

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

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

Respondent,

and

Case No. 5-CA-31828

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

Charging Party,

and

Case No. 5-CA-33125

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

Charging Party.

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

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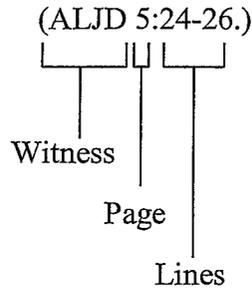
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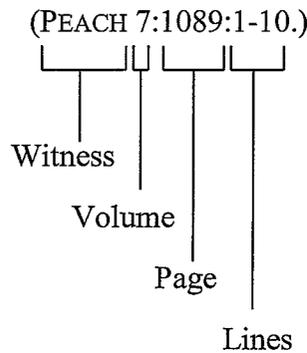
ALJ DECISION:

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



TRANSCRIPT:

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



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

EXHIBITS:

Citations to exhibits shall be by party as follows:

“GC Ex.” for General Counsel Exhibits

“CNNA Ex.” for Respondent CNNA Exhibits

“TVS Ex.” for Respondent TVS Exhibits

“CPDC Ex.” for Charging Party Local 31 Exhibits

CHARGING PARTY'S REPLY BRIEF

Pursuant to Section 102.46 of the Board's Rules and Regulations, 29 C.F.R. § 102.46, Charging Party National Association of Broadcast Employees & Technicians – Communications Workers of America, Local 31 (“NABET Local 31” or “Local 31”) submits this reply brief in response to the Answering Brief by Respondent CNN America, Inc. (“CNN” or “Respondent”) to the cross-exceptions filed by the Counsel for the General Counsel and Local 31.

I. INTRODUCTION

Administrative Law Judge (“ALJ”) Arthur J. Amchan issued a decision on November 19, 2008 finding that CNN committed widespread violations of Sections 8(a)(5), (3) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), (3) and (1). In his 169-page decision, the ALJ found that CNN was a joint employer with Team Video Services (“TVS”) of the employees in the bargaining units at the Washington, D.C. Bureau (“D.C. Bureau”) and New York, N.Y. Bureau (“N.Y. Bureau”). He further determined that CNN violated Sections 8(a)(5) and (1) by failing to recognize and bargain with the employees' representatives over the decisions to terminate the Electronic News Gathering Services Agreements (“ENG Agreements”) as well as changes in the terms and conditions of employment. The ALJ also found that CNN was a discriminatory successor to TVS at the D.C. and N.Y. Bureaus. He also concluded that CNN violated Sections 8(a)(3) and (1) of the Act by discriminating against TVS bargaining unit employees to limit the number of employees who would be hired after the termination of the ENG Agreements so that the Respondent could avoid any obligation as a successor to recognize and bargain with the employees' representative. Based upon the egregious and widespread violations of the Act committed by CNN, ALJ Amchan recommended a make-whole remedy that includes a broad cease and desist order.

CNN filed exceptions to the ALJ's decision and recommended order; and, thereafter, counsel for the General Counsel and NABET Local 31 filed cross-exceptions. Local 31 focused its partial cross-exceptions on a select number of issues the ALJ apparently overlooked or inadvertently omitted from his decision and/or recommended order. Some of these issues involve the failure to make specific conclusions of law, which Local 31 believes should have been made based upon the ALJ's findings of fact in his decision. Other issues involve remedial matters that Local 31 respectfully submits that the Board should address.

CNN consolidated its opposition to the cross-exceptions filed by the General Counsel and NABET Local 31 into one answering brief. Local 31 respectfully submits that, for the reasons set forth in its brief in support of its partial cross exceptions and in this reply brief, CNN has failed to provide any factual or legal basis for denying the Charging Party's cross-exceptions (or, for that matter, the General Counsel's cross-exceptions). Accordingly, Local 31 requests that the Board adopt the ALJ's decision and recommended order, with the modifications sought by the General Counsel and Local 31.

II. ARGUMENT

A. Exception No. 1: CNN's Defense of the Statement Made by its D.C. Bureau Chief to NABET Local 31 President Mark Peach Cannot Withstand Scrutiny

In its partial cross-exceptions, Local 31 took exception to ALJ Amchan's apparent, inadvertent failure to conclude that the statement by the Respondent's D.C. Bureau Chief, Kathryn Kross, to Local 31's President, Mark Peach, that there would be no role for NABET-CWA after December 5, 2003 violated Section 8(a)(1). On October 3, 2003, Local 31's President, Mark Peach, met with Kross to discuss questions that had been brought to his attention by bargaining unit employees about the termination of the ENG Agreements and the subsequent hiring process. During that conversation, Kross told Peach that NABET-CWA "would not be a

part of CNN after [December] 5th, there would be no need for NABET because employees would be so happy that they wouldn't need a union." (PEACH 7:1224:1-4.) Moreover, the record establishes that Kross' statement was disseminated by Peach when relayed Kross' answers to the employees' questions to the bargaining unit employees themselves, beginning with Paul Miller, who relayed the message to other bargaining unit employees. (MILLER 71:14368:11-13, 71:14369:25, 71:14370:1-2, 71:14370:12-25, 71:14419:12-22, 71:14420:13-15.) In the absence of any contradictory evidence, the ALJ credited Peach's testimony, including his account of Kross' statement. (ALJD 25:37-61, 26:1-28.) In its partial cross-exceptions, Local 31 argues that, given this evidence, Kross' statement violated Section 8(a)(1) of the Act.

CNN first responds by arguing that Kross' statement does not violate the Act because, "[c]ommunicating to non-employee union representatives under these circumstances, even assuming the substance of the comment was not lawful in the first place, have not been deemed violative of Section 8(a)(1)." (CNN Ans. Br. at 57.) CNN cites three cases, including *Basin Frozen Foods, Inc.*, 307 NLRB 1406, 1412, n.28, 1413 (1992), to support that proposition.¹ In each of these cases, the respondent's representatives made statements or threats to non-employee, union organizers during an organizing campaign.

