

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

CNN AMERICA, INC. & TEAM VIDEO  
SERVICES, LLC, JOINT EMPLOYERS,

Respondent,

and

Case No. 5-CA-31828

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

Charging Party,

and

Case No. 5-CA-33125

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

Charging Party.

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**ANSWERING BRIEF OF CHARGING PARTY  
NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS,  
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO**

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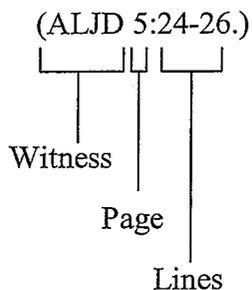
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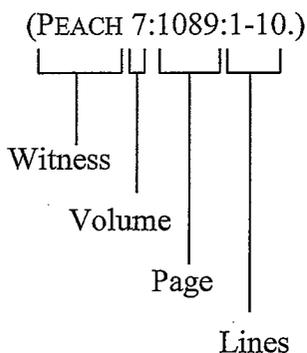
### ALJ DECISION:

Citations to the ALJ's Decision shall be by page and lines. For example:



### TRANSCRIPT:

Citations to the transcript shall be by name of witness or speaker, followed by volume, page and lines. For example:



Note: Citations to the lines of the transcript may include questions to provide proper context for answers.

### EXHIBITS:

Citations to exhibits shall be by party as follows:

"GC Ex." for General Counsel Exhibits

"CNNA Ex." for Respondent CNNA Exhibits

"TVS Ex." for Respondent TVS Exhibits

"CPDC Ex." for Charging Party Local 31 Exhibits

## **CHARGING PARTY'S BRIEF IN SUPPORT OF PARTIAL CROSS-EXCEPTIONS**

Pursuant to Section 102.46 of the Board's Rules and Regulations, 29 C.F.R. § 102.46, Charging Party National Association of Broadcast Employees & Technicians – Communications Workers of America, Local 31 (“NABET Local 31” or “Local 31”) submits this answering brief in opposition to the exceptions filed by Respondent CNN America, Inc. (“CNN” or “CNNA”) from the November 19, 2008 decision of Administrative Law Judge (“ALJ”) Arthur J. Amchan.

### **I. INTRODUCTION**

For many years, CNN subcontracted the electronic newsgathering, production and engineering services performed at its Washington, D.C. Bureau (“D.C. Bureau”), and its New York, N.Y. Bureau (“N.Y. Bureau”) to a series of subcontractors. While their identity changed over time, each successive subcontractor hired the overwhelming majority of the predecessor's employees, who continued to perform the electronic newsgathering, production and engineering services at each bureau. In addition, each successive subcontractor recognized and bargained with the employees' representative, *viz.*, the National Association of Broadcast Employees & Technicians – Communications Workers of America (“NABET-CWA” or “NABET”).

The last of the series of subcontractors was Team Video Services, which operated as Team Video Services, LLC (“TVS-DC”) at the D.C. Bureau and Team Video Services of New York, Inc. (“TVS-NY”) at the N.Y. Bureau (collectively “TVS”). TVS executed an Electronic News Gathering Services Agreement (“ENG Agreement”) with CNN at each of the bureaus. Generally, under the ENG Agreement, TVS provided the employees who would perform the electronic newsgathering, production and engineering services at the D.C. and N.Y. Bureaus, subject to certain significant conditions and restrictions, in return for payment from CNN. After signing the ENG Agreement, TVS hired the overwhelming majority of the predecessors'

employees (referred to as the “bargaining unit employees” or “TVS employee”) at both bureaus and recognized NABET as the employees’ collective bargaining representative at each bureau.

TVS was the nominal employer of the bargaining unit employees at the D.C. and N.Y. Bureaus; however, CNN retained substantial control over important terms and conditions of employment, including, but not limited to, the assignment of work, the direction of work, the employees’ total compensation, their ability to work overtime and the determination of labor relations. CNN exercised this control, not only through the ENG Agreement, but also on a day-to-day basis through its managers and supervisors. While CNN controlled matters such as assignments and overtime, the labor costs of providing the bargaining unit employees pursuant to the ENG Agreement increased substantially over time, exceeding the amounts forecasted by CNN and TVS in the ENG Agreements by hundreds of thousands of dollars.

Without any advanced notice, on September 27, 2003, CNN announced that it would terminate the ENG Agreements with TVS at the D.C. Bureau in 2003 and at the N.Y. Bureau in 2004. CNN knew that the termination of the ENG Agreements would thereby cause TVS to discharge the union-represented workforces at both bureaus. Thereafter, CNN established and implemented the Bureau Staffing Project (“BSP”), through which the Respondent would hire new employees to perform the work that the bargaining unit employees had previously performed for years and, in some cases decades.

Cognizant of the Board’s successorship doctrine, CNN developed and implemented the BSP to avoid any obligation to recognize and bargain with NABET-CWA. The Respondent achieved this unlawful objective by designing the BSP to include a gauntlet of human resources hurdles. Throughout this gauntlet, CNN placed incumbent bargaining unit candidates at a competitive disadvantage with non-unit candidates, making it easier for the Respondent to reject

bargaining unit candidates at any stage of the process. However, there was an obvious limit to the number of highly trained, skilled and experienced bargaining unit employees that CNN could reject as a part of the BSP before the Respondent would compromise the operations of its bureaus and the quality of its programming. Consequently, CNN designed the BSP to create the *false* impression that the Respondent was creating a new, larger bargaining unit. CNN created this illusion by subjecting some of its own employees, such as those working in its information technology department, to the BSP. By selectively adding some of its own employees to the BSP (who, unlike the bargaining unit employees, were all rehired by CNN), the Respondent sought to dilute NABET-CWA's representation in the historic unit, which would later serve as the unlawful basis for the Respondent to reject the Union's demand for recognition as the employees' representative.

In an effort to conceal the unlawful purpose of the Bureau Staffing Project, CNN tried to justify the BSP on the basis that the Respondent sought to implement "new technologies" that affected the "workflows" at both bureaus. In other words, CNN caused the termination of an established workforce, which was skilled and experienced in the operations of the D.C. and N.Y. Bureaus and hired a new, inexperienced workforce along with a cadre of seasoned TVS veterans in order to use new technology. The pretextual nature of this justification was demonstrated by, *inter alia*, the fact that, not only did CNN undertake to train its new workforce in its much-touted, new technology, but also the Respondent had to train its new workforce in the still-used, *old* technology. The pretext is further underscored by the fact that, in the days, weeks and months after the BSP, the new employees continued to use substantially the same equipment and processes as the bargaining unit employees to produce the same product, *i.e.*, cable news stories and programming.

Despite its best efforts, CNN could not conceal its unfair labor practices. After an eighty-two day unfair labor practice hearing, ALJ Amchan issued a decision on November 19, 2008 finding that CNN committed widespread violations of Sections 8(a)(5), (3) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), (3) and (1). In his 169-page decision, the ALJ found that CNN was a joint employer with TVS of the employees in the bargaining units at the D.C. and N.Y. Bureaus. As a joint employer, the ALJ concluded that CNN was bound to the collective bargaining agreements between TVS and NABET-CWA. The ALJ further found that CNN was obligated to provide notice and an opportunity to bargain over the decision to terminate the ENG Agreements; however, the Respondent presented the decision as a *fait accompli*, “a final decision about which CNN had no intent to bargain.” (ALJD 17:6-16.) The ALJ also found that CNN was obligated to bargain over any changes to terms and conditions of employment, and that the Respondent violated the Act by failing to bargain over those changes.

Based upon the foregoing evidence, the ALJ concluded that CNN discriminatorily failed to hire many TVS employees at the D.C. Bureau and the N.Y. Bureau and illegally refused to recognize NABET Local 31 and Local 11 as the collective bargaining representative of the employees it hired to perform the work previously performed by TVS employees. The ALJ further concluded that, because of its discriminatory conduct, CNN forfeited its right, as a successor employer, to set the initial terms and conditions of employment for the newly hired employees. Therefore, CNN violated Sections 8(a)(5) and (1) by failing to recognize NABET Local 31 and Local 11 and by making unilateral changes to the terms and conditions of employment at the D.C. Bureau and the N.Y. Bureau without first bargaining with the Union.

The ALJ also found that CNN is a successor to TVS at both the D.C. and N.Y. Bureaus and that CNN discriminated against the bargaining unit employees in order to avoid a

successor's obligations to recognize and bargain with NABET-CWA. The ALJ found direct evidence of CNN's animus against TVS employees in the statements made by a variety of CNN managers and supervisors at both the D.C. and N.Y. bureaus. The ALJ also found direct evidence of animus based upon how CNN drafted position questionnaires for the new photojournalist positions and in how it assigned certain employees to keep them out of the bargaining unit. (ALJD 29:38-43, 51:21-25, 92:40-44, 93:1-2.)

The ALJ found a broad array of circumstantial evidence that exposed CNN's unlawful motivation. For example, the ALJ found that CNN's purported reasons for terminating the ENG Agreements and hiring a new workforce, *viz.*, the opportunity to take advantage of technological advancements, was pretextual. The ALJ determined that "[a] major motive" in CNN's decisions was the Respondent's "desire to operate its Washington and New York bureaus without a union." (ALJD 8:10-13, 31:4-7.) For example, ALJ Amchan observed, "there is no evidence that CNN has ever taken such draconian measures", *i.e.*, to terminate the entire existing workforce and replace it with new hires, "at any of its non-unionized bureaus or its Atlanta headquarters" when faced with similar technological change. (ALJD 33:44-48, 97:11-13.) The ALJ found that CNN could have easily trained the bargaining unit employees to use these new technological advancements, as it had trained its non-union workforces at other bureaus and the Atlanta headquarters and as it trained the newly hired employees at the D.C. and N.Y. Bureaus.

The ALJ further recommended a comprehensive remedy to redress CNN's unfair labor practices. The ALJ stated, "[t]he Respondent having discriminatorily discharged and/or refused to hire employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits...." (ALJD 147:32-33.) The ALJ's recommended remedy provided stated that if any employee needed training in order to perform their jobs successfully, CNN

must provide that training. The ALJ also directed CNN to withhold and transmit dues to Locals 31 and Local 11 pursuant to the collective bargaining agreements. Finally, the ALJ stated:

Because of CNNA's widespread and egregious misconduct, demonstrating a flagrant and general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner the rights guaranteed employees by Section 7 of the Act.

(ALJD 148:8-11 (citing *Hickmott Foods*, 242 NLRB 1357 (1979).)

Confronted with ALJ Amchan's decision, CNN has responded with a blunderbuss attack, filing more than 1,600 exceptions challenging virtually every aspect of unfair labor practice proceeding and/or the ALJ's decision. The voluminous exceptions cannot obscure the fact that the Respondent's assault upon the ALJ's decision, and, in some respects, the ALJ, amounts to little more than a disagreement over the facts and the reasonable inferences. In the following sections of this brief, NABET Local 31 will set forth a statement of the facts underlying the ALJ's decision based upon the substantial evidence in the record. Local 31 will then address the principal arguments raised by CNN in its exceptions, demonstrating how each argument lacks any semblance of merit. Accordingly, NABET Local 31 respectfully requests that the Board affirm the ALJ's rulings, findings and conclusions, as well as adopt the recommended order with the modifications set forth in the Charging Party's cross-exceptions.

## II. STATEMENT OF FACTS

### A. Part One: The Early Years of CNN's Washington, D.C. Bureau

CNN America, Inc. commenced operations at its Washington, D.C. bureau ("D.C. Bureau")<sup>1</sup> in April 1980 and began broadcasting at the bureau on June 1, 1980. *Mobile Video*

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<sup>1</sup> In this brief, Local 31 will focus primarily on the allegations relating to CNN's D.C. bureau.

*Svcs., Ltd.*, 266 NLRB 1143, 1144, n.2 (1983).<sup>2</sup> In June 1980, the Respondent contracted with Mobile Video Services to provide electronic newsgathering and engineering services at the D.C. Bureau. *Mobile Video Svcs.*, 266 NLRB at 1144. Mobile Video Services provided camera crews consisting of camera operators and video tape operators, as well as master controllers, whose duties included “the direction of various shows, for the technical product, the signal, recording tapes, playing tapes to air and taking in signals from the field, such as from a microwave truck or a telephone facility.” *Mobile Video Svcs.*, 266 NLRB at 1144.

In January 1982, the Board certified NABET, later NABET-CWA, as the representative of a bargaining unit consisting of “camera operators, tape operators, editors, couriers, engineers and master controllers” employed by Mobile Video Services at its Washington, D.C. facility, which was CNN’s D.C. Bureau. (GC Ex. 2 at 1, n.2.) Thereafter, Mobile Video Services and NABET negotiated a collective bargaining agreement covering the employees performing work at CNN’s D.C. Bureau, which was effective through April 30, 1985. (GC Ex. 3.)

Mobile Video Services did not survive long after the initial collective bargaining agreement, and there were a series of successive subcontractors – including Professional Video Systems, News Link and Potomac Television Services Corporation (“Potomac” or “PTSC”) – that provided the electronic newsgathering, production, engineering services over the following ten years, from approximately 1986 through 1997. (STURM 2:210:22-25, 2:211:1.) Each of these subcontractors recognized NABET (or NABET-CWA) as the representative of the historical bargaining unit of camera operators, tape operators, engineers, master controllers and couriers (collectively “bargaining unit employees”). (GC Ex. 4 at 1; GC Ex. 5 at 1; GC Ex. 6 at 1; GC Ex. 7 at 1.) Each subcontractor also negotiated a collective bargaining agreement with

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<sup>2</sup> The Board can take judicial notice of factual findings in an earlier, published decision. *See Nevada Cement Co.*, 181 NLRB 738, n.2 (1970).

NABET (or NABET-CWA) covering the historical bargaining unit. (GC Ex. 4 at 1; GC Ex. 5 at 1; GC Ex. 6 at 1; GC Ex. 7 at 1.)

**B. Part Two: The Advent of Team Video Services, LLC**

In 1997, CNN solicited bids for a new subcontractor to perform the technical newsgathering and engineering services at the D.C. Bureau. (FRYDENLUND 75:15164:4-8.) As part of the proposal process, CNN advised to TVS, one of the potential bidders, that the bidder should “evaluate the market rates of salaries” for the various types of technicians and engineers, particularly because CNN was concerned that Fox News had reentered the marketplace. (FRYDENLUND 75:15170:3-14.) As a result of the bidding process, CNN chose TVS to replace Potomac as the subcontractor providing the electronic newsgathering, production and engineering services at the D.C. Bureau.<sup>3</sup>

After selecting TVS to be the subcontractor at the D.C. Bureau, CNN proceeded to negotiate an Electronic News Gathering Services Agreement (“ENG Agreement”) with the new subcontractor. (FRYDENLUND 75:15166:12-24.) On September 18, 1997, Respondents CNN America, Inc. and Team Video Services, LLC entered into the ENG Agreement (GC Ex. 40), whose “final verbiage” was negotiated by counsel for TVS, an owner of the parent company of TVS (Bryan Frydenlund), and counsel for CNN. (FRYDENLUND 75:15166:21-24.)

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<sup>3</sup> In 2002, CNN also chose Team Video Services to be the subcontractor to provide electronic newsgathering, production and engineering services for the N.Y. Bureau. (GC Ex. 76.) A year later, a CNN manager in charge of set design, Alan Reese, told a TVS employee, Robert Cummings, that, historically, CNN was not a union shop at its Atlanta, GA Bureau and was not used to dealing with the union. (CUMMINGS 40:8654:2-9.) Reese added that CNN hired TVS to act as a go-between with the Union, just as it had with Potomac Television Services Corporation, the previous contractor. (CUMMINGS 40:8654:2-13.) Cummings stood by his testimony under cross-examination by CNN counsel. (CUMMINGS 40:8742:4-25, 40:8743:1-25, 40:8744:1-21.) Like the N.Y. Bureau, CNN had retained Potomac and later TVS as the contractor at the D.C. Bureau, where the subcontractor served as the go-between with the collective bargaining representative of the historically, union-represented workforce at that bureau, *viz.*, NABET-CWA.

The ENG Agreement is nominally a “cost-plus” agreement. (D’ANNA 16:3526:20-25, 16:3527:1-2.) A “cost-plus” contract is “[o]ne which fixes the amount to be paid the contractor on a basis, generally, of the cost of the material and labor, plus an agreed percentage thereof.”<sup>4</sup>

In this case, the ENG Agreement required TVS to provide:

full-time or part-time video and audio technicians (hereinafter referred to as “technicians”) who are fully qualified to perform the services required under this Agreement and experienced in providing those services as professionals ..., and fully qualified managers for the technicians and other individuals as CNNA shall from time to time require to render electronic and other news gathering services ... and production services within the operational area of CNNA’s Washington, D.C. Bureau and elsewhere as CNNA may require.

(GC Ex. 40 at 1.) In return for the technicians (*i.e.*, the bargaining unit employees) provided by TVS, the ENG Agreement required CNN to pay a monthly “Labor Fee” to TVS that would equal “the forecast for wages (including overtime), benefits (including meal penalties), workers compensation insurance premiums, insurance for technicians on National DOD Media Pool, and payroll taxes for the technicians ....” (GC Ex. 40 at 13.) CNN would adjust the Labor Fee “if, in a given month, the number of technicians’ hours worked or meal penalties incurred to provide the services covered by this Agreement as requested by CNN exceed those forecast in Appendix C....” (*Id.*) That Appendix “forecasted” the technicians’ hours and/or meal penalties as follows:

... This fee is based on the following provisions: (1) [TVS] will provide CNNA with 85 technicians whose services, aggregated will provide CNNA a minimum of 157,720 hours per year; (2) it is estimated that field technicians will work at overtime rates ten (10) hours per week per person and that production technicians will work at overtime rights eight (8) hours per person; (3) it is estimated that meal penalties will be incurred at a rate of three (3) penalties per week.

(*Id.* at 43.) The ENG Agreement provided that, in months when the number of hours worked or meal penalties incurred by technicians exceeded the forecasted amounts, CNN would provide additional funds to cover the additional costs. (*Id.* at 13.) However, given that CNN was the

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<sup>4</sup> BLACK’S LAW DICTIONARY 415 (Rev. 4th Ed. 1968).

only customer of TVS (FRYDENLUND 75:15266:4-5), CNN was the ultimate source – and, indeed, the only source – of funds for the compensation of the technicians.

Apart from the foregoing terms, which are typical in cost-plus agreements (*i.e.*, the provision of services and the reimbursement for services), the ENG Agreement included several provisions through which CNN reserved a significant and continuing role for itself with respect to the terms and conditions of the bargaining unit employees provided by TVS. These provisions, as well as the matters affected therein, include the following:

(1) **Setting the Number of Technicians:** By virtue of Section 1 of the ENG Agreement, as well as the calculation of the Labor Fee, CNN and TVS initially set the number of bargaining unit employees to be provided under the Agreement at eighty-five (85) employees. (ALJD 16:21-22; GC Ex. 40 at 1, 43.) CNN retained exclusive control over the adjustment in the number of employees. This control was set forth in the ENG Agreement, which provided, “CNNA shall have the right to require changes in the current levels of service and in such event the parties agree to negotiate in good faith to adjust the number of personnel required by CNNA and the associated fees provided for herein.” (GC Ex. 40 at 1.)

(2) **Assigning Work to TVS and, in turn, the Technicians:** Section 1(c) of the ENG Agreement provided:

CNNA shall be entitled and have the right to freely contract with any other individual or entity *for the provision of ENG Services that are the same or similar to those provided by the Independent Contractor [i.e., TVS]* to CNNA pursuant hereto, or to provide its own employees for the provision of the same or similar ENG Services, including but not limited to services using either existing technology. CNNA retains the right to make such work assignments in connection with such services as it sees fit, whether to its own employees, to the Independent Contractor, or to other entities. The Independent Contractor shall take no action nor enter into any agreement or undertaking contrary to this subparagraph (c).

(GC Ex. 40 at 2 (Section 1(c)) (emphasis added).) This provision left CNN with the unfettered right to make work assignments to TVS, and, in turn, the bargaining unit employees. This provision could also allow CNN to take that work away from TVS and the employees during the contract. (*Id.*)

On a day-to day basis, the ENG Agreement provided CNN with the ability to determine coverage of assignments in the event of a shortage of bargaining unit employees due to the absence, vacation or sick leave taken by employees. (GC Ex. 40 at 14.) In such circumstances, where TVS cannot provide full-time employees to cover the assignments requested by CNN, the Agreement provides that TVS “shall coordinate with CNNA’s designated liaison to determine whether the assignment needs to be covered that day and how such coverage shall be accomplished.” (*Id.*)

**(3) Approving Overtime Worked by Technicians:** The ENG Agreement specifically reserved unto CNN the right to approve overtime worked by bargaining unit employees during the course of covering assignments required by CNN. (ALJD 14:33-44, 15:1-20; GC Ex. 40 at 13-14.) The Agreement provided that CNN had to give such approval in advance. (GC Ex. 40 at 13-14.) In addition, CNN reserved the right to approve overtime for TVS employees in order to cover the assignments required by CNN in cases where there was a shortage of employees (due to absence, vacation, etc.). (*Id.* at 14.)

**(4) Being the Sole Source of Compensation and Controlling the Total Yearly Increase in Payroll:** CNN was the only source of funds for TVS to compensate its employees (ALJD 13:3-4), because CNN was the only customer of TVS. (FRYDENLUND 75:15266:6-7.) In addition, CNN reserved for itself the ability to control yearly increases in the total payroll for the bargaining unit employees. (ALJD 12:29-33, 13:1-12.) Section 2(c)(iv) of the ENG Agreement

provided, “[b]eginning in the second year of the term of this Agreement, ..., [TVS] is authorized by CNNA to increase the actual Payroll by up to four percent (4%) per year over the life of this Agreement in order to account for actual increased Payroll costs.” (GC Ex. 40 at 15 (emphasis added).) The Agreement added, “[u]nless CNNA agrees otherwise in writing, CNNA will not fund increased Payroll costs in excess of four percent (4%) per year over the life of this Agreement.” (*Id.*)<sup>5</sup>

(5) **Being the Sole Source of Merit Pay:** The ENG Agreement provided that CNN was the source of merit pay for bargaining unit employees. (GC Ex. 40 at 16.) Section 2(c)(vi) of the Agreement provided that CNN would provide an additional two percent (2%) of payroll wages and taxes as “Merit Funds” subject to a cap of \$100,000 annually. (*Id.*) TVS retained the right to distribute the merit pay at its sole discretion. (*Id.*) However, if TVS did not distribute the Merit Funds by the anniversary of the ENG Agreement, CNN would reduce the Labor Fee for the following month by the amount of Merit Funds that remained undistributed. (*Id.*)

(6) **Selecting the On-Site Manager of the Technicians:** Through the ENG Agreement, CNN and TVS agreed upon the principal on-site manager of TVS as well as retained the ability to approve any replacement of that manager. Section 4(c) of the Agreement provided that TVS “shall provide” Larry D’Anna as the on-site manager of the technicians. (GC Ex. 40 at 20. *See also* D’ANNA 6:873.) In the event that D’Anna’s services “cease to be available to

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<sup>5</sup> The President of TVS’ parent corporation, Asgard Entertainment, Brian Frydenlund testified that TVS proposed the 4% increases, which CNN accepted. (FRYDENLUND 75:15119:3-10.) This testimony is belied by other record evidence, *viz.*, the e-mail from Mr. Frydenlund to CNN during negotiations over the ENG Agreement for the New York Bureau. (GC Ex. 593.) In that e-mail, Frydenlund seeks “*guidance*” from CNN on the cost-of-living increases for years 2 through 4 of that Agreement. (*Id.*) It is reasonable to find from this evidence, as did the ALJ, that, while CNN agreed to the 4% increases for the D.C. Bureau, the proposal originated with CNN. (ALJD 12:29-33, 13:1-3.)

CNNA” through TVS, CNN retained the right to “reasonably approve” any replacement for Mr. D’Anna. (GC Ex. 40 at 20.)

(7) **Having the Sole Right to Terminate the ENG Agreement:** CNN had the sole right to terminate the ENG Agreement. Section 8(a) of the Agreement stated that CNN had the sole option to renew the Agreement and that CNN may terminate the Agreement “for any reason or no reason” by giving written notice to TVS. (GC Ex. 40 at 25.) By contrast, TVS did not have any right to terminate the ENG Agreement. (FRYDENLUND 75:15275:1-5.)

With the exclusive power to terminate the ENG Agreement, CNN also wielded the ultimate authority over the continued employment of the bargaining unit employees. As noted above, TVS did not have any customers other than CNN. (FRYDENLUND 75:15266:6-7.) Thus, if CNN terminated the ENG Agreement, then TVS would no longer have a client, and, consequently, the employees would no longer have any work to perform. In short, the ENG Agreement provided CNN with, not only the ability to terminate the agreement for any reason or no reason at all, but also the power to terminate the employees’ employment.<sup>6</sup>

**C. Part Three: TVS’ Staffing of the D.C. Bureau**

Having executed the ENG Agreement, TVS needed to hire technicians to perform to perform the newsgathering, production and engineering services required by CNN. TVS followed the practice of prior subcontractors and hired the overwhelming majority of the bargaining unit employees who worked for the predecessor subcontractor (*i.e.*, Potomac).

(D’ANNA 6:877:12-20.) There were compelling advantages to hiring the predecessor’s

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<sup>6</sup> CNN’s control over the continued employment of the technicians was hardly theoretical. When CNN terminated the ENG Agreement in late 2003, it entered into an agreement with TVS that provided the latter respondent would terminate the bargaining unit employees. (GC Ex. 70-B at 1 (providing “TVS agrees that it shall arrange for the termination of its workforces...”).) With the loss of the ENG Agreement, TVS no longer had any work and it consequently terminated its workforces at the D.C. and N.Y. Bureaus. (GC Exs. 70B & 110A-E.)

workforce. The bargaining unit employees were highly skilled; were fully conversant with CNN and its technology at the D.C. Bureau; and had worked side-by-side with CNN managers, producers and reporters for years and in some cases decades. TVS hired these employees into job classifications, which tracked the historical classifications in the bargaining unit, to perform electronic newsgathering, production and engineering work both in the field and at the Bureau.

**1. *The Bargaining Unit Employees in the Field***

**a. *Field Technicians***

TVS hired many of the predecessor's technicians to work in the field to perform newsgathering and broadcasting functions from a variety of established locations, such as Capitol Hill, the White House, and at other locations as dictated by the news coverage. These employees – commonly referred to as “Field Technicians” – typically worked in two-person crews, one working as a camera operator and another working as an audio operator or sound technician. (MORSE 9:1598:14-20; ZOSSO 27:5954:16-17; BODNAR 66:13630:6-12.)

Camera operators were responsible for setting up the field cameras and, on occasion, setting up the lights. (MORSE 9:1614:25, 9:1615:1-2.) After setting up the equipment, camera operators would operate the cameras to capture the visual images that are the basic element of broadcast news. (MORSE 9:1615:3-4.) For example, at a presidential event, the camera operator would be responsible for shooting video of the President. (MORSE 9:1615:3-5.)

Audio technicians would set up microphones and connect that equipment to soundboards and portable audio mixers. (PACHECO 29:6455:5-15.) The technician made the appropriate connections to drops<sup>7</sup> and ensure the continuity and quality of the signal. (MORSE 9:1615:6-19.)

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<sup>7</sup> A “drop” is a panel with video and audio connections to which the camera and the audio mixer are connected. (MORSE 9:1616:12-25, 9:1617:1-3.) The video and audio signals are then sent from the drop to the D.C. Bureau. (MORSE 9:1618:6-11.)

The audio technician would also operate the equipment to record the sound that complements the visual images recorded by the camera operators. (MORSE 9:1615:6-19; PACHECO 29:6455:5-15.)

In addition to operating cameras and audio equipment, field technicians also operated a microwave truck. (*See, e.g.*, ZOSSO 27:5944:1-6.) A microwave truck is “a very large van with a hydraulic mast that comes out from the inside of the van and sticks in the air about 60 or so feet.” (ZOSSO 27:5944:12-14.) “On the top of the [mast], there is a dish that can be pointed in different directions that transmits a microwave signal which carries video and audio signal to wherever you’re sending it.” (ZOSSO 27:5944:14-17.) The microwave truck operator determines the best location to park the truck, because the operator needed a line of sight in order to send the signal to one of three receiving sites that CNN had across Washington, D.C. (*viz.*, on the roof of the D.C. Bureau, the tower of the Pavilion at the Old Post Office, and the WRC tower). (ZOSSO 27:5944-22-25, 27:5945:1, 27:5948:23-24. *See also* MORSE 9:1583:17-21.)<sup>8</sup> The operator ensures that the cables were properly plugged into the camera and audio equipment in the truck to calibrate the signals to ensure that the signals were set properly. (ZOSSO 27:5945:19-23.) The operator then uses a switcher to rout the signals out of the transmitter, and also would control the dish to send the signals to the proper receive site. (ZOSSO 27:5945:24-25, 27:5946:1-2.) The operator remains in contact with Quality Control, as well as the crew who was operating outside of the microwave truck. (ZOSSO 27:5946:21-25, 27:5947:1-5.)

While typically working in two-person crews, often with a microwave truck operator, field technicians also were assigned to work as a “one person crew” or “one man band.” (ZOSSO 27:5954:16-17; PARKER 32:7036:10-12.) As a “one man band,” the field technician may shoot an entire story. For example, during his interview for a photojournalist position with CNN,

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<sup>8</sup> In cases when a microwave truck could not be used, bargaining unit employees operated portable microwave transmitter boxes. (PACHECO 29:6456:9-24.)

former TVS (and current CNN) employee Brian Yaklyvich discussed an instance when he was sent as a “1-man band,” without a producer or a correspondent, to handle an assignment to cover a press conference, which was actually a one-on-one interview. (See GC EX. 543, VOL. 4, BRIAN YAKLYVICH at CNNA-014989.) Yaklyvich spoke with a CNN producer (Jim Barnett) and a CNN correspondent (Jamie McIntyre) in order to develop questions to ask during the interview. (*Id.*) Yaklyvich then did the interview, *i.e.*, he shot the video and played the part of a reporter by asking the questions of the interviewee. (*Id.*)<sup>9</sup> In other instances, employees worked as a one-person crew to shoot B-roll film for future stories. (PACHECO 29:6495:12-25, 29:6496:1-8.)<sup>10</sup>

In late 2003, the bargaining unit employees working as field technicians included William Alberter, Jr., Charles Anderson, Rodney Atkinson, Michael Bannigan, David Berman, Tim Bintrim, John Bodnar, Burke Buckhorn, David Catrett, James Cook, Martin Dougherty, Daniel Farkas, Timothy Garraty, Maurice George, Thomas Greene, Eddie Gross, Christopher Hamilton, David Jenkins, Martin Jimenez, Warren Kinlaw, Larry Langley, Myron Leake, Mark Marchione, Peter Morris, Richard Morse, Jr., Luis Munoz, Ernest Nocciolo, James Norris, Sarah Pacheco, Robert (“Geoff”) Parker, John Quinette, James Riggs, Tyrone Riggs, Gregory Robertson, David Scherer, Barry Schlegel, Reginald Selma, James Suddeth, Jerry Thompson,

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<sup>9</sup> The document cited in GC EX. 543, VOL. 4, BRIAN YAKLYVICH, is a photojournalist interview guide prepared by CNN’s Director of Newsgathering, Matt Speiser, an agent of the Respondent. Speiser took notes of his interviews with photojournalist candidates, such as Yaklyvich, *during the interviews* and then typed those notes into the guide every night after the interviews. (SPEISER 18:3974:17-25, 18:3975:1-2.) Under the circumstances Speiser’s typed notes satisfy the present sense impression exception to the hearsay rule, allowing for the consideration of the truth of the matter asserted in the notes. See *Cargill, Inc. v. Boag Cold Storage Warehouse*, 71 F.3d 545, 555 (6th Cir. 1995) (affirming finding that notes taken by individual during meeting and typed at some later point fell within present sense impression exception to hearsay rule).

<sup>10</sup> “B-Roll” film consists of generic shots that are used as a backdrop or context in telling the story underlying a news event, such as a shot of the Capitol dome for a story about Congress.

Ken Tuohey, Kim Uhl, Anthony Umrani, John Urman, Mark Walz, Brian Yaklyvich, and Elizabeth Zosso. (GC EXS.110-C, 110-D.)

**b. Couriers**

Couriers were responsible for the transportation of gear, personnel and videotape between the field and the D.C. Bureau. (TIPPER 33:7344:1-5. *See also* GC EX. 386.) Couriers were required to have knowledge of the metropolitan Washington, D.C. area (GC EX. 386. *See also* KUCZYNSKI 14:2879:11-15.) In late 2003, there were four couriers: Ronald "Chip" Davis, William Tripper, John Tripp and Alvester Williams. (GC EX. 110C.)

**2. *The Bargaining Unit Employees at the D.C. Bureau***

**a. In the Studios, Control Rooms and Quality Control**

In addition to working in the field, bargaining unit employees worked at the D.C. Bureau, in the studios, control rooms and quality control. In late 2003, these bargaining unit employees included David Bacheler, Reza Baktar, Jay Berk, Keith Crennan, Michael David, John Davis, Timothy Durham, Brenda Elkins, Dennis Faulkner, Vernon Herald, Conrad Hirzel, David Hugel, Lori Jennings, Michael Kaufman, Adilson Kiyasu, Howard Lutt, Ralph Marcus, Barbara McCloskey, Douglas McKinley, Paul Miller, Peter Mohen, Joseph Mosley, Thomas Murphy, Jeffrey Noble, John Otth, Carolyn Stone, James Stubbs, Jr., Jimmy Suissa, Daniel Taylor and Darrin White. (GC EXS. 110-D, 110-E.) These employees worked as audio technicians, camera operators, directors, master controllers, quality control technicians, robotic camera operators, technical directors, video tape operators.

Audio technicians were responsible for all of the sound that came from a variety of sources, such as videotapes, and that was broadcast. (D'ANNA 6:933:16-22.) The audio technicians take the myriad of sounds from various sources and "mix" the sounds to create what

viewers hear during a broadcast. (*Id.*) The audio technicians “mix” sounds by using a console – referred to as an audio board – that has several separate channels for each individual audio source. (D’ANNA 6:933:25, 6:934:1-3. See also NORMAN 14:2958:22-25, 14:2959:1-2.) Each channel has its own processing controls for, *inter alia*, volume, bass, and treble. (D’ANNA 6:934:1-8.) The audio board also permits an audio technician to filter sounds in order to minimize noise or other distractions. (D’ANNA 6:934:8-10.) These channels and their processing controls enable an audio technician to adjust the quality and the intensity of the sound. (D’ANNA 6:934:14-17.)

Camera operators, as their name implies, were responsible for the operation of cameras mounted on moving pedestals in the studios. (D’ANNA 6:937:20-25, 6:938:1-5, 6:938:20-23.) Likewise, robotic camera operators operated up to four cameras from a panel with two joysticks, several buttons and a screen. (SUISSA 22:4901:13-25, 22:4902:5-22.) Using the joysticks, the robotic camera operator could maneuver a camera remotely, enabling shots and angles that a regular camera operator could not achieve. (*Id.*) Robotic cameras are utilized primarily when recording and/or broadcasting the news. (SUISSA 22:4903:2-9.)

Technical directors primarily operated the vision mixer or production switcher, *i.e.*, the physical switching of the video portion of the program in the studio. (SUISSA 22:4906:1-11. See also D’ANNA 6:918:10-16.) The technical director sits before a computer-based switcher in which all of the video sources that are going to be used in the broadcast have been inputted. (D’ANNA 6:919:2-4; SUISSA 22:4906:12-13.) There is a primary row of switches, which are direct switches to what is going out on the broadcast. (D’ANNA 6:919:5-7.) There are other rows of switches for other functions, including special effects, creating boxes, doing wipes, doing chroma keys, and creating other graphics. (D’ANNA 6:919:7-12.) The switcher enables

the technical director to transition from all of the sources in a fluid fashion, providing the audience with a smooth program. (D'ANNA 6:919:12-15.) For example, a technical director could push buttons on the switcher – designated “Camera 1,” “Camera 2,” and “Camera 3,” as well as “Remote 1,” “Remote 2,” “Video Tape 1,” and “Video Tape 2” – for a particular source that would be broadcasted. (D'ANNA 6:919:21-25.) If the technical director previously pressed the button for “Camera 1” and wants to switch to “Camera 2,” there is a second row of buttons that allows for the switch, as well as lever that enables the technical director to create a dissolve or a wipe between the two cameras. (D'ANNA 6:919:21-25, 6:920:1-9, 6:921:1-10.)

Video tape operators were responsible for the recording and playing back of material on video tape for the control room. (D'ANNA 6:927:19-20, 6:931:12-14; SUISSA 22:4903:18-24.) During a program, there are stories that would come in on video tape. (D'ANNA 6:931:17-19.) The tape operator would insert the video tapes into a machine and queue the tape (*i.e.*, have the tape ready to be played in sequential fashion). (SUISSA 22:4903:18-24. *See also* D'ANNA 6:931:20-23.) When the technical director calls for the tape, the tape operator would start the machine and the technical director would place the tape on air. (SUISSA 22:4903:18-24. *See also* D'ANNA 6:932:2-8.) The tapes, which were provided by CNN's operations assistants, included sound bites used in connection with stories. (SUISSA 22:4904:15-25, 22:4905:1-2.)

Finally, master controllers were “all-around” inside employees at the D.C. Bureau. (MOHEN 68:13930:6-7.) Master controllers would operate studio cameras, robotic cameras, and audio in the studios and control rooms. (MOHEN 68:13930:7-10; CRENNAN 68:14088:14-18, 68:14105:19-25, 68:14106:1-4; MILLER 71:14362: 16-23.) They would also serve as directors or technical directors. (SUISSA 22:4893:9-12; MOHEN 68:13930:9-10.)

Master controllers also worked in an area designated “QC” or “Quality Control.” (D’ANNA 6:925:4-5.) As described by former TVS and CNN employee John Davis, “it’s pretty much a transmission place where everything, every video and audio signal comes through ..., control rooms come through there and we send it to Atlanta or New York or wherever else they ask us to send it, the audio/video signal.” (DAVIS 66:13682:17-21.) The bargaining unit employees – such as Keith Crennan and Brenda Elkins – who worked in this area, were called quality control technicians. (D’ANNA 6:948:2-3; CRENNAN 68:14120:3, 68:14120:15-19).

As quality control technicians, bargaining unit employees were responsible for incoming feeds, adjusting levels and maintaining the consistency of video signals that were transmitted to the bureau from a variety of sources, including microwave lines, satellites, and fiber circuits. (D’ANNA 6:925:19-23; CRENNAN 68:14121:13-16; BACHELER 69:14178:5-9.) This duty required bargaining unit employees to adjust cameras ensuring that, among other things, there was a proper color balance and a proper setting of the iris. (DAVIS 66:13682:24-25, 66:13683:1-4, 66:13683:22-25, 66:13684:1-3; CRENNAN 68:14121:21-25, 68:14122:1; BACHELER 69:14178:22-25, 69:14179:1-13, 69:14180:6-12, 69:14180:22-25, 69:14181:1-5.)

**b. In the Engineering Department**

A relatively small group of bargaining unit employees worked as maintenance engineers at the D.C. Bureau. In 2003, the bargaining unit employees who worked as maintenance engineers included Jeff Adkinson, Bill Evans, Bobby Clemons, Nick Kiraly, Ronald Kucyznski, Chris Leonard, and Dennis Norman. (GC EX. 110-C.)

Generally, maintenance engineers installed, maintained and repaired most, if not all, of the broadcast equipment at CNN’s D.C. Bureau and throughout Washington, D.C., including but not limited to audio equipment, cameras, consoles, intercom equipment, remote cameras, routers,

and switchers. (CLEMONS 13:2630:5-10, 13:2689:7-16; NORMAN 14:2952:24-25, 14:2953:1-9; ADKINSON 15:3182:12-21, 15:3186:16-22. *See also* D'ANNA 6:948:15-17 (stating “[t]he maintenance engineers were responsible for the upkeep and maintenance of field and studio equipment and any of the equipment that we operated at CNN”).) For example, the maintenance engineers installed, maintained and upgraded the analog Wheatstone audio boards used in the control rooms of the D.C. Bureau. (NORMAN 14:2958:6-11.) Upgrading the audio board involved the replacement of specific boards or units called IFBs, which would handle different microphones in the studios and/or on remotes. (NORMAN 14:2959:5-15.) Another example is the switchers, which the maintenance engineers installed, maintained and upgraded. (NORMAN 14:2953:22-25, 14:2954:1-23.) When TVS took over the subcontract, there were Grass Valley switchers, which had computer controls, and the engineers (primarily Norman) were responsible for the software upgrades to the switchers. (CLEMONS 13:2636:8-25; NORMAN 14:2954:10-23.) Thereafter, a Sony switcher was installed at the Bureau, which was networked and which was maintained by the engineers. (CLEMONS 13:2776:23-25; NORMAN 14:2953:22-25, 14:2954:1-3.)

Maintenance engineers also assembled, maintained and repaired digital equipment. (NORMAN 14:2973-2976 (discussing work on digital cameras); VU 10:1791:21-25, 10:1792:1-10 (discussing work by TVS maintenance staff on digital router).) For example, engineers assembled the Sony SX-7 cameras used by the field technicians. (NORMAN 14:2973-2976.) This work involved “a complete electronic set-up” on the camera, adjusting the color settings and parameters to achieve a desired color in the image. (NORMAN 14:2973:14-25, 14:2974:1-25, 14:2975:2-4, 14:2975:16-23, 14:2976:1-9.) Much of that equipment is still being used by CNN today. (CLEMONS 13:2630:2-25, 13:2631:1-19 (explaining that CNN continues to use Sony Beta

decks, basically the same Sony switcher, and the same Grass Valley router). *See also* VU 13:2562:19-22 (stating router from 2003 is same, although CNN has added high definition).)

Finally, maintenance engineers also maintained the editing suites at the D.C. Bureau. Most of the editing suites were equipped with tape decks (VU 10:1815:17-25, 10:1816:1-2); however, CNN had one non-linear editing suite for *Larry King Live*. (NORMAN 14:2979:23-25, 14:2980:1-25. *See also* VU 10:1816:3-5.)) The editing suit used the non-linear editing program known as AVID, which allows an editor to ingest material from any source and manipulate the material into a piece. (ADKINSON 15:3195:15-19.) Maintenance engineers did maintenance on the suite, including work referred to as “striping the drive.” (NORMAN 14:2980:2-4.) This involved putting together the Anaraya drives. (NORMAN 14:3133:14-23.) Engineers also installed a Mackie audio board to it. (NORMAN 14:3133:22-23.)

In performing the foregoing work, maintenance engineers used a laptop to diagnose and troubleshoot problems with the broadcasting equipment. (CLEMONS 13:2682:17-24.) For example, if a video router went down at CNN’s facility on Capitol Hill, the engineer would plug in a laptop, upload the pertinent software, and reprogram the router. (CLEMONS 13:2683:6-13.) The laptop provided to the maintenance engineers was very old and slow. (CLEMONS 13:2685:2-5.) Two maintenance engineers – Bobby Clemons and Dennis Norman – purchased their own laptops, on their own initiative, to use when maintaining CNN’s broadcast equipment at the D.C. Bureau or out in the field. (CLEMONS 13:2685:8-25.)

**D. Part Four: TVS’ Negotiation of Collective Bargaining Agreements with the Employees’ Representative, NABET-CWA**

The overwhelming majority of the employees hired by TVS to work in the field and at the D.C. Bureau were formerly employees of Potomac represented by NABET-CWA. Accordingly, TVS recognized NABET-CWA as the representative of the technicians (hereinafter

also referred to as “bargaining unit employees” or “TVS employees”). (GC Exs. 49 & 50.) Following in the footsteps of predecessor subcontractors, such as Potomac, TVS proceeded to negotiate a collective bargaining agreement covering the bargaining unit employees.

**1. The 1998-2002 Collective Bargaining Agreement**

**a. Negotiations over the Employees’ Compensation**

One of the principal issues during the negotiations over the first collective bargaining agreement focused on the compensatory terms of the agreement, *viz.*, the wage rates and increases to those rates over subsequent years. TVS took the position in negotiations that it was limited in terms of what it could agree to as part of an economic package. (*See, e.g.*, GC Ex. 65 (letter from TVS counsel Peter Chatilovicz to NABET-CWA representative in which Chatilovicz states, “[t]he Company has repeatedly made clear that it does not have additional monies to add to the current economic package”). *See also* STURM 2:260:11-19 (testifying, in context of negotiations for agreement covering N.Y. Bureau, that TVS counsel Chatilovicz said TVS’ parameters on wage proposal are limited by contract with CNN), 2:282:13-17 (same).)

At some point during the negotiations, TVS asked for CNN’s approval of a NABET-CWA’s proposal for a four and one-half percent (4.5%) increase in the salaries in the fourth year of the proposed agreement. (FRYDENLUND 75:15252:3-18.)<sup>11</sup> As noted in Part Two (Section II.B.), CNN was the sole source of compensation for the bargaining unit employees and, through

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<sup>11</sup> Frydenlund characterized his request for CNN’s approval of a 4.5% increase as a “revision” to the ENG Agreement. (FRYDENLUND 75:15252:10-13.) However, such a request was not a revision to the ENG Agreement; rather, it was a request for authorization, *pursuant to that Agreement*, to agree to a provision in a collective bargaining agreement that would increase wage rates by 4.5%, an amount in excess of the 4.0% increase built into the ENG Agreement. The record is devoid of any written revisions to the ENG Agreement. The Agreement specifically in Section 15(c) that “[t]he Agreement may not be amended or modified at any time except by a writing executed by both parties hereto.” (GC Ex. 40 at 15.) Thus, CNN approved a contractual term proposed by NABET-CWA, *viz.*, an increase in the wage rates for one of the years covered by the collective bargaining agreement.

the ENG Agreement, TVS needed CNN's written authorization for any increase in the employees' total payroll that exceeded four percent (4.0%). (GC Ex. 40 at 15.) CNN verbally authorized an increase of 4.5% in the fourth year of the collective bargaining agreement. (FRYDENLUND 75:15252:3-18.)

This line of communication between TVS and CNN during the collective bargaining negotiations, as well as the nature of the communications, is underscored by additional evidence of CNN's substantial involvement the negotiations between TVS and NABET-CWA over an agreement covering the employees working at CNN's N.Y. Bureau. (See GC EXS. 591, 592, 593.) In March 2002, Brian Frydenlund, the President of TVS' parent corporation, wrote to Sean Murtagh, who handled financial issues for CNN at the N.Y. Bureau, about the negotiations with NABET-CWA for a collective bargaining agreement covering the N.Y. Bureau. (GC Ex. 593.) In that e-mail, Frydenlund asks for "guidance" on the cost of living increases for subsequent years under the ENG Agreement for the N.Y. Bureau, "so that we can negotiate this component of the NABET contract." (*Id.*) One year later, in March 2003, CNN's Sean Murtagh, sent an e-mail to TVS in which he outlined the changes that he would like to see to the Labor Fee for the N.Y. Bureau. (GC Ex. 591.) The changes included a reduction in the amount of overtime by \$712,000 and a reduction in the healthcare increases by \$100,000. (*Id.*)

While this evidence in the preceding paragraph relates to the negotiations for a collective bargaining agreement covering the N.Y. Bureau, it underscores the evidence pertaining to the D.C. Bureau. The evidence pertaining to negotiations in New York is indicative of the lines of communication between the two Respondents, through which TVS sought guidance from CNN on compensatory matters relating to the technicians. The evidence also highlights the control exercised by CNN over the total compensation paid to technicians, as set forth in the ENG

Agreement, and as would ultimately be set forth in a collective bargaining agreement covering the D.C. Bureau. (GC Ex. 40 at 43.)

**b. Protected Activities by Bargaining Unit Employees**

As TVS and NABET-CWA negotiated the initial collective bargaining agreement covering the D.C. Bureau, the two parties had areas of disagreement. While negotiations were ongoing, bargaining unit employees began to engage in protected activities, which were intended to educate the public about the dispute with TVS. (JENKINS 20:4295:12-14.) The employees involved in this activity included, but are not limited to the following: David Jenkins, Sarah Pacheco, Greg Robertson, James "Giacco" Riggs, Howard Lutt, John Quinette, Mike Bannigan, Rodney Adkinson, Jimmy Suissa, and Ralph Marcus. (JENKINS 20:4295:12-14, 20:4296:7-18.) These protected activities included, but were not limited to the following.

**i. The Red Rabbit**

While working at the White House, employee David Jenkins, erected a mannequin of a rabbit wearing a red NABET-CWA hat and shirt on Easter Sunday in 1998. (JENKINS 20:4301:2-23. *See also* GC Ex. 273.) Jenkins placed the decked-out rabbit in the position of the reporter on the White House's North Lawn in front of the cameras, which sent the rabbit beaming onto the monitors at CNN's Washington, D.C. and Atlanta, GA Bureaus. (JENKINS 20:4301:2-25, 20:4302:17-25, 20:4303:1-25, 20:4304:1-5. *See also* GC Ex. 273 (still image of red rabbit taken with SX cameras used on North Lawn, *see* JENKINS 20:4312:2-25.)

After the red rabbit was in place, Jenkins received a call from TVS slot person asking Jenkins about what he was doing. (JENKINS 20:4307:9-14.) The TVS slot person also told Jenkins that CNN's Atlanta bureau called and directed that the rabbit be taken down. (*Id.*) The rabbit remained. (JENKINS 20:4307:21-25, 20:4308:01.)

**ii. The Ronald Reagan Rally**

David Jenkins and other bargaining unit employees, including Sarah Pacheco, John Quinnette, John Urman and Mike Greene, participated in a rally outside of the Ronald Reagan Building during the summer of 1998. (JENKINS 20:4314:1-22, 20:4315:25, 20:4316:1, 20:4318:4-13. *See also* GC EXS. 274, 276, 277, 278, 279, 280.) Inside the Ronald Reagan Building, TVS was providing video services and camera services to record a local Emmy Awards show. (JENKINS 20:4314:13-15.) Standing outside, the bargaining unit employees held signs emblazoned: "TVS/CNN WE WANT A FAIR CONTRACT." (*See, e.g.*, GC Ex. 276)

**c. CNN's Desire to "Get This Thing Done and Move On"**

Approximately three weeks before an agreement was ultimately reached between TVS and NABET-CWA, one of the union's negotiators, James Suissa, had a discussion with Frank Sesno, who was CNN's Washington, D.C. Bureau Chief at the time. (SUISSA 22:4947:8-10.) Suissa had been in the Sesno's office visiting with Melanie Saunders, who was the office manager for the CNN Bureau Chief and Deputy Bureau Chief. (SUISSA 22:4948:5-10.) Sesno waved Suissa over to his office and pointed toward a chair. (SUISSA 22:4948:22-25.) Suissa went into Sesno's office, and sat in the chair. (*Id.*) Sesno closed the door, walked over to the front of his desk, and then asked Suissa about the negotiations. (SUISSA 22:4948:11-19, 22:4948:25, 22:4949:1). More specifically, Sesno asked what why negotiations were at a stalemate. (SUISSA 22:4948:11-19.) Suissa replied that the problem related to the use of part-time employees. (SUISSA 22:4949:4-8.) Both Sesno and Suissa debated the points concerning part-time employees. (SUISSA 22:4949:18-21.) At the end of the conversation, Sesno said he wanted to get this thing done and move on, to which Suissa replied that if part-time employment

was taken off of the table, the employees would ratify the agreement. (SUISSA 22:4949:23-25, 22:4950:1-2.) Soon thereafter, TVS withdrew its proposal concerning part-time employees.

