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LABOR AND EMPLOYMENT RELATIONS

VIA UPS OVERNIGHT DELIVERY

September 13, 2013

Hon. Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570

**Re: WCCO-TV**  
**Case No. 18-CA-100535**

Dear Executive Secretary Shinnars:

Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, enclosed is an original and seven copies of Respondent's Reply Brief in Support of Respondent's Exceptions to the Decision of Administrative Law Judge in the above matter. True copies of these documents have been served by certified mail this date on all parties to this proceeding.

Very truly yours,

cc Rachel Centinario, Esq.  
Judiann Chartier, Esq.

Enclosures  
#87511-v1B/MWE

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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WCCO-TV :  
 :  
 Respondent :  
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 and : Case No. 18-CA-100535  
 :  
 NATIONAL ASSOCIATION OF :  
 BROADCAST EMPLOYEES & :  
 TECHNICIANS – COMMUNICATIONS :  
 WORKERS OF AMERICA, AFL-CIO :  
 :  
 Charging Party :  
-----X

REPLY BRIEF TO THE NATIONAL LABOR RELATIONS BOARD  
IN SUPPORT OF WCCO-TV'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE

Mark W. Engstrom  
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Dated: September 13, 2013

This Reply Brief is submitted to the National Labor Relations Board (“Board” or “NLRB”) in support of exceptions filed by WCCO-TV (“Respondent”) to the Decision of Administrative Law Judge Arthur J. Amchan, which issued on July 22, 2013 (the “Decision”), and in response to the letter in lieu of an answering brief filed by the Acting General Counsel and Answering Brief filed by the National Association of Broadcast Employees & Technicians – Communications Workers of America, AFL-CIO (“Union”).

***The Union’s Procedural Objections are Without Merit***

The Union contends that Respondent’s Exceptions do not conform to the requirements §§102.46(b)(1) and (c) of the Board’s Rules and Regulations because precise references to the record were not cited and because they did not take exception to the legal conclusions of Judge Amchan. Neither of these arguments has merit.

In addition to the Exceptions, a brief in support of the Exceptions was filed by Respondent. The brief, in a detailed factual summary, fully identified the precise citation of page the portions of the record relied on in support of the exceptions. Thus, there is no doubt about the evidential basis of Respondent’s argument before the Board. Nonetheless, in the interest of making the basis for the Exceptions as clear as possible, the specific record citations for each exception are as follows:

1. To the Judge’s FINDINGS OF FACT that “Respondent is the Columbia Broadcasting System’s Minneapolis, Minnesota Affiliate.” (J.D. 1, L. 41; Stip. 2, ¶5(a))<sup>1</sup>

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<sup>1</sup> References to the Decision of the Administrative Law Judge will be designated as (J.D. [page number], L. [line number]); references to the Joint Motion and Stipulation of Facts will be

2. To the Judge's FINDINGS OF FACT that "I conclude the opposite as one has to read Section 1:04 of the parties' collective bargaining agreement to determine what constitutes a photojournalist. That section defines photojournalist by the work performed." (J.D. 5, L. 36-38; Stip 3-4, ¶7(a); Stip X E)

3. To the Judge's FINDINGS OF FACT that "Nevertheless, it is for the Board, not this judge to reconsider Board precedent, which I deem to lead to the conclusion that Letter of Agreement # 3 is a permissive subject of bargaining." (J.D. 6, L. 8-10; Stip ¶¶7(a), 10(a)-(c), 11(a)-(f); Stip XX E, G, H)

4. To the Judge's FINDINGS OF FACT that "However, by specifying that the employees to whom work is to be transferred are AFTRA members, it effectively precluded the Union from asserting jurisdiction over some of the employees performing the unit work of camera operation." (J.D. 6, L. 13-15; Stip ¶¶7(a), 10(a)-(c), 11(a)-(f); Stip XX E, G, H)

5. To the Judge's FINDINGS OF FACT beginning with "Thus it appears . . ." and ending with ". . . Respondent violated Section 8(a)(5) and (1) by bargaining to impasse over a permissive subject of bargaining." (J.D. 6, L. 24-29; Stip ¶¶7(a), 10(a)-(c), 11(a)-(f), 12(a)-(h); Stip XX E, G-K)

7.<sup>2</sup> To the Judge's REMEDY, ORDER and proposed NOTICE TO EMPLOYEES. (J.D. 6, L. 31 – J.D. 8, L. 4; J.D. Appendix; Stip ¶¶7(a), 10(a)-(c), 11(a)-(f), 12(a)-(h); Stip XX E, G-K)

With respect to failure to except to the legal conclusions, that issue is purely semantic. The Exceptions made reference to the headings in the Decision which contained the language relevant to the particular exception at issue. The headings

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designated as (Stip. [page number], ¶[paragraph number]); references to exhibits to the Joint Motion and Stipulation of Facts will be designated as (Stip X [exhibit letter]).