The facts in the evidentiary record paint a far different picture in this case. On September 27, 2003, CNN announced that it was terminating its ENG Agreements with TVS; and, in turn, TVS announced that it was terminating all of the bargaining unit employees. (GC EXS. 111, 338.) One of the bargaining unit employees, Paul Miller, sent questions to Local 31's President, Mark Peach, for Peach to ask at a meeting with CNN's D.C. Bureau Chief, Kathryn Kross. (GC EXS. 107, 108. See also MILLER 71:1436:9-25.) Peach met with Kross on October 3, 2003 and

¹ *Pan Am. Grain Co.*, 343 NLRB 334 (2004); *The Meat Cleaver*, 200 NLRB 960 (1972).

asked the questions raised by Paul Miller. (PEACH 7:1217:11-25, 7:1218:1-25, 7:1219:1-25, 7:1220:1-25, 7:1221:1-25, 7:1222:1-13, 7:1222:19-25, 7:1223:1-19.) After going through the questions, Peach asked Kross about the role of NABET-CWA at the D.C. Bureau after December 5, 2003. (PEACH 7:1223:21-25.) Kross responded, “that NABET would not be a part of CNN after the 5th, there would be no need for NABET because these employees would be so happy that they wouldn’t need a union.” (PEACH 7:1224:6-8.)

The facts and circumstances of this case establish that statement uttered by Kross coerced and restrained the bargaining unit employees in the exercise of their Section 7 rights. At the time Kross uttered the statement, CNN’s status as a successor employer was unclear, because the Respondent had not hired any employees. As the Board has observed:

Burns^[2] and *Howard Johnson*^[3] hold that although a purchasing employer has no obligation to hire the seller’s unionized employees, it may not refuse to hire those employees solely because they are union members or to avoid being required to recognize the union. Under *Burns*, the purchasing employer has an obligation to recognize and bargain with the union if a majority of the purchaser’s employees were previously employed by the seller and were represented by the union. Thus, the employer does not know whether it will be union or nonunion until it has hired its workforce. When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller’s employees to ensure its nonunion status. Thus, such statements are coercive and violate Section 8(a)(1).

Kessel Food Markets, 287 NLRB 426, 429 (1987). See also *Western Plant Svcs., Inc.*, 322 NLRB 183, 194 (1996). In this case, CNN had not hired any employees at the time when Kross stated that NABET-CWA would not have any role at the D.C. Bureau. There was no basis for her to know whether the workforce would be represented or unrepresented, unless CNN planned to discriminate against the bargaining unit employees to avoid having to recognize NABET-CWA. *Kessel Food Markets*, 287 NLRB at 429.

² *NLRB v. Burns Int’l Sec. Svc.*, 406 U.S. 272 (1972).

³ *Howard Johnson Co. v. Detroit Local Jt. Exec. Bd.*, 417 U.S. 249 (1974).

Finally, while Kross made the statement to Local 31's President rather than directly to the bargaining unit employees, it is a distinction without a difference. *Pacific Custom Materials*, 327 NLRB 75 (1998) (finding Section 8(a)(1) violation where respondent's vice president told managerial and administrative personnel that company would be non-union, without any bargaining unit employees being present). Kross made the statement under circumstances where she reasonably should have expected that the statement would be disseminated to bargaining unit employees, which, in fact, occurred. Moreover, Kross clearly recognized the unlawful nature of her statement, as she quickly added that CNN would not discriminate against the bargaining unit employees. (PEACH 7:1224:14-15.) This hollow assurance does not cure Kross' unlawful statement. *See Noah's New York Bagels, Inc.*, 324 NLRB 266, 267 (1997) (finding respondent's representative threatened reduction of wages if employees selected union and also finding unlawful threat was not remedied by respondent stating immediately thereafter that wages were product of negotiations). Therefore, by stating that NABET-CWA would no longer have a role at the D.C. Bureau, Kross bluntly indicated to the bargaining unit employees that the Respondent would discriminate against them in the hiring process to ensure that CNN did not have to recognize or bargain with NABET-CWA. Kross' statement violates Section 8(a)(1) even though she made the statement to Local 31's President, rather than to any bargaining unit employee.

CNN alternatively argues that the cross-exception is without factual merit because, "[t]he only admissible evidence in the record with respect to what was said at the meeting between Kross and Peach is Peach's testimony and his hand-written notes." (CNN Ans. Br. at 58.) As noted above, the ALJ credited Peach's testimony, which, in turn, established the unlawful statement by Kross. The Respondent challenges the ALJ's findings by comparing Peach's testimony to his handwritten notes. CNN observes that Peach's notes do not contain the

unlawful statement made by Kross, adding, those notes do contain a statement that “union membership is nondiscrim.” (*Id.*) Peach’s notes also state, “If people are happy” and “unions needed when mng. [management] sucks.” (GC Ex. 109C.) Both of these statements support the conclusion that Kross made the statement attributed to her (after all, she stated that the employees would be so happy that they would not need a union). In any event, CNN’s argument is little more than a challenge to the ALJ’s credibility and factual findings, for which the Respondent bears the burden of proof. The argument of its counsel, presented in an answering brief, falls far short of satisfying that burden.

Finally, CNN asserts in its Answering Brief, “[e]ven assuming *arguendo* that Peach accurately recounted the meeting on the witness stand, he testified that Kross told him the union would not be involved *because management would not ‘suck[]’ and the workers would be ‘happy.’*” (CNN Ans. Br. at 59 (emphasis in original).) Based on this blatant distortion of the record evidence, the Respondent argues that this mischaracterization supports the conclusion that Kross was merely predicting employee sentiment and that her statement did not reasonably tend to restrain, coerce or interfere with the employees’ exercise of their protected rights.⁴ (*Id.*)

The reasonable inferences from the evidence strongly counsel otherwise. Less than one week after announcing the termination of the ENG Agreements and less than one week after all of the bargaining unit employees learn that their employment will likewise be terminated, CNN’s D.C. Bureau Chief told the employees’ collective bargaining representative that the representative will no longer be a part of CNN. Given the Bureau Chief made this statement

⁴ CNN cites several cases involving employer’s predictions about a union’s chances of prevailing in a representation election (CNN Ans. Br. at 59); however, those cases are clearly distinguishable from this case. Kross was not forecasting the odds of whether NABET-CWA would win an election; she was stating the fate of employees’ rights to continued collective bargaining representation by that union.

before the Respondent hired any employees, the facts and circumstances in the record support the conclusion that CNN clearly indicated to Local 31 – and, in turn, to the bargaining unit employees – that the Respondent would discriminate against those employees to ensure its non-union status. *Kessel Food Markets*, 287 NLRB at 429.