**d. The Resolution of the Negotiations**

On September 29, 1998, bargaining unit employee, David Jenkins, continued to engage in protected activity to inform the public about the status of the negotiations between TVS and NABET-CWA. (JENKINS 20:4337:1-15.) Jenkins engaged in a "One Man Standing," which involved his standing outside of TVS' office, seeking signatures on a petition and handing out fliers to pedestrians. (*Id.*) The fliers included a page entitled "TEAM KILLS PASSAGE OF THE CONTRACT." (GC Ex. 290 at 3.) This page listed the three issues that divided TVS and NABET-CWA, the second of which involved part-time employees. (*Id.*) While Jenkins was standing outside of TVS' office, Brian Frydenlund approached Jenkins and asked what was going on. Jenkins replied that he was passing out fliers to let TVS customers know that there was no collective bargaining agreement at CNN. (JENKINS 20:4345:6-18.) Jenkins offered a flier to Frydenlund, but he said he already had one because someone brought one into TVS' office. (JENKINS 20:4345:20-22.) Later that day, Frydenlund returned and said that he had looked at the flier and did not care about the first two issues (*i.e.*, turnaround pay and the use of part-time employees), but he could not compromise on the third issue (*viz.*, per diem employees with equipment). (JENKINS 20:4347:14-24.) In light of the comments by Frydenlund, Jenkins called the president of Local 31 to pass along Frydenlund's comments and see if another negotiation session should be arranged. (JENKINS 20:4348:1-25, 10:4349:1-5.)

Approximately one to two weeks later, TVS and NABET-CWA held a negotiation session in which they resolved all of the outstanding issues. (JENKINS 20:4352:9-25, 20:4353:1-5, 20:4358:10-15.) At the meeting, Frydenlund repeated his statement that he did not care about

turnaround pay or part-time employees, but could not make any concessions with respect to the third issue. (JENKINS 20:4352:9-13.) Eventually, TVS and NABET-CWA reached a compromise with respect to the per diem employees, which was included in the initial agreement. (JENKINS 20:4353:6-25. *See also* GC EX. 8 at 10-11.)

**e. The Terms of the Initial Agreement**

TVS and NABET-CWA executed the first collective bargaining agreement effective from January 31, 1998 through January 31, 2002. (GC EX. 8.) In the 1998-2002 agreement, TVS recognized NABET-CWA as the exclusive bargaining representative of a collective bargaining unit of employees consisting of “[a]ll full-time employees employed by the Employer at the CNN Washington, D.C. facility including camera operators, tape operators, engineers, master controllers and couriers....” (GC EX. 8 at 1.) The unit also included technical directors. (D’ANNA 6:923-924.) After January 5, 2000, TVS and NABET-CWA agreed that “freelance” or “daily hire” employees, who are technicians hired on a daily basis (PEACH 7:1092:6-11), would be included as part of the bargaining unit. (PEACH 8:1463:6-16; D’ANNA 15:3406:5-24.)

The initial collective bargaining agreement incorporated express limitations based on the ENG Agreement. Article II, Section 2.1 of the agreement identified the “jurisdiction” as, “[w]ithin one-hundred (100) miles, only Employees employed under this Agreement shall carry, install, operate, test, maintain, repair, retrofit, transport and set up the technical equipment and technical facilities of the Employer.”<sup>12</sup> (GC EX. 8 at 3.) This definition was further limited “to work performed pursuant to the Company’s contract with CNN.” (*Id.* at 4.) In addition, the collective bargaining agreement provided that it was “expressly limited to the work assigned the Company pursuant to the contract between the Company and CNN.” (GC EX. 8 at 30.) The

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<sup>12</sup> TVS did not own the technical equipment or the technical facilities at the D.C. Bureau and the N.Y. Bureau. Both the equipment and the facilities at both bureaus were the property of CNN.

agreement continued, “[i]f CNN cancels or otherwise terminates its contract with the Company, except as provided herein (including severance and any duty to bargain), all obligations required by this Agreement shall cease upon the effective termination date of the CNN contract.” (*Id.*)

3. *The 2002-2006 Collective Bargaining Agreement*

a. **TVS’ Counsel: “I Represent CNN”**

During one of the negotiation sessions for a successor collective bargaining agreement, a member of NABET-CWA’s negotiating committee, James Suissa, confronted TVS’ counsel, Chatilovicz. (SUISSA 22:4953:16-21.) Suissa believed that the TVS employees really worked for CNN and that the CNN-TV S arrangement was a “big pass through.” (SUISSA 22:4953:16-18.) Suissa asked why he should negotiate with Chatilovicz and asked where was the representative of CNN. (SUISSA 22:4953:18-20.) Chatilovicz responded by saying “I represent CNN.” (SUISSA 22:4953:20-21. *See also* ROBERTSON 31:6833:20-25, 31:6834:1-8.) This confrontation took place in front of the union representatives including employee representative Greg Robertson, former Local 31 President Doug Allmond and former NABET-CWA representative Ed Spillett, as well as TVS representatives, such as President Larry D’Anna and Operations Manager Brad Simons.<sup>13</sup>

Stunned by Chatilovicz’s statement, the union representatives went into a caucus. (SUISSA 22:4954:17.) After caucusing, Suissa and the other NABET-CWA negotiators decided

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<sup>13</sup> TVS’ Manager of Operations at the time, Brad Simons, was present at this negotiation session. (SUISSA 22:4953:21-24.) During his testimony, however, Simons could not recall, as phrased by Chatilovicz in his questioning of Simons at the hearing, “legal counsel saying to NABET that legal counsel or anyone from Team was representing CNN at the negotiations?” (SIMONS 75:15296:20-23.) Simons did not deny that Chatilovicz made the statement. (*Id.* (stating only “[r]epresenting CNN? No, I don’t recall that”).) Chatilovicz never took the stand to deny Suissa’s testimony on this important admission.

to continue with the negotiations, focusing on wages and other terms and conditions of employment. (SUISSA 22:4954:12-20, 22:4955:14-25.)

**b. The Terms of the Successor Agreement**

Both TVS and NABET-CWA negotiated a successor agreement, which was effective from February 1, 2002 through January 31, 2006.<sup>14</sup> (GC Ex. 9.) In the 2002-2006 agreement, TVS continued to recognize NABET-CWA as the exclusive bargaining representative of a collective bargaining unit of employees consisting of “[a]ll full-time and per diem employees employed by the Employer at the CNN Washington, D.C. facility including camera operators, tape operators, engineers, master controllers and couriers....” (GC Ex. 9 at 1.) The bargaining unit continued to include technical directors and freelance employees. (D’ANNA 6:923-924, 15:3406:18-24.)

In addition to identifying the bargaining unit, the collective bargaining agreement also identified the work performed by the unit employees. As with the prior agreement, Article II, Section 2.1 of the agreement identified the “jurisdiction” as, “[w]ithin one-hundred (100) miles, only Employees employed under this Agreement shall carry, install, operate, test, maintain, repair, retrofit, transport and set up the technical equipment and technical facilities of the Employer.” (GC Ex. 9 at 3.) This definition was further limited “to work performed pursuant to the Company’s contract with CNN.” (*Id.* at 3.) Under the contract with CNN, all of the technical equipment was supplied by CNN and the only technical facilities at issue were those of CNN. (GC Ex. 40 at 17 (stating “[f]or purposes of providing the ENG Services hereunder,

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<sup>14</sup> For purposes of this brief, all references will be to the second collective bargaining agreement (GC Ex. 9), as that was the agreement in effect when CNN committed the unfair labor practices at issue in this case.

[TVS] shall use such electronic news gathering ... and other equipment provided by CNNA”); *Id.* at 19 (stating TVS “will maintain the technical facilities” of CNN).)

This point—*viz.*, that the equipment and facilities of the “Employer” were owned by CNN and not TVS—also bears upon another provision of the collective bargaining agreement.

Article II, Section 2.2 of the Agreement provided, in relevant part:

In the event the Company introduces or permits to be used any process, machinery, equipment or device which substitutes for, supplements, or replaces any present process, machinery, equipment, or device being operated by Employees within the bargaining unit such process machinery, equipment, or device shall be installed, operated, constructed, tested, maintained, repaired, retrofitted, and set up by Employees in the bargaining unit, to the same extent they installed, operated, constructed, tested, maintained, repaired, retrofitted or set up the replaced process, machinery, equipment or device.

(GC Ex. 9 at 3-4.) Thus, as CNN introduced new processes, machineries, equipment or devices (“devices”), bargaining unit employees would install, test, operate, maintain and repair the new devices to the same extent they performed the work on the old devices.

Finally, as with the prior agreement, the 2002-2006 collective bargaining agreement provided that it was “expressly limited to the work assigned the Company pursuant to the contract between the Company and CNN.” (GC Ex. 9 at 28.) The agreement continued, “[i]f CNN cancels or otherwise terminates its contract with the Company, except as provided herein (including severance and any duty to bargain), all obligations required by this Agreement shall cease upon the effective termination date of the CNN contract.” (*Id.*) The severance pay provision provided employees with one week of pay for each complete years of service (including years of service with prior subcontractors at the D.C. Bureau). (*Id.* at 27.) However, that provision also contained the following caveat: “[i]n the event the Employer’s contract with CNN is canceled or not renewed, the [severance pay provisions] shall not be applicable to Employees who are retained in employment by the successor CNN subcontractor.” (*Id.*) Thus,

if CNN cancelled its contract with TVS, the collective bargaining agreement would likewise be cancelled, resulting in the termination of the bargaining unit employees, who would receive severance pay if a successor CNN subcontractor did not retain them. (*Id.*)

**E. Part Five: The Shared Control over the Bargaining Unit Employees at the Washington, D.C. Bureau**

As the preceding parts show, CNN had been intimately involved in the negotiation of the collective bargaining agreements between TVS and NABET-CWA, as well as retained significant control over important terms and conditions of the bargaining unit employees. CNN's involvement and control over the employees' working conditions is hardly surprising. After all, the employees recorded the video and audio that was essential to CNN's broadcasting of news and programs from the D.C. Bureau. Without bargaining unit employees operating cameras, audio equipment, and microwave trucks in the field, CNN could not record, let alone broadcast, "memorable shots" depicting, for example, the "essence of a small village in Uganda," "the expressions of poor, yet happy villagers in Senegal" or the "pictures of hordes of people lining the motorcade in Dakar to get a glimpse of [President] Clinton" as part of the Respondent's programming. (GC Ex. 133.) In addition, without bargaining unit employees operating and maintaining the broadcast equipment at the D.C. Bureau, CNN could not broadcast important parts of longstanding news shows. (*See* GC Ex. 196A.)

Given the critical nature of the employees' work with respect to the D.C. Bureau's operations, it is not surprising that CNN interjected itself in the bargaining unit employees' terms and conditions of the employment, particularly those terms and conditions that related to the broadcasting of the news, *e.g.*, the assignment of work, the direction of work, and the hours of work. While the level of CNN's control varied with respect to particular groups of bargaining

unit employees, CNN nevertheless retained day-to-day control to the point that those employees could reasonably consider CNN to be co-employer alongside their nominal employer, TVS.

**1. CNN's Control over Bargaining Unit Employees in the Field**

**a. CNN's Assignment of Work**

Bargaining unit employees who worked in the field ordinarily learned of their first assignment, as well as their reporting time, by calling a message service known as Audex. (ZOSSO 27:5949:22-25, 27:5950:1-6.) If the Audex message did not include the employee's first assignment, then he or she reported to the assignment desk at the D.C. Bureau at the start of the shift. (ZOSSO 27:5950:24-25, 27:5951:1-3; PARKER 33:7206:1-10.)

**i. "The Parrot on the Perch"**

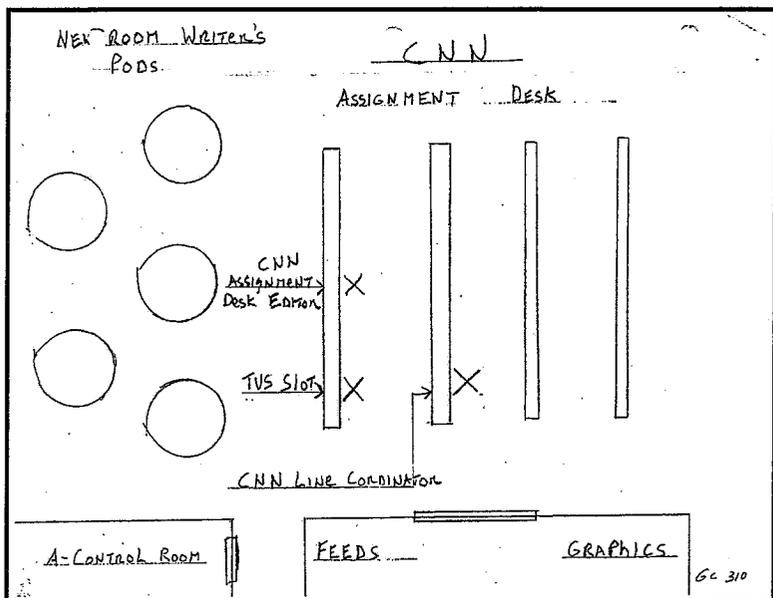
Prior to TVS, the CNN assignment desk editor would give assignments directly to the crews, telling them where they were starting, when they would go on break, where they would report next, and so on. (SUISSA 23:5035:12-20.) The CNN assignment desk editor was stationed at the assignment desk, which was really more of an elevated bar. (JENKINS 21:4600: 24-25, 21:4601:1; SUISSA 23: 5041:16-22.) When TVS became the subcontractor, TVS created a "slot person," who sat at the CNN assignment desk. (See JENKINS 21:4601:3-14, 21:4601:20-22; ZOSSO 27:5955:3-7, 27:5956:1-8.)

A diagram of the assignment desk area at the D.C. Bureau (GC EX. 310), which was prepared by former TVS employee James Suissa, is reproduced on the next page.<sup>15</sup> As the diagram shows, the CNN assignment desk editor, such as Vito Maggiolo, sat at the center of the assignment desk and the TVS slot person, such as Pamela Lehigh, sat immediately to the left of the CNN assignment desk editor. (*Id.* See also JENKINS 21:4601:3-14, 21:4601:20-22; SUISSA

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<sup>15</sup> General Counsel's Exhibit 310 is not drawn to scale; instead, it is Suissa's rendering of the assignment desk area based upon his personal knowledge from years of working at the bureau.

23:5041: 16-22; Zosso 27:5955:3-7, 27:5956:1-8.) The CNN line coordinator sat behind the



CNN assignment desk editor and the TVS slot person. (GC Ex. 310.) The line coordinator managed the signal traffic into the control rooms, such as the "A-Control room," and quality control. (SUISSA 23:5042:17-24.)

At the assignment desk, there was a stack of "rundowns." (ZOSSO 27:5951:1-8; PARKER 33:7206:11-13.)

The rundowns were "little booklets ... listing the assignments of the day." (ZOSSO 27:5951:1-3.)

As former TVS and former CNN employee, Elizabeth Zosso, explained:

It was a list of pretty much the whole plan for the day, so a list of what the correspondents were doing that day, *what the field crews would be doing that day*, what shoots were happening, when, locations, *which crews were assigned*, which correspondents were assigned. It was kind of like our playbook, if we were a football team or something, for the day.

(ZOSSO 27:5953:14-20 (emphasis added). See also JENKINS 21:4691:5-22 (stating that rundown would include event to be covered [e.g., an anti-abortion rally], as well as identify the crew [e.g., David Jenkins and Martin Jimenez] and the producer who would cover the event); SUISSA 23:5043:23-25, 23:5044:1-8 (stating that rundown would identify the crew and their assignment, noting if a producer would accompany the crew and providing information about the stories).)

The CNN assignment manager would prepare a "rundown" every night, using a computer program in which they inputted assignments and other information. (ZOSSO 27:5957:22-23,

27:5958:6-11; Jenkins 20:4482:2-4; SUISSA 23:5044:24-25.)<sup>16</sup> Each crew of bargaining unit field employees would grab a rundown, retrieve their equipment and proceed to their assigned location. (ZOSSO 27:5951:18-20, 27:5956:16-20; PARKER 33:7206:11-13.)

While TVS created the “slot position” to assign crews of employees to particular stories (SIMONS 75:15306:6-16), those employees saw the slot position as little more than a “parrot on a perch,” because the TVS person sitting in the slot position would be “parroting what Vito’s telling them to do....” (PARKER 32:7035:9-13. *See also* JENKINS 21:4601:22-25.) As Suissa recounted during the hearing:

when the Team slot person came in, what would happen is that Vito was say “tell Mini 12 to go to the state department,” then the Team person would get on the radio and go “Mini 12, go to the state department,” and then he’d say “tell them they need to be there by nine o’clock” and then she’d get on and say you know, “you need to be there by nine o’clock.” ... So he had to basically tell them verbatim what needed to be said to the crew, so the crew could get the assignment.

(SUISSA 23:5045:21-25, 23:5046:1-5. *See also* SUISSA 23:5224:23-25, 23:5225:1-4 (recounting how Suissa observed CNN assignment desk editor tell TVS slot person to tell courier to go to White House to retrieve mail and bring it back to D.C. Bureau); ZOSSO 27:6142:2-4 (recounting Maggiolo telling the TVS slot person that, “I need you to send a crew to the Hill or something like that”).) Maggiolo also directly assigned work to bargaining unit employees. (MORSE 28:6282:13-25, 28:6283:1-7 (testifying Maggiolo directed work on microwave truck); PACHECO 29:6457:2-25, 29:6458:1-7 (testifying Maggiolo directed Pacheco to use microwave truck); PACHECO 30:6693:25, 30:6694:1-20 (testifying Maggiolo assigned Pacheco to shoot B-roll of buildings in D.C. for future stories).)

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<sup>16</sup> Zosso did not know whether it was the TVS slot person, or the CNN assignment manager, who filled in the names of the field technicians in the rundown. (ZOSSO 27:6092:8-12.)

Maggiolo's directions were not infrequent. (PARKER 32:7036:2-6.) Former TVS and current CNN employee, Robert Parker testified that, based on his observations, Maggiolo was sort of a "chess player" who loved "the movement of folks," including bargaining unit employees. (PARKER 32:7035:8-19.) For example, Maggiolo would instruct the slot person to move a crew to certain locations because of the crew's proximity to an event. (*Id.* (recounting Maggiolo telling slot person to move crew from Rayburn House Office Building to Dirksen Senate Office Building because of crew's proximity to latter building).)

The "chess" moves of CNN's assignment desk editor are not the only evidence of CNN's control over the assignments given to bargaining unit employees working in the field. Other CNN personnel – such as producers (*e.g.*, Carrie Conner, Karla Crosswhite and Brad Wright) and correspondents (*e.g.*, Brooks Jackson and Beth Nissan) – requested specific bargaining unit employees to work on particular projects. (JENKINS 20:4508:25, 20:4509:1-13, 20:4509:25, 20:4510:1-6, 20:4511:8-11; SUISSA 23:5173:3-25, 23:5174:1-13; ZOSSO 27:5962:16-19; PACHECO 29:6500:5-19.) For example, a CNN correspondent from New York, Beth Nissan, specifically requested employees Reginald Selma and Elizabeth Zosso on stories involving the writer of the Seabiscuit book, amputees at Walter Reed and an inner-city school in Baltimore. (Zosso 27:5962:14-25, 27:5963:1-17.) Another CNN correspondent, Brooks Jackson, requested Martin Jimenez and David Jenkins to work on a story on the economy in the Midwest. (JENKINS 20:4509:8-13.) In each instance, the CNN correspondent told the employees that he or she specifically requested them for the particular assignment. (*See e.g.*, ZOSSO 27:5962:14-25, 27:5963:1-17.)

Not only did CNN producers or correspondents request specific employees by name, they also rejected employees. Sarah Pacheco testified about an occasion when, while standing by the

CNN assignment desk, CNN producer Karla Crosswhite requested a crew for an assignment from Maggiolo. (PACHECO 29:6500:8-19.) Maggiolo first offered Mini 10 (Tim Bintrim and John Urman), which Crosswhite rejected. (*Id.*) Maggiolo then offered Mini 20 (which included Pacheco), which Crosswhite accepted. (*Id.* See also JENKINS 22:4795:15-25, 22:4796:1-7 (testifying that Brooks Jackson admitted to working only with certain, preferred crews).)

## ii. The White House Unit

The producers and correspondents in the White House unit routinely *insisted* on specific bargaining unit employees. (JENKINS 21:4754:7-14.) When shop steward Sarah Pacheco filed a grievance protesting the failure of TVS to rotate White House assignments to give other employees an opportunity to work on the prestigious assignment (PEACH 7:1127:10-22), TVS denied the grievance. The President of TVS, Larry D'Anna, stated that "CNN was the client, that TVS would comply with whatever the – CNN wanted as it related to assigning people to the White House." (PEACH 7:1127:2-4. See also PEACH 7:1138:19-25, 7:1139:1, 7:1139:6-10 (recounting statements by D'Anna that when CNN producers exercised their authority to, or indicated that they chose who would work and did not want an employee, the employee would not be there); PACHECO 29:6603:22-24 (testifying D'Anna stated he did not want to change the way things were with the White House because he did not want to disturb the comfort level of the client, CNN).)

Once the bargaining unit employees were assigned to the White House Unit, CNN producers and correspondents had exclusive control over their particular work assignments. CNN producers, such as Danielle Whelton, assigned bargaining unit employees to regular posts: *viz.*, the briefing room, the driveway stakeout and the North Lawn. (PACHECO 29:6515:3-16.)

CNN producers also notified bargaining unit employees about White House travel assignments, both domestic and international. (MORSE 9:1632:22-25, 9:1633:1-9.) If a particular employee could not travel for the assignment, he or she notified the CNN producer, not the TVS assignment desk. (MORSE 9:1635:5-19.) The producer then requested the employee to find someone to take his or her place. (MORSE 9:1635:11-13.) The employee provided the producer with a possible substitute TVS technician; and, if the producer accepted the substitution, the producer notified the substitute technician about the travel assignment. (MORSE 9:1637:15-20.)

### **iii. The CNNfn and CNN Español Units**

Likewise, at CNNfn and CNN Español, CNN's producers would assign bargaining unit employees to work on specific stories. (ZOSSO 27:6014:3-5; MUNOZ 34:7492:13-17, 34:7493:9-13.) At CNNfn, which was CNN's financial network and which operated out of both the D.C. and N.Y. Bureaus, bargaining unit employees performed whatever assignments were given to them by CNNfn producers, such as Joanne Fuchs. (BODNAR 66:13520:11-12, 66:13522:3-7.) For example, the CNNfn producer assigned bargaining unit employees, like John Bodnar, to cover a speech by the Secretary of Treasury that was being delivered at a hotel. (BODNAR 66:13530:10-17.) Bargaining unit employees also obtained subsequent assignments from CNNfn. (BODNAR 66:13534:21-25, 66:13535:1-8.) While they were working for CNNfn, the TVS slot person could not give assignments to the bargaining unit employees without the approval of the CNNfn producer. (BODNAR 66:13537:15-25, 66:13538:1-12.)

At CNN Español, which was CNN's Spanish-speaking network that operated out of the D.C. and N.Y. Bureaus, CNN producers assigned the bargaining unit employees to the interviews or press conferences that needed to be covered, and the employees performed that

assignment. (MUNOZ 34:7493:9-13, 34:7493:23-25, 34:7494:1-5.) A CNN producer at CNN Español even called one employee, Luis Munoz, at home on a weekend to give him an assignment to cover the Space Shuttle disaster, making the assignment before the TVS slot person called Munoz. (MUNOZ 34:7528:3-25, 34:7529:1-13.) Once the bargaining unit employees were working for CNN Español, they belonged to CNN Español, doing whatever the producers in that unit asked of them. (ZOSSO 27:6015:17-24.) The employees would not take any assignments or directions from the TVS desk without the approval of the producers in CNN Español. (*Id.* See also MUNOZ 34:7520:10-25, 34:7521:1-9.)

**b. CNN's Direction of Work**

Not only did CNN and its producers assign bargaining unit employees to particular stories (*e.g.*, a story about amputees at Walter Reed) or specific places (*e.g.*, the White House), but CNN producers and correspondents directed the employees in the performance of bargaining unit work on those assignments. The amount of direction given by CNN producers and/or correspondents varied by assignment and by location.

**i. General News Assignments**

TVS had only one manager, *i.e.*, the Director of Field Operations, responsible for the management of the twenty or more crews of bargaining unit employees. (SIMONS 75:15289:8-15 (discussing the Director of Field Operations); ZOSSO 27:5954:8-11 (testifying there were about twenty crews).) However, CNN had numerous producers and correspondents, who usually accompanied the bargaining unit employees to their assigned location. (JENKINS 20C:4485:7-9; ZOSSO 27:5986:18-20; PARKER 32:7032:7-13, 32:7032:19-22, 32:7033:4-7.) For example, when former TVS and CNN employee Elizabeth Zosso traveled to the designated locations, she was

accompanied by a CNN producer and/or correspondent, but never by a TVS supervisor or manager. (ZOSSO 27:5984:25, 27:5985:1-9.)

Once the bargaining unit employees arrived at the location, they set up the camera and audio equipment. (MORSE 9:1614:25, 9:1615:1-2.) Depending upon the assignment, the employees sometimes knew which shots were required for a story, and they would proceed to record the video and audio for the particular shot. (See ZOSSO 27:5984:21-24.) However, CNN producers and/or correspondents also knew which shots *they* wanted, and the producers and/or correspondents instructed the employees to obtain the desired shots. (ZOSSO 27:5983:2-8; PACHECO 29:6474:14-25, 29:6475:1-16.) In a two-camera shoot, for example, CNN producers instructed the employees on the shots to record and what backgrounds to use. (PACHECO 29:6490:21-25, 29:6491:1-23, 29:6492:4-22, 29:6493:2-25, 29:6494:6-25, 29:6495:1-6.)

The record contains numerous instances where CNN producers or correspondents directed the work of bargaining unit employees. One specific example of the types of instruction involves the assignment concerning B-2 stealth bombers. The employees recorded video of the refueling of a B-2 bomber, because they “knew it was part of shooting that story” (ZOSSO 27:5982:5-14); however, the correspondent, Jamie McIntyre, told the field technicians that he wanted to interview a specific person and that he wanted a B-2 bomber in the background. (Zosso 27:5983:2-8.) The employees complied with McIntyre’s instructions. (*Id.*)

In another instance, a crew of bargaining unit employees accompanied CNN correspondent Kathleen Coke on an assignment about a former Special Forces war hero involved in the Battle of Mogadishu (*i.e.*, Blackhawk Down) who became a doctor in a small town in Virginia. (ZOSSO 27:5976:10-22.) During the assignment, correspondent Coke instructed the employees on the types of shots that she wanted, *e.g.*, “tight shots of certain pictures on the wall,

pictures of the doctor when he was a soldier in his special forces unit.” (ZOSSO 27:5978:2-10.)  
Coke also instructed the crew to record the interview with the doctor with a Virginia State flag behind the doctor’s friend. (*Id.*)

There are many more examples of the direction by CNN producers and/or correspondents of the bargaining unit employees with respect to the backgrounds of shots and the types of shots during general news assignments. These examples include, but are not limited to, the following:

- JENKINS 20:4507:9-17 (assignment involving direction of employees by CNN producer Laura Bernardini for stakeout on sniper trial);
- JENKINS 21:4544:15-25, 21:4545:1-4 (assignment involving direction of employees by CNN correspondent Brooks Jackson for story on American economy);
- JENKINS 21:4551:8-15, 21:4551:24-25, 21:4552:1-9 (assignment involving direction of employees by CNN producer Carol Craddy for story on Lackawanna 6);
- JENKINS 21:4553:21-25, 21:4554:1-25, 21:4555:1-25, 21:4556:1-19 (assignment involving direction of employees by CNN producer Tory Flowers and CNN correspondent Jonathan Karl);
- ZOSSO 27:5965:1-25, 27:5966:1-15 (assignment involving direction of employees by CNN correspondent Beth Nissan about story involving inner-city school);
- ZOSSO 27:5967:10-19 (assignment involving direction of employees by Nissan regarding story about author of *Seabiscuit*); and
- ZOSSO 27:5969:15-25, 27:5970:1-25 (assignment involving direction of employees by Nissan for story on amputees at Walter Reed).

In each instance, the CNN producer or correspondent directed the bargaining unit employees with respect to the particular shot. (*Id.* See also JENKINS 20:4502:19-25, 20:4503:1-19 (discussing instructions given by CNN producers); PACHECO 29:6475:6-25, 29:6476:1-10 (same).) More importantly, the producer or correspondent had the last word on any particular background or shot. (ZOSSO 27:5989:8-10.)

While the bargaining unit employees received direction from CNN producers and/or correspondents during an assignment, the employees were typically not in communication with TVS supervisors or managers. (*See, e.g.*, PACHECO 29:6475:6-25, 29:6476:1-10 (testifying that she received direction from CNN producers, TVS managers not present).) As Zosso recounted, if the assignment is an all-day shoot, then the crew of employees belonged to the CNN producer or correspondent, which meant that the crew never called the TVS assignment desk during that day. (ZOSSO 27:5980:23-25, 27:5981:1-7.) Employees contacted the TVS assignment desk only at the end of their assignment to obtain their next assignment. (ZOSSO 27:6082:23-25, 27:6083:1-2.)

Not all subsequent assignments came from the TVS assignment desk. TVS employee and current CNN employee, David Jenkins testified that he and his partner received a subsequent assignment from CNN producer, Mike Ahlers, after his crew finished an assignment at Niagara Falls, New York. (JENKINS 21:4546:4-10, 21:4550:4-10, 21:4551:5-15.) The crew—Martin Jimenez and David Jenkins—had traveled to Niagara Falls on an assignment with CNN producer Ahlers and CNN correspondent Jean Meserve. (JENKINS 21:4546:4-10.) Both Ahlers and Meserve wanted to film the shot by the falls; however, Jenkins voiced his concern that, given the frigid temperatures, the lenses would accumulate ice in this environment rendering the cameras inoperable. (JENKINS 21:4548:11-22.) Despite Jenkins' concerns, Ahlers and Meserve insisted that the shot be filmed by the falls. (JENKINS 21:4549:1-10.) As Jenkins feared, ice froze on the lenses, requiring the crew to thaw out the lenses before they could proceed. (JENKINS 21:4549:12-25, 21:4550:1-3.) After completing the shot, Ahlers and Meserve informed the employees that they were going to meet with CNN producer Carol Craddy for a story about the "Lackawanna 6," *i.e.*, a group of suspected terrorists residing outside of Buffalo, New York.

(JENKINS 21:4551:5-15.) The TVS employees accompanied Craddy, per their instructions, to perform the "Lackawanna 6" assignment and, while the employees determined where to set up the camera, Craddy decided the background for the shoot, viz., which books should appear in the shot and whether the shot should be dark. (JENKINS 21:4552:1-9, 21:4552:24-25, 21:4553:1-8. *See also* ROBERTSON 31:6812:1-7 (testifying he would contact CNN manager Maggiolo about next assignment when TVS slot person was not at desk).)

**ii. White House Assignments**

White House assignments differed from general news assignments because CNN's producers and correspondents were already at the White House when the bargaining unit employees received their assignments. (JENKINS 20C:4485:9-14, 20C:4485:24-25, 20C:4486:1.) Once the employees arrived at the White House, they were under the exclusive direction of CNN's producers and correspondents. (JENKINS 20:4502:19-25, 20:4503:1-19, 20:4503:21-25, 20:4504:1-21.) TVS did not assign a supervisor to the White House. (MORSE 9:1601:4-7.)

The CNN producers or correspondents told the bargaining unit employees where they would be stationed around the White House and what they were to shoot. (JENKINS 20:4502:19-25, 20:4503:1-19, 20:4503:21-25, 20:4504:1-21.) For example, if a crew was stationed on the North Lawn, a correspondent would come running out to tell the employees that there would be a live shot or the producer called the employees to inform them of that fact. (PACHECO 29:6516:4-7.) In addition, when the employees were recording an interview on the North Lawn of the White House, and the CNN producer did not want the White House in the background, the producer told the employees that they needed to have a background that did not include the White House. (MORSE 9:1614:4-8.) If there were any changes in the assignments or directions, CNN producers would tell the technicians. (MORSE 9:1626:2-9.) For instance, if an event was

set to take place in the Rose Garden, the CNN producers would call a crew from the North Lawn or another post to cover the event. (PACHECO 29:6516:17-25, 29:6517:1-8.)

When bargaining unit employees traveled on White House assignments, the CNN producers directed their work, providing assignments on a daily basis for the duration of the trip. (MORSE 9:1634:20-24, 9:1646:19-23; PARKER 32:7028:12-14.) Generally, there were no TVS supervisors assigned to domestic trips. (MORSE 9:1634:4-10 (testifying that no TVS supervisor accompanied him on domestic trips, and he knew of only one trip in which a TVS manager was present), 9:1642:2-6 (same).) There were no TVS supervisors assigned for international trips. (MORSE 9:1646:12-14 (testifying that no TVS supervisor went on trips overseas).)

On such trips, crews were typically divided into a pool crews and unilateral crews. (MORSE 9:1681:15-20, 9:1681:1-3.) Unilateral crews did the work needed by CNN producers and correspondents. (MORSE 9:1682:1-3.) Recounting his experience in a unilateral crew on an assignment in Africa, former TVS and CNN employee Richard Morse testified that he received his daily assignments from the CNN producer. (MORSE 9:1682:20-23.) With respect to the background for interviews, Morse testified that the producer or the correspondent would describe what he or she wanted for the background and the crew would find a location that corresponded with that description. (MORSE 9:1683:16-23. *See also* MORSE 28:6285:2-4 (testifying that he received direction from CNN producers on unilateral crew).) The CNN producer or correspondent would also describe for the technicians the type of "beauty shots," *i.e.*, "vignettes of the area" they wanted. (MORSE 9:1684:1-8.) The field technicians then obtained the images and sounds corresponding to the desired shots. (MORSE 9:1684:1-8.)

### iii. CNNfn and CNN Español Assignments

CNN producers and/or correspondents made assignments and provided direction to bargaining unit employees who were assigned to CNNfn and CNN Español. (ZOSSO 27:6014:3-5, 27:6014:8-13, 27:6020:10-25, 27:6021:1-3; BODNAR 66:13522:3-7.) Like bargaining unit employees working at the White House, employees working for these units were attached to the CNN producers and correspondents in each unit on a continuing basis, because the employees did not have any subsequent contact or direction from anyone at TVS. (ZOSSO 27:6021:20-25, 27:6022:1-4; BODNAR 66:13539:11-16.)

At CNNfn, producers—such as Joanne Fuchs—directed the work of field technicians, telling them what to shoot and where. Technicians reported to the CNNfn office for their daily assignments. (BODNAR 66:13527:17-22.) For instance, the CNN producer instructed the field technicians to cover a speech by the Secretary of the Treasury at a hotel. (BODNAR 66:13530:10-17.) The technicians went to the hotel with a producer and set up their equipment. Thereafter, the field technicians would cover the event, which involved recording the video and audio of the speech. (BODNAR 66:13531:21-23.) Technicians recorded wide shots, cutaways, and other shots. (*Id.*) Occasionally, the producer would instruct the field technicians to take the camera off the tripod to get different shots and sound. (BODNAR 66:13531:24-25, 66:13532:1-10.) For particular stories to be aired on CNNfn, producers would instruct the field technicians on the particular shots that the producers wanted for the stories. (ZOSSO 27:6022:12-22 (discussing direction by CNN producer who told Zosso to obtain “shots of a new housing development being built” and sent Zosso to a specific neighborhood telling Zosso, “make sure you get a sign of the neighborhood and a sign of the houses for sale....”)) Once the assignment was completed, the field technicians would report to the producers at CNNfn, would also provide the field

technicians with their next assignment. (BODNAR 66:13634:17-25, 66:13535:1-8.) When working for CNNfn, field technicians did not take assignments from the TVS slot person without approval from CNNfn. (BODNAR 66:13537:15-25, 66:13538:1-12.)

Likewise, for CNN Español, field technicians did whatever they were assigned or directed to do by CNN's producers or correspondents. Munoz also recounted an assignment when he went with a CNN editor/producer to film a story about Spanish restaurants in D.C. (MUNOZ 34:7505:9-25, 34:7506:1-13.) The editor/producer explained how he intended to edit the package and told Munoz to be sure to get particular shots, such as "a tight shot of his hands doing this and that," "a wide shot of the kitchen" and an "exterior shot to show the entrance of the restaurant." (*Id.*) In discussing another example, Zosso recounted:

[t]hey would tell me what kind of B-roll they wanted for their shoot, you know, who we were going to interview and Julio, the reporter, would tell me when to do a stand-up and he would tell me that he wanted a stand-up to look a certain way. He wanted it tight, a very tight shot because he did not want to show his size on the screen.

(ZOSSO 27:6014:8-13.) Munoz similarly recounted:

if I were to cover a hearing with a producer or reporter, they would have to tell me where to set up the camera, for example, because there were rules and regulations that you know where to set up the camera. What they would tell me is, for example, if the hearing lasted three hours, there was no need for me to take the whole three hours. They were looking for specific witnesses, specific statements from one of the Congressman, so I will be recording the event and I would keep my eye on them ... the producer or reporter and they will tell me when to stop recording.

(MUNOZ 34:7498:11-23. *See also* MUNOZ 34:7499:10-24 (testifying that reporters or producers would tell him what to film and when to stop).) After the hearing, Munoz would follow the producer or reporter in an effort to conduct a videotaped interview of one of the witnesses. (MUNOZ 34:7500:4-13.)

**c. CNN's Control Over Hours of Work**

**i. Meal Breaks**

The direction exercised by CNN producers and correspondents over the work performed by bargaining unit employees in the field also carried with it a measure of control over the hours worked by the employees, including when employees could take breaks and whether employees would work overtime. The collective bargaining agreement provided bargaining unit employees with a one-hour meal break. (GC Ex. 9 at 6.) Generally, the "window" for taking a meal break opened at the third hour and closed with the fifth hour. (MORSE 9:1640:24-25.) If the employee missed his or her meal break, the employee was entitled to additional compensation as set forth in the collective bargaining agreement. (GC Ex. 9 at 6.) The field technicians working at the White House, the employees would coordinate with CNN's producers as to when they could take a break for lunch. (MORSE 28:6382:8-10.) In other cases, CNN's producers would simply tell the bargaining unit employees that they were not getting their lunch. (PACHECO 29:6539:25, 29:6540:1-4 (testifying that CNN producer Laura Bernadini told employees they would not get lunch and they could order food, which would be provided by CNN).) Of course, when employees were covering on-going events such as a Congressional hearing, the employees would work through their rest breaks and meal periods. (ZOSSO 27:6070:23-25, 27:6071:1-3.)

**ii. Overtime**

CNN's producers and correspondents routinely directed employees to continue working beyond their regularly scheduled shift, which would result in the employee receiving overtime compensation for any additional hour(s) worked. Under the collective bargaining agreement between NABET-CWA and TVS, bargaining unit employees received overtime pay for all hours worked in excess of their regular shift – either eight (8) hours per day or ten (10) hours per day

– or in excess of forty (40) per week. (GC Ex. 9 at 4.) Under the ENG Agreement between CNN and TVS, CNN had to provide approval for overtime hours if those hours exceeded the amount previously forecast in the Agreement. (GC Ex. 40 at 13-14.) And, as noted *infra*, in the months leading to the termination of the ENG Agreement, overtime generally exceeded the budgeted amounts by a substantial amount. (GC Exs. 158B, 158C, 158D, 158E & 158F.)

The control over whether a bargaining unit employee worked overtime rested with the CNN producers and correspondents, who would decide when the assignment was over and when the employees would be released. (PACHECO 29:6477:12-13.) When employees had to work overtime, they did not seek permission from TVS. (MORSE 9:1630:5-7.) To the employees' knowledge, the CNN correspondents and/or producers did not seek approval of TVS before the employees performed overtime work. (MORSE 9:1629:25, 9:1630:1-7.)

Former bargaining unit employee, Luis Munoz, testified that the producer at CNN Español would ask him to stay late and work overtime. (MUNOZ 34:7513:11-20). However, after September 11, 2001, CNN actually changed Munoz's work schedule to reduce the amount of overtime on a daily basis. (MUNOZ 34:7487:1-21.) As recounted by Munoz, CNN producer Willie Lora informed Munoz after September 11, 2001 that the start time of his shift changed from 9:00 a.m. to 11:00 a.m., "[a]s per Atlanta, he was told that we were having too much overtime on a daily basis, and they needed to cut back on overtime." (MUNOZ 34:7487:1-18. *See also* MUNOZ 34:7488:2-14.) Munoz went to the Lisa Manes, the TVS slot person, to complain about the change in the schedule. (MUNOZ 34:7488:15-25, 34:7489:1-3.) Manes responded that CNN was the client and they had a free hand in determining overtime. (*Id.*)

Another example of CNN's exercise of control over the overtime worked by bargaining unit employees was provided by Sarah Pacheco, who testified that she was given an assignment

to relieve a bargaining unit employee who would otherwise have been earning overtime. (PACHECO 29:6507:2-16.) Pacheco was instructed to go to the Cannon Building on Capitol Hill to relieve an employee who would have earned overtime in order to prevent both employees on the crew from earning overtime. (*Id.*) The instructions originated from the CNN Assignment Desk Manager Vito Maggiolo. (*Id.*)

**d. CNN's Treatment of Bargaining Unit Employees as Its Own**

The record is replete with evidence demonstrating the fact that the bargaining unit employees were, in various ways, considered to be and treated as CNN employees. For example, during assignments, CNN producers enforced certain CNN policies with respect to the bargaining unit employees. (PACHECO 29:6535:8-24, 29:6536:2-17.) As recounted by former employee Sarah Pacheco, after shooting stories at the Marlboro corporate offices, individuals with the Marlboro Corporation offered free merchandise to the bargaining unit employees. (PACHECO 29:6535:8-24.) The CNN producer stated, in front of the employees, that CNN policy precluded the employees from accepting free merchandise. (*Id.*) In another instance, after an assignment involving a restaurant in Georgetown, the restaurant offered food to the crew. (PACHECO 29:6536:5-12.) The producer/reporter stated that the employees could not accept any "freebies." (*Id.*) In another instance, discussed in detail *infra*, CNN's Operations Manager, Mark Sweet, imposed a rule upon all individuals, including studio technicians, which prohibited them from bringing food or drink into the control rooms. (CRENNAN 68:14091:7-16.) Sweet imposed the rule after an office production assistant of CNN spilled a drink in one of the control rooms. (*Id.*) While bargaining unit employees were prohibited from bringing food and drink into the control rooms, CNN employees continued to bring food and drinks into the back rows of the control rooms. (CRENNAN 68:14094:3-8.)

In addition, CNN and its producers and correspondents routinely held out the bargaining unit employees working in the field to the public as CNN employees. CNN producers and/or reporters introduced the bargaining unit employees as CNN staff. (MORSE 9:161T:25, 9:1612-1-6.) Bargaining unit employees were issued passes that, in some instances, identified them as "CNN" or "CNN/TVS." (See GC Exs. 131A, 131B, 131C, 131D, 131E, 131G, 131J, 346, 347, 366.)

**2. *CNN's Control over the Bargaining Unit Employees Working in the Studios, Control Rooms and Quality Control at the D.C. Bureau***

Not only did CNN exercise control over certain terms and conditions of employment for bargaining unit employees working in the field, but it also wielded similar control over the terms and conditions of employment for the employees working in the studios, control rooms and quality control area at the D.C. Bureau. As with the employees in the field, the employees working at the D.C. Bureau played a key role in the broadcasting of video and audio images, whether to other CNN bureaus or to the public. CNN routinely interjected itself into the terms and conditions of employment that related to how and when the work was performed.

**a. *CNN's Direction of Work***

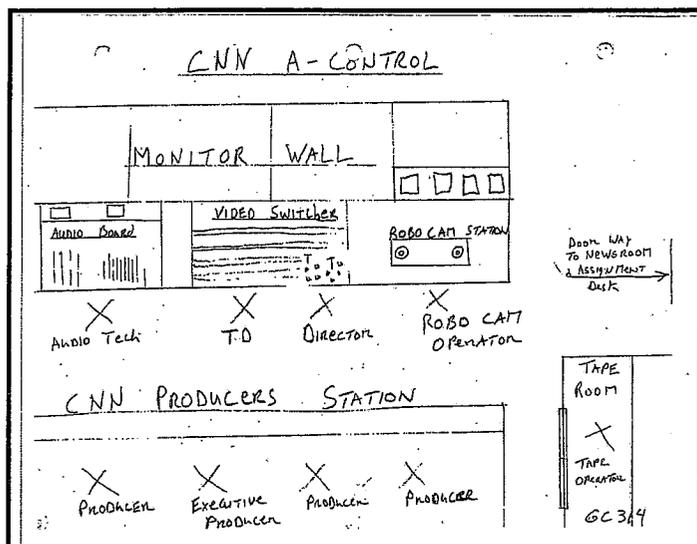
**i. *In the Studios and Control Rooms***

**(A) *The Layout of the Control Rooms***

Just as bargaining unit employees worked in close proximity with CNN producers on assignments in the field, employees also worked in an integrated fashion with a bevy of CNN producers, live producers, and executive producers in the studios and control rooms. The D.C. Bureau had three studios ("A Studio," "B Studio" and "C Studio") and three control rooms ("A Control," "B Control," and "C Control"). (MOHEN 68:13932:5-12; MILLER 71:14363:13-15.)

Each control room had a different layout, but bargaining unit employees were always near CNN personnel, including, but not limited to producers.

For example, General Counsel's Exhibit 314,<sup>17</sup> which is reproduced below, provides an illustration of the A Control at the D.C. Bureau in 2003. There were generally four to five



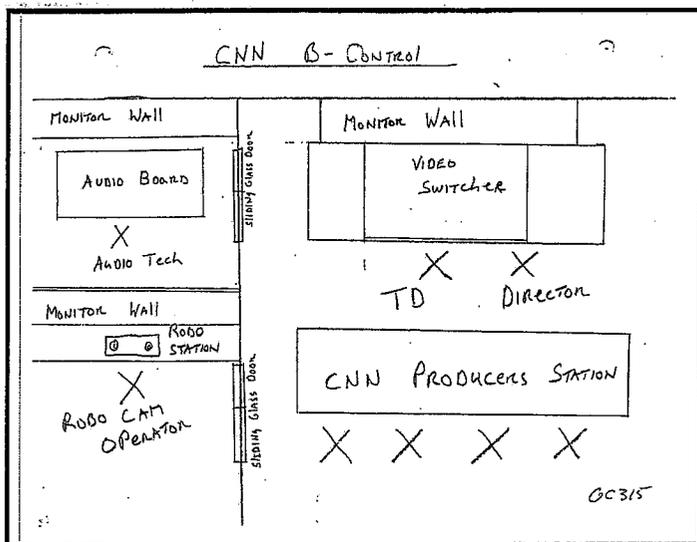
bargaining unit employees working in that control room. (SUISSA 23:5115:19.) The employees worked as audio technicians, technical directors, directors and robotic camera operators. (GC Ex. 314.) These employees sat next to each other in the first row (as shown by the "Xs" in the illustration) in front of

broadcasting equipment, such as an audio board or a video switcher, as well as a wall of monitors. (*Id.* See also SUISSA 23:5093:20-25, 23:5094:1-11, 23:5095: 7-13, 23:5100:4-21.) Another bargaining unit employee, working as a tape operator, sat in a cubicle next to the CNN producers' station. (GC Ex. 314.) The CNN producers' station consisted of a large console that had computer stations, the intercom system and telephones. (SUISSA 23:5101:21-25.) CNN producers, executive producers, and operations assistants sat at that station, which was located directly behind the bargaining unit employees. (*Id.*)

General Counsel's Exhibit 315, which is reproduced on the next page, provides a depiction of B Control at the Washington, D. C. Bureau in 2003. The bargaining unit employees

<sup>17</sup> Like General Counsel's Exhibit 310, which was the drawing of the CNN assignment desk area, former bargaining unit employee James Suissa prepared General Counsel's Exhibits 314 and 315. Suissa's depictions of Control Room A (GC Ex. 314) and Control Room B (GC Ex. 315) were not drawn to scale. (SUISSA 23:5092:11-20.)

working in B Control handled shows, such as *Crossfire* and *Larry King Live*, from that control room. (SUISSA 23:5112:24-25, 23:5113:1-2.) There were three to four bargaining unit



employees working in Control Room B. (SUISSA 23:5116:14-15.) They would work as technical director and director sat side-by-side in front of a video switcher and monitor wall. (GC Ex. 315.) Other bargaining unit employees working as audio technicians and robotic camera operators sat in cubicles to the

left. (*Id.*) The CNN producers sat at the producers' station, which was located behind the bargaining unit employees who worked as technical director and the director. (*Id.*)

The other control room, C Control, was for "overflow," *i.e.*, to handle work when A Control and B Control were preoccupied. (SUISSA 23:5115:6-12.) Originally, C control had a small switcher and a small audio board, which were eventually replaced by better equipment. (SUISSA 23:5114:22-25, 23:5115:1-5.) Generally, one or two bargaining unit employees worked in C Control. (SUISSA 23:5116:24-25.)

While there were three control rooms (and three studios), there was only one TVS manager, *i.e.*, the Manager of Studio Operations. (SUISSA 23:5063:24-25, 23:5064:4-8.) Like the bargaining unit employees in the field, the employees working in the studios closely work with, and routinely took direction from, CNN personnel, such as the producers.

## (B) The Producers

As noted above, CNN producers were situated at the producers' station, wearing headphones and within arms-reach of RTS intercom and the phones. (SUISSA 23:5102:4-8.) From their vantage point, CNN producers would oversee the broadcast, barking out commands to the bargaining unit employees, including the director and technical directors. (SUISSA 22:4895:24-25, 22:4896:1-8.) The TVS director would take his or her cues from the CNN producers who sat behind the director, whether it was the CNN show producer, CNN line producer, CNN live producer or CNN executive producer, as well as the CNN line coordinator. (SUISSA 22:4900:21-24, 23:5060:9-14.)<sup>18</sup> For example, as Suissa testified at the hearing:

I directed *Reliable Sources* for six years straight, seven years straight, and I worked with Jennifer Avellino. She was the producer, the show producer on the show. And the way it would start out is, of course, I'd be scheduled to the control room and then I would go down and talk with her about the show. She would tell me all of the elements. She would say, you know, we're going to have three guests. Let's make sure that Howard Kurtz, who was the host at the time, where we want to have him seated, have him ... sit to the left. Let's have the two guests to the right and then on the second segment, we're going to have three guest[s], but I want the guests on the left and then we'll put Kurtz in the second chair and then put the two guests to the right.... then we would go over all of the elements.

