

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

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

Case 5-CA-31828

and

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

and

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

Case 5-CA-33125

and

(formerly 2-CA-36129)

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

APPENDIX IN SUPPORT OF PROCEDURAL EXCEPTIONS

This Appendix, prepared for the Board's easy reference, contains quotations from the record supporting CNN's previously-filed Exceptions on procedural issues. Due to space constraints, CNN provides record quotations only for selected procedural Exceptions and thus reprises only those selected Exceptions. The selected Exceptions are presented in the same order as in CNN's previously-filed Exceptions. The Exceptions discussed below and are generally grouped by subject matter as indicated below.

A. **Exceptions to Rulings Overruling CNN Objections for Lack of Foundation**

In support of Exception No. 2: To the ruling that admits a document offered by the General Counsel without any foundation, overruling CNN's objection (GC Ex. 150), as such ruling is contrary to the Federal Rules of Evidence. (Tr.2447, L.8-21).

page 2447

8 MR. WILLNER: Your Honor, we object to
9 foundation. There's been no witness who has
10 identified what this document is, where it came from,
11 with any knowledge of it. We note that it appears to
12 be incomplete as well. If it's an e-mail, it's
13 missing who it's from. Perhaps that would be on the
14 previous page of the production. We don't know. We
15 object. There's no foundation to this document at
16 this point in time.

17 JUDGE AMCHAN: Well, I'm going to receive it. . . .
21 (General Counsel Exhibit 150 received into evidence.)

In support of Exception No. 6: To the ruling that admits a document offered by the General Counsel without any foundation, overruling CNN's objection (GC Ex. 237), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 4041, L.18 – Tr.4042, L.3).

page 4041

18 MR. COLLOPY: It's clearly a business record and is
19 part of the production. I agree the foundation is pretty
20 skimpy.

21 MR. FASMAN: It's not been identified.

22 MR. WILLNER: We did produce this.

23 JUDGE AMCHAN: Certainly this is a document from CNN
24 and that is somewhat apparent on its face what it is.
25 I'll receive it. I don't know the amount of weight I'll

page 4042

1 give to you. I'm not exactly sure what it proves. Is it
2 some document generated around August 25th.
3 (General Counsel Exhibit 237 received into evidence.)

In support of Exception No. 7: To the ruling that admits a document offered by the General Counsel without any foundation, overruling CNN's objection (GC Ex. 238), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 4043, L.3-10 (emphasis added)).

page 4043

3 MR. WILLNER: Your Honor, no foundation as to where
4 this document came from, who prepared it, why it was
5 prepared, whether it was prepared in the ordinary course
6 of business.

7 JUDGE AMCHAN: I'll receive it. It seems fairly
8 obvious it's a CNN-generated document.

10 (General Counsel Exhibit 238 received into evidence.)

In support of Exception No. 11: To the ruling that admits a document offered by the General Counsel without any foundation for the portion of the document containing handwriting, overruling CNN's objection (GC Ex.262), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 4106, L.18 – Tr.4107, L.2; D.45, L.17-23 (emphasis added)).

page 4106

18 MR. WILLNER: Lack of foundation.

19 JUDGE AMCHAN: I mean, it's obviously a document
20 generated by CNN.

21 MR. WILLNER: We also object on the ground of hearsay,
22 Your Honor.

23 JUDGE AMCHAN: I don't think it's hearsay. I mean, I
24 think it's obviously generated by an agent of CNN. Having
25 said that and having said that, I'll accept it.

2 (General Counsel's Exhibit 262 received into evidence.)

In support of Exception No. 13: To the ruling that admits a document offered by the General Counsel without any foundation, and allows questioning of the witness about the document despite the witness' testimony that he was not familiar with the document, overruling CNN's objection (GC Ex. 268), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 4121, L.1-23, Tr.4124, L.1-18; D.7, L.34; D.35, L.14; D. 36, L.15; D. 42, L.40 – D.43, L.19; D.53, L.24; D.64, L.24-25; D.100, L.6-7; D.143, L.18-23).

page 4121

1 MR. WILLNER: This is not a document that there's
2 anything in the record that indicates that this witness
3 prepared it. He's testified he doesn't recall whether he
4 ever saw it. The e-mail is not addressed from or to him.
5 There's no foundation for asking this witness questions about
6 what this document -- about the substance of this document.

7 The document speaks for itself. There's no foundation --

8 JUDGE AMCHAN: Well, it's possible that by looking at
9 the document, that he can -- that he has some information
10 related to the information on the document, regardless of
11 whether he authored it or has seen it before, so I'll allow
12 the questions. If it doesn't mean anything to him, he'll
13 tell Mr. Collopy that he doesn't know.

14 MR. WILLNER: I mean, the questions at this point,
15 Your Honor, too, are essentially what column does a number go
16 under, what does it refer to -- this document --

17 JUDGE AMCHAN: Well --

18 MR. WILLNER: -- is in standard Excel format, so it
19 speaks for itself as to what column things go under and
20 there's no foundation that this witness has -- I'll stop

21 there, Your Honor.
22 JUDGE AMCHAN: Well, let's -- maybe he does and maybe he
23 doesn't.

In support of Exception No. 16: To the ruling that admits a document offered by the General Counsel without any foundation, overruling CNN's objection (GC Ex. 271), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 4127, L.24- Tr.4129, L.3 (emphases added)).

page 4127

24 JUDGE AMCHAN: It's received.
25 (General Counsel's Exhibit 271 received into evidence.)

page 4128

1 JUDGE AMCHAN: I'm just a little unclear. It's -- your
2 objection to 271 is what?

3 MR. WILLNER: Foundation. The only information that's
4 been established with respect to Exhibit 271 is that
5 Mr. Speiser does not recall ever seeing it and that's an
6 insufficient foundation.

7 JUDGE AMCHAN: Well, on its face it -- I mean, you're
8 not contending that the attachment -- the top page is an e-
9 mail from Ms. Diviney. It's a bunch of people, including
10 Ms. Reeves and Ms. Patrick. And then there's an -- I mean,
11 you're not contending that the attachment doesn't go with
12 this e-mail, are you?

13 MR. WILLNER: No. No, Your Honor. We just don't
14 believe that the -- this witness has laid a foundation for
15 this document. Ms. Diviney, who's under subpoena, certainly
16 could.

17 JUDGE AMCHAN: Right. But I mean, on its face, it
18 appears that Ms. Diviney is an agent of CNN who sent an e-
19 mail with that attached and you're not contesting that
20 that --

21 MR. WILLNER: No. So far as we know, Your Honor, but I
22 mean, if Ms. Diviney were here and she will be, she could
23 testify to that effect and then there would be a foundation
24 for the document. But there isn't --

25 JUDGE AMCHAN: Well, I mean, I think it's

page 4129

1 self-authenticating.

In support of Exception No. 18: To the ruling that admits a document offered by the General Counsel without any foundation, overruling CNN's objection (GC Ex. 328), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 5868, L.14 -- Tr.5871, L.2; D.60, L.41- D.61, L.1 (emphases added)).

page 5868

14 MR. WILLNER: It's -- well, Your Honor, I think -- we
15 just think that foundation requires evidence that the person
16 is an agent, rather than an assumption and that's --

17 JUDGE AMCHAN: Well, I don't know. Mr. Young's dead, so
18 we're not going to be able to ask him if he wrote it, right?

19 MR. WILLNER: Well, quite frankly, Your Honor, that's
20 not -- you know, had this case proceeded three years ago
21 rather than it sitting in the Board for three years, that
22 wouldn't be a problem. We at CNN are prejudiced by the time
23 that it took for this case to get here. We've heard
24 witnesses talk about what they don't remember. Mr. Young is
25 dead. To admit evidence without foundation, when it's the
page 5869

1 Board's fault, quite frankly, that we're here so late, you
2 know, it prejudices --
3 JUDGE AMCHAN: Well --
4 MR. WILLNER: -- us even further.
5 JUDGE AMCHAN: This is obviously a document by someone.
6 If it's not Mr. Young, it's obviously someone who was
7 involved in the hiring process. If you turn the last page
8 and you look at Quinnette, Number 9, he says, "I interviewed
9 John on the phone, the first go-around." It's got to be
10 somebody who is an agent of CNN. Whether it's Mr. Young or
11 someone else, it's someone who was -- somebody who was
12 interviewing on behalf of CNN. I do not think it's a hearsay
13 document. . . .

page 5870

1 Q. BY MR. COLLOPY: I think the question that was pending
2 was, what statements that Matt Speiser made to you and others
3 during the course of the debriefing process, actually at any
4 point during the bureau staffing project, about Dave Jenkins
5 and why he shouldn't be hired?

6 A. I don't remember.

7 Q. Do you remember Matt feeling -- Matt Speiser feeling
8 stronger about Dave Jenkins rather than other applicants that
9 he had -- that he was speaking for, if any?

10 A. I don't remember Matt doing that.

11 JUDGE AMCHAN: You don't remember Matt saying anything
12 about Dave Jenkins?

13 THE WITNESS: No, I don't.

14 MR. COLLOPY: Your Honor, we would move the last two
15 pages of General Counsel 328.

16 MR. WILLNER: Your Honor, we object on grounds of
17 hearsay and foundation. Mr. Speiser was here last week, I
18 believe, and the General Counsel could've asked him about it,
19 since he's the one who's alleged to have made those comments.
20 My recollection is that they did not show him this document
21 nor ask him about it and our position is that the foundation
22 for something not being hearsay cannot be assumed, it has to
23 be proven.

24 JUDGE AMCHAN: No, I think the document, on its face, is
25 not hearsay and I'm going to receive it.

page 5871

1 (General Counsel's Exhibit 328, Pages 856 and 857, received
2 into evidence.)

In support of Exception No. 20: To the ruling that admits a document offered by the General Counsel without any foundation, overruling CNN's objection (GC Ex.400), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 7906, L.24-Tr.7908, L.4).

page 7906

24 VOIR DIRE EXAMINATION

25 BY MR. WILLNER:

page 7907

1 Q. I'm just going to ask you a few
2 questions.

3 As you know I'm Ken Willner, and I'm
4 an attorney representing CNN.

5 There is some handwriting on
6 General Counsel 400, is any of that your
7 handwriting?

8 A. No.
9 Q. Have you ever seen General Counsel's
10 400 before today?
11 A. No.
12 Q. Did you prepare General Counsel's
13 400?
14 A. No.
15 MR. WILLNER: No further questions,
16 your Honor.
17 We would object for lack of
18 foundation.
19 JUDGE AMCHAN: I'm going to receive
20 it. It's obviously a document generated by
21 the respondent. . . .

In support of Exception No. 23: To the ruling that admits documents offered by the General Counsel without any foundation, overruling CNN's objection (GC Exs. 498-506), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 10249, L.25-Tr.10250, L.19; D.38, L.26-27; D.38, L.46-48 (emphasis added)).

page 10249

25 You move for admission of 498 through
page 10250

1 506?

2 MS. FOLEY: Yes.

3 JUDGE AMCHAN: I think his answers
4 were the same about 501, I don't remember you
5 discussing that.

6 MR. FASMAN: I think I asked him
7 about 501, but if he didn't, we ought to put
8 that on the record.

9 JUDGE AMCHAN: I think it's clear
10 from what he said before.

11 Q. I asked you about 501 because the
12 writing is bad on mine. It looks like 500,
13 but it's actually 501.

14 JUDGE AMCHAN: I'm receiving them
15 solely on the basis they were generated during
16 the bureau staffing project by some unknown
17 representative of CNN.

18 (General Counsel Exhibit Numbers 498
19 to 506 were received in evidence.)

In support of Exception No. 24: To the ruling that admits exhibit offered by the General Counsel without any foundation, overruling CNN's objection (GC Exs.508-509), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 10315, L.14-Tr.10318, L.7; D.91 L.27-28, 39-40; D.105, L.21-23).

page 10315

14 Q. I'm Zach Fasman, I'm representing CNN
15 in this case, nice to see you.

16 508, this is not yours, right?

17 A. That is correct.

18 Q. You have never seen this document
19 before?

20 A. I have never seen this document until
21 now.

22 JUDGE AMCHAN: What about the last
23 page?

24 THE WITNESS: Of this document?

25 JUDGE AMCHAN: Yes. . . .

page 10316

18 Q. Including 49, this is not your
19 handwriting, right?

20 A. That is not my handwriting.

21 Q. You have never seen it before?

22 A. I have never seen that before.

23 Q. It wasn't used by you in the hiring

24 process?

25 A. I could not answer that question. I

page 10317

1 had never seen the document.

2 Q. Obviously, you never saw it before.

3 The same thing for 509, this is a

4 document that you have never seen?

5 A. Yes, 509 I have never seen either.

6 MR. FASMAN: Your Honor, I object to

7 the admission of 508 or 509. We did produce

8 them, but there is no foundation laid through

9 this witness as to what they are.

10 JUDGE AMCHAN: I'm receiving 507.

11 508 and 509, I will receive only as something

12 that was generated during the bureau staffing

13 project by a representative of CNN. That is

14 all you can say about them.

In support of Exception No. 26: To the ruling that admits documents offered by the General Counsel without any foundation, and without any opportunity for CNN to cross examine a witness regarding the documents, overruling CNN's objection (GC Exs. 566-569), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 15066, L.7-Tr.15076, L.8; Tr.15110, L.6-18; D.110, L.15-17; D.100, L. 28-32 (emphases added)).

page 15066

7 MR. BIGGAR: Your Honor, what I've distributed to

8 counsel or CNN and Team Video as well as a copy for yourself

9 are the freelance payroll records for Team Video freelancers

10 who worked at the New York Bureau during the last 12 months

11 that Team Video had the contract with CNN in New York. . . .

16 These were provided to the Board pursuant to a subpoena

17 to Team Video and if you look at 566, they are the actual pay

18 However, we could

19 not find all of the payroll records and so 567 and 568 are

20 actual time sheets for the pay periods for which we could not

21 find payroll records.

22 Finally, 569 deals with one employee only, a Mr. Glenn

23 Zachar, and it deals with one pay period only. . . .

page 15067

9 MR. CHATILOVICZ: If I may, Judge, just at the outset

10 here, I think I'm correct in saying that these documents were

11 provided to the Board on or around December 5th, and I'm

12 miffed over why these are being submitted as an exhibit today

13 when if the Judge will recall, I recall it but I haven't

14 quite as much information go through my brain as the rest of

15 you, but I recall Mr. McCarthy and Ms. Baumerich urging how

16 important it was for us to get all of this to them, and I,

17 you know, I don't know why this is being submitted now,

18 number one, six months after the submission but more

19 importantly after the close of the New York presentation.

20 And I thought we had an understanding we were going to do New

21 York in New York and do D.C. in D.C. and that's how, that's
22 how we prepared our case.

23 MR. FASMAN: I think we're also seriously prejudiced
24 here, Your Honor. I mean these -- looking, just looking,
25 leaving through these documents, which we've just seen, they
page 15068

1 have completely different codes than Ms. Swiger just
2 described, and you also heard her describe how some of the
3 payroll registers contained hours for people on a freelance
4 basis that weren't properly billed to CNN and that were not,
5 in fact, billed to CNN. Lesa Jansen is a classic example of
6 that and, you know, Mr. Biggar in his guide or whatever he
7 called it, the document that he didn't introduce into
8 evidence that contained his computation of freelance hours
9 for D.C., which he gave to Your Honor, which is the basis for
10 their amended complaint and inclusion of all kinds of other
11 people, just to look at that. Lesa Jansen is listed as
12 having 318 freelance hours. All of those hours were worked
13 in 9,000 or whatever the category that Ms. Swiger used. They
14 were non-billable to CNN. Not one of her hours was billable
15 to CNN. Not one of it was under the contract.

16 MR. BIGGAR: We would remove that --

17 MR. CHATILOVICZ: We have no way, we have no way though
18 at this point of going back through these documents and
19 saying, for example, what does code number 4500 mean? Are
20 these billable codes? Are they codes of Team Video using
21 people for its own purposes? There's a 4500, there's a
22 4,000, there's a 1300. Nobody knows what these mean and
23 nobody knows what was billable, and we're not in a position
24 now because Mr. Cohen has already testified. Everybody in
25 New York already testified and testified long ago. How are
page 15069

1 we supposed to rebut this outside of reopening the New York
2 case?

3 JUDGE AMCHAN: Well, who would know?

4 MR. CHATILOVICZ: Well, Judge, is that -- with all due
5 respect, is that really the issue or is the issue when the
6 Board has three, four, five lawyers on this case, should the
7 Board not be asked to put on their case when they're putting
8 on their case, as opposed to this, you know, this hit and
9 miss approach.

10 MR. FASMAN: These are documents they had for eight
11 months. Eight months, Judge.

12 MR. WILLNER: We spent three months in New York, three
13 with their case in New York, Your Honor.

14 MS. FOLEY: Your Honor --

15 MR. WILLNER: There's no reason this could not have been
16 submitted then with the witness who knows something about it.
17 We have a constitutional right to be able to examine
18 witnesses about evidence and that right has been denied if
19 this is admitted.

20 JUDGE AMCHAN: I don't know about that.

page 15074

2 MR. FASMAN: Well, we certainly object to that but you
3 cannot tell from these documents whether any person performed
4 bargaining unit work or not and --

5 JUDGE AMCHAN: Well, --

6 MR. FASMAN: -- certainly either by looking at the codes
7 or by anything else. I mean it's just highly prejudicial.

8 JUDGE AMCHAN: Let me ask, Mr. Chatilovicz, is there any
9 dispute that these are Team Video records, that these are
10 business records?

11 MR. CHATILOVICZ: I gather not. I mean I'm assuming
12 they were -- I think they were gathered from the documents
13 that we provided to the Board, and I have no doubt about that
14 but just because something's a business record doesn't mean
15 you can just throw it into the hopper here and suddenly let
16 the Board argue whatever they want.

17 JUDGE AMCHAN: Well, they may not provide what they want
18 to prove. I'm going to receive them.

19 (General Counsel Exhibits 566 through 569 received into
20 evidence.)

B. Exceptions to Rulings Overruling CNN's Relevance Objections

In support of Exception No. 28: To the ruling that admits exhibit offered by the General Counsel, overruling CNN's relevance objection (GC Ex.11), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 231, L.14-25).

page 231

14 MR. ROSE: Your Honor, I would like to offer this
15 into evidence as General Counsel Number 11.

16 MR. FASMAN: We object on relevance, Your Honor,
17 and I think this witness testified that he was not
18 present in the negotiations, I don't see how he can
19 testify as to who negotiated the agreement.

20 MR. ROSE: Well, Your Honor, I asked if he
21 recognized the names and, of course, he has
22 institutional knowledge going back to 1970 of NABET and
23 Local 11.

24 JUDGE AMCHAN: I'm going to receive it.
25 (General Counsel Exhibit 11 received into evidence.)

In support of Exception No. 31: To the ruling that admits testimony offered by the General Counsel, overruling CNN's relevance objection (Tr. 1134, L.6-Tr.1137, L.11 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 1134

6 MR. FASMAN: I'm going to object on relevance.
7 We got into questions of what other networks do.
8 Now we're dealing with the witness' testimony about
9 when he was working as a freelancer in lighting
10 positions at the White House, not involving Team, not
11 involving CNN.

12 What's the -- what relevance does this have?

13 JUDGE AMCHAN: Well, I'm not sure. I'll figure
14 that out later.

In support of Exception No. 32: To the ruling that admits testimony offered by the General Counsel, overruling CNN's relevance objection (Tr. 1085, L.8-17 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 1085

8 Q. Do you know of any wall-to-wall units?

9 JUDGE AMCHAN: You're asking in the broadcast
10 industry?

11 MR. McCARTHY: Yes, Your Honor.

12 MR. FASMAN: I'm going to object on relevance

13 again.
14 JUDGE AMCHAN: Well, I'll overrule the
15 objection, but if it turns out to be relevant, I'll
16 figure it out.

In support of Exception No. 37: To the ruling that admits testimony offered by the General Counsel, overruling CNN's relevance objection (Tr. 1177, L.16-23 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 1177

16 Q. Since 1995, how have NABET members made changes
17 in the industry?

18 A. Oh --

19 MR. FASMAN: Same objection.

20 JUDGE AMCHAN: Yeah, it's such a broad
21 question, I mean -- I guess you can answer it.
22 Then -- we'll do it backwards. Then you'll establish
23 a foundation, I mean.

