UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the matter of NBC UNIVERSAL, INC., et al., Employer, and NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS – COMMUNICATION WORKERS OF AMERICA, AFL-CIO, et al., Petitioners.	:	Case Nos. 02-UC-619, 02-UC-625, 05-UC-403, 05-UC-407, 13-UC-417, 31-UC-323

REQUEST FOR REVIEW BY RESPONDENT NBCUNIVERSAL MEDIA, LLC

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NBCUniversal Media, LLC (the "Company") submits this Request For Review, pursuant to Rule 102.67 of the National Labor Relations Board Rules and Regulations. For the reasons set forth below, the standard for Board Review is met and review should be granted as to the unit clarification petitions at issue in this matter.

PRELIMINARY STATEMENT

This case involves six consolidated unit clarification petitions filed by NABET-CWA and its various locals (the "Union"). One petition was filed by the Union's Sector (the NABET-CWA national or parent union), one each by the respective Union locals in New York, Chicago, Washington, D.C., and Los Angeles, and one by the American Federation of Television and Radio Artists ("AFTRA") (relating to the Content Producers in Washington only). The Company and the Union are parties to a collective bargaining agreement (the "Master Agreement") that covers, *inter alia*, some of the Company's technical employees, including photographers, editors, and news writers at its local stations in New York, Chicago, Washington, and Los Angeles. All six petitions in this matter relate to the new Content Producer position that was established at the Company's local stations, first in New York and then several months later in Washington, Chicago, and Los Angeles.

The Content Producer position involves Producer work at its core, with ancillary tasks of non-linear editing, news writing, and shooting with hand-held digital cameras. Under the Master Agreement, Producers are non-bargaining unit positions. In the same way, while certain work can only be performed by bargaining unit members (such as linear videotape editing and photography with large professional-grade cameras), pursuant to the Master Agreement non-linear editing, news writing, and shooting with hand-held digital cameras can be assigned at the Company's discretion either to bargaining unit members or to non-bargaining unit persons under certain conditions.

Based on the nature of the position and its rights under the Master Agreement, the Company established the Content Producer position as a non-bargaining unit Producer position, and it followed its normal posting and hiring procedures in filling those new Content Producer positions. In each of the cities, Content Producer jobs were filled by a combination of internal and external new hires, including Union bargaining unit members from both the engineering and news writing bargaining units who successfully applied for the positions.

In New York, where the Content Producer position was established first, NABET-CWA Local 11 acknowledged the Company's right to establish the position as a non-bargaining unit position when it entered into a written agreement (the "Content Producer Agreement") with the Company regarding the New York Content Producers. That Content Producer Agreement allowed any Local 11 bargaining unit members who were selected for Content Producer positions and who elected to remain in the Union to be grandfathered as bargaining unit members (in the D bargaining unit under the Master Agreement). In the Content Producer Agreement, Local 11 also agreed that the Union would not seek to represent, or assert jurisdiction over, the New York Content Producers other than through a Board-sponsored election.

When the Company later launched the Content Center in Washington, Los Angeles, and Chicago, the NABET-CWA locals in those other cities refused to enter into similar Content Producer agreements, and instead the Union filed a series of unfair labor practice charges as well as the unit clarification petitions that are the subject of this proceeding. In both its unfair labor practice charges and its unit clarification petitions, the Union argued that the Content Producer position should be treated as a position within the Union's jurisdiction, and therefore within one of its bargaining units, because members of the Union's bargaining units had performed and

were performing editing, news writing, and camera work at the Company's stations (except in Washington where news writing was within AFTRA's jurisdiction) and because some bargaining unit members were assigned to perform Producer work.

For approximately 18 months after the Union and its locals filed their charges and petitions, the Board and the Regions held the unit clarification petitions in abeyance and processed the Union's unfair labor practice charges in the four Regions where those charges were filed. After a coordinated investigation that involved briefing at the various Regions and then further briefing and meetings before the Division of Advice, the Regions issued their decisions on those unfair labor practice charges. Those decisions were based on the parties' agreements expressly circumscribing the Union's jurisdiction as set out in the Master Agreement and on the parties' practices under those jurisdictional agreements over several decades – and as to the New York station the decisions were also based on the Content Producer Agreement. While dismissing the Union's charges under Section 8(a)(5) relating to the establishment of the Content Producer position as a non-bargaining unit one, the Regions determined to issue Complaints on certain of the Union's direct dealing allegations relating to the Company's discussions with bargaining unit members as to the Content Producer terms and conditions.

While the Union was appealing those Regional unfair labor practice charge dismissals to the Office of Appeals, the Board's Acting General Counsel called in both sides, separately, to announce and explain his determination to reverse the order of proceedings in these matters. The Acting General Counsel informed both sides that the Board would hold the Union's unfair labor practice charges and appeals in abeyance and would proceed instead with processing of the various unit clarification petitions. The Acting General Counsel recognized that these unit clarification petitions were seeking accretions with regard to the new Content Producer position,

and further recognized that the Board's traditional standard for accretion would therefore need to be applied to evaluate these unit clarification petitions.

After the Acting General Counsel's decision, the unit clarification petition cases were consolidated and hearings were held before Hearing Officer Michael McConnell in New York, Washington, Los Angeles, and Chicago. Those hearings were held between March 14, 2011 and May 26, 2011, and they involved 10 weeks of testimony, 50 witnesses, and 3,735 pages of hearing transcript. The parties submitted their post-hearing briefs on July 15, 2011.

On October 26, 2011, Region 2's Acting Regional Director Elbert Tellem (the "ARD") issued an 84-page decision on the consolidated petitions in this matter. In that decision the ARD determined to place the Content Producers into Union bargaining units in New York, Chicago, and Los Angeles. The ARD decided not to place the Content Producers in Washington into any Union bargaining unit because a question concerning representation existed between the Union and AFTRA, which actually represents the Content Producers there.

The ARD's decision to place the Content Producers into the Union's bargaining units in New York, Chicago, and Los Angeles is flawed in many respects under the standard set out in Rule 102.67:

- The ARD erred in failing to apply the Board's traditional accretion standard – or any accretion standard – to these unit clarification petitions, and failed to follow Board law by his application of Premcor;

- The ARD's decision that there is one bargaining unit under the Master Agreement is at odds with the plain language in the parties' collective bargaining agreement, their past practices, the extensive and uncontroverted testimony in the record, and Board case law involving the same parties, the same contract, and the same issue;

- The ARD's determination that the Content Producer Agreement between the Company and NABET-CWA Local 11 was not binding because Local 11's President lacked authority to enter into that agreement disregards material evidence, mischaracterizes other evidence (including similar agreements between the parties), ignores settled Board law in relying on the Union's internal by-laws, and is at odds with the determination made by the Regional Director of Region 2 earlier on the same issue;

– In comparing the Content Producer position with the various bargaining units as they existed before the Company moved to the Content Center model, the ARD ignored Board law and also ruled, *sub silentio*, against the Company on the Union's pending unfair labor practice charges – even though those charges were held in abeyance by the Acting General Counsel and even though the determinations by the Regions on the relevant issues had been in the Company's favor; and

– The ARD's decision fails to apply Board precedent under Union Electric and its progeny regarding agreements reached between the parties as to the exclusion of Producers such as Content Producers from any of the bargaining units because of the Union's lack of jurisdiction over Producer positions (as evidenced by the fact that the Company has the right to assign Content Producer tasks to non-unit persons), over certain news platforms, and over certain tasks and functions.

Applying the proper accretion standard, the record shows that the Content Producers have their own separate group identity and that the Content Producers do not have an overwhelming community of interest with any of the bargaining units under the Master Agreement. The errors and oversights in the ARD's decision call for review under Rule 102.67.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE ARD'S DECISION REPRESENTS A DEPARTURE FROM BOARD PRECEDENT AND BECAUSE THE DECISION IS CLEARLY ERRONEOUS ON SUBSTANTIAL FACTUAL ISSUES.

A. The ARD Failed To Follow The Board's Traditional Accretion Standard (Or Any Accretion Standard At All).

Under established precedent, a Region will clarify a unit to include a newly-created position only where the employees in that new position have no separate group identity and share an overwhelming community of interest with the employees in the bargaining unit. Safeway Stores, 256 N.L.R.B. 918 (1981). That accretion standard takes into account the union's rights under the Act, the employer's rights under the Act, and the Section 7 rights of the employees in the new position. Id. See also Archer Daniels Midland Co., 333 N.L.R.B. 673 (2001).

