

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

NBC UNIVERSAL, INC.

Employer

and

LOCAL 11, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO Case No. 02-UC-000619

Petitioner

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO Case No. 02-UC-000625

Petitioner

LOCAL 31, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO Case No. 05-UC-000403

Petitioner

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTIST Case No. 05 -UC-000407

Petitioner

LOCAL 41, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO Case No. 13-UC-000417

Petitioner

LOCAL 53, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO Case No. 31-UC-000323

Petitioner

DECISION ON UNIT CLARIFICATION PETITIONS

Pursuant to unit clarification petitions filed on February 4, February 18, February 27, and March 17, 2009, December 20, 2010, and January 4, 2011, an Order Consolidating Cases and Notice of Hearing was issued in this matter on February 4, 2011, in which it was ordered that a hearing be conducted before a duly designated hearing officer for the purpose of receiving testimony to resolve the substantial and material issues of fact raised by the aforementioned petitions.¹ Accordingly, a hearing was held before Hearing Officer D. Michael McConnell on the following dates in 2011 and at the indicated locations: March 14-16, 18, 21-22, 24-25, 29 (New York); April 13-15, 18-22 (Washington D.C.); May 9-13 (Los Angeles); May 23-27 (Chicago).

The parties were afforded a full and complete opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues and to argue orally.

Positions of the Parties

The NABET-CWA Petitioners contend that all Content Producers at NBC Universal, Inc., herein NBC or the Employer, must be included in the NABET-CWA bargaining unit(s) because they perform the same basic work previously performed by bargaining unit employees whose positions have been eliminated. In contrast, NBC argues that the Content Producers cannot be accreted to the NABET-CWA bargaining unit(s) because they have been “historically excluded” as “Producers” and do not share a community-of-interest with any extant NABET unit classification.

NBC further argues, with American Federation of Television and Radio Artists Petitioner, herein AFTRA, that the Content Producers at NBC’s owned and operated local news station in Washington DC, WRC, must be represented by AFTRA because they are currently covered by a collective-bargaining agreement between AFTRA and WRC and because of AFTRA’s asserted “exclusive jurisdiction” over news writing at WRC. AFTRA further contends that the WRC Content Producers should be included in

¹ The February 4, 2009, petition (13-UC-000417) was filed by NABET Local 41 in Chicago. The February 18, 2009, petition (31-UC-000323) by NABET Local 53 in Los Angeles. The February 27, 2009, petition (05-UC-000403) was filed by NABET Local 31 in Washington DC. The January 4, 2011, petition (05-UC-000407) was filed by AFTRA, in Washington DC. The March 17, 2009, petition (02-UC-000619) was filed by NABET Local 11 in New York. The December 20, 2010, petition (02-UC-000625) was filed by NABET-CWA, also in New York. One additional petition, 02-UC-000623, was filed and was included in the Order Consolidating Cases. However, that petition was subsequently severed from this proceeding by agreement of the parties in an Order Severing Case No. 02-UC-000623 issued by the Acting Regional Director on March 9, 2011.

the AFTRA unit because they share a community-of-interest with the Reporters at WRC, who are AFTRA-represented.

Upon the entire record in this case, the Acting Regional Director makes the following findings.

Findings

For reasons discussed at length below, I find that the Content Producers at NBC's New York, Los Angeles, and Chicago owned and operated local news stations are part of the NABET-CWA bargaining unit because they perform the same basic functions previously performed by NABET unit employees. I further find that the unit placement of the WRC Content Producers raises a question concerning representation that cannot be resolved through a unit clarification proceeding.

Background

NBC is engaged in the business of producing television news programming for both network and local news stations. The Network Division of NBC creates and distributes news that has a primarily national and international focus, while the Local Media Division of NBC creates and distributes local news at 10 owned and operated stations throughout the country. The Senior Vice President of Broadcast Operations is Matthew Braatz and the President of Local Media is John Wallace. Each local station has its own local news department and infrastructure and exercises independent editorial judgment in creating and producing news for its local market. The Director of News and Content at each local station is responsible for the day-to-day operations of the station.

The Employer's flagship station in the Local Media Division is WNBC in New York. Since 2009, WNBC's Director of News and Content has been Meredith McGinn. Ms. McGinn's boss is WNBC's Vice President of News and Content, who was Vickie Burns, until August 2010, and is now Susan Sullivan. (Ms. Burns is currently the Vice President of News and Content at KNBC in Los Angeles.) Ms. Sullivan's boss is WNBC Manager of News Operations Vern Gant. The Employer also has owned and operated local news stations in Washington D.C. (WRC), Los Angeles (KNBC), and Chicago (WMAQ).