In support of Exception No. 40: To the ruling that admits testimony offered by the General Counsel, overruling CNN's relevance objection (Tr. 1587, L.4-23 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 1587

4 MR. FASMAN: Judge, I'm going to object to
5 this. I don't know what the relevance is of that
6 changeover.

7 If the General Counsel wants to present stuff
8 about technology and make the point that you made,
9 that's fine, but we've already been through a lot of
10 this about NewsLink and Potomac and who was hired and
11 who wasn't hired, and I think you've uniformly
12 sustained our objections to going back 15-18 years
13 into time on this stuff.

14 MS. BAUMERICH: Your Honor, I just have like a
15 very few more questions regarding the changeover.

16 MR. FASMAN: It doesn't make any difference to
17 whether it's relevant or not, I mean, she could ask
18 two or three questions, but unless it's relevant --

19 MS. BAUMERICH: Your Honor, I do think that
20 it's relevant in terms --

21 JUDGE AMCHAN: Why don't we go ahead. It would
22 probably take me longer to decide whether it's
23 relevant than do the question and answer.

In support of Exception No. 49: To the ruling that overrules CNN's relevance objection (Tr. 7157, L.4-Tr.7158, L.16), as such ruling is contrary to the Federal Rules of Evidence.

page 7157

4 MR. FASMAN: I'm going to object to that whole testimony
5 as irrelevant. I don't even know what -- that it could
6 possibly even be relevant to this lawsuit, assuming we did
7 make such a change.

8 JUDGE AMCHAN: Well, I'll leave it in there. Right now,
9 I don't see the relevance.

10 MS. BAUMERICH: Your Honor, the relevance is, if changes
11 are just being made way after the fact, way after the
12 discontinuation of the Team ENG agreement and cancellation of
13 the collective bargaining agreement and failure to recognize
14 the union in 2003, way later --

15 JUDGE AMCHAN: You know, I mean, I'm not going to strike
16 it from the record. You can make whatever argument you want
17 to make. But your point is that there were no fundamental
18 changes in the first year.

19 MS. BAUMERICH: That's right.

20 JUDGE AMCHAN: And if they started changing things in
21 2005, in terms of successorship, it's just too darn late.
22 Isn't that your position?

23 MS. BAUMERICH: That's exactly what my point is.

24 JUDGE AMCHAN: Right. Regardless of motivation.

25 MS. BAUMERICH: Right.

page 7158

1 JUDGE AMCHAN: Okay.

2 MS. BAUMERICH: And I think that when Respondents put
3 their case on, you're going to hear a lot about these changes
4 and I'm just --

5 JUDGE AMCHAN: Right. And you're going to --

6 MS. BAUMERICH: The word on the -- the word from CNN
7 producers was it's because of the lawsuit.

8 JUDGE AMCHAN: Right. But your point is really, unless
9 it was done right away, it doesn't matter what the reason
10 was.

11 MS. BAUMERICH: That is our position.

In support of Exception No. 51: To the ruling that that admits evidence offered by the General Counsel, overruling CNN's relevance objection (GC Ex. 415), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 8276, L.14-Tr.8277, L.1).

page 8276

14 MR. FASMAN: We would object on
15 relevance grounds, Judge.

16 We don't find it troublesome, but
17 what does it add to the record that Ms. Curry
18 was a member of NABET?

19 MS. FOLEY: If you need an offer of
20 proof, I will give it. But I would like Ms.
21 Curry to step out of the room.

22 JUDGE AMCHAN: I'll receive it. I'm
23 not sure that it's relevant either. If it
24 isn't, I'll just ignore it.

25 (General Counsel Exhibit Number 415

page 8277

1 was received in evidence.)

C. **Exceptions to Rulings Sustaining The General Counsel's Relevance Objections**

In support of Exception No. 56: To the ruling that sustains the General Counsel's relevance objection, and excludes testimony proffered by CNN (Tr. 9714, L.12-Tr.9715, L.13), as such ruling is contrary to the Federal Rules of Evidence.

page 9714

12 MR. ROSE: Objection. This is far
13 afield. He's obviously talking about
14 conversations and he has no knowledge of what
15 these other people did in the end. He knows
16 what he did.

17 JUDGE AMCHAN: I'm not sure why it's
18 relevant. He is on inactive status. Why is
19 it relevant?

20 MR. FASMAN: I think it's relevant as
21 to whether they retained their union
22 membership.

23 JUDGE AMCHAN: I don't see that is
24 relevant.

25 If it turns out that CNN is deemed a
page 9715

1 successor, NABET 11 represents the bargaining
2 unit.

3 MR. FASMAN: I have only one more
4 question which is who he spoke to about it.

5 MR. ROSE: I have to place an
6 objection to that, your Honor. It goes into
7 union activities and has no relevance.

8 JUDGE AMCHAN: Sustained.

9 MR. FASMAN: It does not go into
10 union activities.

11 MR. ROSE: I think Your Honor
12 sustained the objection.

13 JUDGE AMCHAN: I sustained it.

D. Additional Exceptions to Rulings Overruling CNN's Relevance Objections

In support of Exception No. 62: To the ruling that admits testimony offered by the General Counsel, overruling CNN's relevance objection (Tr. 14151, L.3-Tr.14152, L.14), as such ruling is contrary to the Federal Rules of Evidence.

page 14151

3 MR. FASMAN: Objection, Your Honor. What does this have
4 to do with anything?

5 JUDGE AMCHAN: I don't know.

6 THE WITNESS: Maybe one week, around Thanksgiving
7 holiday.

8 Q. BY MR. BIGGAR: All right. Did you ever have a
9 conversation with Mr. Sweet, at any time later, about your
10 not being hired by CNN or by -- yeah, by CNN?

11 A. Yes.

12 Q. And when was that conversation?

13 A. About the following summer I was meeting some friends,
14 former Team employees, at a place called Bungalow Billiards
15 in Springfield, after they finished working at Alhurra that
16 day. We were just meeting afterwards to shoot bull and see
17 each other, since we hadn't seen each other in a long time.

18 Q. Okay. Who are those friends, do you remember?

19 A. Darrin White and Dave Burke.

20 Q. Did they work at Alhurra?

21 A. Yes.

22 Q. Okay. And how far is Bungalow Billiards from Alhurra,
23 do you have any idea?

24 A. A couple miles.

25 MR. FASMAN: Your Honor, I object. This is six months
page 14152

1 later. Sweet's gone. He admitted Sweet was gone --

2 JUDGE AMCHAN: Yeah.

3 MR. FASMAN: -- in November.

4 JUDGE AMCHAN: Right.

5 MR. FASMAN: Why are we going into --

6 MR. BIGGAR: I think you should let me finish, Your
7 Honor. I think Mr. Fasman's curiosity will be satisfied

8 here.
9 MR. FASMAN: I'm not interested in my curiosity,
10 Mr. Biggar, I'm interested in whether this has any
11 relationship, anything doing with this case.
12 JUDGE AMCHAN: Well, I think that's what the testimony's
13 going to be, and whether I credit it is something else, you
14 know, but –

E. **Exceptions to Evidentiary Rulings Overruling CNN's Hearsay Objections**

In support of Exception No. 63: To the ruling that admits hearsay evidence over CNN's objection (GC Ex. 105 A-F), as such ruling is contrary to the Federal Rules of Evidence. (Tr. 1130, L.20-Tr.1137, L.11 (emphasis added)).

page 1130

20 Q. And what was your position when Mr. Simons told
21 you and Barbara Krieger that CNN was opposed to
22 expanding the crew assignments at the White House?

23 MR. FASMAN: Objection.

24 There's no testimony to that effect.

25 MR. McCARTHY: There certainly is, Your Honor.

page 1131

1 JUDGE AMCHAN: Yeah. He just said that they
2 didn't want to expand the number of people in the
3 pools.

4 MR. FASMAN: Let me rephrase. . . .

7 But I would object to the statement from Simons
8 and Larry D'Anna standing for the truth of the matter
9 asserted. They may have said it at a grievance
10 meeting, but I don't think it proves that CNN in fact
11 took that position.

12 MR. McCARTHY: That's an exception to the
13 hearsay rule, Your Honor. I am offering it for the
14 truth. This individual was in the meeting, and we
15 will prove up by other evidence, connect that up, but
16 it's offered for the truth.

17 MR. WILLNER: Your Honor, there's double
18 hearsay. There may be an exception for hearsay as to
19 TVS, but there's no evidence as to who, if anyone,
20 actually ever made any statement at CNN to that
21 effect.

22 MR. POWERS: Your Honor, I would say that since
23 this is a joint employer issue, it's a declaration
24 against interest and it's an exception to the hearsay
25 rule.

page 1132

1 MR. McCARTHY: Absolutely.

2 JUDGE AMCHAN: I'm going to receive it, you
3 know, so it depends on which side of the joint
4 employer issue you're as to whether the statement is
5 admissible for the -- against CNN.

6 I'm not sure you're right about the double
7 hearsay. I thought there was something in the rule
8 about that.

9 Anyway, I'll receive it and figure out what the
10 law of evidence is at a later date.

11 (Pause.)

page 1135

14 MR. WILLNER: Your Honor, if we may ask for
15 clarification just with respect to Your Honor's ruling
16 on rule 805 as to -- it states that hearsay within
17 hearsay is not excluded if each part of the implied
18 statement conforms with an exception, so our question
19 would be, with respect to Your Honor's ruling on the
20 second part of the statement alleging comments by an
21 unspecified CNN person, as to which exception of the
22 hearsay rule is relied upon in support of that
23 statement being admitted.

24 JUDGE AMCHAN: Okay. Any statement by
25 Mr. D'Anna wouldn't be hearsay under rule 801(d). And
page 1136

1 he is stating that someone who's an agent of CNN had
2 said to him that they're not going to expand the pool.
3 I don't think that's hearsay. CNN is a party. The
4 statement of a CNN agent to Mr. D'Anna isn't hearsay,
5 and Mr. D'Anna relating it to Mr. Peach isn't hearsay.

6 MR. WILLNER: I don't think, Your Honor,
7 there's anything in the record that identifies who at
8 CNN is alleged to have made that comment as to whether
9 that person is an agent or is not.

10 JUDGE AMCHAN: No, there isn't.
11 I mean, the identification of the individual?

12 MR. WILLNER: Or even the position.

13 JUDGE AMCHAN: Right. I think it's still
14 admissible.

In support of Exception No. 66: To the ruling that admits hearsay evidence over CNN's objection (Tr. 4108, L.20-Tr.4109, L.14 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 4108

19 MR. WILLNER: This was produced in 2005 in the
20 investigation and there is simply no foundation for this
21 document other than that it was produced in 2005 and that's
22 simply not enough to support any exception to hearsay.
23 That's the same -- it's true, Your Honor, and I'm just
24 stating this for the record that we understand Your Honor's
25 ruling, I'm just stating for the record that it takes more
page 4109

1 than the fact that a document came from some unspecified
2 person at CNN to overcome a hearsay objection.

3 MR. FASMAN: Or that we -- or that CNN produced them.
4 That's not --

5 JUDGE AMCHAN: Well, on its face, it appears to be a
6 document generated by CNN during -- actually, not necessarily
7 during the bureau staffing project, but something to do with
8 hiring about this time. It involves, you know, people who
9 are out looking for the bureau staffing project -- I'm going
10 to receive it and I don't think that a hearsay objection's
11 correct. Whether it has any probative value has not been
12 established. I'm accepting it on the possibility that it may
13 be linked up to something --

14 (General Counsel's Exhibit 263 received into evidence.)

In support of Exception No. 70: To the ruling that admits hearsay evidence over CNN's objection (Tr. 7553, L.8-Tr.7559, L.9 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 7553

8 MR. WILLNER: I'm going to object again, Your Honor.

9 This is all hearsay.

10 JUDGE AMCHAN: He saw the list.

11 MR. WILLNER: But he don't know where the list came

12 from.

13 JUDGE AMCHAN: He saw --

14 MR. BIGGAR: Swiger's an agent. She --

15 JUDGE AMCHAN: He saw a computer screen that has his

16 name on it. Swiger is an agent of one of the Respondents in

17 this case and --

18 MR. BIGGAR: Team Video.

19 JUDGE AMCHAN: -- what? Of Team Video. And I think

20 it's probative.

21 MR. WILLNER: Where did she get it?

22 JUDGE AMCHAN: I don't know.

23 MR. WILLNER: That's the point.

24 JUDGE AMCHAN: Well, he --

25 MR. WILLNER: Did it come from --

page 7554

1 JUDGE AMCHAN: She's representing to him it's the list

2 of people hired by CNN. I think it's probative even if it

3 isn't. I mean, you can bring in people to say that there

4 wasn't a list, she didn't know what she was talking about,

5 didn't happen, but I think it's probative.

6 MR. WILLNER: Well, if she said where the list came

7 from, that might perhaps make it probative, Your Honor, with

8 all due respect, but what she has --

9 JUDGE AMCHAN: She indicated to him that it was a list

10 of people being hired by CNN. That's what this witness said.

11 MR. WILLNER: She doesn't work for CNN. Where did the

12 list come from? I think that --

13 MR. BIGGAR: Well, maybe you should call Ms. Swiger and

14 ask her. She's an agent of a Respondent here.

15 JUDGE AMCHAN: Yeah, I think --

16 MR. BIGGAR: It's her computer and she's showing him the

17 list.

18 JUDGE AMCHAN: -- it's probative. If there's other

19 evidence, there was no such list, he wasn't on a list or got

20 mixed up, that's something else.

21 MR. WILLNER: All right. I certainly hope that Your

22 Honor will keep an open mind as to requiring some foundation,

23 someday, from the complainants --

24 JUDGE AMCHAN: Well, I think there is foundation here.

25 MR. WILLNER: -- as to what the list is and where it

page 7555

1 came from.

2 JUDGE AMCHAN: Yeah, Ms. Swiger represented to him, in

3 my understanding of his testimony, that this is a list

4 showing who CNN is going to hire and his name's on that.

5 MR. WILLNER: But is she representing that she prepared

6 the list? We haven't heard that.

7 JUDGE AMCHAN: It's on her computer screen. Did she

8 invent it? She says there's a list, shows him his (sic)

9 computer, his name's on the list. I'm willing to infer that
10 she didn't type up the list, herself, didn't fabricate it.

11 MR. FASMAN: That's something that's -- Your Honor, I
12 have to say that's the first time that I've heard something
13 that I'm seriously troubled by.

14 JUDGE AMCHAN: Well --

15 MR. FASMAN: I mean, it's one thing to say it's
16 probative, but it's another thing to say that an agent of
17 Team Video shows him some list that she alleges is somehow a
18 CNN list, she was not our agent. She was not privy to any of
19 this --

20 JUDGE AMCHAN: Well, I don't know.

21 MR. FASMAN: -- and for you to infer that somehow she's
22 sitting there saying this, I have no problem with her saying
23 well, here's the list, but to say, to infer that what she is
24 saying is here's the CNN list and that it, in fact, was a CNN
25 list, is really --

page 7556

1 JUDGE AMCHAN: Well, I'm inferring, based on what I've
2 heard so far. It could be there'll be evidence from your
3 side that she's showing him a list of people who are being
4 hired by TVS, he either misunderstood her or --

5 MR. FASMAN: Correct. That's the only thing I'm saying,
6 Your Honor. I think --

7 JUDGE AMCHAN: I'm hearing one side of the story now,
8 their side.

9 MR. FASMAN: Right.

10 JUDGE AMCHAN: I'm going to hear your side, but if
11 you're saying that it's totally irrelevant and inadmissible
12 for him to testify about his conversation with Ms. Swiger, I
13 disagree.

page 7557

20 MR. WILLNER: Sorry. We just urge Your Honor to bear in
21 mind that there needs to be evidence, when talking about
22 things like lists, there's no list here that's been put in
23 front of the court. There's no evidence where this supposed
24 list came from. There's no evidence who wrote it. There's
25 not even evidence as to whether it had to do with hiring at

page 7558

1 CNN or hiring at TVS and we would urge Your Honor simply to
2 refrain from making leaps of faith until you've heard --

3 JUDGE AMCHAN: Well, I'm not making a leap of --

4 MR. BIGGAR: Well, Your Honor, I object to the --

5 JUDGE AMCHAN: I'm not making a final leap of faith.

6 MR. FASMAN: Okay, that's fine.

7 JUDGE AMCHAN: When all the evidence is in, I'll make a
8 decision, but he's going in and he's asking Ms. Swiger about
9 the fact that he hasn't heard. She tells him not to worry.

10 She said -- I mean, did she say -- his testimony, so far,
11 infers that she has, on her computer screen, a list of people
12 that CNN is hiring. That's what I understand him to be
13 saying. It may be that you'll have evidence to the contrary;

14 CNN never gave Ms. Swiger a list, you may bring in
15 Ms. Swiger, say, you know, Mr. Munoz misunderstood me. I had
16 a list of people we were considering for Alhurra.

17 MR. WILLNER: All I want to say, Your Honor, is this
18 testimony has all of the red flags and hallmarks that lead to

19 all the reasons why hearsay is either not admissible or given
20 low probative value, for all the reasons I just mentioned.
21 We don't know where it came from, we don't know who wrote it.
22 The person's not here in court.
23 MR. BIGGAR: Your Honor, I'd like to object to the
24 argument that's being made here. I think you're free to make
25 inferences. I understand, from what I hear, they object to
page 7559
1 the evidence is what they don't like, is the evidence –
2 JUDGE AMCHAN: I think it is admissible –
3 MR. FASMAN: We don't know what the evidence is.
4 JUDGE AMCHAN: Let me just –
5 MR. WILLNER: Yeah, show us the list, then there's
6 evidence.
7 JUDGE AMCHAN: Well, I think his testimony on this point
8 is admissible and I think it's probative. Whether it's
9 conclusive is something I'll decide in a couple of months.

In support of Exception No. 71: To the ruling that admits hearsay evidence over CNN's objection (Tr. 10045, L.16-Tr.10046, L.24 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 10045

16 MR. WILLNER: We would move to strike
17 the testimony that was Ms. Phair's work based
18 on the basis that it's hearsay.

19 MR. ROSE: Your Honor --

20 JUDGE AMCHAN: He just said that she
21 told him her safely.

22 MR. WILLNER: Statements by her are
23 hearsay, your Honor, she is not a party in
24 this case.

25 MR. ROSE: Your Honor, it's his

page 10046

1 understanding as a shop steward.

2 JUDGE AMCHAN: She is not a
3 representative party, but she is making a
4 firsthand statement that it's her work, that
5 is what he says.

6 MR. WILLNER: His statement here that
7 she said that is hearsay.

8 JUDGE AMCHAN: I don't think so.

9 MR. WILLNER: It would have to be an
10 admission by a party in order for it to come
11 in with him.

12 MR. ROSE: The truth of the matter
13 served that Saylor's work is substandard is
14 not the issue. It's just the issue of what
15 he understood as a shop steward and what was
16 told to him in his role as shop steward.

17 JUDGE AMCHAN: I thought you were
18 trying to put in more than that.

19 MR. WILLNER: It is an out of court
20 statement being offered for its truth. It's
21 neither an admission of a party, nor is it an
22 ordinary business record.

23 JUDGE AMCHAN: Her statement is
24 hearsay, but I'm not going to strike it.

In support of Exception No. 73: To the ruling that admits hearsay evidence over CNN's objection (Tr. 10870, L.22-Tr.10871, L.19; Tr. 10873, L.5-Tr.10876, L.3; D.21, L.29-D.23, L.17 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence.

page 10870

22 MR. WILLNER: Can we object, this
23 sounds like hearsay.

24 JUDGE AMCHAN: I don't think it's
25 hearsay because -- I don't think it's hearsay.

page 10871

1 What I prefer you do is ask her what
2 she remembers about the meeting. If she
3 can't remember, refer to her notes.

4 Q. What do you remember being said at
5 the meeting?

6 MR. WILLNER: We understand Your
7 Honor's ruling, we want it clear the witness
8 has not identified who the speaker is, cannot
9 identify who the speaker is.

