JD–63–10
Buffalo, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

QUEEN CITY BROADCASTING
OF NEW YORK, INC.,

and

Cases 3-CA-27302
3-CA-27475
3-CA-27526

NATIONAL ASSOCIATION OF
BROADCAST EMPLOYEES AND
TECHNICIANS – COMMUNICAITON
WORKERS OF AMERICA, AFL-CIO

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California, for the Respondent.
Mathew Harris, Esq.,
of Washington, D.C., for the Charging Party.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. These consolidated cases were tried in Buffalo, New York, on May 10 and 11, 2010. The National Association of Broadcast Employees and Technicians – Communications Workers of America, AFL-CIO (the Union or the Charging Party) filed the initial charge on August 24, 2009, the second charge on December 21, 2009, and the third charge on February 1, 2010. The Regional Director of Region 3 of the National Labor Relations Board (NLRB or Board) issued the Consolidated Complaint (the Complaint) on March 29, 2010. The Complaint alleges that Queen City Broadcasting of New York, Inc. (the Respondent or the Station), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by transferring bargaining-unit work to non-unit employees, and unilaterally discontinuing the use of security guards at its facility, without providing the Union with notice or an opportunity to bargain over the conduct or its effects. The Respondent filed a timely answer in which it denied committing any of the alleged violations. The Respondent argues, inter alia, that the challenged conduct was authorized by proposals that the company lawfully implemented after negotiations for a new contract reached impasse.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with its principal place of business in Buffalo, New York, has been engaged in the business of television and radio broadcasting, from which it annually derives gross revenues in excess of $100,000 and receives at its Buffalo facility goods and material valued in excess of $5000 directly from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background Facts

The Respondent owns and operates WKBW television, a local commercial television station in Buffalo, New York. The station is an affiliate of the ABC television network. For many years the Union has been the designated exclusive collective bargaining representative of two units of employees at the station. One of those units is comprised of the Respondent's news reporters, news photographers, news photographer-reporters and news assignment editors. The other unit includes engineering and production technicians.[1]

The most recent collective bargaining agreement between the parties was effective by its terms from November 17, 2002, to November 17, 2007. The parties agreed to extend the agreement until January 1, 2008, while they continued negotiations for a successor agreement. The agreement was not extended further, but the parties continued negotiating through most of 2008. In November 2008 the Respondent presented what it identified as the company's "final proposals for a new agreement." On December 12, 2008, the union membership voted to reject the Respondent's final proposal. In January 2009 the Respondent implemented some, but not all, of its final proposals. Subsequently, on May 19, 2009, the Respondent notified the Union that it was implementing additional final proposals, but still not all such proposals.

B. Unilaterally Implemented Provisions

During negotiations for a successor contract, the Respondent proposed language that would give management far-reaching new authority to transfer bargaining unit work to persons outside the bargaining unit. These proposals were a sticking point between the parties. Union negotiators were concerned that the proposals would give management authority to either outsource all of the bargaining unit work or create a parallel work force of non-union employees to perform the unit work. The Union never agreed to the proposals, but the Respondent unilaterally implemented them in about May 2009 after the parties reached impasse.[2]

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[1] The evidence is vague regarding the total number of unit employees. John DiSciullo, who manages the Respondent's news operation credibly testified that there were 10 employees working in the unit positions of photographer-videographer, photographer-reporter (multi-media journalist/reporter) and editor on any given day during the week and that there were four such employees at work on any given weekend day. Tr.204-05.

[2] In a prior proceeding, Region 3 of the National Labor Relations Board found that negotiations were at an impasse in January 2009 when the Respondent unilaterally implemented proposals concerning pay periods and healthcare premiums. That determination

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The Respondent's proposals giving management new authority to transfer bargaining unit work to non-unit employees were set forth in Sections A-1.011(b), A-1.07 and A-1.08 of its final offer. Proposed Section A-1.011(b) is a modification of a provision in the expired contract. The new language that the Respondent proposed for that section provides that the assignment of work to unit employees in the contract is "not done on an exclusive basis; i.e., nothing limits the use of other Employees or non-bargaining unit personnel to perform such work, and Employees may be assigned to perform work in other bargaining units or other classifications and/or work not covered by this Agreement (including, e.g., that of another employer with whom the company has a business relationship)."[3] During negotiations, the Respondent's proposal for Section A-1.011 included additional subsections in which the company provided assurances that the use of non-unit employees to perform bargaining unit work was not expected to substantially increase or lead to the layoff of unit employees, but the Respondent deleted those assurances from the version of Section A-1.011 that it unilaterally implemented.[4]

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was affirmed by the Board's General Counsel. Respondent's Exhibit Number(s) (R Exh.) 4 and 5 (Dismissal Decision in Case No. 3-CA-27000). The prior proceeding did not address the May 2009 implementation, which occurred subsequent to the decision by Region 3. However, the General Counsel does not dispute the Respondent's contention that the parties were still at impasse at the time of the Respondent's May 2009 implementation.

[3] The Respondent's complete proposal for a new Section A-1.011(b) reads as follows (with the new language in italics):

> In order to achieve the best possible broadcast, and to further increase productivity and economy, *it is understood that the assignment of work or functions to the classifications is not done on an exclusive basis; i.e., nothing limits the use of other Employees or non-bargaining unit personnel to perform such work, and Employees may be assigned to perform work in the other bargaining units or other classifications and/or work not covered by this Agreement (including, e.g., that of another employer with whom the Company has a business relationship). When performing work for the Company not covered by this Agreement, the Employee shall receive no less than his/her current rate of pay for any such assignment. When performing work for another employer the Employee shall receive his/her current rate of pay unless he/she has agreed to a higher rate. When employees are assigned duties outside of their unit and their primary classification,* this will be done with due regard to employee safety and to the skills and abilities of employees. Where appropriate and necessary, sufficient instruction or training will be provided for out of classification responsibilities. The Company agrees to meet with the Union representatives to discuss any issues arising out of the implementation of these principles. If the company is planning a significant and permanent change in an Employee's job duties that would relate to a different classification of work, there will be prior consultation with the Union representative to receive input and suggestions *after which the change can be made*.

Compare General Counsel's Exhibit Number(s) (G Exh.) 2 at Page A-1 (the version in the prior contract) and GC Exh. 3 at Pages 14 to 15 (the Respondent's proposed revision).