(SUISSA 23:5060:18-25, 23:5061:1-7. *See also* SUISSA 23:5067:7-13 (explaining what directions bargaining unit employee working as director took from CNN producer in Atlanta).) In addition, when there was breaking news event, Mike Maltas, CNN's news director, would come running into the control room and take control of the control room. (MOHEN 68:13942:14-25, 68:13943:1-21.) Maltas would then direct the employees to bring up a certain line, such as correspondent Jamie McIntyre at the Pentagon, and then direct the employees as the network went live. (*Id.* *See also* SUISSA 22:4895:13-16.)

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<sup>18</sup> Not only was the director tasked by CNN producers at the D.C. Bureau, but, in Suissa's experience as a director, he also took cues from CNN producers stationed in the Atlanta Bureau. (SUISSA 22:4901:8-10.)

The bargaining unit employee who worked as the director would also take directions from the CNN talent. As Suissa testified:

Howard Kurtz would say can you get — he would say, you know, get a tight shot of the magazine or, you know, he would say I'm going to lift this up, so make sure you get the shot when I lift it up and then I'm going to go to someone else with a question. So he was telling me what he was going to do, and he was telling me that I needed to make sure that I could take a shot of him or he would say take a right shot of this magazine cover, and I'm going, you know, on my second round of questions, I'm going to use it.

(SUISSA 23:5063:8-17.)

Having received the directions from the CNN producers and CNN talent, the bargaining unit employee working as the director communicated those directions to the other bargaining unit employees in the control room and studio. (SUISSA 23:5067:15-25, 23:5068:1-3.) Once again, as Suissa explained:

But most of the time, I'm being tasked by the producer behind me. Whoever's sitting in the back row. They could be yelling out, let's get ready, we're going live with White House, State Department and Pentagon, and then they'd start working on elements and there'd be all this—you know. And I would tell everybody on the headset, okay, everybody, let's get ready. We're going to go live with White House and then, you know, the reporter would run out and sometimes when the reporter was live, the back row, whoever's in the back row is yelling out I got a sound bite for them. It's in VC1. Stand by to roll. The roll cue's coming up. Sometimes they'd give me the roll cue, sometimes they'd give me the length of the tape. Everything was fluid, everything changed [from] second to second, moment to moment.

(SUISSA 23:5067:15-25, 23:5068:1-3.) Thus, the director was the conduit for the directions from CNN producers and CNN talent to other bargaining unit employee, such as the camera operators, robotic camera operators, audio technicians and video tape operators.

CNN producers also directed bargaining unit employees at times when the D.C. Bureau was not broadcasting news or programming. (CRENNAN 68:14107:3-25, 68:14108:1-25, 68:14109:1-25, 68:14110:1-25; 68:14111:1-25; 68:14112:1-22, 70:14319:1-18.) *See also* DAVIS

66:13688:4-25, 66:13689:1-25, 66:13690:1-25, 66:13691:1-18.) Ms. Cullen, a CNN director, directed studio technicians as they were rehearsing and blocking shots (*i.e.*, “looking at shots, different cameras”) for *Late Edition* in Studio B. (DAVIS 66:13691:4-7; CRENNAN 68:14107:7-12; 68:14109:16-19.) As former bargaining unit employee Keith Crennan recalled, he heard the director cursing at the studio technicians, making statements such as “[w]hy are you guys so fucking slow” and “[y]ou need to move this shit.” (CRENNAN 68:14109:25, 68:14110:1-6.) Cullen made these statements as she was directing the camera operators. (CRENNAN 68:14110:6-8.) Indeed, although there was a bargaining unit employee who was supposed to be the director (Reza Baktar), Cullen was usurping the directing work and actually directing the work of the other employees. (CRENNAN 68:14110:6-8, 70:14322:3-13.)

## ii. In Quality Control

CNN producers and staff also directed the work of bargaining unit employees stationed in the quality control area. (DAVIS 66:13685:4-25, 66:13686:1-25, 66:13687:1-25., 66:13688:1. *See also* DAVIS 66:13717:11-25, 66:13718:1-25, 66:13719:1-6.) As noted *supra* in Section II.C.2.a., the quality control area is the main routing station at the D.C. Bureau. (SUISSA 22:4896:12-13.) The bargaining unit employee who worked in quality control managed various incoming sources, such as the White House, the Pentagon and/or the State Department. (SUISSA 22:4896:16-18.) The employee sat at a console where there were three computers, the first was used to switch the incoming lines, the second was used to tune in to microwave shots and the third to downlink to satellite signals. (GC EX. 316.) The console also included the camera control units that allowed the quality control employee to “paint” the cameras, which is “setting the cameras up so that there’s proper flesh tone, where it does not look too bright...” (SUISSA 23:5123:15-23. *See also* GC EX. 316.)

As the quality control employee sat before the computers and other equipment, he or she would receive directions from CNN's producers, line coordinators and assignment editors.

(DAVIS 66:13685:6-9.) For example, as Suissa testified at the hearing:

I would take – the majority of my direction I would take from the CNN line coordinator, and then I also took direction from CNN feeds because minute to minute, they were trying to feed tape that had been shot during the day, trying to feed that down to Atlanta. So the lines would be tied up almost most of the day getting all these packages that had been edited, all the footage that had been shot, down the line so that Atlanta would have access to it.

(SUISSA 22:4897:14-21. *See also* DAVIS 66:13685:12-15.) Suissa added:

They [CNN's line coordinators] would call down and, and as I mentioned before, would say specifically "I want Pentagon in 13," "I want Pentagon Cuts in 14," "I want the state – the elm tree in 1 and 2" and this is really important because everybody in the Bureau had access to these locations, and if they knew that something was on 11, everybody who was in the office could call it up on their router. So when – after they would tell me what was needed to be lined up in those incomings, and everybody in the Bureau knew it, and then they could call it up. Like if somebody was doing a story on the Pentagon, they would just know that the Pentagon was on 13 and then they would call 13 up in the room and they could take notes.

(SUISSA 22:4897:24-25, 22:4898:1-10.) CNN's assignment editors also directed the bargaining unit employee in quality control. (DAVIS 66:13687:15-21.)

Directors or producers would instruct the bargaining unit employee in quality control to shade cameras or adjust cameras, or to put the studio on line with one of CNN's other bureaus.

(DAVIS 66:13685:22-25, 66:13686:1-6.) In one instance, a CNN producer, Jack Lynn, went into the quality control area and began to direct a live shot from that area. (DAVIS 66:13686:10-15.)

Lynn instructed the bargaining unit employee, John Davis, to send a shot from Studio B to New York. (DAVIS 66:13687:5-12. *See also* DAVIS 66:13722:1-25, 66:13723:1-2.) Although this incident was out of the ordinary (DAVIS 66:13723:15-17), it is another example of something much more common, *i.e.*, the direction of the work performed by bargaining unit employees.

**b. CNN's Control over Hours of Work**

The record contains evidence of a CNN director's control over employees during the workday. The CNN director, Renee Cullen, directed the camera operators in preparation for *Late Edition* to the point where she was holding those employees beyond their regularly scheduled duties to the point of affecting the staffing of positions at the bureau. (CRENNAN 68:14110:13-22.) Generally, employees are assigned to work in different places throughout the workday. (CRENNAN 68:14107:4-5.) However, Ms. Cullen had kept employees for such a period of time that they were unable to report to their next location. (CRENNAN 68:14110:13-22.) Consequently, some employees were not being relieved of their duties so that they could take a lunch break or go home at the end of their shift. (*Id.*)

As with field technicians, studio technicians were entitled to overtime compensation for hours worked in excess of eight (8) per day or forty (40) per week. (GC Ex. 9 at 3.) In the control rooms, the live producer would come in and tell the bargaining unit employees that they were not to go anywhere and remain at their posts. (MOHEN 68:13944-2-25, 68:13945:1-25, 68:14002:4-24, 68:14003:18-21.) In issuing this instruction, the live producer would require the bargaining unit employees to work overtime. (MOHEN 68:14003:10-17.) The employees would stay in their positions until released by the producer. (MOHEN 68:13945:11-16.)

**c. CNN's Resolution of Employees' Disputes**

As noted *supra*, CNN's Operations Manager, Mark Sweet, imposed a rule applicable to all CNN employees and all bargaining unit employees prohibiting all food and drink in the control rooms. Local 31 steward Keith Crennan to protested the fact that CNN employees were violating his rule. (CRENNAN 68:14091:7-25, 68:14092:1-5, 68:14093:9-25, 68:14094:1-25, 68:14095:1-25.) Crennan first raised the issue with the TVS manager, Mike Marcus, who had

responded that he would uphold Sweet's rule. (*Id.*) Crennan thereafter approached Sweet and explained that it was unfair to have separate rules for TVS employees and CNN employees and, in addition, that a ban on food and drink that applied to TVS employees would lead to situations where the employees would be "out of position." (*Id.*) Based on Crennan's discussion with Sweet, the latter agreed to a compromise where bargaining unit employees could have food and drink at two desks located away from the broadcast equipment. (*Id.*)

Crennan also approached Mark Sweet about concerns employees over the conditions of Control Room B, where the ceiling tiles were leaking, with mold and mildew forming. (CRENNAN 68:14101:9-23.) Crennan later approached a CNN news director, Mike Marcus, about the issue, asking if it was possible to have an inspection of the studio by the Occupational Health and Safety Administration. (CRENNAN 68:14102:12-25, 68:14103:1-8.) Crennan also raised the issue with TVS management. (CRENNAN 68:14102:21-22, 68:14103:12-13.) Marcus later informed Crennan that an inspection had been done. (CRENNAN 68:14105:11-15.)

### 3. *CNN's Control over Bargaining Unit Employees Working in the Engineering Department*

Generally, either the TVS Manager of Operations or the TVS Manager of Engineering would make work assignments to the maintenance engineers. (KUCZYNSKI 14:2852:6-11.) However, CNN's managers would also make assignments to maintenance engineers and, in addition, direct their work in performing those assignments.

For example, CNN managers, such as Tu Vu and George Kinney, would also give assignments to the maintenance engineers. (ADKINSON 15:3206:8-25, 15:3207:1-8, 15:3207:15-23. *See also* SIMONS 75:15341:1-9 (testifying that CNN Director of Engineering would "come into the shop and direct an engineer to do something" and stating that Simons would have to remind CNN personnel that engineers were TVS employees).) Former bargaining unit employee

Jeff Adkinson estimated that, during the last year of his employment at the D.C. Bureau, he received sixty percent (60%) of his assignments from John Cunha, TVS' engineering manager, 30% of his assignments from Tu Vu, CNN's Director of Engineering, and 10% of his assignments from George Kinney, the CNN's Assistant Director of Engineering. (ADKINSON 15:3208:25, 15:3209:1-11.) Maintenance engineers would also deal with Vu or Kinney, instead of dealing with TVS managers like Cunha. (CLEMONS 13:2701:7-23; KUCZYNSKI 14:2853:21-25, 14:2854:1, 14:2907:10-25, 14:2908:1-4.)

In the Engineering Department, Vu would, on occasion, direct the work of the maintenance employees. (NORMAN 14:3003:1-25, 14:3004:1-6, 14:3048:11-25, 14:3049:1-4.) For example, Vu directed former bargaining unit employee, Dennis Norman concerning the installation of triax cables for the camera control units ("CCUs"), directing how many would be installed, where they were going to be run and to which CCUs each camera would be hooked. (NORMAN 14:3003:19-25, 14:3004:1-6, 14:3111:1-9.) Vu also directed the installation of a new microwave receiver on the roof of the CNN bureau. (NORMAN 14:3003:1-9, 14:3110:5-22) Vu gave specific directions on how the engineers were to install the receiver and connect it to the system. (*Id.*)

Vu also directed engineers to redo work they previously performed. (NORMAN 14:3007:13-25, 14:3008:1-6.) In one instance, Vu directed Norman to re-wire some external DAs in accordance with how Vu wanted the wiring to be done. (NORMAN 14:3007:13-22.) Norman complied with Vu's directions and rewired the DAs. (*Id.*)

**F. Part Six: The Cost of Sharing Control over the Bargaining Unit Employees at the Washington D.C. Bureau**

As Parts Two through Five (Sections II.B. & II.E.) illustrate, CNN and TVS had a relationship starkly different from a typical subcontracting arrangement. TVS existed solely to

provide electronic newsgathering, production and engineering services to CNN's Washington D.C. Bureau. TVS did not have any newsgathering, production or engineering equipment: the "subcontractor" did not own any cameras, no audio mixers, and/or any other piece of broadcasting equipment. The only thing TVS provided to CNN was a little more than four score of bargaining unit employees and a handful of managers. Since TVS had no other clients or other apparent source of income, TVS was entirely dependent upon CNN to provide the compensation for all of these employees and the few managers; and, as noted above, in at least one instance, obtained approval from CNN for a specific increase in the employees wages. (*See, supra*, Section II.D.1.a.) CNN not only provided the monies used to pay the wages and benefits of the bargaining unit employees, but it also exercised significant control over the day-to-day supervision and control of the bargaining unit employees, assigning them work, directing their work, and, in some cases, dictating their hours. However, there was a price for CNN's exercise of this control over the bargaining unit employees. That price manifested itself in the increasing costs of the services provided by the bargaining unit employees.

CNN had always complained to TVS about the costs of the ENG Agreement, particularly the labor costs. (D'ANNA 16:3546:1-12.) In the months leading up to the Bureau Staffing Project, the labor costs of providing the bargaining unit employees exceeded the amounts budgeted by CNN and TVS through the ENG Agreement. (*See, generally*, GC Exs. 185A-185G.) These excessive costs are documented in memoranda between the financial personnel of TVS (Melissa Demple and Kathy Swiger) and the principals of TVS (Brian Frydenlund, Larry D'Anna and Brad Simons). Those memoranda show that the payroll costs were "running over budget" in February 2003, March 2003, April 2003, May 2003, July 2003 and August 2003. (GC Exs. 185B, 185C, 185D, 185E, 185F & 185G.) More specifically, the financial personnel

recounted that, in February and March 2003, “payroll costs” or “payroll expense” were running \$66,000 and \$75,000 over budget. (GC Exs. 185B, 185C.) The principal reason for the labor cost overruns was the excessive amount of overtime worked by technicians due to the Iraq war. (*Id.*) Indeed, after the first four months of 2003, overtime was running approximately \$220,000 over budget. (GC Ex. 185D.) By the end of May, the overtime costs were almost \$250,000 over budget. (GC Ex. 185E.) The excess overtime was being incurred by both field technicians covering certain stories, as well as the technicians in the engineering department performing a “studio build out.” (*Id.*) By the end of June 2003, the additional amounts needed to cover all of the labor costs for the first six months was \$175,000. (GC Ex. 185F.) Payroll expenses continued to run “higher than budgeted.” (GC Ex. 185G.)<sup>19</sup>

CNN faced the prospect of ever-increasing costs under the ENG Agreement. (GC Ex. 185B (stating “[w]ith the coming of war coverage overtime showed a significant jump in February” 2003).) Indeed, that prospect became a reality. (GC Ex. 185C (stating “[t]he continuing coverage of the War in Iraq is showing up on the March financial statements,” in which “[t]he higher than budgeted overtime is the major cause of this.”) (*Id.*)).) This reality continued into April and May 2003. (GC Ex. 185D (stating “[c]ontinuing coverage of the Iraqi War is reflected in the high overtime costs recorded in April); GC Ex. 185E (stating, for May 2003, “[t]he high overtime costs are driving the loss for the Labor Fee account”).) With the ongoing war in Iraq, and with the upcoming United States elections in 2004, the costs under the ENG Agreement continued to grow. (GC Ex. 185H (stating that criminal trials of Moussaui and Malvo, which began in October 2003, “will cause significant overtime during their duration”);

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<sup>19</sup> Other expenses, such as health insurance benefits, also exceeded budgeted amounts in certain months. (GC Ex. 185A (stating health insurance benefits exceeded budgeted amounts in January 2003).) CNN was responsible for providing additional monies to cover these extra costs. (GC Ex. 40 at 13.)

GC Ex. 185I (stating overtime “remains high” would stay high in October 2003); GC Ex. 185J (stating payroll costs were high for studio and engineering departments due to bureau renovations and new sets).)

**G. Part Seven: The Development of the Bureau Staffing Project**

**I. *The “New Strategy”***

Against the background of the rising costs of the ENG Agreement, which consistently exceeded the forecasted and budgeted amounts, CNN’s Executive Vice President of Operations, Cindy Patrick, became the “motivating force” behind a “new strategy” at some point 2003. (CNN Br. at 6; PATRICK 61:12852:15-18, 61:12879:15-19.) As envisioned by Ms. Patrick, this “new strategy” had two fundamental elements. The first element involved CNN’s termination of its ENG Agreements with TVS at the D.C. and N.Y. Bureaus. (PATRICK 61:12879:15-19.) The termination of the ENG Agreements would result, in turn, with the termination of the collective bargaining agreements covering the bureaus (*see, e.g.*, GC Ex. 9 at 28) and, additionally, with the discharge of the bargaining unit employees, who, as Patrick knew, were represented by NABET-CWA. (PATRICK 5:730:7-15.) Patrick anticipated the discharge of the employees because, as the second element of her “new strategy,” CNN would hire new employees to perform the electronic newsgathering, production and engineering services at the D.C. and N.Y. Bureaus.

Patrick claimed that her strategy intended for CNN to hire new employees into new job positions that would allegedly allow the Respondent to take advantage of supposedly new technologies in the industry. (PATRICK 5:815:21-25, 5:816:1-2. *See also* PATRICK 5:832:7-12 (testifying that CNN “would be developing new positions that would be able to support the technology that we were implementing...”).) However, Ms. Patrick – and, by extension, CNN –

had an ulterior objective in proffering this new, two-part strategy, *viz.*, the reduction of labor costs at the D.C. and N.Y. Bureaus.

At a July 2003 meeting, CNN's principals gathered to discuss Ms. Patrick's new strategy. (PATRICK 5:739:20-25, 5:740:21-23.) The principals who were present at this meeting included Jim Walton, President of CNN; Marty Garrison, who was Senior Vice President of Technology and Production Operations; Brad Ferrer, Executive Vice President of Finance & Administration, as well as others including Sean Murtagh and Sue Diviney, who had responsibilities with respect to the finances of the New York, N.Y. and Washington, D.C. bureaus. (PATRICK 5:740:24-25, 5:741:1-15, 5:749:10-17; GC Ex. 101 at 2-3.) In-house counsel, *viz.*, Lisa Reeves, and outside counsel, *viz.*, Zachary Fasman, were also present at this meeting. (PATRICK 5:749:2-4.)

During the meeting, Patrick provided a PowerPoint presentation that addressed the proposal to terminate the ENG Agreements. (PATRICK 5:794:3-6.) The presentation included a "high level financial analysis" of Patrick's proposal, which had been prepared by Sue Diviney and Sean Murtagh. (PATRICK 5:795:24-25, 5:796:1, 5:843:20-24.) This "high level financial analysis" was, according to Patrick, "sort of a one-pager that had very broad categories for me to show that this [*i.e.*, the Bureau Staffing Project] was not going to be a money loser." (PATRICK 5:816:9-15. *See also* PATRICK 61:12881:2-6 (stating level of detail in analysis was "high level categories of spending just buckets of estimates").) In short, this financial analysis was supposed to show that the Bureau Staffing Project would not cost CNN more money than its present arrangement (*i.e.*, the ENG Agreements with TVS). (PATRICK 5:817:1-9, 15:818:6-11.)

The financial analysis shows CNN considered the savings in benefits, penalties, overtime, and merit pay when considering the BSP. (GC Ex. 326 at 4.) As noted above, for most of 2003, the labor costs under the ENG Agreement were exceeding the budgeted and forecasted amounts

by thousands, tens of thousands and even hundreds of thousands of dollars. (GC Exs. 185A-G.) The excess in costs was due primarily to overtime worked by the TVS employees. (*Id.*) The financial analysis confirms that, when considering the implementation of the BSP, CNN was motivated, in part, by reducing labor costs, to a tune of \$1.4 million in projected annualized savings at the D.C. Bureau. (GC Ex. 326 at CNNA-PROD143066).

CNN's motivation to reduce labor costs is corroborated by an e-mail in which Diviney, who was responsible for finances at the D.C. Bureau (SPEISER 17:3836:9-10), referenced a "projected savings in 2004 of \$1.4M." (CPDC Ex. 2.) In that e-mail, Sue Diviney states that "[w]e have been analyzing our new staffing and we believe we could avoid/reduce the use of freelance and [overtime] by covering our Freelance and [paid time off] needs with additional staffing." (CPDC Ex. 2.) Diviney wanted to fill several additional positions, stating "[t]his will not impact the projected savings in 2004 of \$1.4M." (*Id.*) Diviney forwarded her e-mail to Cindy Patrick, who responded, "[s]ounds great to me." (*Id.*) This e-mail reflects that, in terminating the ENG Agreements, displacing the bargaining unit employees and hiring its own workforce, CNN anticipated a "projected savings" of \$1.4 million in the first year of the BSP (or a projected annualized savings of \$1.4 million) *and* that the Respondent sought to maintain those savings by avoiding or reducing labor costs, such as *overtime*. (CPDC Ex. 2.)

Returning to her presentation at the July 2003 meeting of CNN principals, Patrick directed her recommendation of terminating the ENG Agreements with TVS and pursuing the BSP to CNN's President, James Walton. (PATRICK 5:856:7-9.) While one of the purported reasons for the BSP was to take advantage of new technologies, Patrick could not recall during her testimony at the trial whether there was any discussion of new digital newsgathering technologies or non-linear editing technologies that allegedly served as the basis for her new

initiative. (PATRICK 5:835:5-11.) Rather, Patrick went through the PowerPoint presentation, explaining “why are we here, what is the driver for this change, why the timing was appropriate at a high level with what the technology opportunities were.” (PATRICK 5:835:14-19.) Approximately two weeks after the July 2003 meeting, the approval was given to Patrick to proceed with the Bureau Staffing Project. (PATRICK 61:12881:23-24, 61:12882:1.)

After obtaining the requisite approval, Ms. Patrick proceeded with her new strategy. She knew that, once CNN terminated the ENG Agreements, the collective bargaining agreements would likewise terminate and TVS would discharge the union-represented bargaining unit employees. Ms. Patrick also knew of, in the words of CNN’s counsel, “a legal rule about the impact of hiring 50 percent or more of a prior company’s employees.” (PATRICK 61:12889:23-25, 61:12890:1-3.)<sup>20</sup> Thus, Patrick knew that if less than fifty percent of the bargaining unit employees were part of CNN’s new workforce, CNN would not have a legal obligation to recognize and bargain with the bargaining unit employees’ representative. Absent intervening unfair labor practices, CNN would have the right of a successor employer to set the initial terms and conditions of employment; and, if there was no labor organization, the Respondent could also change those terms and conditions of employment without having to bargain. With this knowledge, Ms. Patrick proceeded with her new strategy, *i.e.*, the Bureau Staffing Project.

## 2. *The “Project Team”*

Initially, Ms. Patrick was aided in development and implementation of the Bureau Staffing Project by “somewhat of a project team.” (KILE 73:14768:9.) The project team

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<sup>20</sup> Counsel asked, “[a]t the start of the hiring process for the bureau staffing project, were you aware of a legal rule about the impact of hiring 50 percent [or] more of a prior company’s employees?” (FASMAN 61:12889:23-25, 61:12890:1-3.) However, the “legal rule” pertains to the “impact” of 50% or more of the successor’s workforce being employees of the predecessor. *See, e.g., Jennifer Matthew Nursing & Rehabilitation Ctr.*, 332 NLRB 300, 306 (2000).

consisted of four individuals, each of whom played a role in the recruitment and hiring process under the Bureau Staffing Project. (KILE 73:14768:7-10.) The four individuals were: (1) Karen Bennett, Senior Vice President of Human Resources; (2) Cindy Patrick, Executive Vice President of Operations; (3) Lisa Reeves, in-house counsel for CNN; and (4) Loren Kile, a recruitment manager. (KILE 73:14769:1-7.)

These four individuals had their first meeting as the "project team" in late August or September 2003. (KILE 73:14768:4-6.) During this meeting, they discussed the process the Bureau Staffing Project, which involved the hiring of more than 200 positions over the course of four months. (KILE 73:14769:14-18.) Loren Kile provided advice as to the hiring process. (*Id.*) She advised that CNN utilize a behavioral based interviewing process. (KILE 73:14769:20-21.) Kile then explained each step of a possible selection process, *i.e.*, recruiting, interviewing and selection. (KILE 73:14770:20-24.)

To implement this selection process, Kile first needed to assemble a team of recruiters, who would screen the candidates seeking positions with CNN. (KILE 73:14771:3-7.) Kile needed to know the number of positions, as well as the number of employees to fill each position, in order to determine the number of recruiters. (KILE 73:14771:13-19.) CNN's Human Resources ("HR") Department, along with Cindy Patrick, identified the number of positions and number of openings. (KILE 73:14771:20-25.)

CNN created a myriad of "new" positions that would be filled as part of the Bureau Staffing Project. CNN managers drafted position questionnaires, which purportedly described the major duties and responsibilities of each "new" position, as well as the requirements for that position, such as prior work experience and/or educational degrees. (*See* PATRICK 73:14854:23-25, 73:14855:1-4. *See, e.g.*, GC EX. 227 (position questionnaire for photojournalist position).)

For the field, CNN created the “new” positions such as “Photojournalist” and “Senior Photojournalist” positions, as well as a “Lighting Specialist/Photojournalist” position. (GC Ex. 543.)<sup>21</sup> For the studios and control rooms, CNN created the positions of “Audio Designer,” “Director/Technical Director,” “Studio Operator,” and “Technical Director/Director.” (GC Ex. 534.) Finally, for the engineering department (which was allegedly “merged” with the IT department and renamed “Broadcast Info & Technology” or “BIT”), CNN created the positions of, *inter alia*, “Senior BIT Support Engineer,” “BIT Support Engineer,” “Associate BIT Support Engineer,” “Senior BIT Field Engineer,” and “BIT Field Engineer.”<sup>22</sup> (GC Ex. 134.)

With the positions and openings identified, Kile proceeded to establish the teams of recruiters. (KILE 73:14771:13-19, 73:14773:19-20.) Kile and Rick Denius were designated to be the recruiters for the field personnel (*i.e.*, photojournalists) because of their “editorial recruiting background.” (KILE 73:14773:22-25, 73:14774:1-2.) Anthony Walker and Sherry Saye were selected to be the recruiters for operations (*i.e.*, audio designers, studio operators, etc., *see infra*). (KILE 73:14774:4-9.) Suzanne Mackiewicz was a contract recruiter “for the more technical positions,” *i.e.*, the engineering positions. (KILE 73:14774:11-18, 73:14775:25, 73:14776:1.) Kile also brought in “scheduling coordinators,” who were temporary employees. (KILE

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<sup>21</sup> When CNN was drafting the qualifications for the photojournalist position, one of its managers, Matt Speiser, advised that CNN should “emphasize the use of DV Cams since this isn’t within NABET jurisdiction now.” (GC Ex. 553.) Speiser’s statement strongly suggests that CNN was developing new positions in a manner that would discriminate against bargaining unit employees by placing them at a disadvantage when they applied for positions with CNN to continue their employment at the Respondent’s bureaus. The ALJ specifically found as much, concluding that Speiser’s statement was direct evidence of CNN’s intent to discriminate against the bargaining unit employees. (ALJD 51:22-25.)

<sup>22</sup> The other “BIT” positions created as a part of the Bureau Staffing Project were the Lead BIT Production Support Specialist, BIT Production Support Candidate, Associate BIT Support Specialist and Associate BIT System Administrator. CNN also created the “new” position of “Production Assistant” to staff as part of the BSP. (GC Ex. 692.)

73:14775:1-11.) There were three scheduling coordinators: Kelli Clarke in Washington, D.C.; Cheryl Weiner in New York, N.Y.; and Laura Dees in Atlanta, GA. (KILE 73:14775:7-11.)

While Kile was “recruiting” the recruiters, Cindy Patrick selected most of the hiring managers. (PATRICK 73:14866:13-23.) Table 1 sets forth the hiring managers:

<b>TABLE 1</b> <i>Bureau Staffing Project – CNN Hiring Managers</i>	
<b>Position</b>	<b>Hiring Manager(s)</b>
Audio Designer I, Audio Designer II	Anne Woodward
Associate BIT Support Engineer BIT Support Engineer BIT Field Engineer	Rick Cole Matthew Holcombe Joe Murphy Tu Vu
Director/Technical Director Technical Director/Director	Steve Alperin Bob Hesskamp Mike Maltas Cindy Patrick
Studio Operator I Studio Operator II	Troy McIntyre Anne Woodward
Lighting Specialists/Photojournalists Photojournalists Senior Photojournalists	John Courtney R.J. Fletcher Stuart Redisch Matt Speiser Dan Young
<b>Source:</b> GC Exs. 534 & 543; HOLCOMBE 11:2137:19-21.	

Patrick did not select the managers for the engineering positions. (PATRICK 73:14866:13-23.)

### 3. *The Kickoff Meeting*

With a recruitment team and hiring managers, CNN then scheduled “kickoff meetings” in Washington, D.C. on September 30, 2003 and New York on October 1, 2003, where the recruiters met with the hiring managers for the first time. (KILE 73:14776:6-11, 73:14839:1-14.) After an introduction by Cindy Patrick, there was a behavioral-based interviewing training session. (KILE 73:14778:2-5.) The focal point of the training was a PowerPoint presentation. (GC Ex. 161.) The presentation outlined CNN’s selection system, which purportedly focused on

“competencies,” *i.e.*, “the knowledge, motivations and behaviors associated with success or failure in a job.” (*Id.* at CNNA-PROD0065705.) The presentation listed “CNN’s Organization-wide competencies, which included, *inter alia*, “analytical skills,” “client service,” “creativity,” “ethics & integrity,” “job knowledge,” “teamwork,” and “technical skills.” (*Id.* at CNNA-PROD0065718.) The presentation further identified an additional “dimension,” known as “motivational fit,” which was defined as:

[t]he extent to which activities and responsibilities, the organization’s mode of operations and values, and the community in which the individual will live and work are consistent with the type of environment that provides personal satisfaction, the degree to which the work is personally satisfying.

(*Id.* at CNNA-PROD0065719.) In other words, “as an interviewer,” a hiring manager “need[s] to know whether there is sufficient overlap between what a person likes and what is available in the job to keep him or her satisfied.” (*Id.* at CNNA-PROD0065720.)

The hiring managers were expected to ask questions relating to these “competencies” or “dimensions” in order to elicit certain responses. (GC Ex. 161 at CNNA-PROD0065707 to 65708.) The responses were supposed to cover three particular areas:

1. **Behavior**  
*The background or context in which the candidate took action. It explains why a candidate acted as he or she did.*
2. **Action**  
*What the candidate did or said in a response to a Behavior and how he or she said or did it.*
3. **Result**  
*The effects of the candidate’s Actions.*

(*Id.* at CNNA-PROD0065708.) The presentation cautioned hiring managers to be aware of “Fake/False BAR’s” from candidates, such as “[s]tatements with lots of glitter but no substance.” (*Id.* at CNNA-PROD0065712 to 65713.)

Hiring managers were told that, “[t]he successful interview is built on a unique interviewing tool, the Interview Guide,” which purportedly contained “everything” that a hiring manager would need to conduct an interview. (GC Ex. 161 at CNNA-PROD0065723.) CNN did not have the Interview Guides for each of the positions at this kickoff meeting/training session; instead, CNN had only a sample Interview Guide. (KILE 73:14794:2-7. *See also* GC Ex. 161 at CNNA-PROD0065724.) Thus, the hiring managers did not have the actual questions that would be asked during the interview process; they only had the sample questions on the sample Interview Guide. (KILE 73:14794:9-13.)

The hiring managers were also instructed on “interview techniques,” such as “taking notes.” (GC Ex. 161 at CNNA-PROD0065726.) The presentation instructed managers on certain “note taking tips,” such as “[t]ake notes openly,” “[n]ote only pertinent information,” “[n]ote behavior observed in the interview,” and “[t]ake notes on negative or sensitive information carefully.” (*Id.* at CNNA-PROD0065727.) There is no evidence that hiring managers practiced taking notes—or, for that matter, asking questions—during the behavioral training. When asked if hiring managers did mock interviews, which would have enabled the managers to practice their behavioral interviewing skills, one manager (Troy McIntyre) could not recall doing mock interviews. (MCINTYRE 72:14551:22-25, 72:14552:1-22.)

Upon completing the presentation and the training, hiring managers were expected to be able to understand the selection system. (GC Ex. 161 at CNNA-PROD0065745.) However, when asked whether there were instructions with regard to minimizing bias during the behavioral interview, one of the hiring managers, Stuart Redisch, testified as follows:

Q: (By counsel for the General Counsel) ... Did they tell you how you were supposed to deal with those individuals that you've gotten to know over the years from Team that worked in the building with you?

A: (By Redisch) No.

Q: Did they tell you how to be careful to separate out what happened during the interview from the experiences you had with these individuals outside of the interview?

A: Nothing specific like that, no.

Q: Do you recall anything in general being said about that?

A: No.

(REDISCH 25:5555:3-12. *See also* FLETCHER 26:5752:23-25, 26:5753:1 (responding he “does not remember” any discussion that there should not be bias against bargaining unit employees).)

**H. Part Eight: The Implementation of the Bureau Staffing Project**

**1. *The Notice of the Termination of the ENG Agreement***

**a. CNN’s Notice to TVS**

At some point in 2003, CNN’s Vice President of Finance in New York, Sean Murtagh, and Cindy Patrick scheduled a meeting with a TVS representative, Brian Frydenlund, who was the President of Asgard Entertainment, the parent corporation of TVS. (FRYDENLUND 75:15184:21-23, 75:15185:1-3. *See also* PATRICK 61:12882:2-10.) After the “initial pleasantries,” Murtagh told Frydenlund that CNN was going to terminate the ENG Agreements with TVS at the D.C. and N.Y. Bureaus, as well as the dates of the termination. (PATRICK 61:12882:22-25, 61:12883:1.) Patrick told Frydenlund that CNN was “at the point in technology investment that we needed to staff differently, we needed to hire our own personnel so that we could manage the workflow that had turned editorial in nature.” (PATRICK 61:12883:6-10. *See also* FRYDENLUND 75:15185:1-6 (testifying that Patrick “talked about that the changing conditions in their business were requiring them to revisit their staffing and workflow models and, based on that, they were terminating our contract”).)

**b. CNN's Notice to its own Staff**

Cindy Patrick thereafter sent an-email notice to CNN's staff at the D.C. and N.Y. Bureaus on September 29, 2003: (GC Ex. 338.) The notice read in pertinent part:

CNN will announce today that it is ending its six-year relationship with Team Video Services ("Team"), the contractor hired by CNN to provide newsgathering, operations, and engineering services in the DC and New York bureaus.

This move reflects our desire to hire our own staff to perform all of CNN's newsgathering, operations and engineering/IT support functions, and to implement technological advancements that will alter traditional job responsibilities, bringing our two largest bureaus in line with Atlanta and the rest of the News Group. This change will not occur immediately and Team will continue to support our two bureaus for the next several months while CNN fills the positions created by this change. I want to be very clear when I say that we have the highest regard for Team and its staff and thank them for their years of service to CNN.

(*Id.*) Patrick then informed CNN's staff that the bureau chiefs, including Kathryn Kross from CNN's D.C. Bureau, would be sending e-mails "explaining in greater detail the next series of steps for those directly or indirectly affected by today's announcement." (*Id.*)

Approximately twelve minutes later, D.C. Bureau Chief Kross sent an e-mail to CNN's staff at the D.C. Bureau. (GC Ex. 381.) Kross stated, in relevant part:

Technology has broken down many of the traditional barriers in television news. DV cams. Video phones. Editing in the field. Transmitting from laptops. Non-linear will bring more changes still. Within the bureau, we've been "designing for the future" with many of these technological forces in mind. In order to take full advantage of these technological changes, we're looking to change internally as well.

Toward that end, we'll be ending our contractual relationship with Team Video Services (TVS) in both DC and NY. CNN will be creating, advertising, interviewing for, and ultimately filling approximately 240 new newsgathering, operations and engineering/IT positions between both bureaus....

(*Id.*) Like Cindy Patrick, Kathryn Kross commended the bargaining unit employees for their work, noting that they "are our friends and allies, professionals through and through." (*Id.*)

**c. TVS' Notice to the Bargaining Unit Employees**

Those "friends and allies" received their own notice, which was issued by the President of TVS, Larry D'Anna. (GC EX. 111.) That notice, which is GC Ex. 111, is reproduced below:

It is my unfortunate duty to inform you that CNN has notified Team that they are canceling our contracts in both New York and Washington, D.C. Their decision was not to replace Team with another contractor but to handle their staffing needs internally. CNN has expressed both publicly and privately that the service Team provided has been excellent.

*"I want to be very clear when I say that we have the highest regard for Team and its staff and thank them for their years of service to CNN."*

This business decision by CNN was based on the availability of new technology and a desire to restructure their operations and alter traditional job responsibilities.

This change will not occur immediately, rather, CNN and Team will design an orderly transition with details of this plan coming soon.

It is our understanding that CNN will be posting the new positions to their web site, [www.turnerjobs.com](http://www.turnerjobs.com). Team employees are invited to review the new positions and make application to CNN if interested.

Team will be in communication with you to discuss and help you navigate a variety of HR, severance and other issues that will come up during the transition.

In closing I would like to say that it has been a real pleasure and honor to have been associated with such a dedicated, professional hard working group of individuals. Truly the finest broadcast team anywhere.

Speaking for all of Team, we thank you for your years of service and commitment to the highest level of customer service.

(*Id.*) In other words, the termination of the TVS contract would also result in the termination of the bargaining unit employees' employment. (*Id.*)

**d. TVS' Notice to NABET Local 31**

Larry D'Anna also notified Mark Peach, who was the President of NABET Local 31 at the time, of CNN's cancellation of the ENG Agreements. (PEACH 7:1210:18-25.) Peach was on his way to a meeting with ABC, Inc. when he received a call from Mr. D'Anna. (*Id.*) D'Anna

informed Peach that TVS would no longer have employees at CNN's Washington, D.C. bureau after December 5, 2003 and that CNN made the decision. (PEACH 7:1211:3-6.) D'Anna also informed Peach that, "everybody would be terminated and could apply for the jobs that CNN was offering." (PEACH 7:1211:7-8.) If CNN did not hire the employees, then, according to D'Anna, they would be eligible for severance pay. (PEACH 7:1211:9-10.)

**2. *The Rejection of NABET-CWA and Local 31***

**a. CNN's D.C. Bureau Chief, Kathryn Kross: "NABET Will Not be a Part of CNN"**

Immediately after having learned about the cancellation of the ENG Agreement, Mark Peach arranged for a meeting with CNN's D.C. Bureau Chief, Kathryn Kross, on October 3, 2003. (PEACH 7:1212:21-24, 7:1213:19-23, 7:1214:8-10.) The purpose of the meeting was to find out what the role of NABET-CWA would be at CNN after the expiration of the ENG Agreement. (PEACH 7:1215:13-18.) Prior to the meeting, Peach had received two e-mails from Paul Miller, a shop steward and bargaining unit employee working at the D.C. Bureau. (GC EXS. 107 & 108. *See also* PEACH 7:1211:22-25, 7:1212:1-15; MILLER 71:14365:8-11, 71:14366:6-25, 71:14367:1-9.) The first e-mail was a list of questions that an employee forwarded to Peach to ask of Kathryn Kross at the upcoming meeting. (PEACH 7:1212:5-9; MILLER 71:14366:9-18; GC EX 107.) The second e-mail was a question from a bargaining unit employee as to whether the TVS personnel files will be considered during CNN's hiring process. (MILLER 71:14366:24-25, 71:14367:1-4; GC EX. 108.)

On October 3, 2003, Peach went from NABET Local 31's office in Silver Spring, Maryland to CNN's Washington, D.C. bureau to meet with Kross. (PEACH 7:1215:6-10.) Peach and Kross met in the latter's office at the bureau. (*Id.*) Kross spoke first, and, as recounted by Peach during the trial, Kross spoke in a scripted, tense fashion:

She began to describe reasons for the changes that were happening at CNN. She explained that the changes were technologically driven. She explained that CNN had outgrown the old model of managing.

She stated that these new technologies would provide, create opportunity for people. In specifically, she said that camera people, field camera people, would be able to create a new opportunity with laptop editing and that their work, their function, wouldn't be diluted or taken away from, but it would add to their creative opportunity.

She also went on to say that in the hiring process the recruiter would not be trying to put square pegs into round wholes.

(PEACH 7:1216:16-25, 7:1217:1-10.) Peach proceeded to ask the questions in the e-mail provided by Paul Miller. (PEACH 7:1217:11-25, 7:1218:1-25, 7:1219:1-25, 7:1220:1-25, 7:1221:1-25, 7:1222:1-13, 7:1222:19-25, 7:1223:1-19.)

After going through the questions, Peach then asked what NABET-CWA's role at CNN would be after December 5, 2003. (PEACH 7:1223:21-25. *See also* GC EX. 109.) In asking this question, Peach testified that he was trying to ascertain whether CNN intended to recognize and bargain with NABET-CWA after the termination of the contract with TVS. (PEACH 8:1365:16-25, 8:1370:19-20.) Peach recounted Kross' response at trial: "***She said that NABET would not be a part of CNN after the 5th, there would be no need for NABET because these employees would be so happy that they wouldn't need a union.***" (PEACH 7:1224:1-4 (emphasis added).) Kross' response shocked Peach. (PEACH 7:1224:6-8.)<sup>23</sup> Sensing Peach's shock, Kross added, "NABET people wouldn't be discriminated against. It's okay." (PEACH 7:1224:14-15.) Peach then looked at Kross and replied, "You mean to tell me that the only reason for a union is when

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<sup>23</sup> At the N.Y. Bureau, CNN's Senior Director of Operations, Lew Strauss, made a statement about NABET-CWA's presence after the transition that was similar to the statement by Kross to Peach. Strauss made the statement to a bargaining unit employee, Jon Ford, during an interview for a position with CNN. With rumors circulating that CNN would bust NABET-CWA (FORD 51:10993:3-7), Ford wanted to know whether it was a safe assumption that NABET-CWA would not be back after the transition. (FORD 51:10984:21-24.) Strauss responded that it would be a safe assumption to make. (*Id.* *See also* FORD 51:10993:8-21.)

management sucks?" (PEACH 7:1224:17-19. *See also* GC EX. 109C.) Kross sat there in silence. (PEACH 7:1224:20.) The meeting ended. (PEACH 7:1224:17-19.)

After leaving Kross' office, Peach contacted Paul Miller, who was at work in the D.C. Bureau at the time. (MILLER 71:14368:11-13, 71:14419:12-22.) Peach told Miller that "Kathryn Kross was not going to be using the union in the future, that they wanted to manage the workforce themselves." (MILLER 71:14369:25, 71:14370:1-2. *See also* MILLER 71:14420:13-15 (testifying that Peach told him Kross stated that CNN did not foresee needing a union group in their future workings with the employees".)) Miller relayed Peach's comments to the employees in the control room with him at the time, which included Mike David, Peter Mohen, Douglas McKinley and Chip Hirzel. (MILLER 71:14370:12-25.)

**b. CNN's Executive Producer, Danielle Whelton: "There Will Be No Union"**

Other employees learned about CNN's plans directly from the Respondent's correspondents and producers. On or about September 29, 2003, CNN's White House correspondent, John King, approached TVS employees, including Tim Garraty, who were working at the White House. (GARRATY 67:13749:15-21.) John King asked the employees, "have you heard yet?" The employees replied, "heard what?" (GARRATY 67:13749:15-21) King then asked the employees to join him in the office. (*Id.*) In the office, King told the employees that CNN was going to be hiring them directly. (*Id.*)

After his shift, Garraty returned to the D.C. Bureau, where he walked by the White House Unit office and saw the door was open. (GARRATY 67:13750:2-11.) Garraty "popped" his head in and saw CNN White House Producer Danielle Whelton. (*Id.*) Garraty asked if she was busy, to which she replied in the negative. (GARRATY 67:13750:13-16.) During their conversation, Whelton told Garraty that she was happy about the news and that CNN would be hiring "us"

directly. (*Id.*) Whelton further added that “*there won’t be any union.*” (GARRATY 67:13775:7-10 (emphasis added).) Garraty relayed his conversation with Whelton to other TVS employees including Mike Bannigan and Rick Morse. (GARRATY 67:13751:8-16; 67:13777:10-13.)

**c. CNN’s President, James Walton: “I Don’t Believe There is Any Benefit to Meeting” with NABET-CWA**

On November 19, 2003, NABET-CWA President, John S. Clark, along with CWA President, Morton Bahr, sent a letter to the CNN President, Jim Walton. (GC Ex. 23.) In the letter, the Union Presidents observed that NABET-CWA has represented the bargaining unit employees for almost twenty years. (*Id.*) They added:

Each and every current employee in Washington and New York has already proven his or her worth to you. Your management has worked closely for many years with these people. There is no valid reason why each one does not merit working directly for CNN now.

In addition, the labor agreements crafted by TVS recently and by its predecessors were approved by CNN, and continue to provide a viable framework for the employment of your workers.

(*Id.*) The Union Presidents further stated, “NABET-CWA and the agents of CNN have worked closely and beneficially for many years, and we see no reason why this relationship should not continue with CNN now as a direct rather than an indirect employer.” (*Id.*) They closed by requesting a meeting to discuss the foregoing issues with CNN. (*Id.*)

CNN’s President, James Walton, responded on December 3, 2003. (GC Ex. 24.) Walton’s response was short: “I will certainly keep your concern and interest in mind, *but I do not believe that there is any benefit to meeting at this time.*” (*Id.* (emphasis added).)

**3. The Applications for the New Positions**

Returning to the hiring process, CNN posted job openings for the “new” positions on the web site, <http://www.turnerjobs.com>. These job openings included many positions whose

responsibilities included the performance of work previously performed by TVS employees, such as photojournalist, studio operator, and BIT support engineer.

Almost all of the TVS employees applied for the "new" positions at CNN. The TVS employees who worked in the studio, control rooms and quality control, applied for studio positions, such as audio designer, director/technical director, and/or studio operator, and technical director/director. TVS field technicians, including both camera operators and audio technicians, applied for photojournalist, senior photojournalist and lighting specialist/photojournalist. Engineering employees applied for the BIT support engineer and/or BIT field engineer positions.

The job openings also included positions whose responsibilities had not been performed by former TVS employees, as those positions (or their pre-BSP equivalent) had not been part of the historical bargaining unit in the collective bargaining agreements between the subcontractors (including TVS) and NABET-CWA. These positions included "production assistants," "BIT Production Support Specialist," and "BIT System Administrator."

The application process required candidates to submit their application and their résumés on-line to <http://www.turnerjobs.com>. (See ZOSSO 27:6024:6-8 (testifying about going to Turner Jobs web site to apply for position with CNN); MILLER 71:14371:1-4 (same).) Once the application was submitted, the candidate received a confirmation e-mail. (CLEMONS 13:2717:10-12; PACHECO 30:6629:13-16.)

#### **4. *The Initial Screening of Candidates***

Once CNN received the applications, the applications were forwarded to the recruiters, who, as a first step, screened the candidates by telephone. (CLARKE 72:14468:14-17.) The recruiters used "phone screen templates" (KILE 73:14783:21-24), which varied by position.

(Compare GC EX. 534, VOL. 1, DAVID BACHELER at CNNA-012532 (phone screen for studio operations position) with GC EX. 543, VOL. 1, WILLIAM ALBERTER at CNNA-0113343 (phone screen for photojournalist position). The templates included general questions, such as “what are you currently earning?” (See, e.g., GC EX. 543, WILLIAM ALBERTER at CNNA-011343.) The templates also included questions that about the candidates’ skills and abilities. (*Id.*) The recruiters would ask some or most of the questions on the template, taking notes of the answers provided by the candidates. (See, e.g., GC EX. 534, VOL. 1, DAVID BACHELER at CNNA-012532 (phone screen of David Bacheler by Shari Saye with handwritten notes).)

The recruiter decided whether a candidate “passed” or “did not pass” the initial screening based upon the candidate’s responses to the questions. (See, e.g., GC EX. 543, VOL. 1, WILLIAM ALBERTER at CNNA-009494 (e-mail from Rick Denius to Matt Speiser, Loren Kile and Daniel Young of 10/07/03 at 7:17 P.M. informing recipients that four photojournalist candidates—including Alberter—passed initial screen while one candidate did not).) If a candidate “did not pass” the initial screening, the recruiter indicated that he or she did not recommend that candidate. (See GC EX. 543, VOL. 1, MICHAEL BANNIGAN, at CNNA-009465 (recommending against three candidates, including Derek Davis from KHOU in Houston, Texas).)

The hiring managers did not accept all of the recruiters’ recommendations. On October 10, 2003, recruiter Rick Denius recommended against Derek Davis from KHOU in an e-mail sent to Matt Speiser with copies to, *inter alia*, Daniel Young. (*Id.*) Denius sent another e-mail a couple weeks later attaching the résumé and phone screen of Derek Davis who had “5 years experience ... for KHOU (Houston/CBS).” (GC EX. 543, VOL. 1, DEREK DAVIS at CNNA-009418.) Denius stated that “[a]fter viewing his resume tape, Dan [Young] recommends Derek be interviewed by a member of the hiring manager team.” (*Id.*) Similarly, non-unit candidates

John Bena and Jeremy Moorehead failed the initial phone screen. Young insisted that Bena and Moorehead be interviewed despite their inexperience and CNN hired both non-unit candidates. (GC 228, Tab K at CNNA-020805, 009499; GC 228, Tab Q at CNNA-016903, 009480.)

If the candidate “passed” the initial screening or was recommended by a hiring manager, the recruiter referred the candidate to the hiring managers for the next step in the process. (*See, e.g.*, GC Ex. 543, VOL. 1, MICHAEL BANNIGAN at CNNA-009465 (recommending CNN move forward with applicants).) The next step the hiring process subjected the candidates to “behavioral interviewing” by CNN’s hiring managers.

### 5. *The “Behavioral Interviews” of Candidates*

Initially, Loren Kile had suggested the use of “behavioral interviewing” for the BSP because, in Cindy Patrick’s words:

She [Loren Kile] said that this was a good approach to use to have people discuss and explain qualifications that they had given their actual experience. So it kind of draws someone out with reference to things that have actually happened to them or actions they have taken where they can demonstrate, this is how I demonstrate this quality.

(PATRICK 61:12885:19-25, 61:12886:1-4.) Patrick further believed that behavioral interviews were “a very impactful way to find good employees, to find the people that you want to hire.”

(PATRICK 61:12886:16-18.) After all, the alleged goal of the BSP was to hire “the best qualified people for the positions that we had available.” (PATRICK 61:12886:22-24.)

