sesno who wanted to discuss negotiations with Suissa. (Suissa 4948-4949.) Matt Speiser, then a CNN official and later a BSP hiring manger, approached Suissa at one point during the negotiations for the second Team contract approached Suissa to find out how negotiations were going. (Suissa 5240-41.)

The record leaves no doubt that, for each of the Complaint ¶ 20 discriminatees, some CNN supervisor or manager knew about the individual's activism. As set forth above, this knowledge must be imputed to CNN absent credible, affirmative evidence that the information was never communicated to the individual managers responsible for hiring the named discriminatees. CNN has pointed to no evidence that knowledge of the union activity was never communicated to the relevant decision makers. Instead, CNN has simply wrongly placed on General Counsel the burden of identifying the decision-makers and proving they had knowledge. Accordingly, the Board should find that CNN had knowledge as to the activities of each of the discriminatees in Complaint ¶ 20.

VI. REMEDIAL ISSUES

A. **Employees Hired By CNN Into Unit Positions Are All Entitled To A Make-Whole Remedy, Regardless Of Whether They Had Previously Worked For TVS**

CNN objects to General Counsel's argument that employees in unit positions who had not previously worked for TVS should receive a make-whole remedy along with their counterparts who worked under TVS. (CNN Ans. Brief 88-89; GC Cross Ex. Brief 45.) Initially, CNN argues that it had no duty to bargain over the conditions of employment of employees performing historical unit work because it was neither a joint employer nor a successor employer to whom bargaining obligations attached. These arguments have been thoroughly refuted elsewhere.

CNN's alternative route to avoiding remedial relief for unit employees who did not previously work for TVS is a mis-framing of the theory of this relief. CNN argues that employees hired after the in-sourcing did not suffer a "change" in their terms of employment, and thus that CNN could not be found to have effected an unlawful change, thereby relieving it of the obligation to correct an unlawful change. However, CNN unlawfully unilaterally determined the terms and conditions of employment for the new employees in historical unit positions as well as those who had been in those positions under TVS. Thus, the "new" employees were harmed by CNN's unlawful failure to bargain and CNN should not be permitted to profit from its violation of its duty to bargain by maintaining the unilaterally-implemented terms for any of the effected employees.

CNN relies improperly on *Federal-Mogul Corporation*, 209 NLRB 343 (1974), (CNN Ans. Brief 89), which supports General Counsel's theory of this case. *Federal-Mogul* involved a workforce of employees who were already represented by a union and covered by a collective-bargaining agreement. The union was then certified to represent a new group of employees of the same employer. The employer, without bargaining, applied the terms of the contract to the new group of employees, causing them to lose some benefits. The Board found that the employer's action amounted to an unlawful unilateral change, and that the employer had violated

its duty to bargain with the union over the terms of employment of the newly-certified group. Thus, the case turned on an employer's unilateral setting of employment conditions for represented employees. Here, CNN has likewise set terms without bargaining; if anything, the instant case is a more egregious violation of the duty to bargain because in *Federal-Mogul* the employer chose terms that had been bargained, albeit for a different group of employees. CNN has refused to bargain with the Unions herein over any of the employees performing the work of the historical unit.

In *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), also cited by CNN (CNN Ans. Br. 89), the Board overturned a monetary remedy recommended for employees victimized by an employer's failure to bargain for an initial contract while the employer was testing certification. The Board decision was reached "reluctantly," *Ex-Cell-O*, 185 NLRB at 108, and was remanded and criticized on appeal. *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1046, 1050 (1971). In any event, that case is not analogous to this one. Monetary remedies for unit employees in a successorship failure-to-bargain situation have long been recognized as appropriate. To grant relief only to part of the affected unit would only perpetuate the ill effects of CNN's unlawful refusal to recognize the Unions as lawful representatives of all employees performing historical unit work, and would allow CNN to benefit from its violation of the NLRA, and its employees to continue to suffer for it.²⁹