[4] The assurances that the Respondent deleted from the version of Section A-1.011 that it implemented read as follows:

> (c) It is the intent of the Company that the performance of the bargaining units' work by non-bargaining unit personnel will not substantially increase above the current level absent unforeseen circumstances.
>
> (d) It is the intent of the company that there will be no layoff of bargaining unit

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The Respondent's proposed Sections A-1.07 and A-1.08 were entirely new. Section A-1.07 discusses the production of material to be broadcast by the station on secondary digital channels, as opposed to on "its FCC assigned frequency." The Respondent's proposal states that "[i]n the absence of agreement on the terms and conditions applicable to such work there shall be no restrictions on the station with regard to that production." The proposed section further provides that "[n]othing herein or elsewhere in the Agreement prevents the use of media from the primary signal on a secondary signal or vice versa, provided that the Station will not use news programs (as distinct from news segments or elements) originally broadcast on a secondary digital signal for broadcast on the primary digital signal."[5] The Respondent's proposed Section A-1.08 provides that the agreement does not limit the ability of the Respondent to use material produced by non-unit sources for broadcast or other purposes, even if the work would be covered by the agreement if done by unit employees.[6]

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employees because of the use of non-bargaining unit personnel under the terms of this Article.

[5] The complete Section A-1.07 paragraph from which this proposed language comes provides:

> Notwithstanding the foregoing, with respect to material created by WKBW-TV for initial broadcast on one or more of the station's secondary digital channels, the station will give due consideration to using the services of bargaining unit employees on such work when the employees have the current skill and ability to perform such work. The use of bargaining unit employees and the wage rates and working conditions that would be applicable to such work is subject to the satisfactory completion of negotiations between the station and the union for each such production. Failure to agree on terms will not be subject to the grievance and arbitration procedure and neither party shall be entitled to engage in economic action with respect to that or any related issue. In the absence of agreement on the terms and conditions applicable to such work there shall be no restrictions on the station with regard to that production. Nothing herein or elsewhere in the Agreement prevents the use of media from the primary signal on a secondary signal or vice versa, provided that the Station will not use news programs (as distinct from news segments or elements) originally broadcast on a secondary digital signal for broadcast on the primary digital signal.

GC Exh. 3 at Pages 23-24.

[6] The Respondent's proposed Section A-1.08 provides in its entirety:

> Except as provided in the last sentence of Section A-1.07, no express or implied provision in this Agreement shall be interpreted or applied as [to] preclude the Company from utilizing programming, program elements or media in any form received from any non-bargaining unit source, whether or not by pre-arrangement and whether such work or media, had its production been assigned to a bargaining unit Employee, would have been covered by this Agreement. No express or implied provision of this Agreement shall be interpreted or applied so as to preclude the Employer from using any work product produced under the terms of this Agreement in any other form or for any other purpose (whether or not for broadcast) or for any other enterprise, without further compensation to Employees.

GC Exh.3 at Page 24.

The expired contract defined bargaining unit work in several sections that set forth the types of work to be performed by employees in various bargaining unit classifications. After impasse, the Respondent unilaterally implemented revised classifications, but these changes do not appear to redefine bargaining unit work in any way that is relevant to this case. The bargaining unit classifications in the Respondent's implemented proposal are: maintenance technician; operations technician; multi-media journalist; news reporter; news producer/reporter; news photographer/editor; assignment editor; mobile production videographer; graphic artist; and crew chief. General Counsel's Exhibit Number(s) (GC Exh.) 3 at Pages 14 to 22.

C. The Work Performed by Non-Unit Sources

The Respondent has long had a practice of airing features that are not produced by its own employees, but rather by the network with which the station is affiliated (ABC) or other outside sources. The features include "Mr. Food," "Connect with Kids," "Bloomberg Business Reports," "Money Scope," a gardening segment, material from CNN, and a traffic update. Some of these features have been part of the station's regular broadcasts for over 20 years. The record indicates that most of the content provided by these outside sources was not "local" in nature.

The record shows that, in 2009, the Respondent began assigning unit work to two non-unit members of its staff – Scott MacDowell and Allen Leight. Both of these individuals had previously been bargaining unit employees, but the Respondent moved them to non-unit positions in 2009. MacDowell was promoted to "director of news content implementation" and Leight became "internet content manager."

The record shows that at about the time Leight was made "internet content provider," the Respondent carried out a layoff of unit employees in the photography department. Then, in mid-December 2009, the Respondent carried out a second layoff of unit employees, this one affecting three photographers, one technician, and two part-time reporters.

The expired contract has a number of provisions that the Respondent contends gave it authority, even apart from the unilaterally implemented proposals, to transfer the bargaining unit work at-issue here to MacDowell and Leight. Section A-1.05(e) of the expired collective bargaining agreement permits the Respondent to use non-unit individuals to "[o]perate a remote broadcast . . . beyond forty (40) airline miles from Company's studio." Although, on its face, the 40-mile rule concerns only stories that are broadcast from the remote site, there is significant evidence that for over three decades the practice of the Respondent and the Union has been to allow non-unit employees to videotape stories when they are outside the 40-mile radius, even if those stories are not actually being broadcast from the remote locations.[7] Section A-1.05(f) of the expired contract provides that non-unit individuals may "irregularly perform news reporter, news photographer[ ] or news photographer/reporter duties so long as such performance does not eliminate any employee's job." In addition, Section 1-1.05(a) authorizes any company supervisor to perform employee duties "when reasonabl[y] necessitated by an emergency."

[7] I base this on the testimony of Kenneth Koller, the Respondent's business manager. He testified that he has worked for the Respondent for 37 years and that during his entire tenure the practice has been to permit non-unit individuals to videotape stories outside the 40-mile radius. Tr. 164-65. No testimony contradicting Koller's account on this subject was introduced.

1. MacDowell

Prior to January 26, 2009, MacDowell held the bargaining unit position of "chief photographer." As chief photographer, MacDowell was responsible for scheduling the shifts of other photographers, counseling photographers about the quality of their work, issuing warning letters to photographers, designating the equipment to be used on assignments, arranging for the maintenance of photographic equipment, and working as a photographer himself.[8]

In a memorandum dated January 26, 2009, the Respondent notified the Union that MacDowell had been promoted to the newly created, non-unit, position of "director of news content implementation." In a communication to staff, the Respondent stated that in his new position MacDowell was responsible for "managing the long term and day to day operations of the Assignment Desk" and "work[ing] with the news staff on all levels to maximize efficiencies in implementing the 'Eyewitness News' product on air and online." MacDowell testified that his new duties included developing stories, critiquing the staff, hiring replacement and relief photographers, and serving as "point person" for disciplining employees. Although MacDowell's new position was outside the bargaining unit, the Respondent stated in its communications to both the Union and employees that MacDowell duties continued to include those of his old bargaining unit position.

On January 28, Gerald Rott, Jr., the Union's chief steward, met with John DiSciullo, the Respondent's director of strategic content and news operations, to discuss management's decision to have MacDowell continue performing bargaining unit duties in his new non-unit position. Rott told DiSciullo that this was "a violation of the contract." The next day, Ken Koller, the Respondent's business manager sent an email to Rott, in which he asserted that MacDowell was a "film-tape supervisor" and that under Section 1-1.05(i) of the old collective bargaining agreement MacDowell was therefore authorized to perform unit work.[9] Rott testified that, despite the assertion in Koller's letter, MacDowell did not hold the position of film-tape supervisor during the relevant time period. Rott stated that his own most recent tenure with the Respondent was from September 2002 until approximately April 2010 and that during that period MacDowell had never been a film-tape supervisor. There was no sworn evidence contradicting Rott on this point. Indeed, MacDowell, testifying as a witness for the Respondent, stated that he had gone from the position of chief photographer to the position of director of news content and implementation. MacDowell did not claim that he held the position of film-tape supervisor either before or after his promotion. Moreover, the January 26 email message that the Respondent sent to staff to notify them of MacDowell's promotion makes no mention of MacDowell holding the position of film tape supervisor. I find that MacDowell was not a film-tape supervisor at any time relevant to these proceedings.