Accordingly, for the foregoing reasons, NABET Local 31 respectfully requests that the Board reject CNN’s opposition to Local 31’s cross-exception and find, under the facts and circumstances of this case, that Kathryn Kross’ statement to Mark Peach coerced and restrained the bargaining unit employees in violation of Section 8(a)(1) of the Act.

B. Exception Nos. 2 & 3: CNN’s Counter-Argument Regarding the Negotiability of the Decision to Terminate the ENG Agreements Lacks Merit

NABET Local 31 filed cross-exceptions asserting that the ALJ erroneously failed to conclude that CNN violated Sections 8(a)(5), (3) and (1) by unilaterally terminating the ENG Agreements and, in turn, causing the termination of the bargaining unit employees (because of their status as employees represented by NABET-CWA), without providing prior notice and an opportunity to bargain. The Respondent takes issue with Local 31’s exceptions as they relate to the Section 8(a)(5) violations. CNN claims that its decision to terminate the ENG Agreements was not a mandatory subject of bargaining. CNN is wrong.

When an employer decides to terminate union-represented employees and transfer their work to non-union employees in order to reduce its labor costs, the employer is obligated to bargain with the union over the decision and its effects. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 679-80 (1981); *Fibreboard Paper Prods., Inc. v. NLRB*, 379 U.S. 203, 213-14 (1964). The Respondent asserts in its Answering Brief that Local 31 “purports to support its Cross-Exceptions 2-3 with ‘evidence that CNN was motivated by labor costs in its decision to terminate the ENG Agreements,’ claiming that ‘CNN had always complained to TVS about the

labor costs under the ENG Agreements....” (CNN Ans. Br. at 52, n.42.) The Respondent challenges that evidence by arguing, “Local 31 spends almost two pages of its brief quoting various internal memoranda between Team personnel, which merely show that *Team*, not CNN, was concerned about rising labor costs compared to the budget it had submitted to CNN.” (*Id.* (citing Local 31 Br. at 15-16 (citing GC Exs. 185A-G).)

Apparently, CNN did not read beyond page 16 of Local 31’s brief in support of its partial exceptions, because, if it did, the Respondent would not have made such an absurd argument. After setting forth the facts as it related to the excessive labor costs, especially overtime and contractual penalties, as documented in the TVS memoranda, Local 31 proceeded to document the evidence involving CNN’s own agents and representatives. More specifically:

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

(Local 31 Br. at 16-17.) The e-mails between Diviney and Patrick clearly reveal CNN’s concern about controlling the cost of overtime and other compensatory matters, such as paid time off. (CPDC EX. 2.) Indeed, CNN anticipated a savings of \$1,400,000 in labor costs at the D.C. Bureau alone during the first year of the BSP. (*Id.* See also GC Ex. 326.)

Consequently, the record contains sufficient evidence to find that labor costs were an important factor in CNN’s decision to terminate the ENG Agreement. See *Connecticut Color*,

Inc., 288 NLRB 699, 707 (1988) (finding decision to transfer work from represented employees to unrepresented employees was motivated by labor costs given difference in wage rates and fringe benefits). Under the circumstances, as a joint employer, CNN had a duty to provide advanced notice and a reasonable opportunity to bargain over the decision to terminate the ENG Agreements, as well as the effects of that decision. Having failed to do so, CNN violated Sections 8(a)(5) and (1) of the Act.

Nevertheless, the Respondent claims that the decision to terminate the ENG Agreements was not a mandatory subject of bargaining “because it lay at the core of CNN’s entrepreneurial control.” (CNN Ans. Br. at 53.) CNN further asserts that the decision “involved a substantial capital investment in new technology that transformed CNN’s operations and allowed CNN to exercise greater, decentralized editorial control over the integrity of its product.” (*Id.*) The record also shows that the “transformation” of operations brought about by this new technology was far less than substantial. The introduction of new technology – whether it is non-linear editing, Enco music servers, Euphonix audio boards or Clarity Walls – constitute operational changes, not changes in the scope or direction of an enterprise or business. *See, e.g., Leach Corp.*, 312 NLRB 990, 995 (1993) (rejecting respondent’s claim that change from batch system to just-in-time system represented fundamental change in manufacturing process and finding change did not result in different operation), *enforced*, 54 F.3d 802 (D.C. Cir. 1995). Changes in technology simply change the way an employer conducts its business; those changes do not change the business itself. Both before and after the implementation of the new technologies, which took place months and years after termination of the ENG Agreement, the business of CNN remained unchanged: *viz.*, electronic newsgathering, production and engineering services in furtherance of the broadcasting of cable news programming.

As the ALJ concluded, CNN could have implemented the new technology, as well as garnered a greater degree of editorial control, by simply implementing the new technology and training the existing workforce, as it had done in the past. Instead, CNN chose to terminate the ENG Agreements, and, in turn, cause the termination of the bargaining unit employees. The question turns on the motivation for these choices. The answer lies, not in any particular piece of equipment, but in the Respondent's desire to implement labor cost savings through the reduction of overtime and other labor costs set forth in the TVS collective bargaining agreement. (CPDC Ex. 2; GC Ex. 326.)