The Board has deviated from that traditional accretion test in unit clarification cases only in two limited circumstances. Under The Sun, 329 N.L.R.B. 854 (1999), where the bargaining

unit work is functionally defined in the collective bargaining agreement, community of interest analysis is still applied, but the bar for accretion is lowered and the burden is shifted to the employer. Id. at 859. See also WLVI, Inc., 349 N.L.R.B. 683 (2007). Under Premcor, Inc., 333 N.L.R.B. 1365 (2001), the targeted employees can be placed into the bargaining unit without any accretion analysis but only when the employees in the new position perform "the same basic functions historically performed by members of the bargaining unit." Premcor, 333 N.L.R.B. at 1366. This Premcor rule applies even if there are some differences in the duties and functions of the new position and the bargaining unit position due to advances in technology, but only if the basic functions of the new position and the bargaining unit positions are the same. Id. See also Developmental Disabilities Institute, 334 N.L.R.B. 1166 (2001).

In addressing the Union's unit clarification petitions, the ARD recognized that the approach used in The Sun does not apply because the bargaining unit work for each of the units is not functionally defined. (ARD Dec., pp. 66-67.) The ARD further determined that this case differs from Premcor because the Content Producers "have some responsibilities that do not appear to have been performed by bargaining unit employees." (ARD Dec., p. 70.)[1] Having recognized that the Content Producers are doing more than merely the same basic functions historically performed by members of the bargaining unit, and having earlier correctly determined that the bargaining unit duties are not functionally defined, the ARD was required to apply the Board's traditional accretion standard in addressing the unit clarification petitions before him in this case. However, the ARD chose not to apply any accretion analysis at all,

[1] The ARD recognized in numerous places that the Content Producer position was a new position and was one that had new duties unlike those in any previous bargaining unit positions although he understated the difference in those duties and their corresponding responsibilities. See, e.g., ARD Dec., p. 72, recognizing that Content Producers spend some amount of their time as "producers," a non-bargaining unit position both before and after the move to the Content Center model. See also ARD Dec., pp. 69-70, recognizing that Content Producers perform "other work, not previously performed by bargaining unit employees, for example, creating content for the [Company's] new digital cable channels and collaborating with Reporters."

because he felt that application of that traditional accretion analysis would be "problematic" under the facts in this case. (ARD Dec., p. 70.) Instead, the ARD applied Premcor, even after explaining that it did not apply to the petitions in this case, and he then decided to include the Content Producers in the Union's bargaining units. In doing so the ARD went against settled Board law and he violated both the Company's rights and the Section 7 rights of the Content Producers.

No reported Board precedent exists to support the ARD's application of Premcor as to the petitions in this case. Premcor has never been applied to a situation involving a new position with duties and functions that are not the same as those performed by members of the bargaining unit at issue. Nor has Premcor ever been applied to a situation where a union did not have exclusive jurisdiction over the core or ancillary functions which comprise the new position. In Premcor, the differences between the position at issue and the bargaining unit jobs were solely attributable to technological advances, and the Board concluded that the basic functions of the two positions were the same. Premcor, 333 N.L.R.B. at 1366. That same finding lies at the heart of the Board's decision to apply Premcor in Developmental Disabilities Institute. 334 N.L.R.B. at 1168. It is only that determination that the new position and the bargaining unit positions are the same that allows the Board to place employees into the bargaining unit without an accretion analysis. Id.

There is no Board case suggesting that a Region can dispense with an accretion analysis and place new employees into a bargaining unit based on a degree of functional overlap between the position at issue and the bargaining unit position involved in a unit clarification case where the basic functions of the positions are not the same. In such cases, the Board has always applied accretion analysis – either the traditional accretion test or the modified accretion test of The Sun

when the work of the unit is functionally defined. See, e.g., WLVI, 349 N.L.R.B. at 683; Safeway Stores, 256 N.L.R.B. at 918.

In attempting to support his application of Premcor to this case, the only Board case cited and relied on by the ARD was Hill-Rom Company, Inc., 297 N.L.R.B. 351 (1989). Hill-Rom, however, is distinguishable as it was an unfair labor practice case involving claims that employees were removed from the bargaining unit in violation of Section 8(a)(5). Also, the Board in Hill-Rom determined that "whatever differences existed between [the new position and the bargaining unit position] resulted from technological change and that the job functions remained significantly unchanged" and that "[a]ccordingly, the new work title simply stood in the shoes of the old work title in the bargaining unit." Id. at 351. Hill-Rom, like Premcor, stands in sharp contrast to the case here, since the record evidence here showed (and the ARD recognized) that the new Content Producer position is much more than merely the same job as any of the bargaining unit positions to which it should be compared without any of those changes simply being limited to those brought on by advances in technology. Finally, even in the Hill-Rom unfair labor practice case the Board performed a community of interest analysis, thus further exposing the error of the ARD's reliance on Hill-Rom to support his application of Premcor in this unit clarification case.

With Hill-Rom exposed as not providing any support for the ARD's application of Premcor here, there is no support under Board law for the ARD's decision not to apply the Board's traditional accretion test to these petitions. The ARD's refusal to follow that Board law calls for review under Rule 102.67.

B. <u>The ARD's Single Unit Finding Is Unsupported By The Evidence.</u>

In reaching his decision to place the Content Producers into the Union through these petitions, the ARD claimed that there was "ambiguity" regarding the issue of whether there is one nationwide unit under the Master Agreement or multiple units (ARD Dec., pp. 55-56), and then he simply resolved that unit issue and that supposed ambiguity by determining that there is a single nationwide unit. (ARD Dec., pp. 57-58.) That single unit determination was the necessary foundation for the ARD's determination that Local 11's President lacked authority to bind his own local as to the Content Producers at the Company's station in New York and thus allowed the ARD to ignore the New York Content Producer Agreement and its preclusive effect. (ARD Dec., p. 62, fn. 94.) That single unit determination also allowed the ARD to ultimately avoid having to perform a community of interest analysis with respect to any of the bargaining units (A, H, M, or N) and the Content Producer position.[2] As demonstrated below, the ARD's one unit determination is at odds with the Master Agreement's plain language, with the overwhelming and unrebutted testimony in the record, with the conspicuous lack of testimony by two senior Union officials who were promised as witnesses and then not called, and with an earlier Board decision involving the same parties, the same contract language, and the same issue.

The terms and plain language of the Master Agreement show that there are multiple units rather than a single nationwide unit under that Master Agreement. For example, the second paragraph states plainly that there are multiple units, in spelling out the Intent and Purpose of the agreement and its various units. (Joint Exh. 1, p. 1.) (referring to the "Individual Articles which . . . contain the description of *each bargaining unit* . . . ") (emphasis added). Throughout the

[2] Only through that determination could the ARD avoid the fact that the Content Producer job is obviously not like any other position in any of the different units under the Master Agreement, before or after the move to the Content Center model.

Master Agreement's 291 pages there are multiple references made to the separate and distinct bargaining units, even referencing them as separate units and with each unit having its own separate scope of unit provision. (Joint Exh. 1, pp. 58, 97, 98, 105, 108, 110, 111, 121, 132, 135, 140, 153, 169, 171, 176.) Those units include the nationwide A (Engineering) unit, the city-specific M, N, and H (Newswriter) units, and eleven other separately defined and designated units. (Id. at 58, 98, 111, 140.)

Like the unambiguous references to separate units in paragraph 2 and elsewhere cited above, Sideletter 50 of the Master Agreement, sets out the terms and conditions that apply when a Union member in one bargaining unit "crosses over" and performs work that is within the jurisdiction of one of the other bargaining units under the Master Agreement. (Joint Exh. 1, p. 262.) Of necessity, then, that sideletter further confirms that there are separate and distinct bargaining units under the Master Agreement. Yet, the ARD did not even substantively address this evidence in his 84-page decision in concluding that there was a single nationwide unit comprising all of the different work groups and contracts under the Master Agreement. (ARD Dec., p. 57.) Instead, in looking to justify his single unit determination the ARD relied on what was a clear misinterpretation of sideletter 50, which actually confirms that there are multiple units. (ARD Dec., p. 56.)

The testimony on the single unit versus multiple units issue was every bit as clear and conclusive as the language in the Master Agreement. The Company's current Head of Labor Relations, Andrew Herzig, and its recently-retired Head of Labor Relations, Day Krolik, testified that there are multiple units under the Master Agreement. (Tr. 550, 1013.) Mr. Krolik further explained how the Union's bargaining representatives had acknowledged that there are multiple units under the Master Agreement. (Tr. 550.) Mr. Krolik also testified as to how the various

units came into the Master Agreement at different times and in different ways, and how the different units remained as separate units under the Master Agreement. (Id.) Both Mr. Krolik and Mr. Herzig also testified regarding the different units under the Master Agreement in terms of ratification and administration of the contracts for those separate units including separate seniority lists for each of the units. (Tr. 550, 552, 1013, 1017.)