On March 23, 2009, the Union filed a charge alleging that the Respondent was transferring bargaining unit work to MacDowell's new non-unit position. The parties settled that

[8] No party to this proceeding has disputed that MacDowell was a bargaining unit employee, not a supervisor, when he was chief photographer. The "crew chief" classification in the expired contract covers employees with the responsibilities that MacDowell had as chief photographer. GC Exh. 2, Page A-6.

[9] Section A-1.05(i) of the expired contract states: "Company's film-tape supervisor, executive producer and main anchor (main news anchor, sports anchor, and weather anchor) may perform any and all news unit work, so long as such work does not result in a news department layoff." GC Exh. 2, Page A-8.

charge on June 29, 2009, and the Respondent returned MacDowell to the bargaining unit position. In the settlement the Respondent agreed, inter alia, that it would "on request by the Union, restore the bargaining unit work (crew chief/chief of photography) back to the bargaining unit," and would "not transfer bargaining unit work out of the bargaining unit without first giving the Union notice and an opportunity to bargain." At around the time of the settlement, William Ransom, the general manager of the station, met with Rott and told him that MacDowell would be back in the bargaining unit for a "little while" or "60 days," after which the Respondent would again promote MacDowell to the position of director of news content implementation.

In an email communication on September 23, 2009, an attorney for the Respondent notified the Union that the company was again promoting MacDowell from the position of chief photographer to a non-unit position overseeing news content. The Respondent stated that MacDowell would continue to perform some of the duties he had in the position of chief photographer. This time the Respondent did not rely on the old contract to justify having MacDowell continue to perform bargaining unit work in his non-unit position, but rather cited the unilateral changes the company had announced on May 19.[10] MacDowell credibly testified that, after his promotion, he continued to possess all of the duties of his previous, bargaining unit, position of chief photographer. The Respondent did not give the Union notice or an opportunity to bargain before announcing that MacDowell would perform the duties of chief photographer in his new, non-unit, position.

The Respondent assigned bargaining unit duties to MacDowell on numerous occasions after his September 23 promotion, and did so without giving the Union notice of these assignments. Subsequent to his promotion, MacDowell was assigned the duties of the bargaining unit position of "assignment editor"[11] on an intermittent, but recurring, basis. The duties of assignment editor include deciding which stories to cover on a particular day and choosing what resources to allocate to each story. During the period from September 2009 (when he was re-promoted to "director of strategic content and news operations") until the time of trial, MacDowell filled-in as an assignment editor 12 times or more.[12]

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[10] See, supra, footnote 3, for the text of the unilaterally implemented provision.

[11] At one time the Respondent had five assignment editors. However, by approximately 2009, the Respondent had reduced that number to only two. Prior to 2009, it was very rare to have a non-unit individual fill-in as an assignment editor. Instead, when an assignment editor was unavailable, his or her duties would be performed by another assignment editor working overtime, or by another bargaining unit employee.

[12] There is no dispute that MacDowell filled-in as assignment editor, but the evidence is somewhat contradictory regarding how often he did so. I credit the testimony of Richard Kowalski, an assignment editor for one of the two shifts per day when the Respondent had an assignment editor on duty. Kowalski stated that he had witnessed MacDowell working as an assignment editor on about a dozen occasions after MacDowell was promoted to a non-unit position in September 2009. This leaves open the possibility that MacDowell served as assignment editor during other periods of time when Kowalski was not present – especially since there was testimony that MacDowell worked very long hours that exceeded regular shifts. Tr. 74-75 (Kowalski testifies that MacDowell and himself were present from 6 am to noon, but that MacDowell would sometimes continue working until as late as 11 pm.). I found Kowalski a credible witness based on his demeanor, testimony, and the record as a whole. He testified in a measured and confident manner and did not give the impression of bearing any animosity towards the Respondent or its management. Kowalski is currently a bargaining unit employee, but the record shows that he previously spent approximately a decade in management positions with other companies. While my credibility determination regarding Kowalski's testimony is

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The record shows that on a number of occasions after leaving the bargaining unit, MacDowell served as a photographer-videographer for the Respondent. On December 20, 2009, MacDowell photographed a story about Buffalo's New Year's Eve celebration. The following December 30, he covered a story regarding a fire when no bargaining-unit employee was available to do so. In February 2010, MacDowell travelled to Washington, D.C., to photograph hearings conducted by the National Transportation Safety Board (NTSB) and he also edited that story. MacDowell went to Boston, Massachusetts, to photograph and/or report a story about a Buffalo sports fan living in the Boston area.[13] In March 2010, MacDowell acted as the station's photographer for an event at a local hospital. In addition, from November 3, 2009, to December 31, 2009, MacDowell wrote a number of scripts for stories that were broadcast by the Respondent,[14] reported some stories on-air, and edited a broadcast segment about the top stories of 2009. MacDowell did some of these assignments during a period in late December 2009 when multiple unit members were on vacation or otherwise unavailable.

2. Leight

Leight has worked for the Respondent since about early 2008. Prior to July 2009, he was a photographer – a bargaining unit classification. On July 22, 2009, the Respondent announced that, effective July 27, the Station was moving Leight to the non-unit position of "internet content manager." In the new position Leight selects and posts content for the station's website. Some of the time Leight uses pre-existing content, either from the Respondent's broadcasts or from web sources, and "re-purposes" it for the station's website. In other instances, Leight produces original content, some of which is used on the Respondent's broadcast news program. Leight does a webcast each afternoon in which he previews the stories that will be on that evening's news broadcast.

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made independently of the fact that he is a current employee, I nevertheless note that crediting him is consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). See also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006) and *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996) (Table). In addition, Kowalski's testimony that MacDowell performed these duties on a relatively frequent basis is lent support by the testimony of Rott, who stated that MacDowell filled-in as assignment editor once or twice a week since leaving the bargaining unit in September 2009. When MacDowell himself was asked whether he had performed the duties of assignment editor since September 2009, he responded, "I believe once I was asked to step in" for "[a] few hours." MacDowell did not state that he had only performed those duties when "asked to step in," or that he remembered that he had not performed those duties on other occasions. In addition, his testimony was somewhat uncertain on its face. He stated that he "believed" he had been asked to step in on one occasion and was unable to state when, or for whom, he had substituted.