As argued in General Counsel's Brief in Support of Cross-Exceptions, CNN should be ordered, upon request of the Unions, to retroactively restore the terms and conditions of employment existing prior to its unlawful unilateral changes to all employees who have

²⁹ General Counsel is confounded by CNN's interest in referencing *G & T Terminal Packaging Co.*, 326 NLRB 114 (1998) (CNN Ans. Br. 89) as in that case the Board strove to give effect to the extent possible to a contract that the parties had bargained over, but that the employer had unlawfully unilaterally abrogated. The Board found that as the innocent party, the Union, "should have the option of treating the contract as having expired [on the bargained expiration date] or as having renewed on that date." *G & T*, 326 NLRB at 117. If anything, the finding bolsters the argument that innocent employees should not suffer for CNN's unlawful failure to bargain.

performed unit work, and make all affected employees whole for any losses they incurred as a result of unilateral changes. *Banknote*, 315 NLRB 1041, 1051 (1994).³⁰

B. CNN Should Be Required To Post Notices By Email

As thoroughly argued in General Counsel's Brief in Support of Cross-Exceptions at 48 (and as requested of the ALJ in General Counsel's brief to him), electronic posting is appropriate in this case. It is true, as CNN notes (CNN Ans. Br. 93-95), that the Board has denied such posting in a few cases. However, as CNN acknowledges, that denial has been based on a lack of evidence that employer communicated electronically with employees. *See National Grid USA Service Co., Inc.*, 348 NLRB 1235 n.2 (2006), *Nordstrom, Inc.*, 347 NLRB 294 n.5 (2006).³¹

By contrast, the Board has ordered electronic posting where, as in this case, evidence of electronic communication in the workplace was adduced at hearing. *Windstream Corp.*, 352 NLRB 510 n.3 (2008). Chairman Liebman (during her tenure as Member Liebman), has repeatedly expressed her less-restrictive view toward electronic posting. *See, i.e., National Grid*, 48 NLRB 1235 n.2, and *Nordstrom*, 347 NLRB 294 n.5.

Managers and other CNN agents have used email to communicate with technicians at CNN's New York and DC bureaus for years, both throughout the TVS era and into the present. General Counsel's Brief in Support of Cross-Exceptions included references to some of the abundant testimonial and documentary evidence of electronic communication. While CNN

³⁰ As noted in General Counsel's Brief in Support of Cross-Exceptions, the issue of whether CNN might have negotiated to impasse or reached an agreement with the Unions on a particular date, the appropriate time to make that argument is in the compliance stage of the proceeding. *Planned Building Services*, 347 NLRB 670, 676 (2006).

³¹ CNN's reference to *Int'l Bus. Machines Corp.*, 339 NLRB 966 (2003) (CNN Ans. Br. 94) in this regard is misleading. The Board did not deny electronic posting in that case because of an insufficiency of evidence but rather because the requesting party (the union) failed to seek the remedy in a timely manner. The union in that case asked for electronic posting only after the issuance and enforcement of a Board Order with traditional posting language. 339 NLRB at 967. The Board briefly noted the evidence supporting the union's request, but ultimately denied the request without ruling on the merits of the evidence, instead stating that, "[h]ad the . . . request for this relief been timely made, these issues could have been appropriately considered." 339 NLRB at 967. General Counsel herein has made the electronic posting request before the ALJ, and is now making it before the Board.

complains that one instance of testimony is improperly cited,³² the weight of evidence cannot be denied. CNN additionally seems to find significant that General Counsel did not present evidence about “CNN’s current email system.” It cites to no caselaw, and General Counsel is aware of no caselaw, that requires exposition regarding an employer’s email system in arguing for electronic notice posting. However an electronic communications system is constructed, its frequent use is the salient issue. It would be ludicrous for CNN to deny continued regular email use between managers and staff in its New York and DC bureaus. It does not do so. Electronic notice posting is clearly appropriate.