Even the Union's own witnesses testified that there are multiple units under the Master Agreement. Al Zodun, who testified that he had over 30 years of experience negotiating the Master Agreement for the Union, conceded that there were multiple bargaining units under that Master Agreement. (Tr. 2682-83.) Yvonne Beltzer and John Alarid of the Union also admitted that there are multiple units under the Master Agreement. (Tr. 3015, 3144-45.) On this issue, their testimony was in line with that of the Company's witnesses and that of the clear language in the Master Agreement itself.

Against all of this record evidence, the only evidence offered by the Union in support of its new single unit position was a one-sentence answer by Local 41's former President, Ray Taylor, suggesting – without any support or explanation – that there is a single unit under the Master Agreement. (Tr. 3535.) Even Mr. Taylor, though, later on cross-examination had to concede that there are separate units, when he testified that the various units came into the Master Agreement separately and that negotiations as to the mail messengers ceased when the mail messengers' unit dropped to a single person. This undermined his single unit testimony, since the only reason those negotiations ceased, as Mr. Taylor conceded, was because a one-person bargaining unit cannot be sustained. (Tr. 3614-16.)

The fact that two prominent Union officials, former Sector President John Clark and current Sector President James Joyce, failed to testify and address the issue provides further

proof on this issue. Those two witnesses obviously have personal knowledge on the issue and would have had to corroborate Mr. Krolik's and Mr. Herzig's record testimony. Whether the Board applies an adverse inference with regard to their non-testimony or not, the fact remains that the testimony on this issue was overwhelming and stood uncontroverted that there always have been and continue to be multiple units under the Master Agreement.[3]

The Union's various petitions in this matter themselves as well as the authorized statements by the various locals' own counsel in the course of these proceedings further confirm that there are multiple units under the Master Agreement. In the petitions, the Union locals pointed to the various Scope of Unit provisions in the Master Agreement, recognizing that the contract has several bargaining units rather than a single bargaining unit. (Formal Papers.) The fact that each local union filed its own petition for the Content Producers in the respective cities is further proof on the issue. While the Union's counsel asserted the single nationwide unit theory for the first time just before these proceedings began, the various local union submissions as well as statements made by Union counsel in these proceedings themselves are at odds with that single nationwide unit argument. (See, e.g., Unfair Labor Practice Charge 31-CA-29100; Tr. 79, 83.)

Finally, there is even controlling Board law supporting and confirming the Company's position on this issue. In National Broadcasting Co., Inc., 114 N.L.R.B. 1 (1955), the Board was

[3] Board law allows for an adverse inference in contested proceedings where a witness with knowledge and who would be expected to testify nevertheless fails to appear. See, e.g., Greg Construction Co., 277 N.L.R.B. 1411 (1985) (holding that where a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorable to that party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge); Rochester Tel. Corp., 1998 WL 1985310 (1998) (drawing adverse inference against union where its chief spokesperson was not called as a witness to rebut testimony of employer's chief spokesperson). The ARD said that he would not apply that law here since this matter involves representation petitions and thus in his view was not a contested proceeding. The record shows beyond any question, however, that this matter was anything but a non-adversarial proceeding, and the Board's adverse inference law should apply as to Mr. Clark's and Mr. Joyce's failure to testify on this issue (and numerous other central issues in this case). Even without any adverse inference their failure to testify leaves the record devoid of any support for the Union's single unit position and the ARD's determination on that issue.

presented with the issue of whether the Master Agreement between the Union and the Company had one nationwide unit or multiple units. The Board relied on the language of the "Intent and Purposes" provision, stating that there are multiple units. Id. at 4. That provision in the Master Agreement remains unchanged today. (Joint Exh. 1, p. 1.) The language in Paragraph A of the recognition clause relied on by the Board in that case is likewise identical in the current Master Agreement. (Compare 114 N.L.R.B. at 3 and Joint Exh. 1, p. 1) ("The Union represents and warrants, and it is the essence hereof, that it represents for collective bargaining purposes all employees of the Company as defined in the applicable SCOPE OF UNIT clause . . .".) In its decision the Board noted that there are multiple references to multiple units throughout the Master Agreement and that there are 16 separate sections, each with its own "Scope of Unit" clause and its own terms and conditions of employment. Nothing has changed on that front either except that there are now 15 different units instead of 16. 114 N.L.R.B. at 3-4; Joint Exh. 1. The doctrines of *res judicata* and collateral estoppel thus further call for review of the ARD's decision on this critical unit issue. See, e.g., California Gas Trans., 352 N.L.R.B. 246 (2008); My Store, Inc., 181 N.L.R.B. 321 (1970).

Here again the ARD in his decision simply ignored the record evidence and the Board law on this issue. In doing so the ARD pointed to an earlier decision from 1944 dealing with the Union's certification as bargaining representative for the original A Unit, National Association of Broadcast Engineers and Technicians, 59 N.L.R.B. 478, 483-84 (1944), and determined that "[a]lthough the case tends to support the employer's position that there exist multiple units, the case is not conclusive." (ARD Dec., pp. 54-55, fn. 82.) While the ARD then goes on to state that "the mere existence of supplemental agreements does not undercut the existence of a single bargaining unit where the parties' course of conduct otherwise supports a single unit," with a

reference to a Columbia Broadcasting System case and a "but see" citation to the 1944 National Broadcasting Co., Inc. case, he ignored the fact that that the 1955 National Broadcasting Co., Inc. case addressed the same issue, under the same contract, and with the same parties – and was conclusive on that issue.

The ARD's decision that there is a single bargaining unit under the Master Agreement is flawed in several material respects, calling for review under Section 102.67.[4]

C. The ARD's Analysis With Regard To The Local 11 September 19, 2008 Agreement In New York Disregards Unrebutted Record Testimony, Ignores The History of the Course of Conduct Between the Parties, And Directly Contradicts A Previous Finding On This Same Issue By The Regional Director.

In the Content Producer Agreement, NABET-CWA Local 11 acknowledged that the New York Content Producer position was a non-bargaining unit position under the language in the Master Agreement and the parties' practices, and agreed not to seek representation of the New York Content Producers other than through a Board-sponsored election. (Employer Exh. 10, ¶¶ 1, 4.) The Company in that Content Producer Agreement agreed further that any Local 11 member who applied for and obtained a New York Content Producer position could elect to remain a Union member as part of the D unit. (Id. at ¶¶ 1, 2.) At the time that Mr. Herzig from the Company and Mr. McEwan as the President of Local 11 entered into the Content Producer Agreement, the Company had announced plans to introduce the Content Producer position only at its New York station. (Tr. 1034.) By its terms and as the record testimony made clear, that

[4] From the outset of these proceedings the Company pressed the Union to state the unit into which the Union believed the Content Producers could and should be placed, and the Union refused, saying essentially that the Content Producers should be accreted and then the unit placement issue could be determined later. From this approach was born the Sector's position that the Master Agreement had a single all-encompassing bargaining unit. Aside from being at odds with the record and with applicable Board law, the Union's position and the ARD's determination cannot be squared with the practical realities of the parties' work under the Master Agreement. The record also established that every employee working in any of the units under the Master Agreement resides on one unit roster only and thus that no employee has ever been simultaneously in different bargaining units or without an identified place in one of the bargaining units (as would be the case under the ARD's decision). (Tr. 552, 1017.)

Content Producer Agreement applied only to the Company's Content Producers at its WNBC station in New York. (Tr. 1040, 1111-12.)

In the unfair labor practice charges filed by the Union and its locals, the Union took the position that the New York Content Producer Agreement was not binding or enforceable because Mr. McEwan lacked authority to enter into that agreement. (See, e.g., Unfair Labor Practice Charge 2-CA-39208.) Both sides submitted extensive information and documentation on that issue to Region 2 and to the Division of Advice, and the issue was decided by Region 2 after review by the Division of Advice. In her determination letter addressing the issues of Mr. McEwan's authority and the binding nature of that Content Producer Agreement, then Region 2 Regional Director Celeste Mattina found that Mr. McEwan had both actual and apparent authority to enter into the Content Producer Agreement. (See July 30, 2010 Region 2 Dismissal Letter, pp. 1-2.) Regional Director Mattina also determined that the actions by Mr. McEwan in entering into the Content Producer Agreement provided an independent basis for the Company's challenged conduct in New York, on top of her determination that by their sideletter agreements and practices over many years the parties had recognized the Company's right to assign non-linear editing, camera shooting with hand-held digital cameras, and news writing to non-bargaining unit persons. Id.