[13] Section A-1.05(e) of the expired collective bargaining agreement permits the Respondent to use "[a]ny person" to "[o]perate a remote broadcast (i) beyond forty (40) airline miles from Company's studio." Both Washington, D.C., and Boston, Massachusetts, are more than 40 airline miles from the Respondent's Buffalo studio. However, the record does not show that when MacDowell covered either the NTSB story in Washington, or the Buffalo sports fan story in Boston, he was operating "a remote broadcast." To the contrary, the record shows that the NTSB story was not broadcast remotely.

[14] It takes MacDowell approximately 30 to 45 minutes to prepare a script.

The record shows that after Leight became internet content manager the Respondent continued to assign bargaining-unit work to him. It made these assignments without providing the Union with notice or an opportunity to bargain. For example, after Leight left the bargaining unit, he was used as a reporter during the Respondent's broadcasts on 29 or more occasions. Some or these reports were self-contained pieces for which Leight prepared the script, and also did the on-camera reporting and photography.[15] The Respondent told Leight that these pieces had to be posted to the station's website before they could be aired on the station's news broadcast. That procedure was generally followed. In addition, after Leight left the bargaining unit, the Respondent had him produce a recurring segment called "Morning Leight," that was aired as part of the morning news broadcast. Leight would write the script for these segments, photograph them himself, and, in some or all cases, appear on-camera as the reporter for the segment. During the morning broadcast, Leight would introduce the segment and, after it was aired, he would discuss the segment on-air with the anchor-person. Each "Morning Leight" segment was approximately 2 to 3 minutes long. Unlike most of the Leight-produced pieces that the Respondent used in the station's broadcasts, the "Morning Leight" segments were not posted to the website before being broadcast. The Respondent aired Morning Leight segments approximately 14 times in November 2009, but subsequently discontinued the feature.

On other occasions after Leight left the bargaining unit, the Respondent gave him assignments to photograph stories for on-air broadcast. The record shows that on December 23, 2009, Leight was assigned to photograph an interview with the Mayor of Buffalo. On December 30, 2009, he was assigned to photograph three stories – one about an automobile accident, one about sports, and one about a public official's collapse during a press conference. Finally, the evidence shows that, as with MacDowell, Leight was sometimes assigned the duties of assignment editor – a bargaining unit position. Leight did this on approximately six occasions or more after he became a non-unit employee.[16]

D. Discontinuation of Security Guard Service

For a period of several decades, the Respondent paid an outside contractor to supply security guards at the facility after normal business hours and on weekends.[17] In addition to controlling access at the entrance to the facility, the security guards were also present in the parking lot when station staff arrived in the early morning hours. The guards would sometimes escort reporters from the parking lot into the building. In addition, the security guards would position themselves nearby when employees were broadcasting from around the outside of the facility.

The record shows that it was not uncommon for persons without legitimate business at the Station to attempt to gain access to the building, and the security guards took responsibility

[15] It takes Leight 35 to 40 minutes to prepare a script. The record did not show how much additional time it takes him to report the story on-camera, photograph that report, or put the content into a format compatible with on-air broadcast.

[16] I base this on the testimony of Kowalski, who, for the reasons stated above, I found credible. See, supra, footnote 12. Leight testified that he could "specifically recall" two occasions when he had filled-in as assignment editor since leaving the bargaining unit. However, Leight did not testify that he knew these were the only times he had done so.

[17] It is undisputed that the expired collective bargaining agreement dose not contain any provision requiring the Respondent to provide security guards and that security guards are not part of the bargaining unit.

for directing such individuals to leave, escorting them from the premises, and contacting the police if necessary. In some instances, these persons were mentally unstable and/or were bizarrely fixated on one of the station's on-air personalities. On a number of occasions the Respondent found it necessary to warn employees about the presence of an unauthorized person in the parking lot or the receipt of a threat from a member of the public.

In 2009, the Respondent decided to reduce its costs by discontinuing the guard service. On November 30, 2009, management notified the security contractor that it was cancelling the service effective December 31. The Respondent never provided the Union with notice of this action and did not inform employees until the day the change took effect.

In a January 3, 2010, memorandum, Rott, on behalf of the Union, complained to the Respondent about the discontinuation of the security guard service. Rott stated that the discontinuation constituted a "universal change of working conditions" and had compromised the safety of employees who worked after-hours. In particular, Rott expressed concern about safety in the parking lot, which he said had no gate, was sometimes unlit, and was often deserted at night. He noted that on-air personalities attracted threatening attention from mentally unstable persons. Rott stated that the Union was "filing this formal complaint in hopes that you change your mind and staff the building with a security guard before something bad happens." The Respondent answered the Union in a January 13 memorandum, stating that the company believed the use of the security guards was "not an effective component of security" and that other security precautions would suffice.

With the security guards absent, the employees were required to turn a mechanized security system on and off. These tasks took about a minute, but the record does not make clear whether the tasks had to be performed each time a staff member entered or left during off-hours, or whether the system only had to be armed once at the beginning of the off-hours period and disarmed once at the end of that period. In addition, whereas the security guards had previously admitted visitors to the building during off-hours, this now became the task of staff members. When the visitors arrived they were required to contact an employee inside to arrange for someone to open the door. In addition, the security guards had been the custodians of keys for secured rooms at the facility and, when the guard service was discontinued, the employees became responsible for maintaining control of those keys.

The Respondent reinstituted the security guard service on February 3, 2010, after discovering that the entrance door was not locking securely.

E. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by taking the following actions without providing the Union with notice and an opportunity to bargain over the conduct or its effects: since July 22, 2009, transferring unit work to a non-unit classification by broadcasting material prepared by the internet content manager; on about August 24, 2009, December 29 and 31, 2009, and other dates, directing non-unit employees to perform unit work at the assignment desk; on about September 15, 2009, November 30, 2009, December 10, 11, 12, 14, 23, 24, 30 and 31, 2009, and other dates, directing non-unit employees to perform unit work by videographing and/or reporting stories to be broadcast on the air; on about September 15, 2009, December 10, 11, 12, 14, 19, and 24, 2009, and other dates, directing non-unit employees to perform unit work by creating, editing, and/or reporting stories to be broadcast on the air; on about December 30, 2009, by directing a non-unit employee to perform unit work by videographing stories to be broadcast on the air; and from about December 31, 2009, until about February 3, 2010, by discontinuing the use of security

guards at its facility and requiring employees in the unit to perform certain security functions.