VII. THE ALJ SHOULD HAVE ALLOWED GENERAL COUNSEL’S AMENDMENTS

CNN contends that the ALJ correctly denied the General Counsel’s offer to amend ¶ 4 of the Consolidated Complaint near the end of the hearing. (*See* GC 572.) CNN complains that it would be prejudiced if the General Counsel were allowed to amend the complaint at that time. It contends that were the amendment allowed, it would have been denied proper notice that additional individuals were alleged as supervisors or agents, and would not have had the opportunity to “question witnesses about the supervisor/agent status.” (CNN Ans. Brief 98.)

CNN makes no effort to demonstrate any real prejudice it would have suffered were the General Counsel allowed to amend the Complaint. That is because there was none. The Consolidated Complaint (GC 1-BB) listed eleven pages of names and job titles of CNN and TVS employees who the General Counsel alleged as supervisors and/or agents of either CNN or TVS. In neither their Answers to the Complaint, nor at any time during the trial, did either CNN or TVS stipulate or otherwise admit that a single person listed in these eleven pages was either a supervisor or agent. They did not present any evidence on the question of the supervisory or

³² CNN objects to only one of General Counsel’s examples of email use -- testimony of Jimmy Suissa. (CNN Ans. Br. 94-95.) Suissa clearly described receiving emails from CNN producers as well as commendations of his work via electronic bulletin board postings. (Suissa 5205-5207.) Both are examples of electronic communication.

agency status of any of those listed in ¶ 4 of GC 1-BB or on GC 572, the proposed amendment to ¶ 4 of GC 1-BB.

The identity of all of those persons listed in the eleven pages of ¶ 4 of the Consolidated Complaint belies CNN's argument that it was prejudiced because it was not given proper advance notice that those individuals listed on GC 572 would also be alleged as supervisors and/or agents of CNN. The additional persons on GC 572 that the General Counsel was precluded from adding to ¶ 4 occupied the same job classifications (primarily that of producer) as many of those listed in ¶ 4 of the Consolidated Complaint. CNN could not have been surprised that the General Counsel decided to amend ¶ 4 to include these additional persons, with the same job titles and whose identity was unknown until the hearing, as supervisors and/or agents as well. It is untenable for CNN to contend that it was prejudiced because it did not have the opportunity to present evidence to refute the supervisory/agency status of those individuals listed on the proposed amendment when it declined to present any evidence on the status for any of the persons in the same job classifications who were named in ¶ 4 of GC 1-BB. Furthermore, had the ALJ granted the proposed amendments, CNN could have requested time to prepare witnesses or investigate the issues raised by the proposed amendments. CNN's contention that the proposed amendment was untimely, thereby causing prejudice to its position, should be rejected, and the amendment should be allowed.

VIII. CONCLUSION

For the all the reasons stated herein, and in General Counsel's Answering Brief, General Counsel's Cross-Exceptions and Brief in Support thereof, General Counsel respectfully urges the Board to affirm the ALJ's Decision with the modifications set forth in General Counsel's Cross-Exceptions.

Dated at New York, New York
June 30, 2009

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**CNN America, Inc, and Team Video Services, LLC,
Joint Employers**

Respondents

and

**National Association of Broadcast Employees &
Technicians, Communications Workers of America,
Local 31, AFL-CIO**

Charging Party

and

**CNN America, Inc. and Team Video Services, LLC,
Joint Employers**

Respondents

and

**National Association of Broadcast Employees &
Technicians, Communications Workers of America,
Local 11, AFL-CIO**

Charging Party

Case Nos.

5-CA-31828

and

5-CA-33125 (formerly 2-CA-36129)

Date of Mailing: June 30, 2009

AFFIDAVIT OF SERVICE OF: GENERAL COUNSEL'S BRIEF IN REPLY TO CNN'S ANSWERING BRIEF

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail (email) and overnight delivery, as indicated below, upon the following persons, addressed to them at the following addresses:

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