10 JUDGE AMCHAN: I think I can put two
11 and two together to figure out who the speaker
12 is.

13 MR. WILLNER: That may be, but the
14 evidence in the record doesn't show who the
15 speaker is and we object as hearsay.

16 JUDGE AMCHAN: Overruled.

17 I would ask you that ask her what she
18 remembers, if she can't remember she can
19 refresh her recollection from the notes.

In support of Exception No. 74: To the ruling that admits hearsay evidence over CNN's objection (Tr. 14152, L.5-Tr.14156, L.20), as such ruling is contrary to the Federal Rules of Evidence.

page 14153

2 Q. Okay. Did you have a conversation with Mr. Sweet that
3 night?

4 A. Yes.

5 Q. How did you happen to have this conversation?

6 A. When Mike Marcus entered the pool hall, I was very upset
7 with Mike because I feel that he mistreated and mislead me;
8 that I was going to go ahead and speak to him because I never
9 saw him ever since that interview. Mark saw that I was
10 really upset and so Mark pulled me aside and he and I had
11 a -- were having a conversation.

12 Q. Okay. What was that conversation? What did he say to
13 you and what did you say to him?

14 MR. FASMAN: Hearsay objection. He's not an agent. His
15 agency's long terminated.

16 MR. BIGGAR: He's going to be talking about events that
17 occurred when he was an agent, Your Honor.

18 MR. FASMAN: It doesn't make any difference.

19 JUDGE AMCHAN: Well, I don't know. Well, he certainly
20 can testify as to what he heard. Is it admissible for the
21 truth of the matter asserted? I don't know.

22 MR. FASMAN: Not six months after the fact, I don't
23 think, Judge.

24 JUDGE AMCHAN: Well, yeah, but I mean, I'll sort it out
25 later.

F. **Exceptions Concerning Rulings Granting General Counsel's Hearsay Objections**

In support of Exception No. 75: To the ruling sustaining the General Counsel's hearsay objection to testimony offered by CNN (Tr. 15444, L.13- Tr.15451, L.5; Tr. 15462, L.15-23; Tr. 15479, L.10- Tr.15481, L.19 (emphasis added)), as such ruling is contrary to the Federal Rules of Evidence because the testimony qualified under one or more hearsay exceptions. (D.69, L.5-33).

page 15444

13 MS. FOLEY: Your Honor, I'm going to object to this line
14 of questioning. There's no foundation. How does Mr. Coyte
15 know that? He's not there when it's being recorded.

16 JUDGE AMCHAN: I guess that's right. I mean, you do
17 have to lay a better foundation. Also with regard to the --
18 how do you know what happened in Shannon?

19 MS. FOLEY: Right, he doesn't. He doesn't.

20 THE WITNESS: Because it was reported. The video ended
21 up on air. Logistically, it wouldn't have made it any other
22 way because they got back on the plane and were flying and
23 with no transmission ability and obviously Khalil reported
24 back to me that he had done this.

25 MS. FOLEY: This is all hearsay.

page 15445

1 JUDGE AMCHAN: It is.

2 THE WITNESS: Well, other than the video aired.

3 JUDGE AMCHAN: Well, the video aired.

4 Q. BY MR. WILLNER: Are you the supervisor of the
5 photojournalists?

6 A. Yes.

7 Q. And in the ordinary course of business do you receive
8 reports from the photojournalists as to what they're doing?

9 JUDGE AMCHAN: No, that's still hearsay.

10 MS. FOLEY: It's still hearsay. It doesn't matter.

11 JUDGE AMCHAN: If you want to -- you have to bring the
12 person that did it, who has first-hand knowledge, in.

13 MR. WILLNER: Your Honor, I believe, actually, that a
14 person who has knowledge by virtue of being the supervisor of
15 what the subordinates do --

16 JUDGE AMCHAN: Absolutely not.

17 MS. FOLEY: No.

18 JUDGE AMCHAN: Absolutely not.

19 MS. FOLEY: Right.

20 MR. WILLNER: And might I ask --

21 JUDGE AMCHAN: It's hearsay. Because they have a right
22 to cross-examine the person with first-hand knowledge.

23 MR. WILLNER: Your Honor, if I might, just by way of
24 comparison, point out you raised the same objection to great
25 volumes of Team Video documents that the General Counsel

page 15446

1 submitted for its New York case after they closed the New
2 York case without any witnesses whatsoever and then submitted
3 summaries prepared by their lawyers which have been accepted
4 into evidence. Here we have a manager who received reports
5 in the ordinary course of business of what his subordinates
6 were doing and that's being excluded.

7 JUDGE AMCHAN: There's a difference between documents
8 that are received in the ordinary course of business, like
9 payroll record. You cannot bring in a supervisor who has
10 second-hand knowledge of what a subordinate told him and
11 prove something that way.

12 MR. WILLNER: Your Honor, manager who, in the ordinary
13 course of business, obtain information --

14 JUDGE AMCHAN: Absolutely not.

15 MS. FOLEY: Your Honor, I'm going to move to strike the
16 DVD and all the testimony related that Mr. Coyte has given so
17 far related to how --

18 JUDGE AMCHAN: Well, I'm not going to strike it, but I'm
19 going to give it no weight.

20 MR. WILLNER: Your Honor, can we take a break for a
21 moment?

22 JUDGE AMCHAN: Yeah.

23 MR. WILLNER: Thank you.

24 (Off the record.)

25 JUDGE AMCHAN: Back on the record.

page 15447

1 Q. BY MR. WILLNER: Mr. Coyte, did you receive reports from
2 your subordinate photojournalists while they were perceiving
3 the events that they were involved in or immediately
4 thereafter?

5 A. Sorry?

6 Q. Do you receive reports from the photojournalists who you
7 supervised while they were perceiving the activities that
8 they did as photojournalists or immediately afterwards?

9 A. Sometimes communication wouldn't allow them to do it or
10 simply what they're doing, but usually if a photojournalist
11 came back from a loadable story, they would come to me and
12 tell me about it.

13 Q. Now --

14 MS. FOLEY: Objection, Your Honor, this is still
15 hearsay.

16 JUDGE AMCHAN: Well, he hasn't asked the question,
17 but -- asked a question. I'm probably going to sustain an
18 objection.

19 Q. BY MR. WILLNER: One more question. With respect to the
20 information on the DVD that was shown --

21 A. Um-hum.

22 Q. -- where Mr. Koehler and Mr. Bohrman were speaking --

23 A. Um-hum.

24 Q. -- were they describing or explaining an event or
25 condition that they were perceiving at that time as you were

page 15448

1 filming?

2 MS. FOLEY: Objection.

3 THE WITNESS: Yes.

4 JUDGE AMCHAN: Sustained.

5 MR. WILLNER: Your Honor, I'm laying a foundation that
6 these are present sense impressions under Rule --

7 JUDGE AMCHAN: No, absolutely not. Absolutely not.

8 MR. WILLNER: Your Honor, I'd like to have this entered
9 as an offer of proof.

10 JUDGE AMCHAN: Well, whatever they said on the DVD is in
11 the record. It is pure hearsay. I will not consider it for
12 the matter, for the truth of the matter that they said. They
13 are not subject to cross-examination. It doesn't fall within
14 any of the hearsay objections.

15 MR. WILLNER: And Your Honor, just for the record, I did
16 previously state they are available for cross-examination.

17 JUDGE AMCHAN: Well, that's --

18 MS. FOLEY: Uh-uh. No, no, no, no, no.
19 JUDGE AMCHAN: -- not the point. You want to prove
20 something, you bring the witness in.
21 MS. FOLEY: Bring them in.
22 MR. WILLNER: And --
23 JUDGE AMCHAN: It's not their burden to subpoena them
24 for cross. You want to prove something that Mr. Bohrman
25 says, you bring Mr. Bohrman in, you have him testify, you
page 15449
1 have him subjected to cross-examination. Evidence 101.
2 MR. WILLNER: And as Mr. Coyte just said, they were
3 describing conditions that were present as they were
4 describing them.
5 JUDGE AMCHAN: He can testify about what he saw. He
6 cannot testify to the truth of what someone else told him.
7 MR. WILLNER: Your Honor, I didn't ask him to testify as
8 to the truth of what they told him. I asked him to testify
9 as to whether what is on that tape is what the people who
10 were there saw at the time.
11 JUDGE AMCHAN: Well, they testified about a lot of
12 things. Mr. Koehler testified about the process, what people
13 did in the past, what they do now. That is pure hearsay.
14 MR. WILLNER: Your Honor --
15 JUDGE AMCHAN: If you want to prove it, you bring
16 Mr. Koehler in.
17 MR. WILLNER: I don't want to get into an argument with
18 Your Honor, however I do just want to state for the record
19 our position, that these are included within the scope of
20 Rule 803 Subsection (1), present tense impressions.
21 JUDGE AMCHAN: Which one?
22 MR. WILLNER: Rule 803(1), present sense impressions
23 and --
24 JUDGE AMCHAN: 803(1).
25 MR. WILLNER: And also 803(6), which has to do with
page 15450
1 business records which report -- which include reports --
2 JUDGE AMCHAN: I disagree 100 percent.
3 MS. FOLEY: Oh, please. Please.
4 MR. WILLNER: I understand Your Honor disagrees. I just
5 want to state my position for the record --
6 JUDGE AMCHAN: Okay.
7 MR. WILLNER: -- if I may. And that records of
8 regularly conducted activities include records that are kept
9 in any form.
10 JUDGE AMCHAN: You want to prove something, you bring in
11 someone who has first-hand knowledge. If you want to prove
12 that Mr. Abdallah FTPed something from Shannon Airport in
13 March 2004 --
14 MS. FOLEY: Bring him in.
15 JUDGE AMCHAN: -- bring in Mr. Abdallah, not Mr. Coyte,
16 who heard it from Mr. Abdallah.
17 MR. WILLNER: Your Honor, we do take exception to these
18 rulings, as I'm sure -- and Your Honor has said before
19 Your Honor does not take that personally.
20 JUDGE AMCHAN: Right.
21 MR. WILLNER: I would like to make an offer of proof
22 with respect to this witness' testimony on these subjects,
23 Your Honor.

24 JUDGE AMCHAN: Yeah.

25 MR. WILLNER: Okay.

page 15451

1 JUDGE AMCHAN: You have an absolute right to make an
2 offer of proof.

3 MR. WILLNER: Okay. It may take some time, but we'll go
4 ahead.

5 JUDGE AMCHAN: Okay.

page 15462

15 MR. WILLNER: Just for the record, Your Honor, based
16 upon Mr. Coyte's testimony thus far, as to the basis for his
17 knowledge, having seen the footage itself and having made the
18 assignments that call for the editing and the fact that the
19 footage was edited not in Washington, D.C., that's apparent
20 from the footage that he personally saw, Your Honor. I'm
21 going to ask Your Honor to reconsider Your Honor's ruling on
22 this matter.

23 JUDGE AMCHAN: No.

G. **Exceptions to Rulings Overruling CNN's Objection to Producing All Documents Reviewed by a Witness In Advance of Testifying (Fed. R. Evid. 612)**¹

In support of Exception No. 76: To the ruling that CNN must produce to the General Counsel all documents that Cindy Patrick reviewed during the months leading up to trial, as such ruling is contrary to Federal Rule of Evidence 612. (Tr. 676, L.22-Tr.686, L.7; Tr.757, L.15-Tr.761, L.2 (emphases added)).

page 676

22 MS. BAUMERICH: Your Honor, General Counsel
23 would request that they be produced by this witness,
24 as she has reviewed them prior to her testimony. . . .

page 677

5 MR. FASMAN: Your Honor, there has been no
6 basis presented for production of these e-mails.

7 Under Rule 612 -- it requires and I will read
8 Weinstein. Rule 612 requires that for an adversary to
9 obtain production of a document in writing, the
10 witness must actually have relied upon the document to
11 refresh his or her recollection.

12 There has been no proof that this witness is
13 testifying in any way from documents used to refresh
14 his or her recollection.

15 The rule is very clear that there has to be a
16 foundational inquiry to the effect that this witness
17 has had his or her recollection refreshed by review of
18 the documents.

19 Ms. Baumerich has never asked that question to
20 the witness.

21 I have here, Your Honor, eight cases that we
22 have found on that point. Let me read to you from --

23 JUDGE AMCHAN: I'm going to short-circuit this.

24 I will make you turn them over. It seems to me
25 from the examination yesterday, we are talking about

page 678

¹ On March 20, 2008, the Board issued an Order reversing Judge Amchan's ruling as inconsistent with Rule 612.

1 events that occurred over four years ago.

2 I thought Ms. Patrick made it pretty clear that
3 she didn't have a very good recollection of those
4 events without refreshing her recollection by looking
5 at documents.

6 MR. FASMAN: I think, Your Honor, if I may, it
7 is very clear that absent proof that her testimony on
8 the witness stand is based upon her review of those
9 documents, that there is no requirement to turn them
10 over, and there is a ton of case law right on point.

11 JUDGE AMCHAN: I'm looking at the language of
12 612. It seems to me I have discretion as to whether
13 to have them turned over.

14 I guess I will exercise my discretion to have
15 them turned over.

16 It seems to me from her testimony yesterday it
17 is pretty clear she doesn't remember a whole lot
18 without looking at documents.

19 I assume she reviewed the documents. She
20 testified that she reviewed the documents a couple
21 weeks ago in your office.

22 I can't think of any other reason why she would
23 look at them other than to prepare for this trial.

24 MR. FASMAN: Your Honor, I think there still
25 has to be a foundational question asked, is your
page 679

1 testimony based on review of those documents. She
2 doesn't even remember what documents there were.

3 JUDGE AMCHAN: I think I can draw the inference
4 that if she looked at these documents recently in your
5 offices with this trial looming, in conjunction with
6 her testimony yesterday, which indicates she remembers
7 very little about the events in 2003 without some
8 review of documentation, I think that's enough.

9 MR. FASMAN: I think, Your Honor, she was
10 testifying without claiming that her recollection was
11 refreshed by any of these documents.

12 I think at least I have the right to ask her --
13 before you order production, I have the right to ask
14 her whether or not the review of the documents
15 refreshed her recollection as to any factual issue in
16 this case.

page 683

18 MR. FASMAN: Your Honor, all I can say is if
19 there is a rule requiring me to specify I showed this
20 witness this, that or the other thing, I would like to
21 know what it is. I don't think there is a rule.

22 JUDGE AMCHAN: Do you know what at least some
23 of the documents are?

24 MR. FASMAN: I don't know. I could take a
25 look.

page 684

1 I really would be guessing. We can sit down and
2 take a look and say, "Do you think we showed her this
3 or did you look at this?"

4 A lot of that, I have to say, was questions
5 about what's the story about this. That's my point.

6 JUDGE AMCHAN: You are preparing her. It is
7 four years since the events occur.

8 You show her a document. It has to be the basis
9 for her testimony to some extent because without
10 reference to the document, she doesn't know what
11 happened four years ago.

12 MR. FASMAN: You are making an assumption, Your
13 Honor, that that is in fact why we showed them to her
14 and that they did refresh her recollection.

15 The foundational issue is did that happen. When
16 we were preparing Ms. Patrick, we went over documents,
17 we showed them to her. But some of it was questions
18 that we had about the case and about this situation.

19 JUDGE AMCHAN: But she couldn't have answered
20 your questions without looking at the documents.

21 MR. FASMAN: We would ask her about this and
22 say what happened here with this particular fact.

23 JUDGE AMCHAN: I'm sticking by my ruling.

24 MR. FASMAN: Would you like to take a look at
25 the cases to perhaps reconsider?

page 685

1 JUDGE AMCHAN: No. Let's move on.

page 757

15 JUDGE AMCHAN: Maybe I'm wrong about this. But
16 I'm willing to take it as a presumption.

17 If you showed her documents pertaining to this
18 time period and you are talking about a time period
19 four years ago, that her testimony is at least colored
20 by what she reviewed in the past couple of weeks.

In support of Exception No. 77: To the ruling that each party must produce to the opposing parties all documents that its witnesses have reviewed during the previous six months, as such ruling is contrary to Federal Rule of Evidence 612. (Tr. 1063, L.9-Tr.1065, L.9 (emphasis added)).

page 1063

9 MR. FASMAN: Your Honor, I would only make one
10 more mention of one preliminary issue.

11 As I said off the record, we delivered to Your
12 Honor this morning and have served on the parties a
13 letter along with some cases dealing with the
14 application of rule 612 in this case.

15 You know, our purpose in doing so is solely
16 this, and that is to protect the record. It's a very
17 long trial, and we want to make sure for everybody's
18 sake that we get this right.

19 I'm not sure that we're disadvantaged in any
20 particular way or that this would have a more
21 significant impact on Mr. McCarthy or Mr. Powers who
22 have gotten a huge amount of documents, but if we're
23 going to ask every witness to -- or counsel for each
24 party to bring in every document that every witness
25 looked at in the past six months, I think it's

page 1064

1 appropriate at least to relook at it and make sure
2 that that is the correct ruling. That's the only
3 reason we've done it.

4 JUDGE AMCHAN: All right.

5 MR. FASMAN: And we needn't discuss it because
6 I just served it on these guys.

7 JUDGE AMCHAN: I'll put off opining, but it
8 does seem to me that your suggestion is a good one. I
9 would think that if any witness has reviewed any
10 document in the last six months, those documents ought
11 to be identified, if asked, and, if they haven't been
12 produced, provided to whoever asks for them.

13 It just seems to me -- and I go back to my
14 comment with Ms. Patrick -- the events in this case
15 took place quite a while ago. If she looks at
16 documents, how am I intelligently going to determine
17 whether she's relying upon them? She may not even
18 know, you know, what refreshed her recollection and
19 what didn't.

20 I'm under the assumption that if she's looking
21 at documents from 2003 in the last six months that
22 they may have refreshed her recollection and I'll make
23 that assumption with all witnesses.

24 Now, the one thing is Jencks-type material,
25 affidavits, you would only get -- CNN or TVS would
page 1065

1 only get after the witness is done testifying.

2 MR. FASMAN: Yes.

3 JUDGE AMCHAN: But I mean, if General Counsel
4 or the charging parties', you know, witness looked at
5 documents in the last six months, I expect them to be
6 able to identify what documents those are and, if they
7 haven't been previously provided, that they be
8 provided.

In support of Exception No. 78: To the ruling that the witness must identify documents that the witness reviewed in preparation for his/her testimony and which refreshed his/her recollection generally, as such ruling is contrary to Federal Rule of Evidence 612. (*See e.g.*, Tr.13900, L.4-Tr.13901, L.6; Tr.328, L.1-Tr.338, L.5; Tr.865, L.3 – Tr.866, L.14; Tr.2015, L.9-20; Tr.2123, L.25 – Tr.2124, L.13; Tr.2766, L.11 – Tr.2767, L.19; Tr.7909, L.24 – Tr.7910, L.11; Tr.8031, L.15-Tr.8032, L.8; Tr.8421, L.23-Tr.8422, L.8).

page 13900

4 JUDGE AMCHAN: Well, the question is what document --
5 let's see. Did you review any documents to refresh your
6 memory for the purpose of testifying?

7 THE WITNESS: Did he ask me?

8 JUDGE AMCHAN: Yes.

9 THE WITNESS: Yes.

10 JUDGE AMCHAN: And the question is what are those?

11 THE WITNESS: I don't know.

12 JUDGE AMCHAN: I mean are they --

13 THE WITNESS: They're various documents.

14 JUDGE AMCHAN: Are they the exhibits?

15 MR. WILLNER: And again, Your Honor, I understand that I
16 can't object to a question being asked by the Judge.

17 JUDGE AMCHAN: Well, you can. You can.

18 MR. WILLNER: But the rule does require, as I understand
19 it, that the documents actually refresh her recollection as
20 to something she testified about.

21 JUDGE AMCHAN: Well, if a witness uses a writing to
22 refresh memory for the purposes of testifying --

23 MR. WILLNER: And I think the question was missing, Your

24 Honor, with all due respect, is which documents did they
25 refresh your recollection as to which topics you testified
page 13901

1 about because a general question about did a document refresh
2 your recollection, I don't believe, Your Honor, is sufficient
3 under the applicable rule.