<sup>2</sup> Exception 7 was incorrectly numbered. It should have been exception 6.

included a “Statement of the Case”, “Findings of Fact”, “Remedy” and “Order”, with various subheadings appearing under the “Findings of Fact” heading. There was no heading for “Legal Conclusions” or “Finding of Law”. Nonetheless, it is clear from reading the Exceptions that Respondent was taking issue with the Judge’s legal conclusions that the bargaining over Letter of Agreement # 3 (“LOA3”) was a permissive subject of bargaining and that Respondent had violated Section 8(a)(5) and (1) of the Act. Those conclusions just happened to be stated under the Findings of Fact heading. The Union also argues that Respondent’s brief raised arguments against Judge Amchan’s “legal conclusion that the Board’s decision in *Antelope Valley Press*, 311 NLRB 459 (1993) demonstrates that the Respondent bargained to impasse over a permissive subject of bargaining” that were not included within the scope of Respondent’s exceptions. This argument is without foundation, as exception 3 expressly addresses the Judge’s conclusion that the negotiation at issue involved a permissive subject of bargaining, and exceptions 2 and 4 deal with the elements of that conclusion.

### ***Exception 2***

In response to the argument of the Acting General Counsel that Paragraphs 1.03 and 1.04 of the 2009 – 2012 collective bargaining agreement (“CBA”) must be read in concert and the argument of the Union that paragraph 7(b) of the Joint Motion and Stipulation of Facts (the “Stip”) is dispositive of the question how the unit is defined, Respondent notes that paragraph 7(a) of the Stip defines the unit based on the Photojournalist job classification. While paragraph 7(b) does describe the work performed by Photojournalists, and is characterized in the Stip as a further definition of the unit, these facts are nonetheless distinguishable from

*Antelope Valley and Bremerton Sun Pub. Co.*, 311 NLRB 467, 470-71 (1993), where large wall-to-wall units comprised of many classifications were unequivocally defined by the work performed. The bargaining landscape at Respondent's business is a much different environment where multiple unions have been recognized as the exclusive bargaining representatives of different employee classifications. The CBA negotiated by Respondent and the Union takes pains to emphasize that the Photojournalist job classification is the heart of the unit definition. Section 4.01 of the CBA states that Respondent recognizes the Union as the exclusive bargaining agent "for all Employees now and hereafter employed in the Bargaining Unit as defined in Paragraph 1.03", which is the paragraph that defines an Employee as a Photojournalist. Paragraph 4.01 does not reference paragraph 1.04, which is the paragraph that describes the duties of a Photojournalist. Accordingly, Exception 2 should be sustained.

### ***Exception 3***

The Union has mischaracterized Respondent's brief in support of exception 3 as an argument that Judge Amchan should have deliberately disregarded Board precedent in order to reach a decision favorable to Respondent. More specifically, page 4 of the Union's Answering Brief incompletely quotes exception 4 by omitting the substantive conclusion of Judge Amchan that LOA3 is a permissive subject of bargaining. Instead, the Union focused its attention on the first half of the sentence setting forth this conclusion, in which the Judge expressed his personal belief that it would have been necessary for him to reverse Board precedent in order to find that LOA3 was a mandatory subject of bargaining. In fact, Respondent took the opposite position on page 18 of its brief, stating that

“Respondent submits that it is not necessary to reconsider precedent in order to determine that Respondent, by insisting to impasse on preserving LOA3, has not violated the Act.” Respondent did express its view in footnote 10 of the brief that the Board may wish to reconsider *Antelope Valley* in order to reach a result more consistent with the Supreme Court’s decision in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), but never argued that such reconsideration was necessary in order to sustain the Exceptions. Similarly, in footnote 7 Respondent stated:

While it is not necessary in order for the Board to decide this case in the manner urged by Respondent, Respondent respectfully suggests that the Board reconsider its decision in *Antelope Valley* to the extent a distinction is drawn between units defined by work performed as opposed to job classification. In *Antelope Valley* the Board expressed its concern about locking employers into patterns of work assignments “that might make no sense in the light of changing technology in the workplace.” 311 NLRB at 461. Yet, as evidenced by the Decision, a conclusion that a unit is defined by work performed can have precisely that effect.