#### a. **The Preparation for the Interviews**

To find the “best qualified people,” CNN needed to provide its hiring managers with their “unique interviewing tools,” *i.e.*, Interview Guides, so that the managers had “everything” they needed to interview the candidates. (GC Ex. 161 at CNNA-PROD0065723.) The recruiters drafted separate “Interview Guides” for each position (KILE 73:14789:15-18, KILE 73:14790:9-

25. See, e.g., GC Ex. 134, TAB C at CNNA-PROD0021591 to 21600 (BIT support engineer); GC Ex. 543, VOL. 3, JOHN QUINETTE at CNNA-014316 to 014325 (photojournalist); GC Ex. 543, VOL. 4, PAUL MILLER at CNNA-015221 to 015230 (audio designer); GC Ex. 543, VOL. 4, THOMAS MURPHY at CNNA-016956 to 016965 (studio operator); GC Ex. 543, VOL. 5, JAMES SUISSA at CNNA-014551 to 014560 (director/technical director).)

The recruiters first identified the “competencies” or “dimensions” for each position (*i.e.*, qualities or skills desired or required for the position). (KILE 73:14789:19-24, 73:14790:1-8.)

Table 2 sets forth the competencies identified for the jobs for which TVS employees applied.

<b>TABLE 2</b> <i>Interview Guides – “Competencies” or “Dimensions”</i>			
<b>AUDIO DESIGNER</b>		<b>PHOTOJOURNALIST</b>	
Interpersonal Skills	Ethics & Integrity	Creativity	Ethics & Integrity
Technical Skills	Teamwork	Initiative	Teamwork
Initiative	Motivational Fit	Decision Making	Motivational Fit
<b>BIT SUPPORT ENGINEER BIT FIELD ENGINEER</b>		<b>SENIOR PHOTOJOURNALIST</b>	
Analytical Skills	Verbal Skills	Leadership	Decision-Making
Teamwork	Technical Skills	Creativity	Ethics & Integrity
Organizational Skills	Motivational Fit	Initiative	Teamwork
			Motivational Fit
<b>DIRECTOR/TECHNICAL DIRECTOR</b>		<b>STUDIO OPERATOR</b>	
Leadership	Client Service	Analytical Skills	Ethics & Integrity
Organizational Skills	Motivational Fit	Technical Skills	Teamwork
Creativity		Initiative	Motivational Fit
<b>LIGHTING SPECIALIST/ PHOTOJOURNALIST</b>		<b>TECHNICAL DIRECTOR/ DIRECTOR</b>	
Creativity	Ethics & Integrity	Initiative	Verbal & Written Skills
Initiative	Teamwork	Leadership	Technical Skills
Decision Making	Motivational Fit	Organizational Skills	Motivational Fit
<b>Source:</b> GC Exs. 134, 534 & 543.			

As Table 2 reflects, the recruiters did not identify the CNN organization-wide “competency” of “job knowledge” (see GC EX. 161 at CNNA-PROD0065718) as a “competency” or “dimension” for any of the technical positions. The recruiters also did not identify “technical skills” as a “competency” or “dimension” for director/technical director or for the photojournalist positions.

After identifying the “competencies” or “dimensions” for each position, the recruiters drafted two questions for each “competency” or “dimension.” (KILE 73:14791:20-25, 73:14792:1-19. See, e.g., GC EX. 543, VOL. 1, WILLIAM ALBERTER at CNNA-015422 to CNNA-015427 (interview guide for photojournalist.) Some Interview Guides included time limits for asking questions with respect to each competency, such as, for example, providing seven minutes to ask the questions relating to “technical skills.” (See, e.g., GC EX. 134, TAB C (DENNIS NORMAN) at CNNA-014432 to 014443.) Due to the short time limits for the questions, hiring managers often had time only to ask one of the two questions. (MURPHY 11:2108:19-24.) Other Interview Guides contained instructions advising hiring managers that they need only ask one question per competency, unless clarification was needed. (See, e.g., GC EX. 543, ROBERT PARKER at CNNA-016143.)

In addition to the interview questions, each interview guide contained a page entitled “Post-Interview Instructions.” (See, e.g., GC EX. 543, VOL. 1, ALBERTER TAB at CNNA-015426.) This page set forth the standard for rating candidates as to each of the “competencies” or “dimensions.” The ratings were as follows:

- 5 - **Excel:** The individual demonstrates well-developed expertise, and is considered highly skilled and influential in this competency or skill area; can provide expert advice, and train or develop others in this competency or skill area.
- 4 - **Proficient:** The individual has great knowledge and experience in this competency or skill area; well advanced; more than acceptable in this area.

- 3 - **Competent:** The individual has requisite or adequate ability in this competency or skill area; meets the criteria for successful performance in this competency or skill area.
- 2 - **Gap:** The individual is not fully competent in this area. The individual may have had limited or no opportunity to demonstrate this skill or competency, but there is every reason to believe that she/she will be able to sufficiently develop this skill or competency in a reasonable period of time; with guidance, practice and/or reinforcement.
- 1 - **Void:** The individual is not fully competent in this area, and will not be able to sufficiently develop this skill or competency in a reasonable period of time.

(*Id.*) The hiring managers also had to “assess Motivational Fit Dimensions” and rate the candidate as “Fit” or “Not Fit.” (*Id.*)

The Interview Guide also contained a “Rating Sheet,” which was attached at the end of the guide. (GC EX. 543, VOL. 1, WILLIAM ALBERTER at CNNA-015427) On this sheet, hiring managers would rate each candidate using the above-quoted scale on each of the “dimensions” for the position, as well as determine whether the candidate was “F” for “fit” or “NF” for “not fit.” (*Id.*) The managers would then write the areas of “strengths” and/or “concerns” for each candidate at the bottom of the Rating Sheet. (*Id.*)

#### b. The “Behavioral Interviews”

With the Interview Guides, hiring managers conducted the behavioral interviews of the candidates. However, there is no evidence, that CNN validated the questions in the Interview Guides, *i.e.*, tested the questions on a group of job incumbents (such as the employees working at CNN’s Atlanta, GA Bureau) to ensure that the questions would actually elicit the information sought by the Respondent. There is no evidence that CNN trained the hiring managers in asking the questions that were drafted by the recruiters. There is no evidence that CNN provided benchmark responses, *i.e.*, the types of answers that would be acceptable. The absence of such

evidence led to behavioral interviews marred by, *inter alia*, the hiring managers' subjective views of the candidates; the interview and/or the rating systems; the managers' bias in favor or against certain applicants; and the managers' failure to probe important job-related areas of inquiry. These deficiencies, which are evident from the notes taken by the hiring managers during the behavioral interviews,<sup>24</sup> are discussed *infra*.<sup>25</sup>

**i. Interviews of Senior Photojournalist, Photojournalist and Lighting Specialist/Photojournalist Candidates**

Candidates seeking photojournalist positions were interviewed in person, by phone or both either in late October 2003 or early November 2003. (GC Ex. 543 (dates on Interview Guides). *See also* SPEISER 18:3901:14-25, 18:3902:1-17 (discussing interviews in his office and by phone); FLETCHER 26:5768:1-3 (stating most interviews in Speiser's office).) Often times, more than one hiring manager participated in the interview. (SPEISER 18:3902:25, 18:3093:1-5.)

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<sup>24</sup> Acting pursuant to their limited training (GC Ex. 161), the hiring managers took notes in their Interview Guides during the interview and rated the candidates on the Rating Sheet after the interview. (*See, e.g.*, MURPHY 11:2042:20-25, 11:2043:1-12 (testifying he completed rating sheets after interview); SPEISER 18:3906:13-24 (stating he took notes on interview guides).) The Interview Guides and the Rating Sheets constitute records of events made at or near the time by an individual with knowledge, kept in the course of a regularly conducted business activity, as shown by the testimony of the hiring managers themselves. Accordingly, the Interview Guides and Rating Sheets—along with the notes written or typed therein—fall within the business record exception to the hearsay rule, Fed. R. Evid. 803(6). The “behavioral interviews” took place, the hiring managers completed the Interview Guides and the Rating Sheets in the normal course of business (*i.e.*, hiring new employees), and CNN retained the guides and sheets. *See Thanongsinh v. Board of Educ. Dist. U-46*, 462 F.3d 762, 776-77 & n.12 (7th Cir. 2006) (finding score sheets from interview, along with handwritten notes on sheets, were within business records exception because no dispute that interviews were conducted, sheets were completed and kept, and notes were taken in the normal course of business). The guides and sheets, along with the handwritten or typed notes, also qualify as admissions by party-opponent, because the hiring managers completed the documents in the course of performing their responsibilities. *Thanongsinh*, 462 F.3d at 779 (finding that records were admissions against party opponent, as record shows party's agents prepared documents).

<sup>25</sup> The ALJ decided that he did not have to discuss the “very suspicious aspects” of the behavioral interviews because the evidence showed that CNN did not rely upon the interviews when making its hiring decisions. (ALJD 40:50-51, 41:47.) Local 31 sets forth many of the “very suspicious aspects” to assist the Board in issuing its decision.

While there were five hiring managers designated to interview photojournalist candidates, there was no policy of having candidates interviewed by all five managers. (SPEISER 18:3903:22-24.) The managers' notes reveal the following about the behavioral interviews of the photojournalist, senior photojournalist, and lighting specialist/photojournalist candidates.

**(A) The Absence of any Prepared Questions Concerning Technical Skills:** As noted above, the recruiters did not identify "job knowledge" or "technical skills" as a "competency" or "dimension" of the lighting specialist/photojournalist, photojournalist or senior photojournalist positions. Thus, if the hiring managers followed the Interview Guides, they would not have asked the candidates any specific questions about their technical skills. A candidate could communicate his or her experience and/or technical skills only by incorporating those skills in answering a question such as, "[d]escribe the most successful troubleshooting you have done" and "contrast this with a time when you were unsuccessful." (GC EX. 534, VOL. 1, WILLIAM ALBERTER at CNNA-015424.)<sup>26</sup> This was a haphazard exercise at best, which depended upon impromptu questions or voluntary leaps into areas that might provide insight into technical skills.

**(B) The Hiring Managers' Subjective Views of the Candidates:** While hiring managers were instructed to focus on the BARs (Behaviors, Actions, Results) in the candidate's answers, the managers focused on the candidates. Managers often acted as amateur psychiatrists, assessing the candidate's personality or character. Some assessments were positive, noting the energetic, enthusiastic, or caring nature of the candidate. (See, e.g., GC EX. 543, VOL. 1, JERRY APPLEMAN at CNNA-PROD0037553 (rating sheet of Dan Young describing Appleman as

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<sup>26</sup> There was an issue with respect to the asking behavioral questions during the interviews of candidates applying for lighting specialist/photojournalist *and* photojournalist positions. (GC EX. 543, VOL. 3, GREG ROBERTSON at CNNA-014190.) Matt Speiser sent an e-mail to Loren Kile asking, "[d]o we do two different interviews, asking them essentially the same *peculiar* behavioral questions (that'll seem *pretty creepy* in my opinion)?" (*Id.* (emphasis added).) Both Loren Kile and Michael Poley, the CNN lighting manager, recommended one interview. (*Id.*)

“enthusiastic, energetic...”).) Some were neutral. (GC Ex. 543, VOL. 3, JOHN QUINNETTE at CNNA-023058 (rating sheet of Fletcher and Speiser describing Quinnette as “likeable”).) Some views were a combination of both. (GC Ex. 543, VOL. 4, KEN TUOHEY at CNNA-015718 (rating sheet of Redisch describing Tuohey as having “gung ho attitude” and being “likeable”). And some were downright negative. (GC Ex. 543, VOL. 1, DANNY FARKAS at CNNA-023047 (rating sheet of Fletcher stating “didn’t get the felling [sic] he was creative (tape”).) For example, hiring manager Fletcher thought that TVS employee Chris Hamilton was “boring” and gave him low ratings and a “not fit” assessment. (GC Ex. 259 at CNNA-023510.)

**(C) The Hiring Managers Subjective Views of the Interviews:** Some hiring managers gave evaluations of, not only the candidates, but also the interviews. As with the assessment of the candidates, some evaluations of the interviews were positive. (GC Ex. 543, VOL. 1, DAVID BERMAN at CNNA-016177 (writing “excellent interview” and “very impressed [sic] with interview); GC Ex. 543, VOL. 2, RICK MORSE at CNNA-023054 (writing “good intv”).) Some were negative. *See* GC Ex. 543, VOL. 1, RODNEY ADKINSON at CNNA-023039 (writing, “intv was uneasy” and “I didn’t like intv.”). Hiring managers made these observations even though none of the “competencies” or “dimensions” included “interview skills.”

**(D) The Hiring Managers’ Split Ratings of Candidates:** After the interviews, some hiring managers did not follow the rating system set forth in the Interview Guides. The hiring managers’ training emphasized the importance of the Interview Guide, along with the rating system of 1 (Void), 2 (Gap), 3 (Competent), 4 (Proficient) and 5 (Excel), as well as the importance of taking notes. (GC Ex. 161 at CNNA-PROD0065733.) However, some hiring managers gave candidates two scores for a “competency” or “dimension.” (GC Ex. 543, VOL. 1, JERRY APPLEMAN at CNNA-PROD0037566 (rating sheet of Courtney giving Appleman a “3/4”

for creativity, “2/3” for decision-making, “2/3” for ethics and integrity, a “3/4” for teamwork and a “3/4” for motivational fit, although there is no such score for the latter dimension); GC EX. 543, VOL. 1, DAVID BERMAN at CNNA-016117 (rating sheet of Poley, *id.* at CNNA-016188, giving Berman “4/5” for teamwork) Nothing in the instructions allows for hiring managers to hedge the ratings of candidates between two scores.

**ii. Interviews of Audio Designer, Director/Technical Director, Studio Operator and Technical Director/Director Candidates**

The behavioral interviews for the various positions inside the bureau – audio designer, director/technical director, studio operator, and technical director – took place in late October or early November. (GC EX. 534 (handwritten dates on Interview Guides). *See also* MCINTYRE 72:14574:12-24 (testifying he conducted interviews in early November).) Audio designer and studio operator candidates were interviewed by one hiring manager (either Anne Woodward or Troy McIntyre). (WOODWARD 67:13838:9-23; MCINTYRE 72:14575:14-19.) Candidates applying for director/technical director positions were interviewed by a handful of hiring managers, such as Cindy Patrick, Bob Hesskamp and Mike Maltas (*See, e.g.*, GC EX. 534, VOL. 5, CAROLYN STONE at CNNA-016090, 016104, 019973.) Candidates applying for technical director/director positions were also interviewed by a few managers, including Steve Alperin and Mike Maltas. (*See, e.g.*, GC EX. 534, VOL. 53, CHRISTIAN KELLER at CNNA-014742, 019921.) The managers’ notes reveal the following about the behavioral interviews of these candidates.

**(A) The Hiring Managers’ Subjective Views of the Candidates:** Hiring managers also noted their subjective views of the candidates. Some views were positive. (GC EX. 534, VOL. 2, STANLEY HAILES at CNNA-016733 (writing on Instruction Sheet that Hailes is “energetic”); GC EX. 534, VOL. 4, JOSEPH MOSLEY at CNNA-019956 (writing on rating sheet

“enthusiastic”); GC EX. 534, VOL. 4, CHRISTOPHER PARKS at CNNA-016858 (noting “strength” of “great attitude”); GC EX. 534, VOL. 4, MANUEL SAMANIEGO at CNNA-014419 (noting “strength” of “energetic”).)

Other views were negative. Anne Woodward wrote that “communication skill” was a “concern” on the Rating Sheet for bargaining unit employee John Otth. (GC EX. 534, VOL. 4, JOHN OTTH at CNNA-014381.) Woodward elaborated: “no eye contact,” “seemed nervous,” “articulate though.” (*Id.*) During her interview of Ralph Marcus for a technical director/director position, Cindy Patrick noted a concern of “lack of hunger, energy, drive.” (GC EX. 534, VOL. 3, RALPH MARCUS at CNNA-019943.) Cindy Patrick also noted a concern that TVS employee Tim Durham had “low energy” and “married to current situation” after interviewing Durham for a Director/Technical Director position. (GC EX. 534, VOL. 2, TIM DURHAM at CNNA-014698.) Troy McIntyre also described Durham as “low on enthusiasm” after interviewing him for a Studio Operator position. (GC EX. 534, VOL. 2, TIM DURHAM at CNNA-014696.) Mike Maltas and Steve Alperin noted that bargaining unit employee Jeffrey Noble was “not especially commanding.” (GC EX. 534, VOL. 4, JEFFREY NOBLE at CNNA-019969.)

**(B) The Bias against Protected Activities:** During his interview, bargaining unit employee Keith Crennan mentioned that he had been a shop steward with Local 31 while working at the D.C. Bureau. (MCINTYRE 72:145998:24-25, 72:14599:1-3.) Troy McIntyre asked Crennan the following question from the category of “ethics & integrity”: “[i]t is often easy to blur the line between confidential information and public knowledge. Have you ever been faced with this? What did you do?” (GC EX. 534, VOL. 1, KEITH CRENNAN at CNNA-PROD0037998.) As McIntyre wrote in his Interview Guide, Crennan responded as follows:

Tendency to give people a head’s up so they don’t get blind-sided by management. As a shop steward, management will contact him to find a time &

he will tell the employee so they are prepared for the meeting. On a personal level, will let the person know person is more important than the issue. One thing I don't like is a lot of people talking behind other people's back. Keep things on an even level.

(*Id.*) As McIntyre later explained:

Well, in terms of confidentiality. If a manager told him that, hey, I have to meet with this employee about this issue, if it was a confidential issue, I would expect that he would keep that information confidential until the manager met with the employee.

(MCINTYRE 72:14601:9-13.) Later, counsel for the General Counsel asked the following:

COUNSEL FOR THE GENERAL COUNSEL: Okay, so if Mr. Crennan was told that an employee was going to be disciplined and Mr. Crennan told the employee before management did, you're saying that's a breach of confidentiality that you think he should not have done, correct?

MCINTYRE: Yes.

(MCINTYRE 72:14602:24-25, 72:14603:1-4.) McIntyre did not provide a response; instead, he continued to record notes. (CRENNAN 70:14348:12-17.) After the interview, McIntyre gave Crennan a "2" for "ethics and integrity," meaning that, in McIntyre's view, Crennan had a "gap" in the area. (GC EX. 534, KEITH CRENNAN at CNNA-PROD0038001 to 0038002. *See also* MCINTYRE 72:14603:5-8.) McIntyre further noted that "confidentiality" was a concern on the Rating Sheet for Crennan. (GC EX. 543, KEITH CRENNAN at 0038002.)<sup>27</sup>

**(C) The Hiring Managers use of Symbols for Ratings:** After the interviews, the hiring managers did not follow the rating system set forth in the Interview Guides. After interviewing candidates for audio designer positions, Anne Woodward would give some candidates a "+" rating, such as a "3+" rating she gave bargaining unit employee Michael David for "Teamwork." (GC EX. 534, VOL. 1, MICHAEL DAVID at CNNA-014504.) The instructions do

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<sup>27</sup> McIntyre admitted that he considers an employee's wage rate to be confidential and that CNN asks employees to keep wage rates confidential. (MCINTYRE 72:14599:20-25, 72:14600:1-2.)

not provide for the enhancement of ratings with a “+” (or, for that matter, the downgrading of a rating with a “-”). Woodward also gave TVS employee Darrin White a “4+” for Teamwork, rather than either a “4” or a “5.” (GC EX. 534, VOL. 5, DARRIN WHITE at CNNA-014542.) She also gave non-unit employee Patricia Carroll a “3+” in Technical Skills. (GC EX. 534, VOL. 1, PATRICIA CARROLL at CNNA-016946.)

As she completed her rating sheet after interviewing TVS employee Joseph Mosley for a director/technical director position, Cindy Patrick gave Mosley a “?” for organizational skills and motivational fit. (GC EX. 534, VOL. 4, JOSEPH MOSLEY at CNNA-014489.) The instructions in the Interview Guide do not allow for the use of grammatical marks in lieu of a numerical rating.

### **iii. Interviews of BIT Engineer Candidates**

The hiring managers – Tu Vu, Matthew Holcombe, Rick Cole, and Tom Murphy – conducted the interviews of the candidates applying for BIT Engineer positions over the course of a few days in late October and early November 2003. (HOLCOMBE 11:2137:19-21; GC EX. 134.) The managers divided themselves into two groups: (1) Vu and Holcombe and (2) Cole and Murphy. (MURPHY 11:2041:15-22, 11:2047:17-19; HOLCOMBE 11:21444:13-15.) Candidates were interviewed separately by each group of hiring managers. (VU 10:1944:13-18.) The managers’ notes reveal the following about the interviews of the engineering candidates.

**(A) The Disconnect between the Questions and the Ratings:** The recruiters prepared Interview Guides for BIT Engineer positions, which required hiring managers to ask questions in the five or six areas. For BIT Support Engineer candidates, the areas were: “Analytical Skills,” “Teamwork,” “Organizational Skills,” “Verbal Skills,” “Technical Skills,” and “Motivational Fit.” (GC EX. 134, TAB C, DENNIS NORMAN at CNNA-014434 to 014439.) The Rating Sheet required hiring managers to rate candidates on the following areas: “Client Service,” “Initiative,”

“Interpersonal Skills,” “Teamwork,” “Communication Skills (observed or asked”), and “Motivational Fit.” (GC EX. 134, TAB C, DENNIS NORMAN at CNNA-104441.) Thus, hiring managers did not rate any candidate for any BIT Support Engineer or BIT Field Engineer position on his or her analytical skills or technical skills.

The same disconnect between the questions to be asked and the “dimensions” to be rated existed for candidates seeking positions as BIT Field Engineers. The Interview Guides for BIT Field Engineer positions identified the following areas for questions: “Analytical Skills,” “Teamwork,” “Technical Skills,” “Organizational Skills,” and “Motivational Fit.” (GC EX. 134, TAB D, JEFFREY ADKINSON at CNNA016977 to 016981.) However, the Rating Sheet required hiring managers to rate BIT Field Engineer candidates on “Client Service,” “Initiative,” “Interpersonal Skills,” “Teamwork,” “Organizational Skills,” “Communication Skills (observed or asked)” and “Motivational Fit.” (GC EX. 134, TAB D, JEFFREY ADKINSON at CNNA016983.) Hiring managers did not rate candidates on their analytical skills and technical skills. (*Id.*)

As noted above, the disconnect between the questions and the ratings meant that engineer candidates – who would be responsible for the installation, maintenance and upgrade of complicated broadcasting and other equipment – were not rated at all as to their ability to analyze or troubleshoot malfunctioning equipment and were not rated on their technical skills as part of the interview process. Moreover, hiring managers rated these candidates on matters – such as client service and initiative – that were not based on any of the questions asked during the interviews. The ratings for BIT Engineer candidates were based upon non-technical “dimensions,” such as “communications skills” and “interpersonal skills.”

**(B) The Hiring Managers’ Subjective Views of the Candidates:** As with other interviews, the hiring managers often played the role of psychiatrist, focusing on the candidates’

personalities rather than their experiences. For example, Matthew Holcombe wrote, as a “concern,” that candidate John Cunha was “bit reserved personality wise but not a big concern.” (GC EX. 134, TAB B, JOHN CUNHA at CNNA-016546.) Holcombe also observed, with regard to TVS employee, that he “was relaxed and confident” and “very likeable and easy going.” (GC EX. 134, TAB C, DENNIS NORMAN at CNNA-014453.) Holcombe also wrote, as a “concern,” that TVS employee Bobby Clemons was “quiet & difficult to get full feel from.” (GC EX. 134, TAB E, BOBBY CLEMONS at CNNA-016646.) However, Rick Cole wrote, as a “concern,” that TVS employee Dennis Norman was “perhaps a little of the ‘getting by.’” (GC EX. 134, TAB C, DENNIS NORMAN at CNNA-014443.) Hiring managers also recorded their observations of candidates’ personalities and character during interviews of other candidates. (See GC EX. 134, TAB H, CRAIG FINGAR at CNNA-016603 (describing Fingar as having “a can-do attitude”); GC EX. 134, TAB J, RON FRIBUSH at CNNA-014401 (describing Fribush as “cynical but funny” and “dry wit & likeable”); GC EX. 134, TAB N, NICHOLAS KIRALY at CNNA-PROD0036628 (describing Kiraly as “not a ‘go getter.’”))

Apparently, during the interview of Stephen Pless, who was not a TVS employee, Rick Cole skipped over the question(s) concerning “Verbal Skills” because, in Cole’s view, Pless had “very good verbal skills,” noting with an asterisk that Pless had “good eye contact” and “took notes.” (GC EX. 134, TAB G, STEPHEN PLESS at CNNA-016189.) While Pless may have had good verbal skills for an interview, Cole’s failure to ask the questions in the Interview Guide limited the possibility of the hiring managers to learn whether Pless has “communicated technical information to people without a background” and “what methods did [he] use and how did [he] know they were effective.” (*Id.*) It also prevented hiring managers from learning “[w]hat procedure [does Pless] use to elevate a critical issue” and any examples. (*Id.*) By

contrast, Cole had asked the latter question of other BIT Support Engineer Candidates, including Dennis Norman. Although Cole found that Norman communicated well, Cole asked the question relating to “Verbal Skills” and found that Norman gave a “false BAR”<sup>28</sup> in response to the question of what procedure Norman used to elevate a critical issue. (GC EX. 134, TAB C, DENNIS NORMAN at CNNA-014437, 014441.)

**(C) The Hiring Managers’ Differing Views as to the Definitions of the “Dimensions” and Ratings:** The evidence shows that, not only did the hiring managers have subjective views about the candidates, they also had subjective views about the “dimensions” for the support engineer positions, as well as the ratings to be given to candidates seeking those positions. For example, in Tom Murphy’s view, a candidate deserved the highest rating for the “dimension” of “interpersonal skills” if he or she had “a lot of charisma, maybe a potential leader, as far as someone who just has stronger communications skills....”<sup>29</sup> (MURPHY 11:2061:2-9.) In Matthew Holcombe’s view, when he assessed a candidate’s “interpersonal skills,” Holcombe “would try to determine” if the candidates “talked back and forth during the interview and how they responded to the questions that were in the interview guide.” (HOLCOMBE 11:2166:15-19.) And, in Tu Vu’s view, he assessed a candidate’s “interpersonal skills” based upon “[h]ow you relate to your coworker, how you relate to your client.” (VU 12:2247:1-3.) The hiring managers had differing views as to “organizational skills,” which was another “dimension” of the BIT

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<sup>28</sup> As noted above, a false “BAR,” is a statement “with lots of glitter but no substance”; a response that is “vague, state[s] an opinion or [is] theoretical or future oriented”; or is “false because sometimes [it] seem[s] to give you the behavior you need to make accurate hiring decisions” but does not. (GC EX. 161 at CNNA-PROD0065712.)

<sup>29</sup> When asked how he would differentiate his view of “interpersonal skills” from another dimension of BIT engineers, *viz.*, communication skills, Murphy testified that the two dimensions overlapped, with communications skills being “a broader category.” (MURPHY 11:2066:5-16.)

Support Engineer and BIT Field Engineer positions. (*Compare* MURPHY 11:2063:13-20 (organizational skills) *with* VU 12:2248:17-25, 12:2249:1-5 (organizational skills).)

**(D) The Hiring Managers' Deviation from the Rating System:** Like his colleague, Anne Woodward, who interviewed audio designers, Matthew Holcombe gave a 2½ rating for "communications skills" to TVS employee William Evans, Jr. because of "very slow speaking and no eye contact." (GC EX. 134, TAB O, BILL EVANS at CNNA-017105.) Yet, Holcombe observed the strengths of maintenance and broadcast experience, satellite newsgathering experience, site experience and "wants to learn." (*Id.*)

**(F) The Hiring Managers' Changed Ratings of Candidates:** Finally, when it came time for hiring managers to rate the candidates, some had difficulty in terms of settling on a particular rating. Hiring managers changed ratings on the Rating Sheet, often more than once. (GC EX. 134, TAB C (DENNIS NORMAN) at CNNA-014441 (multiple changes to initiative ratings), at CNNA-014429 (changes to client service ,interpersonal skills and communication skills ratings); GC EX. 134, TAB C (JEFF ADKINSON) at CNNA-16996 (changes to client service and initiative ratings, as well as changes to interpersonal, organizational and communication skills); GC EX. 134, TAB G (STEVE PLESS) at CNNA-016193 (change to initiative rating); GC EX. 134, TAB H (CRAIG FINGAR) at CNNA-016617 (change to client service rating); GC EX. 134, TAB N (NICK KIRALY) at CNNA-PROD00366643 (changes to client service and initiative ratings); GC EX. 134, TAB O (BILL EVANS) at CNNA-017105 (change in initiative rating).)

#### iv. Conclusions as to the Behavioral Interviews

As noted at the outset of this section, CNN adopted the behavioral interview process ostensibly to advance its goal of hiring the most qualified employees for the new positions that were being staffed as part of the Bureau Staffing Project. (PATRICK 61:12886:22-24.) CNN

went through an elaborate process of drafting Interview Guides and Rating Sheets, all with the objective of having hiring managers focus on “job related information,” as well as “behavioral information that could be used to predict future behavior.” (GC Ex. 161 at CNNA-PROD0065704.) In sum, the hiring managers focused on matter such as the candidates’ personalities. When they had to rate the candidates, those ratings were heavily tilted toward behavioral categories (*e.g.*, interpersonal skills), with little emphasis on technical skills and no emphasis on job knowledge. In addition, hiring managers sometimes failed to follow the simple 1 to 5 rating system, providing candidates with a “+” rating, such as a “2+” rather than a hiring rating, or hedging the ratings between two numbers, *e.g.*, “2/3.” The deviation in the rating of candidates negatively affected any attempt to average such ratings, which was an attempt undertaken by CNN shortly after the conclusion of the behavioral interviews.

**c. The Compilation of Ratings from the Behavioral Interviews**

After completing the interviews, the hiring managers were required to return their rating sheets (or at least provide the ratings) to Kelli Clarke, a recruiter. Ms. Clarke prepared a ranking sheet for each job classification in MS Excel. (CLARKE 72:14475:22-23, 72:14480:24-25, 72:14484:21-25, 72:14485:1-2.) Clarke ranked the employees by their average score, *i.e.*, the average of the scores given by the hiring managers on the ranking sheets during the behavioral interviews. (CLARKE 72:14481:1-7.) If there were rankings from only one manager, then that would be the average. (CLARKE 72:14483:23-25.) If there were rankings from two or more managers, then Clarke would average the rankings. (CLARKE 72:14483:25, 72:14484:1-4.)

Clarke provided this MS Word document to Matthew Speiser and to the Chief Financial Officer, Sue Diviney. (CLARKE 72:14485:8-16.) Diviney returned the document to Clarke, in a different setup with different averages. (CLARKE 72:14486:4-8.) Clarke noticed the changes in

the ratings, double checking her averages. (CLARKE 72:14486:14-25.) She determined that she did not make any errors in calculating the averages. (CLARKE 72:14522:17-25, 72:14523:1-4.) Clarke nevertheless inserted the altered numbers provided by Diviney in a spreadsheet, which was provided with the files to the hiring managers for the debriefing session. (CLARKE 72:14488:3-10, 72:14489:1-8, 72:14489:10-12.)

CNN initially contemplated the hiring of 39 photojournalists (REDISCH 25:5545:11-13), although CNN hired a total of 44 photojournalists, senior photojournalists and lighting specialist/photojournalists. (CNNA Ex. 706.) The 44 candidates with the highest averaged ratings from the interviews are set forth in Table 3:

<p style="text-align: center;"><b>TABLE 3</b>  <i>44 Photojournalist Candidates With Highest Averaged Ratings from Behavioral Interviews</i></p>							
No.	Name	Rating	TVS/ Non-TV	No.	Name	Rating	TVS/ Non-TV
01	Brian Yaklyvich	5.0	TVS	23	Carlos Christian	3.8	Non-TV
02	Jerry Thompson	5.0	TVS	24	Charles Anderson	3.8	Non-TV
03	Reginald Selma	4.9	TVS	25	Eddie Gross	3.8	TVS
04	Worth Kinlaw	4.8	TVS	26	Jeremy Moorhead	3.8	Non-TV
05	Anthony Umrani	4.4	TVS	27	Mark Marchione	3.8	TVS
06	Daniel Lopez	4.4	Non-TV	28	Skip Nocciolo	3.7	TVS
07	Greg Robertson	4.4	TVS	29	Geoff Parker	3.7	TVS
08	Peter Morris	4.4	TVS	30	John "Jake" Scheuer	3.7	Non-TV
09	Rick Hall	4.4	Non-TV	31	Luis Munoz	3.7	TVS
10	Ken Tuohey	4.2	TVS	32	Mike Greene	3.7	TVS
11	Barry Schlegel	4.2	TVS	33	Randy Thielben	3.7	Non-TV
12	David Jenkins	4.2	TVS	34	Tim Garraty	3.7	TVS
13	Martin Dougherty	4.1	TVS	35	Brian Chacon	3.6	Non-TV
14	Doug Schantz	4.1	Non-TV	36	James Norris	3.6	TVS
15	Burke Buckhorn	4.0	TVS	37	John Bena	3.6	Non-TV
16	Chris Hamilton	4.0	TVS	38	John Urman	3.6	TVS
17	Jeremy Harlan	4.0	Non-TV	39	Mike Bannigan	3.6	TVS
18	Ken Tillis	4.0	Non-TV	40	Adam Shumaker	3.6	Non-TV
19	Ray Britch	4.0	Non-TV	41	Damien Catanza	3.6	Non-TV
20	Ron Couvillon	4.0	Non-TV	42	Floyd Yarmuth	3.6	Non-TV
21	William Alberter	3.9	TVS	43	Bryan Pearson	3.5	Non-TV
22	Maurice George	3.9	TVS	44	Tim Bintrim	3.5	TVS

Source: GC Ex. 266

As Table 3 illustrates, 26 of the 44 candidates or fifty-nine percent (59%) with the highest averaged ratings from the “behavioral interviews” were former TVS employees.

Although initially planning to hire 17 studio operators (MCINTYRE 72:14560:5-6), CNN hired 19 studio operators. (See, e.g., CNNA Ex. 706.) The 19 studio operator candidates with the highest averaged ratings from the “behavioral interviews” are set forth in Table 4:

<p style="text-align: center;"><b>TABLE 4</b>  <b>19 Studio Operator Candidates With</b>  <b>Highest Averaged Ratings from Behavioral Interviews</b></p>							
No.	Name	Rating	TVS/ Non-TV	No.	Name	Rating	TVS/ Non-TV
01	Brenda Elkins	5.00	TVS	11	Gershon Peaks	3.83	Non-TV
02	John Davis	4.50	TVS	12	David Bachelor	3.67	TVS
03	Leslie Connor	4.33	Non-TV	13	Darrell Jordan	3.67	Non-TV
04	Thomas Murphy	4.33	TVS	14	Doug Kotztoski	3.67	Non-TV
05	Erik Banks	4.17	Non-TV	15	Jeffrey Noble	3.67 <sup>30</sup>	TVS
06	Patricia Carroll	4.00	TVS	16	Kevin Cawley	3.50	Non-TV
07	Kenneth White	4.00	TVS	17	Michael David	3.50	TVS
08	Emmanuel Agomouh	3.83	Non-TV	18	Doug McKinley	3.50	TVS
09	Rex Grigg	3.83	Non-TV	19	Raeshawn Smith <sup>31</sup>	3.50	TVS
10	Emma Kelly	3.83	Non-TV				

Source: CNNA Ex. 633

<sup>30</sup> On CNNA Exhibit 633, the rankings from Noble’s interview for the technical position are listed and it shows an average of “0.” However, Noble interviewed for the studio operator position and, the average of the ratings provided by McIntyre after the interview is 3.67. (GC Ex. 534, VOL. 3, JEFFREY NOBLE at CNNA-015104.) The 3.67 rating is used in Table 4.

<sup>31</sup> Raeshawn Smith was a freelance employee who worked for TVS at the D.C. Bureau. Freelance employees worked on a day-to-day basis at the Bureau. The Board has recognized that, in the entertainment industry, employees are often hired to work on a day-by-day or production-by-production basis. —*DIC Entertainment, L.P.*, 328 NLRB 660 (1999). This employment practice applies also in the broadcasting industry. (PEACH 7:1092:8-14.) In the context of initial unit determinations, the Board will include these employees in the unit when the employees have a continuing interest in employment, which is usually demonstrated by having worked a certain period in the previous six months or year. *DIC Entertainment*, 328 NLRB at 660. As shown by her resume, Smith has worked as a freelance employee for TVS since August 1998. (GC Ex. 534, RAESHAWN SMITH at CNNA-012463. See also GC Ex. 534, RAESHAWN SMITH at CNNA-014030 (stating, in cover letter, “CNN has actually felt more like a full-time job and my second home over the past couple of years because of the hours I have put in”).) This analysis applies to all other per diem or freelance employees who worked for TVS.

Again, as the above chart shows, 10 of the 19 candidates—or 52.63% of the candidates—for studio operator positions are TVS employees.

## 6. *The Debriefing Sessions and Ranking of Candidates*

While many former TVS employees received high ratings from the behavioral interviews, CNN did not use the ratings from the “behavioral interviews” (either individually or averaged) when making its hiring decisions. Instead, the hiring managers reconvened in “debriefing sessions” at the D.C. Bureau, at which time the managers discussed the interviews and “ranked” the candidates based upon their “overall candidacies.”

### a. **The Debriefing of Photojournalist, Senior Photojournalist and Lighting Specialist/Photojournalist Candidates**

The hiring managers and recruiters involved in the hiring process for the photojournalist and senior photojournalist positions attended debriefing sessions on November 5 and 6, 2003. (KILE 73:14805:18-22, 73:14840:12-16.) These hiring managers included Matt Speiser, Dan Young, John Courtney, R.J. Fletcher, as well as Cindy Patrick and Lisa Reeves. (*Id.*) The recruiters included Loren Kile and Rick Denius. (*Id.*) All of the debriefing participants had their interview guides and candidate information, such as résumés. (KILE 73:14806:20-23.) There was also a centralized spreadsheet with the different ratings for the candidates interviewed by the hiring managers. (KILE 73:14809:1-2. *See also* CLARKE 72:14481:1-3, 72:14489:10-14.)

The debriefing session began with a review of the “must-haves” for the photojournalist position, which was a “recap” of what was discussed at the kickoff meetings (*see supra* at Section II.F.3.). (KILE 73:14806:3-8.) The participants then discussed the candidates for the positions. (KILE 73:14811:1-2.) Each candidate was discussed and “essentially rated by the group,” *i.e.*, the hiring managers, as “strong possible,” “possible,” and “not possible.” (*Id.* *See also* KILE 73:14813:4-7.) As the group discussed the candidates, they wrote the candidates’

strengths and weaknesses on large pieces of paper or butcher blocks, along with his or her last employer. (KILE 73:14806:9-16.)

After the group discussed and rated each of the candidates, they proceeded to rank the photojournalist candidates. (KILE 73:14816:6-8.) Each hiring manager made his or her own list ranking the candidates. (KILE 73:14817:7-8.) After each hiring manager made his or her own list, the lists were entered into a spreadsheet and the rankings were averaged and the candidates were listed in ascending order. (GC Ex. 261. See also KILE 73:14819:22-25, 14820:1.)

As CNN hired 41 photojournalists (*i.e.*, 33 photojournalists, 8 senior photojournalists, see CNNA Ex. 706), Table 5 sets forth the highest, averaged rankings of the first 44 candidates, as determined by the hiring managers at the debriefing session.

<p style="text-align: center;"><b>TABLE 5</b> <i>Averaged Rankings of 41 Photojournalist Candidates</i></p>							
No.	Name	Rank	TVS/ Non-TV	No.	Name	Rank	TVS/ Non-TV
01	Rick Hall	3.0	Non-TV	22	Ron Couvillon	23.0	Non-TV
02	Jerry Thompson	5.0	TVS	23	Randy Thielben	23.2	Non-TV
03	Rick Morse	5.4	TVS	24	Bryan Pearson	24.6	Non-TV
04	Anthony Umrani	5.6	TVS	25	Maurice George	25.4	TVS
05	Derek Davis	7.4	Non-TV	26	John Bena	25.8	Non-TV
06	Barry Schlegel	7.6	TVS	27	Jeremy Moorhead	27.0	Non-TV
07	Burke Buckhorn	9.2	TVS	28	Ken Tillis	27.2	Non-TV
08	Daniel Lopez	9.2	Non-TV	29	Ken Tuohey	28.0	TVS
09	Jose Santos	10.4	Non-TV	30	Floyd Yarmuth	28.8	Non-TV
10	Michael Bannigan	13.0	TVS	31	Eddie Gross	29.0	TVS
11	Timothy Garraty	14.4	TVS	32	David Catrett	30.8	TVS
12	Kim Uhl	14.4	TVS	33	Jeremy Harlan	32.2	Non-TV
13	Reginald Selma	14.8	TVS	34	William Alberter	33.0	TVS
14	Jay McMichael	15.2	Non-TV	35	James Riggs	35.4	TVS
15	Doug Schantz	17.4	Non-TV	36	Worth Kinlaw	35.4	TVS
16	Mark Walz	17.6	TVS	37	Elizabeth Zosso	35.8	TVS
17	John Bodnar	19.8	TVS	38	David Scherer	36.2	TVS
18	Brian Yaklyvich	19.8	TVS	39	Ray Britch	36.6	TVS
19	Skip Nocciolo	20.2	TVS	40	Mike Greene	39.0	TVS
20	Peter Morris	20.4	TVS	41	Chris Hamilton	40.4	TVS
21	Martin Dougherty	20.6	TVS				

Source: GC Ex. 250

The foregoing ranking represents the average of the rankings, after hiring managers “went around the room” looking at the butcher blocks of the candidates to make sure the candidates were in the right category. (FLETCHER 26:5800:2-4.) As a result of this walk-around, managers made changes to the categories that resulted in candidates rising or slipping in the rankings. (FLETCHER 26:5800:5-7, 16-25.)

In preparing the averaged rankings, the hiring managers had a “statistical problem.” (SPEISER 18:3943:9-18.) Not every candidate was ranked by all five hiring managers. (See GC EX. 260.) The names of several TVS candidates – Tim Bintrim, James Cook, Daniel Farkas, Chris Hamilton, David Jenkins, Luis Munoz, Jim Norris and John Quinette – were not included in the final averaged rankings of all five managers (*i.e.*, some were ranked in the top 55 by four or fewer managers).<sup>32</sup> Given these candidates did not appear on the rankings of all five managers, then the managers excluded the candidates from the final, averaged rankings. (SPEISER 18:3943:9-18, 18:3944:15-20.) As hiring manager Matthew Speiser testified at the hearing, the candidates were excluded from the averaged final rankings because “they looked better than they should have.” (SPEISER 18:3944:18-19.) Speiser added, because on one or more managers did not include these candidates in their ranking of candidates from 1 to 55, “[i]n actuality somebody didn’t think they were worth even considering.” (SPEISER 18:3944:19-20.) Thus, all of the foregoing TVS candidates were not included in the final, averaged rankings. (GC EX. 250.) However, while Dan Young did not think non-TVS candidate Ron Couvillion was “worth even considering” given he did not include Couvillion in his rankings, Couvillion was included in the final ranking, even though he appeared on only four of the five lists. (*Id.*)

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<sup>32</sup> Other TVS candidates – Charles Anderson, Rodney Atkinson, Martin Jiminez, Larry Langley, Myron Leake, Sarah Pacheco, James Suddeth, and John Urman – were not ranked by any of the hiring managers. (GC EX. 260.) Hence, their names did not appear on the final, averaged ranking of photojournalist and senior photojournalist candidates. (GC EX. 250.)

As Table 5 illustrates, twenty-four (26) of the 41 highest ranked candidates – or 63.41% of the candidates – were TVS employees. In other words, after the rating of the photojournalist and senior photojournalist candidates during the behavioral interview process and after the ranking of the candidates in the debriefing process, a strong majority of the 41 ranked candidates were TVS employees, who had been represented by NABET-CWA.

**ii. The Debriefing Sessions for Audio Designer, Director/Technical Director, Studio Operator and Technical Director/Director Candidates**

The debriefing session for the audio designer, director/technical director, studio operator and technical director/director candidates generally unfolded in a manner similar to the session for the photojournalist candidates. With respect to the debriefing session for audio designer candidates, the record contains little due to the inability of the sole hiring manager, Anne Woodward, to recall any details of the session while testifying on the stand. Woodward recalled there were five people present at the debriefing session or, as she referred to it, the “selection meeting.” (*See, e.g.*, WOODWARD 67:13840:1-5, 67:13841:2-3.) The five people, including Woodward, were Lisa Reeves, Cindy Patrick, Mike Maltas and Anthony Williams. (WOODWARD 67:13841:4-9.) Woodward did not recall much else about the meeting, such as how many candidates were discussed, other than it was the same number she interviewed. (WOODWARD 67:13741:22-25, 67:13742:1-6.) During the meeting, “[t]here was discussion on the candidate.” (WOODWARD 67:13843:10.) Woodward could not remember how the group of managers arrived at a list of audio designer candidates to hire. (WOODWARD 67:13845:10-12.)

The record does not contain a ranking of audio designer candidates or, for that matter, a ranking of director/technical director (or technical director/director) candidates. Nevertheless, on each butcher block there appears a number inside of a circle. (*See, e.g.*, GC 534, VOL. 5, STEVE

TOVAREK at CNNA-015808 (showing © in lower left corner of butcher block).) Some of the butcher blocks for candidates seeking the same position, such as audio designer, have a number with the word "tie," strongly suggesting that the individual candidate was "tied" with another candidate. (See GC 534, VOL. 2, CORY HALL at CNNA-015117 (showing © on left side with "tie"); GC 534, VOL. 3, PETER MOHEN at CNNA-015757 (showing © on left side with "tie").) These facts support the reasonable inference that, while Woodward could not recall a ranking of audio candidates, such a ranking took place, evidenced by the butcher blocks. A similar inference could be drawn with respect to the candidates seeking director/technical director (or technical director/director) positions. (GC 534, VOL. 1, PAUL BROOKER at CNNA-014753 (showing © with word "tie"); GC 534, VOL. 3, CRAIG JACKSON at CNNA-015850 (same).)

However, the managers who met to discuss the studio operator candidates did arrive at a list of candidates. (CNNA EX. 635.) The debriefing session took place over the course of two days. (MCINTYRE 72:14582:13-15.) There were five people who were present at the session: Troy McIntyre, who interviewed the studio operator candidates; Sherry Saye, a recruiter; Tim Traylor, a human resources representative; Mike Maltas, the D.C. Bureau Manager; Lisa Reeves; and Cindy Patrick. (MCINTYRE 72:14582:16-21, 72:14583:15-17, 72:14583:23-24.)

As with other debriefing sessions, the CNN managers went over the candidates, talking about their strengths, weaknesses and other issues. (MCINTYRE 72:14584:6-21.) During the discussion, McIntyre told the other CNN managers that candidate Keith Crennan had received confidential information from a manager and breached the confidence by relating the information to the employee. (MCINTYRE 72:14740:11-17.)

At some point, McIntyre prepared an enumerated list of 29 studio operator candidates. (MCINTYRE 72:14695:14-16; CNNA EX. 635.) Although McIntyre incredibly testified that he

put the numbers next to the names, and hence created an order with respect to the candidates, the order of the names on his list did not have any significance. (MCINTYRE 72:14696:3-5.) He created a list similar to the rankings of the candidates by the highest averaged rating from the "behavioral interviews." (See Table 4 *supra*.) McIntyre's list is reproduced in Table 6 below:

<b>TABLE 6</b> <i>McIntyre's List of Studio Operator Candidates</i>					
No.	Name	TVS/ Non-TV	No.	Name	TVS/Non- TVS
01	Brenda Elkins	TVS	16	Doug McKinley	TVS
02	John Davis	TVS	17	Doug Kozloski	Non-TV
03	Leslie Connor	Non-TV	18	Mike DiSilva	Non-TV
04	Thomas Murphy	TVS	19	Darrell Jordan	Non-TV
05	Erik Banks	Non-TV	20	Kevin Cawley	Non-TV
06	Patricia Carroll	Non-TV	21	Stanley Hailes	Non-TV
07	Rex Griggs	Non-TV	22	Dennis Faulkner	TVS
08	Michael David	TVS	23	Corey Hall	Non-TV
09	David Hugel	TVS	24	Vernon Herald	TVS
10	Kenneth White	TVS	25	Jeff Noble	TVS
11	David Bachelor	TVS	26	Raeshawn Smith	TVS
12	Emma Kelly	Non-TV	27	Wenzell Taylor	Non-TV
13	Gershon Parks [sic]	Non-TV	28	Tawana Smith	TVS
14	Adilson Kiyasu	TVS	29	James Stubbs	TVS
15	Chris Parks	Non-TV			

**Source:** CNNA Ex. 635

Notably, McIntyre did not place Keith Crennan's name on his list. (CNNA Ex. 633.)

### iii. The Debriefing Session for BIT Engineer Candidates

The debriefing session for the BIT support engineer and field engineer candidates proceeded in a manner similar to the sessions for audio designers, studio operators and photojournalists. A bevy of CNN managers met for one day at the D.C. Bureau. (MURPHY 11:2043:23-25.) The CNN managers included the four managers who interviewed the candidates (Cole, Holcombe, Murphy, and Vu), as well as the recruiter (Mackiewicz), the Vice President for Technology Services (Marty Garrison), and a human resources representative (James Hebb). (HOLCOMBE 11:2151:2-4.)

During the debriefing session, the managers discussed the strengths and weaknesses of each candidate. (HOLCOMBE 11:2152:8-12.) Tu Vu, who had worked with the TVS engineers (*see, supra*, Section II.E.3), provided “valuable input” as to each of the candidates. (HOLCOMBE 11:2156:11-13.) This input included “insight into their background and how they worked and how they communicated.” (HOLCOMBE 11:2156:17-19.) One of the hiring managers, Holcombe, explained that Vu was part of the “consensus” reached as to which candidates to hire:

Certainly numbers aren't everything. I mean, you take a lot into account when you hire people. It's not that objective. I mean, just because somebody has a 3.2 and somebody else has a 3.3, it doesn't mean that the 3.3 guy automatically gets hired. There's a lot that influences that decision, certainly background, work experience, you know, how he communicated in the interview, other people's input on the person. I mean there was a lot and certainly what Tu Vu said about how he had worked with the people in the past or how they had performed in the past, it was valuable input and played into that.

(HOLCOMBE 11:2158:18-25, 11:2159:1-4).

After reaching a consensus on the candidates, the CNN managers proceeded to rank the candidates. Again, as Holcombe explained:

We ranked the individuals to make sure we hired the top people, and then there were other people below that. If they didn't accept the position, we would have ... people to fill the slot. You know, the next person would move up, if we agreed that generally that was the right person to move in the position.

(HOLCOMBE 11:2159:19-24.) Thus, the hiring managers compiled a ranking of the candidates for use when making offers.

## 7. *The Process of Making Offers*

Despite the efforts to made to compile final rankings for each of the positions, the Respondent did not extend offers based on those rankings. (PATRICK 73:14881:10-19.) Instead, as Cindy Patrick testified, the order in which candidates would receive offers “just depended on, you know, when someone was ready to be given an offer.” (PATRICK 73:14881:15-16.)