4 JUDGE AMCHAN: I don't know. It seems good enough to
5 me.

H. **Exceptions to Rulings on CNN's Objections to Order and Timing of Witness Examination**

In support of Exception No. 79: To the ruling that (1) overrules CNN's objection that the General Counsel has started, but not finished, its examinations of Cindy Patrick, Larry D'Anna, and Richard Morse, and CNN has not been permitted the opportunity to conduct its examination of those witnesses; and (2) overrules CNN's further objection that new witnesses will be called by the General Counsel before these and other witnesses are completed (Tr. 1648, L.2 -Tr. 1653, L.14 (emphases added)), as such ruling is contrary to Federal Rule of Evidence 611.

page 1648

2 MR. WILLNER: As we look at it on this side of
3 the room, thus far General Counsel has started but not
4 finished or we have not had an opportunity to cross-
5 examine Mr. D'Anna and Ms. Patrick, and we understand
6 Mr. Morse will not be finished today either, and they
7 don't plan on having him back again tomorrow because
8 of other witnesses they want to examine.

9 The General Counsel has asked for three other
10 witnesses for the remaining two days of this week. If
11 things go according to how they've gone in the last
12 week and a half, it's highly unlikely that any of
13 those three witnesses will be completed this week.

14 The General Counsel has indicated to us earlier
15 today that they expect to call two other witnesses on
16 Monday. That would make a total of eight witnesses
17 begun but not completed without any of the Respondents
18 having an opportunity to cross-examine any of these
19 witnesses.

20 The distance in time in between the starting of
21 these witnesses and the opportunity to cross-examine
22 them hinders our ability to cross-examine the
23 witnesses, so we would respectfully suggest that the
24 rest of the time here -- we understand their witnesses
25 are already scheduled for tomorrow, you know, why not

page 1649

1 do those, but we would respectfully suggest that
2 rather than starting with other whole new witnesses
3 next week that aren't going to get finished, what the
4 parties should do is just focus from now until the end
5 of this session next Wednesday on finishing up the
6 witnesses who have been started and giving the
7 defendants an opportunity to cross-examine witnesses
8 such as Mr. D'Anna, Ms. Patrick and Mr. Morse and the
9 witnesses who I understand General Counsel intends to
10 call tomorrow.

11 MR. FASMAN: Can I add one coda on that, Judge?

12 And that is that, as I said before we broke for
13 lunch, we were given less than a full week's notice
14 for the two other witnesses that Mr. McCarthy has
15 informed me of this afternoon. Both of those folks

16 work in the same department.

17 And as I told Mr. McCarthy at the break, this is
18 the time of year where people with accrued vacation
19 are out. And I don't know -- I haven't talked to
20 their supervisor yet. I will do that this evening
21 because he's a witness tomorrow to see if we can
22 accommodate. I can't even guarantee at this point
23 that we're going to be able to staff the department,
24 you know, given four days notice.

25 So I mean, I would add to that to Your Honor's
page 1650

1 consideration of what Mr. Willner just said.

2 MR. WILLNER: We do think the right to cross-
3 examine is very important, and it is of some concern
4 to us that as these witnesses are called one after
5 another we are not getting an opportunity to ask
6 questions of virtually -- not all of them but close to
7 all of them.

8 MR. POWERS: Your Honor, Mr. D'Anna was a
9 witness who had scheduling problems. He would have
10 been completed if he had -- he was under subpoena for
11 consecutive days, but we accommodated Mr. D'Anna's
12 schedule per Mr. -- per counsel's request.

13 But Mr. D'Anna and Ms. Patrick have -- are also
14 witnesses that have -- are responsible for tens of
15 thousands of documents that Your Honor is well aware
16 of -- and that's an understatement -- and Your Honor
17 is well aware that we have not had an opportunity to
18 review those documents. We are going to review those
19 documents. We couldn't be through with them if we
20 tried because of that responsibility, so they're
21 unique.

22 And I certainly agree with Mr. Willner that -- I
23 would rather finish up these witnesses as well. I
24 would rather -- we could have finished up Mr. D'Anna
25 had his schedule permitted.

page 1651

1 But given the fact that they're unique, and you
2 know, if witnesses take a little bit longer than
3 expected and we've got this scheduling conundrum that
4 we're all trying to work through, that we're working
5 in good faith.

6 And usually people -- you know, having extra
7 time to cross-examine someone cuts both ways.

8 I would rather have a witness on and off. I
9 think it's a disadvantage from our side to have them
10 have the transcript, review the transcript, prepare
11 everything.

12 But we're doing our best.

13 JUDGE AMCHAN: Yeah. Actually I think it's
14 actually an advantage to have the time to prepare for
15 cross.

16 Plus Mr. D'Anna and Ms. Patrick, I mean, you're
17 going to be able to produce them as your own witnesses
18 as your part of the case, so I don't really see that
19 you're at a disadvantage.

20 I mean, I understand that it's a little bit
21 confusing to have people not finish, then have someone

22 else.

23 I mean, to the extent that we can avoid that,
24 I'm in favor of it, but I'm certainly not going to
25 force the General Counsel to complete one witness
page 1652

1 before they put another -- I mean, my preference is
2 just to keep moving and use the time allotted as best
3 we can. However, that's -- it will all work out in
4 the end.

5 MR. WILLNER: We do believe, Your Honor,
6 that -- we're totally in favor of keeping things
7 moving, but we just suggest keeping things moving in a
8 way that gives us the opportunity to cross-examine
9 witnesses. We think it simply doesn't give a fair
10 impression of what the witnesses have to say if only
11 direct goes on witness after witness after witness and
12 we don't have the opportunity to cross-examine them.

13 JUDGE AMCHAN: Oh, you're going to have the
14 opportunity to cross-examine them. And actually I
15 think, particularly if you have the transcript, I
16 think it's an advantage in preparing cross.

17 MR. FASMAN: Well, the only thing that I would
18 add to that, Your Honor, is that if Mr. Morse gives
19 his testimony today and then disappears until the end
20 of January, when we say, Well, do you remember the
21 testimony that you gave about X, Y and Z, he's going
22 to look at us and say --

23 JUDGE AMCHAN: Well, then you show him the
24 transcript if he doesn't remember.

25 MR. WILLNER: If you ask him what did he mean,
page 1653

1 is he going to say, I don't remember?

2 JUDGE AMCHAN: Well, no. You show him the
3 transcript. . . .

In support of Exception No. 81: To the ruling that overrules CNN's and Team's objections to the General Counsel's practice of refusing to call its witness back immediately after their direct examination so that CNN and Team can conduct their examination immediately after the General Counsel's, and instead calling new witnesses (Tr. 3164, L.4-Tr.3165, L.18), as such ruling is contrary to Federal Rule of Evidence 611.

page 3164

4 MR. WILLNER: Before the questioning begins, we do
5 want to register our continuing objection that we have
6 made here from the beginning, that we do have the right to
7 cross-examine those witnesses who have already been called
8 and who have been examined by the General Counsel, and we
9 have not been permitted to cross-examine yet as the
10 General Counsel continues to call new witnesses, rather
11 than calling those whom we have the right to cross-
12 examine.

13 We would point out the American Wholesalers, Inc.
14 case at 210 NLRB 499 in which the Board held that it was
15 reversible error to deny this right to cross-examination
16 and to delay the ability to cross-examine witnesses. And
17 in this case it has happened repeatedly, and we object to
18 the calling of this witness and any other until we have
19 had the opportunity to cross-examine the witnesses.

20 JUDGE AMCHAN: It's 210 NLRB --

21 MR. WILLNER: 210 NLRB 499. We have copies,
22 actually, Your Honor, that I think will be here
23 momentarily.
24 JUDGE AMCHAN: All right.
25 MR. WILLNER: We'll have them for you momentarily.
page 3165

1 JUDGE AMCHAN: If I'm violating any rule, I will
2 make sure that it's a harmless error before the day is
3 ended. How is that? Not today but before we're done.

In support of Exception No. 83: To the ruling denying CNN's verbal motion to strike the testimony of Richard Morse on the grounds that there had been two months' delay between the first time the General Counsel called him and the second time the General Counsel called him, and CNN had not been permitted to cross-examine him in the interim (Tr. 6155, L.4-22), as such ruling is contrary to applicable law.

page 6155

4 MR. FASMAN: Can I make a motion, please? I move to
5 strike all of Mr. Morse's prior testimony and preclude his
6 testimony this morning. It's been two months, more than two
7 months since he last testified. I think we've been
8 prejudiced by the Board's refusal to call him. We've had
9 months and months of testimony. There is no excuse for a
10 two-month delay in a witness -- when we discussed this
11 originally, Mr. -- Ms. Baumerich said well, we'll get him
12 back next week. We objected at the time and said we thought
13 there would be prejudice by the excessive delay and in cross-
14 examination, in order to follow direct, direct ought to be
15 completed, we ought to have a witness. I understand the
16 office -- it's two months later. Whatever Your Honor -- and
17 we recognize Your Honor ruled, okay, and I'm not -- you know.
18 JUDGE AMCHAN: I'm not going to change it.
19 MR. FASMAN: Yeah. I'm just saying, it's been two
20 months. We think we've been very much prejudiced and we'd
21 like to make that motion.
22 JUDGE AMCHAN: Okay. Well, it's denied.

In support of Exception No. 86: To the ruling that overrules CNN's objection to the General Counsel's statement that it "reserves the right" to defer its examination of Loren Kile (Tr. 13054, L.22-Tr.13056, L.24), as such ruling is contrary to Federal Rule of Evidence 611.

page 13054

22 MS. FOLEY: Your Honor, we consider
23 Ms. Kile an overall witness and, therefore, we
24 will reserve our right to examine her until we
25 get to Washington.

page 13055

1 MR. WILLNER: Just to be clear, your
2 Honor, for the record, we do not agree that
3 cross-examination can be deferred in that
4 manner. We think the Board has spoken on
5 that, as have the courts, and it is not
6 permitted.

7 JUDGE AMCHAN: Well, they can call
8 her as their witness in D.C., and if she
9 testifies as part your case in D.C., they can
10 cross-examine her then.

11 MR. WILLNER: Certainly, your Honor,
12 if we were to call her in our case in D.C.,
13 they would have the opportunity to

14 cross-examine her.
15 I will point out that she is based in
16 New York, lives in New York City and works in
17 New York and she should be examined in New
18 York.
19 Ms. Foley has mentioned today that
20 she is going to be in Washington, D.C., no
21 reason that the same counsel here today cannot
22 cross-examine her today.
23 We also think that what this is, this
24 is effectively allowing a simple deferral of
25 cross-examination. They can call it calling
page 13056
1 her in D.C. but we all know what it is. It is
2 cross-examination of her that can and should
3 have been done today.
4 MS. FOLEY: Well, Mr. Willner doesn't
5 set the schedule.
6 MR. WILLNER: The rules do, the
7 Board does. And the Board does not permit
8 this sort of deferral.
9 MS. FOLEY: Show it to me in
10 writing.
11 JUDGE AMCHAN: Let's not have the
12 back and forth. They haven't rested --
13 MR. WILLNER: We did, your Honor,
14 you will recall in Washington, give to your
15 Honor a case that stands for that proposition.
16 JUDGE AMCHAN: Yes. I don't know
17 how sound that case is actually. But in any
18 event, we will cross all these bridges when we
19 get to it.
20 But you are not going to cross her
21 today?
22 MS. FOLEY: Not today, your Honor.
23 JUDGE AMCHAN: You are excused, at
24 least for the time being.

In support of Exception No. 89: To the ruling that overrules CNN's objection to the General Counsel's re-calling of Cindy Patrick (Tr. 14846, L.6-Tr.14849, L.1, CNNA Ex. 736 (emphases added)), as such ruling is contrary to Federal Rule of Evidence 611.

page 14846

6 MR. FASMAN: Your Honor, before Ms. Patrick takes the
7 witness stand, I'd like to put on the record our objection to
8 this proceeding. We addressed these in correspondence to the
9 court and I think the reader of the record ought to know the
10 basis of our objection. As Your Honor will recall,
11 Ms. Patrick was called and examined for two full days at the
12 start of this case under Rule 611 over our objection and
13 actually, at one point, with Your Honor's direction, but the
14 Board was told, at the end of her examination, that they'd
15 have an opportunity to call Ms. Patrick and examine her on
16 specific documents that hadn't been provided.
17 The Board agreed that they would do that in January of
18 this year; Ms. Baumerich agreed to that. Ms. Patrick was not
19 called in January or February or March or April and we
20 finally went up to New York at some point and she still

21 wasn't called and Ms. Patrick then was called by us as part
22 of our case. When she was called, General Counsel refused to
23 cross, although Ms. Foley was there, as she's here today.
24 And although Ms. Foley had, in fact, said to Your Honor on
25 the record this was one case, not two cases, our position is
page 14847

1 that you can't recall someone as an adverse and avoid
2 contemporaneous cross. If this were the approved procedure,
3 why would anyone do a contemporaneous cross at all? I think
4 we've made clear, in our correspondence to Your Honor, that
5 we believe this is directly contrary to court law. We've
6 cited to you, in this context and elsewhere, American
7 Wholesalers.

8 You've said that you don't find it persuasive. I still
9 don't know why you don't find it persuasive, but it is in the
10 record, and it's the only case that the Board has ruled on.
11 You mentioned in your ruling on this matter that you sent us
12 last week that a judge has discretion to allow a 611 witness
13 to be recalled. I don't think that's necessarily consistent
14 with the Board's position, and the Board has said that this
15 is reversible error.

16 But I don't think it is important, and this is the basis
17 of our objection, under Rule 611(c), as it's used in the
18 district courts and the federal courts, a party just cannot,
19 without a compelling reason, say I'm not going to cross
20 contemporaneously and then recall the person as a 611(c)
21 witness. You have to state, at least, state a reason for
22 that. We haven't heard a reason for that yet. And I don't
23 know what the reason could be. I won't go through what I
24 think is the litany of reversible errors that the Board is
25 looking for, Your Honor, so I won't go there. I also want to
page 14848

1 make clear that or maybe ask this question. We're a little
2 puzzled by your decision because you appear to impose no
3 limitations on the Board's examination of Ms. Patrick. At
4 one point, in January, you said the Board could recall her to
5 conclude her testimony but only to examine her on documents
6 that had been provided and that the Board had apparently not
7 gone through at that point. You also said, in New York, that
8 when the Board rested in New York, that they were done with
9 the New York case --

10 JUDGE AMCHAN: Um-hum.

11 MR. FASMAN: -- unless and until they got documents from
12 the district court. In your ruling, I didn't see anything
13 limiting their examination of Ms. Patrick to comply with that
14 ruling, and of course, you did make that ruling with regard
15 to Ms. Kile.

16 JUDGE AMCHAN: Yeah. My ruling with regard to
17 Ms. Patrick would be the same as with Ms. Kile, that is, I
18 would not allow the General Counsel to cross-examine on
19 things that are specific to New York. I think they had their
20 chance. I'm not inclined to limit them -- let's just see
21 what happens. As far as reversible error, I'll be like
22 Admiral Farragut, damn the torpedoes.

In support of Exception No. 90: To the ruling that directs Cindy Patrick to take the stand to answer questions posed by counsel for Local 31, overruling CNN's objection that she was not under

subpoena and Local 31 had the chance on four previous occasions to cross-examine her (Tr. 15145, L.13-Tr.15149, L.13 (emphases added)), as such ruling is contrary to Federal Rule of Evidence 611.

page 15145

13 MR. BOLEK: Then I call Cindy Patrick to the stand.

14 JUDGE AMCHAN: Right.

15 MR. FASMAN: She's not under --

16 MR. BOLEK: Yes, she is.

17 MR. FASMAN: She is not. There's no subpoena -- for

18 her.

19 MR. BOLEK: The subpoena was taken with her name on it.

20 JUDGE AMCHAN: Well, regardless of whether she is or

21 not, I'm directing her to come up here and testify as to

22 whether these are authentic documents.

23 MR. FASMAN: We will take a recess, Judge.

24 MS. REEVES: Yeah.

25 MR. FASMAN: Thank you.

page 15146

1 (Off the record.)

2 MR. FASMAN: With all due respect, Your Honor, without a
3 valid subpoena, you don't have the power to direct
4 Cindy Patrick to get on the witness stand.

5 MR. BOLEK: Your Honor --

6 MR. FASMAN: That being said -- and Mr. Bolek, of
7 course, has not produced the subpoena -- because he can't.

8 That being said, we'll put Ms. Patrick on the witness stand
9 to be questioned about these two documents as an effort to
10 move this case along.

11 JUDGE AMCHAN: Okay.

12 MR. FASMAN: And I note for the record that your
13 direction is wholly improper and it is, in my view, another
14 example of what -- of the type of reversible error that has
15 occurred throughout this trial.

16 MR. BOLEK: Your Honor --

17 MR. FASMAN: Absolutely improper.

18 MR. BOLEK: Your Honor, if may I put our position on the
19 record? Local 31 served a subpoena duces tecum to
20 Ms. Cindy Patrick, personally. We provided a witness fee
21 with mileage. The subpoena duces tecum, on its face,
22 directed her to appear, with documents, to testify. That's
23 all that's sufficient. There's nothing in the Board's rules
24 or a Board precedent that requires any party to issue a
25 subpoena ad testificandum in addition to a subpoena duces

page 15147

1 tecum. Moreover --

2 MR. FASMAN: Perhaps Mr. Bolek will grace us, then, with
3 putting the subpoena duces tecum in the record.

4 MR. BOLEK: It's coming, it's being faxed.

5 MR. FASMAN: All right. So shall we put that in the
6 record, Judge?

7 JUDGE AMCHAN: It's fine with me.

8 MR. BOLEK: It's the same one you've been responding to
9 all along. By you, I mean CNN. But in any event, the --
10 those two e-mails are -- were in Ms. Patrick's custody as
11 reflected in a document produced by CNN.

12 JUDGE AMCHAN: Well, I don't know that we have to go
13 through that. Mr. Fasman said he's willing to put her on the
14 stand even though he doesn't think I have the authority to do

15 so. You'll ask her about --
16 MR. FASMAN: In the absence of --
17 JUDGE AMCHAN: He'll ask her about the things and then
18 he'll put the subpoena in. So relevant to whether I
19 committed reversible error. I guess if I committed
20 reversible error once, does it matter if I do it again?

page 15148

16 MR. WILLNER: Just for the record, Your Honor, as well.
17 Your Honor's order requiring Ms. Patrick to testify, this is
18 now the fourth time Ms. Patrick has been on the stand.
19 There's been a pattern throughout this case with regard to
20 Ms. Patrick and other witnesses, calling them over and over
21 again to manipulate the rules on cross-examination. It's
22 contrary to due process, it's contrary to the Board's
23 decisions, and we feel that this kind of repeated cross-
24 examination of the same witness is simply inappropriate.
25 JUDGE AMCHAN: Well, the union has the right to present

page 15149

1 its own case.

I. **Exceptions to Rulings on CNN's Objections to the General Counsel's
Summary of Evidence/Demonstrative Evidence Exhibits**

In support of Exception No. 91: To the ruling that admits into evidence charts prepared by the General Counsel that summarize evidence contained in GC Exhibit 134, overruling CNN's objection to the summaries as incomplete and inaccurate (Tr. 2381, L.3-Tr.2392, L.19, GC Exs. 135-139), as such ruling is contrary to Federal Rule of Evidence 1006.

page 2381

3 MR. COLLOPY: Your Honor, I have pulled
4 together a little demonstrative evidence to -- pulled
5 together charts of the information that's in the
6 binder in General Counsel Exhibit 134, and I would
7 like to present that to you as demonstrative evidence
8 for your work in judging this case.

9 (General Counsel Exhibit 135 marked for
10 identification.)

11 MR. WILLNER: Your Honor, we do object to this
12 document.

13 First, this is argument. Second, there are
14 actual contemporaneous documents that have the scores,
15 including summaries, which could have been used with
16 this witness rather than something that was prepared
17 by counsel. And we have reason to believe that this,
18 just looking at the gaps in it, may not be accurate or
19 complete as well.