Accordingly, for the foregoing reasons, NABET Local 31 respectfully requests that the Board reject CNN's arguments with respect to the negotiability of the termination of the ENG Agreements (and the bargaining unit employees) and, in addition, grant Local 31's second and third cross-exceptions in their entirety.

C. Exception No. 4: CNN's Reasons for Denying a Remedy to Discriminatee Jerry Thompson Similarly Lack Merit

NABET Local 31 filed a cross-exception asserting that former TVS employee Jerry Thompson, who was hired by CNN as a senior photographer, was inadvertently excluded from Appendix A of the ALJ's decision. Appendix A sets forth the names of the former TVS employees who are entitled to a make-whole remedy. Thus, Local 31 respectfully requested that Thompson's name be added to the Appendix A so that he, like many other TVS employees who were hired by CNN, may receive a make-whole remedy to restore him to the position he would have had but for the Respondent's unlawful conduct.

CNN admits that Jerry Thompson was listed in the appendices of the Second Amended Complaint (CNN Ans. Br. at 46), but the Respondent claims that Thompson was omitted from GC Ex. 544, which was an amendment to one of the appendices in the Second Amended

Complaint and, hence, he should be denied a remedy. CNN's admission precludes its argument. Given Thompson was included in earlier versions of the complaint, as well as being a part of the litigation, his addition to the Appendix A at this point would not amount to the addition of a new discriminatee. Indeed, as Local 31 pointed out in its brief in support of its partial cross-exceptions, the ALJ found that Jerry Thompson was a former bargaining unit employee who was hired by CNN as a photojournalist. The ALJ included Thompson's colleagues – Rick Morse, Anthony Umrani, Barry Schlegel and Reginald Selma – in the Appendix A, ensuring that they receive a make-whole remedy. Thompson is entitled to a similar remedy.

Accordingly, Local 31 respectfully requests that the Board add the name of Jerry Thompson to the Appendix A.

D. Exception Nos. 5, 6 & 7: CNN's Answer to Local 31's Partial Cross-Exceptions to the Scope of the Remedy are Legally Erroneous

In three of its partial cross-exceptions, NABET Local 31 sought the Board's review of the ALJ's recommended remedy with respect to certain groups of employees who were omitted from the make-whole and/or reinstatement provisions of that remedy. Local 31 sought to extend the make-whole and reinstatement remedies to (1) all bargaining unit employees who turned down offers to work for CNN; (2) all bargaining unit employees who accepted offers to work for CNN but later left those positions; and (3) all bargaining unit employees who were similarly situated with those in the Appendices. CNN challenges these exceptions as being based on a "faulty legal premise," being "afield, and plainly improper," and lacking evidentiary support. (CNN Ans. Br. at 83-86.) The error lies with CNN, not Local 31.

1. *General Legal Principles*

Section 10(c) of the Act empowers the Board to require, *inter alia*, that a respondent "take such affirmative action including reinstatement of employees, with or without back pay, as

will effectuate the policies of this subchapter....” 29 U.S.C. § 160(c). “To that end,” as the Board has recognized, a reinstatement order “envisages ‘a restoration of the situation, as nearly as possible, to that which would have been obtained but for the employer’s illegal discrimination.’” *Chase Nat’l Bank*, 65 NLRB 827, 829 (1946) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). Therefore, the Board’s traditional reinstatement order requires the respondent to reinstate the former position (*i.e.*, the position the discriminatee would have had but for the respondent’s unlawful discrimination) if that position exists as of the date of the order. *Chase Nat’l Bank*, 65 NLRB at 829. In the event the former position no longer exists, the reinstatement order requires the respondent to reinstate the discriminatee to a substantially equivalent position. *Id.* This alternative obligation is “specifically intended thereby to impose a continuing obligation on the employer *to restore the status quo as nearly as possible* when it is not possible to restore the absolute status quo.” *Id.* (emphasis added).

In addition, the offer of reinstatement – to a former position or, if that position no longer exists, a substantially equivalent one – must be without prejudice to the discriminatee’s seniority, as well as any other rights or privileges that the discriminatee enjoyed or would have enjoyed except for the respondent’s unlawful discrimination. *See, e.g., D & F Indus.*, 339 NLRB 618, 624 (2003) (setting forth traditional reinstatement order, which requires restoration of seniority, as well as any other benefits or privileges).⁵ If a respondent extends a job offer to a discriminatee

⁵ CNN claims that, for purposes of the joint employer analysis, the Board’s decision in *D & F Indus., Inc.* is distinguishable from this case because there was no evidence that the nominal employer “was authorized to question or, in fact, ever questioned” the putative joint employer’s demand that employees be laid off. (CNN Ans. Br. at 10.) The evidence, according to CNN, was that the nominal employer’s manager “acted in a sycophantic manner, always honoring” the putative joint employer’s demands and never questioning that employer. (*Id.*) However, this case has its own toady, *viz.* TVS. The record evidence establishes that TVS never questioned CNN and, when its obsequious behavior was challenged, TVS simply underscored that behavior.

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that fails to restore the discriminatee's seniority and other rights and privileges, then that offer does not constitute a *bona fide* offer of reinstatement and, accordingly, the respondent's obligation to reinstate the discriminatee and make him or her whole continues unabated. See *Marlene Indus. Corp.*, 234 NLRB 285, 290-91 (1974) (finding respondent's offer of employment was not valid reinstatement offer because, *inter alia*, it did not preserve discriminatee's seniority); *J. H. Rutter Rex Mfg. Co.*, 206 NLRB 656, 657-58 (1973) (finding respondent's offer was not valid reinstatement offer because it did not offer full reinstatement, with seniority, as well as other benefits and privileges previously provided to discriminatee prior to discharge). A discriminatee is under no obligation to accept a deficient offer; and, even if he or she accepts the offer and subsequently quits the Respondent's employ, the respondent still remains under the obligation of making a valid offer of reinstatement. *Manhattan Graphic Prods.*, 282 NLRB 277, 286 (1986) (finding offer was invalid and adding, "it follows that [discriminatee's] quitting cannot affect his right to backpay and his right to receive a valid offer of reinstatement").