At the hearing there was testimony from both Mr. Herzig and from Mr. Krolik concerning the New York Content Producer Agreement, Mr. McEwan's authority to execute the Content Producer Agreement, and the binding nature of the Content Producer Agreement. None of that testimony was rebutted by any Union witness. Mr. Herzig and Mr. Krolik also provided unrebutted testimony that Local 11 has acknowledged the Content Producer Agreement, operated under the Content Producer Agreement, and even continued to file grievances under the Content

Producer Agreement – both before and after the Union had begun to assert that Mr. McEwan lacked authority to bind Local 11 in that Content Producer Agreement and that the Content Producer Agreement was not binding or enforceable. (Tr. 1041-43, 1045, 1078-79.)

The ARD here again ignored the testimony of the Company's witnesses as to the Content Producer Agreement, he ignored the fact that the two senior Union officials who had knowledge of the Content Producer Agreement and the authority of Local 11 Presidents to bind Local 11 on New York issues had failed to testify, and he ignored the Regional Director's earlier findings that Mr. McEwan had both actual and apparent authority to bind Local 11 as to the Content Producer Agreement and that the Content Producer Agreement was enforceable as to the New York Content Producers. Instead, the ARD simply accepted and embraced the Union's argument that Mr. McEwan lacked authority to enter into this Content Producer Agreement and then from there determined that the Content Producer Agreement did not preclude him from placing the New York Content Producers into one of the bargaining units there in New York. (ARD Dec., p. 63.) This analysis is flawed for several reasons, as set out below.

In explaining his decision as to Mr. McEwan's supposed lack of authority, the ARD relied principally on the Union's argument that its Sector by-laws precluded Mr. McEwan from entering into the Content Producer Agreement and on the fact that in his opinion there was nothing in the those Sector by-laws "tending to establish that Local Union Presidents have the authority to sign agreements with the Employer concerning who will and will not fall within the union's representation." (ARD Decision, p. 62.) The New York Content Producer Agreement, however, did not affect or concern "who would or would not fall within the union's representation" at all. Rather, it covered the terms and conditions of non-jurisdictional

assignments and recognized that the Company had the right to establish that Content Producer position as a non-bargaining unit position. (Tr. 662-65, 695, 1029-30, 1034-36.)

Even if Mr. McEwan had violated the Union's by-laws by signing the New York Content Producer Agreement, the ARD's decision would still be flawed. That is so because the parties' course of dealing and past practices trump the Union's by-laws in determining whether Mr. McEwan had authority to bind Local 11. See, e.g., Inland Steel Prods. Co., 120 N.L.R.B. 1678 (1958) (holding that despite union by-laws, the negotiating local's failure to alert the employer as to any lack of authority resulted in a valid and binding agreement); Maremont Automotive Prods., Inc., 134 N.L.R.B. 1337 (1961) (holding that the failure of the union to notify the employer about a possible limitation of authority left the local with full authority to enter into an agreement with the employer). That course of dealing and past practice between the Company and Mr. McEwan was established by the unrebutted testimony of Company witnesses, meaning that Mr. McEwan had both actual authority and certainly apparent authority to bind Local 11 with regard to that Content Producer Agreement. That course of dealing, involving a long history of *de facto* delegation by the Sector and the Sector President allowing local presidents to negotiate and enter into work assignment agreements that address jurisdictional boundaries and that acknowledge the parties' agreed exclusions of work or of positions from the different bargaining units, as set out below, should control and not the by-laws.

Mr. Herzig and Mr. Krolik testified that each of them had entered into many similar agreements with Mr. McEwan in his role as President of Local 11, and even with Mr. Clark when he was President of Local 11 (as Regional Director Mattina had recognized in her earlier decision on this issue). (Tr. 547-49, 1051.) Mr. Herzig also testified that Mr. McEwan was a member of the Sector Bargaining Committee, which in and of itself gives Mr. McEwan at least

apparent authority under Board law and under basic contract law in that at no time did Mr. McEwan ever indicate that he lacked the authority to negotiate and enter into the Content Producer Agreement. (Tr. 1034-36, 1040-41, 1051-53, 1086-87.) The Union's fall-back argument that even if Mr. McEwan could bind Local 11, the Sector was not bound and could override that agreement and proceed with a unit clarification petition as to the New York Content Producers is absurd and falls of its own weight, since Local 11 represents any and all NABET-CWA members working for the Company in New York and since Local 11 is obviously part of NABET-CWA and the agent of NABET-CWA, as Regional Director Mattina also recognized in rejecting that same argument. (July 30, 2010 Region 2 Dismissal Letter, pp. 1-2.)[5]

With regard to the ARD's statement that Mr. McEwan lacked authority to enter into any agreement that modified the Master Agreement (ARD Dec., p. 63), here again the ARD ignored and apparently misunderstood the overwhelming and uncontroverted record evidence. Mr. Herzig testified that the Company had a history of entering into agreements with Mr. McEwan like the Content Producer Agreement to set terms and conditions for work done by bargaining unit members outside of the scope of the Master Agreement. Specifically, Mr. Herzig testified concerning agreements that he had reached with Mr. McEwan that provided work assignments beyond the Union's jurisdiction under the A Contract by allowing such A unit members to do work for the Telemundo Network and the Weather Channel. (Tr. 1051-56.) Mr. Herzig also

[5] In its efforts to overcome the fact that Mr. McEwan had authority to negotiate and enter into the Content Producer Agreement as President of Local 11 and the clear impact of that as to the New York Content Producers, the Union has asserted many inconsistent and conflicting arguments over the past two and one-half years. At times the Union misrepresented the Company's position, arguing that the Company was looking for the New York Content Producer Agreement to be dispositive as to Washington, Los Angeles, and Chicago, and then from there asserting its position that Mr. McEwan could not bind locals in other cities or the Sector as to those other cities. This, however, was never the Company's position, as the Company made clear at the hearing and in its post-hearing brief. Rather, the Company's position is, and always has been, that Mr. McEwan as Local 11 President had authority to reach the Content Producer Agreement as to the Content Producers in New York – the only Content Producers that were covered by that agreement and the only Content Producers that were even being contemplated at the time.

testified regarding the agreement he reached with Mr. McEwan concerning increasing the scope of A unit work to include work on the "Dr. Oz" show. To provide that work to A unit members, Mr. Herzig and Mr. McEwan had to negotiate a change to the meal period provision of the Master Agreement. (Tr. 1059-60.)

The ARD acknowledged these other agreements in a footnote, but then went on to find that "there is no evidence as to whether such agreements altered the scope of the unit and, in any case, no evidence as to whether such agreements were concluded without an express designation of authority by, input from, or knowledge of the Sector." (ARD Dec., p. 63, fn. 95.) However, like the Weather Channel, Telemundo, and Dr. Oz agreements before it, the Content Center Agreement did not alter the scope of the units in the Master Agreement. Each agreement covered work that the parties recognized was outside of the jurisdiction of the Master Agreement.

The evidence showed that each of these agreements was negotiated and signed by Mr. McEwan in his role as Local 11 President, and there was no evidence presented by Local 11 or the Sector – including obviously from Mr. McEwan or Mr. Clark since they changed course and elected not to testify – suggesting that Mr. McEwan exceeded his authority in negotiating and entering into those earlier agreements. Moreover, because of the Union's decision not to have Mr. Clark and Mr. McEwan testify, there was likewise no evidence of any lack of authority, input, or knowledge on the Sector's part – and Mr. McEwan's role as a member of the Sector Bargaining Committee further exposes the fallacy of the ARD's determination on this issue.

In determining that the Content Producer Agreement did not preclude the Union's petitions as to the New York Content Producers, the ARD also ignored the testimony and exhibits showing that Local 11 and the Sector have recognized the validity and enforceability of

the New York Content Producer Agreement itself even after raising their contrary arguments in these proceedings. Mr. Herzig testified, without any challenge or contradiction from any Union witness, that over the more than two and one-half year period since the Content Producer Agreement was signed, Local 11 has continued to operate under the Agreement, has continued to accept the benefits of the Agreement, and has even continued to file and process grievances under the Agreement, thereby recognizing in every respect the valid and binding nature of the Content Producer Agreement. (Tr. 1042-43, 1045.) As a matter of Board precedent and basic contract law, the Union's conduct would amount to ratification of the Content Producer Agreement and would make it binding and enforceable even if the Union were somehow to prevail on its lack of actual or apparent authority arguments. See, e.g., One Stop Kosher Supermarket, Inc., 355 N.L.R.B. No. 201, 2010 WL 3813249, at *6 (Sept. 29, 2010) (finding that the failure to disavow the execution of the agreement at issue after acquiring knowledge of it and subsequent affirmative conduct constituted ratification "equivalent to an original authorization"); see also 12 Williston on Contracts Sec. 35:22 (4th Ed. 2009).