**a. Performing Reference Checks and Employment Verifications**

Initially, a candidate's readiness initially depended upon whether the candidate was a TVS candidate or a non-TV S candidate. Generally, Loren Kile instructed the human resources department, as well as recruiters like Clarke, to check the references of the non-TV S candidates before checking the references of the TV S candidates. (CLARKE 72:14493:12-18. *See also* KILE 73:14824:2-6 (testifying CNN's human resources checked references; CLARKE 72:14493:5-8 (testifying Clarke performed reference checks).) Clarke checked the references of those candidates who Loren Kile, Cindy Patrick and Lisa Reeves wanted to be checked. (CLARKE 72:14511:20-22.) Kile, Patrick and Reeves would give particular names to Clarke from the list, starting with candidates ranked high on the list but not necessarily in numerical order. (CLARKE 72:14513:2-10.) Clarke would determine whether a candidate was a non-TV S candidate or a TV S candidate based upon the person's application. (CLARKE 72:14494:1-4.)

As Clarke checked the references of the non-TV S candidates (CLARKE 72:14494:7-9), she encountered problems with the professional references submitted by non-TV S candidates, with some business having folded or others having incorrect phone numbers. (CLARKE 72:14495:1-5.) When Clarke got a negative professional reference, which was "frequent," Kile told Clarke to check personal references. (CLARKE 72:14496:6-17.) Clarke called the personal references and, in some cases, the personal references called Clarke. (CLARKE 72:14497:22-25, 72:14498:1-5.) The personal references were generally positive. (CLARKE 72:14498:21-23.)<sup>33</sup>

Clarke then checked the professional references of the TV S candidates. (CLARKE 72:14499:3-11.) Clarke did not recall any negative references for TV S candidates. (CLARKE

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<sup>33</sup> Kile's instruction, to check personal references after receiving a negative professional reference, is contrary to Clarke's experience in the human resources field. (CLARKE 72:14497:10-17.)

72:14499:6-8, 72:14505:21-23.) In addition, the checking of the references for TVS candidates took less time, as Clarke simply contacted the TVS office at the D.C. Bureau. (CLARKE 72:14499:12-25, 72:14500:1.)

**b. Providing the "Final Authorization"**

Once the reference checks were completed, final authorization had to be given before an offer was made to a candidate. Before anyone at CNN could extend an offer to a candidate, he or she had to get the authorization of Vice President of Operations Cindy Patrick (PATRICK 73:14911:2-8) and in-house counsel Lisa Reeves.<sup>34</sup> (GC EX. 534, VOL. 2, DENNIS FAULKNER at CNNA-PROD0005375 (e-mail from Cindy Patrick to Bob Hesskamp of 12/08/03 at 6:55 P.M. stating "[n]o one is to make offers until Lisa [Reeves] and I [Cindy Patrick] say go ahead").) Patrick or Reeves often provided this final approval by e-mail. (See, e.g., GC EX. 534, VOL. 1, JAY BERK, at CNNA-PROD0064005 (e-mail from Cindy Patrick to Robert Jackson of 12/05/03 at 1:31 PM directing the extension of an offer to Craig Jackson); GC EX. 534, VOL. 5, DANIEL TAYLOR, at CNNA-PROD0016975 (e-mail from Lisa Reeves to Robert Jackson, Domingo Sarmiento, and Mike Maltas of 11/25/03 at 5:53 P.M. stating "[t]wo additional people [Chip Hirzel and Dan Taylor] who may also now receive offers"). ) Once Patrick and/or Reeves provided the final authorization, then one of the managers would extend an offer to the particular candidate. (See, e.g., GC EX. 534, VOL. 5, TAWANA SMITH at CNNA-0222249 (e-mail from Mike Maltas to Cindy Patrick and others of 12/02/03 at 6:31 A.M. (stating Maltas and Domingo

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<sup>34</sup> In one instance, Patrick sought guidance from Reeves as to when offers could be extended to candidates who worked for TVS (*i.e.*, bargaining unit employees). (GC EX. 534, VOL. 4, PAUL MILLER, at CNNA-PROD0005462 (e-mail from Cindy Patrick to Mike Maltas and Bob Hesskamp of 11/21/03 at 9:12 A.M. stating "[g]etting guidance from Lisa [Reeves] on when we can extend offers to TVS folks...").) Although Ms. Patrick does not mention why she needed to get "guidance" from legal counsel on *when* offers could be extended to "TVS folks," *i.e.*, bargaining unit employees, it seems that Ms. Patrick felt the timing of the offers to bargaining unit employees had some importance.

Sarmiento would extend offers to “Rashon Smith,” “Tajuana Smith,” and “Emma Kelly” in response to earlier e-mail from Cindy Patrick.)

**c. Making the Initial Offers**

When making the offer, the managers would first communicate the offer verbally with the candidate. (*See, e.g.*, BACHELER 69:14195:8-25, 69:14196:1-2 (recounting phone call from CNN managers Domingo Sarmiento and Robert Jackson offering Studio Operator II position).) If the candidate accepted the offer, then CNN extended a written offer. (*See, e.g.*, GC EX. 534, VOL. 1, DAVID BACHELER, at CNNA-PROD0075149 to 0075150.)

In the written offer letter, CNN informed the candidate of the position (*e.g.*, Studio Operator II), the start date (*e.g.*, December 6, 2003) and the compensation in terms of an hourly rate and an approximate salary. (*Id.*) CNN also informed the candidate of the particular job responsibilities that were attendant with the position. Every letter—regardless of position—also contained the following two sentences: (1) “[t]his position may require different types and skills than you currently possess” and (2) “[y]ou will be required to successfully complete training required for this position.” (*Id.* (offer letter for Studio II position). *See also* GC EX. 534, VOL. 1, MICHAEL DESILVA, at CNNA-010594 (written offer letter for Studio Operator I position); GC EX. 534, VOL. 4, PAUL MILLER, at CNNA-010646 (written offer letter for Audio Designer II position); GC EX. 534, VOL. 4, BRAD ROBERTS at CNNA-01671 (written offer letter for Director/Technical Director position); GC EX. 543, VOL. 2, MAURICE GEORGE, at CNNA-PROD0075188 (written offer letter for photojournalist position).)

The offers were not final, however, until the candidate signed the offer letter and mailed it back to CNN. (GC EX. 534, VOL. 5, STEVE TOVAREK, at CNNA-PROD0005512 (e-mail from Lisa Reeves to Cindy Patrick and Sue Diviney of 11/19/03 at 2:29 P.M. (stating candidates “need

to know that they will need to accept the offer by mailing in a signed offer letter and that no acceptances are final until we receive those back....”).) There was one exception, *viz.*, candidates who were currently CNN employees. (*Id.* (stating “with the exception of CNN employees who do not need to sign offer letters).)

**d. Reaching Down the Final Rankings to Find Alternate Candidates**

When a candidate declined the offer, CNN did not simply extend an offer to the next candidate on the ranking list for the position. (KILE 73:14832:8-24.) The hiring managers had to “regroup,” and determine, “given whoever declined and the balance of the group ..., who would be next.” (PATRICK 73:14913:5-11.) Cindy Patrick retained control over which candidate would receive an offer, even to the point of altering the ranking lists. (*See* GC EX. 534, VOL. 3, CHRISTIAN KELLER, at CNNA-019107 (e-mail from Cindy Patrick to Sue Diviney, James Carter, and Lisa Reeves of 11/24/03 at 3:41 P.M. instructing Diviney to make Craig Jackson appear as the next listed candidate).) On November 21, 2003, Bob Hesskamp sent an e-mail asking who was the next candidate on the list to receive an offer. (GC EX. 534, VOL. 3, BARBARA MCCLOSKEY, at CNNA-PROD0005464.) In the subsequent string of e-mails, Cindy Patrick responded that the next candidate was “Barb,” *i.e.*, Barb Cranmer,<sup>35</sup> a bargaining unit employee, to which Hesskamp responded, “AAHHH.” (*Id.*) Patrick replied by stating, “Barb, then a guy from Comcast Sports Net Christain [sic] Keller. We could argue to opt for *him*. Any word from Rich?” (*Id.* (emphasis added).) On November 24, 2003, Patrick instructed that Christian Keller and Barbara Cranmer be switched on the list of technical director candidates, observing that Keller had accepted a job offer and “Barb and Jimmy Suissa are unlikely to get offers.” (*Id.*)

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<sup>35</sup> Barbara Cranmer remarried and name changed to Barbara McCloskey. (GC EX. 534, VOL. 3, BARBARA MCCLOSKEY, at CNNA-019130.)

While Patrick readily suggested skipping over certain bargaining unit employees to extend offers to non-bargaining unit employees, she was unreceptive to the converse situation. (See GC 534, VOL. 3, PETER MOHEN at CNNA-PROD0064005.) On December 5, 2003, the last day of the TVS subcontract, Robert Jackson asked Cindy Patrick if consideration could be given to Peter Mohen, a bargaining unit employee, for an audio position, observing "I think he out scores the two I spoke to yesterday..." (*Id.* (e-mail from Robert Jackson to Cindy Patrick of 12/05/03 at 12:36 P.M.)) Ten minutes later, Patrick responded by e-mail in pertinent part:

Once we get the headcount approved, we are going to make an offer to Craig Jackson [a non-bargaining unit employee] who was next on our list as a result of our selection process. Since you were not a participant in the selection process, you are not in a position to compare fairly the broad group as a whole.

(*Id.* (e-mail from Cindy Patrick to Robert Jackson of 12/05/03 at 12:47 P.M.)) Thereafter, Cindy Patrick instructed Robert Jackson to extend an offer to Craig Jackson. (*Id.* (e-mail from Cindy Patrick to Robert Jackson of 12/05/03 at 1:31 P.M.))

Cindy Patrick also deviated from the rankings to extend offers to "growth candidates" over "non-growth candidates." The term "growth candidate" meant a candidate "who had perhaps less experience but showed great potential for growth." (SPEISER 18:3940:20-25.)<sup>36</sup> Or, as Patrick phrased it, someone with "tremendous potential," "who is very sharp on technology" or had "just great promise." (PATRICK 61:12894:9-17.) When asked to identify "growth candidates" who sought photojournalist positions at the D.C. Bureau, Patrick identified Khalil Abdallah, Bethany Chamberland, Doug Schantz and Floyd Yarmouth, all of whom were non-bargaining unit employees. (PATRICK 61:12898:3-11.) When asked to identify any "growth

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<sup>36</sup> Apparently, a "non-growth candidate" was a candidate who had more experience and, in the view of CNN, had realized much of his or her potential. As the record also shows, a "non-growth candidate" was a bargaining unit candidate and a "growth" candidate was never a bargaining unit employee.

candidates” who were bargaining unit employees, Ms. Patrick identified Tawana Smith and Raeshawn Smith. (PATRICK 73:14968:17-25, 14969:1-3.) However, throughout the entire proceedings, CNN has taken the position that Tawana Smith and Raeshawn Smith were not TVS employees. (See, e.g., CNNA EX. 706 (identifying both Tawana Smith and Raeshawn Smith as something other than TVS employees).) Thus, no bargaining unit employee was considered a “growth candidate.”

The absence of any “growth candidates” who were bargaining unit employees had a significant impact on the extension of offers. After the rankings of the photojournalist candidates, and while offers were being made, there was an issue of whether the pool of candidates receiving offers contained a sufficient number of “growth candidates.” (SPEISER 18:3942:1-7.) The issue arose with respect to how CNN intended to deal “with how we were going to move forward beyond the 39 who we were originally offered or offering the jobs to.” (SPEISER 18:3942:19-22.) During the hearing, Matt Speiser placed the issue in the context of “[w]ere there any adjustments that could be made dealing with increasing the number of growth candidates that would increase the number beyond 39.” (SPEISER 18:3942:23-25.)

The record shows how the resort to “growth candidates” was used with respect to the initial 39 employees, suggesting another reason for the resort to “growth candidates.” On or about December 1, 2003, CNN extended an offer of a photojournalist position to Ron Couvillion, a non-unit candidate (GC EX. 543, VOL. 2, THOMAS GREENE at CNNA-PROD0005422), who was one of the top 39 candidates (SPEISER 18:4026:10-11) and who had approximately 15 years of experience as a field technician, including eleven years as a technician with Potomac. (CNNA EX. 693, TAB 8 at CNNA-012365.) As a seasoned field technician, Couvillion was a “non-growth candidate” and, thus, Matt Speiser observed that the next “non-growth candidate” on the

list was Thomas Mike Greene, a TVS employee. (GC EX. 543, VOL. 2, THOMAS GREENE at CNNA-PROD0005422 (e-mail from Matt Speiser to Cindy Patrick, Lisa Reeves and Sue Diviney of 12/01/03 at 12:48 P.M.)) Cindy Patrick responded by stating, “[w]e have not even begun to correct our growth candidate issue so the next offer should go to Khalil Abdallah.” (GC EX. 543, VOL. 2, THOMAS GREENE at CNNA-PROD0005421 (e-mail from Lisa Reeves to Matt Speiser and others of 12/01/03 at 2:15 P.M.))

Apparently perplexed by Patrick’s direction to replace a non-growth candidate with a growth candidate, Speiser responded by e-mail:

As for replacing Ron, Sue and I thought that we had all agreed that when growth candidates fell off the list (such as Randy Thieben) we would replace them with growth candidates, but non-growth candidates would be replaced by non-growth candidates. Is your recollection different? I’ll obviously go with whatever you want, but our understanding was different.

(GC EX. 543, VOL. 2, THOMAS GREENE at CNNA-PROD0005421 (e-mail from Matt Speiser to Cindy Patrick and Sue Diviney of 12/01/03 at 2:57 P.M.)) Cindy Patrick replied:

I thought our understanding [sic] was we needed to correct the lack of growth candidates on the list and once we had a reasonable balance we would start looking at equitable losses. So far we have only added Ron Help to the list to replace a growth candidate so we didn’t gain any ground on a better balance.

(GC 543, VOL. 2, THOMAS GREENE at CNNA-PROD0005421 (e-mail from Sue Patrick to Matt Speiser and Sue Diviney of 12/01/03 at 5:20 P.M.))

In attempting to obtain a “reasonable balance,” Patrick was also aware of the implications of hiring a workforce that contained a majority of the predecessor’s employees. (PATRICK 61:12889:23-25, 61:12890:1-3.) While Cindy Patrick did not communicate this “reasonable balance” rule to the hiring managers, the employer of each candidate was affixed to that candidate throughout the hiring process under the Bureau Staffing Project. CNN utilized spreadsheets to keep track of who applied, who had been screened, who had been interviewed,

and who had been recommended. (SPEISER 18:3884:22-25, 18:3885:1-2.) Those spreadsheets also included the candidate's current employer. (SPEISER 18:3884:3-5.) When CNN began extending offers, the Respondent used another spreadsheet that tracked whether background checks had been done, which candidate received an offer, the salary offered and even the candidate's current employer. (SPEISER 18:3885:17-25, 18:3886:1-8.) Thus, at every stage of the hiring process, Cindy Patrick was positioned to track carefully the number of candidates who had been employees of the predecessor, TVS, as those candidates wound their way through that process and, when it came time to give the final authorization, Patrick was able to take the candidate's current employer into account.

#### **8. The Wrap-Up of Affairs with TVS**

While CNN was extending offers to candidates, the Respondent was also finalizing the discharge of the bargaining unit employees. CNN met with TVS to negotiate the terms under which the ENG Agreements at the Washington, D.C. and New York, N.Y. bureaus—and the TVS employees at both locations—would be terminated. On or about December 4, 2003, the two Respondents entered into an agreement (“Cancellation Agreement”) specifying the terms under which the ENG Agreement would be cancelled. (GC Ex. 70-B.)

In the Cancellation Agreement, CNN stated that it exercised its option to terminate the ENG Agreement covering the D.C. Bureau effective December 29, 2003 and to terminate the ENG Agreement covering the N.Y. Bureau effective February 26, 2004. (GC Ex. 70-B at 1.) However, CNN would not require TVS to provide ENG services at the D.C. Bureau after December 5, 2003 and at the N.Y. bureau after January 16, 2004 (*i.e.*, the “Cessation Dates”). (*Id.*) For its part, TVS agreed that “it shall arrange for the termination of its workforces” at the two bureaus on the Cessation Dates. (*Id.*)

The provisions of the Cancellation Agreement disguised one important aspect relating to the termination of the bargaining unit employees. As discussed *supra* in Section II.B.2.b., the collective bargaining agreement required TVS to pay severance pay to employees who were laid off as a result of the termination of the ENG Agreement and who were not rehired by a subsequent subcontractor. TVS “had no resources to meet that obligation” unless CNN provided the funding. (D’ANNA 16:3557:1-21.) Indeed, TVS communicated to NABET Local 31 that TVS could not commit to any amount of severance pay until TVS had made financial arrangements with CNN. (D’ANNA 16:3557:25, 16:3558:1-9.) While CNN expressly stated in the Cancellation Agreement that it had no obligation to pay severance pay to the bargaining unit employees, CNN nevertheless provided the monies for the employees’ severance pay through its financial arrangement with TVS in that agreement. (GC Ex. 70-B at 2.)

**I. Part Nine: The Aftermath of the Bureau Staffing Project**

By December 5, 2003, CNN had fully realized Cindy Patrick’s “new strategy” (the Bureau Staffing Project) at the Washington, D.C. Bureau. By the end of that day, CNN had terminated its ENG Agreement with TVS (GC Ex. 70B at 1), procured the termination of the TVS employees who had been working at the D.C. Bureau (*id.*), and hired a new workforce of employees to perform the work previously performed by TVS employees at the Bureau.

***1. The Substantial and Representative Complement of Employees at the Washington, D.C. Bureau***

While the ENG Agreement and all of the TVS employees may have been terminated, CNN continued to operate the D.C. Bureau without interruption in the days, weeks and months after December 5, 2003. Indeed, as of December 6, 2003, CNN had substantially filled all of the job titles or positions required for the operation of the D.C. Bureau. (GC Ex. 582; CNNA Ex. 544.) CNN hired approximately eighty-three (83) employees in the positions including

photojournalists, senior photojournalists, lighting specialists/photojournalists, audio designers, studio operators, technical directors /directors, support engineers and field engineers. (*Id.*) All of the 80 employees working in these positions performed work previously performed by TVS employees. In addition, based upon CNN's payroll records (GC Ex. 582 and CNNA Ex. 544), forty-five (47) of the 83 employees – or 56.62% – were TVS employees. (*Id.*)

**2. *CNN's Refusal to Recognize NABET-CWA as the Representative of the Employees at the Washington, D.C. Bureau***

On December 8, 2003, NABET-CWA sent a request for recognition by CNN as a successor or joint employer of the employees who previously worked for TVS. (GC Ex. 25.) The Union based its request for recognition on the fact that a majority of the NABET-CWA represented employees had accepted offers of employment with CNN to perform bargaining unit work. (*Id.*) Three days later, on December 11, 2003, CNN denied NABET-CWA's request for recognition. (GC Ex. 26.) Despite having hired a majority of former bargaining unit employees as early as December 6, 2003, CNN disputed the NABET-CWA's claim that a majority of its employees in any appropriate bargaining unit were previously represented by the union. (*Id.*) CNN also denied that its employees were performing the same or similar work as the former bargaining unit employees. (*Id.*)

**3. *CNN's Newly Hired Employees Continued to Perform the Same or Substantially the Same Work as the Former TVS Employees, Using the Same Equipment and under Similar, if not the Same, Supervision***

The record belies CNN's denial that the newly hired employees were performing the same or similar work. Indeed, each of the former TVS/current CNN employees who testified at the hearing – David Bachelor, Bobby Clemons, John Davis, Tim Garraty, Ronald Kuczynski, Paul Miller, Peter Mohen, Rick Morse, Robert Parker, Gregory Robertson, William Tipper and Elizabeth Zosso – emphatically stated that the work they performed in the days, weeks and

months after being hired by CNN was exactly the same as the work they had performed while employed by TVS. (See e.g., BACHELER 69:14204:7-22 (stating nothing had changed with respect to studio or control room); KUCZYNSKI 14:2849:19-22 (stating, once on CNN payroll, “I did basically the same job, the same shift, the same everything, really”); MORSE 28:6247:6-11 (testifying job did not change from summer of 2003 until he left CNN’s employment).)

**a. Photojournalists, Senior Photojournalists and Lighting Specialists/Photojournalists**

After obtaining their assignments, the photojournalists grabbed the same keys, went to the same lockers, got the same equipment out, and loaded that equipment into the same van. (ZOSSO 27:6036:20-23; MORSE 28:6244:22-25, 28:6245:1-11. See also PARKER 32:7115:1-10 (testifying that, working at White House on Saturday, December 6, he used the same equipment he used with TVS).) TVS field employees, who had turned in their credentials, which were used to get into buildings like the White House, on Friday, December 5, 2003, were re-issued the identical credentials on Saturday, December 6. (ZOSSO 27:6033:14-25, 27:6034:1-2; MORSE 28:6244:6-21; PARKER 32:7113:4-12, 32:7113:24-25, 32:7114:1-9.) Thereafter, the photojournalists continued to handle the same types of assignments, such as operating the microwave truck. (ZOSSO 27:6040:12-22; BODNAR 66:13549:3-24.)

Further reinforcing the continuity in the TVS and CNN work, the former TVS/current CNN employees were the individuals who trained the non-unit employees on various aspects of their new positions. For example, a former TVS/current CNN employee, Rick Morse, conducted an orientation in which he took new CNN employees to show them the CNN locations at the White House, Capitol Hill and the State Department. (ZOSSO 27:6050:8-12. See also PARKER 34:7127:2-15 (explaining training of new employees on how to get around, where drop were, etc.).) Morse also showed the new hires what a live drop looked like, which was important given

the number of live shots handled by the employees. (ZOSSO 27:6050:12-16.) Former TVS/then-current CNN employee, Elizabeth Zosso, had to train new hire, John Bena, “what a mixer was and you know, how to use it.” (ZOSSO 27:6050:18-20.) A mixer, as Zosso explained at the hearing, “is a very basic piece of equipment for Washington news coverage” that takes audio from microphones and allows the technician/photojournalist to control the level of the audio and send it to the live drop or microwave truck. (ZOSSO 27:6050:22-25, 27:6051:1-2.) Zosso also had to explain what an IFB box was, which is a “very basic tool that we all use, television crews use for doing live shots,” that allows the crew to interface with the reporter through earpieces. (ZOSSO 27:6052:23-25, 27:6053:1-4. *See also* PARKER 32:7125:21-25, 32:7126:1-24 (describing training provided to new hires on how to operate equipment to ensure quality video and audio).)

**b. Audio Designers, Directors/Technical Directors, Studio Operators and Technical Directors/ Directors**

Like their counterparts in the field, the new CNN employees who worked at the D.C. Bureau continued to perform just like the bargaining unit employees. (BACHELER 69:14203:25, 69:14204:1-6.) For example, as an Audio Designer II, Paul Miller testified that he basically performed the same work that he performed while employed by TVS. (MILLER 71:14378:24-25, 71:14379:1-4, 71:14380:7-12, 71:14380:21-25, 71:14381:1-3.) Another Audio Designer II, Peter Mohen, testified that there was no new equipment in the D.C. Bureau during the first two weeks of his work as a CNN employee. (MOHEN 68:13967:6-21.) The first new piece of equipment that Mohen could recall was an Enco music server, which was brought in several weeks after he became a CNN employee. (*Id.*) An Enco music software is, as described by Mohen, “a playback device that allows you to access a library of tens of thousands of songs and it’s networked to the three cities that we operate in.” (MOHEN 68:13967:23-25.) In addition, while the Enco music server was a new piece of equipment, Mohen recalls that CNN provided training

for him and two other Audio Designer IIs, Paul Miller and John Otth, through an Enco representative around the time that the music server was installed in the Bureau. (MOHEN 68:13968:8-23, 68:13969:17-19.) However, the addition of new equipment, even new technologies, was not unprecedented at the D.C. Bureau. Mohen recalled that a Digicart, which is a digital playback cart machine, was installed to replace an old analog cart machine during his employment with TVS. (MOHEN 68:13975:9-14.)

The situation was the same for studio operators. For example, as a Studio Operator II, David Bacheler reported to the D.C. Bureau, handled the video in quality control, and then head to George Washington University to work on *Crossfire*, setting up the cameras and preparing for the show, just as he did while working for TVS. (*Id.*) In performing this work, Bacheler continued to work on the same equipment. (BACHELER 69:14204:14-15.) Likewise, another Studio Operator II, John Davis testified that there was no change in his work or in the equipment during the first two weeks, *i.e.*, the time period from approximately December 8, 2003 to December 22, 2003. (DAVIS 66:13695:24-25, 66:13696:1-10.) Davis performed the same tasks, using the same equipment, that he performed while employed by TVS. (*Id.*)

**c. BIT Support Engineers and BIT Field Engineers**

In the days and weeks after being hired by CNN, the BIT support engineers and BIT field engineers continued to perform the same work as the engineers previously employed by TVS. (KUCZYNSKI 14:2849:19-22.) BIT support engineers continued to maintain and repair broadcast equipment at the D.C. Bureau or any remote location, including tape decks, lighting equipment, camera gear and the field camera gear, all of which was work previously performed by TVS maintenance engineers. (CLEMONS 13:2629:21-25, 13:2630:1-10; KUCZYNSKI 14:2866:4-12.)

While CNN purportedly merged the engineering and IT functions through the creation of the BIT department, there remained a clear demarcation between the two groups. CNN moved the IT department into the engineering department; however, the engineers remained in a carpeted area of the office and the IT people were in another, tiled area. (KUCZYNSKI 14:2870:2-14.) The distinct separation led the engineers to refer to themselves as the “carpet people” and the IT people to refer to themselves as “tile people.” (KUCZYNSKI 14:2871:6-17.)

Moreover, like the new employees working in the field or in the control rooms, the new employees working as BIT support engineers had to be trained with respect to the facilities at the D.C. Bureau. (KUCZYNSKI 14:2880:10-19.) The former TVS/current CNN employees had to explain to the newly hired CNN employees what needed to be done, how to do it and why. (CLEMONS 13:2745:14-23.) And, shortly after CNN hired its BIT engineers, two of them left. One BIT support engineer, Craig Fingar, could not cope with the pace of the work, and, ultimately, moved to another part of the shop to make drawings. (CLEMONS 13:2743:1-22.) One BIT field engineer, Ron Fribush, could not cope with the work and quit shortly after beginning his employment with CNN. (CLEMONS 13:2762:3-7.)

**d. Transportation Facility Specialists**

Finally, like all of the other former TVS employees who were hired by CNN, the transportation facility specialists continued to perform the same work they performed as couriers for TVS. (TIPPER 33:7344:1-12, 33:7346:9-19.) The transportation facility specialists continued to perform the identical assignments, viz., transport people and tapes, given by the same CNN people, i.e., the CNN assignment desk, using the same vehicles. (*Id.*)

4. *CNN's Unilateral Changes to the Terms and Conditions of Employment for Employees Working at the Washington, D.C. Bureau*

While the work did not change in the days, weeks and months after the transition from TVS to CNN, the terms and conditions of employment drastically changed. As discussed above, the labor costs under the ENG Agreement routinely exceeded the budgeted and forecasted amounts and, the primary reason for those costs was the excessive amount of overtime. Under the collective bargaining agreement, TVS employees received overtime for hours worked beyond their regular eight or ten hour day *and* for hours worked in excess of forty hours per week. (GC EX. 9 at 4-5.) CNN immediately changed this arrangement, limiting overtime for new employees to only those hours worked in excess of forty hours per week. (MORSE 28:6250:10-14.)

CNN also eliminated other forms of compensation that former TVS employees previously received pursuant to the collective bargaining agreement, such as meal penalties, paid lunch hours and holiday pay. (KUCZYNSKI 14:2857:10-25, 14:2858:1-3 (testifying that he had paid lunch under TVS, no paid lunch under CNN); JENKINS 21:4632:18-19 (testifying that he did not receive meal penalties while employed with TVS); ROBERTSON 31:6803:1-2 (testifying under collective bargaining agreement, employees were paid through meal period); MORSE 28:6249:23-25 (testifying CNN eliminated contractual penalties and holiday pay). *See also* FASMAN 31:6883:14-18 (stipulating that meal penalties were eliminated by CNN).) The collective bargaining agreement also provided that employees were paid double time if they worked seven (7) consecutive days. (ROBERTSON 31:6886:14-19.) CNN also eliminated double time so that, if employees worked 7 consecutive days, the most they could earn is time and one half. (ROBERTSON 31:6886:24-25, 31:6887:1-5.)

Not only did the former TVS employees lose substantial income through lower salaries, reduced overtime, and eliminated penalties, but they also lost *all* of their seniority. While many

of the former TVS employees worked years and, in some cases, decades at the D.C. Bureau, CNN did not recognize that former work experience in terms of determining seniority for the benefits provided by the Respondent. (MORSE 28:6250:21-25.) This was contrary to the treatment of seniority in the collective bargaining agreement, which recognized service for predecessor contractors performing technical work at the D.C. Bureau. (GC Ex. 9 at 15.)

In addition to the elimination of TVS employees' accrued seniority, CNN changed their leave benefits, replacing the sick leave, personal leave and vacation benefits with twenty-eight (28) days of use-it-or-lose-it paid leave. (JENKINS 21:4630:23-25, 21:4631:1-3, 21:4631:20-25, 21:4632:1-6.) Under the collective bargaining agreement, employees could carry over annual leave and sick leave. (JENKINS 21:4632:8-11.) Under CNN, employees had to use their leave within the same year, none of the leave carried over to the next year. (JENKINS 21:4632:3-4.)

### **III. STANDARD OF REVIEW**

#### **A. The Standard Governing the ALJ's Findings of Fact and Conclusions of Law**

The Board reviews an Administrative Law Judge's decision using a *de novo* standard of review. *Standard Drywall Prods.*, 91 NLRB 544, 545 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). In applying this standard, the Board considers the ALJ's rulings, finding and conclusions in light of the entire record. *Standard Drywall Prods., Inc.*, 91 NLRB at 545. The Respondent has filed over 1,600 exceptions, which appear to cover every ruling, finding and conclusion of the ALJ, as well as every piece of evidence in the record of this case.

#### **B. The Standard Governing the ALJ's Credibility Determinations**

Amidst this barrage of exceptions, CNN targets the Administrative Law Judge Amchan's credibility determination, arguing that the Board should use a *de novo* standard of review for those findings. The Board has set a high standard for reviewing an ALJ's credibility

determinations: viz., “we do not overrule a Trial Examiner’s resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner’s resolution was incorrect.” *Standard Drywall Prods., Inc.*, 91 NLRB at 545.

CNN first argues that this high standard does not apply because ALJ Amchan did not make credibility determinations based upon the demeanor of the witnesses. The Respondent claims that the ALJ “refers to a specific witness’ demeanor once in his 150 page decision and in doing so states he is generally ‘not a believer’ that one can assess a witness’ truthfulness from their demeanor. (CNN Br. at 51 (quoting ALJD 99:5-9).) The lack of a specific discussion of demeanor and the ALJ’s alleged “admission,” in CNN’s view, means that the ALJ’s credibility determinations were not based on demeanor. (*Id.* See also CNN Brief at 51, n.46 (taking issue with ALJ’s initial statement that “[o]n the entire record, including my observation of the witnesses,” because an alleged “lack of demeanor based discussion in the record”).

The Respondent’s view that credibility determinations can be based *only* on an ALJ’s assessment of a witness’ demeanor while testifying on the stand is clearly in error. Credibility determinations are based, not simply on the demeanor of a witness. As one court recognized:

we are not unmindful that definitions of credibility do not necessarily confine that concept to the narrow peg of truthfulness. It has been termed as “the quality or power of inspiring belief.” Webster’s Third New International Dictionary (1966). “Credibility involves evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be “credible” in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it relates as to make it ease to believe it.

*Indiana Metal Prods. v. NLRB*, 442 F.2d 46, 51-52 (7th Cir. 1971). The court added, “[d]ifferentiating between credibility based upon demeanor and credibility based upon analysis

of the evidence could well be a semantical exercise in conceptualism of gossamer calibre.”  
*Indiana Metal Prods.*, 442 F.2d at 52.

CNN seeks to engage in this semantical exercise of conceptualism, arguing that the Board should reject the ALJ’s credibility determinations as incredible because the ALJ did not base those determinations on demeanor. (CNN Br. 50-51.) Yet, as the ALJ’s decision illustrates, ALJ Amchan based his determinations on his evaluation of the testimony of the witnesses in light of the evidence in the record, including the testimony of other witnesses. (*See, e.g.*, 139-45.) For example, with respect to CNN’s witnesses, the ALJ determined that, regardless of the witnesses’ performance on the stand, their testimony was so unreasonable and improbable as to lack any credibility. Indeed, CNN witnesses generally testified that a prominent news network terminated scores of experienced employees, who possessed substantial knowledge of the network’s equipment and facilities gained over years and decades of on-the-job experience, only to rehire certain employees and, additionally, hire a significant number of inexperienced employees in order to take advantage of even newer, supposedly more complicated technologies. Regardless of how truthful CNN’s witnesses may have appeared on the stand, their testimony “was of the very sort warranting a trier of facts in believing the opposite of what was asserted.” *Sam’s Club*, 322 NLRB 8, 14 (1996) (quoting *NLRB v. United Mineral & Chem. Corp.*, 391 F.2d 829, 833 (2d Cir. 1968)). In other words, the ALJ properly found that CNN’s witnesses lacked credibility because their testimony itself so unnatural, unreasonable and improbable in light of the underlying facts as to be unworthy of any credibility. Under the circumstances, even assuming that the ALJ did not base his credibility determinations upon demeanor, the Board should still affirm those determinations because all of the relevant evidence, which was relied upon by the ALJ (as discussed in greater detail *infra*), clearly proves that the ALJ is correct. *See S.S. Krege*

Co., 199 NLRB 303, n.1 (1972) (finding, even though ALJ did not base credibility determinations on demeanor, Board affirmed determinations because testimony of General Counsel's witness was consistent and; "in fact, more consonant with the inherent probabilities existing in the case that the testimony of the Respondent's principal witness....")

CNN also complains that ALJ Amchan uniformly credits the General Counsel's witnesses and resolves all factual conflicts in favor of the General Counsel. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). In *Pittsburgh Steamship Co.*, 337 NLRB at 658-59, the Supreme Court rejected an appellate court's refusal to enforce the Board's order because the trial examiner repudiated all of the respondent's witnesses and credited all of the General Counsel's witnesses. Writing for the Court, Justice Rutledge stated:

We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigate. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of facts in dispute is accepted by the trial of fact. Where the number of facts in dispute increases, the arithmetical chance which controls our present inquiry, for the facts disputed in litigation are not random unknowns in isolated equations – they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, the total rejection of an opposed view cannot in and of itself impugn the integrity or competence of a trier of fact.

*Id.* at 659. Justice Rutledge also quoted from a decision of United States Court of Appeals for the Fifth Circuit that rejected an argument similar to the one presented by CNN in this case:

The fact alone ... of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for finding by us that such a bias or partiality existed and therefore the hearings were unfair. Unless the credited evidence ... carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence ... carries its own irrefutable truth, that is, is of such nature that it cannot be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias.

*Id.* at 659-60 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (5th Cir. 1947)).

As the excepting party, CNN bears the burden of revealing the “death wound” in the credited evidence, as well as the “irrefutable truth” in the discredited evidence. *Pittsburgh Steamship Co.*, 337 U.S. at 660. CNN fails to satisfy that burden. For example, CNN also complains that the ALJ “rejects” allegedly “uncontradicted evidence,” such as the testimony from Hugo Gaggioni regarding technology changes in the broadcast industry. (CNN Br. at 53, n & n.48.) However, the ALJ did provide an explanation, *viz.*, “[o]ne of the striking things about this case is how little specific evidence Respondent presented on issues that really matter, such as why various individuals were hired in the Bureau Staffing Project and why other individuals were not hired.” (ALJD 140:8-10.) A large aspect of this case involved discriminatory successorship issues, which focus on CNN’s hiring practices and the composition of the substantial and representative complement at the time in which the bargaining obligation attaches. Yet, CNN presented reams of evidence that had very little to do with these issues, such as evidence regarding technological changes (including the testimony of Mr. Gaggioni) that occurred *years* after the date in which the bargaining obligation arose.

In sum, ALJ Amchan observed the witnesses as they took to the stand and listened as they testified about the facts of this case. Based upon his observations, the ALJ found that many of CNN’s witnesses were not forthcoming – *i.e.*, they were evasive – about the matters that should have been reasonably within their personal knowledge. (ALJD 142:8-10.) The ALJ added that the witnesses were not credible because “when testifying they appeared to be more interested in supporting a litigation theory than testifying candidly.” (ALJD 142:12-13, 143:1.) The ALJ provided examples of the evasiveness of CNN’s witnesses on the stand (ALJD 139-145), tying those examples to the issues in the case. The character of the testimony provided by

CNN's witnesses supports the ALJ's credibility determinations, as well as his conclusion that those witnesses were more interested in supporting CNN's litigation theories than testifying candidly. See *Southwest Janitorial & Maint. Corp.*, 209 NLRB 402 (1974) (stating "[t]he character of [the Respondent's Vice President's] testimony clearly warrants the inference, which we draw, that Respondent was attempting to conceal the true reason for the six discharges, that is their support of the Union"), *enforced, without op.*, 495 F.2d 1376 (7th Cir. 1974).

Accordingly, for the foregoing reasons, Local 31 respectfully requests that the Board conclude that, based upon the record, CNN has failed to satisfy the high burden of proof required to set aside ALJ Amchan's credibility findings and the Board should deny CNN's exceptions with respect to the credibility determinations.

#### IV. ARGUMENT

##### A. CNN and TVS were Joint Employers

ALJ Amchan found that CNN was a joint employer of the bargaining unit employees at the D.C. and N.Y. Bureaus with TVS. (ALJD at 11:28-32.) The ALJ found that it was CNN, and not TVS, that "effectively determined many of the essential terms and conditions of employment of TVS employees." (ALJD 13:31-33.) CNN effectively determined the number of employees, supervision of those employees ("to a very great extent"), assignment of their work, direction of their performance of that work, and the performance of overtime work, (ALJD at 13:16-22; 13:31-33; 14:33-35; 15:19-21; 15:33-34; 16:21-22.) The ALJ also found that CNN was the sole source of compensation for the employees, including the determination of their wage increases. (ALJD at 13:3-4.) Based upon these findings, the ALJ concluded that CNN and TVS were joint employers of the bargaining unit employees at the D.C. and N.Y. Bureaus.

(ALJD 11:28-32.) While CNN has raised numerous exceptions to the ALJ's joint employer finding, not one of these exceptions has any merit in law or fact.

**1. CNN Misstates the Standard Governing the Joint Employer Analysis**

CNN first asserts that "Board law has been well-established for more than a quarter of a century," quoting *TLI, Inc.*, 271 NLRB 798 (1984), *enforced*, 772 F.2d 894 (3d Cir. 1985). (CNN Br. at 59.) The Board held in *TLI, Inc.* that two employers will be joint employers when they "share or codetermine those matters governing the essential terms and conditions of employment" and where the putative employer "meaningfully affects" those terms and conditions of employment. *TLI, Inc.*, 271 NLRB at 798-99. However, CNN gratuitously grafts an additional element to the standard set forth in that "well-established law" in *TLI, Inc.*, *viz.*, that the putative joint employer's control over "employment matters be direct and immediate." (CNN Br. at 59 (quoting *American Freight Co.*, 338 NLRB 597, n.1 (2002).) The requirement that a putative joint employer have "direct and immediate control" over employment matters misconstrues the Board's joint employer standard.

The Board first announced the joint employer standard – *i.e.*, share and codetermine matters governing essential terms and conditions of employment – in *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966). In that case, the Board addressed the question of a joint employer relationship in the context of Greyhound's subcontracting of porter, janitor and maid work to Floors, Inc. 153 NLRB at 1491. Based upon the facts in the record, the Board concluded "that the evidence cogently demonstrates that Greyhound and Floors share, or codetermine, those matters governing essential terms and conditions of employment of porters, janitors and maids herein in such a manner as to support our finding that their status is that of joint employers." *Id.* at 1495. The Board added, "[i]t is

clear from the circumstances of this case that, whatever Floors' status as an independent contractor with Greyhound, Greyhound has reserved to itself, *both as a matter of express contractual agreement and in actual practice*, rights over these employees which are consistent with its status as their employer along with Floors." *Id.* (emphasis added). The Board based its holding on, in addition to the record of a prior representation proceeding:

the nature of service agreements which bestow upon Greyhound the right to (1) establish work schedules, and assign employees to perform the work; (2) specify the exact manner and means through which the work will be accomplished and issue orders and instructions to that effect, especially when Floors' supervisors are absent from Greyhound premises; and (3) control straight-time wage rates and overtime hours and pay rates in accord with the fixed costs, percentages, and total amounts due to Floors for weekly and annual period, as set forth in the agreements....

*Id.* at 1495-96. The Board further based its holding on:

the role of the porters (who comprise by far the largest group in the unit) as integral parts of Greyhound's transportation enterprise, and their use of Greyhound's equipment and supplies in their work performance, and, finally, the fact that in the course of their duties the porters are given detailed supervision by other Greyhound personnel.

*Id.* at 1496. As noted above, the Fifth Circuit affirmed the Board's decision. *NLRB v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966).

Fifteen years later, the Board found the Fifth Circuit's enforcement of *Greyhound Corp.*, as well as the Board's decisions in subsequent cases, to be "instructive in the application of the joint employer test." *Browning-Ferris Indus. of Pa., Inc.*, 259 NLRB 148, 150 (1981), *enforced*, 691 F.2d 1117 (3d Cir. 1981). The Board elaborated:

In *Greyhound*, it was subsequently held that respondent was a joint employer with its cleaning contractor, where Greyhound established work schedules, assigned and supervised cleaners, and prompted the discharge of one of the cleaners. 368 F.2d 778 (5th Cir. 1966).... Similarly, in *Hamburg Industries, Fidelity Services, Inc. & Industrial Technical Services, Inc.*, 193 NLRB 67 (1971), the Board found Respondent to be a joint employer of maintenance repair employees provided by a contractor whose sole business was to provide manpower, where Respondent

controlled the scope and quality of work, scheduled the work, and indirectly controlled wages. And in *Mansion House Management Corporation and Central Parking System of St. Louis, Inc.*, 195 NLRB 250 (1972), respondent was found liable, as a joint employer, for the discharge of security guards employed by a contractor, where it exercised control and direction over the day-to-day activities of the guards and both its employees and guards wore substantially identical uniforms.

*Browning-Ferris Indus. of PA, Inc.*, 259 NLRB at 150. The Board proceeded to find a joint employer relationship in that case, where, although there were only verbal contracts, the respondent “effectively discharge[d] and rehire[d]” the employees “in a number of instances,” provided the employees with overalls bearing the respondent’s logo, provided medical insurance to the employees, established the employees’ hours and provided day-to-day supervision of the employees. *Id.* The Third Circuit enforced the Board’s decision. See *NLRB v. Browning-Ferris Indus. of PA, Inc.*, 691 F.2d 1117 (3d Cir. 1982) (“*Browning-Ferris*”). The Third Circuit observed that “the ‘joint employer’ concept recognizes that the business entities are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.” *Browning-Ferris*, 691 F.2d at 1123. In making this observation, the Third Circuit cited the Board’s decision in *C.R. Adams Trucking, Inc.*, 262 NLRB 563 (1982), enforced, 718 F.2d 869 (8th Cir. 1983), in which the Board followed the joint employer standard first set forth in *Greyhound Corp. C.R. Adams Trucking, Inc.*, 262 NLRB at 566.

Three years later, in 1984, the Board issued its decision in *TLI, Inc.* The Board recognized that “the appropriate standard for determining joint employer status was recognized by the Third Circuit” in *Browning Ferris. TLI, Inc.*, 271 NLRB at 798. As noted above, this standard requires evidence that the two employers shared or co-determined the matters governing the essential terms and conditions of employment. *Id.* The Board added, “[f]urther, we find that to establish such [joint employer] status there must be a showing that the employer meaningfully

affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.” *Id.* (emphasis added). The Board found that this showing had not been made in *TLI*, because, the evidence showed that the supervision and direction by the putative joint employer was “limited and routine.” (*Id.*)

Over the next eighteen years, the Board adhered to the joint employer standard first set forth in *Greyhound Corp.* (*i.e.*, share or co-determine) and as refined in *TLI, Inc.* (*i.e.*, “meaningfully affect”), focusing upon the facts and circumstances of each case to determine whether two employers were joint employers. See *Mingo Logan Coal Co.*, 336 NLRB 83, 87-95 (2001), *enforced*, No. 02-1205, 172 L.R.R.M. (BNA) 2746 (4th Cir. Jun. 17, 2003); *Painting Co.*, 330 NLRB 1000, 1006-07 (2000), *enforced*, 298 F.3d 492 (6th Cir. 2002); *DiMucci Constr. Co.*, 311 NLRB 413, 418 (1993), *enforced*, 24 F.3d 949 (7th Cir. 1994); *Windemuller Elec., Inc.*, 306 NLRB 664, 666 (1992), *enforced in relevant part*, 34 F.3d 384 (6th Cir. 1994); *Quantum Resources Corp.*, 305 NLRB 759, 760-61 (1991); *D & S Leasing, Inc.*, 299 NLRB 658, 659-60 (1990), *enforced, sub nom., NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1992); *G. Heileman Brewing Co.*, 290 NLRB 991, 999-1000 (1988). In some of these cases, the Board focused, not only on the putative joint employer’s direct control over the terms and conditions of employment, but also indirect control through its arrangements or contracts with the nominal employer. *Mingo Logan Coal*, 336 NLRB at 95 (finding putative joint employer exercised control over employees’ compensation through limitations on reimbursements); *Windemuller Elec., Inc.*, 306 NLRB at 666 (finding putative joint employer exercised “indirect but effective” control over employees’ compensation through agreement with nominal employer); *Quantum Resources Corp.*, 305 NLRB at 760-61 (finding putative joint employer exercised control over “holidays, hours and benefits” through its contract with nominal employer).

Then, in 2002, the Board issued its decision in *Airborne Express*, 338 NLRB 597, n.2 (2002). A majority of the Board panel (Members Cowen and Bartlett) stated that, “approximately twenty years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative employer’s indirect control over matters relating to the employment relationship.”<sup>37</sup> *Id.* The majority added, citing *TLLI, Inc.*, that “[t]he essential element in this analysis is whether a putative joint employer’s control over employment matters is direct and immediate.”<sup>38</sup> *Id.* However, the words “direct” and “immediate” are nowhere to be found in *TLLI, Inc.*, or, for that matter in any case decided by the Board in the eighteen years from 1984 until 2002. Indeed, even after *Airborne Express*, the Board continued to adhere to the established standard, *viz.*, whether the employer shared or co-determined terms and conditions of employment and, in doing so, meaningfully affected matters relating to the employment relationship, such as supervision and direction of work. *See D & F Indus., Inc.*, 339 NLRB 618, 627-28, 640 (2003) (citing standard of share or co-determine matters essential to terms and conditions of employment, along with “embellishment” from *TLLI, Inc.* that employer “meaningfully affect” such matters and finding joint employer relationship). *See also AM Property Corp.*, 350 NLRB 998, 999-1000 (2007) (identifying standard as an employer who “shares or co-determines those matters governing the essential terms and conditions of

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<sup>37</sup> Nowhere in *TLLI, Inc.* does the Board expressly abandon any prior test or overrule any prior decisions that supposedly focused on a putative joint employer’s indirect control.

<sup>38</sup> Interestingly, nowhere in its decision in *TLLI, Inc.* does the Board state that the “essential element” of the joint employer analysis is that the putative joint employer’s control over employment matters is “direct and immediate.” *TLLI, Inc.*, 271 NLRB at 798-99. In addition, the Board did not cite to any prior decisions in *Airborne Express* where it required a showing that the putative joint employer’s control was “direct and immediate” in order to find a joint employer relationship.

employment” and “meaningfully affects matters relating to the employment relationship,” without mentioning “essential requirement” that control be “direct and immediate”).<sup>39</sup>

Accordingly, NABET Local 31 respectfully submits that, despite the “gloss” contained in *Airborne Express*, the joint employer standard is as follows: whether CNN *shared or co-determined* matters governing essential terms and conditions of employment of the bargaining unit employees and whether CNN *meaningfully affected* those matters, as a matter of contract and in actual practice.<sup>40</sup> *TLI, Inc.*, 271 NLRB at 798; *Browning-Ferris Indus. of Pa., Inc.*, 259 NLRB at 150; *Greyhound*, 153 NLRB at 1495.

**2. CNN Misstates Governing Precedent by Arguing that the Board Requires Evidence of the Putative Joint Employer’s Control Over all “Five” Terms and Conditions of Employment**

CNN’s penchant for misstating the applicable legal standards is demonstrated again when the Respondent claims that, “[f]or two entities to be joint employers, at a minimum they must co-determine the essential terms and conditions of employment, namely hiring, firing, discipline, supervision and direction.” (CNN Br. at 60.) The Respondent adds, “Board cases since *TLI* have required proof of all five essential terms and conditions of employment (hiring, firing, discipline and direction) and have not found joint employer status based on one area of control standing alone.” (*Id.* at 61.) The Respondent is wrong.

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<sup>39</sup> CNN cites *Summit Express, Inc.*, 350 NLRB 592, n.3 (2007), wherein the Board finds that the specific contract terms at issue in that case, standing alone, “do not establish direct and immediate control” over employment matters sufficient to establish a joint employer relationship. This decision is consistent with *Greyhound Lines*, *Browning-Ferris* and *TLI, Inc.*, in that the Board looks to both contractual provisions and actual practice to determine whether a putative joint employer shares or codetermines employment matters in a meaningful way.

<sup>40</sup> While CNN argues that contractual provisions – such as those in the ENG Agreement – are insufficient to prove a joint employer relationship (CNN Br. at 59-60), it nevertheless argues that contractual provisions – such as those in the ENG Agreement – are sufficient to disprove such a relationship. (CNN Br. at 63.) Self-serving statements denying joint employer status hardly qualify as evidence of the non-existence of a joint employer status.

The Board has never stated that there must be evidence establishing the putative joint employer's control over hiring, firing discipline, supervision *and* direction. This point is evident from the Board's decision in *TLI, Inc.*, where it states, "to establish such status, there must be a showing that the employer meaningfully affects matters relating to the employment relationship *such as* hiring, firing, discipline, supervision and direction." 271 NLRB at 798 (emphasis added). The use of the phrase "such as" indicates that the Board's reference to particular matters is simply to provide examples, not to suggest that the putative joint employer must control all of those working conditions before the Board will find joint employer status.

Moreover, when applying this standard, the Board does not require evidence that the putative joint employer has meaningfully affected the full range of essential terms and conditions of employment, *e.g.*, hiring, firing, discipline, supervision, direction, etc. *Sun Maid Growers of Cal.*, 239 NLRB 346, 350-51 (1978) ("*Sun Maid Growers*"), *enforced*, 618 F.2d 56 (9th Cir. 1980). In other words, while a putative joint employer, "may not have exercised the full panoply of powers" over the bargaining unit employees, that fact "does not, of itself, serve to render it any less of a joint employer" of those employees. *Sun Maid Growers*, 239 NLRB at 351. Indeed, the Board has found a joint employer relationship where the putative joint employer did not have control over hiring and discipline. *D & F Indus., Inc.*, 339 NLRB 618, 640 (2003) (finding joint employer status even though employer does not hire or discipline employees); *Skill Staff of Colorado*, 331 NLRB 820-21 (2000) (finding joint employer status where putative employer only assigns work and supervises employees).