2. ***All of the Bargaining Unit Employees are Entitled to a Reinstatement Remedy, Regardless of whether CNN made Offers of Employment and Regardless of whether the Employees Accepted such Offers***

The record evidence establishes that, as a joint employer with TVS, CNN caused TVS to terminate all of the bargaining unit employees at the D.C. and N.Y. Bureaus when CNN

(continued from previous page)

For example, after Local 31 filed a grievance protesting the failure of TVS to rotate assignments to the White House, the President of TVS, Larry D'Anna, stated, "CNN was the client, that TVS would comply with whatever the – CNN wanted as it related to assigning people to the White House." (PEACH 7:1227:2-4. See also PEACH 7:1138:19-25, 7:1139:1-10.) Similarly, bargaining unit employee Luis Munoz complained to the TVS slot person about a change in Munoz's shift, which reduced the amount of overtime he worked. The slot person's response was that CNN was the client and they had a free hand in determining overtime. (MUNOZ 34:7488:15-25, 34:7499:1-3.) Indeed, the Board's decision in *D & F Indus.* is directly on point, as it is a case where two employers, like CNN and TVS, shared the determination of the terms and conditions of employment for the bargaining unit employees and, thus, were found to be joint employers. *D & F Indus.*, 339 NLRB at 628, 640.

terminated its ENG Agreements with TVS. (ALJD 6:19-22, 17:8-16, 33:44-49 & 34:1-26. *See also* ALJD 147:32-26 (stating “[t]he Respondent *having discriminatorily discharged and/or refused to hire employees...*” (emphasis added).)⁶ The record evidence also establishes, as found by the ALJ, that CNN was motivated in substantial part to terminate the ENG Agreements with the objective of eliminating NABET-CWA from the Bureaus. (ALJD 112:24-25 (stating “I find that the decision to terminate the ENGAs was motivated in substantial part by CNN’s determination to get rid of NABET”).)

The appropriate remedy for CNN’s unlawful discharge of the bargaining unit employees is for the Respondent to reinstate all of the unlawfully discharged employees to their former position or, if that position no longer exists, to substantially equivalent positions with no prejudice to seniority and any other benefits or privileges. *Chase Nat’l Bank*, 65 NLRB at 829. Obviously, CNN must extend reinstatement offers to the bargaining unit employees whose discharge was caused by the Respondent with the termination of the ENG Agreements and who were not rehired by the Respondent as a part of the Bureau Staffing Project (“BSP”). However, as explained below, CNN’s offers of employment, which were made as a part of the BSP, to

⁶ In its Answering Brief, CNN approaches the issue from the perspective of a successor employer. (*See, e.g.*, CNN Ans. Br. at 84-85.) However, if CNN is a joint employer with TVS, then question of whether the Respondent is a successor to TVS becomes secondary. As a joint employer, CNN was obligated to recognize and bargain with NABET-CWA over the decision to terminate the ENG Agreements and its effects, including the termination of the bargaining unit employees. Having failed to do so, CNN violated Sections 8(a)(5) and (1) of the Act and, because the termination of the employees was motivated by anti-union animus, the Respondent also violated Section 8(a)(3). The remedy for these violations is a Board order directing the Respondent to recognize NABET-CWA, bargain with the Union and to make *bona fide* offers of reinstatement to *all* of the unlawfully discharged employees. The issues relating to CNN as a successor to TVS are largely in the alternative to CNN being a joint employer with TVS. The ALJ found that CNN is a successor to TVS despite the Respondent’s unlawful discrimination against the bargaining unit employees in a vain attempt to avoid such a status. The remedy arising from the discriminatory successorship findings is likewise secondary, taking preeminence only to the extent it goes beyond the remedy for the unfair labor practices committed by CNN as a joint employer.

bargaining unit employees do not constitute *bona fide* offers of reinstatement sufficient to toll or relieve CNN of its back pay and reinstatement obligations to those employees. Accordingly, Local 31 respectfully submits that the Respondent remains obligated to extend *bona fide* offers of reinstatement to those employees and make them whole, even though the employees may have accepted offers of employment from CNN as part of the BSP and even though some of those employees are currently employed by CNN at the D.C. (or N.Y.) Bureau.

As the governing legal principles mandate, CNN is obligated to reinstate all of the bargaining unit employees to their former position or, if that position no longer exists, to a substantially equivalent position without prejudice to their seniority and any other rights or privileges. *D & F Indus.*, 339 NLRB at 624; *Chase Nat'l Bank*, 65 NLRB at 829. CNN's offers of employment to the bargaining unit employees fail in two important respects.

First, the offers of employment fail to recognize the seniority accrued by the bargaining unit employees while working for TVS and other subcontractors as provided by their collective bargaining agreement. (MORSE 28:6260:21-25.) The collective bargaining agreement between NABET-CWA and TVS at the D.C. Bureau provided, "[e]mployees will also be credited with service for seniority purposes for all employment with Mobile Video Services, Ltd., Professional Video Systems, Limited and Newslink, Inc. and Mobile Video Services Corp. to the extent such employment related to work on a CNN contract." (GC EX. 9 at 15.) Consequently, many of the bargaining unit employees had accrued seniority of years and, in some cases, decades. (GC EX. 110.) For example, CNN made an offer of employment to bargaining unit employees John Bodnar who had over 20 years of seniority (Apr. 25, 1983) and to Richard Morse who had about 15 years of seniority (May 23, 1988). (*Id.*) However, as new CNN employees, neither Bodnar nor Morse retained this accrued seniority. By offering employment that failed to preserve the

bargaining unit employees' seniority, CNN failed to make *bona fide* offers of reinstatement. Therefore, this failure alone mandates that the Respondent's remedial obligations to reinstate and make whole continue uninterrupted. *Marlene Indus. Corp.*, 234 NLRB at 290-91.