In addition to all of these flaws in the ARD's decision on this issue, Mr. Clark as the Union's Sector President expressly recognized the validity of the Content Producer Agreement, in an e-mail that he sent to the Union's Local Presidents addressing that Content Producer Agreement. (Intervenor Exh. 1.) This e-mail from Mr. Clark contained his opinion that the New York Content Producer Agreement "isn't very favorable to us," and under any fair reading amounts to a direct acknowledgment of the binding nature of that Content Producer Agreement. It strains credulity to suggest or argue that if Mr. Clark had believed the Content Producer Agreement to be unenforceable and invalid he would not have said so here or at least suggested so, in a message to the other Union Local Presidents wherein he was complaining about the

Content Producer Agreement not being good for the Union and wherein he was urging those other Local Presidents not to enter into similar agreements in their cities. (Id.)

In trying to support his decision as to Mr. McEwan's supposed lack of authority and the New York Content Producer Agreement, the ARD also relied on what he described as "the unrebutted testimony" of Local 31 President Carl Mayers regarding a telephone conference with NABET Sector President Clark and the Presidents of the other Union locals in the fall of 2008 to discuss the New York Content Producer Agreement. Mr. Mayers testified that Local 41 President Ray Taylor participated in that call (Tr. 2430, 2450), and yet Mr. Taylor testified that he had no recollection of that call ever taking place. (Tr. 3612.) This testimony by Mr. Taylor obviously undercuts the ARD's contention that Mr. Mayers' testimony was "unrebutted" – since the fact that one of the Union Local Presidents stated that he had no recollection of the call certainly rebuts Mr. Mayers' testimony – even putting aside the fact that the Company obviously could not rebut this testimony because only Union members participated on this alleged call. This testimony by Mr. Mayers was also nothing more than rank hearsay and should not have been accepted as dispositive on such an important issue – particularly in light of the extensive and unrebutted testimony by Company witnesses to the contrary on this issue, Mr. Clark's telling e-mail on the issue, and the telling failure of Mr. Clark and Mr. McEwan – the persons on the Union side who did have personal knowledge on this issue – to testify. See, e.g., Conagra, Inc., 311 N.L.R.B. 1056 (1993) (affirming decision to give no weight to uncorroborated hearsay evidence).

Contrary to the ARD's assertion (ARD Dec., p. 62, fn. 94), his determination that the NABET-CWA Sector petition subsumes the other petitions in this matter does not mean that it was unnecessary for him to decide the issue of Mr. McEwan's authority on the binding nature of

the Content Producer Agreement. Indeed, that footnote reflects a compounding and conflation of errors in the ARD's decision, as to the single versus multiple unit issue and the validity of the Content Producer Agreement. The Content Producer Agreement needed to be addressed in any event, since the Company is not asserting that it barred the filing of any of the Union's petitions, but rather that it is independently dispositive as to the New York Content Producers.

Finally, the ARD also simply ignored the fact that his own Regional Director had rejected his position on the issue and found that Mr. McEwan had both actual and apparent authority to enter into the New York Content Producer Agreement in deciding the same issue based on the same evidence and positions. This finding by the Regional Director, which was discussed and understandably relied upon in the Company's post-hearing brief, is not even addressed anywhere in the ARD's 84-page decision. The Regional Director's decision on this issue was clear and unambiguous in finding that "the Local 11 representative conducting the negotiating on behalf of Local 11 had previously negotiated and entered into numerous agreements with the Employer and the Employer could reasonably conclude he was empowered to negotiate future agreements on behalf of Local 11." (July 30, 2010 Region 2 Dismissal Letter, pp. 1-2.)

The ARD's decision to ignore extensive and unrebutted evidence on this issue, his reliance on hearsay testimony where witnesses with personal knowledge were available to testify, and his failure to consider the Regional Directors' finding, are the type of errors and oversights warranting and calling for review under Rule 102.67.

D. The ARD Erred In Comparing The Content Producer Position To Bargaining Unit Positions Before The Content Center, And Improperly Ruled, *Sub Silentio*, Against The Company On The Unfair Labor Practice Charges That Are Being Held In Abeyance.

In unit clarification cases the decision-maker is required to compare the position at issue with the bargaining unit positions as they existed at the time when the petition was filed. GHR

Energy Corp., 294 N.L.R.B 1011 (1989); Gould, Inc., 263 N.L.R.B. 442 (1982). The Union itself recognized this long-settled principle of Board law and argued it during the hearing. (Tr. 2797-98.) More specifically, the Union argued that the decision-maker was required to focus on the comparison of the positions at issue at the time the petitions were filed, even if the Content Producers had been doing more producing work in the months after the filing of the petitions and before the hearings in the respective cities. Id.

The ARD did not follow that Board mandate as to the petitions at issue here, however, because (as noted above) he found that doing so would be "problematic." (ARD Dec., p. 70.) Such a comparison of the relevant positions at the time of the petitions would necessarily call for denial of the petitions, since there were so few remaining bargaining unit editors and news writers at the stations after the Company's move to the Content Center model. Id. See Renaissance Ctr. Partnership, 239 N.L.R.B. 1247 (1979) (denying petition to accrete a larger group into a smaller group in recognition of the Section 7 rights of the targeted group of employees). The ARD instead compared the Content Producer position to the newswriter bargaining units (the M, N, and H Units) and the photographer/editor bargaining unit (the A Unit) as they had existed before the move to that Content Center model and thus months before the petitions in this matter had been filed. (ARD Dec., pp. 71, 75.)[6]

In making this determination the ARD accepted the Union's argument that the Content Producers were unlawfully removed from bargaining unit positions (where they had been editors,

[6] In New York the Content Producers were working under the Content Producer Agreement at the time the Union's petitions were filed and the newswriter and editor/photographer bargaining units were therefore already smaller in numbers because of the move to the Content Center model as noted above. To the extent that the Union argues that its petitions were filed before there were Content Producer positions in Chicago and Los Angeles (but only the announcement of the move to the Content Center model), the petitions would fail under Coca-Cola Bottling Co., 310 N.L.R.B. 844 (1993). Either way, the ARD erred in focusing on the units as they existed before the Company's shift to the Content Center and in ruling against the Company, *sub silentio,* as to the reductions in the need for daily hire editors and news writers.

news writers, or photographers) and "transferred" to their new Content Producer positions. (ARD Dec., pp. 69-70.) Aside from being at odds with Board law, this approach by the ARD is at odds with the record evidence as to how the Content Producer positions came to be filled, as shown below. The ARD's decision on this issue is also flawed in that the ARD in making his determination ruled against the Company, *sub silentio*, on the Union's pending unfair labor practice charges which are being held in abeyance at the direction of the Acting General Counsel. This approach by the ARD is all the more troubling in that his own Regional Director had ruled against the Union and for the Company on the same unfair labor practice charge issues that the Union is appealing.

As to the ARD's factual determination that the Content Producers were somehow removed from their bargaining unit positions and "transferred" into Content Producer positions, the evidence showed overwhelmingly that all of the Content Producers in all four of the cities at issue applied for, interviewed and tested for, and received offers for those new Content Producer positions, as opposed to being removed from their bargaining unit positions and "transferred" into the Content Producer positions as the Union had asserted in its unfair labor practice charges. (Tr. 488-89, 493-94, 1154-55, 2784-86, 2852, 2966, 3438, 3487.) The Union's argument that the Company's conduct in urging bargaining unit members to apply for Content Producer positions and letting them know that there would be a reduced need for bargaining unit editors and newswriters was the same as removing them from the bargaining units and transferring them to Content Producer jobs is the essence of the Union's charges under Section 8(a)(5). While the ARD did not explicitly say that he was ruling on the related Section 8(a)(5) unfair labor practice charges, any fair reading of his decision shows (with his reference to the supposedly "problematic" nature of applying established Board law) that he ruled on those Section 8(a)(5)

charges, *sub silentio,* and determined as part of the basis for his decision that the Company acted improperly in filling the Content Producer positions with former members of the Union's bargaining units. (ARD Dec., p. 70.)[7]

The ARD's *sub silentio* ruling on this issue is even more troubling, in that Region 2 had earlier ruled on those same charge allegations and had ruled in the Company's favor. Part of the Union's unfair labor practice charges in New York involved a claim that the Company violated Section 8(a)(5) by its conduct in establishing the Content Producer position as a non-bargaining unit position and in assigning non-linear editing, shooting with hand-held digital cameras, and news writing to the Content Producers. The Union further argued that the Company had removed members from their respective bargaining units in violation of Section 8(a)(5) and transferred those bargaining unit members to their new Content Producer positions. In defending against these Section 8(a)(5) claims and allegations, the Company presented evidence showing that all Content Producers applied for their new positions and that the Company was acting pursuant to the Master Agreement in assigning those non-linear editing, shooting, and news writing tasks and functions to the non-bargaining unit Content Producers.