**3      *The ALJ Properly Found that CNN Co-Determined the Employees' Terms and Conditions of Employment in a Meaningful Way***

The ALJ found that CNN was a joint employer "solely on the basis [of] CNN's direction and control of the terms and conditions of Team employees' employment." (ALJD 12:47-48.)

CNN challenges the ALJ's finding, by arguing, "[t]he undisputed evidence in the record establishes that Team exercised pervasive control over the essential terms and conditions of employment of its own workforce." (CNN Br. at 62.) To the contrary, the substantial evidence in the record, leaves one with the inescapable conclusion, which the ALJ reached, that CNN clearly and meaningfully controlled a wide range of terms and conditions of employment that governed the bargaining unit employees working at the D.C. and N.Y. Bureaus. NABET Local 31 summarizes much of the substantial evidence *infra*.

(a) **The Total Number of Bargaining Unit Employees.** CNN clearly shared with TVS the determination of the initial number of bargaining unit employees who would work at the D.C. Bureau by setting the initial number of employees at eighty-five (85) in their ENG Agreement. (ALJD 16:21-23. *See also* GC Ex. 40 at 1, 43.) CNN further retained the sole and exclusive right to adjust the number of bargaining unit employees in the ENG Agreement. (*Id.* at 1.) The record establishes that, in fact, CNN exercised its right to require changes in the "current levels of service" on at least one occasion. (D'ANNA 16:3463:5-8.) At some point during the ENG Agreement, CNN "requested less numbers" of bargaining unit employees. (*Id.*) TVS responded by reducing the number of employees. (*Id.*)

An employer's control over the number of employees in the bargaining unit translates into control over employment opportunities within the unit, and, in some cases, control over continued employment within the unit. Based on the record, CNN clearly retained control over the number of employees in the bargaining unit. *See D & F Indus., Inc.*, 339 NLRB at 640 (finding joint employer relationship based upon, *inter alia*, putative joint employer's ability to determine number of vacancies for nominal employer's employees to fill); *G. Heileman Brewing*

Co., 290 NLRB at 1000 (finding joint employer relationship where, *inter alia*, putative joint employer “decided when, how many, and for how long additional electricians were needed”).

(b) **Total Compensation of the Bargaining Unit Employees.** The ALJ found that the Respondent, CNN, “was effectively the only source from which TVS could draw upon to compensate its employees at the D.C. and N.Y. bureaus.” (ALJD 13:3-4, 16:23.) Both CNN and TVS co-determined the total compensation to be paid to bargaining unit employees by setting the Labor Fee in the ENG Agreement, which covered the wages, fringe benefits, payroll taxes, and other employment costs related to the bargaining unit employees. (GC Ex. 40 at 13, 43; D’ANNA 16:3499:4-21 (testifying that 401(k) match and health insurance were treated as costs under the agreement and paid by CNN).) A contractual arrangement that makes an employer the sole source of that compensation for the bargaining unit employees provides strong evidence of that employer’s ability to meaningfully affect an important term and condition of employment. See *D & F Indus.*, 339 NLRB at 628, 640 (finding joint employer status in part upon facts that putative joint employer was sole source of funds for employees’ compensation and set the rates of pay); *Windemuller Elec., Inc.*, 306 NLRB at 666 (finding joint employer status where, *inter alia*, nominal employer set wage rates, but wage rates were limited and determined by subcontract agreement between nominal and putative joint employers, whereby latter exercised indirect control over wage rates); *Greyhound Corp.*, 153 NLRB at 1496 (finding joint employer status, in part, where putative joint employer “control[led] straight time wage rates and overtime hours and pay rates in accordance with fixed costs, percentages, and total amounts due to [nominal employer] for weekly and annual period, as set forth in the agreements”).

(c) **Increases to Total Compensation of Bargaining Unit Employees.** CNN also retained the sole and exclusive authority to approve increases in the total compensation (or total

payroll). (ALJD 13:1-3.) With respect to the contract, the ENG Agreement provided that TVS “is *authorized by CNNA* to increase actual payroll by “up to four percent (4%) per year over the life of this Agreement....” (GC Ex. 40 at 15 (emphasis added).)<sup>41</sup> The ENG Agreement also provided that, “[u]nless CNNA agrees otherwise in writing, CNNA will not fund increased Payroll costs in excess of four percent (4%) per year over the life of this agreement.” (*Id.*)

CNN’s actual control over increases to total compensation manifested itself during the collective bargaining negotiations between TVS and NABET-CWA. *See Mingo Logan Coal Co.*, 336 NLRB at 95. During its negotiations, whether for an agreement covering the D.C. Bureau or an agreement covering the N.Y. Bureau, TVS repeatedly stressed to NABET-CWA that the employer’s flexibility with respect to its economic proposals was limited by its contract with CNN. (*See GC Ex. 65; STURM 2:260:11-19, 2:282:13-17.*) Indeed, when NABET-CWA made a proposal to increase total payroll by four and one-half percent (4.5%) during the final year of the initial collective bargaining agreement for the N.Y. Bureau, TVS had to obtain CNN’s approval before accepting the proposal. (FRYDENLUND 75:15252:3-18.) TVS also had to obtain CNN’s approval for additional compensation to provide retroactive wage increases and meal penalties as part of the initial collective bargaining agreement that covered the bargaining unit employees at the D.C. Bureau. (GC EXS. 66 & 69.) This evidence clearly establishes that Respondent CNN retained sufficient control over wage increases to meaningfully affect that term and condition of employment for the bargaining unit employees and to support a joint employer finding. *Hamburg Indus., Inc.*, 193 NLRB 67, 67-68 (1971) (finding joint employer status, in

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<sup>41</sup> CNN points to the testimony of Frydenlund that the proposal pertaining to wage increases was the proposal of TVS, not CNN. (CNN Br. at 83.) The source of the proposal is irrelevant. Even assuming that TVS made the proposal to allow CNN to authorize wage increases, the salient fact remains that CNN had control, which it actually exercised, over the amount of the increases in bargaining unit employees’ total compensation.

part, where putative joint employer reimbursed nominal employer for all payroll costs and had to approve pay increases).<sup>42</sup>

(d) **Approval of Overtime.** CNN also controlled the bargaining unit employees' ability to work overtime both as a matter of contract and actual practice. (ALJD 14:33-44; 15:1-20. *See also* GC Ex. 40 at 13-14.) CNN and TVS initially co-determined in the ENG Agreement that employees would be compensated for overtime work at ten (10) hours per week for field employees and eight hours per week for production employees (bureau and engineering employees). (GC Ex. at 43.) CNN also exercised actual control over the amount of overtime worked by bargaining unit employees. (*See* ALJD 14:33-45, 15:1-20.)

CNN falsely claims that its control over overtime "was not a cost control measure so much as a means for CNN to decide whether a particular story was important enough to require coverage on a particular day." (CNN Br. at 84). CNN changed former bargaining unit employee Luis Munoz's shift by having him start two hours later in the morning in order to reduce his overtime in order to control costs. (*See* MUNOZ 34:7513:11-21, 34:7487:1-21. *See also* PACHECO 29:6507:2-16 (testifying that CNN dispatched her to take over for crew in the field to avoid overtime).) When Munoz complained to TVS' assignment desk manager, Lisa Manes, she told him that CNN was the client and they could do whatever they wanted. (MUNOZ 34:7488:5-

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<sup>42</sup> In this regard, the Board's decision in *Laerco Transp.*, 269 NLRB 324 (1984) is distinguishable. In that case, the Board refused to find a joint employer relationship because the nominal employer had negotiated wages and fringe benefits in the collective bargaining agreement, which had been executed prior to the employer's relationship with the putative joint employer. In contrast, many critical terms and conditions of employment for the bargaining unit employees, such as the total amount of compensation and the approval of overtime (*see infra*) were established in the ENG Agreement before TVS negotiated the collective bargaining agreement. *See Quantum Resources Corp.*, 305 NLRB at 761 (distinguishing *Laerco* on grounds that collective bargaining agreement already existed prior to subcontracting arrangement and putative joint employer was not involved in negotiation of collective bargaining agreement.) Any of the essential terms and conditions of employment for TVS employees were pre-ordained, to a large degree by the ENG Agreement. *Id.*

15, 34:7489:1-3.) This evidence mandates the finding that CNN shared control over the bargaining unit employees' overtime, which is an essential term and condition of employment. *Hamburg Indus.*, 193 NLRB at 67 (finding joint employer status, in part, where employer discontinued overtime for extra two hours per day). *See also D & F Indus.*, 339 NLRB at 640 (finding employer's approval of overtime worked by employees supportive of joint employer finding); *Sun Maid Growers*, 239 NLRB at 351 (same).

(e) **Assignment of Work.** The ALJ found that "the assignments of Team field employees would undertake on any given day were determined by CNN." (ALJD 13:16-17.) Indeed, several bargaining unit employees testified that CNN effectively assigned work to the field technicians, with TVS serving as a conduit for those assignments. (JENKINS 20:4508:25, 20:4509:1-13, 20:4510:1-6; SUISSA 23:5045:21-25, 23:5046:1-5, 23:5225:1-5; ZOSSO 27:5962:16-19; 27:6014:3-5; 27:6142:2-4; PACHECO 29:6500:5-19, 29:6515:3-16, 29:6603:22-24; PARKER 32:7035:9-13; MUNOZ 34:7492:13-17, 34:7493:9-13. *See also* PEACH 7:1127:2-4, 7:1138:19-25, 7:1139:1, 7:1139:6-10.) By controlling work assignments, CNN meaningfully affected an essential term and condition of employment of the bargaining unit employees because the Respondent was able to dictate the employees' work opportunities. *D & F Indus., Inc.*, 339 NLRB at 628; *D & S Leasing Co.*, 299 NLRB 658, 659 (1990), *enforced, sub nom.*, *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1990); *DiMucci Constr. Co.*, 311 NLRB at 417-18.

(f) **Supervision and Direction of Work.** "Most importantly," according to the ALJ, "CNN supervisors and agents supervised and directed the work of Team employees to a very great extent." (ALJD 13:31-33.) Although the level of supervision and direction varied (ALJD 14:8-9), the ALJ found that the bargaining unit employees were under the continuing control of CNN's supervisors and agents. (ALJD 14:9-16, 14:30-31, 15:29-40, 16:1-19.) While CNN

claims that its direction and supervision of bargaining unit employees was “limited and routine” (CNN Br. 68-81), the record evidence clearly establishes that the Respondent exercised substantial control over the bargaining unit employees in the performance of their work.

A putative joint employer controls the direction of the employees’ work even if its officials were not constantly hovering over the bargaining unit employees, directing each particular action taken by those employees. *Sun Maid Growers*, 239 NLRB at 351 (stating “[o]f course, Respondent’s officials did not hover over the maintenance electricians, directing each turn of their screwdrivers” and finding that such evidence is not required to establish joint employer status). *See also G. Heileman Brewing Co.*, 290 NLRB at 996 (recognizing that, under system established by employers, it was “seldom necessary” for putative joint employer’s supervisors to “exercise supervisory rather than technical discretion,” but finding that putative joint employer nevertheless directed work of employees). Evidence that an employer directed the employees “to the extent it determined that such supervision and direction were necessary” is sufficient to support a joint employer finding. *G. Heileman Brewing Co.*, 290 NLRB at 999.

Indeed, the very nature of the bargaining unit employees’ work clearly precluded TVS from directing the employees in the performance of that work. *G. Heileman Brewing Co.*, 290 NLRB at 999. The bargaining unit employees were engaged in electronic newsgathering, production and engineering services, all of which “were closely related to and essential to” CNN’s normal operations at the Washington, D.C. Bureau. *Id.* The electronic newsgathering, production and engineering services performed by bargaining unit employees, while nominally employed by TVS, represented the visual and aural manifestations of the content desired by CNN managers, producers and correspondents for the news to be broadcasted from the D.C. Bureau. Therefore, it is not at all surprising that these managers, producers and correspondents

directed the bargaining unit employees in the performance of their work collecting the images and sounds, as well as transmitting those signals to other CNN Bureaus and to the general public.

This direction of the employees' work took place in the field and throughout the D.C. Bureau to the extent such direction was necessary. For example, in the field, CNN's producers and correspondents provided instructions on the backgrounds and the images that they wanted from the bargaining unit employees. (*See, e.g.,* ZOSSO 27:5976:10-22 (discussing directions by correspondent about story involving doctor who had been involved in "Blackhawk Down"). *See also, supra*, Section II.E.1.b. (setting forth additional examples of producers and correspondents directing employees in the field).) In the studios and control rooms, CNN producers barked out directions over the intercom to the bargaining unit employees serving as directors, who, in turn, relayed those directions to other employees working as technical directors, video tape operators, and audio technicians. (SUISSA 22:4895:24-25, 22:4896:1-8, 22:4900:21-24, 23:5060:9-14. *See also, supra*, Section II.E.2.a.i.(B) (discussing manner in which CNN producers directed employees in the studios and control rooms).) In the quality control area, CNN's producers and line coordinators dictated to the bargaining unit employees where to send particular feeds. (SUISSA 22:4897:14-21, 22:4897:24-25, 22:4898:1-10.) Finally, in the engineering department, CNN's managers and agents, such as Tu Vu and George Kinney, directed the bargaining unit employees on how to perform their work, such as the installation of triax cables or the installation of a new microwave receiver. (NORMAN 14:3003:1-25, 14:3304:1-6, 14:3111:1-19.) This evidence establishes CNN's control over the manner in which the employees performed their work from the content of particular shots, to the location of the transmission to the manner in which triax cables would be installed. *See DiMucci Constr. Co.*, 311 NLRB at 418; *G.*

*Heileman Brewing Co.*, 290 NLRB at 999; *Sun Maid Growers*, 239 NLRB at 351; *Greyhound Corp.*, 153 NLRB at 1495-96.

(g) **Enforcement of CNN Policies.** When the putative joint employer enforces its own company policies on the employees of the nominal employer, such conduct supports the finding of a joint employer relationship. *N. K. Parker Transp.*, 332 NLRB 547, 549 (2000). In this case, CNN producers or correspondents enforced a CNN policy against the acceptance of so-called “freebies” while on assignment. (PACHECO 29:6535:8-24, 29:6536:2-17.) CNN’s Operations Manager, Mark Sweet, also enforced a rule against all employees – CNN and TVS – barring food and drink in the control rooms. (CRENNAN 68:14091:7-16, 68:14094:3-8.) In the latter case, Local 31 steward, Keith Crennan, brought a dispute over the ban against food and drink in the control room to Sweet’s attention. (CRENNAN 68:14091:7-25, 68:14092:1-5, 68:14093:9-25, 68:14094:1-25, 68:14095:1-25.) A ban against food and drink in the workplace is a mandatory subject of bargaining and, hence, a term and condition of employment. *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (stating “[i]t reasonably follows that the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those ‘conditions’ of employment that should be subject to the mutual duty to bargain”). This evidence adds a new dimension to CNN’s control, *viz.*, the Respondent treating the bargaining unit employees as its own employees. *N. K. Parker Transp.*, 332 NLRB at 549.

(h) **Holding Out TVS Employees as CNN Employees.** Further evidence of CNN treating the bargaining unit employees as its own employees is found in the manner in which the bargaining unit employees were held out to the public. In the field, CNN producers and correspondents routinely introduces the bargaining unit employees as CNN employees or CNN

staff. (MORSE 9:1611:25, 9:1612:1-6.) Bargaining unit employees also wore credentials and badges that identified them either as “CNN” or “CNN/TVS.” (GC Exs. 131A, 131B, 131C, 131D, 131E, 131G, 131J, 346, 347 & 366.) This evidence vividly demonstrates that CNN held out the bargaining unit employees as its own. *Browning Ferris*, 691 F.2d at 1135 (affirming Board’s finding of joint employer status based, in part, on fact that putative joint employer provided the employees with the uniforms used by that employer’s employees); *C.R. Adams Trucking*, 262 NLRB at 566 (finding joint employer status where, *inter alia*, drivers were held out to public as employees of putative joint employer).

(i) **Impact on Labor Relations between TVS and NABET-CWA.** Finally, CNN exerted substantial control over the collective bargaining relationship between TVS and CNN. The evidence shows that CNN kept TVS on a proverbial short leash during negotiations with NABET-CWA through the ENG Agreement. For example, as noted above, TVS repeatedly relied upon its agreement with CNN as a defense to the bargaining demands of NABET-CWA. (See GC EX. 65; STURM 2:260:11-19, 2:282:13-17.) Jimmy Suissa testified that, during negotiations, TVS negotiators, such as Larry D’Anna, would say that they needed to check with Atlanta or “the people down south,” which is an obvious reference to the CNN, which (unlike TVS) maintains a headquarters in that city. (SUISSA 22:4939:15-25, 22:4940:1-5.)

When negotiations encountered difficulties, with union members engaging in protected activities, CNN’s Bureau Chief, Frank Sesno, had a discussion with Jimmy Suissa, a TVS employee who was one of NABET-CWA’s negotiators. As the evidence shows, through Suissa’s testimony, Sesno asked why the negotiations had stalled. Suissa replied that TVS’ proposal to use part-time employees had become the biggest obstacle to an agreement. After debating the merits of using part-time employees, Sesno stated that he wanted to get this done

and move on. Suissa replied that if TVS withdrew its part-time employee proposal, he felt that a contract would be reached. (SUISSA 22:4949:23-25; 22:4950:1-2.) Soon thereafter, TVS abandoned its part-time employee proposal and a contract was reached. The physical presence of CNN at the bargaining table was immaterial. CNN was clearly relying upon TVS to represent CNN's best interests. CNN's "posture during the negotiations was nothing less than that of an interested and involved party." *American Air Filter*, 258 NLRB 49, 54 (1981).

In subsequent negotiations, Suissa challenged TVS' counsel and principal negotiator, Peter Chatilovicz, stating that NABET-CWA should really be dealing with CNN and not TVS. Chatilovicz replied that CNN's presence was unnecessary because "I represent CNN." (SUISSA 22:4953:20-21; ROBERTSON 31:6833:20-25, 31:6834:1-8.) CNN was "involved in collective bargaining in a manner which led the parties to believe that the company was acquiescing in its role as an affected joint employer." *American Air Filter*, 258 NLRB at 54. Chatilovicz's statement simply reflects the reality recognized by both sides of the bargaining table that, in dealing with NABET-CWA, TVS was not simply negotiating on its own behalf, but it was also acting as a go-between with CNN.

There is evidence in the record that reinforces the conclusion that TVS was simply a "go-between" for CNN when dealing with NABET-CWA. A CNN manager, Alan Reese, told a TVS employee at the N.Y. Bureau, Robert Cummings, that, historically, CNN was not a union shop at its Atlanta, GA Bureau and was not used to dealing with the union. (CUMMINGS 40:8654:2-9.) Reese added that CNN hired TVS to act as a go-between with the Union, just as it had with Potomac Television Services Corporation, the previous contractor. (CUMMINGS 40:8654:2-13.) The use of TVS to insulate CNN from having to deal with NABET-CWA supports a joint employer finding. See *Sinclair & Valentine, Inc.*, 238 NLRB 754, 758 (1978 (finding putative

joint employer retained subcontractor “not as a source of employees or a means of getting a job done but rather as a device for continuing to employ” union employees “and at the same time to avoid unnecessary entanglement with the Union”).

(j) **Conclusion.** Based on the foregoing discussion, the evidence in the record clearly establishes that CNN shared or co-determined a wide array of the terms and conditions of employment that governed the bargaining unit employees who worked at the D.C. and N.Y. Bureaus. CNN determined the number of employees in the bargaining unit, determined the total compensation paid to the employees in the unit, approved of increases in the total amount of compensation, approved overtime worked by the employees, assigned work to the employees, directed employees in the performance of that work, enforced its policies on those employees, held out the bargaining unit employees as its own workforce and directly affected the collective bargaining between the employees and their nominal employer, TVS.

The Board has previously found that, given such evidence of direct and indirect control, an employer is a joint employer of the employees. *D & F Indus., Inc.*, 339 NLRB at 340 (finding joint employer status where employer determined number of vacancies, established rates of pay, provided funds for compensation, decided when overtime was required, and was apparently authorized to suspend employees); *DiMucci Constr. Co.*, 311 NLRB at 418 (finding joint employer status where employer assigned and directed employees and controlled employee movement without nominal employer’s consent); *Hamburg Indus., Inc.*, 193 NLRB at 67 (finding joint employer status, despite presence of nominal employer’s supervisors, where putative joint employer can require work to be redone, enforced its policies on employees, adjusted employee schedule, and approved overtime).

Accordingly, for all of the foregoing reasons, the Administrative Law Judge properly found that CNN is a joint employer in this case. NABET Local 31 respectfully requests that the Board deny CNN's exceptions and affirm the ALJ's findings and conclusions that CNN was a joint employer with TVS of the bargaining unit employees at the D.C. and N.Y. Bureaus.

**4. CNN Violated the Act by Refusing to Recognize and Bargain as a Joint Employer with NABET-CWA**

ALJ Amchan found that, as a joint employer, CNN violated Sections 8(a)(5) and (1) by refusing to recognize and bargain with NABET-CWA over the termination of the ENG Agreements. (ALJD 16:48-49, 17:1-44, 18:1-7.) CNN challenges the ALJ's finding by arguing that (a) the ALJ failed to determine whether the termination of the ENG Agreements was a mandatory subject of bargaining and (b) the NABET-CWA waived its right to bargain over the matter. (CNN Br. at 88-95.) Once again, CNN is wrong on both counts.

**a. CNN had a Duty to Bargain over the Termination of the ENG Agreement and the Effects of that Decision**

CNN argues that it terminated the ENG Agreements with TVS "to adjust to emerging technologies in the broadcasting industry and to obtain greater control over its newsgathering, editing and production processes in light of those technologies." (CNN Br. at 89.) The Respondent further asserts that the termination of the ENG Agreements "was by definition a decision 'involving a change in the scope and direction of the enterprise' and thus was not a subject of mandatory bargaining" citing *Noblit Bros.*, 305 NLRB 329, 330 (1992). (CNN Br. at 89-90.) The Board's decision in *Noblit Bros.* is inapposite, as the change in that case involved a change in the way the employer dealt with its customers, going from an in-person showroom with some telephone sales to a more sophisticated telemarketing operation. *Noblit Bros.*, 305 NLRB at 330. The Board concluded that the change was outside of the duty to bargain because

it was tantamount to a “choice in advertising or promotion.” *Id.* Choices in advertising or promotion had nothing to do with CNN’s decision to terminate the ENG Agreements.<sup>43</sup>

Moreover, CNN’s introduction of new technology – whether it is non-linear editing, Enco music servers or Euphonix audio boards – fell far short of changes in the scope or direction of a business. *See, e.g., Leach Corp.*, 312 NLRB 990, 995 (1993) (rejecting respondent’s claim that change from batch system to just-in-time system represented fundamental change in manufacturing process and finding change did not result in different operation), *enforced*, 54 F.3d 802 (D.C. Cir. 1995). Changes in technology simply alter the way an employer conducts its business; those changes do not transform the business itself. Both before and after the implementation of the new technologies, which took place months and years after termination of the ENG Agreement, the business of CNN at the D.C. Bureau remained unchanged: *viz.*, electronic newsgathering, production and engineering services in furtherance of the broadcasting of cable news programming.

The record clearly establishes that, in terminating the ENG Agreements, CNN was motivated by labor costs and the desire to avoid the perceived burden of a unionized workforce. CNN considered the savings in benefits, penalties, overtime, and merit pay when considering the BSP. (GC Ex. 326 at 4.) The Respondent’s consideration of savings in labor costs must be viewed in terms of the larger picture, as set forth in Local 31’s brief. (*See* Local 31 Br. at 58-61.) For most of 2003, the labor costs under the ENG Agreement were exceeding the budgeted and forecasted amounts by thousands, tens of thousands and even hundreds of thousands of dollars. (GC EXS. 185A-G.) The excess in costs was due primarily to overtime

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<sup>43</sup> Likewise, concerns over the “protection of its editorial integrity” (CNN Br. at 90-91) did not factor into the decision to terminate the ENG Agreements, because, under those agreements, CNN controlled the functions underlying the editorial process as well as the content of the stories. (*See* GC Ex. 40 at 21-22 (“Program Rights”).)

worked by the bargaining unit employees, which was considerably more expensive because of the collective bargaining agreement. (*Id.*) GC Exhibit 326 simply confirms that, when considering the termination of the ENG Agreements and the implementation of the Bureau Staffing Project, CNN was motivated by reducing labor costs, to the tune of \$1.4 million in projected annualized savings at the D.C. Bureau. (GC Ex. 326 at CNNA-PROD143066). That motivation is corroborated by CPDC Exhibit 2, which echoes CNN's effort to maintain its \$1.4 million in savings at the D.C. Bureau by avoiding the use of freelancers or having employees work overtime.

To achieve the reduction in labor costs, CNN terminated the ENG Agreements and implemented the BSP in order to substitute "one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 218 (1964) ("*Fibreboard*"); *Torrington Indus., Inc.*, 307 NLRB 809, 810 (1992). *See also Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1443-46 (D.C. Cir. 1996) (approving Board's conclusion that permanent subcontracting of work is mandatory subject of bargaining under *Fibreboard* where subcontracting replaced one set of employees with another), *enforcing*, 319 NLRB 1139 (1995). The termination of the ENG Agreements resulted in the discharge of the NABET-represented bargaining unit employees at both the D.C. and N.Y. Bureaus. The implementation of the Bureau Staffing Project allowed CNN to hire a new workforce to perform the same work with substantially the same equipment under CNN's control. The facts of this case present a textbook example of a mandatory subject of bargaining under *Fibreboard*. *See Fibreboard*, 379 U.S. at 213-14. Therefore, CNN's failure to bargain over the decision to terminate the ENG Agreements violates Section 8(a)(5) of the Act. *Torrington Indus., Inc.*, 307 NLRB at 810; *D & S Leasing, Inc.*, 299 NLRB at 660, n.9.

**b. NABET-CWA did not Waive its Right to Bargain over the Termination of the ENG Agreements**

CNN also argues that NABET-CWA waived its right to bargain over the termination of the ENG Agreements. The Respondent contends that it announced “that it was planning to terminate the Team contracts and directly hire its own workforce” in September 2003; and, CNN claims that NABET-CWA did not make a request to bargain until December 8, 2003. (CNN Br. at 91.) Citing *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244 (7th Cir. 1988), CNN claims that, after being informed of CNN’s decision in September 2003, NABET “had every opportunity at that point to raise the joint employer issue, and to seek bargaining with CNN if it believed CNN had a duty to bargain.” (CNN Br. at 92-93.) CNN’s argument is fatally flawed for two reasons.

First, the Seventh Circuit’s decision in *W.W. Grainger, Inc.* is distinguishable. As CNN observes in its own brief, the court found that the union had indirect notice on five occasions that the employer was considering the cancellation of the contract *before* the employer announced that cancellation. (CNN Br. at 92 (quoting *W.W. Grainger, Inc.*, 860 F.2d at 248).) CNN does not argue that NABET-CWA had been provided with indirect notice that the Respondent had contemplated the termination of the ENG Agreements prior to September 2003. Instead, CNN argues that NABET-CWA had notice *after* the Respondent announced its decision to terminate the ENG Agreements. (CNN Br. at 92-93.)

CNN’s argument leads directly to the second point, *viz.*, that CNN’s announcement in September 27, 2003 was a *fait accompli*. The Respondent’s official announcement, which was sent only to its employees, stated, “CNN will announce today that it is ending its six-year relationship with Team Video Services (“Team”), the contractor hired by CNN to provide newsgathering operations, and engineering services in the DC and New York Bureaus.” (GC Ex. 338.) Despite the announcement, NABET-CWA sought to meet with CNN on at least two

occasions. Local 31 President Mark Peach met with CNN's D.C. Bureau Chief Kathryn Kross on October 3, 2009. Kross told Peach that "NABET would not be a part of CNN after the 5th, there would be no need for NABET because these employees would be so happy that they wouldn't need a union." (PEACH 7:1224:14-15.) The NABET-CWA sought a meeting with CNN's President in November 2003 (GC Ex. 23), which CNN's President refused. (GC Ex. 24.)

The foregoing evidence establishes that, even if NABET-CWA made a demand, CNN would have refused to meet with the Union. Under these circumstances, the Board refuses to find a waiver of the right to bargain; instead, it finds that the employer violated the Section 8(a)(5) of the Act. *See Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993), *enforced, sub nom.*, *Salaried Employees Ass'n v. NLRB*, No. 93-2584, 1995 U.S. App. LEXIS 1023 (4th Cir. Jan. 19, 1995). Under the circumstances, CNN's announcement of its intention to terminate the ENG Agreement was presented as a *fait accompli*, thereby excusing any requirement of a demand to bargain. *Westinghouse Elec. Corp.*, 313 NLRB at 453 (finding that, despite two month period between disclosure of employer's plans and implementation of plans, employer still violated Section 8(a)(5) by failing to bargain over plans, absence of union's request to bargain immaterial because employer would not have bargained with union anyway because of employer's belief that it was privileged to take action pursuant to management rights clause). Therefore, CNN violated Sections 8(a)(5) and (1) by presenting its decision to terminate the ENG Agreement as a *fait accompli* without providing advanced notice and an opportunity to bargain. *Torrington Indus., Inc.*, 307 NLRB at 807; *D & S Leasing, Inc.*, 299 NLRB at 660, n.9.

Accordingly, NABET Local 31 respectfully requests that the Board find that CNN reject CNN's exceptions to the ALJ's findings that the Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with NABET-CWA.

**B. CNN is a Successor to TVS**

ALJ Amchan found that CNN is a successor to TVS at both the D.C. and N.Y. Bureaus and, in addition, that CNN discriminated against bargaining unit employees during the Bureau Staffing Project in order to avoid becoming a successor. (ALJD 19:45-50, 20:1-6.) CNN asserts a variety of exceptions to the ALJ's underlying findings of fact and conclusions of law; however, before addressing those exceptions, Local 31 sets forth the evidence that underscores the ALJ's findings with respect to the Respondent's status as a successor.

**1. *The Successorship Standard***

In *Burns*, the Supreme Court recognized that "a mere change in employers" is not such an "unusual circumstance" that would affect the continued representation of employees by a labor organization, especially when the operations of both employers are substantially continuous and when a majority of the employees after the transition between employers was employed by the predecessor employer. *NLRB v. Burns Int'l Sec. Svc.*, 406 U.S. 272, 279 (1972). Thus, in *Burns*, the Court established a two-part standard to determine whether a new employer is a successor of the predecessor employer: (1) whether there is substantial continuity between the operations of the two employers; and, (2) whether the new employer has hired a workforce, of which a majority of whom are the predecessor's employees. *Id.* at 281. If the standard is satisfied, a presumption arises that the collective bargaining representative of the predecessor's employees has the majority support of, and is the representative of, the successor's employees. *Id.*

The Supreme Court and the Board "examine a number of factors" to determine whether there is substantial continuity. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) ("*Fall River Dyeing*"); *Jennifer Matthew Nursing & Rehabilitation Ctr.*, 332 NLRB 300, 306 (2000) ("*Jennifer Matthew Nursing*"). These factors include the following:

Whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and basically has the same body of customers.

*Fall River Dyeing*, 482 U.S. at 43; *Jennifer Matthew Nursing*, 332 NLRB at 306. No factor is determinative, because the Board bases the determination of substantial continuity on the totality of the circumstances. *Foodbasket Partners, Inc.*, 344 NLRB 799, 803 (2005), *enforced*, No. 05-60706, 2006 U.S. App. LEXIS 23816 (5th Cir. Sept. 19, 2006). Moreover, the Board also analyzes the substantial continuity factors from the employees' perspective, asking the question "whether these employees will view their job situation as essentially unaltered." *Fall River Dyeing*, 482 U.S. at 43 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1972)).

**2. *There is a Substantial Continuity of Operations Before and After the Transition from TVS to CNN***

Simply put, this case does not involve the proverbial conversion of a steel mill into a bakery. *Capitol Steel & Iron Co.*, 299 NLRB 484, 488, n.12 (1990); *Good N' Fresh Foods, Inc.*, 287 NLRB 1231, 1235 (1988). Instead, the facts in the record establish, beyond any serious debate, that the newly hired CNN employees continued to perform the same work previously performed by TVS employees, using the substantially the same equipment and processes, under the same working conditions and supervision. The newly hired CNN employees also used the same equipment and the same production processes to provide the same product to the same market of customers. In other words, *all* of the factors comprising the Board's substantial continuity analysis conclusively establish that there is substantial continuity, if not complete continuity, between the operations of TVS and the operations of CNN at the D.C. Bureau.

**(a) The Business is the Same.** From 1997 until December 5, 2003, TVS provided electronic newsgathering, production and engineering services for CNN's D.C. Bureau pursuant

to the ENG Agreement. Beginning on December 6, 2003 and continuing to this day, CNN provides the *same* electronic newsgathering, production and engineering services for its D.C. Bureau, using newly hired employees who perform the same work (*see infra*) previously handled by TVS employees. Given the absence of any hiatus, as well as the identical nature of the services being performed at the D.C. Bureau, the evidence establishes that TVS and CNN were engaged in the same business for purposes of the Board's successorship doctrine. *See Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007) (finding no hiatus in business after successor employer acquired predecessor's operations).

**(b) The Employees Perform the Same Jobs Under the Same Working Conditions with Substantially the Same Supervision.** The record contains substantial evidence, including the testimony of CNN employees from each segment of the newsgathering operations of the Bureau (field, studio and engineering). Both before and after the termination of the ENG Agreements, photojournalists in the field continued to call the Audex system to learn of their reporting time, report to the assignment desk, which was staffed with the same individuals (former TVS managers, now CNN managers Lisa Manes and Valerie Nocciolo) to learn about their first assignments, and consult the daily rundown for information about those assignments. (ZOSSO 27:6036:18-24, 27:6037:14-22, 27:6038:1-5; MORSE 28:6245-12-17.) After receiving their assignments, the employees grabbed the same keys, went to the same lockers, got the same equipment, and loaded the same vans. (ZOSSO 27:6036:18-24; MORSE 28:6244:22-25, 28:6245:1-11.) They drove those vans to the same or similar locations, including the White House and Capitol Hill, where the employees used the same credentials to gain access. (ZOSSO 27:6033:14-25, 17:6034:1-2; MORSE 28:6244:5-21; PARKER 32:7113:4-12, 34:7113:24-25, 34:7113:1-9.) The employees continued to receive the same instructions from the producers as

they did when they were TVS employees. (ZOSSO 27:6057:17-22.) Once the employees completed their assignments, they received assignments from the CNN desk, just as many of them did while TVS employees.<sup>44</sup> (ZOSSO 27:6039:14-23.)

The newly hired employees who worked at the D.C. Bureau reported to their work just like the former TVS employees. (BACHELER 69:14203:25, 69:14204:1-6.) In the studios, control rooms and quality control, these employees continued to perform the same work as they did while employed by TVS. (DAVIS 66:13695:24-25, 66:13696:1-10; MOHEN 68:13967:6-21; BACHELER 69:14204:14-15; MILLER 71:14378:24-25, 71:14379:1-4, 71:14380:21-25, 71:14381:1-3.) They continued to perform this work in conjunction with the myriad of CNN producers (*e.g.*, executive producers, live producers, etc.) and correspondents. In the engineering department, the employees – now called BIT Support Engineers and BIT Field Engineers – continued to maintain broadcast equipment both at the bureau and at remote locations, working with the same CNN managers (*viz.*, George Kinney and Tu Vu) that they worked with while employed with TVS. (CLEMONS 13:2629:21-25, 13:2630:1-10.)

Thus, the evidence in the record establishes that CNN's newly hired employees continued to perform the same work with the same equipment under the same working conditions and substantially the same supervision, even though CNN created catchy new names for the positions

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<sup>44</sup> CNN contends that, because of new technology introduced at the D.C. Bureau, the newly hired employees perform additional tasks that were not previously handled by TVS employees. As discussed in Section III.B.5., CNN's evidence involves changes in technology that took place over a period of years long after the transition on December 6, 2003 from TVS to CNN. For this reason and others discussed *infra*, any "changes" to the work performed by employees resulting from this new technology is irrelevant. *See Aquabrom*, 280 NLRB 1131, 1133 (1986). In any event, any new tasks that accompanied the new technology, such as non-linear editing, do not preclude a finding that the newly hired CNN employees performed the same work as TVS employees. *Capitol Steel & Iron Co.*, 299 NLRB at 487 (stating "although, with the consolidation of functions, each employee may be performing some additional tasks, each one continues to perform work he had performed for" the predecessor).

and added a few additional responsibilities for some of the positions. *See Great Lakes Chem. Corp.*, 298 NLRB 615, 618 (1990) (finding that, while predecessor's "chemical operators" were now called "chemical technicians" by successor, "they still work with the same equipment" and further finding substantial continuity); *Cencom of Missouri*, 282 NLRB 253, 259, 260 (1986) (finding substantial continuity where, despite change in job titles where employees continued to perform same work, as well as additional tasks due to consolidation of positions). When viewed in conjunction with the work being performed for the same business at the same location and in furtherance of the same business, this evidence reinforces the conclusion that the employees would have viewed their situation as unchanged.

(c) **The Equipment and the Production Process is the Same.** Not only did CNN's newly hired employees perform the same work, but they performed that work using the same equipment and production processes as TVS employees. All of the newly hired CNN employees who testified in this case stated that, in the days, weeks and months after the transition from TVS to CNN, they continued to use the same equipment in the same manner as they did while working for TVS. (ZOSSO 27:6037:20-23; MORSE 28:6244:22-25, 28:6245:1-10; DAVIS 66:13695:24-25, 66:13696:1-10; MOHEN 68:13967:7-21; BACHELER 69:14204:14-15; MILLER 71:14378:24-25, 71:14379:1-4, 71:14380:21-25, 71:14381:1-3.) In addition, during this timeframe, there were no changes in *how* the employees performed their work using this equipment. (See MORSE 28:6248:6-16 (testifying nothing changed with regard to work as audio or camera work at White House); ROBERTSON 31:6866:9-23 (testifying that there was no change in audio, camera or lighting equipment used); DAVIS 66:13695:24-25, 66:13696:1-10 (testifying that there was no change in manner in which work was performed); BACHELER 69:14204:7-13 (testifying that there was no change what work he performed in studio or control room). *See also*

KUCZYNSKI 14:2866:4-18 (testifying that, as BIT Support Engineer, he performs equipment repair just as he did while employed by TVS.) Thus, the evidence that, in the days, weeks and months after the transition, the newly hired employees used the same equipment in the same manner as they did while employed by TVS. See *Harter Tomato Prods.*, 321 NLRB 901, 902 (1996), *enforced*, 133 F.3d 934 (D.C. Cir. 1998) (finding substantial continuity in part where successor used “identical equipment” and “same production method” to produce tomato paste).

(d) **The Same Services were Provided to the Same Customers.** The culmination of the foregoing evidence – *i.e.*, that TVS and CNN engaged in the same business, that their employees performed the same work under the same working conditions and substantially the same management, using the same employment and production methods – lies with the evidence proving that the same services are being provided to the same customers. The newly hired employees continued to perform the technical work required to complete general news assignments, as well as White House assignments, which provided the news stories that were broadcasted from the D.C. Bureau or other CNN bureaus to viewers throughout the United States and around the world. The employees also continued to perform the work required to broadcast shows such as *Reliable Sources* and *Late Edition* to both domestic and international viewers.

(e) **Conclusions.** The record conclusively establishes that there was a substantial continuity in operations after the transition from TVS to CNN on December 6, 2003. See *Fall River Dyeing*, 482 U.S. at 43-44; *Cadillac Asphalt Paving Co.*, 349 NLRB at 9. The presence of each factor in this case has been established and provides the objective basis upon which one could ascertain the employees’ subjective attitudes with respect to their jobs and their representation. *Straight Creek Mining, Inc.*, 323 NLRB 759, 763 (1997) (stating the factors relevant to substantial continuity “are used as a method for predicting the subjective attitudes of

the employees”), *enforced*, 164 F.3d 292 (6th Cir. 1998). When all of the factors are present, the Board concludes that “those employees who have been retained will understandably view their job situations as essentially unaltered.” *Fall River Dyeing*, 482 U.S. at 43 (quoting *Golden State Bottling Co.*, 414 U.S. at 184.)

**3. *The Evidence Shows that TVS Employees Constitute a Majority of the Substantial and Representative Complement of Employees in the Historic Bargaining Unit***

The evidence shows that, by December 6, 2003, CNN retained a newly hired workforce of approximately eighty-three (83) employees in positions that would fall within the historical bargaining unit. (GC Exs. 582, 587; CNNA Ex. 544) These positions include BIT Support Engineers, Associate BIT Support Engineer, Lead BIT Support Engineer, BIT Field Engineer, Lead BIT Field Engineer, Photojournalists, Senior Photojournalists, Lighting Specialist/Photojournalists, Audio Designers (both Audio Designer I and Audio Designer II), Directors/Technical Directors, Studio Operators (both Studio Operator I and Studio Operator II), Technical Directors/Directors, and Transportation Facility Specialists. The 83 employees working in these positions performed the work previously performed by TVS. In addition, based upon CNN’s payroll records (GC Ex. 582 and CNNA Ex. 544), forty-five (47) of the 83 employees – or 56.62% – were TVS employees. (*Id.*) Thus, as of December 6, 2003, a majority of the substantial and representative complement of CNN employees were TVS employees.

Not only did CNN employ a substantial and representative complement of employees as of December 6, 2003, the Respondent had engaged in substantially normal production as of that date. The D.C. Bureau did not close on December 6, 2003. CNN continued the operations of the D.C. Bureau without interruption, using a combination of former TVS, newly hired CNN employees along with CNN employees from the Respondent’s Atlanta, GA Bureau. One

employee, Paul Miller, testified that, during the first day of the two-day orientation, on December 6, 2003, he worked on the *Capitol Gang* show, which was shot out of C Studio and B Control. (MILLER 71:14376:9-24.) Other employees testified that, either during and after that two-day orientation on December 6 and 7, they continued to perform the same work that they performed prior to the transition from TVS to CNN. (See BODNAR 66:13549:3-24 (testifying that after orientation, continued performing work during first week of employment with CNN just as he did while employed with TVS); BACHELER 69:14200:2-13 (testifying that, during first week, he performed work for shows like *Lou Dobbs* that were broadcast out of other bureaus).)

**4. *CNN's Obligation as a Successor Employer to Recognize and Bargain with NABET-CWA Arose No Later than December 6, 2003***

The evidence establishes that, despite the change in employers from TVS to CNN, there was a near seamless transition whereby the operations of the D.C. Bureau continued without any significant hiatus or interruption. For the average television viewer, he or she could have turned on CNN and the network was still broadcasting the news. For the newly hired employees, some of them continued performing their work, albeit with brief interruptions for training and orientation sessions. The evidence further establishes that, during the orientation session, CNN's Deputy Bureau Chief, Stuart Redisch asked employees to refrain from signing authorization cards and/or otherwise exercising their Section 7 rights to organize and collectively bargain, giving CNN an opportunity to manage the employees without having to deal with a union. (ZOSSO 27:6032:9-14. See also MORSE 28:6236:20-25, 28:6237:1-3; PARKER 32:7119:16-19.) When viewed in conjunction with the statement of D.C. Bureau Chief Kross to Local 31 President Peach that there would be no role for NABET-CWA after the transition, it becomes clear that CNN did not have any intention of recognizing and/or bargaining with NABET-CWA.

Therefore, a request for recognition and/or to bargain in good faith would have been futile. *Smith & Johnson Constr. Co.*, 324 NLRB 970 (1997). Moreover, CNN's discrimination against bargaining unit employees during the Bureau Staffing Project, in furtherance of the Respondent's effort to limit the number of bargaining unit employees hired as a part of a new CNN workforce, further reinforce the conclusion that any demand for recognition would have been futile. *Triple A Svcs., Inc.*, 321 NLRB 873, 877, n.7 (1996). Accordingly, the date on which CNN became obligated to recognize and bargain with NABET-CWA was the date in which the Respondent took over the work previously performed by TVS at the D.C. Bureau, *i.e.*, December 6, 2003. *Smith & Johnson Constr. Co.*, 324 NLRB at 970.

In the alternative, NABET-CWA sent a request, dated December 8, 2003, for recognition by CNN as a successor or joint employer of the employees who previously worked for TVS. (GC Ex. 25.) The Supreme Court recognized in *Fall River Dyeing* that, typically, "[t]he successor's duty to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand," 482 U.S. at 52, unless, as discussed above, such a demand would have been futile. NABET-CWA based its request for recognition on the fact that a majority of bargaining unit employees had accepted offers of employment with CNN to perform bargaining unit work. (*Id.*) And, in fact, a majority of the substantial and representative complement of CNN's newly hired employees, who were hired by CNN into positions that performed the work of the historic bargaining unit, were bargaining unit employees as of December 8, 2003.<sup>45</sup> (*See* Section II.I.1, *supra.*) However, three days later, on December 11, 2003, CNN denied NABET-CWA's request for recognition. (GC Ex. 26.)

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<sup>45</sup> CNN asserts that the "substantial and representative complement date" for the D.C. Bureau was December 15, 2003. (CNN Br. at 104.) It is undisputed that, as of that date, bargaining unit employees constituted a majority of the substantial and representative complement.

CNN does not dispute that it failed and refused to recognize NABET-CWA as the collective bargaining representative of the employees working in positions that perform the work of the historic bargaining unit and, consequently, fall within that unit. CNN's denial of NABET-CWA's request for recognition and its ongoing refusal to recognize and bargain with the Union, despite the fact that the successorship standard has been satisfied in this case, violates Sections 8(a)(5) and (1) of the Act. *Jennifer Matthew Nursing*, 332 NLRB at 307; *Capitol Steel & Iron Co.*, 299 NLRB at 489.

**5. Respondent CNN's Challenge to the Appropriateness of the Historic Bargaining Unit is Without Merit**

The ALJ found – and the substantial evidence in the record shows – that there was a substantial continuity in the operations of CNN both before and after the termination of the ENG Agreements. The newly hired CNN employees – a majority of whom were former bargaining unit members – continued to perform the same work using substantially the same equipment and production processes to produce the same product under the same supervision. Ordinarily, these facts conclusively establish the continued appropriateness of the historical bargaining unit. *See, e.g., Banknote Corp. of Am.*, 315 NLRB 1041, 1043 (1994) (finding historical unit remained appropriate, despite respondent's challenge, where employees performed same or substantially similar work), *enforced*, 84 F.3d 637 (1996). However, CNN claims that, through its Bureau Staffing Project, the Respondent “created a wall-to-wall production unit when it terminated its contracts with Team and combined all production work into an integrated whole.” (CNN Br. at 98.) The Respondent contends that this newly-created “wall-to-wall production unit” is the only appropriate bargaining unit in this case.

In pressing this argument, CNN shoulders a heavy evidentiary burden. “The Board's longstanding policy is that ‘a mere change in ownership should not uproot bargaining units that

have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness.” *Cadillac Asphalt Paving Co.*, 349 NLRB at 9 (quoting *Indianapolis Mack Sales & Svc.*, 288 NLRB 1123, n.5 (1988)). “The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate.” *Cadillac Asphalt Paving Co.*, *supra* at 9. See also *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003); *Pioneer Concrete of Ark., Inc.*, 327 NLRB 311, n.2 (1998); *Banknote Corp. of Am.*, 315 NLRB 1041, 1043 (1994), *enforced*, 84 F.3d 637 (1996). “Indeed, compelling circumstances are required to overcome the significance of bargaining history.” *Cadillac Asphalt Paving Co.*, *supra.* at 9 (quoting *Mayfield Holiday Inn*, 335 NLRB 38, 39 (2001)).

CNN first seeks to satisfy its evidentiary burden by arguing that “the historical units under Team had no independent viability; rather they were the product of CNN’s decision to contract to Team only certain production functions.” (CNN Br. at 98.) To the contrary, the historical unit has its origins with the Board’s certification of a unit employed by Mobile Video Services, which is inherently the product of a community of interest analysis. (GC Ex. 2.) Although Mobile Video Services was replaced by a series of successive subcontractors, those subcontractors maintained the historical unit with minor changes in successive collective bargaining agreements over approximately twenty (20) years. (GC EXS. 4-9.) Those collective bargaining agreements and the 20-year time span constitute a compelling bargaining history that supports the continued appropriateness of the historical unit. See *Columbia Broadcasting Sys., Inc.*, 214 NLRB 637, 643 (1974).

In *Columbia Broadcasting Sys., Inc.*, the Board recognized the importance of the history of collective bargaining when analyzing the continued appropriateness of the historical unit:

The question of what constitutes an appropriate unit may not be divorced form the history of collective bargaining in this case. Thus, if we were to consider what would be an

appropriate unit absent bargaining history, it might be concluded that a unit of all film editors<sup>46</sup> would be appropriate, despite the differences of functions and skills. However, the Board is not called upon to make an initial unit determination. Much water has passed under the bridge since the initial unit determination was made more than 20 years ago. Relationships have evolved and been established since that time. These relationships cannot not now be ignored.

*Columbia Broadcasting Sys., Inc.*, 214 NLRB at 643. Similarly, the Board is not being called upon to make a unit determination in this case. Instead, the question is whether, despite the collective bargaining history underlying the historical bargaining units at the D.C. and N.Y. Bureau, there are compelling circumstances that result in the historical units being inappropriate.

CNN next argues that the historical unit is inappropriate because the Respondent created new job positions with new duties. (CNN Br. at 99.) The Board has repeatedly held that the addition of job tasks does not mandate a finding that employees are engaged in different work. *Capitol Steel & Iron Co.*, 299 NLRB at 487; *Stewart Granite Enterprises*, 255 NLRB 569, 571 (1981). If the addition of job tasks does not alter the work of the employees, then those additional responsibilities are insufficient to provide the compelling circumstances required for a finding that the historical bargaining unit is inappropriate.

For example, CNN designed the photojournalist position to include the additional tasks of performing non-linear editing (“NLE”) with a G-4 laptop. The introduction of NLE and G-4 laptop computers simply changed the operations of CNN by degree, not kind. *Winchell Co.*, 315 NLRB 526, n.2 (1994) (rejecting argument that introduction of computers changed scope and direction of business in way that defeated successorship, observing that “technological advance of the desktop computer changed the Respondent’s operation by degree, not kind”) *review granted*, 74 F.3d 227 (7th Cir. 1995) (unpub. op.). The evidence in the record establishes that, as

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<sup>46</sup> The case involved a challenge to the historical unit of documentary film editors, assistant editors, librarians and expeditors in favor of a unit of all film editors. *Columbia Broadcasting Sys., Inc.*, 214 NLRB 637, 643 (1974).

camera operators, TVS employees exercised a certain degree of editorial prowess. When not being directed by a producer or correspondent as to the content of shots, camera operators used their judgment to find the shots that best captured the sights and sounds needed to properly report the news or tell the story. (See, e.g., GC EX. 543, VOL. 3, REGINALD SELMA at CNNA-015464 (explaining how, at Million Man March and during September 11, 2001 attacks, he obtained the images for the story).) The addition of NLE and the G-4 laptops simply changed the camera operator's duties in degree, providing them with another means by which they could exercise their judgment to determine the best shots for the story. The employees still recorded the video and audio for the assignments and still transmitted the signal to the bureau (whether by tape, microwave truck or laptop). The new tasks required by the use of NLE and/or G-4 laptops did not result in a change that would be substantial enough to warrant a finding that the historical unit is no longer appropriate.