20 JUDGE AMCHAN: Well, if it's inaccurate, any
21 testimony based on the exhibit would be pretty
22 worthless.

23 MR. WILLNER: And there's no foundation
24 indicating that it is accurate.

25 JUDGE AMCHAN: Yeah. I don't know. To me,
page 2382

1 it's half a -- what is it? -- half a dozen of one, six
2 of the other. They could attach this with their brief
3 or they could put it in as an exhibit, as long as it's
4 clear what it is.

5 MR. COLLOPY: I would like to have it in front
6 of the Court as the Court reviews the testimony. You

7 can make of it what you want. It's merely
8 demonstrative evidence, nothing more than that.

9 JUDGE AMCHAN: They've represented that they've
10 gone through and made this chart. If he asks some
11 questions and it turns out that the exhibit is
12 inaccurate, then that affects the -- affects or maybe
13 destroys the probative value of the testimony.

14 MR. WILLNER: You know, I guess, Your Honor,
15 without a witness testifying as to who prepared it and
16 how it was prepared, where the information came from
17 and why there are the gaps that are evident in these
18 numbers, you know, what are we supposed to do? Put a
19 witness up to testify that the numbers --

20 MR. COLLOPY: Counsel, I think I represented
21 that I put the chart together. I put it together
22 based on the materials contained in the binder in 134.

23 If there are gaps, it's gaps that were in
24 documents that you didn't produce so far or we don't
25 have, so if you want to supplement the chart or do
page 2383

1 your own chart down the road, you're welcome to do
2 that.

3 But I think for the purposes that I would like
4 the Court to look at this, I would like to have it in
5 front of the Court now rather than have the Court, if
6 the Court wanted to do a similar job down the road, I
7 would hate to have the Court do that -- I mean, you're
8 going to have this case for a long time. I imagine at
9 different times you may want to look at different
10 reference points to take a shot at writing something.

11 JUDGE AMCHAN: I'm going to let him -- he's
12 identified the document. I think he can ask Mr. Vu
13 questions from the document.

14 If it turns out that the chart is inaccurate, as
15 I said, it destroys the probative value of both the
16 testimony and the chart.

page 2387

23 MR. WILLNER: Your Honor, the witness did not
24 prepare this document and is not in a position while
25 sitting on the stand to go through every rating from
page 2388

1 four different raters for it looks like 13
2 individuals, nor should the witness be asked to do
3 that.

4 If this was prepared by someone from General
5 Counsel, whether it's their counsel or not, they
6 should put up their own witness to testify under oath
7 about how it was prepared and be cross-examined about
8 it after we've been given a chance to examine it.

9 JUDGE AMCHAN: Well, I don't know that that's
10 necessary. They're introducing it as a tool for me to
11 use, and I would only rely on it if I -- you know, I
12 assume they're going to make the point at the end of
13 the hearing as to what this shows, and I certainly
14 wouldn't rely on the documents without going back and
15 checking to see whether the chart is an accurate
16 representation of the ratings that the four people

17 gave.

18 MR. WILLNER: Just to illustrate the point, who
19 exactly are we supposed to cross-examine about the
20 foundation for this document?

21 JUDGE AMCHAN: Well, I don't think you need to
22 cross-examine it anyway. Mr. Collopy prepared it.
23 He's represented that he prepared it from Exhibit 134.
24 It's a summary, and I don't know that you'd have to
25 cross-examine anybody or that you should.

page 2389

1 I mean, if it's inaccurate, it's inaccurate, and
2 I won't rely on it. And if it's --

3 MR. WILLNER: Are we supposed to submit a brief
4 to suggest it's inaccurate?

5 JUDGE AMCHAN: Well, I don't know. I guess if
6 you review it and find that it is inaccurate, you can
7 tell me that. On the other hand, also if you think
8 that there are other comparisons, you know, suppose
9 it's accurate, but there are other comparisons that
10 are more relevant, you can tell me that, too.

11 MR. WILLNER: We can certainly do that, Your
12 Honor, but it's, you know -- exactly how or when one
13 does that without a witness who prepared it --

14 JUDGE AMCHAN: Well, no. But this is all --
15 Mr. Collopy has represented this is all prepared from
16 documents that are already in evidence. I don't think
17 you have to -- either they accurately represent what's
18 in 134 or it doesn't. They're going to make an
19 argument from that that -- they're going to make an
20 argument that Mr. Vu rated the TVS applicants who
21 weren't hired lower than anybody else. Maybe that's
22 not the relevant question to ask. You'll tell me
23 that. You'll tell me what the relevant comparisons
24 are.

J. Exceptions to Rulings Related to Subpoenas

In support of Exception No. 97: To the ruling admitting exhibits offered by the General Counsel, overruling CNN's objection that the document was responsive to CNN's subpoena to Local 11 but had not been provided to CNN previously (GC Ex. 471), as such ruling is contrary to applicable law. (Tr. 9952, L.22-Tr.9955, L.7).

page 9952

22 VOIR DIRE EXAMINATION

23 BY MR. WILLNER:

24 Q. Is Government Exhibit 471 a document
25 that you provided to the union in response to
page 9953

1 their request for information related to the
2 subpoena?

3 MR. ROSE: Your Honor, I object to
4 this, Team is a respondent here, they have
5 access to these documents. This is improper.

6 JUDGE AMCHAN: I will let him ask it.

7 A. Restate your question, I was never
8 subpoenaed to give any documents. Nobody
9 subpoenaed me to give anything.

10 What was your question?

11 Q. My question follows from your

12 testimony earlier that the union asked you for
13 documents so the union can respond to the
14 subpoena that was served on the union. You
15 testified that you gave the union some
16 documents?

17 My question is Exhibit 471, one of
18 the documents that you gave to the union.

19 A. As a shop steward these documents
20 were in the union binders. As a shop
21 steward, I would make the union aware when
22 these documents came out.

23 These documents were given to the
24 union, the union will them early on.

25 I don't understand what the question
page 9954

1 is.

2 If you're asking me did I supply
3 these documents, you know, for this case, the
4 union had these documents as far as I know,
5 because as a shop steward my job was to keep
6 records of things like this.

7 Q. So I think it's established the union
8 had this document already.

9 My question to you is: Did you give
10 this to the union again in preparation of this
11 case?

12 MR. ROSE: I have to object to this.
13 Is there a good faith basis on which he is
14 asking these questions. Does he claim CNN
15 doesn't have these documents?

16 JUDGE AMCHAN: He's saying the union
17 didn't provide them pursuant to subpoena.

18 MR. ROSE: Does he know that for a
19 fact, maybe they did.

20 MR. WILLNER: I would like an answer
21 to the question.

22 JUDGE AMCHAN: He can answer.

23 A. I mean --

24 MR. ROSE: He answered the question.

25 A. I'm a little confused. Yes. I

page 9955

1 guess I would have to answer yes, then.

2 MR. WILLNER: Our objection is on the
3 ground this was a document that was subpoenaed
4 but not provided in response to the subpoena.

5 JUDGE AMCHAN: I'm receiving it.

6 (General Counsel Exhibit Number 471
7 was received in evidence.)

K. **Exceptions to Rulings on CNN's Assertions of Attorney Client and/or Work Product Privilege**

In support of Exception No. 116: To the ruling that work product protection does not attach until the first complaint in this case was filed, and to his ruling that CNN must produce two documents for which CNN asserted a claim of privilege (Tr. 5914, L.2-Tr.5921, L.11 (emphasis added)), as such rulings are contrary to applicable law.

page 5914

3 ... For it

4 to be work product, it has to be in anticipation of

5 litigation, and the last e-mail here even predates the date
6 upon which everybody found out that the TVS contract was
7 being terminated. I don't see it as work product at all. I
8 see the work product clock actually, in general, running from
9 the filing of the complaint in April of 2007. At this point,
10 not even the charges had been filed, so I don't see work
11 product. Attorney-client privilege, the document passes
12 through Ms. Reeves, but no one asked her any questions as to
13 will this pass legal muster, and she doesn't offer any legal
14 advice. I don't see that it meets the test under either
15 privilege.

16 MR. WILLNER: Might I respond, Your Honor, briefly?

17 JUDGE AMCHAN: Yes.

18 MR. WILLNER: On the question of work product, as
19 Your Honor points out, it's correct that the chargers were
20 filed later, in this case, than September 18th, 2003, but the
21 work product privilege is not limited only to this
22 litigation. It doesn't have to be in anticipation of this
23 litigation, it also relates to anticipation of other
24 litigation. And when there is anticipation of a strike,
25 particularly where one would be a secondary employer, whether
page 5915

1 it would be unlawful secondary picketing, in the view of the
2 company, for example, what is being anticipated is litigation
3 to enjoin an unlawful strike and that doesn't have to wait
4 for a complaint to be issued in this case. I mean, that --
5 when there is -- this is clearly being prepared in
6 anticipation that there will be unlawful secondary picketing.

7 JUDGE AMCHAN: There's no indication of that in here.

8 MR. WILLNER: Well, I mean, this is a strike plan and --

9 JUDGE AMCHAN: Well, you're saying that any time there's
10 a strike, you may seek an injunction, but there's nothing in
11 this that indicates that there's any -- you know, if there
12 was an e-mail in here from somebody, say, Ms. Patrick or Mr.
13 Speiser to Ms. Reeves, saying, if they go on strike, can we
14 go into federal court? That's clearly covered by attorney
15 work product, and whatever Ms. Reeves would say back is
16 clearly covered. But there's no -- I mean, your planning for
17 the possibility that there's going to be a strike when the
18 contract ends, but there's no -- very, very premature, it
19 seems to me. I mean, for one thing, suppose, you know, you
20 terminated the contract and you hired 95 percent of TVS the
21 bargaining unit. I doubt there would've been a strike. I
22 don't think it meets the standard of in anticipation of
23 litigation.

In support of Exception No. 121: To the ruling refusing to admit into evidence a document offered by CNN because it is "incomplete" (*i.e.*, part of the document was redacted for privilege), and to his ruling that CNN must either put the whole document in or wait until the District Court decides whether the document is properly redacted for privilege, overruling CNN's objection that the General Counsel had been allowed to submit incomplete documents (CNNA Ex. 666), as such rulings are contrary to applicable law. (Tr. 15606, L.4-Tr.15610, L.20).

page 15606

4 MR. WILLNER: Well, I certainly will do that, but I also
5 believe, Your Honor, that I don't think it's appropriate to
6 reject a document because it contains something on it which
7 is asserted to be privileged.

8 JUDGE AMCHAN: Well, I don't know if it's privileged. I

9 don't know if it's privileged because you never let me look
10 at it.

11 MR. WILLNER: Well, that's true, but Your Honor, our
12 position is -- and it's being asserted before the District
13 Court -- is that it's improper to require a review of every
14 single privileged document. It's simply unprecedented.

15 JUDGE AMCHAN: Okay. And if the District Court says
16 it's privileged, the record's going to be open for them to
17 put in things that, if any, the District Court makes you
18 cough up to the GC and if the District Court says this is
19 privileged, you can put in the redacted document.

20 MR. WILLNER: Your Honor, let me draw a comparison here.
21 The General Counsel has advanced numerous documents which we
22 have stated are incomplete and which Your Honor has stated we
23 think it's incomplete and we will have the ability to try and
24 put in what's missing.

25 JUDGE AMCHAN: That's right.

page 15607

1 MR. WILLNER: And I would suggest, Your Honor, that in
2 this case the same procedures should be followed if they get
3 something additional from the District Court, and they feel
4 that that's appropriate to put in the record, they will have
5 the right to put it in the record. There would be no reason
6 to keep this document, the portion of it which is not
7 privileged and which we're introducing, out on the prospect
8 that perhaps they may get something more later. If they get
9 it, they can use it later when they get it. That would be
10 consistent with Your Honor's rulings.

L. **Exceptions to Rulings Admitting Evidence Offered by the General Counsel
Regarding New York Events After the Board Rested its Case in New York**

In support of Exception No. 128: To the ruling that allows the General Counsel to introduce a New York document from 2002 into evidence after the General Counsel had closed its case in New York, overruling CNN's objection that the document pertains to New York and is outside the time frame of the BSP (GC Ex. 559), as such ruling is contrary to applicable law. (Tr. 14925, L.24-Tr.14928, L.11).

page 14925

24 MR. FASMAN: I'm going to object to any questions about
25 this. This refers to New York, it's New York-specific, and

page 14926

1 it's not within the timeframe of the bureau staffing project.
2 This is exactly what Your Honor ruled already. This was
3 produced as part of our production. Mr. Palmer was on the
4 witness stand, Ms. Curry, Ms. Chapin, and this is not within
5 the relevant timeframe. It has nothing to do with Washington
6 or the overall project and ought not to be in the record.

7 MS. FOLEY: It certainly has to do with union animus
8 and --

9 MR. FASMAN: Nonsense. It does not. And even if it
10 did, this is something that was produced long ago to the
11 General Counsel and Your Honor has already ruled that the New
12 York material should not be here. It has nothing to do with
13 Washington or the bureau staffing project or what
14 Ms. Patrick's testifying about.

15 MS. FOLEY: Ms. Patrick is an overall witness, Judge.

16 JUDGE AMCHAN: Right. Well, have you offered it?

17 MS. FOLEY: I'm offering it now.

18 JUDGE AMCHAN: I'm receiving it.

19 (General Counsel's Exhibit 559 received into evidence.)
20 MR. FASMAN: May we know why, Judge?
21 JUDGE AMCHAN: Well, because, you know, I think it is
22 potentially relevant to the whole plan, I mean.
23 MR. FASMAN: What plan? This is March 2002.
24 JUDGE AMCHAN: Right.
25 MS. FOLEY: Um-hum.

page 14927

1 JUDGE AMCHAN: But it seems that there was a concern.
2 MR. FASMAN: It was a year and a half before anything
3 was done.
4 JUDGE AMCHAN: Right, but there seems to be a general
5 concern. Well, you know, they're going to make an argument
6 that it suggests something about the motivation behind the
7 bureau staffing project and I'm going to let them make that
8 argument. I may be receptive to it or I may not.
9 MR. FASMAN: Well, I have to say that this violates your
10 specific order on introducing New York issues, and we may
11 have to call rebuttal witnesses on that basis. If that's
12 what we're going to do here, we can go back to New York.
13 JUDGE AMCHAN: Yeah.
14 MR. FASMAN: We can just go back to New York City.
15 JUDGE AMCHAN: I don't know that it's only relevant -- I
16 don't know that it's only relevant to how the bureau staffing
17 project was handled in New York. Their argument is that it's
18 relevant to the bureau staffing project in general.
19 MS. FOLEY: Um-hum.
20 MR. FASMAN: How could it be relevant to the bureau
21 staffing project in general if it's March 2002? Why don't we
22 just go back to April 1999 and find some memo from there
23 dealing with New York?
24 JUDGE AMCHAN: Well, if Mr. McCarthy was here, he'd
25 probably --

page 14928

1 MR. FASMAN: He'd probably dig one out.
2 JUDGE AMCHAN: -- reply to you.
3 MR. FASMAN: He probably would dig one out, and I would
4 make the same objection and say, Your Honor, it's not in the
5 timeframe, it doesn't refer to the bureau staffing project,
6 it involves another city, you already ruled on this, and I
7 see no basis for this going into the record.
8 MS. FOLEY: It certainly does, Your Honor. And why
9 would Ms. Patrick be getting it if it wasn't involved in the
10 overall --
11 JUDGE AMCHAN: Well, I received it.

In support of Exception No. 130: To the ruling that allows the General Counsel to introduce TVSNY payroll documents regarding freelancers into evidence after the General Counsel had closed its case in New York, overruling CNN's objections that (1) admitting the documents would violate the ALJ's previous ruling that after the New York case was closed, new documents would not be admitted unless they were disclosed following the subpoena enforcement proceedings, and (2) CNN would not have an opportunity to cross-examine a witness regarding the documents (GC Exs. 566-569), as such ruling is contrary to applicable law. (Tr.15066, L.7 – Tr.15076, L.8; Tr.15110, L.6-18 (emphasis added)).

page 15070

19 MR. WILLNER: Your Honor, I was. They had the
20 opportunity and were required under Your Honor's orders
21 previously with respect to how this case was going to

22 proceed, they were required to put forth their evidence
23 specific to the New York issues in New York. Now, they say
24 Your Honor said, oh, well, maybe they can try to admit these
25 later. Your Honor entered an order requiring them to put on
page 15071

1 their evidence in New York and for reasons, including the
2 fact that we ought to have a chance if they're going to put
3 on witnesses as you really need to even show these are
4 business records, we ought to have a right to cross-examine
5 those witnesses. We shouldn't have to take people back and
6 forth from New York. If they were going to put on evidence
7 about New York, and we know from hearing Ms. Swiger today
8 that you can't just take these at face value and say everyone
9 on here is a freelancer billable to CNN, working under the
10 contract.

11 MR. FASMAN: Performing work that would be within the
12 bargaining unit.

13 MR. WILLNER: You can't just take -- you've heard from
14 Ms. Swiger today, you just can't assume that, and that's what
15 they're asking you to do. They're saying --

16 JUDGE AMCHAN: Well, --

17 MR. WILLNER: -- don't, don't require us to adhere to
18 Your Honor's order. Don't require us to put someone on in
19 New York. Just assume that this is something that the
20 evidence thus far in D.C. shows that they're not, and that's
21 the --

22 JUDGE AMCHAN: Do you know what day I said what you said
23 I said?

24 MR. WILLNER: I'd be happy to submit Your Honor any
25 number of quotes from the transcript that would also point
page 15072

1 out that whenever, that there were a number of occasions when
2 we were in New York where Your Honor prohibited us,
3 prohibited CNN from putting on evidence that related to
4 Washington, D.C. We asked question --

5 JUDGE AMCHAN: Well, when did I do that?

6 MR. WILLNER: A number of times you sustained the
7 General Counsel's objection.

8 MS. FOLEY: I don't recall you doing that.

9 MR. WILLNER: And instructed us that we would have to
10 call witnesses, even witnesses who were there on the stand in
11 New York, that we would have to call them again in D.C.
12 because you would not permit testimony about the other --

13 JUDGE AMCHAN: Can you site me to something, a
14 transcript where I did that?

15 MR. WILLNER: Absolutely.

16 JUDGE AMCHAN: Well, let me have them.

17 MR. WILLNER: Absolutely, Your Honor. I will get them
18 for Your Honor today.

19 JUDGE AMCHAN: I don't remember that.

20 MR. WILLNER: I do very clearly because we're going to
21 have to recall those witnesses because of those -- because of
22 Your Honor's order.

23 JUDGE AMCHAN: I don't remember that.

24 MR. WILLNER: Well, I'll supply the transcript but, Your
25 Honor, this is not only a request to admit evidence which is
page 15073

1 not competent, which there's no foundation for it, and which

2 has been shown to not be reliable based upon Ms. Swiger's
3 testimony but also seriously infringes CNN's constitutional
4 rights to examine witnesses, examine the evidence that's
5 being presented and it's just manipulation of the process
6 where --

7 JUDGE AMCHAN: Well, I don't know about that. It seems
8 to me they're clearly freelance people who worked for the New
9 York Bureau who may be entitled to a remedy if I rule against
10 you, and I think I ought to try to find out who those people
11 are, and I wonder how am I going to do that. The General
12 Counsel's subpoenaed records from Team Video and Team Video
13 produced some records, and they -- I don't know what they
14 prove but they apparently have some relevance to who did
15 freelance work in New York as to, you know, if it's
16 unexplained, if I can't tell whether the people did
17 bargaining unit work or not, I guess that's just the General
18 Counsel's disadvantage. I mean if you need a witness to go
19 through the New York codes, I'm going to let them call them.

20 MR. FASMAN: How could you possibly -- well, in terms of
21 calling someone from New York and reopening the New York
22 case, I think that that's wholly improper. That's one of the
23 things that we're talking about.