III. Discussion

A. Allegation that Respondent Unlawfully Transferred Bargaining Unit Work to Non-Unit Employees.

After MacDowell was promoted to a non-bargaining unit position on about September 23, 2009, and Leight was moved to a non-bargaining unit position on July 27, 2009, the Respondent assigned various types of bargaining unit work to them. The General Counsel alleges that the Respondent did this without giving the Union notice and an opportunity to bargain, and that the conduct therefore violated Section 8(a)(5) and (1) of the Act. It is well-established that an employer violates the Act by reassigning work performed by bargaining unit employees to supervisors or other individuals outside the unit without providing the collective bargaining representative with notice and an opportunity to bargain. See, e.g., *St. George Warehouse, Inc.*, 341 NLRB 904, 905-06 and 924 (2004), enfd. 420 F.3d 294 (3d Cir. 2005); *Stevens International*, 337 NLRB 143 (2001); *Regal Cinemas, Inc.*, 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003); *Harris-Teeter Super Markets, Inc.*, 307 NLRB 1075 at fn.1 (1992); *Technicolor Services*, 271 NLRB 1220, 1224 (1984). This responsibility is not altered by the fact that the transfer is prompted by economic considerations. *Talbert Manufacturing, Inc.*, 264 NLRB 1051,1056 (1982). The Respondent raises essentially two defenses to the allegation that it violated the Act by unilaterally transferring bargaining unit work to the non-unit employees. First, it argues that the assignment of the work to non-unit employees was permitted under bargaining proposals that the company lawfully imposed after reaching an impasse in negotiations for a new contract. Second, the Respondent argues that the amount of work improperly transferred was not substantial enough to give rise to a violation. For the reasons discussed below, I find that the Respondent's defenses are not valid, and that it violated Section 8(a)(5) and (1) by unilaterally assigning bargaining unit work to non-unit employees.

1. Post-Impasse Implementation and the *McClatchy* Exception.

After reaching a good faith impasse in negotiations for a new contract, the Respondent unilaterally implemented a number of its bargaining proposals, including ones that gave management new discretion to assign the work of bargaining-unit employees to non-unit individuals. As a general rule, an employer may implement some or all of the terms and conditions of employment that are reasonably comprehended by its pre-impasse proposals when the parties have reached an overall impasse. *Richmond Electrical Services*, 348 NLRB 1001,1003 (2006); *Lihli Fashions Corp.*, 317 NLRB 163, 165 (1995). The General Counsel does not dispute that the parties reached a valid impasse, or that the provisions the Respondent implemented post-impasse would, if given effect, authorize the Respondent to assign the bargaining unit work at-issue to MacDowell and Leight. However, the General Counsel argues that the proposals the Respondent implemented fall into an exception to the general rule regarding unilateral implementation at impasse. That exception was recognized by the Board in *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998), and under it "an employer cannot implement (i.e., take action) pursuant to a clause that gives it unfettered discretion to act, even if the clause itself was placed into effect after impasse." *E.I. Du Pont & Co.*, 346 NLRB 553, 560 (2006), discussing *McClatchy Newspapers*, supra. For the reasons discussed below, I conclude that the *McClatchy* exception applies in this case.

In *McClatchy* the Board explained that the general rule permitting an employer to unilaterally implement its prior bargaining proposals at impasse is "legitimated only as a method of breaking the impasse" and encouraging further good faith negotiations. Permitting an employer to use that rule to implement a proposal that gives management the discretion to act unilaterally on a recurring basis, the Board explained, could not be sanctioned under that rationale since such implementation would discourage, rather than further, active collective bargaining. *McClatchy*, 321 NLRB at 1389-91. The facts in *McClatchy* concerned post-impasse implementation of a merit pay proposal, but the Board did not state that the exception, or the rationale for the exception, only reached proposals regarding wages. Later decisions have viewed the exception as extending to proposals on other subjects in circumstances where allowing the employer to grant itself unfettered discretion would be inherently destructive of collective bargaining. Examples have included proposals granting management discretion to make future changes to healthcare benefits, *KSM Industries*, 336 NLRB 133, 134-35 (2001), and other "key terms and conditions of employment," *California Offset Printers, Inc.*, 349 NLRB 732, 736 (2007).[18] Moreover, the Board noted in *McClatchy* that there have always been a number of types of proposals that an employer is prohibited from unilaterally imposing after impasse, including those on arbitration, union-security, dues checkoff, and strike prohibitions. 321 NLRB at 1390; see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006).

In this case, I have little trouble concluding that the Respondent's proposals giving management unlimited authority to transfer the bargaining unit's work to non-unit individuals so seriously undermine future bargaining as to fall within the *McClatchy* exception. In those proposals, the Respondent gives itself unfettered discretion to decide what, if anything, is bargaining unit work. As discussed above,[19] the Respondent's unilaterally implemented proposals give the company authority, without limits, to "use . . . other employees or non-bargaining unit personnel to perform" any of the work that the collective bargaining agreement assigns to bargaining unit classifications. The proposals also give the Respondent authority to require bargaining unit employees to perform any type of non-unit work, including work for other employers. In addition, the Respondent's unilaterally implemented proposals give management discretion to use broadcast material produced by non-unit sources even if the production of that material would be unit work if done by unit employees. This discretion is comparable in its sweep to that which triggered the exception to the impasse rule in *McClatchy.* Indeed, the proposals implemented by the Respondent give management the ability to create a parallel workforce of non-union individuals to do the bargaining unit's work and ultimately to eliminate the bargaining unit entirely by assigning all of the unit employees' work to non-unit individuals. The Respondent does not make any argument that the company's discretion under these provisions is somehow less sweeping than the plain language indicates. Permitting the Respondent to use the implementation-at-impasse rule to endow itself with unfettered discretion to make changes to this key term of employment whenever it chooses would nullify the Union's authority to bargain over that term and would be "inimical to the postimpasse, on-going

[18] The Respondent claims that in *California Offset Printers* the Board "did not apply the *McClatchy*" exception because the "proposal did not grant discretion to make changes to wages and benefits." Brief of Respondent at Page 19. This misrepresents the Board's holding. Contrary to the Respondent's suggestion, in *California Offset* the Board explicitly stated that the *McClatchy* exception applied not only to wages, but also to "*other key terms and conditions of employment."* 349 NLRB at 746 (emphasis added). The Board did not apply the *McClatchy* exception in *California Offset*, but the reason was not that the implemented proposal concerned something other than wages, but rather that the implemented proposal, even if given full effect, would not have permitted the challenged conduct. Id.

[19] See, supra, section II B.

collective-bargaining process" envisioned under the Act. *KSM*, 336 NLRB at 135. The implemented provisions creating that discretion fall within the *McClatchy* exception and the Respondent is prohibited from taking action pursuant to those provisions even though the provisions were placed into effect after the parties reached impasse.