CNN's concludes its efforts to satisfy the evidentiary burden by arguing that all of its production positions, from those that would fall within the historical unit to those that have been historically excluded from that unit, share a "community of interest." (CNN Br. at 101-102.) The Respondent claims that, *inter alia*, these employees work the same hours, receive the same benefits, have their compensation determined by one central source, and are subject to the same evaluation process. (*Id.*) However, many of these factors are the product of CNN's unfair labor practices, when, as a joint employer (*see supra*), the Respondent unlawfully caused the termination of the bargaining unit employees and unlawfully, unilaterally changed the terms and conditions of employment, including the hours of work, compensation, benefits and evaluations. Those unfair labor practices preclude CNN's reliance upon such changes to demonstrate the inappropriateness of the historical unit. CNN also claims that all of its production employees

contribute to the newsgathering and production process, have frequent interaction with each other, and “work together with each other each day, particularly studio and control room personnel who are assigned to the same shows each day and who thus have to work as part of a coordinated team.” However, the bargaining unit employees regularly interacted with many CNN employees in non-unit positions, such as line coordinators, *before* the termination of the ENG Agreements. (*See, e.g.*, SUISSA 22:4897:14-25 (discussing how, working in quality control, he took “majority of direction from the CNN line coordinator”). *See also, supra*, Section II.E.2.a. (discussing interaction between CNN employees who directed work of bargaining unit employees in control rooms and studios). The fact that the employees continued to contribute to the newsgathering and production processes, as well as continued to interact and work with non-unit positions, does not constitute “compelling circumstances” sufficient to overcome the well established, bargaining history underlying the historical unit.

Finally, CNN’s challenge to the historical bargaining unit suffers from one glaring, fundamental flaw: *viz.*, the Respondent fails to acknowledge that, “the continued appropriateness of a bargaining unit for successorship purposes is measured at the time the bargaining obligation attaches.” *Cadillac Asphalt Paving Co.*, 349 NLRB at 9. As noted above, the bargaining obligation attaches when a new employer hires a substantial and representative obligation (a majority of which is comprised of the predecessor’s employees) and the new employer commences normal or substantially normal production. *Fall River Dyeing*, 482 U.S. at 48-50. And, as noted in the previous section, those events occurred on December 6, 2003 or December 8, 2003 (and, even CNN concedes that the date is no later than December 15, 2003, *see* footnote 48 below). *See Torch Operating Co.*, 322 NLRB 939 (1997) (finding that respondent assumed operations and employed representative complement on November 1 and received bargaining

demand on November 2, “the point for determining whether the Respondent had a duty to bargain with the Union arose almost immediately after the Respondent acquired the facilities...”). Accordingly, the continued appropriateness of the historical unit must be judged as of December 6 or December 8, 2003 (or, as Respondent seems to argue, December 15, 2003, see footnote 48, *supra*). *Cadillac Asphalt Paving Co., supra*.

Many of the “changes” that CNN relies upon in its challenge to the continued appropriateness of the bargaining unit occurred a year or more *after* the date on which CNN’s bargaining obligation attached. Almost all of the new technology was installed by CNN months and years after the date in which CNN became obligated to recognize and bargain with NABET-CWA in December 2003. In the case of non-linear editing and the G-4 laptops, the training for and utilization of this technology spanned at least one year. Moreover, some of the job classifications that CNN seeks to include in its so-called “wall-to-wall” unit did not exist until years after the attachment of the bargaining obligation. For example, CNN did not hire Electronic Graphic Operators at the D.C. Bureau until 2005, more than a year after the unfair labor practices in this case. (ALJD 116:18-22.) Likewise, CNN did not employ Media Coordinators at the D.C. Bureau until July 2006. (*Id.*) Thus, any discussion about the interaction or interchange of these positions (*see, e.g.*, CNN Br. at 102-119) is clearly irrelevant. *Cadillac Asphalt Paving Co.*, 349 NLRB at 9 (finding operational changes made one year after bargaining obligation attaches were irrelevant to whether bargaining unit remained appropriate); *Banknote Corp. of Am.*, 315 NLRB at 1043 (finding evidence of changes in work duties made in December 1990 were irrelevant when bargaining obligation attached in April 1990); *Aquabrom*, 280 NLRB 1131, 1132-33 (1986) (finding evidence of new production process, which was

implemented “many months after the takeover,” was irrelevant because implementation occurred after “time relevant to the successorship determination”).

In the end, CNN presents little more than its unfair labor practices, facts common to the operations of the bureaus both before and after the termination of the ENG Agreements, and changes made months and years after the relevant timeframe for the analysis of the continued appropriateness of the historical unit. Indeed, as ALJ Amchan found, the termination of the ENG Agreements simply eliminated a layer of supervision; the operations of both Bureaus continued without any substantial change. (ALJD 19:29-44.) The substantial continuity in the operations mandates a finding that the historical unit remains appropriate. *Cadillac Asphalt Paving Co.*, 349 NLRB at 9. Accordingly, Local 31 respectfully requests that the Board deny CNN’s exceptions with respect to the appropriate bargaining unit and find that CNN has failed to carry its heavy, evidentiary burden and that the historical unit remains appropriate.

C. **CNN Discriminated Against Bargaining Unit Employees With the Objective of Avoiding the Obligations of a Successor to Recognize and Bargain with the Employees’ Collective Bargaining Representative**

1. ***Introduction***

The failure of CNN to satisfy the heavy evidentiary burden of proving that the historical bargaining unit is no longer appropriate, as well as that the Respondent’s wall-to-wall unit is appropriate, has implications that extend beyond any *Burns* successorship analysis. CNN structured and implemented the BSP to create the impression, albeit a false one, that the Respondent was creating a wall-to-wall unit. The false wall-to-wall unit in the D.C. Bureau is graphically depicted in CNNA Ex. 706. If CNN followed the practice of its subcontractors, which was to hire the vast majority of the predecessor’s employees, the Respondent would have had a wall-to-wall unit that consisted of a majority of bargaining unit employees. If CNN hired

the bargaining unit employees into the newly-created positions that performed bargaining unit work (*i.e.*, BIT Support Engineer, BIT Field Engineer, Audio Designer, TD/Director, Director/TD, Studio Operator, Senior Journalist, Photojournalist, and Lighting Specialist/Photojournalist), then the Respondent would have hired approximately eight-seven (87) bargaining unit employees.<sup>47</sup> By contrast, if the Respondent hired non-unit employees into positions that had been historically excluded from the unit or performed work historically excluded from the unit (*i.e.*, IT & Senior BIT Support Engineers, Tape Evaluator, Editor/Producer, Tape Editor and Production Assistants), CNN would have hired only twenty-five (25) employees.<sup>48</sup> Under the circumstances, the bargaining unit employees would have constituted a significant majority of the Respondent's wall-to-wall unit, approximately 77.7% (*i.e.*, 87 out of 112 employees).<sup>49</sup>

The ALJ found that, throughout the Bureau Staffing Project, "throughout the Bureau Staffing Project, CNN was determined to limit the number of bargaining unit employees hired in order to avoid having to recognize and bargain with the Union." (ALJD 42:41-43.) Indeed, the "motivating force" behind the Bureau Staffing Project, CNN's Executive Vice President of Operations Cindy Patrick (CNN Br. at 6), was aware of "a legal rule about the impact of hiring 50 percent or more of a prior company's employees." (PATRICK 61:12889:23-25, 61:12890:1-3.) In other words, Cindy Patrick was aware of the potential legal obligations of CNN to recognize

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<sup>47</sup> The breakdown of bargaining unit employees in the new CNN positions would have been as follows, approximately 7 BIT Engineers (excluding Cunha), 6 Audio Designers, 8 TD/Directors, 19 Studio Operators, 9 Senior Photojournalists, 35 Photojournalists and 3 Lighting Specialists/Photojournalists).

<sup>48</sup> The breakdown of non-unit employees in positions outside of the historic bargaining unit would have been as follows, approximately 5 IT & Senior BIT Engineer, 2 Tape Evaluators, 9 Editor/Producers, 1 Tape Editor, and 7 Production Assistants).

<sup>49</sup> Moreover, as discussed above, the bargaining unit employees also constituted a majority of the newly-hired, CNN workforce in positions that fall within the historical bargaining unit.

and bargain with NABET-CWA if the Respondent hired a workforce consisting of a majority of bargaining unit employees.

Nevertheless, CNN excepts to the ALJ's findings and conclusions that CNN discriminated against bargaining unit employees during the BSP in violation of Sections 8(a)(3) and (1) of the Act in order to avoid any obligation as a successor to recognize and bargain with NABET-CWA. The Respondent claims that the ALJ erroneously found that the General Counsel satisfied the burden of proving a *prima facie* case, particularly failing, in CNN's view, to establish anti-union animus and unlawful discrimination. (CNN Br. at 152-57.) CNN also claims that the ALJ wrongfully shifted the burden of disproving animus and discrimination on the Respondent. (*Id.*) As explained *infra*, CNN is wrong on all counts; however, before addressing the Respondent's arguments on the merits, Local 31 first sets forth the governing legal standard that applies to this case.

## 2. *The Discriminatory Successor Standard*

A new employer "is not obligated to hire any of its predecessor's employees"; however, that employer "may not refuse to hire the predecessor's workers solely because they were represented by a union or to avoid having to recognize the union." *Laro Maint. Corp.*, 312 NLRB 155, 161 (1993), *enforced*, 56 F.3d 224 (D.C. Cir. 1995); *U.S. Marine Co.*, 293 NLRB 669, 670 (1989), *enforced*, 944 F.2d 1395 (7th Cir. 1990); *Love's Barbeque Restaurant No. 62*, 245 NLRB at 79. In this case, the General Counsel alleges that Respondent CNN engaged in "an overall plan ... to undermine union activity" by TVS employees, which included, *inter alia*, "Respondent CNN's creation and implementation of recruitment and hiring procedures to discriminatorily limit the hiring of a majority of the TVS bargaining unit employee applicants" for the new workforce at the D.C. Bureau. (GC Ex. 1-BB, ¶ 22(b).)

Generally, the Board applies the standard set forth in *Wright Line* when analyzing the allegedly discriminatory hiring plans of a successor. *Planned Bldg. Svcs., Inc.*, 347 NLRB 670, 673-74 (approving of *Wright Line* as the standard for discriminatory successorship cases). The *Wright Line* standard places the initial burden upon the General Counsel to prove that “a substantial factor” underlying the respondent employer’s hiring decisions was that employer’s desire to avoid having to recognize the union. *Id.* The Board has outlined several factors that guide this analysis. *Planned Bldg. Svcs., Inc.*, 347 NLRB at 673. The factors are as follows:

substantial evidence of union animus, lack of a convincing rationale for refusing to hire the predecessor’s employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor’s employees from being hired as a majority of the new owner’s overall work force to avoid the Board’s successorship issues.

*U.S. Marine Co.*, 293 NLRB at 670. As with any issue involving motivation, the General Counsel can establish motive using direct and/or circumstantial evidence. *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624, 627 (D.C. Cir. 1992).

Once the General Counsel has established a *prima facie* case, the burden shifts to the respondent to establish an affirmative defense that it had a nondiscriminatory reason for not hiring the predecessor’s workers and/or would not have hired those workers in the absence of their protected activity. *Jennifer Matthew Nursing*, 332 NLRB at 307. The respondent bears the burden of persuasion as to its affirmative defense. *Id.* If the respondent’s purported non-discriminatory reasons are pretextual, then those defenses cannot save the respondent from a finding that it unlawfully discriminated against the predecessor’s workforce to avoid having to recognize the workers’ collective bargaining representative. *Wright Line*, 251 NLRB 1083, 1091 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1982), *cert. denied*, 445 U.S. 989 (1982), *approved in*, *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

**3      *The ALJ Properly Found that the General Counsel Established a Prima Facie Case of CNN's Unlawful Discrimination against the Bargaining Unit Employees to Avoid Having to Recognize NABET-CWA***

The ALJ held that the General Counsel satisfied that burden of proof. (ALJD 21:4.) The ALJ found that it was undisputed that CNN knew the bargaining unit employees were organized and that the Respondent knew which applicants were members of the bargaining unit (ALJD:4-8). See *Jennifer Matthew Nursing*, 332 NLRB at 307. See also *Lemay Caring Ctr.*, 280 NLRB 60, 69 (1986) (stating, “where all or most of the predecessor’s employees are union members, as in this case, it is not necessary to demonstrate that Respondent had knowledge of each discriminatee’s particular activities before Respondent took adverse action against him/her, especially where Respondent’s actions were part of a pattern of reducing support for the Union”), *enforced without op.*, 815 F.2d 711 (8th Cir. 1987). Those facts are beyond dispute. (PATRICK 5:730:7-15 (testifying she knew TVS employees were represented).) The only dispute is whether CNN was motivated by anti-union animus when it failed or refused to hire a substantial number of TVS employees. *Id.* The evidentiary record contains an overwhelming amount of direct and circumstantial evidence that proves CNN harbored animus toward the bargaining unit employees, because of their status as union-represented employees, which served as the motivating factor for CNN’s discrimination against those employees.

**a.      *The Direct Evidence of Animus***

The record in this case contains “sufficient direct evidence of animus and discriminatory motivation....” *Jennifer Matthew Nursing*, 332 NLRB at 307. For example, at the D.C. Bureau, D.C. Bureau Chief Kathryn Kross told NABET Local 31 President on October 3, 2003 that NABET-CWA “would not be a part of CNN after [December] 5th, there would be no need for NABET because the employees would be so happy that they wouldn’t need a union.” (PEACH

7:1224:1-4.) CNN's Executive Producer at the White House, Danielle Whelton, made a similar statement to one of the TVS employees, Tim Garraty. (GARRATY 67:13775:7-10 (testifying Whelton stated that "there won't be any union").) These statements are direct evidence of union animus. *Jennifer Matthew Nursing*, 332 NLRB at 307. See also *Advanced Stretchforming Int'l, Inc.*, 323 NLRB 529, 530 (1997), enforced in relevant part, 233 F.3d 1176 (9th Cir. 2000). Likewise, CNN managers at the N.Y. Bureau echoed these anti-union statements, by making their own statements about how CNN intended to hire only 50% of the TVS workforce to avoid recognizing NABET-CWA and/or that the Union would not be around after the transition from TVS to CNN in New York. (See DELAUTER 40:8526:5-24, 40:8526:25, 40:8527:2-6; FORD 51:10984:21-24, 51:10993:8-21.)

In *Jennifer Matthew Nursing*, the Administrative Law Judge found there was "sufficient direct evidence of animus and discriminatory motivation" in a statement by the new employer's attorney, Carl Schwartz, to a union representative, Paul Taylor, that the employer did not plan to hire enough of the predecessor's employees to obligate it to recognize another union. *Jennifer Matthew Nursing*, 321 NLRB at 307. The Board agreed, affirming the ALJ's rulings, findings and conclusions. *Id.* at 300. Member Hurtgen found in his dissent that the General Counsel had established a *prima facie* case based upon, *inter alia*, "Attorney Carl Schwartz Jr.'s remark to Hotel Employees Union Representative Paul Taylor that Respondent did not plan to hire enough of predecessor Nortonian's employees to obligate it to recognize District 1199." *Id.* at 300, n.1 (Hurtgen, Member, dissenting). The attorney's statement constituted direct evidence of anti-union animus even though the hiring decisions were made, not by the attorney, but the human resources director. *Id.* at 302-05. Thus, the fact that D.C. Bureau Chief Kross and Executive Producer Dianne Whelton did not make any of the hiring decisions during the Bureau Staffing

Project is immaterial. Their statements constitute direct evidence of CNN's animus against NABET-CWA. *Jennifer Matthew Nursing*, 321 NLRB at 307.

These statements by Kross and Whelton (as well as those by CNN managers at the N.Y. Bureau, *supra*) evince a desire on the part of CNN to manage the employees in the D.C. and N.Y. Bureaus without having to recognize and bargain with NABET-CWA. This desire is reflected in the statements of other CNN managers. For instance, in November 2003, CNN's President James Walton rejected a request by NABET-CWA for a meeting to discuss the future of the TVS employees, stating, "I do not believe there is any benefit to meeting at this time." (GC Ex. 24.) Another example involves statements made by Deputy D.C. Bureau Chief, Stuart Redisch during the initial orientation on December 6, 2003. Redisch told a group of newly hired CNN employees that cards being passed out by NABET-CWA supporters were "legal documents," and that the employees should give CNN a chance to manage them before the employees signed any such documents. (ZOSSO 27:6032:9-14. *See also* MORSE 28:6236:20-25, 28:6237:1-3; PARKER 32:7119:16-19.) Redisch's statement reveals CNN's true objective, *i.e.*, CNN wanted the opportunity to manage the employees at the D.C. Bureau without having to recognize and/or bargain with NABET-CWA.

**b. The Circumstantial Evidence of Animus**

Apart from the direct evidence of animus, the General Counsel introduced, and the ALJ found, convincing circumstantial evidence that compels the conclusion that CNN used the Bureau Staffing Project to achieve its objective of managing the D.C. Bureau without having to recognize NABET-CWA. (ALJD 30:18-51, 31:1-7.) The analysis of circumstantial evidence is akin to putting together the pieces of a puzzle. Each individual piece standing alone may not seem significant; however, when the pieces are connected together, a broader picture begins to

emerge. Local 31 has set forth the pieces to this evidentiary puzzle in Parts Seven and Eight of the Statement of Facts (*see* Sections II.G. & II.H, *supra*). When these pieces are put together, the resulting picture has a “broadly damning character” showing how CNN used the BSP to limit the number of TVS employees who would be hired as part of the new workforce, thereby enabling CNN to avoid the obligations of a successor. *Great Lakes Chem. Corp.*, 967 F.2d at 628.

(i) **The Continuing Focus on Candidates’ Employers.** One of the larger pieces of circumstantial evidence is the fact that, throughout the Bureau Staffing Project, CNN continually tracked the candidates’ current employer. CNN utilized spreadsheets to keep track of who applied, who had been screened, who had been interviewed, and who had been recommended. (SPEISER 18:3884:22-25, 18:3885:1-2.) Those spreadsheets also included the candidate’s current employer. (SPEISER 18:3885:3-5.) During the debriefing sessions, when hiring managers writing the “strengths” and “developmental areas” of candidates on so-called “butcher blocks,” the managers also included the candidates’ current employer. (*See, e.g.*, GC EXS. 232, 233, 235.) When CNN began extending offers, the Respondent used another spreadsheet that tracked whether background checks had been done, which candidate received an offer, the salary offered and even the candidate’s current employer. (SPEISER 18:3885:17-25, 18:3886:1-8.) Thus, at every stage of the hiring process, CNN and its managers (*e.g.*, Cindy Patrick) could track the number of candidates who had been employees of the predecessor, TVS, as those candidates wound their way through that process.

CNN did not have a need to continuously track the current employer of a candidate unless that particular piece of information was a “relevant factor” in CNN’s recruitment and hiring processes. *Pacific Custom Metals, Inc.*, 327 NLRB 75, 84 (1998) (finding fact that

employer maintained distinctions between “new hires,” “nonunion” former employees and “union” former employees was evidence that such distinctions were relevant factors in hiring process). While the information about a candidate’s current employer may prove useful during the early stages of the hiring process, such as during an interview, the continued tracking of candidates’ current employers at later stages, such as the extension of offers, becomes highly problematic. By including that information on spreadsheets and other documents, CNN tracked where bargaining unit employees, individually and in the aggregate, stood at the various stages of the recruitment and hiring processes. The Respondent could also compare the number of TVS candidates and non-unit candidates at any stage of the processes, including the final stages when CNN decided which candidates would receive offers. Therefore, the fact that CNN kept track of candidates’ current employers throughout the Bureau Staffing Project allows for a reasonable inference that the Respondent was monitoring the number of bargaining unit and non-unit candidates who would be hired as part of the workforce, in furtherance of its objective of limiting the number of bargaining unit candidates hired as part of the new workforce. *Pacific Custom Metals, Inc.*, 327 NLRB at 84.

(ii) **The Behavioral Interviews.** Additional circumstantial evidence is found with the behavioral interviewing process utilized by CNN during the Bureau Staffing Project. Behavioral interviewing may be an acceptable practice in the field of human resources management, depending upon the facts and circumstances. The key is the manner in which CNN implemented the practice. Several aspects of the evidence relating to the development and implementation of the behavioral interviewing process leads to the reasonable inference, which was drawn by the ALJ, that CNN was conducting its hiring practices in a manner that interjected subjectivity to limit the hiring of TVS candidates so that CNN would have a pretext to avoid

having to recognize NABET-CWA as the representative of the newly hired CNN employees at the D.C. Bureau.

First, CNN intentionally devalued the qualities of “job knowledge” and “technical skills,” which were the strengths of the TVS employees. As noted by CNN’s Deputy Bureau Chief at the D.C. Bureau, Stuart Redisch, during his testimony, the biggest strength of the TVS employees was their “experience.” (REDISCH 25:5526:9-17.) As Redisch explained:

Most of the Team employees had been working in the building as part of either the Team contractor or previous contractors for a number of years. So they had experience doing the work that CNN required, understanding where things are in the building, understanding where things are in the city.

(REDISCH 25:5526:19-24.) He added that experience is a strength because “you don’t have to teach people every day, new people every day, what the process and procedures are or don’t have these growing pains in dealing with the contractor.” (REDISCH 25:5527:1-3.) Thus, the experience of the TVS employees brought experience, job knowledge and technical skills.

The recruiters ignored “competencies” or “dimensions” that related to experience when they drafted the Interview Guides that would be used by hiring managers during the behavioral interview process. While “job knowledge” is an “organization-wide competency” at CNN (GC Ex. 161 at CNNA-PROD0065718), the recruiters did not identify “job knowledge” as a “competency” in the Interview Guides for any of the positions. Instead, recruiters chose abstract “dimensions” unrelated to experience, such as “verbal skills” (for BIT Support Engineers), “initiative” (for Audio Designers, and Studio Operators), and “creativity” (for all Photojournalist positions). See *Waterbury Hotel Mgmt., LLC.*, 333 NLRB 482, 503 (2001) (finding evidence of respondent’s bad faith in its design of interview questions for applicants, where respondent’s agent removed all questions relating to experience and added questions relating to motivation), *enforced*, 314 F.3d 645 (D.C. Cir. 2003).

The recruiters' treatment of the "organization-wide competency" of "technical skills" is even more suspect. Recruiters did not identify "technical skills" as a competency for Director/Technical Director positions, as well as Photojournalist, Senior Photojournalist, and Lighting/Specialist Photojournalist positions, even though these positions were supposedly part of an initiative to take advantage of new technologies that were being implemented at the D.C. Bureau. By contrast, recruiters and hiring managers did identify "technical skills" as a "competency" for the engineer positions, and did include questions in the Interview Guide that related to the candidates' skills. (*See, e.g.*, GC EX. 134, TAB C (DENNIS NORMAN) at CNNA-PROD0021597.) However, the Rating Sheet did not identify "technical skills" as a "dimension" to be rated by the hiring managers. (*Id.* at CNNA-PROD0021600.) Hiring managers rated engineering candidates on matters such as "client service" and "interpersonal skills," rather than "technical skills." (*Id.*)

In *Waterbury Hotel Mgmt.*, the Administrative Law Judge found that the human resources director changed the list of interview questions to be asked at a job fair being conducted to hire a new workforce by removing questions relating to experience, and adding more generalized questions relating to "motivation" and "hospitality." 333 NLRB at 503. The ALJ found that this evidence revealed the respondent's bad faith with respect to the hiring of the predecessor's workforce. *Id.* The Board affirmed the ALJ's decision. The D.C. Circuit enforced the Board's decision, specifically noting:

The ALJ found that the human resources director, in preparation for the job fair, winnowed Waterbury's list of post-screening interview questions down to a few highly general, abstract questions, excluding all inquiries relating to the interviewees' experience. As the ALJ saw it, this refusal to credit job experience reflected a desire to avoid hiring incumbent, union employees. We think this is sufficient to establish a prima facie case that Waterbury's hiring decisions were motivated by anti-union animus.

*Waterbury Hotel Mgmt., LLC v. NLRB*, 313 F.3d 645, 652 (D.C. Cir. 2003).

Second, after devaluing the strengths of TVS employees, the Respondent placed TVS employees at a greater disadvantage by avoiding sources pertaining to the experience, technical skills and work performance of TVS employees. *Jennifer Matthew Nursing*, 332 NLRB at 303. TVS maintained an office at the D.C. Bureau to manage its workforce, where the hiring managers conducted the interviews of TVS employees. (MURPHY 11:2111:22-25, 11:2112:1.) Despite the availability of TVS management and personnel files, CNN hiring managers pointedly and purposefully did not review the personnel files of any of the TVS employees who were candidates for positions with CNN. (MURPHY 11:2112:2-17; SPEISER 18:3933:22-24; REDISCH 25:5556:7-17.) One hiring manager, Matt Speiser, even rejected input from TVS managers and CNN employees (including producers, correspondents, and assignment editors) about the work performance of TVS employees. (SPEISER 18:3933:25, 18:3934:1-22.)

By contrast, at least two CNN hiring manager, Anne Woodward and Troy McIntyre, spoke to the supervisors of candidates who were employed by CNN in Atlanta. (WOODWARD 67:13850:21-25, 67:13851:1-8; MCINTYRE 72:14577:13-25, 72:14578:1-25, 72:14579:1-20.) When they spoke with supervisors, Wood and McIntyre asked whether the candidate had any performance or behavioral issues. (WOODWARD 67:13851:3-6; MCINTYRE 72:14579:9-18.) Neither Woodward nor McIntyre ever contacted TVS supervisors about the work performance of TVS employees who were candidates for positions with CNN. (WOODWARD 67:13851:9-12; MCINTYRE 72:14579:21-25, 72:14580:1-6.) CNN's refusal to consider the personnel files and input from TVS managers is additional circumstantial evidence of unlawful motivation. *Jennifer Matthew Nursing*, 332 NLRB at 303.

Third, CNN failed to provide adequate safeguards against bias by the hiring managers who were conducting the behavioral interviews. In the PowerPoint Presentation provided during the behavioral interview training given to CNN's hiring managers, the Respondent emphasized that a "characteristic of a legal selection system" is that "[w]e interview to determine whether a candidate has the **skills and core competencies** to be successful in our positions." (GC Ex. 161 at CNNA-PROD0065738 (emphasis in original).) CNN also stressed to its hiring managers that "[w]e will hire or reject a candidate based solely upon their [sic] abilities/qualifications to perform a job successfully." (*Id.*) However, CNN failed to ensure that hiring managers remained focused on "skills and core competencies" during their interviews and/or made hiring decisions based upon objective assessments of a candidate's abilities and/or qualifications.

Ironically, this failure is most evident by what is not in the record. There is no evidence in the record that the Respondent trained its hiring managers with respect to the *specific questions* that they would asking the candidates. See *Dunlap v. Tennessee Valley Auth.*, No. 3:04-0045, 2007 U.S. Dist. LEXIS 5664, at \*12 (M.D. Tenn. Jan. 22, 2007) (recounting expert's testimony as to proper protocol for behavioral interview process).<sup>50</sup> CNN used only a sample Interview Guide when it provided behavioral interview training (MCINTYRE 72:14553:5-10); the Respondent did not train the managers in asking the specific questions in the Interview Guides for Photojournalists, Audio Designers, BIT Support Engineers and/or other positions. There is also no evidence in the record that the Respondent validated the questions in any of the Interview Guides, *i.e.*, tested the questions to develop "benchmark acceptable responses." *Dunlap, supra*

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<sup>50</sup> CNN cited *Dunlap* for the proposition that "[c]ourts routinely require expert testimony to support criticism of a professionally developed evaluation process." (CNN Br. at 151, n.128.) The decision in *Dunlap* contains no such requirement; instead, the court found that the plaintiff satisfied its burden of proof by presenting, *inter alia*, expert evidence. *Dunlap*, 2007 U.S. Dist. LEXIS 5664 at \*28.

at \*12 (recounting expert's testimony that one aspect of proper process for behavioral interviewing is "validation of questions to determine benchmark acceptable responses").) Moreover, there is no evidence that the Respondent provided any training with respect to minimizing bias and maximizing the objective assessment of the candidates' answers. *Dunlap, supra* at \*13 (recounting expert's testimony that another aspect of proper process for behavioral interviewing includes training interviews about "forming judgments against benchmark answers and avoiding bias; conducting interviews to minimize bias; and an objective evaluation" of candidates' answers).

It does not take an expert to conclude that the failure to provide adequate safeguards with respect to interviewing prospective employment candidates may lead to hiring managers infusing their subjective views – or worse, their biases – into the hiring process. At most, CNN included a handful of slides in its PowerPoint Presentation that seemingly stated the obvious, such as do not ask questions about, *inter alia*, a candidate's race, national origin, sex, "affiliation or organizations (e.g. union affiliation)," pregnancy or disability. (GC Ex. 161 at CNNA-PROD0065740. *See also* GC Ex. 161 at CNNA-PROD0065738 to 0065744.) This superficial training addressed only the most blatant of questions; it did not address the more subtle forms of discrimination or bias that could arise during an interview, such as the hiring managers' subjective views of the candidates or the candidates' responses.

Fourth, hiring managers often inserted their subjective views of candidates, which laid the foundation for the Respondent's discrimination. The record establishes that the hiring managers drifted away from the "skills and core competencies," or "abilities/qualifications" of a candidates and focused on more subjective matters, such as a candidate's personality traits. Based on the notes taken by the hiring managers, many of the behavioral interviews seemed to

devolve into an amateur psychological assessment of the candidates, which were apparently based on the managers' subjective view of the candidate's performance at the interview. Hiring managers often noted personality traits of the candidates as "strengths" or "weaknesses."

When CNN hiring managers made a negative assessment of a candidate's personality, that candidate was more often than not a TVS employee. There are several examples of such negative assessments of TVS candidates in the record and discussed in the Statement of Facts of this brief. For example, R.J. Fletcher wrote down that TVS employee Chris Hamilton was "boring," giving low ratings and a "not fit" assessment for Hamilton. (GC Ex. 259 at CNNA-023510.) Cindy Patrick noted a "lack of hunger, energy, drive" for TVS employee and shop steward Ralph Marcus. (GC Ex. 534, VOL. 3, RALPH MARCUS at CNNA-019943.) She also noted "low energy" for TVS employee Tim Durham, another employee who had worked at the D.C. Bureau for various subcontractors since 1985, performing work on such CNN programs as *Wolf Blitzer Reports* and *Inside Politics*. (GC Ex. 534, VOL. 2, TIM DURHAM at CNNA-012312, 014698.)<sup>51</sup> Moreover, with respect to the interview of TVS employee Rodney Adkinson, the hiring manager wrote that the interview was "uneasy" and that the manager "didn't like" the interview. (GC Ex. 543, VOL.1, RODNEY ADKINSON at CNNA-023039.)

When used in conjunction with CNN's emphasis on subjective "competencies" such as "initiative" or "creativity" over objective "competencies" like job knowledge, job performance, and technical skills, CNN was in a position to limit the number the of bargaining unit employees hired as a part of the workforce by rejecting candidates because of their supposed failure to interview well, as opposed to their inability to perform the work. NABET Local 31 provides three examples to illustrate this point. First, CNN was able to reject a bargaining unit employee

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<sup>51</sup> CNN did not hire Hamilton, Marcus or Durham as part of the Bureau Staffing Project Cindy Patrick did authorize an offer for Hamilton *after* the BSP, on December 22, 2003. (GC Ex. 259.)

such as Ralph Marcus because, despite having worked at the D.C. Bureau since 1981 on shows such as *Inside Politics*, Marcus had what Cindy Patrick characterized as a “lack of hunger, energy, drive.” (GC EX. 534, VOL. 3, RALPH MARCUS at CNNA-011058, 019943.) This assessment plagued Marcus’ candidacy during later stages of the BSP, such as the debriefing session, where the hiring managers identified “motivation” as a “developmental area” and “not a strong TD candidate.” (GC EX. 534, VOL. 3, RALPH MARCUS at CNNA-PROD0037942.)

Second, CNN rejected bargaining unit employee Tim Durham because, despite having worked at the D.C. Bureau since 1981 and despite Patrick having noted that Durham “has done every job except engineering,” Durham had “low energy.” (GC EX. 534, VOL. 2, TIM DURHAM at CNNA-012312, 014697, 014698.) During the debriefing, the hiring managers identified, among other things, “motivation” as “developmental areas” for Durham, listing him as not fit for a technical director/director position. (GC EX. 534, VOL. 2, TIM DURHAM at CNNA-016736.) Finally, CNN rejected bargaining unit employee Rodney Adkinson because, despite having worked at the D.C. Bureau since 1996, he had an “uneasy interview.” GC EX. 543, VOL.1, RODNEY ADKINSON at CNNA-011608, 023039.) The interview continued to haunt Adkinson during the BSP, as the hiring managers determined during the debriefing session that Adkinson was only a “possible” photojournalist, with “communications skills” being one of his “development areas.” GC EX. 543, VOL.1, RODNEY ADKINSON at CNNA-015383.)

The behavioral interview process, with the emphasis on subjective “competencies” over objective ones, enabled CNN to reject the candidacies of bargaining unit employees during the Bureau Staffing Project. Able to sidestep the obvious experience and technical skills of these employees, CNN’s hiring managers allowed their subjective views and biases to tarnish the candidacies of some of the bargaining unit employees – whose services had previously benefited

CNN for years, if not decades – with negative characterizations of the employees’ personalities, which hung like an albatross around those candidates in later phases of the BSP. The focus on subjective traits constitutes additional circumstantial evidence of an unlawful motivation to limit the number of bargaining unit employees hired as part of the new workforce. *See Waterbury Hotel Mgmt., LLC*, 333 NLRB at 503-504, 527 (finding that effort to document negative attributes during screening and interview process at job fair constituted means of avoiding hiring union-represented employees).

Fifth, at least one hiring manager expressed hostility toward the protected activities of bargaining unit employee Keith Crennan. As discussed *supra* in Section II.G.5.b.ii, McIntyre interviewed Crennan for a Studio Operator position. McIntyre asked a question from the “competency” of “ethics & integrity,” *viz.*, whether Crennan has ever been faced with a situation where the line between confidential information and public knowledge had become blurred. (GC EX. 534, VOL. 1, KEITH CRENNAN at CNNA-PROD0037998.) Crennan responded by stating that he would “give people a head’s up so they don’t get blind-sided by management” and, “[*a*]s a *shop steward*, management will contact him to find a time and he will tell the employee so they are prepared for the meeting.” (*Id.* (emphasis added).) McIntyre interpreted Crennan’s statements to violate some supposed duty of confidentiality between an employee and CNN. (MCINTYRE 72:14061:9-13, 72:14062:24-25, 72:14063:1-4.) McIntyre rated Crennan a “2” for “ethics & integrity,” meaning that McIntyre viewed Crennan as having a “gap” in this area, and McIntyre further noted a “concern” about “confidentiality.” (GC EX. 534, VOL. 1, KEITH CRENNAN at CNNA-PROD0038001 to 0038002; MCINTYRE 72:145603:5-8.) McIntyre’s antagonism toward Crennan was also evident in later phases of the Bureau Staffing Project, such as when McIntyre omitted Crennan’s name from McIntyre’s list of Studio Operator candidates

during the debriefing. (CNNA Ex. 633.) By leaving Crennan's name off the list, McIntyre precluded Crennan receiving an offer for a Studio Operator position with CNN.

The evidence in the record clearly establishes that McIntyre harbored animus toward Crennan's protected activity. McIntyre's views provides additional evidence of CNN's animus toward NABET-CWA, its representatives, and employees' Section 7 rights. It also reinforces the conclusion that CNN sought to manage the new workforce at the D.C. Bureau without having to recognize, bargain in good faith or deal in any way with NABET-CWA.

**(iii) The Selection Process.** Additional circumstantial evidence may be found in the fact that, despite the substantial amount of effort expended by CNN to conduct the behavioral interview process, from formulating the questions to having its hiring managers rate candidates on various "competencies," the Respondent did not use the behavioral ratings when determining which candidates would be hired. Instead, during the next step of the hiring process, *i.e.*, the debriefing sessions, the Respondent reconvened its hiring managers to "rank" the candidates according to their overall candidacies and the rankings were to be used in making hiring decisions. (*See* HOLCOMBE 11:2158:18-25, 11:2159:1-4; KILE 73:14806:9-16; MCINTYRE 72:14693:19-25.) The "ranking" process provided CNN with another opportunity to limit the number of bargaining unit employees who would be hired as a part of the new CNN workforce. For example, when ranking photojournalist candidates, hiring managers excluded bargaining unit candidates whose names did not appear on every hiring manager's personal rankings. However, the hiring managers included a non-unit candidate, Ron Couvillion, even though he did not appear on each of the hiring manager's rankings. (GC Ex. 250.) The inconsistent treatment of TVS candidates and non-TVS candidates is evidence of unlawful motive. *Waterbury Hotel*

*Mgmt., LLC*, 333 NLRB at 528-29. Nevertheless, as the evidence in the record demonstrates, even with the ranking, TVS employees still fared better than the other candidates.

Perhaps, for that reason, CNN admittedly did not extend offers to new employees in strict accordance with the numerical rankings. (PATRICK 73:14881:10-19.) As explained by CNN Executive Vice President of Operations, Cindy Patrick:

So we get the final list of everyone we were going to hire in every position.... Then, we determined everything from who needed to relocate, who needed to give-two weeks notice, the fact that we had to collect references and employment verification on everybody, and depending on how quickly HR could check those things and they would come in and would get response phone calls and you know, it just depended on, you know when someone was ready to be given the offer. But it could have been person number 15 who got the first phone call. We didn't start at the top and work to the bottom.

(*Id.*) Thus, recruiter Loren Kile instructed CNN's human resources department and recruiters to check the references of non-TVS candidates before TVS candidates. (CLARKE 72:14493:12-18.) However, there were problems with the professional references for some of the non-TVS candidates, *viz.*, negative professional references. Rather than set aside the candidates who received negative professional references and proceed with other candidates, such as the TVS candidates, CNN instructed the recruiters, such as Kelli Clarke, to check personal references. (CLARKE 72:14496:6-17.) According to Clarke, this instruction was contrary to her experience in the human resources field. (CLARKE 72:14497:10-17.)

Once the verifications and references were checked, either the Executive Vice President of Operations, Cindy Patrick, or CNN's in-house counsel, Lisa Reeves had to provide final approval to extend an offer. (GC EX. 534, VOL. 2, DENNIS FAULKNER at CNNA-PROD0005375 (e-mail from Cindy Patrick to Bob Hesskamp of 12/08/03 at 6:55 P.M. stating "[n]o one is to make offers until Lisa [Reeves] and I [Cindy Patrick] say go ahead"). Patrick admitted that she

was aware of the "legal rule" relating to, in the words of CNN's counsel, "the impact of hiring 50 percent or more of a prior company's employees." (PATRICK 61:12889:23-25, 61:12890:1-2.)

With the knowledge of the "legal rule," Patrick favored non-TVS candidates over TVS candidates, extending offers to the former rather than the latter. As outlined in detail *supra*, Patrick skipped over Barbara McCloskey, a bargaining unit candidate for technical director/director, in order to extend an offer to non-unit candidate Christian Keller. (GC Ex. 534, VOL. 3, BARBARA MCCLOSKEY at CNNA-PROD0005464.) When asked to extend an offer to bargaining unit candidate, Peter Mohen, Patrick steadfastly refused, insisting that the list be followed and an offer be extended to Craig Jackson, a non-unit candidate. (GC Ex. 534, VOL. 3, PETER MOHEN at CNNA-PROD0064005.)

In addition, CNN's purported goal of hiring "growth candidates" provides further circumstantial evidence of union animus and unlawful motivation. The pool of "growth candidates," who were applicants without a lot of experience, were all non-TVS candidates. During the hiring process, when a non-growth candidate (*i.e.*, an experienced candidate) refused an offer, CNN extended an offer, not to another non-growth candidate, but to a growth candidate. For example, when non-TVS candidate Ron Couvillion rejected an offer from CNN, CNN did not extend an offer to the next non-growth candidate, who would have been Thomas Mike Greene, a TVS candidate. Rather, the Respondent extended an offer to a growth candidate, Khalil Abdullah. GC Ex. 543, VOL. 2, THOMAS GREENE at CNNA-PROD0005421 to 0005422.) As CNN did not classify any bargaining unit employees as "growth candidates," CNN was able to hire additional non-unit employees at the expense of bargaining unit employees.

(iv) **Conclusion.** At each stage of the BSP, CNN implemented the Bureau Staffing Project with the objective of limiting the number of bargaining unit employees who would

ultimately be hired, so that the Respondent could argue that, as it does in CNNA Ex. 706, the bargaining unit employees did not constitute a majority of CNN's proposed wall-to-wall unit. Indeed, the record in this case contains overwhelming evidence to support the finding that CNN "harbored a general animus toward the Union." *Great Lakes Chem. Corp.*, 967 F.2d at 928 (affirming Board's finding of general animus where respondent blacklisted union officers, used support of union as litmus test in making hiring decisions, and tried to fill remaining positions with inexperienced employees). The general animus inherent in the Respondent's conduct dispenses with the need to provide individualized evidence of animus with respect to particular TVS employees. *Great Lakes Chem. Corp.*, *supra*. "Retail proof with regard to each individual would be surplusage; the larger scheme necessarily entailed refusing to hire individual employees." *Id.* See also *Radiadores Paragon de Puerto Rico*, 206 NLRB 918, 926 (1973) (finding discharges motivated by general animus and stating "scant purpose would be served in examining the minutiae offered by the Respondent as to why each employee retained was superior in performance or value to the company than each employee discharged"), *enforced without op.*, 502 F.2d 1160 (1st Cir. 1974). In light of the evidentiary record, the inescapable conclusion is that the bargaining unit employees' protected activities (*i.e.*, their status as union-represented employees) was a motivating factor for CNN's discriminatory treatment and refusal to hire those employees during the BSP.

Accordingly, NABET Local 31 respectfully submits that the ALJ properly found that the General Counsel and the Charging Party have established their burden of proving *prima facie* case of discrimination under *Wright Line*. *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Great Lakes Chem. Corp.*, 967 F.2d at 627-28; *W & M Properties of Conn., Inc.*, 348 NLRB 162, 175-76 (2006), *enforced*, 514 F.3d 1341 (D.C. Cir. 2008); *Waterbury Hotel Mgmt.*,

*LLC*, 333 NLRB at 526-28; *Jennifer Matthew Nursing*, 332 NLRB at 307-08; *Laro Maint. Corp.*, 312 NLRB at 161-62; *Daka, Inc.*, 310 NLRB 201, 208 (1993). Indeed, the record shows that CNN “went to considerable length to replace the union employees with entirely new workers – most of whom had no previous experience ...” working for CNN or at the D.C. Bureau. *NLRB v. Foodway of El Paso*, 496 F.2d 117, 119 (5th Cir. 1974). See also *Great Lakes Chem. Corp.*, 967 F.2d at 628 (finding successor “tried assiduously to avoid hiring a union majority”). Thus, Local 31 respectfully requests that the Board deny CNN’s exceptions as they relate to the ALJ having found that the General Counsel and the Charging Parties have established a *prima facie* case of unlawful discrimination in violation of Sections 8(a)(3) and (1) of the Act.

**4. CNN’s Exceptions to the ALJ’s Findings of Unlawful Discrimination Lack Any Semblance of Merit**

In its exceptions, CNN raises a series of challenges to the ALJ’s findings that the Respondent violated Section 8(a)(3) by discriminating against bargaining unit employees during the Bureau Staffing Project. These arguments include the following: (a) CNN did not engage in unlawful discrimination because it hired a majority of the bargaining unit employees; (b) the statistics underlying the Respondent’s hiring process support a finding that the process was a neutral one; (c) the ALJ reversed the burden of proof when he called the Bureau Staffing Project was a “sham”; and (d) CNN did not discriminate against numerous individual bargaining unit candidates because of their protected activities. Each of these defenses lacks merit.

**a. The Fact that CNN Hired a Majority of Bargaining Unit Employees during the BSP Does Not Preclude a Finding of Unlawful Discrimination**

CNN claims that evidence of “an employer’s hiring of some – and especially a majority – of the union applicants is strong evidence against a finding of discrimination.” (CNN Br. at 133.) CNN cites a couple of cases, such as *E & I Specialists, Inc.*, 349 NLRB 446 (2007), which

are distinguishable on their facts because, unlike those cases, CNN actively tracked and screened out bargaining units at each stage of the BSP and there is direct evidence of animus.

While CNN ultimately hired a majority of bargaining unit employees (as part of the substantial and representative complement in the historic unit), “the more reasonable inference is that the Employer’s discriminatory design ultimately failed, not that it was not tried.” *Great Lakes Chem. Corp.*, 967 F.2d at 628. CNN knew there were limits to the number of bargaining unit employees who could be rejected as part of the BSP before the Respondent would negatively affect its ability to operate the D.C. Bureau. This knowledge is illustrated by an e-mail from Robert Jackson to Bob Hesskamp on Tuesday, November 18, 2003 at 1:02 P.M. (GC EX. 534, VOL. 1, DAVID BACHELER at CNNA-PROD0017029). Jackson wrote, in part:

If we could extend offers to the following people it would make the transition far smoother because of their knowadge [sic] and understanding of the plant and the shows. Let me know what you think.

Audio	John Otth
Cam	Mike David
QC	Brenda Elkins
Video	Dave Bacheler
Dir.	Rezaer Bakter [sic]
Dir.	Conrad Hirzel
TD	Dan Taylor
TD	Lori Jenning

(*Id.*) In addition, CNN also hired Peter Mohen after Mohen impressed upon one of CNN’s leading talents, Wolf Blitzer, that the failure to hire Mohen would comprise the quality of the audio for Blitzer’s show, *Wolf Blitzer Reports*.<sup>52</sup> Thus, put bluntly, CNN’s hiring of TVS

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<sup>52</sup> On December 5, 2003, Mohen told Wolf Blitzer that CNN had not hired Mohen and if Mohen was not hired, the audio on Blitzer’s show, *Wolf Blitzer Reports*, would be compromised. (MOHEN 68:13951:9-15.) Mohen had approached Blitzer, not only out of concern for keeping his job, but also because he had a lot invested in Blitzer’s show. (MOHEN 68:13951:20-21, 68:13952:5-7.) Thereafter CNN extended an offer of employment to Mohen. (MOHEN 68:13952:12-25, 68:13953:1-9.)

employees says more about the limits of CNN's ability to endure the self-inflicted pain and attendant risk of operating prominent news bureaus in two important cities with staffs of inexperienced technicians, than it says about CNN's *bona fides* during the hiring process.

Apparently aware of its own limits, CNN structured the Bureau Staffing Project to make it appear, falsely, that the Respondent was creating the wall-to-wall unit. CNN included, not only positions previously performed by bargaining unit employees, but positions staffed by CNN employees, such as the positions in CNN's Information Technology Department, and its production assistant positions. However, the record establishes that, unlike the positions previously staffed by TVS employees, CNN *rehired* all of its IT employees to fill the new IT positions and, likewise, hired its operations assistants and news assistants to fill the new production assistant positions. CNN also included positions, such as Editor/Producers, who were not even subjected to the hiring processes of the BSP, thereby retaining all of the CNN employees who worked in those positions.

If CNN's motives had not been tainted, it could have – and, indeed, would have – hired all of the TVS employees. *E.S. Sutton Realty Co.*, 336 NLRB 405, 406 (2001) (finding that successor hired new workforce while predecessor's employees were working at facility and “there should have been no difficulty in hiring the incumbent workers, had [the successor's] motives been pure”). The fact that CNN hired a majority of bargaining unit employees in the historic bargaining unit or a substantial number of unit employees in the Respondent's bogus unit does not preclude a finding that CNN discriminated against the remaining TVS employees during the hiring process. *Daufuskie Island Club & Resort*, 328 NLRB 415, 421-22 (1999) (finding new employer discriminated against predecessor's employees despite hiring 48.5% of predecessor's employees), *enforced without op.*, 221 F.3d 196 (D.C. Cir. 2000).

**b. The Respondent's Statistics are Irrelevant**

CNN next argues that “[t]he Board repeatedly has made clear that statistical evidence is probative of animus or lack thereof.” (CNN Br. at 135.) Statistical evidence may be *probative* of animus or lack thereof, but the Respondent is really arguing that such evidence is *determinative*. (*Id.* at 135-36.) However, the Board has never so held and for good reason.

While acknowledging the utility of statistics in discrimination cases, the Supreme Court cautioned “that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted.” *United States v. International Bhd. of Teamsters*, 431 U.S. 324, 340 (1977). The Court added, “their usefulness depends on all of the surrounding facts and circumstances.” *Id.* In this case, Administrative Law Judge Amchan found that those facts and circumstances effectively rebutted CNN’s statistical evidence. (ALJD 143:33-45.) The ALJ found that CNN’s statistical expert failed to take into consideration the fact that CNN hired a number of non-unit employees who were interviewed after the debriefing meetings at which time hiring managers allegedly selected the candidates who would be hired as part of the BSP. (ALJD 143:37-40.) The expert also failed, as the ALJ found, to take into account “the possibility that TVS [bargaining unit] applicants were better qualified than nonTVS applicants because they had been doing the jobs for which they were applying for years....” (ALJD 143:42-43.) The ALJ also determined that the expert “ignored the fact that almost 100% of the CNN incumbents who were subjected to the BSP kept their jobs.” (ALJD 143:44-45.) These facts and circumstances, all of which were not considered by CNN’s statistical expert, undermined the probative value of her testimony, leading the ALJ to reject that testimony. (ALJD 143:33-34.)

**c. The ALJ Did Not Shift the Burden of Proof With Respect to Anti-Union Animus**

CNN argues that ALJ Amchan committed a “critical error” by reversing the burden of proof as to anti-union animus and unlawful discrimination. (CNN Br. at 154.) Generally, the Board’s decision in *Wright Line* provides the “appropriate overall framework for violations like the Respondent’s discriminatory hiring plan, which in this case was implemented to avoid *Burns* bargaining obligations.” *Jennifer Matthew Nursing*, 332 NLRB at 307 (citing *Galloway School Lines*, 321 NLRB 1422 (1996)). See also *Planned Bldg. Svcs., Inc.*, 347 NLRB at 673-74 (approving of *Wright Line* as the standard for discriminatory successorship cases). The General Counsel has the initial burden of proving that “a substantial factor” underlying the respondent employer’s hiring decisions was that employer’s desire to avoid having to recognize the union. *Planned Bldg. Svcs., Inc.*, 347 NLRB at 673-74; *Jennifer Matthew Nursing*, 332 NLRB at 307. CNN claims that the ALJ “should have held the General Counsel to his burden” to prove anti-union animus; however, in the Respondent’s view, “he displaced onto CNN the burden of proving lack of animus.” (CNN Br. at 152.)