In addition, CNN failed to extend reinstatement offers to the bargaining unit employees that restored their terms and conditions of employment. Instead, the Respondent offered employment to the bargaining unit employees under terms and conditions of employment (*i.e.*, benefits and privileges) that differed vastly from those provide by the collective bargaining agreement. For example, CNN eliminated the employees' ability to earn overtime after eight hours in one day, which had been provided for in the collective bargaining agreement. (GC EX. 9 at 4-5.) CNN also eliminated all of the contractual penalties and premiums that the employees previously received, including meal penalties, paid lunch hours, holiday pay and double time after working seven consecutive days. (KUCZYNSKI 14:2857:10-25, 14:2858:1-3 (testifying that he had paid lunch under TVS, no paid lunch under CNN); JENKINS 21:4632:18-19 (testifying that he did not receive meal penalties while employed with TVS); ROBERTSON 31:6803:1-2 (testifying under collective bargaining agreement, employees were paid through meal period); MORSE 28:6249:23-25 (testifying CNN eliminated contractual penalties and holiday pay); ROBERTSON 31:6886:14-25, 31:6887:1-5 (testifying CNN eliminated double time after working seven consecutive days). *See also* FASMAN 31:6883:14-18 (stipulating that meal penalties were eliminated by CNN).) CNN also changed the leave benefits previously provided to bargaining unit employees, replacing their sick leave, personal leave and vacation benefits with twenty-eight (28) days of use-it-or-lose-it paid leave. (JENKINS 21:4630:23-25, 21:4631:1-3, 21:4631:20-25, 21:4642:1-6.) Prior to their termination, the employees could carry over their annual and sick

leave. (JENKINS 21:4632:8-11.) As new employees, the discriminatees had to use their leave within the same year, with none of it carrying over to the next year. (JENKINS 21:4632:3-4.)

Given CNN's offers of employment *were not* without prejudice to the bargaining unit employees' seniority and *were* premised on unlawfully changed, substantially different terms and conditions of employment, those offers would not satisfy the legal requirements for a *bona fide* offer of reinstatement. *White Oak Coal Co.*, 295 NLRB 567, 572 (1989) (stating "[w]here, as here, the offers contemplate reinstatement to position with unlawfully imposed terms and conditions of employment, the offers are invalid"); *PRC Recording Co.*, 280 NLRB 615, 615, n.2, 651 (1986) (finding respondent's reinstatement offers to nine unlawfully discharged employees were invalid because offers conditioned reinstatement on employees accepting unlawfully, unilaterally changed terms and conditions of employment), *enforced*, 836 F.2d 289 (7th Cir. 1987). In other words, even though CNN offered employment to many discriminatees, those offers do not toll the Respondent's remedial obligations to reinstate these employees to their former positions or substantially equivalent positions with their seniority, benefits and privileges intact. *PRC Recording Co.*, 280 NLRB at 651. Those obligations continue and must be a part of the remedy, as well as any order, issued by the Board in this case.

Finally, as explained in Local 31's Brief in Support of its Partial Exceptions, there is an additional reason why CNN's offers of employment to some of the bargaining unit employees cannot toll the Respondent's remedial obligations vis-à-vis those employees, *viz.*, the offers were part and parcel of CNN's unfair labor practices. *Pioneer Elec. of Monroe, Inc.*, 333 NLRB 1192 & n.1 (2001) ("*Pioneer Elec.*"). In *Pioneer Elec.*, the respondent – Pioneer 1 – excepted to the ALJ's recommended remedy of reinstatement on the ground that the unlawfully laid off employees rejected offers of reinstatement with the new iteration of the respondent, Pioneer 2

(i.e., the alter ego). *Pioneer Elec.*, 333 NLRB at 1192, n.1. The respondent argued that, given their rejection of the offers, the respondent should not have to extend new offers of employment or make them whole. *Id.* The Board disagreed:

Absent exceptions, it is now undisputed that the Respondent did not offer the discriminatees employment under the same contractual terms and conditions and with the continued collective bargaining representation by the Union that they had while employed by Pioneer 1. The offers of employment were therefore part and parcel of the Respondent's unfair labor practices and cannot serve to toll the Respondent's remedial obligations. We therefore find that the traditional backpay and reinstatement remedy ordered by the judge was proper.

Id. When disposing of CNN's exceptions, NABET Local 31 respectfully submits that the Board will conclude that the Respondent did not offer employment to the bargaining unit employees under the same contractual terms and conditions along with the continued bargaining representation by NABET-CWA that they had while employed by TVS. The Board should further find that the offers of employment, which represent the culmination of the unlawful Bureau Staffing Project, were "part and parcel of the Respondent's unfair labor practices...." *Id.* As such, the offers of employment were not *bona fide* offers of reinstatement – with respect to CNN as a joint employer – or valid offers of employment – with respect to CNN as a discriminatory successor – that would otherwise toll the Respondent's remedial obligations of reinstatement/instatement, as well as back pay, for any of the bargaining unit employees.

Based upon the foregoing, the Board should direct that the remedial remedy of reinstatement and back pay must extend to *all* of the bargaining unit employees, including: (1) those who never received an offer of employment from CNN; (2) those who received an offer from CNN but rejected it; and (3) those who accepted CNN's offers of employment, even if they subsequently left CNN's employ. *See Manhattan Graphic Prods.*, 282 NLRB at 286. *See also White Oak Coal Co.*, 295 NLRB at 572; *PRC Recording Co.*, 280 NLRB at 651. In addition,

given the ALJ's recommended order does not include all of the bargaining unit employees in the appendices (as demonstrated by the omission of Jerry Thompson, *see supra*, and as further explained in Local 31's brief in support of its partial exceptions at pages 25-27), the Board should modify the requested remedy to cover all similarly situated employees. As Local 31 previously explained in its brief in support, the Board has stated that "[i]t is well established that both named and unnamed discriminatees are entitled to a reinstatement and make-whole remedy in a situation, as where, where the General Counsel has alleged and proven discrimination against a defined and easily identified class of employees." *Morton Metal Works, Inc.*, 310 NLRB 195 (1993). *See also New Concept Solutions, Inc.*, 349 NLRB 1136, n.3 (2007). In the complaint, the General Counsel alleged that CNN unlawfully caused the termination of the bargaining unit employees nominally employed by TVS (but jointly employed by TVS and CNN). The General Counsel further alleged that he sought a remedy seeking "immediate and full *reinstatement* to the TVS discriminatees *discharged* and/or denied hire, and make-whole relief for their losses." (Second Am. & Consolidated Compl. at 26 (emphasis added).) Thus, CNN is clearly on notice that the General Counsel is seeking a reinstatement and a make-whole remedy for all bargaining unit employees that CNN discharged or caused to be discharged.