After investigating these unfair labor practice charges over the course of nearly two years, and after the issues were reviewed by the Division of Advice, the Regions issued their determinations as to these Section 8(a)(5) charges. In its dismissal letter, Region 2 found that the Company had acted lawfully in establishing the Content Producer position as a non-bargaining unit position in New York, both because of the Union's recognition of the Company's right to assign the non-linear editing, shooting with hand-held digital cameras, and news writer tasks and

[7] The ARD also ignored the fact that bargaining unit members in New York who became Content Producers could elect to be grandfathered and thus remain in the Union in the D unit, under the New York Content Producer Agreement.

functions to non-bargaining unit employees and also because of the fully-authorized Content Producer Agreement between the Company and Local 11 as to the New York Content Producers. (See Region 2 Dismissal Letter, dated July 30, 2010.) These earlier rulings by Region 2's Regional Director are at odds with the ARD's underlying premise for ignoring Board law as to the proper time for comparison in a unit clarification case (aside from being at odds with the ARD's incorrect decision as to the binding nature of the Local 11 Content Producer Agreement, as discussed in Section I.C. above). Moreover, those earlier unfair labor practice cases are being held in abeyance and certainly should not have been addressed and decided against the Company at all, much less *sub silentio* and without the Company being afforded any due process, in the course of these unit clarification proceedings.[8]

As shown above, the ARD's decision has multiple errors and oversights in terms of the timing and nature of his comparisons. These errors and oversights in the ARD's decision call for review under Rule 102.67.

E. The ARD Misapplied The Board's Historical Exclusion Doctrine.

One of the core policies of the Act is to encourage parties to reach agreements through good-faith collective bargaining and to respect and honor such agreements when they are reached. NLRB v. Jones & Loughlin Steel Corp., 301 U.S. 1 (1937). Applying this core policy in the unit clarification context, the Board has long recognized that:

> "[c]larification is not appropriate … for upsetting an agreement of a union and an employer or an established past practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one

[8] While the Union had early on in these proceedings argued against the clear decisions set out in the Region 2 dismissal letters by pointing to the Complaint that issued in Region 13 on Local 41's charge there, the Union's counsel in the hearing conceded that the unfair labor practice charges in Chicago related only to the direct dealing allegations under Section 8(a)(2) and that thus those Region 13 unfair labor practice charges did not address the issues associated with the Company's establishing the Content Producer position as a non-bargaining unit one and assigning non-linear editing, shooting with hand-held digital cameras, and news writing to the Content Producers. (Tr. 3581-82.)

> of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express agreement."

Union Electric, 217 N.L.R.B. 666, 667 (1975). See also Plough, Inc., 203 N.L.R.B. 818, 819 (1973) (holding that "the Board does not normally use its power to police its certification to include in a unit by way of clarification, classifications or categories of employees who historically have been excluded"). The Board's historical exclusion doctrine thus recognizes that where the parties have themselves reached agreements as to the contractual exclusion of certain positions and followed those agreements as to the scope and limitations of a union's jurisdiction, those agreements should be honored and cannot be re-written or circumvented by unit clarification proceedings.

Here, the record contains extensive evidence regarding the parties' agreements as to the exclusion of Producer positions from any of the bargaining units, as well as each of the ancillary tasks of non-linear editing, new writing, and shooting with hand-held digital cameras. For example, Articles H and M of the Master Agreement unambiguously exclude producing from the Union's jurisdiction by stating explicitly that nothing "contained herein [shall] be deemed in any way to confer on members of the bargaining unit jurisdiction over producing news programs, or producing elements, portions, segments, inserts, stories or pieces for such programs." (Joint Exh. 1, pp. 118, 148.)

The record testimony was also extensive in showing that Producer positions are not bargaining unit positions under the Master Agreement and that the Union has never had jurisdiction over Producer positions at any of the Company's stations. (Tr. 294, 529-30, 562-63, 775, 1031-32, 1282, 2776, 2841, 3172, 3249-50, 3298.) In fact, the Master Agreement clearly states that any reassignment of a NABET-represented news writer to a Producer position in local news would require a conversion of that employee to non-unit status. (Joint Exh. 1, Sideletters

H-1, M-1, N-2, pp. 118-19, 151-52, 166-67.) Even one of the Union's own counsel had plainly stated in the earlier related unfair labor practice proceedings that "producers are not covered by the Master Collective Bargaining Agreement" (Local 11 Submission to Office of Appeals, dated August 12, 2010, p. 3) – something that was brought out in the Company's post-hearing brief but ignored by the ARD in his decision. The fact that the Company has the right to assign Producer tasks and functions to bargaining unit members and on occasion does so does not change the fact that by express agreement of the parties Producer positions are outside of the Union's jurisdiction, nor does it change the fact that the parties have respected the non-bargaining unit status of Producer positions. (Tr. 558.)

Throughout his decision, the ARD downplayed or simply ignored the extensive evidence showing that the Content Producer position is at its core a Producer position and thus one that has been historically excluded by the parties' express agreement from the Union's jurisdiction. The ARD ignored and disregarded the testimony of numerous witnesses – Content Producers, their managers, the persons who designed the Content Producer position, and even some of the Union's own witnesses – who made it clear that the job of Content Producer is a Producer job, with the ancillary tasks and functions of non-linear editing, shooting with hand-held digital cameras, and news writing. See WLVI, 349 N.L.R.B. at 683 (2007). The ARD also asserted, incredibly, that "it is not entirely clear" what Content Producer Tenille Gibson meant when she testified that she is "always producing" in her work as a Content Producer (ARD Dec., p. 39, fn.47) – and he ignored the testimony of numerous other witnesses who likewise explained that the core of their jobs as Content Producers is producing, with the full editorial responsibility and accountability that separates Producer jobs from the technical jobs in the various Union bargaining units. (Tr. 293, 330, 352, 364, 772-75, 850-51, 955, 1622, 1636, 1765-66, 1786-87,

1805-09, 2861, 3179-80.) Indeed, in looking to downplay and disregard the Producer core function of the Content Producers' work, the ARD even went so far as to delete through the use of ellipses the words "producing" and "producer" from his direct quotations of record testimony. (See ARD Dec., pp. 29, 38, 61; compare Tr. 1199, 1859, 2149.)

In his decision the ARD placed grossly disproportionate emphasis on those few Union supporters who testified that they were not really producing in their new jobs as Content Producers, but rather were spending most of their days doing the same photography, editing, and writing work that they had done earlier as bargaining unit members before applying for and becoming Content Producers, or that they were simply doing a combination of news writing and editing now as Content Producers. (ARD Dec., p. 77.) In doing so the ARD ignored contradictory testimony elicited on cross-examination. For example, in relying extensively on the New York testimonies of NABET-represented Content Producers Keith Feldman and Jeff Richardson – both open and strong Union supporters who resisted the Company's move to the Content Center model – the ARD ignored their own words in their own earlier annual performance reviews (brought out on cross-examination) wherein they said they were producing and doing a Producer job as Content Producers with many new and different tasks and functions. (Tr. 1352-64, 1403-10, 1413-15, 1423-26; Employer Exhs. 16, 17, 18.) The ARD also ignored and disregarded the testimony (in all four cities) of Company witnesses who emphasized that Content Producers are always producing in their new Content Producer positions. (Tr. 293, 352-53, 406-12, 839-40, 950-55, 1181, 1184, 1343-57, 1410, 1633-34, 1771, 1898, 1928-29, 1949-51, 2528, 2638-39, 2851-52, 2897-98, 3184-85, 3234, 3315.) The sentiments of a small handful of Union supporters who were opposed to the Company's move to the Content Center model cannot dictate the Section 7 rights of more than 90 Content Producers.

Similar to the explicit jurisdictional exclusions involving producing, the Company's right to assign non-linear editing and shooting with hand-held digital cameras to non-bargaining unit persons is also clear in the plain language of Articles H, M, and N, as well as Sideletters 11, 14, and 70 of the Master Agreement. (Joint Exh. 1, pp. 232-34, 241-42, 277-78.) The Company's former and current Heads of Labor Relations, Day Krolik and Andrew Herzig, both testified that these provisions of the Master Agreement were extensively negotiated and by their clear terms exist for the express purpose of allowing the Company the right to assign these tasks and functions either to bargaining unit persons or non-bargaining unit persons. For example, referring to the Company's right in Sideletter 11 to assign non-bargaining unit persons hand-held digital camera work, Mr. Krolik stated "[t]here was a great deal of discussion with respect to this provision. It was extremely important. And we ended up with what you see in the agreement." (Tr. 532-33.) (See also Tr. 506-13, 520-35, 1099-1104, 1150-51, 1495-96, 1510.) This evidence went unrebutted. As noted above, the ARD on this issue went directly against the earlier ruling of his Regional Director on this same issue. By disregarding this record evidence and that earlier ruling, the ARD prejudiced the Company's rights under agreements bargained and followed over many years, as well as the Section 7 rights of the Content Producers.