The Union has completely missed the point of exception 3. It states on page 7 of its Answering Brief that “Respondent did not file an exception to the ALJ’s legal conclusion that its proposal was permissive,” but that is exactly what exception 3 articulates. The Acting General Counsel, the Union and Judge Amchan are of one mind in believing that *Antelope Valley* requires the conclusion that the bargaining issues surrounding LOA3 were permissive, and for the reasons stated in its brief in support of the Exceptions, Respondent does not believe that is the case. Similarly, both the Acting General Counsel and the Union have argued that Respondent has accused the Union of unlawfully bargaining to impasse on

LOA3. That is not Respondent's position, and Respondent did not file an unfair labor practice charge against the Union because Respondent believed that the issues related to LOA3 involved a mandatory subject of bargaining over which both sides had the right to bargain to impasse. As noted above in the discussion of Exception 2, the unit in the CBA is defined by job category, which gives Respondent the right to bargain to impasse on a proposal that does not change the unit description, but does involve a transfer of work out of the unit to employees represented by another union. The bottom line is that nothing in the LOA3 proposals being discussed by the parties in 2013 would have changed the scope of the unit. The proposals were about job assignments only, and constituted a mandatory subject of bargaining.

#### ***Exception 4***

Respondent disagrees with Judge Amchan's conclusion that work was transferred to AFTRA-represented employees that the Union could not represent. This was an issue that was resolved three years before the 2013 negotiations commenced. The Union agreed to amend the CBA to permit such assignments in the 2009 negotiations and, as Judge Amchan found, Respondent bargained to impasse on a proposal that was not materially different from what was agreed to in 2009. (J.D. 4, footnote 4)

The Union, on page 8 of its Answering Brief, incorrectly characterizes the 2009 amendments to LOA3 as a "pilot program", even though that term does not exist in the record. Similarly, the Acting General Counsel argues on pages 4 and 5 of its letter brief that the 2009 LOA3 amendments were subject to a contingency that was somehow broader than what the parties actually negotiated, and that this

inflated contingency somehow revealed the parties intent that LOA3 would not survive the term of the 2009 CBA. That argument is squarely contradicted by the record.

The bargaining history discloses it was the Union's desire to sunset the AFTRA assignments that were ultimately provided for in paragraph 6 of LOA3 in the event that Respondent failed to negotiate reciprocity for NABET-represented employees in the next AFTRA contract, but the Union proposal in that regard was rejected by Respondent. Eventually, the parties agreed to different language for paragraph 6 whereby Respondent's right to make the AFTRA assignments would not take effect until April 1, 2011, provided that Respondent had exercised its best efforts to achieve reciprocity. The parties could have stated unequivocally that paragraph 6 would sunset at the conclusion of the term of the CBA as they did in with respect to Letter of Agreement # 7 of the CBA, but they elected not to take that approach. Thus, the clear intent of the language was that Respondent was to have the right to make the AFTRA assignments absent evidence that it failed to exercise its best efforts to negotiate reciprocity with AFTRA, and there is no evidence in the record that Respondent failed in this regard. The record does state that Respondent endeavored to negotiate reciprocity and presented AFTRA with three proposals on this issue (Stip 7, ¶11(d)), and further states that the Union grieved Respondent's subsequent decision to make the AFTRA assignments. (Stip 7, ¶11(e)) For reasons not set forth in the record, the Union then withdrew the arbitration and asserted LOA3 was a permissive subject of bargaining, an assertion rejected by Respondent. (Stip 7, ¶11(e))