Accordingly, for the foregoing reasons, NABET Local 31 respectfully requests that the Board reject CNN's opposition to Local 31's partial exceptions as they relate to the scope of the reinstatement and back-pay remedies. Local 31 further requests the Board find merit in these exceptions and modify the ALJ's recommended remedy to ensure that all bargaining unit employees – *i.e.*, all discriminatees – are provided with a remedy that restores their employment, as well as their terms and conditions of employment, by eliminating the unlawful effects of the Respondent's unfair labor practices.

E. **Exception No. 8: CNN's Counter-Argument with Respect to the Discrimination against Individual Employees Lack Merit**

CNN challenges the cross-exceptions filed by the General Counsel and Local 31 relating to the Respondent's discrimination against certain bargaining unit employees because of their protected activities. (CNN Ans. Br. at 63-80.) These individual victims of CNN's discrimination were NABET-CWA activists and shop stewards, such as Sarah Pacheco, David Jenkins and Jimmy Suissa. The Respondent first argues that it did not violate Section 8(a)(3) with respect to these individuals because "the record shows that 15 out of 21 NABET officers and shop stewards who applied for jobs were hired – a 71% rate of success that exceeded the success rates of any other category of applicant." (*Id.* at 63 (emphasis in original).) This argument lacks merit.

CNN could have hired 20 out of 21 union officers and stewards; however, if it failed to hire the one officer or steward because of his or her union activities, then it violated Section 8(a)(3) of the Act. The Board has repeatedly held that the respondent's failure to discriminate against one employee does not serve as a defense to the respondent's intentional discrimination against another employee. *See Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) (stating "it is established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents"). *See, e.g., George A. Tommaso Constr. Corp.*, 316 NLRB 738, 742 (1995) (rejecting respondent's argument that it did not discriminate against employees because it rehired 34 of 39 – or 87% -- of employees, some or most of which respondent assumed signed authorization cards; argument does not foreclose finding of unlawful discrimination in failing to recall other employees), *enforced*, 100 F.3d 942 (2d Cir. 1996) (table); *KRI Constructors, Inc.*, 290 NLRB 802 (1988) (rejecting argument that "statistically its hiring records show that employees with a past history of employment with

union firms had just as good a chance, if not a better chance, of employment than applicants with a history of nonunion employment”).⁷ Thus, CNN’s argument that it did not violate Section 8(a)(3) by discriminating against particular union activists and shop stewards, because it hired many other activists and stewards is without merit.

CNN also takes issue with the evidence as it relates to the particular individual activists and shop stewards. For example, the Respondent asserts that “CNN’s hiring managers were not aware of most or all of Crennan’s union activities.” (CNN Ans. Br. at 69.) Nevertheless, this statement is an admission that CNN knew of Crennan’s union activities. The evidence included a hiring manager, Troy McIntyre, raising concerns during Crennan’s interview about the fact that, *as a shop steward*, Crennan would inform employees about disciplinary matters before they met with management. (GC EX. 534, VOL. 1, KEITH CRENNAN at CNNA-PROD0037998, 0038001-02; MCINTYRE 72:146012:9-13.) CNN argues that this “ethics issue was legitimate,” adding “the confidentiality rule promotes direct and frank discussion of performance issues among those involved rather than through back-channels.” However, as a shop steward and an employee’s representative, Crennan would have been involved in those discussions of performance issues along with the employee and the management. The Respondent takes issue with Crennan simply performing his job because, performing the responsibilities of a shop steward, “also bears on his trustworthiness, because he secretly conveyed confidential information of the employer.” (CNN Ans. Br. at 70, n. 55.) Telling an employee that an employer is considering imposing discipline upon him or her does not constitute the divulgence

⁷ Likewise, CNN’s argument that, as a successor, it did not discriminate against bargaining unit employees generally because it hired many of them is without merit. *George A. Tommaso Constr. Corp.*, 316 NLRB at 742. The fact that CNN hired some of the bargaining unit employees, even a majority of them, does not serve as a defense against a finding the Respondent discriminated against the remaining employees in its efforts to avoid the obligation of a successor employer to recognize and bargain with NABET-CWA. *Id.*

of an employer's "confidential information." Indeed, this is the bedrock principle underlying *Weingarten* rights. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). CNN's arguments in this regard only underscore its animosity toward Crennan and his exercise of his protected rights.

The Respondent's arguments with respect to other particular employees also lack merit. With respect to those discriminatees who worked at the D.C. Bureau, CNN claims that it did not discriminatee against, not only Keith Crennan, but also David Jenkins, Dennis Norman, Jimmy Suissa, Sarah Pacheco and Ralph Marcus. (CNN Ans. Br. at 71-80.) In trying to explain why it did not hire these employees, the Respondent principally relies upon its Bureau Staffing Project, which, as Local 31 has shown in its answering brief to CNN's exceptions and as the ALJ found, was blatantly discriminatory against bargaining unit employees generally and many of those employees in particular. (See NABET Local 31 Ans. Br. at 62-113, 170-185.) To the extent that CNN reaches beyond its own discriminatory conduct, it relies upon denigrations of the discriminatees (CNN Ans. Br. at 75-76 (discussing Norman)) or matters for which there is no evidence that its hiring managers ever considered (*id.* at 78-79 (discussing Suissa)).⁸

Therefore, Local 31 respectfully requests that the Board reject CNN's defenses to the Section 8(a)(3) charges relating to specific bargaining unit employees. Local 31 further requests that the Board make the appropriate findings that CNN violated the Act with respect to its failure to hire these employees after the termination of the ENG Agreements.