The Respondent argues that the amount of bargaining unit work that was reassigned in this case was too minimal to justify application of the *McClatchy* exception. As is discussed later in this decision, the Respondent substantially understates the proportion of bargaining unit work that it is transferring to others outside the bargaining unit. At any rate, the correct inquiry for purposes of deciding whether an employer's post- impasse changes take an impermissible amount of discretion is not whether the particular actions carried out thus far pursuant to that discretion have been more than de minimis, but whether the discretion the employer has granted itself is more than de minimis. See *Springfield Jewish Nursing Home*, 292 NLRB 1266 , 1274-75 (1989) (whether changes are de minimis is not evaluated individually, or based on the extent to which those changes were actually enforced, but based on the overall design of the changes the employer implemented); *The Boeing Company*, 230 NLRB 696, 703 (1977) (limited number of hours of bargaining unit work transferred to others out of the unit is insufficient to show that transfer did not violate Act where transfer will not end with those hours, but continue in the future), enf. denied in part on other grounds 581 F.2d 793 (9th Cir. 1978); *Seattle-First National Bank*, 176 NLRB 691, 693-94 (1969) (whether a change is de minimis is not based only on its ramifications so far, but on the effects it will have in the future and with consideration of the possibility that the employer will expand its use of the new policy), enfd. 444 F.2d 30 (9th Cir. 1971). As discussed above, the discretion with which the Respondent seeks to imbue itself is not de minimis, but unfettered and profound.

The Respondent also contends that applying *McClatchy* here would "create[ ] a 'gotcha' scenario . . . . for the unwary employer" who believed it was privileged to unilaterally implement proposals because the parties were at impasse. Although I am mindful of such concerns, I do not believe they warrant finding the *McClatchy* exception inapplicable under the circumstances present here. First, I note that the argument that employers may incur unanticipated liability by making unilateral changes can be made in *any* case where the *McClatchy* exception is applied or indeed in any case where an employer makes unilateral changes based on an erroneous assertion that impasse has been reached or that employees have rejected the collective bargaining representative. When an employer takes action pursuant to unilaterally implemented provisions at a time when the lawfulness of that unilateral implementation has not been finally determined, it risks having those actions reversed and appropriate remedies ordered. Cf. *Taino Paper*, 290 NLRB 975, 977 (1988) ("When an employer makes changes in terms and conditions of employment of unit employees after an election, but before the union is certified, it does so at its peril in the absence of compelling economic considerations."). Moreover, although the Respondent's counsel suggests that the company would be caught unawares if the *McClatchy* exception is applied here, there was no testimony or other evidence showing that the Respondent's officials or agents were, in fact, unaware that application of the *McClatchy* exception was a real possibility when they decided to unilaterally impose proposals giving the company unfettered discretion to transfer any or all of the bargaining unit's work to non-unit individuals. Indeed, given the nature of the discretion that the Respondent was seeking, the company should have been aware that the *McClatchy* exception to the rule regarding implementation at impasse was in the picture.

2. Was the Reassignment of Unit Work to Non-Unit Individuals Substantial?

The Respondent argues that the unilateral assignment of bargaining unit work to non-unit employees MacDowell and Leight does not give rise to a violation of Section 8(a)(5) because the amount of work involved was de minimis, and a transfer of unit work does not trigger a bargaining obligation unless it is "material, substantial, and significant," *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). I conclude that, to the contrary, the Respondent's assignment of bargaining unit work to others outside the unit was material, substantial, and significant. The evidence shows that on numerous occasions after July 27, 2009, the Respondent had non-unit employees MacDowell and Leight perform the work of bargaining unit employees. In MacDowell's case, the testimony showed that in his non-unit position he continued to have all the duties of his former bargaining unit position of chief photographer. The record also shows multiple specific examples of MacDowell performing bargaining unit work. For example, MacDowell acted as assignment editor 12 or more times, reported stories on-air during the Respondent's broadcasts, performed segment editing, and videographed stories. In the case of Leight, the record shows that he performed unit work by making 29 or more on-air reports during the Respondent's broadcasts, and by creating, and providing on-air discussion of, "Morning Leight" segments on 14 occasions. Leight also performed the bargaining unit work of assignment editor on six or more occasions and of photographer on at least four occasions. This was a material and substantial transfer of bargaining unit work to non-unit employees. By failing to give the Union an opportunity to bargain about the preservation of this work within the bargaining unit, the Respondent materially undercut the Union's negotiating strength. *St. George's Warehouse*, 341 NLRB at 925; *Overnite Transportation Co.*, 330 NLRB 1275, 1276-77 and 1290-91 (2000).

The impact on unit employees of the assignment of this unit work to non-unit individuals is particularly significant here in light of the fact that at about the same time as the Respondent began assigning the photographer and reporter work to the non-unit individuals it laid off six or more unit employees from their positions as photographers and reporters.[20] Moreover, the layoffs and reassignments came from among a group of unit employees that was relatively small. The Respondent's complement of bargaining unit photographers, reporters, and editors was only about ten on any given weekday. The Respondent, by unilaterally assigning the bargaining unit work at-issue to others outside the unit, denied the Union the opportunity to bargain about avoiding layoffs or recalling laid-off employees. See *Talbert Manufacturing, Inc.*, 264 NLRB at 1056 (the reassignment of unit work to supervisors delayed the recall of laid-off unit employees and significantly impacted the job opportunities of the bargaining unit).

The Respondent contends that much of the bargaining unit work performed by non-unit individuals should not be considered when assessing the substantiality of the station's unilateral transfer of unit work because the station was already authorized by the expired agreement or prior practice to use the non-unit employees for that work. I have examined the evidence relative to this contention, and, in general, find it lacking. The only exception is the Respondent's claim that using MacDowell as the photographer for two stories – one covered in Washington, D.C. and one in Boston, Massachusetts – was in keeping with a longstanding practice of permitting the company to use non-unit employees to film and videograph at

[20] In mid December 2009, the Respondent laid off three photographers and two part-time reporters, and in approximately late July 2009, it laid off staff in the photography department.

locations more than 40 miles from the station.[21] I have not considered those instances in assessing the substantiality of the transfer of unit work.

On the other hand, I do consider the 29 instances when the Respondent aired Leight's reports and the 14 instances when it aired his "Morning Leight" segments as examples of the reassignment of bargaining unit work to a non-unit individual. The Respondent claims that although reporting and photographing for broadcast was bargaining unit work, assigning this work to Leight was authorized by the station's longstanding practice of including segments produced by outside entities in its broadcasts. This argument is not persuasive. First, on its face the use of pre-produced content from outside entities is not the same as the Respondent's creation, under its own direction and using its own staff, of original broadcast content. The latter is the traditional work of the bargaining unit, whereas the former is not. Moreover, as one might expect, the types of programming that the Respondent acquired from outside sources generally consisted of non-local segments (for example, "Bloomberg Business Reports" and "Mr. Food"), not the local programming that was the core work of its own unit employees. Under Board law, even if an employer is authorized to have one type of work performed by a non-unit source, the employer violates Section 8(a)(5) by unilaterally expanding that practice to include other types of work. See, e.g., *Public Service Co.*, 312 NLRB 459, 460-61 (1993) (the union's waiver of the right to bargain over employer's use of contractors to maintain and construct natural gas fueling stations, does not constitute waiver of bargaining over use of contractors to perform other types of work); *American Telephone Co.*, 309 NLRB 925, 927 (1992) (fact that union agrees to allow an employer to subcontract in specified circumstances, does not mean it agrees to subcontracting in other circumstances). Thus the fact that the Respondent had an established practice of using pre-produced, non-local, programming from outside sources does not mean that it had no obligation to bargain before transferring the Station's own production of local programming to non-unit employees.