24 JUDGE AMCHAN: Well, I'm going to do it anyway.

25 MR. FASMAN: Pardon me.

page 15074

1 JUDGE AMCHAN: I'm going to do it anyway.

2 MR. FASMAN: Well, we certainly object to that but you
3 cannot tell from these documents whether any person performed
4 bargaining unit work or not and --

5 JUDGE AMCHAN: Well, --

6 MR. FASMAN: -- certainly either by looking at the codes
7 or by anything else. I mean it's just highly prejudicial.

8 JUDGE AMCHAN: Let me ask, Mr. Chatilovicz, is there any
9 dispute that these are Team Video records, that these are
10 business records?

11 MR. CHATILOVICZ: I gather not. I mean I'm assuming
12 they were -- I think they were gathered from the documents
13 that we provided to the Board, and I have no doubt about that
14 but just because something's a business record doesn't mean
15 you can just throw it into the hopper here and suddenly let
16 the Board argue whatever they want.

17 JUDGE AMCHAN: Well, they may not provide what they want
18 to prove. I'm going to receive them.
19 (General Counsel Exhibits 566 through 569 received into
20 evidence.)

21 MR. WILLNER: Your Honor, just for the record, Your
22 Honor, we do find it very troubling in a constitutional sense
23 that --

24 JUDGE AMCHAN: Well, you can make the constitutional
25 argument.

page 15075

1 MR. WILLNER: -- and if I may finish my statement, Your
2 Honor. We find it very troubling in a constitutional sense
3 that there appear to be very different standards applied in
4 this case.

5 JUDGE AMCHAN: Well, I take issue with that. I think
6 I've been very fair with you, and if you don't think that
7 I've been very fair with you, you can make allegations of

8 bias to the Board, to the Courts, and they'll sort that out.

In support of Exception No. 131: To the ruling that allows the General Counsel to introduce a New York document into evidence after the General Counsel had closed its case in New York, overruling CNN's objection that the document pertains to New York and is highly prejudicial (GC Ex.571), as such ruling is contrary to applicable law. (Tr. 15090, L.25-Tr.15091, L.6).

page 15090

25 JUDGE AMCHAN: Okay. So your objection to 571 is you

page 15091

1 have no idea what Mr. Hadrovic and these other people did?

2 MR. FASMAN: Correct, and it's New York. It shouldn't

3 be introduced now. This is highly prejudicial to the

4 hearing. It's improper.

5 JUDGE AMCHAN: Well, I'll receive it.

6 (General Counsel Exhibit's 571 received into evidence.)

In support of Exception No. 132: To the ruling that allows the General Counsel to introduce New York documents into evidence after the General Counsel had closed its case in New York, overruling CNN's objections that (1) admitting the documents would violate Judge Amchan's previous ruling that after the New York case was closed, new documents would not be admitted unless they were disclosed following the subpoena enforcement proceedings, and (2) the documents pertain to New York and are irrelevant (GC Exs. 580-583, 585-588) as such ruling is contrary to applicable law. (Tr. 15126, L.12-Tr.15130, L.15; Tr. 15141, L.5-12).

page 15126

12 MR. FASMAN: We object, Your Honor. There's no basis.

13 There's no foundation for this. This is continuing to add

14 New York documents after the close of the case and Your

15 Honor, I'd like to, if I may, read you the portions of the

16 transcript. You invited us to remind you of the portions of

17 the transcript dealing with this yesterday.

18 JUDGE AMCHAN: Uh-huh.

19 MR. FASMAN: May I do that?

20 JUDGE AMCHAN: Sure.

21 MR. FASMAN: Here is the transcript from 4/7/08 at

22 Page 10029. It was preceded by a discussion that Your Honor

23 will recall several days later or several days earlier in

24 which Your Honor told the General Counsel and I quote, "It

25 seems to me the way that this -- work, you move this along,

page 15127

1 is you put on your case, you rest subject to reopen into

2 record to introduce any documents you get into the district

3 court." That's 4/7/08, 9917. Ms. Foley requested time to

4 discuss the issue with the Regional Director, Your Honor

5 permitted her to do so, but cautioned that Your Honor was and

6 I quote, "Inclined to order the GC to do so," as instructed

7 above. That's 9919. Ms. Foley then spoke to the Regional

8 Director. There was further discussion on the record and you

9 said, and I quote yourself, "Once they," -- the GC -- "rests

10 here, unless it's tied to documents that they get through the

11 district court, the General Counsel is done as far as I'm

12 concerned."

13 Ms. Foley responded, saying, "Meaning documents that we

14 may have in our possession, may now have in our possession,

15 but haven't used, we're precluded from using later?" Your

16 Honor said yes. That's 10029. Two days later Ms. Foley

17 asked to revisit the issue and stated the General Counsel's

18 understanding of Your Honor's ruling.

19 I quote Ms. Foley, "My understanding of what we talked
20 about when we talked about ending the General Counsel's
21 presentation of witnesses here and on to Washington,
22 eventually, after Respondent introduces its New York case.
23 If documents are turned over that necessitate the recalling
24 of a New York witness, we'll be able to do that in
25 Washington." Your Honor said, "Right." That's 10444.
page 15128

1 Mr. Willner then sought further clarification and Mr. Willner
2 said, and I quote, "I'm assuming, if I understand it
3 correctly, that that is documents that they don't already
4 have and that they can ask about those documents, not just
5 use that as an excuse for calling someone else?" Your Honor
6 said, "Correct. Are we all on the same page?" Ms. Foley
7 answered, "We are all on the same page." That's 4908 at
8 10446. Several days later, when the General Counsel rested
9 its case in New York, on April 14th Your Honor asked the
10 General Counsel, "Am I correct that you are resting
11 contingent on the documents?" clearly referring to
12 discussions that had occurred on the record about
13 subsequently acquired documents and Ms. Foley responded,
14 "Correct."

15 That's the transcript references that we're talking
16 about. We still think that these documents, the other
17 documents from New York that Your Honor admitted yesterday,
18 the amendment regarding New York, is improper. We would like
19 the opportunity to ask Your Honor to reconsider preparing a
20 letter with some citations which we'd like Your Honor to
21 consider.

22 I think the General Counsel has violated its agreements
23 in court and has acted improperly. Those were very clear
24 instructions by Your Honor. We tried our case on that basis,
25 and to say now we're going to introduce all these additional
page 15129

1 documents involving New York and the complaint and
2 discriminatees in New York. I read the case law last night.
3 I'm sorry we don't have that letter with us today, but we'll
4 have it to you in the next day or two. This is absolutely
5 highly improper, and we think it's wrong. I also want to
6 withdraw my motion to reopen in New York. We're not going to
7 reopen in New York. We're not going to retry this case in
8 New York. We have gone forward. We've tried our case on the
9 basis of the materials and the General Counsel's case. They
10 rested, we presented our case in New York, and they can't now
11 come in and amend the complaint in Washington months after
12 they rested in New York, violate the agreements that they
13 agreed to in open court, introduce additional documents like
14 this amended complaint and the discriminatees. It's just
15 flatly improper.

16 MS. FOLEY: May I respond, Your Honor?

17 JUDGE AMCHAN: Yes, ma'am.

18 MS. FOLEY: As you will recall, we didn't get the New
19 York payroll records until May 23rd, which was during the
20 presentation of Mr. Fasman's case. So those are records,
21 yes, we received them after we had conditionally rested our
22 case pursuant to what documents we were getting. So
23 therefore, I don't understand how that could possibly violate
24 the agreement.

25 We didn't get the documents until well after, more than
page 15130

1 a month after we "rested" our case in New York. As far as
2 the Team payroll records, which we had a discussion about
3 yesterday, I'd also like to cite you to the transcript on
4 April 10th at Line 10597. We said, "As far as Team payroll
5 records are concerned, the New York and Washington records
6 are located in Washington and we are presuming that we are in
7 line with your requests about records if we put those in in
8 Washington," to which you responded, "I don't see a problem
9 with that." We've done nothing improper, we've acted in good
10 faith, and all of these documents should be admitted.

11 MR. FASMAN: I made my position clear, Judge.

12 MS. FOLEY: And we've made our position clear.

13 JUDGE AMCHAN: Well, I'm going to receive them. And
14 I'll give you the opportunity to reopen the record in New
15 York when we close here.

page 15141

5 MR. WILLNER: And also, just to reiterate, Your Honor,
6 our position that all documents that relate to New York are
7 untimely and barred by Your Honor's prior order, as well as
8 the Board precedents and the applicable rules, as this case
9 is already –

10 JUDGE AMCHAN: Yeah. I think under 611, Rules of
11 Evidence, I have discretion to do what I did.

12 MR. FASMAN: I'm sorry, under Rule 611?

In support of Exception No. 133: To the ruling that allows the General Counsel to introduce New York documents into evidence after the General Counsel had closed its case in New York, overruling CNN's objections that (1) admitting the documents would violate Judge Amchan's previous ruling that after the New York case was closed, new documents would not be admitted unless they were disclosed following the subpoena enforcement proceedings, and (2) the resulting prejudice could not be cured (GC Exs. 589, 590), as such ruling is contrary to applicable law. (Tr. 15223, L.23-Tr.15228, L.10).

page 15223

23 MR. FASMAN: Your Honor, I don't think that they can be
24 offered with those on it. We have no objection to either
25 document with regard to the overall situation, and so far,
page 15224

1 all that Mr. Biggar has done is talk about producer education
2 provisions of these documents. And 590 clearly relates to
3 New York. We don't think that it's appropriate to introduce
4 New York documents. We had three months of trial in New
5 York. This has been in their hands for many, many years and
6 I don't think it's appropriate to start introducing evidence
7 about New York at this point in the proceeding.

8 MR. CHATILOVICZ: Judge, I apologize. I did not realize
9 that the second document was a New York document and I have
10 the same objection.

11 JUDGE AMCHAN: Well, I'm going to receive both documents
12 only for the printed material and not for the handwritten
13 material.
14 (General Counsel's Exhibits 589 and 590 received into
15 evidence.)

16 MR. BIGGAR: Your Honor, before I go on -- oh, never
17 mind.

18 DIRECT EXAMINATION (cont.)

19 Q. BY MR. BIGGAR: Now, under the terms of the ENG
20 agreements, there were periodic forecasts made for labor
21 costs, is that correct?

22 A. That's correct.

23 Q. And was overtime a component of that forecast?

24 A. That's correct.

25 MR. CHATILOVICZ: Judge, I'm going to object. This
page 15225

1 appears to be a New York document again.

2 MR. FASMAN: It certainly is a New York document,
3 Your Honor. And, you know, I listened to Ms. Foley talk
4 about how there was an exception to her commitments to the
5 court, based upon more recently derived documents and Team
6 payroll documents or whatever. She made a commitment to Your
7 Honor that this would not happen, that once we rested in New
8 York, we weren't going to go back to New York and anything
9 that they were going to put on the witness stand, any
10 documents, would be stuff that was supplied pursuant to the
11 District Court proceeding.

12 This has been in the General Counsel's control for many,
13 many years. It's part of our production. They've had for
14 months and we had three months of trial up there. This is
15 flatly improper. There's no excuse. There's nothing in the
16 record that would justify anything like this. And I could go
17 on and on and on about the number of commitments that have
18 been violated here, but this is clearly improper and it
19 should not go into the record.

20 MR. BIGGAR: Your Honor, it's my understanding that
21 there was -- that you had agreed that we could call overall
22 witnesses. This is an overall case that applies to both New
23 York and D.C., and that if there was a witness that was an
24 overall witness, then we would be permitted to call that
25 person in Washington as part of our case in chief, and that's
page 15226

1 what I'm doing.

2 JUDGE AMCHAN: Well, I'm going to err on the side of
3 deciding this case on the merits, and if you need to call
4 other witnesses here or in New York to counteract this, I'm
5 going to allow you to do that.

6 MR. WILLNER: We do want to just make clear, as
7 Mr. Fasman quoted earlier from the transcript --

8 JUDGE AMCHAN: Um-hum.

9 MR. WILLNER: -- we asked that it be made clear, and
10 both the General Counsel at the time and Your Honor, I
11 believe, weighed in that it was clear that Your Honor's
12 ruling about documents that were to be received from any
13 subpoena proceeding for the District Court, that Your Honor's
14 exception to allow that to take place was not be used as an
15 excuse for calling witnesses and putting in documents that
16 are specific to New York, and that's exactly what has
17 happened here.

18 JUDGE AMCHAN: Well, I'm certainly not going to let them
19 call any witnesses who are specific to New York. But he's on
20 the stand and I'm going to err on the side of deciding the
21 case on the merits and that you -- whatever way you want to
22 react to it.

23 MR. WILLNER: Just to be clear on the record, Your

24 Honor, it's frankly too late. The New York is closed, and
25 our presentation's already made.

page 15227

1 JUDGE AMCHAN: Well, I'll you reopen it if you feel
2 prejudiced.

3 MR. FASMAN: We choose not to do that. We have tried
4 the New York case for months on end, Your Honor, and allowing
5 the General Counsel to circumvent -- you asked them if they
6 rested and they said they rested, and now to start with New
7 York documents down here and having this witness testify,
8 perhaps, about the details of the relationship in New York is
9 just simply improper. Mr. Frydenlund's been under subpoena
10 for many months. It wouldn't have been a problem to call him
11 up there if they wanted to make it part of their case and
12 they chose not to.

13 JUDGE AMCHAN: Right.

14 MR. FASMAN: And that's fine, but these are not one
15 case, they are two cases, and they've been consolidated for
16 purposes of trial. But so far as we're concerned, the New
17 York case is closed.

18 JUDGE AMCHAN: Well, I don't know that I agree with
19 that. I mean, the allegation is that it's all part of one
20 major plan. But anyway, I made my ruling. Let's go on.

21 MR. FASMAN: All right.

22 MR. WILLNER: Just one last quote for the record,
23 Your Honor. Our view is that prejudice cannot be cured. It
24 is impossible.

25 MR. FASMAN: I agree.

page 15228

1 JUDGE AMCHAN: Well, I don't agree with that.

2 MR. BOLEK: Well, Your Honor, I'd also point that, as
3 any judge, you have the inherent authority to manage this
4 trial.

5 JUDGE AMCHAN: Right.

6 MR. BOLEK: And that includes -- issues that were
7 brought.

8 JUDGE AMCHAN: Right. And I think any prejudice that
9 you suffer can be cured and I'm offering you the opportunity
10 to do it, anyplace, anytime.

In support of Exception No. 134: To the ruling that allows the General Counsel to introduce New York documents into evidence after the General Counsel had closed its case in New York, overruling CNN's objections (GC Ex. 182), as such ruling is contrary to applicable law. (Tr. 15238, L.15-Tr.15244, L.9).

page 15238

15 Q. BY MR. BIGGAR: Directing your attention to the bottom
16 of Page 3, it appears that there were some unauthorized
17 overtime for which you had been reimbursed and for which you
18 had to pay back, is that correct?

19 MR. CHATILOVICZ: Page 3?

20 MR. BIGGAR: Page 2. Did I say three?

21 MR. CHATILOVICZ: If I may, Judge, is it General
22 Counsel's position that they have a right at this time to
23 call Mr. Frydenlund with respect to the New York agreement?

24 MR. BIGGAR: Yes, he's an overall witness, Your Honor,
25 and it's my understanding that you had stated it in New York

page 15239

1 that we had the right to call overall witnesses --

2 JUDGE AMCHAN: Yeah.
3 MR. BIGGAR: -- in Washington.
4 MR. CHATILOVICZ: I think that is absolutely
5 inconsistent with what Your Honor stated at the hearing, and
6 I gather then, with respect to any other witness that comes
7 up as part of our case, even though our questioning is
8 limited completely to D.C., that the General Counsel has a
9 right to question about anything, right?
10 JUDGE AMCHAN: Well, Mr. Frydenlund's an overall
11 witness. He was involved with both Washington and New York.
12 Mr. Simons and Mr. Marcus, as I understand it, would only
13 have knowledge of New York. There's no reason for them to
14 inquire.
15 MR. CHATILOVICZ: Judge, we presented our case in
16 New York. We didn't call Mr. Frydenlund.
17 JUDGE AMCHAN: Right.
18 MR. CHATILOVICZ: They could've called Mr. Frydenlund.
19 So now he's an overall witness, whatever in God's name that
20 means?
21 MR. BOLEK: Well, Your Honor, they called Mr. Frydenlund
22 in New York, and they called him again in D.C. and didn't
23 have any objection about how we called him twice. This has
24 been the most efficient way of doing it.
25 MR. FASMAN: We share it.

page 15240

1 MR. CHATILOVICZ: Counsel, you're absolutely wrong. We
2 called Mr. -- the Board called Mr. D'Anna in D.C. We called
3 Mr. D'Anna in New York. We would've called Mr. Frydenlund in
4 New York if we felt it necessary and you could've done so as
5 well. We're now putting on our case in D.C., we're calling
6 Mr. Frydenlund to testify as to the inception of the
7 relationship, and now you're going into issues relating to
8 New York and there is no such thing as an overall witness.
9 MR. FASMAN: We join in Mr. Chatilovicz's statements and
10 objection. This is just --
11 MR. CHATILOVICZ: It's just nonsense.
12 MR. FASMAN: Your Honor, this is just litigating the
13 New York case in Washington, which is exactly what you said
14 would not be done, and it is a commitment that Ms. Foley made
15 on the record to Your Honor, which she has now violated not
16 once, not twice, but any number of times.
17 MR. BOLEK: Well, certainly there are issues in this
18 case that apply to both D.C. and New York, and the facts of
19 the issues that are raised here should not be -- the facts
20 that are raised here and weren't raised in New York,
21 necessarily, I don't think is determined.
22 MR. CHATILOVICZ: There are two cases here and Judge,
23 you may --
24 MS. FOLEY: No, there's one.
25 MR. CHATILOVICZ: -- disagree, but the point is that

page 15241

1 what Team did in D.C. and what they did in New York
2 hypothetically could result in different findings.
3 MR. BOLEK: There are two charges but one complaint.
4 MR. BIGGAR: One complaint.
5 MR. CHATILOVICZ: No. But my point being, there is no
6 dispute that they were separate operations, that they had
7 separate management. You know, arguably there could be a

8 joint employer finding here and no joint employer finding in
9 New York, depending upon the evidence. And so what
10 Mr. Frydenlund's testifying today goes -- we had thought --
11 goes strictly to the D.C. issue. Now, you're asking him
12 questions. The only purpose of this, because none of the
13 questions relating to New York can possibly implicate D.C.

14 MR. BOLEK: That's wrong.

15 MR. CHATILOVICZ: Oh, really?

16 MR. BOLEK: What happens in New York could certainly be
17 used with circumstances of what happened in D.C.

18 MR. CHATILOVICZ: Oh, really?

19 MR. BOLEK: Yeah.

20 MR. BIGGAR: Yes.

21 JUDGE AMCHAN: I would say that's so. To me, the key to
22 this case is Paragraph 20(b) of the complaint, which says
23 this is part of an overall plan.

24 MR. WILLNER: For the record, Your Honor, we find the
25 General Counsel's position and the union's position here
page 15242

1 today quite ironic in light of the positions that they took
2 in New York, when, for example, based upon their request,
3 Your Honor, you prohibited us from asking questions of
4 witnesses, including, for example, Grace Dyson, based upon
5 their representations that these are two separate cases and
6 we can't ask in New York questions about Washington. Now to
7 hear them saying that, no, it's all one case and they should
8 be able to try their entire New York case down in Washington,
9 in spite of Your Honor's orders, in spite of their
10 representations to the contrary, in spite of their
11 successfully inducing prohibitions against us asking
12 questions in New York about Washington, it's --

13 JUDGE AMCHAN: I don't remember that.

14 MR. FASMAN: Your Honor, we will cite you chapter and
15 verse from the testimony in New York. But we presented
16 overall witnesses there. Ms. Dyson is a classic, where we
17 said she's in charge of training and we tried to ask
18 questions about Washington and training in Washington and
19 getting records about what happened in Washington, and we
20 were not allowed to do so.

21 I will be happy to quote you the objections of the
22 General Counsel, which you sustained and said we're trying
23 the New York case, we're not trying the Washington case, you
24 can't present that evidence. While we're here trying the
25 Washington case, which is Mr. Chatilovicz's point, they
page 15243

1 should not be allowed to go back to New York evidence and
2 reopen the New York proceeding, which you've allowed them to
3 do.