F. Exception Nos.9-16: CNN's Arguments about "Extending any Bargaining Order to the National Level" are Absurd

In several cross-exceptions, Local 31 sought to correct an inadvertent oversight made by the ALJ with respect to his conclusions of law and his recommended order. The ALJ concluded

⁸ As for discriminatee Ralph Marcus, he, like others discussed above, Marcus served as a shop steward in 1997 while TVS was the subcontractor. (See GC Ex. 51.)

that CNN violated the Act by failing to recognize and bargain with NABET Locals 31 and 11. Both Local Unions did represent employees at CNN's D.C. and N.Y. Bureaus; however, the duly-recognized collective bargaining representative at both bureaus was their parent union, NABET-CWA. (*See, e.g.*, GC Ex. 9 at 1 (recognizing NABET-CWA as representative at D.C. Bureau); GC Ex. 17 at 1 (recognizing NABET-CWA at N.Y. Bureau).) Local 31 filed partial cross-exceptions asking the Board to modify the conclusions of law and the recommended order to require CNN to recognize and bargain with NABET-CWA, along with the Local Unions.

In its Answering Brief, CNN asserts, "Local 31 nonetheless argues that [the] ALJ did not go far enough and that CNN should also be required to recognize and bargain with the national union, NABET/CWA, because the National, along with the Locals, 'negotiated and administered the collective bargaining agreements.'" (CNN Ans. Br. at 89 (quoting Local 31 Br. in Supp. of Partial Cross Exceptions at 29).) The Respondent goes further, by making the rather remarkable statement that "[t]he record does not support the conclusion that the National was involved in negotiating or administering the contracts with Team." (*Id.* at 90.) Rather, according to the CNN, the evidence shows that the Local Unions negotiated contracts. (*Id.*)

The Respondent's argument is premised upon a fundamental misunderstanding of the facts and legal principles. With respect to the facts, there is substantial evidence of NABET-CWA's role in negotiating the collective bargaining agreements. In addition to the recognition clauses in the agreements, as well as the fact that NABET-CWA executed the agreements, there is substantial evidence of NABET-CWA's participation in the negotiation of those agreements with TVS. (*See* GC Ex. 52 (information request by NABET-CWA staff representative in advance of negotiations); GC Ex. 53 (response to information request by TVS made to NABET-CWA staff representative); GC Ex. 58 (letter from TVS to NABET-CWA staff representative

including proposal for collective bargaining agreement); GC Ex. 65 (letter from TVS to NABET-CWA staff representative about collective bargaining proposals); GC Ex. 66 (letter from TVS to NABET-CWA staff representative confirming agreements between TVS and NABET-CWA); GC Ex. 68 (letter from TVS to NABET-CWA staff representative enclosing final draft of collective bargaining agreement). CNN further claims “Local 31’s 2002 contract was not even signed or ‘approved’ by the National’s President” (CNN Ans. Br. at 90 (citing GC Ex. 9)); however, CNN overlooks the fact that it was signed by NABET-CWA’s Staff Representative, Ed Spillet. (GC Ex. 9 at 28.) CNN’s claim that there is no evidence that the NABET-CWA was involved in the negotiation of the collective bargaining agreement is simply false.

CNN similarly fails to distinguish the case authority relied upon by Local 31 in support of its argument that the bargaining order should extend to NABET-CWA. *See Jo Vin Dress Co.*, 279 NLRB 525 (1986). The Respondent correctly observes that the case arose in the context of multi-employer bargaining; however, the legal principles relied upon by the Board transcend that particular context. As CNN correctly quotes from the decision, the “record shows that the Dressmakers’ Joint Council negotiated and executed the expired 1979-1982 contract, the Memorandum of Agreement of 14 June 1982, and the 1982-1985 contract on behalf of its affiliated locals, including Local 185. (CNN Ans. Br. at 91 (quoting *Jo Vin Dress Co.*, 279 NLRB at 525, n.2).) The excerpts quoted by CNN establish the case’s relevance.

The evidence in this case, as outlined above, shows that NABET-CWA negotiated the collective bargaining agreements with TVS alongside the Local Unions. When crafting the bargaining order in a case involving a respondent’s unlawful refusal to recognize and bargain, the Board properly requires the respondent to recognize the employees’ duly chosen, collective bargaining representative. The record establishes that, at the D.C. Bureau, the Board certified

NABET-CWA as the collective bargaining representative of the bargaining unit employees at the D.C Bureau. (GC Ex. 2.) The record further establishes that, while the nominal employer of the bargaining unit employees may have changed, the successor employer recognized NABET-CWA as the collective bargaining representative. (GC Exs. 3, 4, 5, 6, 7, 8, 9.) This evidence also establishes that NABET-CWA negotiated the collective bargaining agreements.

Thus, given NABET-CWA negotiated the agreements, which Local 31 administered on a day-to-day basis (as recounted by CNN in its Answering Brief at 90-91), the Board should require CNN to recognize and bargain with NABET-CWA as part of the remedy in this case. *Jo Vin Dress Co.*, 279 NLRB at 525, n.2. Local 31 respectfully requests that the Board reject CNN's arguments and modify the ALJ's recommended order to require the Respondent to recognize and bargain with NABET-CWA, along with Locals 31 and 11, as the representatives of the bargaining unit employees at the D.C. and N.Y. Bureaus respectively.

III. CONCLUSION

Accordingly, for the reasons set forth in NABET Local 31's brief in support of its partial cross-exceptions and as further elaborated above, Local 31 respectfully requests that the Board grant its partial cross-exceptions and, in addition, affirm the ALJ's findings of fact and conclusions of law, as well as the recommended order, as modified.

Respectfully submitted,

DATED: June 30, 2009

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