Even assuming the type of programming that the Respondent was using MacDowell and Leight to create was the equivalent of the type it was already obtaining from outside sources, the use of MacDowell and Leight to do that work still required bargaining. Under Board law, the fact that an employer is authorized to use one non-unit source to do work does not mean that it is relieved of the obligation to bargain before beginning to use other non-unit sources to do the same work. For example, in *Quickway Transportation, Inc.*, 354 NLRB No. 80, slip op. at 2 (2009), the Board held that even though the employer had previously assigned unit delivery work to a temporary agency, it violated the Act by unilaterally hiring independent contractors to do that work. Thus, in the instant case, the Respondent's established practice of using outside entities to produce content for broadcast did not mean it could begin using MacDowell, Leight, or the station's other non-unit staff, to produce that type of work without first bargaining over the reassignment.[22]

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[21] This is not based on Section A-1.05(e) of the expired contract, which concerns only live transmissions, but on the testimony of Koller regarding an unwritten policy.

[22] In most instances, the pieces Leight reported were posted to the station's website before being aired as part of the Respondent's broadcast. The Respondent argues that in such instances it was not using Leight to perform bargaining unit work because production of content for the website was not covered by the collective bargaining agreement. The Respondent cites no legal support for the notion that the Station may convert bargaining unit work into non-unit work simply by using the product of that work in a manner that is not covered by the collective bargaining agreement shortly before using the same work product in a manner that clearly is covered by the agreement. Moreover, the Respondent's argument proves too much because acceptance of it would mean that the Station could render the production of essentially all of its

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I also reject the Respondent's contention that transferring much of the work at-issue to non-unit individuals was authorized by provisions of the expired contract. Those provisions permit the company to use supervisors to perform unit employees' duties "when reasonably necessitated by an emergency," and also allow it to use non-unit individuals to "irregularly" perform the work of reporters and photographers so long as that work does not "eliminate any employee's job." The applicability of these provisions must be considered with due regard for the fact that at the same time the Respondent began assigning bargaining unit work to non-unit individuals MacDowell and Leight, it also laid off multiple unit employees whose jobs it had been to perform that work. The Respondent relies on the provisions in the expired contract primarily in relation to its use of MacDowell and Leight to perform unit work during a period from December 20, 2009 to the beginning of 2010 when a large number of unit employees were on leave. However, only about a week before the start of that period the Respondent carried out the second of its recent workforce reductions – laying off three photographers, one technician, and two part-time reporters. The shortage of unit employees was not an unexpected "emergency," but a consequence, at least in large part, of the Respondent's decision to grant holiday season leave to some unit employees while laying others off. Similarly, the use of MacDowell and Leight to perform bargaining unit assignments during the relevant time period cannot be reasonably viewed as an "irregular" use that did not "eliminate any employee's job." The evidence suggests, to the contrary, that this use of the non-unit individuals was ongoing and came at the expense of work opportunities for unit employees. Not only did the layoffs of unit photographers and reporters occur during the period when the Respondent was assigning photography and reporter work to non-unit employees, but the Respondent's repeated use of non-unit employees as assignment editors came at the end of a period during which the station reduced the complement of bargaining unit assignment editors from five to two.[23]

The Respondent argues that the bargaining unit work assigned to MacDowell and Leight constituted only a fraction of one percent of all the bargaining unit work and, therefore, that the unit work assigned to them was de minimis. I reject this argument both because the significance of a change such as the one at issue here is not judged solely on the basis of the individual applications of that change thus far, and also because the Respondent understates the amount of bargaining unit work being assigned to persons outside the bargaining unit. When considering whether the Respondent's transfer of bargaining unit work to non-unit individuals is de minimis, it is appropriate to consider not only the examples of that transfer that have taken place so far, but also the overall design of the transfer, the effects of the continuation of that transfer going forward, and the likelihood that the conduct will be expanded in the future if approved in this instance. See *Springfield Jewish Nursing Home*, supra, *The Boeing Company*, supra, *Seattle-First National Bank*, supra. To make the transfers at-issue here, the Respondent relied on unilaterally implemented proposals by which it purported to give management authority, *without limits*, to assign *any* bargaining unit to persons outside the bargaining unit. Moreover, the Respondent argues that even apart from those implemented proposals it has the authority, as part of its established practice of broadcasting non-local segments produced by outside entities, to assign bargaining unit production work to non-unit employees. The overall

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broadcast material non-unit work simply by posting that material to the website moments before broadcasting it. There is no logical or precedential basis for such an outcome and I reject the argument that would produce it.

[23] The Respondent also claims that MacDowell could perform the bargaining unit work of videography and editing because he was a film-tape supervisor. This argument fails because, as discussed earlier, MacDowell was not a film-tape editor. See, supra, Section II.C.1.

design of the Respondent's changes to its practices regarding the transfer of unit work, and the likely future ramifications of those changes, are not de minimis, but substantial and material.

At any rate, the Respondent understates the proportion of bargaining unit work it was transferring outside the bargaining unit. To begin with, the Respondent expresses the amount of bargaining unit work it improperly transferred to Leight and MacDowell as a percentage of all the work done by the bargaining unit from May 19 to December 31, 2009. However, Leight was himself a bargaining unit member from May 19 until July 22, 2009 and MacDowell was a bargaining unit member from June 29 until September 23, 2009. Thus the Respondent includes months when no bargaining unit work was being transferred to MacDowell and Leight for the simple reason that those individuals were still bargaining unit employees. This exaggerates the number of relevant hours of bargaining unit work and devalues the importance of the hours improperly transferred to non-unit individuals MacDowell and Leight. In addition, the Respondent understates the amount of bargaining unit work done by MacDowell and Leight by failing to include various types of bargaining unit work that they performed. The Respondent includes the 14 "Morning Leight" segments, but does not include the more than 30 other instances in which Leight and MacDowell, after leaving the bargaining unit, reported stories aired during the Respondent's broadcasts. In addition, the Respondent only considers "two or three times" that MacDowell and Leight were assigned the bargaining unit duties of assignment editor, but they were assigned those duties 18 times or more. Lastly, the Respondent makes no effort to account for the fact that after MacDowell was promoted in September 2009 he retained *all* of the duties of his prior bargaining unit position of chief photographer. See *Hampton House*, 317 NLRB 1005 (1994) (employer unilaterally transferred unit work in violation of the Act when, after promoting unit members to supervisory positions, it continued to have those individuals perform their unit work). Therefore, even were I to assess the substantiality of the transfer of unit work without considering the overall design and future ramifications of that transfer, I would not be persuaded by the Respondent's claims about the proportion of bargaining unit work transferred because the Respondent fails to take into account all, or even most, of the examples of such transfer. [24]