In addition, in stating that the A, M, N, and H agreements "permit non-covered employees to do unit work under limited circumstances" (ARD Dec., p. 11), the ARD materially mischaracterized the clear language of the Master Agreement. As the Master Agreement and the unrefuted testimony by Mr. Krolik and Mr. Herzig made clear, the Company negotiated for and obtained the right to assign non-linear editing, shooting with hand-held digital cameras, and news writing tasks and functions to non-bargaining unit persons, including but not limited to the new Content Producers. (Tr. 506-15, 520-35, 1029-32, 1099-1104, 1150-51, 1495-96, 1510.)

Indeed, Mr. McEwan was simply recognizing this when he agreed that the Content Producer job could be established as a non-bargaining unit position in New York in the earlier-referenced Content Producer Agreement. The ARD here again ignored the record evidence and the controlling Board law as to this issue.

In his decision the ARD also stated that the Content Producers' use of hand-held digital cameras rather than larger professional grade cameras used by NABET-CWA photographers "is immaterial" (ARD Dec., p. 72, fn.106), and that in his view the fact that Content Producers were doing a substantial amount of their work for the Internet, for NBC Non-stop, and for other non-broadcast platforms was likewise immaterial. (ARD Dec., p. 74.) In both instances, the ARD disregarded the parties' express agreements as followed and respected by both parties over the course of many years. As such, the cases cited and relied upon by the ARD – Berea Publishing Co., Oxford Chemicals, and Avco Corp. – are distinguishable and inapposite because there was no evidence in any of those cases that the agreements at issue spelled out any specific unit exclusions or what was and what was not within the Union's jurisdiction such as the parties have here. Even in the WLVI case there was no language regarding work being performed by non-bargaining unit persons or bargaining unit persons at the Company's discretion, even though the Board in that case still ruled in the employer's favor because the tasks and functions that had been done earlier by bargaining unit members were ancillary to the non-bargaining unit work that was at the core of the new position. WLVI, 349 N.L.R.B. at 685-86.

Mr. Krolik and others further testified that by express agreement of the parties and by their practices over the course of many years, the Union's jurisdiction was limited to the stations' broadcast operations and did not apply to cable operations, to the Internet, or to other non-broadcast platforms for which Content Producers are charged with providing content. (Tr. 331-

33, 565-68, 847-48, 978, 3661; Joint Exh. 1, Sideletter 55, pp. 266-67.) The testimony as to these agreements and as to the scope and limitations of the Union's jurisdiction over certain platforms and over certain tasks and functions went unrefuted. Here again the ARD simply ignored the Master Agreement that had been reached between the parties and that had been followed by the parties over the course of many years.

The proper application of the Board's unit clarification procedures is to clarify a unit regarding a new position when there is ambiguity. When, however, the parties have already reached agreement on these issues through good-faith bargaining, Board law as well as strong Board policy call for respecting and following those negotiated agreements reached through that good-faith bargaining. See Union Electric, 217 N.L.R.B. at 667. See also Plough, Inc., 203 N.L.R.B. at 819. Since the ARD ignored the agreements between the parties as to the exclusion of Producer positions from the different units, the agreements between the parties as to the broadcast-only limitation on the Union's jurisdiction, and the agreements between the parties as to the tasks and functions of non-linear editing, shooting with hand-held digital cameras, and news writing, the ARD thus ignored controlling Board law and policy. Accordingly, the ARD's decision calls for review under Section 102.67.

II. UNDER THE PROPER ACCRETION ANALYSIS, THE PETITIONS IN THIS MATTER FAIL AND SHOULD BE DENIED.

During the meeting with the Acting General Counsel wherein the decision to process the Union's unit clarification petitions was explained, the Acting General Counsel quite properly told the Company's representatives that in doing so the Board would apply its traditional accretion analysis in analyzing those petitions. Yet, and as the ARD's decision shows, the ARD did not do any accretion analysis at all in making his determinations as to the Union's petitions. As the record in this matter showed, had he done so the petitions would fail in every instance,

because the evidence showed that the Content Producers have their own separate group identity and because the Union failed to provide evidence that the Content Producers in the four cities have the requisite overwhelming community of interest with any of the bargaining units. Accordingly, under the required accretion analysis, the petitions fail under both prongs of the Board's test, as shown below.

A. The Content Producers In All Four Cities Have A Clear Separate Group Identity, Thus Independently Calling For Denial Of The Petitions In This Case.

The record evidence as to all four cities established that the Content Producers have their own separate group identity. That separate group identity comes from the fact that the Content Producers took on new ways to produce and present local news, and from the fact that they have a new job that is unlike anything that had existed before and unlike any other job in the new Content Center model at the Company's local stations. (See Tr. 752, 755, 1872-73, 1931, 2045, 2559, 2631, 2850, 3090-91, 3149-50, 3179, 3199-3200, 3301, 3381-82, 3445-46.) The record evidence of this separate group identity among the new Content Producers was both overwhelming and uncontroverted, and it came both from every Company witness who addressed the issue and even from Union witnesses who addressed the issue. In total, no fewer than 17 witnesses – again, from the Company and from the Union – testified clearly and unequivocally that the Content Producers have that separate group identity. (See Tr. 352, 2940 (V. Burns); 449 (M. McGinn); 749 (G. Midouin); 772-73, 811 (V. Gantt); 850-57 (O. Martinez); 955, 958, 971 (K. Lynch); 1872-73 (T. Gibson); 1929-32 (A. Borenstein); 2040-41, 2044-45 (A. Eisenhuth); 2258-59 (P. O'Donnell); 2631 (A. Vurnis); 2806-809 (E. Caballero); 2858-59 (K. Esparros); 3090-91 (M. Harris); 3149-50 (J. Alarid); 3264, 3290-91 (M. Piacente); 3481, 3492 (N. Templeton).

Against this clear and overwhelming record evidence, the Union did not present a shred of evidence or a single word of testimony or documentation suggesting that the Content Producers lacked that separate group identity. Rather, the Union's only rebuttal was its evidence that the various bargaining units under the Master Agreement likewise have their own separate group identity. This evidence has no relevance to these petitions since Board law focuses on the separate group identity of the Content Producers only because it is their Section 7 rights that lie at the heart of the matter. Indeed, if anything the separate group identity of the different bargaining unit groups refutes rather than supports the Union's position on this issue.

The fact that the Content Producers have their own separate group identity is independently dispositive, even before reaching the second prong of the Board's accretion test. This is so because the Board's accretion test takes into account the Section 7 rights of the employees targeted by the petition. Where those employees as a group have that separate group identity, the Union cannot have them placed into the bargaining unit by accretion, but rather only through the Board's regular representation channels (i.e., voluntary recognition or a Board-sponsored election). See, e.g., Archer Daniels Midland Co., 333 N.L.R.B. at 675.

While Board law makes the existence of a separate group identity for the Content Producers a necessary inquiry in the accretion analysis, the ARD did not focus at all on that part of the accretion standard anywhere in that 84-page decision. Indeed, nowhere in that 84-page decision did the ARD even mention the record evidence on the separate group identity of the Content Producers. In ignoring both the record evidence and the Company's argument in its brief, the ARD violated both the Company's rights with regard to these petitions and the Section

7 rights of the Content Producers. This failure by the ARD provides an independent basis for review of his decision.[9]

B. The Content Producers Do Not Share An Overwhelming Community of Interest With Any Of The Bargaining Unit Positions.

In addressing the overwhelming community of interest standard in a unit clarification case, the factors to be considered are the following: (1) the functional integration of the groups involved, involving more than just interaction; (2) the management and supervision of the target group versus the existing bargaining unit group or groups (i.e., do the groups have the same supervision or different supervision); (3) the places where the groups work physically; (4) the nature and level of interchange between the target employees and the employees in the existing bargaining unit; and (5) the collective bargaining history between the parties, including any historical exclusion of the target group from the existing bargaining unit or units. See Milwaukee City Ctr., LLC, 354 N.L.R.B. No. 77, 2009 WL 2998229, at *3 (Sept. 21, 2009); Safeway Stores, 256 N.L.R.B. at 924. While all of these factors are important, the Board has held that common day-to-day supervision and significant employee interchange are critical to any finding of accretion. Frontier Tel. of Rochester, Inc., 344 N.L.R.B. 1270, 1271 (2005)