4 It's improper and it's inconsistent with the rulings you
5 made with regard to our presentation of evidence. It's
6 highly prejudicial. We do not want to put New York witnesses
7 on the stand. The reason we went up to New York was to
8 accommodate the General Counsel. We said fine, we'll go, but
9 let's do New York, let's finish New York, let's go back down
10 to D.C. And your offer to allow us to reopen the New York
11 case and to resume proceedings in New York is just -- I mean,
12 it's just -- I don't even know how to describe it, so I won't
13 characterize it.

14 MR. WILLNER: Your Honor, it strains credulity. In
15 New York, Ms. Foley said repeatedly that the Washington team
16 is not here in New York. Well, Ms. Foley is the Washington
17 team. They have made representations to procure prohibitions
18 against our introducing evidence in New York so they can then
19 bring up stuff in Washington, trying to make it difficult for
20 us to respond to it, and they have succeeding at prejudicing
21 CNN by making it difficult for us to respond to evidence
22 because we have already left New York. By sandbagging us and
23 delaying until now to bring up New York issues, that
24 prejudice cannot ever be cured.

25 JUDGE AMCHAN: Well, I think it can be cured, and I'm
page 15244

1 offering you an opportunity to. Go ahead.

2 MR. BIGGAR: I'm offering General Counsel's 182,
3 Your Honor.

4 MR. CHATILOVICZ: We object for all the reasons stated
5 by both Respondents.

6 MR. FASMAN: As do we.

7 JUDGE AMCHAN: Right. I'll receive it only for the
8 printed material and not the handwriting.

9 (General Counsel's Exhibit 182 received into evidence.)

In support of Exception No. 135: To the ruling that allows the General Counsel to ask questions about New York events after the General Counsel had rested its case in New York, overruling CNN's objection, as such ruling is contrary to applicable law. (Tr. 15244, L.10-19).

page 15244

10 Q. BY MR. BIGGAR: Thank you. Mr. Frydenlund, I think
11 testified that during the life of the ENG, you discussed the
12 level of staff that Team provided with CNN. You discussed
13 that with CNN representatives from time to time, correct?

14 A. Which location are you speaking of?

15 Q. At New York.

16 A. New York.

17 MR. FASMAN: Objection. This should not be allowed.

18 Why are we --

19 JUDGE AMCHAN: All right. You can answer.

In support of Exception No. 136: To the ruling that allows the General Counsel to introduce a New York document into evidence after the General Counsel had closed its case in New York, overruling CNN's and Team's objections (GC Ex. 592), as such ruling is contrary to applicable law. (Tr. 15246, L.23-Tr.15248, L.20 (emphasis added)).

page 15246

23 MR. BIGGAR: I'll offer GC-592.

24 MR. CHATILOVICZ: I'm going object based on two things,
25 one, the New York issue, but secondly, the relevance. This

page 15247

1 is a document that pertains to negotiations between CNN and
2 Team, with respect to the core of the agreement, the core of
3 the ENG agreement. I mean, this is what the contract is all
4 about, trying to provide CNN with an adequate number of
5 people based upon their needs, and I'm not sure what the
6 relevance of this is vis-a-vis -- certainly vis-a-vis the
7 case, again the separate against CNN, but also with respect
8 to the joint employer issue. And this has nothing whatsoever
9 to do with who sets terms, conditions of employment. We're
10 trying to come up with a staffing model based upon the needs

11 of our client.
12 JUDGE AMCHAN: Well, I agree with you. I'll receive it,
13 and I'll ignore it unless they show me that it's relevant to
14 any issue in the case.
15 (General Counsel's Exhibit 592 received into evidence.)
16 MR. FASMAN: Let me also say, Judge, that we join in
17 that objection and we also continue to reiterate --
18 JUDGE AMCHAN: Right.
19 MR. FASMAN: -- this all about New York, all about fn.
20 And I just want to note for the record two of the people who
21 are on this e-mail slug --
22 JUDGE AMCHAN: Right.
23 MR. FASMAN: -- Rob Fox and Rick Cohen (ph.) were both
24 on the stand, both testified extensively in New York.
25 JUDGE AMCHAN: Right.

page 15248

1 MR. FASMAN: If this had been raised in New York, they
2 would've been able to bring their attention to this issue,
3 they would've supplied the background, they would've been
4 able to discuss this, they would've been able to discuss the
5 entire process. I really don't think this should be in the
6 record at all.
7 JUDGE AMCHAN: Well, I have to agree with you. I'm
8 going to receive it, but I tend to agree, they certainly
9 could have asked Mr. Cone about it.

In support of Exception No. 137: To the ruling that allows the General Counsel to introduce a New York document into evidence after the General Counsel had closed its case in New York, overruling CNN's objections (GC Ex. 593), as such ruling is contrary to applicable law. (Tr. 15255, L.19-Tr.15256, L.7).

page 15255

19 MR. BIGGAR: I'd like to offer General Counsel's 593,
20 Your Honor.
21 MR. CHATILOVICZ: We object in that it's another example
22 of the New York negotiations, but I guess you've ruled on
23 this.
24 MR. FASMAN: We object as well. This should've been
25 done in New York. Mr. Frydenlund was available. Mr. Murtagh

page 15256

1 was under subpoena. This is sandbagging. This is bringing
2 up the New York contract after we've finished the litigation
3 of the New York case. It shouldn't be done here. It should
4 never have been done here. This is violating the Board's
5 commitments of the court.
6 JUDGE AMCHAN: All right, I'll receive it.
7 (General Counsel's Exhibit 593 received into evidence.)

M. **Exceptions to Rulings Regarding Regional Director Wayne Gold's Letter of June 15, 2007**

In support of Exception No. 138: To the rulings regarding the letter sent by Regional Director Wayne Gold of June 15, 2007, which rulings (1) denied CNN's request that Judge Amchan conduct an investigation into the letter, (2) denied CNN's request that Judge Amchan refrain from hearing testimony until the investigation was complete, and (3) ordered the Regional Director to send a letter reflecting CNN's position, as such rulings are contrary to applicable law. (Tr. 133, L.15-21; Tr. 135, L.12-24; Tr. 136, L.11-14; 543, L.7-Tr.549, L.23).

page 136

11 JUDGE AMCHAN: Okay. My solution is to have

12 Mr. Fasman draft a letter and to have the Regional
13 Director send it out to everybody that got the first
14 one.

page 543

7 MR. McCARTHY: Mr. Fasman has prepared a
8 letter, and I believe there's a fundamental
9 understanding about what the Judge ordered, a
10 misunderstanding about what the Judge ordered in this
11 matter. Mr. Fasman has prepared a letter that's
12 addressed to the former TVS employees for --

13 MR. FASMAN: Would you like to see copy of it?
14 I gave it to the other side. I probably should have
15 given you a copy.

16 MR. McCARTHY: Mr. Fasman has an extra copy.
17 Preliminary discussions with the Regional Director
18 about this matter, General Counsel thinks that this
19 letter should not come from Mr. Gold. Mr. Gold has
20 already issued a retraction letter.

21 This letter was drafted by Mr. Fasman. I think
22 some of the representations in here are outrageous.
23 And in fact, this letter should be signed by
24 Mr. Fasman, and Mr. Fasman should not put words into
25 Regional Director Gold's mouth. Mr. Gold has not been

page 544

1 present to hear what is said.

2 General Counsel objects to this letter and to
3 the substance of this letter. We would make
4 available, Your Honor, sets of stickers that we would
5 use to send out a letter that Mr. Fasman would prepare
6 under his signature in a sealed envelope for purposes
7 of distribution to the parties.

8 MR. FASMAN: That's absolutely unacceptable,
9 Your Honor. That's just silly. The whole point is
10 this went out on government letterhead signed by a
11 senior official of the National Labor Relations Board.
12 There's nothing, in my view, outrageous in this.

13 In fact, I drafted a very soft letter for
14 Mr. Gold, who I've known for a very long time. I
15 don't see anything outrageous in this. General
16 Counsel has some problems with it.

17 For the Regional Director to try to reach out to
18 the entire witness pool, issue a milk toast, at best,
19 retraction, and then say we'll send it out on your
20 behalf, that's totally ridiculous. It's unacceptable.

21 The idea here is to try to preserve the record
22 and cure a serious problem that was created by a false
23 statement contained in a letter that probably
24 shouldn't have gone out in the first place. I'm happy
25 to talk about whether particular statements are

page 545

1 inappropriate. I tried to do a reasonable letter on
2 behalf of the Board. Having the Board say, well, you
3 can send out a letter, that's ridiculous.

4 JUDGE AMCHAN: I think the letter should
5 probably go out from Mr. Gold, since Mr. Gold sent out
6 the first two letters. Just a quick look. I think I
7 could tone it down a bit more.

page 548

5 MR. FASMAN: We've reviewed your changes in
6 this letter, and they're acceptable to us. We don't
7 think that any letter issued now would cure what
8 happened. But in terms of getting the case moving
9 forward and getting a letter out there from Mr. Gold
10 informing the people what happened in a realistic
11 fashion, we're fine with the changes.

page 549

16 MR. FASMAN: We issued subpoenas to find out
17 what happened in this matter. If there are additional
18 facts that Your Honor should know that we don't know
19 about right now, I think we're entitled to put those
20 before you.

21 JUDGE AMCHAN: I would grant a petition to
22 quash. It's tangential to the issues in this case.

23 MR. FASMAN: We respectfully disagree.

N. **Exceptions to Rulings Permitting the General Counsel to Amend the Complaint at the Conclusion of the Case.**

In support of Exception No. 140: To the ruling that overrules CNN's objection and allows the General Counsel to amend the Appendices to the complaint to identify alleged additional freelancers as discriminatees in New York and Washington, as such ruling is contrary to applicable law. (Tr. 15111, L.6-Tr.15116, L.15 (emphasis added)).

page 15111

6 MR. FASMAN: I hate to be dense, but we're all asking
7 the same question. What are Appendix C and Appendix D in the
8 claim? What are these amending? I'm sorry.

9 MR. BIGGAR: Those are the people who were allegedly
10 discriminatorily not hired.

11 MR. FASMAN: Okay.

12 MR. BIGGAR: In Washington, D.C.

13 MR. CHATILOVICZ: The full-timers?

14 MR. BIGGAR: Pardon me.

15 MR. CHATILOVICZ: The full-timers?

16 MR. BIGGAR: The applicants, the bargaining unit
17 employees who applied that were not hired.

18 MR. FASMAN: I think, Your Honor, to the extent that
19 these are being offered, we object to all of them, but we
20 particularly object to the one in New York.

21 UNIDENTIFIED SPEAKER: I don't see one for New York.

22 MR. FASMAN: That's D.

23 MR. CHATILOVICZ: I didn't get a copy of New York.
24 Thank you.

25 JUDGE AMCHAN: These amendments are based on -- these
page 15112

1 are people -- well, let's take 578. Are these all people
2 that were supposedly full-time employees of Team Video?

3 MR. BIGGAR: Bargaining unit employees of Team Video.

4 JUDGE AMCHAN: Some of them might be freelancers?

5 MR. BIGGAR: A few might be freelancers, correct. Some
6 of the freelancers were actually on Exhibit C before we
7 amended it. Donna Lacey for example.

8 MR. CHATILOVICZ: This, this list is not a supplement.
9 This list is the complete list now, right?

10 MR. BIGGAR: It's a replacement of the prior Exhibit A.

11 MR. CHATILOVICZ: And you haven't designated who the new
12 additions are?

13 MR. BIGGAR: We have not, but there were a couple of
14 people on the former Exhibit A who we find out, okay, that
15 actually were offered jobs and turned them down. So they've
16 been removed and there were some people who had not been
17 included on the original Exhibit A -- I'm sorry -- Exhibit C,
18 and there are some people who were not on the original
19 Exhibit C who are on it now. Changes to my recollection is
20 Koztoski was one, was on the original Exhibit C, Doug
21 Koztoski who we found out had been offered a job and turned
22 it down. Chip Hirzel, same thing I believe. Howard Lutt was
23 the same thing. He has been removed. Hirzel has been
24 removed. Who else was removed?

25 JUDGE AMCHAN: How about Elkins? Was Elkins on the
page 15113

1 list? Was she -- my recollection was she turned down a job?

2 MR. BIGGAR: She's not on this one. I don't think she
3 was on the first one either.

4 MR. FASMAN: Do we have any additions on this one?

5 MR. BIGGAR: We have Oscar Romay and help me out guys.
6 That's the only addition. Oscar Romay.

7 MR. FASMAN: We object to 578 on that basis.

8 JUDGE AMCHAN: Well, I'll grant the amendment and if I
9 think you're prejudiced, I'll deal with it at that time.

10 MR. FASMAN: Yeah.

11 MR. BIGGAR: You are --

12 MR. FASMAN: I don't know. I think 579, amending New
13 York to add all of these people and take people out, I don't
14 think that should be allowed. This was done. This was done.
15 This is a New York document. This was done. It shouldn't be
16 allowed. And now we're going to have to -- I mean I already
17 said --

18 JUDGE AMCHAN: I mean, a lot of the names look very
19 familiar.

20 MR. FASMAN: Yeah.

21 JUDGE AMCHAN: I mean, so do you know what the changes
22 are?

23 MS. FOLEY: I don't, Your Honor.

24 MR. BIGGAR: We might have an e-mail --

25 MS. FOLEY: We might have an e-mail that would let us
page 15114

1 indicate what the changes are.

2 MR. FASMAN: Just, I just think it's so prejudicial. We
3 litigate the case up in New York for months on end, and then
4 after we're down here again, for a month. I mean they rested
5 in New York. Rested in May. Right? They rested. They
6 didn't want to rest but you said, you're done. So they're
7 done in New York. Now, we're amending the complaint in New
8 York, this and the documents on the freelancers. This is
9 just -- I mean it just eviscerates the whole basis upon which
10 this hearing was held. I've never seen, and I say this
11 advisably and without any personal animus. I don't want to
12 say that, but this is just bad faith. We litigate the case
13 in New York, we go forward, we do exactly as Your Honor
14 suggests, we go and litigate the whole case up there. We
15 have witnesses on the witness stand. We present our
16 affirmative case. We go on and on and on up there and then

17 all of a sudden, months after we leave New York at the end of
18 the Board's case, there are amendments to the complaint. I
19 mean it's just, it's just unbelievable, and I might say thank
20 you. You can't add additional discriminatees on the last day
21 of the hearing, Detroit Newspapers, 330 NLRB 524, denying
22 General Counsel's motion to amend a consolidated complaint
23 who had additional discriminatees on the last day of the
24 hearing. Stage Hands Referral Service, LLC, 2006 Westlaw
25 255, 9825 (2006), the same effect. It's just wrong.
page 15115

1 MR. BIGGAR: Well, Your Honor, these are based on part
2 upon the payroll records that we didn't get until very late
3 in the proceeding and in addition to that, we still have not
4 received what we believe would be acceptable, usable payroll
5 records, which is part of the underlying proceeding before
6 Judge Buxbaum. Had we got those payroll records in useable
7 form, early on when they were subpoenaed, then maybe
8 Mr. Fasman has a more valid argument but --

9 MR. FASMAN: The only reason you didn't get payroll
10 records at anytime was that you wouldn't tell us what you
11 wanted.

12 MS. FOLEY: Let's not --

13 JUDGE AMCHAN: You know what? I'm going to grant the
14 amendment, and I'll let you fight out, you know, who shot
15 John on whose prejudice by what.

16 MR. WILLNER: Just to be clear on the record, Your
17 Honor, these are lists of Team people and the payroll records
18 that presumably they're referring to are their -- Team
19 payroll records. These are non-hires. They had the Team
20 payroll records in December. So all these statements about
21 payroll records about CNN is all simply wrong and
22 inappropriate, and I might add the reference over and over
23 again is to Judge Buxbaum, are directly contrary to Judge
24 Buxbaum's orders that they're not supposed to refer to that,
25 and I really feel that it should be made clear that they're

page 15116

1 probably raising false issues here by doing so in violation
2 of Judge Buxbaum's order.

3 MR. BIGGAR: Well, I apologize, Your Honor. I was not
4 involved in those proceedings before Judge Buxbaum. So I
5 wasn't aware of that.

6 MR. FASMAN: Well, that's happened again and again and
7 again in this proceeding, and frankly, I'm not sure that we
8 even have any agreements anymore. You guys have treated that
9 with such bad faith and such cavalier treatment, I don't
10 think that there's any basis for us to go forward. We've
11 written to Judge Buxbaum, and we'll write again. And I don't
12 want to go further, Judge.

13 JUDGE AMCHAN: Anyway, we'll see whether these people
14 are discriminatees and whether there's prejudice, and I'll
15 sort it out later.

O. **Exceptions to Rulings Regarding Other Procedural and Evidentiary Issues**

In support of Exception No. 149: To the ruling that admits exhibits into evidence, overruling CNN's objections that the document are unsigned drafts of letters, and that the witness testified that he did not prepare the drafts and could not be sure that the final signed versions of the letters were

identical to the drafts (GC Exs. 176, 177), as such ruling is contrary to applicable law. (Tr. 3407, L.2-Tr.3410, L.7).

page 3407

2 MR. FASMAN: I want to object to 176 and 177. The
3 witness has testified that he has no idea whether these
4 are drafts or actual letters. We have no -- we've never
5 seen these, I guess, in actual form. I presume
6 Mr. McCarthy would have produced them if they were in
7 actual form of letters sent out. But we object to both of
8 these documents.

page 3409

11 VOIR DIRE EXAMINATION
12 Q. BY MR. FASMAN: Did you prepare these letters?
13 A. No.
14 Q. Do you have any idea who did?
15 A. I can't say specifically, but I would say it
16 probably was Pete Couste since he dealt with the
17 freelancers and/or independent contractors, depending on
18 what time it was.
19 Q. But you don't know that for a fact?
20 A. No.
21 MR. McCARTHY: I'm going to ask the last question be
22 stricken as improper voir dire, Your Honor. That's -- you
23 know, he can ask the witness on redirect.
24 JUDGE AMCHAN: Well, the short answer is I'm going
25 to receive 176 and 177, and if somebody finds out that

page 3410

1 they find that the letters went out --
2 JUDGE AMCHAN: I mean, you did testify that letters
3 similar to this did go out to the vendors, right?
4 THE WITNESS: That is correct.
5 JUDGE AMCHAN: I'm going to receive them, and if
6 somebody finds that these are not the letters that went
7 out, we'll substitute them.

In support of Exception No. 151: To the ruling that that admits exhibits into evidence, overruling CNN's objections that the documents were illegally obtained by the witness and the government (GC Exs. 294, 295), as such ruling is contrary to applicable law. (Tr. 4469, L.10-Tr.4478, L.18).

page 4469

10 MR. McCARTHY: Your Honor, I offer General Counsel
11 Exhibits 294 and 295.
12 MR. FASMAN: Voir dire, Your Honor.
13 JUDGE AMCHAN: Okay.
14 VOIR DIRE EXAMINATION
15 Q. BY MR. FASMAN: You printed these documents out,
16 Mr. Jenkins?
17 A. Yes, sir.
18 Q. CNN News Desk is a proprietary information system, isn't
19 it?
20 A. I wouldn't think so.
21 Q. It's created by CNN and it's used for CNN's business
22 purposes, isn't it?
23 A. Yeah, I guess. Like I said, it's a daybook to me.
24 Q. Is it password protected, sir?
25 MR. McCARTHY: Objection, Your Honor. We're going

page 4470

1 beyond the direct.

2 MR. FASMAN: No, we're not.

3 MR. McCARTHY: We're beyond the scope of the document,
4 Your Honor, on voir dire. Password protected, there's
5 nothing on this document --

6 MR. FASMAN: I want to know how this witness got this
7 document. These are stolen from our system. There's
8 confidential and proprietary polices at issue here. I'm
9 entitled to establish this in order to argue to Your Honor
10 that you should not receive these into the record.