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[24] In its post-hearing brief the Respondent asserts, for the first time in the proceedings before me, that a determination that the Respondent unlawfully transferred unit work to MacDowell and Leight is precluded because the Respondent waived bargaining by failing to request it when, on May 19, the Respondent announced that it would unilaterally implement proposals permitting it to reassign unit work to non-unit individuals. I decline to consider this defense because the Respondent did not properly raise it. Waiver is an affirmative defense that the party must either set forth in its pleadings or raise at trial. *Phelps Dodge Mining Co.*, 308 NLRB 985, 1002 (1992), enf. denied on other grounds in 22 F.3d 1493 (10th Cir. 1994). In this case the Respondent did not plead waiver as an affirmative defense, did not seek to amend its answer to assert it, declined to make an opening statement to apprise the other parties of the waiver defense, and never mentioned waiver at trial. Not surprisingly, the General Counsel did not include discussion of the purported waiver defense in its brief and did not introduce any evidence that directly addresses the issue. The result is a record that leaves many of the questions relating to waiver either inadequately explored, or unexplored. Among these questions are: Did the Respondent present the post-impasse implementation as a change that could be bargained about or as a fait accompli? How much time, if any, passed between the Respondent's May 19, 2009, announcement that it was unilaterally implementing the proposals and the effective date of those proposals? When did the Union become aware that the Respondent would, in fact, begin transferring work from the bargaining unit to non-unit employees? How exhaustively had the parties bargained about the Respondent's proposals regarding the assignment of unit work to non-unit individuals during the pre-impasse period?

Continued

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring bargaining unit work to individuals outside the bargaining unit on various dates since July 27, 2009.

B. Allegation that the Respondent Violated Section 8(a)(5) by Unilaterally Discontinuing the Use of Security Guards at Its Facility.

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) when it unilaterally discontinued the use of security guards at its facility from December 31, 2009, to February 3, 2010. The record shows that for a span of decades prior to 2010 the Respondent provided security guards at the facility. The security guards engaged in a number of activities to enhance the safety of the station's employees. The record shows that on December 31, 2009, the Respondent abruptly discontinued the security detail without notifying the Union, and without informing the affected employees until the day the change took effect. The evidence shows that the Respondent had decided to discontinue the service at least a month before the December 31 effective date of that decision.

The General Counsel establishes a prima facie violation of Section 8(a)(5) by showing that the employer made a material and substantial change in a term of employment without negotiating with the union. *Fresno Bee*, 339 NLRB 1214 (2003). The Board has held that safety conditions in the workplace are a mandatory subject of bargaining. See *Kohler Mix Specialties*, 332 NLRB 630, 631-32 (2000); *Gulf Power Company*, 156 NLRB 622, 625 (1966), enfd. 384 F.2d 822 (5th Cir. 1967); see also *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (employer must bargain over working conditions that are "plainly germane to the 'working environment'" and which are "not among those 'managerial decisions, which lie at the core of entrepreneurial control'"). By ceasing to provide the security guards, the Respondent made a material and substantial change to the safety conditions of unit employees at the facility. Since the Respondent did this without bargaining with the Union, a prima facie violation of Section 8(a)(5) and (1) is established.

As with the transfer of bargaining unit work, the Respondent attempts to avoid a finding of violation by claiming that the unilateral change it made was so de minimis as to have no meaningful impact on unit employees. According to the Respondent, the only way the discontinuation of the security detail impacted unit employees was by requiring those employees to turn an alarm on and off, and answer the door when there were after-hours visitors. Even if those were, in fact, the only effects I am not sure that the change would be insubstantial, but those were not the only effects. The more significant impact of the change was to the safety conditions under which employees were working, and that impact was material and substantial. The security guards enhanced workplace safety conditions for unit employees not only by screening after-hours visitors, but also by: patrolling the unsecured parking lot; escorting employees into the building from the parking lot; stationing themselves at areas around the facility from which employees were broadcasting; and removing unauthorized persons from the premises. The loss of these safety services was of particular concern because station employees were subject to unwanted and sometimes threatening attention from mentally unstable members of the viewing public. On multiple occasions, the Respondent warned employees that their safety had been called into question either by the presence of an unauthorized person at the facility or the receipt of a threat. The Board has made clear that

Under the circumstances here, I conclude that the affirmative defense of waiver was neither properly raised nor fully litigated, and I do not make a determination regarding its merits.

substantial changes to workplace safety conditions are serious enough to constitute a mandatory subject of bargaining. *Kohler Mix Specialties*, supra; *Gulf Power Company*, supra. Under the circumstances present here, I conclude that the change's impact on unit employees' safety conditions was material and substantial.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(5) and (1) from December 31, 2009, to February 3, 2010, by unilaterally ceasing to provide security guards at the facility where the bargaining unit employees worked.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union as the exclusive collective bargaining representative of its unit employees: on various dates since July 27, 2009, by unilaterally transferring bargaining unit work to individuals outside the bargaining unit; from December 31, 2009, to February 3, 2010, by unilaterally ceasing to provide security guards at the facility where the bargaining unit employees worked.

Remedy

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

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the work of the bargaining unit to others outside the unit, I recommend that the Respondent be ordered, upon request by the Union, to restore the transferred work to the bargaining unit, and provide the Union with notice and an opportunity to bargain before transferring bargaining unit work to non-unit individuals in the future. In addition, I recommend that the Respondent be required to make current and former unit employees whole for any losses they suffered as a result of the transfer of that work, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, compounded daily, as computed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[25]

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

ORDER

The Respondent, Queen City Broadcasting of New York, Inc. (Buffalo, New York), its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring bargaining unit work to others outside the bargaining unit.

(b) Unilaterally ceasing to provide security guards at the facility where the bargaining unit employees work.

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

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

(a) Upon request by the Union, restore to the bargaining unit the unit work that the Respondent has unilaterally transferred to individuals outside the bargaining unit since July 27, 2009.

(b) Provide the Union with notice and an opportunity to bargain before transferring any bargaining unit work to individuals outside the bargaining unit in the future.

(c) Make current and former unit employees whole for any losses they suffered as a result of the transfer of that work, plus interest, as set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region Three, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

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

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 2009.

Dated, Washington, D.C. November 4, 2010

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PAUL BOGAS
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT transfer bargaining unit work to others outside the bargaining unit without providing the Union with notice and an opportunity to bargain.

WE WILL NOT cease to provide security guards at the facility without providing the Union with notice and opportunity to bargain.

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

WE WILL, upon request by the Union, restore to the bargaining unit the unit work that we unlawfully transferred to individuals outside the bargaining unit.

WE WILL provide the Union with notice and an opportunity to bargain before transferring any bargaining unit work to individuals outside the bargaining unit in the future.

WE WILL make current and former bargaining unit employees whole for any losses they suffered as a result of the unlawful transfer of bargaining unit work, plus interest.

QUEEN CITY BROADCASTING
OF NEW YORK, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.