[9] The Company sought to introduce evidence in the hearing that the Union had tried to organize the Content Producers and been unsuccessful, suggesting that even the Union acknowledged the Content Producers' separate group identity, but the Hearing Officer excluded that evidence based on his determination that employee sentiments were not relevant. (Tr. 3266-72; 3347-48.) While the Board has not decided this issue, the courts of appeals have recognized the relevance of the sentiments of the targeted employees in unit clarification cases. See, e.g., Baltimore Sun v. NLRB, 257 F.3d 419, 429 (4th Cir. 2001) (finding serious and prejudicial error where the hearing officer refused to accept evidence of employee sentiments, and stating that "it is difficult to imagine more probative evidence of employees' community of interest and group identity than the documentation of their sentiment about the proposed accretion"); Local 144, Hotel, Hospital, Nursing Home & Allied Servs. Union, SIEU v. NLRB, 9 F.3d 218 (2d Cir. 1993) (holding that "views of the employees to be accreted" was one of the factors to be considered in an accretion case). While the Company agrees with the reasoning and the holdings by those courts and preserves its rights with regard to the Hearing Officer's exclusion of this relevant evidence, the separate group identity of the Content Producers and the lack of an overwhelming community of interest with bargaining unit employees were both clearly established even without the excluded evidence as to the sentiments of the Content Producers themselves as to their desire to be part of any bargaining unit.

(citing E. I. DuPont de Nemours, Inc., 341 N.L.R.B. 607, 608 (2004)); Gitano Group, Inc., 308 N.L.R.B. 1172, 1174 (1992); Super Valu Stores, 283 N.L.R.B. 134, 136 (1987).

The issue under this accretion standard comes down to whether the targeted positions and the bargaining unit positions are so similar that the community of interest between the positions can fairly be seen as "overwhelming." Safeway Stores, 256 N.L.R.B. at 918. This unit clarification standard is a much higher bar than the Board's traditional community of interest standard for representation elections, taking into account the interests and Section 7 rights of the targeted group of employees. The Board will only grant an accretion petition applying that overwhelming community of interest standard if the Board can fairly and safely assume that the targeted employees would choose to be part of that existing bargaining unit. See, e.g., Archer Daniels Midland Co., 333 N.L.R.B. at 675. Obviously under this standard and these factors, mere interaction and even regular contact between employees or groups of employees does not satisfy the standard for accretion or even come close to satisfying that standard.

With respect to the critical factors of common day-to-day supervision and significant employee interchange, the Union has presented no relevant evidence with respect to either of these critical factors. To the contrary, multiple Company and Union witnesses testified that the Content Producers and bargaining unit personnel in the A, H, M, and N units have completely different and separate supervision. (Tr. 344, 658, 845-46, 955, 2038, 2533, 2806, 2858, 3021, 3101, 3118.) The mere fact that a bargaining unit photographer may on occasion get some direction from a Platform Manager or a Day Part Manager does not remove that photographer from his daily supervisor's authority. There is also substantial evidence in the record that the bargaining unit photographers, editors, and news writers do not carry the same editorial responsibilities and control as the Content Producers and therefore are not by any means similar

to them or interchangeable with them. (Tr. 293, 330, 352, 364, 772-75, 850-51, 955, 1622, 1636, 1765-66, 1786-87, 1805-809, 2861, 3179-80.) Again, simply because some of these bargaining unit employees may share a single function with the Content Producers, that does not make these two groups of employees interchangeable or mean that the two groups have an overwhelming community of interest, and the record reflects that in fact there is very little interchange between the jobs of the two groups in any of the four cities.

The Content Producers themselves established this lack of interchange by testifying that their work was similar to the work done by their fellow Content Producers, and they could not have been clearer or more emphatic in establishing that their work was very different from the pre-Content Center work of editors, photographers, or news writers. (Tr. 956-59, 971-73, 993-94, 1191, 1193, 1334-36, 1344-45, 1362, 1385, 1401-402, 1870-72, 1873, 1934-36, 1949-50, 1962, 2041, 2044-45, 2503-504, 2522, 2559, 2584-85, 2631, 2901-904, 2967-68, 2970, 3090-91, 3149-50, 3199-200, 3301, 3381-82, 3445-46.) In providing this testimony, they had in-depth personal knowledge, both because they had worked as news writers earlier in their careers and because they had worked with bargaining unit editors, photographers, and news writers for many years over the course of their careers. (Tr. 941-43, 1170-76, 1186-91, 1322, 1373, 1913-16, 1942-43, 2495, 2563-64, 2892-93, 2964.) Perhaps most telling of all was the testimony of a former Content Producer in Washington who applied for and became a Content Producer, having formerly spent many years as a bargaining unit photographer. (Tr. 2561-62.) Over the course of his ten months as a Content Producer, however, this individual came to recognize how vastly different his new job was from his former job, and based on that difference he asked for and received a transfer back to the bargaining unit photographer position, even though the move resulted in a loss of pay. (Tr. 2561-62, 2567, 2574, 2577, 2588-85.)

Based on the record evidence adduced in each of the four cities, it certainly cannot be said that the Content Producers would elect to be in the bargaining unit if given that choice. See Safeway Stores, 218 N.L.R.B. at 924; Archer Daniels Midland Co., 333 N.L.R.B. at 675. Indeed, the record evidence shows clearly that just the opposite is true. In New York, for example, the Content Producer Agreement allows for the Union to gain jurisdiction over the Content Producers through a Board-supervised election, and in the two and one-half years since that Content Producer Agreement the Union has not organized that potential unit of Content Producers at WNBC in New York. (Employer Exh. 10, ¶ 4.) Moreover, of the ten former Union members who were given the opportunity to stay in the Union under the Content Producer Agreement in New York, only five elected to remain in the Union there. (Tr. 683-84, 1042.)

Throughout these proceedings the Union also pointed to what it claimed was lower pay for Content Producers versus bargaining unit employees, lack of overtime, lack of shift differential, and other differences that in the Union's view would make life better for the Content Producers if they were in the Union. Contrary to the Union's argument, the Content Producer terms and conditions are not lesser terms but rather are simply very different terms based on an "all-in" salary in an exempt position – facts that undermine rather than support the Union's position. In any event, the Union's arguments that the pay and benefits on the bargaining unit side are better are of course things that the Union could (and can) argue in any organizing effort, but they do not in any way support the Union's position on accretion.

In that same regard, in all four cities there was no evidence suggesting that a majority of the Content Producers wished to be represented by the Union. Rather, the only showing of support that the Union could muster involved getting one or two Content Producers in each city who were unhappy about the Company's change to the Content Center model and who wanted

things to be the way they used to be in the pre-Content Center world. The fact that those Union members and former bargaining unit members are unhappy about the Company's move to Content Center is simply not grounds for accreting four groups of approximately 25 Content Producers each into much smaller bargaining unit groups in those four cities. Rather, those two or three Union supporters in each city must recognize and accept, as does the Board, that their fellow Content Producers have Section 7 rights that are recognized in the Board's standard for accretion.

The fact that there is some overlap between functions of the Content Producer position and certain bargaining unit positions does not prove that there is an overwhelming community of interest between the Content Producer job and any of those bargaining unit positions. Under the second prong of the Board's accretion test, the Union falls far short of showing an overwhelming community of interest between the Content Producer position and any bargaining unit job. As such, the ARD's decision as to these petitions here again ignored and disregarded substantial record evidence and went against reported and long-settled Board law, calling for review under Rule 102.67.[10]

[10] With regard to the Content Producers at the Company's station in Washington, the ARD reached the correct result in dismissing the Union's petition. The ARD was certainly correct in determining that the question concerning representation between the Union and AFTRA independently called for dismissal of that petition. (ARD Dec., pp. 83-84.) The fact that AFTRA is the proper bargaining representative for the Content Producers in Washington provides a separate and independent bar to any effort by the Union to gain jurisdiction over those Washington Content Producers, and the Company reserves all of its rights with regard to that issue.

CONCLUSION

For the foregoing reasons, the Company respectfully submits that the Board should grant review of the ARD's decision in this matter pursuant to Rule 102.67.

Respectfully submitted,

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Dated: December 15, 2011

STATEMENT OF SERVICE

I hereby certify that on December 15, 2011, I served the above electronically-filed Request For Review Of Respondent NBCUniversal Media, LLC on all parties and on the Acting Regional Director in Region 2, by e-mail and in accordance with NLRB Rule 102.114(i).

/s/ Michael A. Curley
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