11 MR. McCARTHY: Your Honor, these are --

12 MR. FASMAN: These are highly inappropriate. They were
13 printed off of a proprietary system containing information
14 that throughout the hearing we've said is protected by
15 reporters' privilege. They are documents that he is
16 forbidden to print out and forbidden to take out of our
17 system, and I think I'm entitled to show that to you in terms
18 of your ruling of whether they're admissible or not.

19 JUDGE AMCHAN: You can make the record. I'll make two
20 observations. One, I disagree with you on reporter's
21 privilege, and I've made that clear. The second thing is
22 even if he obtained these documents illegally, they're not
23 inadmissible and the case that comes -- there are a couple of
24 cases on that I remember came up in the -- context where
25 employees recorded conversations without the knowledge of the
page 4471

1 person they were recording, in states where that's a
2 violation of state law, there are a couple of cases, and
3 where the Employer contended that they were inadmissible, and
4 Board law, I have the decisions I issued in '97, making it
5 clear that they are admissible. I mean legality and all that
6 other stuff is not --

7 MR. FASMAN: Your Honor --

8 MR. POWERS: And, Your Honor, these are the types of
9 documents that we subpoenaed, you enforced that subpoena,
10 they didn't turn them over. That doesn't make them
11 privileged. Quite the reverse.

12 JUDGE AMCHAN: They're not privileged as far as I'm
13 concerned.

14 MR. FASMAN: Your Honor, with all due respect, I have
15 several comments on that. Number one, you have, you have
16 generally not upheld our objections on reporter's privilege.
17 You have not said, well, you don't have a reporter privilege
18 under any circumstances. Certainly, Your Honor, we hold that
19 we didn't have any First Amendment protections at all.

20 JUDGE AMCHAN: Yeah, I think I made it pretty clear that
21 I thought they were limited to confidential sources.

22 MR. FASMAN: That's fine. Number one. Number two, the
23 notion that Mr. Powers just enunciated, that he could
24 subpoena documents, we could not supply them and therefore
25 it's fine if a witness comes into our -- if an employee comes
page 4472

1 into our system, prints them off, gives them to the Union,
2 that therefore that's appropriate, is absolutely
3 inappropriate. And before Your Honor rules on that these are
4 admissible under the law that you, that you have -- you've
5 stated, we'd like to address that issue and address it in
6 detail because I don't think Your Honor is right under the

7 law any longer both under the NLRA and under Federal Rules of
8 Civil Procedure.

9 There is, there is a lot of case law that says that
10 witnesses cannot take documents from an Employer's
11 proprietary system, print them out, turn them over to
12 counsel, and then those documents are then introduced into
13 the hearing. I mean you were talking about violations of
14 state law. Well, we're talking about violations of Employer
15 practices. This is extremely serious business to CNN. If
16 this were allowed, if he could print this out and take it and
17 send it anywhere, he could send it to Fox. He could send it
18 to CBS, to ABC. Your Honor certainly isn't claiming that.
19 We have not been given the opportunity to even mark these as
20 confidential and to seal them within the record to prevent
21 them from being revealed to our competitors.

22 And I think Mr. Jenkins has committed an extremely
23 serious offense and is clearly prohibited by CNN's policies.
24 I think you ought to at least let me make a record as to the
25 policies he's violated, and I think we're entitled to be
page 4473

1 heard on this, and at least cite cases to you why --

2 JUDGE AMCHAN: Well, you claim confidentiality, but I'm
3 going to receive them.

In support of Exception No. 154: To the ruling that rejects an exhibit offered by CNN, sustaining an objection that the witness had not seen the document and could not remember receiving it, and rejecting CNN's argument that exhibits offered by the General Counsel under the same circumstances had been admitted (CNNA Ex. 109), as such ruling is contrary to applicable law. (Tr. 5339, L.20-Tr.5342, L.10).

page 5339

20 A. Um-hum.

21 Q. Is that an e-mail that -- does that accurately describe
22 the conversation that you had with Mr. Marcus on or about
23 September 7th, 2003?

24 A. Yes.

25 MR. WILLNER: I would move the admission of CNNA
page 5340

1 Exhibits 109 and 110.

2 MR. McCARTHY: Objection, Your Honor. He has the wrong
3 witness. I don't mind testimony about the substance of the
4 conversation, but this document's hearsay. It can't be
5 authenticated by this witness.

6 MR. POWERS: Your Honor -- problem with the relevance of
7 the documents. There's -- I may have missed this testimony,
8 but unless there's testimony that incidents like this were
9 communicated to CNN, what relevance does it have?

10 JUDGE AMCHAN: I don't know. It may be part of the
11 defense as to why he wasn't hired.

12 MR. POWERS: No, but what I mean is, is that if they
13 communicated it to CNN, I understand, but I -- from the
14 testimony that I have heard, there's been no statements that
15 things like this were ever communicated to CNN. I mean, the
16 interviews were behavioral, the whole process, the interview
17 process, as described by the managers -- I never heard any
18 reference that they accessed materials like this or that
19 materials like this --

20 JUDGE AMCHAN: We haven't heard it from their witnesses
21 as to why Mr. Suissa was hired -- wasn't hired.

22 MR. WILLNER: With respect to the hearsay question,
23 Your Honor, I would note that he just -- this is a
24 statement -- Mr. Suissa that's being summarized by Mr. Marcus
25 which he identified as being --

page 5341

1 JUDGE AMCHAN: Yeah, I'm going to receive 110. 109,
2 seems to me -- he says he hasn't seen it and I don't think
3 you've -- for it being received.

4 (Respondent CNN's Exhibit 110 received into evidence.)

5 MR. WILLNER: Your Honor, we can bring in another
6 witness to testify that it's a business record. I don't know
7 if that's good use of the -- time, court's time.

8 JUDGE AMCHAN: Well, I think you'll probably have to do
9 that to get 109 admitted. I mean, he says he didn't see it,
10 didn't -- he doesn't recall receiving it.

11 MR. McCARTHY: I'll also note, Your Honor, it's undated.
12 There's handwriting at the bottom. This witness --

13 JUDGE AMCHAN: Well, the handwriting on the bottom
14 doesn't concern me. I mean -- but it isn't dated. It refers
15 to some dates, you know. This witness basically testified he
16 doesn't recall any of this.

17 MR. WILLNER: Your Honor, might I request that it be
18 admitted and we tie it up later?

19 JUDGE AMCHAN: No, I think you have to bring -- because
20 you're introducing this as substantive evidence, things that
21 occurred. This witness says he doesn't remember any of this.
22 I think you have to have another witness come in, either say
23 you know, we sent him this letter. I mean, these letters are
24 in the files. I don't even know whether as a business record
25 I'd receive this because -- well, I -- the thing is you're

page 5342

1 trying to prove that these things happened and I think, you
2 know, you -- I don't know if you plan to call Mr. Simons, you
3 know, or whoever interacted with Mr. Suissa, but that is --
4 to testify that he had these conversations. I think -- for
5 this at all to be relevant, you probably have to bring a
6 witness in. Anyway, I'm not going to receive 109.
7 (Respondent CNN's Exhibit 109 rejected.)

In support of Exception No. 157: To the ruling that rejects an exhibit offered by CNN, sustaining an objection that, even though the witness was familiar with the contents, and even though the document contained party admissions, the witness had not created the document, and rejecting CNN's argument that exhibits offered by the General Counsel under the same circumstances had been admitted (CNNA Ex.126), as such ruling is contrary to applicable law. (Tr. 6136, L.13-Tr.6138, L.7).

page 6136

15 MR. WILLNER: This one, Your Honor, she did testify that
16 it reflects what she, what she was asked and what she said.
17 It refreshed her recollection.

18 JUDGE AMCHAN: Yeah, but I think the only way -- you can
19 get this in, in two ways. One is to have the person, you
20 know, the recruiter say this is my document and I took these
21 notes when I talked to Elizabeth Zosso. The other thing is
22 if -- I think you probably could also get somebody in the
23 hiring process who said they received this document and they
24 relied upon it, whether she said it or not, I mean, for
25 another purpose. But I mean, she's confirmed and it does

page 6137

1 strike me that someone would've had to talk to Ms. -- write
2 this down, but we don't know who wrote and I don't think you
3 can get the document in through her.

4 MR. WILLNER: Your Honor, we would just state that, in
5 our view, Numbers 119 through 120 -- 119, 120, 121, 122 and
6 Number 126 are no different than the Dan Young documents, or
7 a document of unknown origin that was found on Mr. Young's
8 hard drive, it was admitted yesterday.

9 JUDGE AMCHAN: I disagree because I think it's clear
10 that the Dan Young document was authored by somebody who's a
11 CNN agent, and this is not authored by her or anybody who was
12 her agent.

13 MR. WILLNER: And Your Honor, these do contain
14 essentially a transcription of statements by someone who's
15 seeking relief in this case. That would make them
16 admissions. The General Counsel is seeking relief on behalf
17 of Ms. Zosso and these are her statements that were written
18 down.

19 JUDGE AMCHAN: That hasn't been established.

20 MR. WILLNER: Well, I asked her, did she say these
21 things that were written down here, and she said yes.

22 JUDGE AMCHAN: Yeah. But you're asking to admit the
23 whole document. You know, she can see that she said certain
24 things to the interviewer. When you're looking at this
25 document, it refreshed your recollection that said some
page 6138

1 things. But you're asking to receive not only those things,
2 but other things in this document that she didn't testify
3 about. And whoever recorded them isn't here even to testify
4 that this is what she said to them. And I don't know, I
5 don't think it's admissible through her.

In support of Exception No. 160: To the ruling sustaining objections to CNN's questions about the witness's opinion of whether a change in circumstances affected his desire to vote on union representation, as such ruling is contrary to applicable law. (Tr. 9656, L.17-Tr.9660, L.4 (emphases added)).

page 9656

17 Q. Did you vote in an NLRB election in
18 the '80s when NABET came in?

19 MR. ROSE: Objection, whether someone
20 voted is union activity.

21 MR. FASMAN: I just asked if he
22 voted.

23 JUDGE AMCHAN: I don't see why it's
24 relevant, I sustain the objection.

page 9657

8 Q. In the mid '80s, Mr. Shine, did you
9 have the opportunity to decide whether you
10 wanted NABET to represent you for the purposes
11 of collective bargaining?

12 A. Yes, I did.

13 Q. Don't you think that employees who
14 never had that opportunity ought to have that
15 opportunity as well?

16 MR. ROSE: Objection, your Honor.

17 JUDGE AMCHAN: Sustained.

18 Q. Have you ever, since the mid '80s

19 voted to have NABET represent you?

20 MR. ROSE: Objection, your Honor.

21 JUDGE AMCHAN: Sustained.

22 Q. Given the significant changes in your
23 job responsibility that we just talked about,
24 do you think it would be appropriate to allow
25 you to decide whether you wish to have union
page 9658

1 representation at this time?

2 MR. ROSE: Objection.

3 MR. PETERSON: Objection.

4 JUDGE AMCHAN: Sustained.

5 MR. FASMAN: I want to say this: In
6 all of the board's successorship cases they
7 all talk about whether or not a change, a
8 significant change in responsibilities
9 provides a basis for deciding whether an
10 employee wishes continued representation by a
11 union. That is the language in case after
12 case after case.

13 I think I'm entitled to inquire as
14 to, without inquiring as to how he would vote,
15 whether this is the basis for a change in his
16 attitude towards union representation and
17 whether or not he feels that it's appropriate
18 to have an election conducted in this
19 situation.

20 JUDGE AMCHAN: I don't think it's
21 relevant.

22 MR. PETERSON: As so stated it's
23 clearly objectionable inquiry into his support
24 for or lack of support for union
25 representation.

page 9659

1 MR. ROSE: I am not completely
2 familiar with the law, I'm sure it's an
3 objective rather than subjective standard.

4 JUDGE AMCHAN: It depends when the
5 changes occurred.

6 MR. FASMAN: I don't think the board
7 has ever held it's an objective as opposed to
8 a subjective.

9 JUDGE AMCHAN: A lot of these changes
10 that he testified have occurred since January
11 2004.

12 MR. FASMAN: You're exactly right.

13 JUDGE AMCHAN: That does have a lot
14 to do with the outcome of this case.

15 MR. FASMAN: I think the answer is
16 that goes to a remedial issue which is clearly
17 part of this case.

18 JUDGE AMCHAN: With all due respect
19 to Mr. Shine, I don't think that his view of
20 this matters, the law is the law.

21 MR. FASMAN: The law is the law and
22 every single successorship case said that this
23 had to be considered from the employees point
24 of view. They all say that you have to

25 consider successorship in terms of job duties,
page 9660
1 et cetera from the employee's point of view.
2 JUDGE AMCHAN: I don't believe his
3 subjective opinion on this issue matters at
4 all.

In support of Exception No. 165: To the ruling that overrules CNN's objection that the General Counsel was provided more latitude with the scope of voir dire than CNN, as such ruling is contrary to applicable law. (Tr. 12069, L.18-Tr.12071, L.14).

page 12069

18 MR. WILLNER: I'm going to
19 object, your Honor. Now she's not
20 asking about the document. It's not
21 Voir Dire.

22 JUDGE AMCHAN: I think it goes
23 to -- I'm going to end up receiving it
24 regardless of what happens, but I
25 think before that she's entitled to

page 12070

1 establish exactly what this
2 represents, why it was prepared, how
3 it was prepared.

4 MR. WILLNER: I would just point
5 out, your Honor, for the record,
6 Washington DC. When Mr. Kallopy [sic]
7 presented his own analyses of the
8 engineering exhibits prepared by
9 counsel, we were not permitted to
10 examine him even though --

11 JUDGE AMCHAN: My recollection
12 of that was what I said was I would
13 only rely on it to the extent that
14 it's consistent with the underlying
15 documents, so... Mr. Kallopy's [sic]
16 compilation is almost like a brief;
17 it's not personal methods. I think I
18 made that clear on the record.

19 MR. WILLNER: You made it clear
20 on the record that it was not evident
21 at all. Here, however, we have a
22 witness who was prepared to -- it's a
23 demonstrative exhibit showing where
24 people sat, which is not claimed to be
25 identical to -- other than the, you

page 12071

1 know, the line -- it's not claimed to
2 be identical in terms of what the
3 colors are. This is just
4 cross-examination, it's not even Voir
5 Dire. And it's the kind of
6 questioning that we were not permitted
7 to do. We were never permitted to do
8 this kind of examination in general
9 counsel's case we believe.

10 JUDGE AMCHAN: I don't know.
11 You know, there are a lot of things

12 that happened in this case. If I have
13 been inconsistent and I ruled against
14 you that will go into the exceptions.

In support of Exception No. 172: To the ruling that overrules CNN's objections and permits counsel for the General Counsel and for Local 31 to ask hypothetical questions of Mr. Frydenlund, and to the ruling that sustains the objection to an allegedly hypothetical question asked of the same witness by CNN's counsel, as such rulings are contrary to applicable law. (Tr. 15235, L.20-Tr.15236, L.15; Tr. 15264, L.14-Tr.15265, L.7; Tr. 15273, L.11-Tr.15274, L.4 (emphases added)).

page 15264

14 Q. And isn't it true that if CNN asked, you could've also
15 trained the existing workforce to perform duties of
16 photojournalists or to service digital servers?

17 MR. FASMAN: Objection. It's all hypothetical. Could
18 this have happened, could that have happened?

19 JUDGE AMCHAN: Well, was he capable of --

20 MR. BOLEK: Of providing training --

21 JUDGE AMCHAN: Yeah.

22 MR. BOLEK: -- for the workforce.

23 MR. WILLNER: That's a separate question, Your Honor, as
24 to whether those employees would've succeeded with the
25 training, and I think it's hypothetical. It's a separate

page 15265

1 question as to whether those employees would've succeeded in
2 the training.

3 JUDGE AMCHAN: Well, he's not asking that, he's asking
4 whether he would have provided it.

page 15273

11 Q. Do you remember having discussions with Mr. Murtagh
12 between the date of the original proposal and his responsive
13 e-mail?

14 A. I do not.

15 Q. Is it possible that you did?

16 A. It could be possible.

17 Q. And if that had happened, is it possible that
18 Mr. Murtagh's just saying change the proposal in line with
19 our discussion?

20 MR. BIGGAR: Two objections, Your Honor. One is he's
21 leading the witness, and two is it's all hypothetical.

22 MR. FASMAN: Hypothetical?

23 JUDGE AMCHAN: Yeah.

24 MR. FASMAN: I thought we were doing hypotheticals
25 today.

page 15274

1 MR. BIGGAR: He doesn't recall having conversations.
2 Now he's saying if you did.

3 JUDGE AMCHAN: Right. I'm going to sustain the
4 objection.

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

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

and

Case 5-CA-31828

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

and

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

and

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

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

AFFIDAVIT OF SERVICE

Eric D. Engberg, being duly sworn, deposes and says as follows:

1. I am over 18 years of age, am not a party to this proceeding, and am employed by the law firm of Paul, Hastings, Janofsky & Walker LLP, 875 15th Street, N.W., Washington, D.C. 20005.

2. On the 7th day of April, 2009, I filed, by E-file, CNN America, Inc.'s Appendix In Support of Procedural Exceptions, with Henry S. Breiteneicher, Associate Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570.

3. On the 7th day of April, 2009, I served one true and correct copy of CNN America, Inc.'s Appendix In Support of Procedural Exceptions, by e-mail, on the following:

Gregory Beatty, Esq.
National Labor Relations Board
103 S. Gay Street, 8th Floor
Baltimore, MD 21202-4061
Gregory.beatty@nlrb.gov

Dorothy C. Foley, Esq.
Allen Rose, Esq.
National Labor Relations Board
Region 2 – New York Resident Office
26 Federal Plaza – Room 3614
New York, NY 10278
Dorothy.foley@nlrb.gov
Allen.rose@nlrb.gov

Peter Chatilovicz, Esq.
Seyfarth Shaw
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006
Attorneys for Team Video Services, LLC
pchatilovicz@seyfarth.com

Brian Powers, Esq.
O'Donoghue & O'Donoghue
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016
Attorneys for NABET-CWA Local 52031
bpowers@odonoghuelaw.com

David Biggar, Esq.
Region 18, National Labor Relations Board
330 Second Avenue South, Suite 790
Minneapolis, MN 55401
David.biggar@nlrb.gov

Robert Marinovic, Esq.
Meyer, Suozzi, English & Klein, P.C.
1350 Broadway, Suite 501
New York, NY 10018
rmarinovic@msek.com
Attorneys for NABET Local 11

4. On the 7th day of April, 2009, I served one true and correct copy of CNN America, Inc.'s Appendix In Support of Procedural Exceptions, by overnight delivery on the following and notified the same by telephone at the numbers below:

Steve Sturm, Esq.
Sturm and Pearl
9 Wittman Drive
Katonah, NY 10536
(914) 299-4007

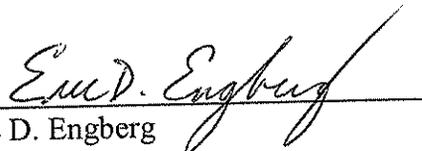
National Association of Broadcast Employees
and Technicians Local 11
145 West 30th Street, 12th Floor
New York, NY 10001
(212) 757-3065

Communications Workers of America, District 2
c/o Jimmy Tarleu, Esq.
17000 Science Drive, Ste. 210
Bowie, MD 20715
(301) 809-4160

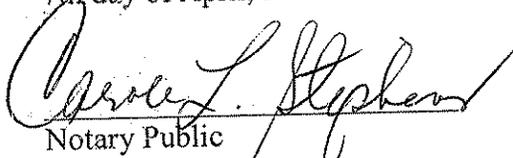
Mr. Larry D'Anna
Team Video Services, LLC
4455 Connecticut Avenue, N.W., Suite 300
Washington, DC 20008
(202) 363-1000

NABET-CWA Local 52031
962 Wayne, Suite 400
Silver Spring, MD 20910
(301) 495-4999

Matt Harris, Esq.
Communications Workers of America,
AFL-CIO
501 3rd Street, N.W., Suite 800
Washington, DC 20001
(202) 434-1100


Eric D. Engberg

Sworn to before me this
7th day of April, 2009


Notary Public

Carole L. Stephens
Notary Public, District of Columbia
My Commission Expires 2-14-2010

LEGAL_US_E # 83322746.1