Nothing in the bargaining history supports the claim that paragraph 6 of LOA3 was destined to end with the term of the 2009 CBA absent evidence that Respondent did not exercise best efforts to negotiate reciprocity with AFTRA. The question of whether Respondent did exercise the required best efforts could have been addressed in the arbitration filed by the Union, but the Union elected not to have that question answered in the face of evidence that Respondent had satisfied the requirements of that contingency. Absent such an arbitration award, the Union and Acting General Counsel are not free to reinvent the bargaining history and insert a sunset provision that clearly did not exist. The Acting General Counsel sought to distinguish *Bremerton* from the instant case by arguing on page 4 of the letter brief that the permanent modification to the bargaining unit in *Bremerton* did not exist in the 2009 CBA because of the reciprocity contingency. However, as noted above, that contingency was satisfied by Respondent, and that makes *Bremerton* very much on point for the proposition that if the 2009 amendments to LOA3 did, in fact, amount to a modification of the bargaining unit, then that modification was permanent.

The Union and the Acting General Counsel argue that LOA3 paragraph 6 was a permissive subject that changed the scope of the bargaining unit when it was negotiated in 2009, and that it remained so in 2013, notwithstanding the bargaining history. The cases cited by the Union in support of this proposition are inapposite in that none of them deal with the issue of a change in the scope or composition of the bargaining unit. While it is true that the mere inclusion of a permissive subject of bargaining into a collective bargaining agreement does not transform that issue into a mandatory subject, *Allied Chem. & Alkali Workers*

*Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Board has nonetheless long recognized that the parties to a collective bargaining agreement may mutually agree to change the composition of the bargaining unit on an on-going basis. See e.g., *Bremerton, supra*, and *Lever Bros. Co.*, 96 NLRB 448 (1951)(material change in a certified unit was recognized as sufficient to bar election sought by union seeking to represent employees incorporated into expanded unit).

If, in fact, paragraph 6 in LOA3 did amount to a change in the composition of the bargaining unit in 2009, it should no more be subject to impasse bargaining in 2013 than any other scope clause. As noted by Judge Amchan, Respondent's final proposal on LOA3 was not materially different from what was in the 2009 CBA, and it was the Union that was insisting to impasse on removing LOA3 from the CBA in its entirety.

### ***Exceptions 5 and 7***

Ultimately, Respondent has done nothing more here than seek to preserve the status quo from the 2009 negotiations. While the Acting General Counsel and the Union have argued that there was no intent by the parties that the 2009 amendments to paragraph 6 of LOA3 should survive the expiration of the 2009 CBA, the bargaining history demonstrates otherwise. The Union's efforts to limit paragraph 6 in that manner were rejected, and an open-ended clause was agreed upon. This clause was subject to only one condition, that Respondent would exercise its best efforts to negotiate a reciprocal clause with AFTRA, and there is no evidence in the record that Respondent failed to satisfy that condition. To the

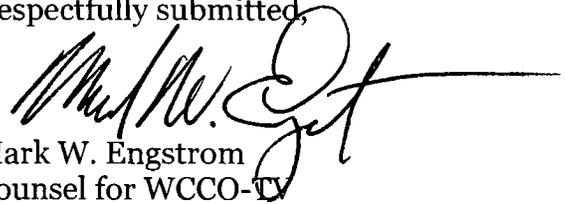
contrary, the record shows that Respondent made repeated efforts to achieve such a clause with AFTRA.

The 2009 changes to paragraph 6 were nothing more than an extension of cross-jurisdictional assignment rights that extend back to 1992. The Acting General Counsel acknowledged on page 4 of its letter brief that the pre-2009 language did not amount to a modification of the unit scope. Yet, the Judge's remedy provides that Respondent should not bargain to impasse on any aspect of LOA3. Under any view of this case, that portion of the Judge's remedy is over-broad and should be eliminated. More importantly, however, the 2009 amendment to LOA3 should be recognized as the job assignment issue it is and should be treated as a mandatory subject of bargaining. As such, there was no unfair labor practice committed during the course of the 2013 negotiations, and this matter should be dismissed.

### ***Conclusion***

Under these circumstances, Respondent respectfully submits that the Decision is not supported by the facts or the law and must be overturned by the Board.

Respectfully submitted,



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 Charging Party :  
-----X

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Respondent's Reply Brief to the National Labor Relations Board In Support of WCCO-TV's Exceptions to the Decision of the Administrative Law Judge in this matter was served this date by certified mail on the following:

Rachel Centinorio, Esq.  
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Dated at New York, New York this 13<sup>th</sup> day of September, 2013.

  
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