As explained *supra*, in Section III.C.3., the ALJ properly required the General Counsel to establish a *prima facie* case. The ALJ also properly held that the General Counsel satisfied that burden of proof. (ALJD 21:4.) The ALJ found that it was undisputed that CNN knew the bargaining unit employees were organized and that the Respondent knew which applicants were members of the bargaining unit. (ALJD:4-8.) The ALJ then catalogued the direct and circumstantial evidence supporting a finding that CNN harbored anti-union animus toward the bargaining unit employees, which was a motivating factor in the Respondent’s discrimination against those employees. (See ALJD 21:10-44, 22:1-52, 23:1-47, 24:1-48-31, 25:1-51, 26:1-51, 27:1-43, 28:1-51, 29:1-51, 30:1-51, 31:1-7, 33:33-48, 34:1-26 & 34-51, 35:1-34, 36:1-20, 40:12-

31 & 50-51, 41:47, 42:1-11 & 40-43, 45:25-27, 50:40-49, 51:1, 52:22-25, 53:45-48, 55:3-49, 56:1-21, 62:36-40, 67:35-51.) This evidence included direct evidence of animus, such as independent unfair labor practices by CNN's agents (e.g., unlawful statements that the Respondent would operate non-union) and the Respondent's drafting of the photojournalist position to emphasize experience with DV Cameras, because those cameras were outside of NABET's jurisdiction. This evidence also included circumstantial evidence, such as, *inter alia*, CNN's de-emphasis of prior experience during the hiring process, the Respondent's hiring of inexperienced applicants over experienced bargaining unit employees, CNN's pretextual reasons for not hiring the bargaining unit employees and the absence of any legitimate reasons for why the Respondent chose to hire those inexperienced employees over experienced unit employees.<sup>53</sup>

The evidence presented by the General Counsel clearly satisfies the evidentiary requirements for a *prima facie* that, motivated by anti-union animus, CNN discriminated against bargaining unit employees during the Bureau Staffing Project. *See W & M Properties of Conn., Inc.*, 348 NLRB at 162-63, 174-75 (finding General Counsel satisfied burden of presenting *prima facie* case based on direct evidence of animus as well as pretextual defense); *Adair Express, L.L.C.*, 335 NLRB 1224, 1228-29 (2001) (finding General Counsel satisfied burden of presenting *prima facie* case based on anti-union statements by respondent's agents, pretextual defenses, and circumstantial evidence, such as hiring inexperienced applicants over experienced employees).

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<sup>53</sup> CNN claims that the ALJ improperly shifted the burden of proof from the General Counsel to the Respondent by relying upon CNN's failure to provide any legitimate reasons for not hiring bargaining unit employees. (CNN Br. at 3-4.) The Board recognizes that "a *prima facie* case of discriminatory motivation may be supported by consideration of the lack of any legitimate basis for the Respondent's action." *Weco Cleaning Specialists, Inc.*, 308 NLRB 310, n.3 (1992). *See also Wright Line, Inc.*, 251 NLRB 1083, 1088, n.12, *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1982), *cert denied*, 455 U.S. 989 (1982), *approved in, NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). Thus, the Respondent's claim has no merit.

Once the General Counsel has established a *prima facie* case, the burden of production and persuasion shifts to CNN to prove that it would not have hired the bargaining unit employees even in the absence of their protected activities. *Planned Building Svcs.*, 347 NLRB at 674-75. “To meet this burden ‘an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.’” *Western Plant Svcs., Inc.*, 322 NLRB 183, 194 (1996) (quoting *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)). “False defenses become a two-edged sword in that they may serve to support an ultimate inference of unlawful motive.” *Western Plant Svcs.*, 271 NLRB at 194.

Thus, the ALJ expected CNN to introduce evidence that the Respondent would not have hired the bargaining unit employees in the absence of their protected activities. In other words, ALJ Amchan expected the Respondent to introduce evidence to support a non-discriminatory reason as to why CNN did not hire the bargaining unit employees. *W & M Properties of Conn., Inc.*, 348 NLRB at 163. The ALJ observed, “[o]ne of the striking things about this case is how little specific evidence Respondent presented on issues that really matter, such as why various individuals were hired in the Bureau Staffing Project and why other individuals were not hired.” (ALJD 140:8-10.)<sup>54</sup> Indeed, throughout his decision, the ALJ points out where CNN failed to produce evidence in support of the Respondent’s burden under *Planned Bldg. Svcs.* (ALJD 43:31-37, 45:12-15, 46:8-51, 47:1-52, 48:1-51, 49:1-51, 50:1-51, 51:1-2 & 39-45, 54:5-34, 54:1-35, 56:26-34 & 37-51, 57:1-52, 58, 1-16, 60:28-39, 140:8-10) or when the evidence actually introduced by CNN, such as its “Turner Performance Management Program” or “TPMPs,”

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<sup>54</sup> CNN devoted most of its energy to introducing evidence relating to technological changes at the D.C. and N.Y. Bureaus that took place from 2004 to 2008, long after the termination of the ENG Agreements and the implementation of the BSP.

appeared to be generated to justify the Respondent's hiring practices after the fact (ALJD 68:1-51, 69:1-61, 70:1-6.)

In its exceptions, CNN forgoes a detailed discussion of the evidence that would prove the Respondent would have refused to hire bargaining unit employees in the absence of their protected activities, opting to argue that the ALJ is second-guessing CNN's business decisions and/or substituting his judgment of the employees' qualifications for the judgment of the Respondent. (CNN Br. at 3 & n.2, 125, 165-66.) The Board has recognized that "[a]nalyzing the relevant evidence is not an exercise in second-guessing the Respondent." *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), *enforced*, No. 95-9502, 2006 U.S. App. LEXIS 25243 (10th Cir. Oct. 6, 2006). "It is, instead, a necessary process, in light of the complaint allegation, to determine whether or not the Respondent has violated the Act. *Midnight Rose Hotel & Casino*, 343 NLRB at 1005. And, based upon its arguments with respect to why it did not hire certain bargaining unit employees, it is clear that CNN falls far short of proving that it would not have hired those employees in the absence of their protected activities and the Respondent's anti-union animus. (See CNN Br. at 165-80.)

Indeed, CNN's explanations only underscore the Respondent's anti-union animus toward these employees. "Looking at the situation from a neutral business standpoint, one would expect that, in starting a new operation like this, an employer would look to the people who were already doing the work, who were familiar with the Respondent's facility and its needs." *Downtown Hartford YMCA*, 349 NLRB 960, 982 (2007). In this case, there was a ready and available workforce of bargaining unit employees at both the D.C. and N.Y. Bureaus, all of whom had worked with CNN personnel for years and all of whom had knowledge of the equipment and facilities used at the bureaus. See *Houston Distribution Svcs.*, 227 NLRB 960,

966 (1977) (finding incumbent workforce “provided a willing and available source of manpower, which could serve Respondent’s immediate need for qualified [employees] with little adjustment and training”), *enforced*, 573 F.2d 260 (5th Cir. 1978). Yet, during the hearing before the ALJ and in its exceptions to the Board, the Respondent asserted a litany of reasons for its refusal to hire certain bargaining unit employees, which only served to provide additional evidence of CNN’s animus toward the protected activities of those employees.

For example, CNN continues to assert justifications for failing to hire employees, such as Sarah Pacheco, Larry Langley and Jimmy Suissa, that were not considered by the hiring managers. The Respondent argues that Pacheco was a “weak candidate” who “had an unfavorable record at Team,” Langley had a “track-record of poor behavior” and Suissa had been disciplined by Team after an altercation with a freelancer. (CNN Br. at 167-69, 176.) However, CNN’s hiring managers (*e.g.*, Matt Speiser and Stuart Redisch) studiously avoided any consultation of TVS’ employment records. (SPEISER 18:3933:22-24; REDISCH 25:5556:7-17.) Thus, CNN is raising nothing more than *post hoc* rationalizations for why the Respondent did not hire these employees. Such rationalizations are, in and of themselves, additional evidence of anti-union animus reinforcing the fact that CNN acted with unlawful motivation when it refused to hire these TVS candidates. *See Shortway Suburban Lines*, 286 NLRB 323, 326-27 (1987) (rejecting reasons proffered by respondent for not hiring predecessor’s employees, including one proffered in post-hearing brief to ALJ, evidence did not establish that respondent relied on reasons to reject employees), *enforced*, 862 F.2d 309 (3d Cir. 1988) (unpub. op.).

The Respondent also asserts patently pretextual justifications for failing to hire some of the bargaining unit employees. Most notably, CNN claims that these employees – such as Sarah Pacheco, John Urman, David Jenkins, Luis Munoz, and Charles Anderson – lacked non-linear

editing experience, suggesting that CNN did not hire them for that reason. (CNN Br. at 165-80.)

CNN made that argument before ALJ Amchan, who rejected the argument as pretextual. (ALJD

32:10-51, 33:1-39.) Indeed, CNN's own counsel elicited the evidence of pretext from the

Respondent's Deputy D.C. Bureau Chief Stuart Redisch, who testified as follows:

Q: (By Respondent's Counsel)... How is nonlinear editing significant, if at all, in coverage in Washington, D.C.?

A: (By Redisch) It's significance is marginal, as far as how CNN is set up, the bureau is set up, because many of the – much of what – the video we bring in, comes in on fiber lines that were already established, whether it's a hearing coming in on line, whether it's a photo opportunity at the White House that gets fed out, it gets fed out on lines and that's already coming into the house. So the need for editing material out in the field is – the need is low. There are times where, yes, it could help. You're at a hearing and you can whittle down what you are going to use; you are at a news conference or you need to get something done right away, for air. But for the most part, since the bureau is wired in a way that much of its material comes in on lines, what we call lines, that the need for nonlinear editing out in the field is marginal.

(REDISCH 25:5695:10-25, 25:5696:1.) Moreover, while CNN also faults many of these bargaining unit employees for their lack of experience in shooting film, the Respondent hired many inexperienced employees who had little with a camera. (ALJD 73:8 (finding Haan “was not principally a photographer); ALJD 73:43 (finding Helm was editor, not photographer); ALJD 74:34-4 2 (finding Moorehead did not have requisite three years of experience); ALJD 76:4-6 (finding Yarmouth had “lack of practical shooting experience).)

In addition to post-hoc and pretextual rationales, CNN also relies upon the subjective evaluations of its hiring managers, which they made during the Bureau Staffing Project. *Waterbury Hotel Mgmt., Inc.*, 333 NLRB at 529. However, “Respondent's use, and misuse of subjective criteria makes it virtually impossible for Respondent to establish a *Wright Line* defense for any employee.” *Id.* As discussed extensively in Section II, CNN used the Bureau

Staffing Project, with its behavioral interviews and debriefing sessions, to winnow the number of bargaining unit employees at each of the bureaus. Thus, evidence relating to employees' average interview scores (CNN Br. at 167 (Pacheco)), "motivation" (*id.* at 169 (Suissa)), "concerns about ethics and integrity" (*id.* at 171 (Crennan)), lack of creativity (*id.* at 175 (Jenkins)) or issues with employee's tapes (*id.* at 177-78 (Anderson)) is tainted by CNN's objective of avoiding all obligations of a successor employer. *Waterbury Hotel Mgmt., Inc.*, 333 NLRB at 529.

Setting aside the post-hoc and pretextual rationales, along with the tainted evidence, there is a void of evidence that would show CNN would have refused to hire any of the bargaining unit employees absent their protected activities, *i.e.*, their status as bargaining unit employees represented by NABET-CWA. The record establishes that CNN hired a group of experienced TVS employees (because it had to in order to ensure a smooth transition from TVS to CNN without affecting the quality of its broadcasts, *see* GC EX. 534, VOL. 1, DAVID BACHELER at CNNA-PROD0017029) and then proceeded to hire inexperienced employees (*e.g.*, "growth candidates") for the remaining positions. *See Laro Maint. Corp.*, 56 F.3d at 230; *Great Lakes Chem. Corp.*, 967 F.2d at 628; *Laro Maint. Corp.*, 312 NLRB at 162. In doing so, CNN deviated from its hiring policies, or followed unwritten policies (such as the policy with respect to "growth candidates") to hire non-unit employees over bargaining unit employees, even when the non-unit employees failed to satisfy the minimum experience requirements (*e.g.*, John Bena, Derek Davis, Christian Keller and Jeremy Moorehead) and/or even though those non-unit employees were not processed through the Bureau Staffing Project. (*See, e.g.*, ALJD 35:1-26, 55:32-35, 73:22-27 74:24-4.

After hiring these employees, CNN proceeded to provide basic training on how to use, not only the new technologies, but also the current equipment and procedures, which had been

used by the bargaining unit employees for years. (ALJD 31:28-44, 32:10-51, 33:1-39, 34:1-26, 79:1-52, 80:1-25, 119:40-44.) The Respondent even used the bargaining unit employees who were hired as part of the BSP to train the inexperienced employees on the existing equipment and procedures. *See also* ZOSSO 27:6050:8-12 (explaining that bargaining unit employee, Rick Morse, conducted an orientation taking non-unit CNN employees to show them the CNN locations at the White House, Capitol Hill and the State Department); ZOSSO 27:6050:12-16 (explaining Morse also showed live drops to new hires, which was important given the number of live shots handled by CNN employees); ZOSSO 27:6050:18-20, 27:6052:23-25, 27:6053:1-4 (explaining that she trained non-unit employee John Bena on how to use basic equipment, such as audio mixer and IFB Box); PARKER 34:7127:2-15 (explaining training of new employees on how to get around, where drop were, etc.), 32:7125:21-25, 32:7126:1-24 (describing training provided to new hires on how to operate equipment to ensure quality video and audio).)

Accordingly, NABET Local 31 respectfully submits that CNN has failed to establish its burden under *Planned Bldg. Services* to prove that it would not have hired the bargaining unit employees in the absence of their protected activities. The ALJ reached this conclusion based upon a lengthy review and discussion of the evidence in the record. The ALJ further concluded that CNN refused to hire many of the bargaining unit employees because of their status as members of the bargaining unit, in furtherance of the Respondent's objective of avoiding any obligation to recognize NABET-CWA. Local 31 respectfully requests that the Board deny CNN's objections and affirm the ALJ's findings of fact and conclusions of law in this regard.

**5. CNN's Reliance on New Technology is Additional Evidence of Pretext**

Rather than introduce evidence relating to why the Respondent did not hire certain bargaining unit employees, CNN spent an enormous amount of time in an effort to introduce

everyone to digital newsgathering (“DNG”), non-linear editing (“NLE”), as well as a host of acronym-named technologies or equipment such as BGAN, COFDN, FTP, MIRA and XSAN. CNN also engaged in a great effort to educate everyone about the inner workings of the latest equipment (e.g., Clarity Walls, Enco music servers and Euphonix audio boards) and software (e.g., Final Cut Pro) used in the broadcasting industry. In its brief, CNN asserts that “understanding changes in technology was so central to the proper resolution of this case” and that the Respondent provided an “an expert witness to explain the technological changes in question and why they made it logical for CNN to want its own workforce in place.” (CNN Br. at 8.) The Respondent also complains that the ALJ “summarily dismisses this technology as ‘pretextual’....” (*Id.*) Although CNN misstates the ALJ’s findings, the ALJ properly rejected the Respondent’s attempt to rely upon technological changes as a defense to its failure to hire many of the bargaining unit employees.

ALJ Amchan does not dismiss the technology as pretextual; instead, the ALJ dismisses CNN’s reliance upon the technology to justify the termination of experienced bargaining unit employees and the hiring of inexperienced non-unit employees. *See Omahalines Hydraulics Co.*, 342 NLRB 872, 882 (2004). CNN may very well have thought that the Respondent needed to implement non-linear editing with G-4 laptops, add Enco music servers, install Euphonix audio boards and erect a Clarity Wall in order to keep pace with technological advances in the broadcasting industry.

However, it is irrational for CNN to rely upon technological changes particularly in light of the evidentiary record. *Omahalines Hydraulics Co.*, 342 NLRB at 882. The record establishes that, while working at the D.C. and N.Y. Bureaus, the bargaining unit employees worked in “an industry [in which] technological changes happen daily” and, consequently, the

employees and their employer “adjusted [their] workflow to whatever technological changes that CNN implemented....” (FRYDENLUND 75:15218:4-17.) The record further establishes that the work of the employees remained substantially the same both before and after the implementation of the technology. (ALJD 19:29-50, 68:1-51, 69:1-27. *See also* BACHELER 69:14204:7-22 (stating nothing changed with respect to studio or control room); KUCZYNSKI 14:2849:19-22 (stating, once on CNN payroll, “I did basically the same job, the same shift, the same everything, really”); MORSE 28:6247:6-11 (testifying job did not change from summer of 2003 until he left CNN’s employ).) The Respondent trained all of the new employees in the new technologies and, with respect to employees who had not previously worked for TVS, CNN had to train those employees in the old equipment. (*See, e.g.*, Garraty 67:13761:16-17 (testifying that he received two days of training in non-linear editing while working for CNN after transition). And, as noted above, CNN had to train some of the new employees in the existing equipment and processes that were used at the bureaus. (ZOSSO 27:6050:8-12; ZOSSO 27:6050:12-16; ZOSSO 27:6050:18-20, 27:6052:23-25, 27:6053:1-4; PARKER 34:7127:2-15, 32:7125:21-25, 32:7126:1-24.)

ALJ Amchan concluded that, based on this evidence, it defies logic for CNN to argue that, as part of an initiative to take advantage of new technology, the Respondent has to terminate the experienced, existing workforce and hire a new workforce that does not even know how to operate the existing equipment. *Omahalines Hydraulics Co.*, 342 NLRB at 878-79. In *Omahalines Hydraulics Co.*, the Board addressed a company’s reliance upon the institution of a new “Demand Flow Technology” production process for its refusal to afford recall rights striking employees. The employer refused to afford recall rights because the new technology, which was implemented during the strike, allegedly changed the nature of the jobs, from one where employees worked on a particular piece of equipment to one where employees were trained on

all of the equipment in the factory. *Omahalines Hydraulics Co.*, 342 NLRB at 878-79. The ALJ found that, in fact, there had been no substantial change to the work required by the jobs. The ALJ further found that, in refusing to provide recall rights to the experienced strikers when jobs would become available, the employer was willing to rely upon inexperienced, new employees to staff the production lines. *Id.* at 882. The ALJ then observed, with the Board's approval:

As long ago as 1938, in an opinion affirming an early decision of the Board, Judge Learned Hand observed that a presumption of impropriety may be drawn from an employer's refusal to act on the principle that "seasoned men are better than green hands."

*Id.* at 883 (quoting *NLRB v. Remington Rand*, 94 F.2d 862, 872 (2d Cir. 1938)). The ALJ further concluded, with the Board's approval, that the employer's reliance upon its new technology to justify its refusal to provide recall rights to be pretextual. *Id.* at 872. As in *Omahalines Hydraulics Co.*, ALJ Amchan found CNN's reliance upon its new technologies to be pretextual, particularly when used to justify its refusal to hire the experienced bargaining unit employees.

Accordingly, NABET Local 31 respectfully submits that the ALJ properly found that CNN's reliance upon the new technologies implemented at the D.C. and N.Y. Bureaus to be pretextual. Local 31 requests that the Board deny CNN's exceptions and affirm the ALJ's findings of fact and conclusion of law with respect to the Respondent's reliance on its new technology as a defense to the unfair labor practices.

**D. The ALJ Properly Recommended a Broad Make-Whole Remedy**

As the preceding sections illustrate, the General Counsel has satisfied the burden of proof necessary to establish multiple unfair labor practices that violate Sections 8(a)(5), (3) and (1) of the Act, while Respondent CNN has failed to satisfy its burden of proffering legitimate, nondiscriminatory justifications for its actions. Therefore, the Administrative Law Judge recommended a comprehensive make-whole remedy designed to redress the unlawful effects of

CNN's unfair labor practices. CNN attacks the ALJ's recommended remedy; however, the Respondent's arguments lack merit.

CNN first argues that the Board has improperly delayed the litigation of this case; and, consequently, the Respondent believes that it would be improper to issue, among other things, a reinstatement order or a bargaining order. (CNN Br. at 182-83.) The Respondent fails to recognize that, even if the Board delayed the litigation of this case (which it did not), "[w]ronged employees are at least as much injured by the Board's delay ... as is the wrongdoing employer." *NLRB v. J. H. Rutter Rex Mfg. Co.*, 396 U.S. 258, 264 (1969). Consequently, "[t]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *J. H. Rutter Rex Mfg. Co.*, 396 U.S. at 265.

CNN next claims that a status quo order will unduly prejudice the Respondent. (CNN Br. 184-87.) To the contrary, neither the General Counsel nor the Charging Parties are asking for an order that requires CNN to return its G-4 laptops and Final Cut Pro software to the vendor, place the Enco music servers and the Euphonix audio boards at the curbside, or tear down the Clarity Wall. The General Counsel and the Charging Parties are asking for an order that requires CNN to bargain with NABET-CWA, reinstate the TVS employees, and restore the terms and conditions of employment to the status quo ante (with the obvious exception of benefits or higher wage rates that were unlawfully granted, which should be restored to the status quo only upon request of NABET-CWA). Such a remedy is clearly appropriate given the facts of this case, because it redresses much of the harm caused by CNN's unfair labor practices.

Finally, CNN brazenly claims that, "[i]mposing a bargaining order on CNN employees – who up to this date have chosen to remain unrepresented – would offend this principle of employee choice." (CNN Br. at 197.) The employees have not chosen to remain unrepresented

for the past five years; instead, CNN has deprived the employees of their Section 7 rights to organize and bargain collectively. The evidence clearly proves that, through the Bureau Staffing Project, CNN sought to eliminate NABET-CWA from the D.C. and N.Y. Bureaus so that the Respondent could manage the workforces without having to bargain with NABET-CWA. This point was underscored by Deputy Bureau Chief Stuart Redisch, who told employees that they should not exercise their protected rights and give CNN an opportunity to manage them. (ZOSSO 27:6032:9-14. *See also* MORSE 28:6236:20-25, 28:6237:1-3; PARKER 32:7119:16-19.)

CNN's "concern" about employee rights is a sham, as the Respondent employer is invoking its employees' rights in order to deny them those rights. As one court keenly observed:

We note that here, as is often the case in labor cases, the employer argues valiantly for the right of the 'rank and file' to be protected against the imposition of a union they did not want. Counsel for the company eloquently argues that purposes of the Act are frustrated when a union is imposed on employees against their will. What this pious statement overlooks is that there was indeed a fair representation election in this bargaining unit and that the union was selected by a majority of the employees. It further overlooks the numerous unfair labor practices which the employer engaged in to bring illegal pressure on the employees to reject the union.... While such representations are not at all novel arguments by employers ..., the overnight transformation to real concern for the "free choice" of the employees by the employers who make these arguments in such cases never ceases to amaze us.

*NLRB v. Schill Steel Prods., Inc.*, 480 F.2d 586, 591 (5th Cir. 1973). In this case, there was a representation election and a certification by the Board of NABET-CWA as the collective bargaining representative of the employees in the bargaining unit at the D.C. Bureau. There has also been a series of subsequent voluntary recognitions by successor subcontractors of NABET-CWA as the collective bargaining representative. The longstanding, continuous representation of the employees at the D.C. Bureau by NABET-CWA was brought to an abrupt end on December 5, 2003 by CNN's unfair labor practices, as discussed in detail in Local 31's Post-Hearing Brief and this Reply Brief. The lack of representation since December 5, 2003, has been

the result of CNN's unlawful discrimination against TVS employees and its equally unlawful refusal to recognize their collective bargaining representative.

**E. CNN's Challenges to the ALJ's Procedural and Evidentiary Rulings Lack Any Semblance of Merit**

CNN raises several challenges to certain procedural and evidentiary rulings made by ALJ Amchan during the trial. Some of these arguments are efforts to resurrect issues long settled by the Board, such as a claim that the ALJ erroneously interpreted Fed. R. Evid. 612. (CNN Br. 202-06.) Other arguments are frivolous, such as CNN's attack on the Regional Director for an allegedly "improper letter" to the bargaining unit employees. (CNN Br. 206-210.) As explained *infra*, NABET Local 31 respectfully submits that the Board should deny all of these challenges because CNN has failed to establish any prejudice.

***1. CNN Has Not Established any Prejudice Arising from the ALJ's Rulings With Respect to Fed. R. Evid. 612***

CNN challenged ALJ Amchan's rulings that required *all parties* to produce documents reviewed by witnesses within the six-month period preceding the hearing. The Respondent filed a request for special permission to appeal, which the Board granted. *CNN America, Inc.*, 352 NLRB 265 (2008). The Board set aside ALJ Amchan's ruling. *Id.* at 267. In doing so, the Board observed that CNN did not request a specific remedy with respect to documents that had been disclosed pursuant to the ALJ's order. *Id.* at 267, n.9. The Board further stated that it applied its order prospectively only, "without prejudice to raising the issue in any exceptions to the judge's decision that he will issue following the conclusion of the hearing." *Id.*

The Respondent filed exceptions relating to the now-rejected interpretation of Fed. R. Evid. 612 by the ALJ and addressed those exceptions in its brief in support. (CNN Br. at 202-06.) CNN claims that the ALJ's ruling prejudiced the respondent in its preparation of the

witnesses, by limiting its counsel's ability to prepare witnesses and invading their work product.<sup>55</sup> (*Id.*) According to CNN, these limitations resulted in its management witnesses having faulty memories when they were called by the General Counsel as adverse witnesses. (*Id.*) The Respondent concludes, "[t]he prejudicial effect to CNN is evident in the Decision, which cites the inability of some witnesses to recall precise details of meetings and events that occurred five years earlier – a failing of memory caused in major part by his ruling that prevented ordinary trial preparation with documents – as a basis to make a whole sale finding of lack of credibility. (CNN Br. at 205-06.)

CNN's claim of prejudice omits one important fact: *viz.*, the Board set aside the ALJ's evidentiary ruling during the General Counsel's case, which meant that the Respondent's counsel could have prepared its witnesses as they saw fit in anticipation of CNN's case, including the presentation of evidence that would have filled any perceived gaps in testimony. While the General Counsel called CNN managers as adverse witnesses, CNN recalled many of these same management witnesses – such as Jeff Kinney, Joe Murphy, Cindy Patrick, and Jeff Polikoff in the Respondent's case in chief. When the Respondent called these witnesses during its case, the ALJ's ruling was not in effect. Thus, the Respondent's counsel could freely prepare these

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<sup>55</sup> The attorney-client privilege and/or the work product doctrine may be waived if a witness reviews a privileged document in preparation for testifying. *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*, 81 F.R.D. 8, 10-11 (N.D. Ill. 1978). See also *Barrer v. Women's Nat'l Bank*, 96 F.R.D. 202, 203-04 (D.D.C. 1982); *Marshall v. United States Postal Svc.*, 88 F.R.D. 348, 349-50 (D.D.C. 1980). There is no infringement on attorney work product in situations where a party is required to produce documents selected by its attorney for the witness to review before his or her deposition. See *Reed v. Advocate Health Care*, No. 06 C 3337, 2008 U.S. Dist. LEXIS 3561, at \*9-\*10 (N.D. Ill. Jan. 17, 2008); *Pepsi Cola Bottling Co. of Pittsburg, Inc. v. Pepsico, Inc. Bottling Group*, No. 01-2009 KHV, 2001 U.S. Dist. LEXIS 19935, at \*4-\*5 (D. Kan. Nov. 8, 2001).

witnesses to testify about any matter as part of the Respondent's case, including matters for which the witnesses needed to refresh their recollection.<sup>56</sup>

Based upon the foregoing, NABET Local 31 respectfully submits that CNN has not suffered any prejudice as a result of the ALJ's interpretation of Fed. R. Evid. 612. Therefore, Local 31 respectfully requests that the Board deny CNN's exceptions on this issue.

## 2. *CNN's Assault on Regional Director Wayne Gold is Frivolous*

Regional Director of Region 5, Wayne Gold, sent a letter dated June 15, 2007, to the former TVS (and, in many cases, current CNN) employees. In the June 15, 2007 letter, Regional Director Gold stated, in relevant part as follows:

You have heard a lot about the CNN/TVS case now set for trial by the National Labor Relations Board. NABET Local 11 and Local 31 have been the exclusive bargaining representatives of employees working at CNN's New York and Washington, D.C. bureaus in bargaining units that were certified by the NLRB, following secret ballot elections. Thereafter, for many years CNN and NABET executed and maintained collective-bargaining agreements covering terms and conditions of employment of these employees.

This past March, the General Counsel of the NLRB authorized me to issue an unfair labor practice complaint against CNN and TVS. As a CNN and/or former TVS employee, you are entitled to know the basic allegations contained in the complaint. The complaint alleges that CNN and TVS, as joint employers, under federal labor law, were obligated to bargain with NABET-CWA Locals 11 and 31 before terminating the TVS contracts, transferring bargaining unit work, and discharging TVS employees. The complaint also alleges that CNN was a successor employer to TVS with certain other obligations, and that CNN unlawfully limited its hiring of former TVS employees.

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<sup>56</sup> In this regard, while the General Counsel called management witnesses as adverse witnesses, CNN's counsel had the opportunity to cross-examine these witnesses after the General Counsel completed its direct examination. If the witness failed to recall some event or other fact, CNN's counsel could have, at that time, sought to refresh the witnesses' recollection through the cross-examination. For example, a witness testified on direct examination that he or she could not recall who attended a meeting. Respondent's counsel could have asked the witness on cross-examination if there are any documents that would refresh the witness' recollection, such as meeting notes, and then proceeded to fill in any perceived gaps in testimony.

To remedy CNN's unlawful conduct, the complaint seeks an Order requiring CNN to recognize and bargain with NABET Locals 11 and 31, to give jobs to any former TVS employees found to have been unlawfully terminated or refused a job, and to restore all of the more favorable terms and conditions of employment, including all seniority benefits, that were in effect when CNN took its unlawful actions.

No doubt, CNN will contact you in an effort in an effort to convey its side of the story. After all, CNN is in the news business, and it has the right to communicate its position to you. This matter is set for trial this fall. The trial is a search for truth. The truth is found when witnesses testify under oath before an Administrative Law Judge in a formal proceeding, free from interference, restraint or coercion. Over the next few months, NLRB attorneys may contact you to discuss the facts giving rise to this case. Your voluntary cooperation with the NLRB is protected by federal law. It is unlawful for an employer to take action against you for speaking to an NLRB attorney or for testifying in NLRB proceedings.

If you have any questions or concerns about this matter, please do not hesitate to contact one of the NLRB attorneys assigned to this case....  
(CNNA Ex. 1.)

At the December 3, 2007 hearing in this case, counsel for CNN, stated to the ALJ, "I'm compelled to bring to your attention an instance of extremely serious misconduct that we discovered in reviewing Local 31's production late last Thursday night," adding "[t]his is not misconduct by Local 31...." (FASMAN 2:115.) Counsel for CNN proceeded to accuse the Regional Director of Region 5, Wayne Gold, of the "extremely serious misconduct." (FASMAN 2:117-127.) More specifically, and in CNN counsel's own words:

It is a letter from regional director Gold addressed to all former TVS employees and it starts, "Dear Former TVS Employees." It's dated June 15th, 2007. It is therefore a document that has gone to the entire witness pool, the entire employee witness pool in this case I must say that the document in itself, once a case is sub judice, I have never seen a senior official of the National Labor Relations Board addressing the entire witness pool and I think it's unprecedented and improper from that point of view, but I bring this to Your Honor's attention not for the fact of the document, but from the content of the document.

(Tr. 117.) CNN's counsel expounded on this point:

The letter contains completely inaccurate fact statements that go to the issues in this case, and if I may, Your Honor, let me direct your attention to the last sentence in the first paragraph and it reads, "Thereafter, for many years, CNN and NABET executed and maintained collective bargaining agreements, covering the terms and conditions of employment of these employees," and I think "these employees" necessarily refers to the Team Video employees in the New York and D.C. Bureaus.

\* \* \*

I will say as well in the second paragraph, second sentence, it says, "As a CNN and/or former TVS employee," it refers to "these employees," which is the entire witness pool."

(Tr. 117-18.)

Counsel for CNN also discussed the Respondent's view is with respect to the "inaccurate fact statements" in the June 15, 2007 letter. As counsel explained, once again, in his own words:

I also want to make clear that in our view this is a violation of the *federal criminal laws*, as explained to Mr. Gold, Section 18 U.S. Code Section 1001 [18 U.S.C. § 1001] provides that "Whoever in a matter within the jurisdiction of the executive, legislative or judicial branch of government, of the United States, knowingly and willfully" and then subparagraph 2 says, "Makes any materially false, fictitious, fraudulent statement or representation, or" subparagraph 3 says, "Makes or uses any false writing or document, knowing the same or contain any materially false, fictitious or fraudulent statement or entry shall be fined under this title, or imprisoned for not more than five years, or both."

I note that subsection 3 of 18 U.S. Code 1001 [18 U.S.C. § 1001(3)] provides it makes it a crime to use a false document in writing, and in our view, that includes a false document, a document from Mr. Gold, containing false statements of fact about key issues in this case, showing such a document to a witness, asking a witness to rely upon that document, or suggesting to the witness – to a witness that he or she should rely upon the false representation. I think all of those are arguably criminal conduct.

(Tr. 122-23 (emphasis added).)

As for the alleged prejudice suffered by CNN as a result of the "false representation," counsel for CNN stated:

I don't think that we're in a position, certainly, at this point, to cross-examine employee witnesses who may have received this and may have relied upon this

effectively. I think this can be sort out very quickly. I would ask Your Honor to please inform the parties to whom we'll send subpoenas that they should answer in a week, not in two weeks, so that we can get the facts before your Honor, and so that your Honor can make some judgments as to exactly what happened here and what impact this may have had upon the testimony that you're about to hear.

(Tr. 125.) Thus, counsel for CNN stated that he intended to serve subpoenas documents "to find out what happened here," including "where it was sent, to whom it was sent...." (Tr. 126.) Counsel for CNN further cited two cases for the proposition that "there are a number of cases that deal with a trial judge's duty to investigate things just like this" (Tr. 126). *See Ty, Inc. v. Softbelly's Inc.*, 353 F.3d 528 (7th Cir. 2003); *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995).

These two cases do not support CNN's position. In one case, a losing party filed a motion pursuant to Fed. R. Civ. P. 60(b)(3), seeking to set aside the final judgment on the grounds of serious misconduct by the prevailing party. *Ty, Inc. v. Softbelly's Inc.*, 353 F.3d 528, 534, 536-37 (7th Cir. 2003). Rule 60(b)(3) provides that a court may set aside a final judgment where there is "fraud (whether previously called intrinsic or extrinsic), misrepresentation or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3) (as revised Dec. 1, 2007). The prevailing party had persuaded the "star witness" for the losing party not to testify in the case and, as the appellate court noted, "[w]itness tampering is serious misconduct." *Ty, Inc.*, 353 F.3d at 537. In the other case, the losing party filed a motion pursuant to Fed. R. Civ. P. 60(b)(3) asserting that counsel for the prevailing party used an altered and fraudulent document in his closing argument to the jury. *Lonsdorf v. Seefeldt*, 47 F.3d 893, 896 (7th Cir. 1995). In that case, the losing party was able to establish the prejudice suffered as a result of the opposing party's use of the forged document while arguing before the jury. *Lonsdorf*, 47 F.3d at 897, 898.

In each of those cases, a party was able to present *something* other than the unsupported statements of its counsel. In this case, CNN has not presented anything, making its effort

“hopeless.” *Roger Edwards, LLC v. Fiddes & Son LTD*, 437 F.3d 140, 143 (1st Cir. 2006). The only misstatement that CNN can proffer is the incorrect statement in the Regional Director’s June 15, 2007 letter that “for many years CNN and NABET executed and maintained collective-bargaining agreements covering the terms and conditions of these employees.” (Ex. 2 (emphasis added).) Yet, this misstatement is completely irrelevant – as the allegations are that CNN is a joint employer with TVS and, in the alternative, that CNN is a successor to TVS. If CNN was the one that signed the collective bargaining agreement, then there would be no basis for alleging that CNN is either a joint employer with, or successor to, TVS. Any confusion is quickly dispelled when the employee realizes that the reference to “CNN” is a typographical error and that it should read “for many years TVS and NABET executed and maintained collective-bargaining agreements....” That is why there is the allegation that CNN is a joint employer with TVS and/or that CNN is a successor to TVS.

Moreover, any confusion that may have arisen from the Regional Director’s letter was dispelled by the two letters sent by the Regional Director after CNN raised the issue. After CNN raised the issue, the Regional Director sent a letter to the employees correcting the inadvertent error in the initial letter. (CNNA Ex. 2.) CNN still protested and the ALJ then allowed CNN to draft its own letter that would be sent by the Regional Director to the employees. The ALJ edited the letter and the Regional Director sent that letter. The ALJ then concluded that the issue had been resolved. Indeed, after receiving three letters, no employee would have been under any misimpression about the facts or issues in this case.

In any event, as aptly stated by the First Circuit in *Roger Edwards, LLC*, “[s]o what we have here are highly dubious charges of fraud which, in any event, are not effectively connected to any plausible showing of necessary prejudice.” 437 F.3d at 144. The court added, “[n]o

reasonable lawyer considering a Rule 60 motion could suppose such a combination had any chance of upsetting a final judgment reached after extensive litigation and a defeat of [his client's] claim in different respects by both judge and jury." *Id.* In this case, we have the "highly dubious" and very injudicious allegations of criminal conduct without even the most generalized showing that there was any prejudice on CNN's ability to present its case. Local 31 respectfully requests that the Board strongly reject CNN's exceptions on this point.

**3. *The General Counsel's Amendments to the Complaint Were Not Prejudicial or Unwarranted***

CNN complains that the General Counsel was allowed to amend the complaint to identify additional discriminatees at the D.C. and N.Y. Bureaus during the trial. (CNN Br. 210.) The particular discriminatees at issue were freelancers (also referred to as "per diem" or "daily hire" employees). (*Id.*) The Respondent claims that "CNN would have investigated its case, examined witnesses differently had it known of these allegations at the time." (*Id.* at 212.)

The Amendments simply added names of freelancers who were also discriminatees; the amendments did not involve any new theory of liability. The issues pertaining to freelancers were litigated in the case. (*See, e.g.*, D'ANNA 4:351:25, 4:352:1-5, 4:438:16-25, 4:439:1-14, 4:512:11-25, 4:513:1-12; PEACH 8:1313:19-25, 8:1314:1-9. *See also* Tr. 3428-29 (argument of counsel).) Indeed, CNN admits that employees who worked as freelancers for TVS and CNN were called by the General Counsel. (CNN Br. at 214.) While CNN claims that it had no knowledge that the General Counsel intended to add "freelancer claims," the above quoted citations and other citations relating to freelancer, per diem or daily hire employees – relating to their coverage by the collective bargaining agreement and their membership in the collective bargaining unit – clearly demonstrate that the matters were raised early in the case.

CNN also claims that the ALJ improperly revoked its subpoena to the extent that it sought “information” about freelancers. (*Id.* at 212-13.) As CNN notes, the ALJ stated, “[i]t is irrelevant to this case whether freelancers, etc. who worked for TVS, *were members of Local 11, or to the contrary exercised their Section 7 right not to join the Union. It is also irrelevant to any issue in this case which such persons paid dues to Local 11.*” (*Id.* (emphasis added).) As the ALJ’s ruling illustrates, CNN was not seeking information about whether daily hires were members of the bargaining unit; the Respondent was seeking information about whether they were members of the union. Such an inquiry is clearly inappropriate as it invades the employees’ Section 7 rights.

Accordingly, NABET Local 31 respectfully submits that the ALJ properly allowed for the amendments to the compliance specification, which added freelancers as discriminatees. CNN has suffered no prejudice from the amendments, other than being denied an improper attempt to engage in a fishing expedition into the employees’ protected rights. Local 31 respectfully requests that the Board deny CNN’s exceptions with respect to this issue.

#### ***4. The ALJ Properly Managed the Case***

The Respondent excepts to the ALJ’s rulings with respect to the presentation of witnesses. First, CNN complains that the ALJ improperly allowed the General Counsel to defer cross-examination of Cindy Patrick and Loren Kile. (CNN Br. at 216-18.) Second, CNN complains that the ALJ improperly allowed the General Counsel to avoid calling witnesses back for successive days of testimony, hindering its ability to cross-examine its own managers. (CNN Br. at 218-20.) Both arguments are without merit.

First, with respect to the cross-examination of Patrick and Kile, the ALJ’s rulings were clearly appropriate. While CNN relies on *American Wholesalers, Inc.*, 210 NLRB 499 (1974),

that case does not support the Respondent's argument. The Board stated in that case, "[t]he orderly and normal presentation of testimony in Board proceedings, *absent unusual circumstances not present here*, requires that cross-examination of witnesses follow their testimony on direct." *American Wholesalers*, 210 NLRB at 499 (emphasis added). The Board faced a question of the deferral of cross-examination in an objections hearing in a representation case, which involves circumstances that are vastly different than this case. The unfair labor practice proceedings in this case presented unusual circumstances, with tens of witnesses and tens of thousands of pages of documents, all of which concern an organized plan by the Respondent to deny the protected rights of hundreds of employees in Washington, D.C. and New York, which presents vastly different, and much more complex, issues than whether a union improperly coerced employees prior to a representation election. *American Wholesalers, Inc.*, 222 NLRB 917, 918 (1976) (noting employer argued hearing officer's erroneous conclusions about union's alleged coercive conduct during election). In any event, while CNN claims that ALJ Amchan found Kile and Patrick not to be credible witnesses "in reliance at least in part on the deferred cross-examination," the Respondent fails to point out where in the decision that the ALJ actually relied on that cross-examination to discredit the witnesses.

With respect to the deferral of testimony, the ALJ's rulings are correct. Prior to the hearing and in response to the subpoenas of the General Counsel and NABET Local 31, the Respondent dumped tens of thousands of pages of documents on the General Counsel and Local 31. In other words, CNN created the situation where the General Counsel could not complete the direct examination of witnesses, such as Larry D'Anna and Cindy Patrick, because counsel had to still go through thousands of pages of documents.

As the cases cited by CNN reflect, the decision of whether to allow for interrupted testimony is within the judge's discretion. *See United States v. Puckett*, 147 F.3d 765, 770 (8th Cir. 1998). Thus, it is incumbent upon CNN to prove that the ALJ abused its discretion and/or that CNN was prejudiced by the ALJ's rulings. Rather than satisfy that burden of proof, the Respondent exposes the glaring inconsistency in CNN's arguments with respect to the presentation of witnesses. As noted *supra*, CNN complained that the General Counsel improperly deferred cross-examination of Kile and Patrick for months in order to gain a tactical advantage. However, the breaks in the testimony of the General Counsel's witnesses provided the Respondent with the same tactical advantage with respect to the cross-examination of the General Counsel's witnesses. Thus, although the General Counsel did not complete the direct examination of some witnesses on the same day or the next day, the Respondent was able to get the transcript of the examination and had additional time to prepare for the cross-examination of the witness. Under the circumstances, CNN cannot establish any prejudice or that the ALJ abused his discretion. *Boyle v. Revici*, 962 F.2d 1060, 1064 (2d Cir. 1992).

CNN further complains that the ALJ allowed the General Counsel to call Cindy Patrick, Respondent's Executive Vice President of Operations, for two days (December 5 and 6, 2007) and sought the postponement of further testimony until January 2008. The General Counsel sought the postponement in order for the General Counsel to complete the review of the documents that had been dumped upon its attorneys by the Respondent in response to the General Counsel's subpoena. (BAUMERICH 7:849:2-22.) It is unclear why the General Counsel did not recall Patrick in January 2008. Nevertheless, the Respondent did not suffer any prejudice because it obtained a transcript of her testimony and even showed the transcript to Patrick prior to her testifying in the Respondent's case. (PATRICK 61:12848:1-3.) Thus, CNN was able to

prepare Patrick to respond to any issues raised in her prior testimony. (*See, e.g.*, PATRICK 61:12851:22-25, 61:12852:1-25, 61:12853:1-22 (discussing prior testimony about reasons for BSP and expounding upon that testimony).) Thus, any prejudice suffered by the Respondent in not being able to cross-examine Patrick was remedied by its ability to present her during its case after she had an opportunity to review her prior testimony.

Under the circumstances, the Respondent cannot show that it suffered any prejudice with respect to the fact that witnesses were taken out of order or that the ALJ abused its discretion in allowing the General Counsel to take witnesses out of order. Therefore, Local 31 respectfully requests that the Board deny the Respondent's objections with regard to this matter.

**5. *The ALJ Properly Enforced the Subpoenas of the General Counsel and NABET Local 31***

CNN continues to protest the ALJ's enforcement of the subpoenas served by the General Counsel and NABET Local 31. (CNN Br. at 221.) The Board has already ruled on this issue. *CNN America, Inc.*, 353 NLRB No. 94 (2009); *CNN America, Inc.*, 352 NLRB 675 (2008); *CNN America, Inc.*, 352 NLRB 448 (2008). In its exceptions, however, CNN claims that the ALJ improperly made adverse findings against the Respondent "based on the absence of certain documents." (*Id.* at 221-22.) After reciting a couple of examples in the ALJ's decision, the Respondent contends that, "[i]n each of these instances, Judge Amchan relies on the absence of documents – which CNN was obligated to produce only if the subpoenas are enforceable – as support for his findings." (*Id.* at 222.) CNN is wrong.

The "decisional sanctions" issued by ALJ Amchan were not based upon CNN's failure to comply with the subpoenas. Indeed, this conclusion is evident from the three citations provided by the Respondent in its brief. For example, at page 95 of his decision, the ALJ finds that there is "absolutely no evidence to corroborate" the claim that CNN managers Joe Murphy and Rick

Cole interviewed applicant Ron Fribush over the phone. (ALJD at 95:44-47.) The ALJ adds, that there is “no explanation as to why CNN does not have Murphy’s and Cole’s interview rating sheets for Fribush.” (*Id.* at 95:46-48.) At page 140, the ALJ states, “there is little credible documentation of what occurred and Respondent’s witnesses generally had trouble remembering what had transpired,” adding “CNN did little to preserve a record of how decisions were made, by whom and when they were made.” (ALJD at 140, lns. 18-22.) At page 144, the ALJ observes that a CNN manager, McIntyre, testified that there was a schedule for studio coverage for the D.C. Bureau for the week of December 8, 2003; however, CNN had *introduced* a plan for studio coverage for December 6 and 7, 2003. (ALJD at 144, lns. 44-46.) The ALJ observed that CNN never introduced a schedule for the week of December 8, 2003 at trial and he discredited McIntyre’s testimony. (*Id.* at 144, lns. 47-48.)

As each of these examples illustrates, the ALJ drew adverse inferences based upon CNN’s failure to provide documents to support its defense as a part of its case; the ALJ did not draw those inferences based upon CNN’s failure to produce documents in compliance with the subpoenas. The distinction is material and delineated in Board law. *See RCC Fabricators, Inc.*, 352 NLRB 701, 726-27 & n.20 (2008). As explained by ALJ Buxbaum in a case involving the alleged supervisory status of foremen:

If a party fails to comply with a subpoena, the trier of fact may impose an adverse inference as a sanction for the noncompliance.... In that event, the fact that the party actually complied with the subpoena would certainly be a complete defense. In this case, nobody has sought imposition of any sanction for noncompliance with a subpoena and I have not imposed any such relief. Instead, I have examined the entirety of the evidence and drawn the appropriate inferences from what was presented and what was not presented. The simple and inescapable fact remains that, despite having multiple opportunities to provide the trier of fact with the document that may best represent the Company’s non-litigation based view of the status and responsibilities of the foremen, the Company has chosen not to provide the document and has also chosen not to present any explanation in support of that decision. From this, applying longstanding and wise principles of jurisprudential

analysis, I infer that the document contained a vision of the scope and nature of the foremen's job that is adverse to the constructed picture of that job painted in the Company's trial testimony.

*RCC Fabricators, Inc., supra*, slip op. at 26-27. While the General Counsel in this case may have requested an adverse inference based upon CNN's failure to produce documents in response to the subpoena, the ALJ's decision clearly shows that – like ALJ Buxbaum – ALJ Amchan drew the inferences based upon CNN's failure to produce corroborating documentary evidence that one would expect the Respondent to produce at trial. *Id.*, slip op. at 27, n.20.

Such adverse inferences are appropriate and reasonable, given that a party's failure to comply with a subpoena is not required before a trier of fact can draw an adverse inference. *See International Union, United Auto., Aero. & Agric. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) (stating, "first, it is important to realize that the applicability of the [adverse inference] rule in no way depends on the existence of a subpoena compelling production of the evidence in question") ("*Gyrodyne*"). As the D.C. Circuit observed:

The theory behind the [adverse inference] rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it. Of course, if a party has good reason to believe his opponent has failed to meet his burden of proof, he may find no need to introduce his strong evidence.... Similarly, if the other party or the judge plays a role in suppression of the evidence, the force of the inference is dissipated.... These special exceptions should not, however, be allowed to detract from the more general, commonsense observation that in most cases a party will introduce his most favorable evidence without being compelled by legal process to do so.

*Gyrodyne*, 459 F.2d at 1338 (citations omitted). ALJ Amchan applied this "general, commonsense observation" (*id.*) in making the rulings cited by CNN in its brief. The observation led the ALJ to draw adverse inferences based upon CNN's failure to produce the documents as part of the Respondent's own case, not because of its steadfast refusal to comply

with the subpoenas of the General Counsel or Local 31. Therefore, Local 31 respectfully requests that the Board reject CNN's exceptions with respect to this matter.

**6. *CNN's Challenges to the ALJ's Admission of Hearsay Lack Merit***

Finally, CNN challenges the ALJ's admission into evidence of, and his reliance upon, what CNN characterizes as "uncorroborated and not rationally probative hearsay evidence" proffered by the General Counsel. (CNN Br. at 222-23.) CNN also complains that the ALJ refused to rely upon hearsay evidence offered by CNN. NABET Local 31 respectfully submits that the ALJ did not err with respect to his findings in this regard. Thus, Local 31 respectfully requests that the Board reject CNN's exceptions with respect to this matter.

**IV. CONCLUSION**

The Respondent filed 1,633 exceptions to the decision of Administrative Law Judge Arthur J. Amchan, challenging every conceivable aspect of the decision and the unfair labor practice hearing. None of the exceptions provides any basis for setting aside any of the ALJ's findings of fact or conclusions of law.

Accordingly, for the foregoing reasons, NABET Local 31 respectfully requests that the ALJ deny all of CNN's exceptions, affirm the ALJ's finding and conclusions and adopt the ALJ's order (as modified in accordance with Local 31's partial cross-exceptions).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this 18th day of May 2009, a true and correct copy of the foregoing "Answering Brief of Charging Party NABET-CWA Local 31" was served by United Parcel Service, overnight delivery on the following:

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The undersigned further certifies that, on May 18, 2009, the foregoing counsel were advised, by e-mail, of the filing of the Post-Hearing Brief by hand with the National Labor Relations Board and the service on the parties by overnight delivery.

  
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