For several decades, the National Association of Broadcasting Employees and Technicians (herein "NABET" or "the Union") has represented various classifications of employees at the Employer, including News writers, Editors, Photographers, electrical and technical employees. The represented employees have been covered by a series

of collective-bargaining agreements, the most recent of which expired on March 31, 2009. The collective-bargaining agreement (hereafter “the Master Agreement” or “the NABET-NBC CBA”) contains sub-agreements that apply to different groups of employees according to their job classification and, in some instances, their work locations. For example, all technical employees, including Editors and Photographers, are covered by a sub-agreement referred to as the “A” Agreement which is national in scope, while Newswriters are covered by either the “H,” “M,” or “N” Agreements according to their location (Chicago, Los Angeles, and New York, respectively).² The exception to this is at the Employer’s Washington D.C. station, WRC, where Newswriters are represented by a different union, AFTRA, which has a collective-bargaining agreement with WRC that also covers WRC’s Reporters and Desk Assistants.³ Reporters are not covered under the Master Agreement, and neither the AFTRA-WRC collective-bargaining agreement nor the Master Agreement covers Producers.⁴

For many years, broadcast or television news was the Employer’s traditional and principal platform for news distribution. Over the past decade, however, the Employer has faced a substantial decline in its broadcast news viewership as news consumers increasingly have made use of other “platforms”--24/7 cable, the internet, cell phones, and “out of home” sources such as screens in taxi cabs and on gas pumps--to obtain news. In order to respond to this shift in news consumption and improve the efficiency of its operations, the Employer, at the end of 2007, began contemplating a restructuring of its staffing for the creation and production of local news.

Towards the end of 2007, Senior Vice President of Broadcast Operations Braatz and President of Local Media Wallace conceived a project called “Project Phoenix” the

² The Master Agreement contains a “D” contract which covers employees who may be assigned to work on “new business” projects not within the exclusive jurisdiction of NABET, for example production intended for internet or mobile phone viewing. The parties disagree as to whether the classifications covered under these various sub-agreements are parts of a single unit or whether each should be treated as separate units.

³ AFTRA is an Intervener in these proceedings and has also filed a UC petition on its own behalf regarding the representation of the Content Producers at WRC.

⁴ I note that the “H,” “M,” and “N” Agreements of the Master Agreement do include some Producer titles, see *infra* fn. 12. Moreover, both the NABET Master Agreement and the AFTRA-WRC Agreement provide that covered employees may be assigned producing work as discussed more fully below. However, it appears undisputed that Show Producers and Executive Producers are not covered by the Master Agreement. Finally, as discussed more fully below, the current AFTRA-WRC collective-bargaining agreement (hereafter “the AFTRA-WRC CBA”) covers Content Producers as detailed in Sideletter #9 of that Agreement, signed in June 17, 2009.

goal of which was to develop a new process for creating and distributing local news across platforms, using the Employer's flagship station, WNBC, as a test site. The project involved the creation of a "Content Center" at WNBC that, rather than producing news principally for particular broadcast television shows, would produce news as "content" that could be readily adapted to the entire range of news platforms. If the project was successful in New York, the Employer would contemplate implementing a similar system at other local owned and operated stations. Mr. Wallace and Mr. Braatz presented the concept to Employer CEO Jeff Zucker during a management meeting and obtained approval for the project. Shortly thereafter, Vickie Burns was selected as WNBC's Vice President of News and Content.

The development and implementation of Project Phoenix was undertaken by a management team including WNBC General Manager Tom O'Brien, Senior Vice President of Broadcast Operations Braatz, WNBC Vice President of News & Content Burns, WNBC Director of News and Content McGinn, Vice President of Human Resources Geline Midouin, and Karen LaFleur and Doug Thurlow, who were the technology leads. The management team developed job descriptions for three new positions—Day Part Manager, Platform Manager and Content Producer--that would perform the essential functions of the Content Center. [The Content Producer position, described in detail below, is the one whose placement within or outside of the bargaining unit(s) is at issue here.⁵]

The Employer also sought out new technology that would enable the new work flow envisioned for the Content Center to operate smoothly and selected a system known as DALET. At the time, WNBC was using a system called INews to manage information, receive newswires, and make assignments and rundowns, as well as several separate systems for editing, primarily two nonlinear systems known as AVID and Final Cut Pro. DALET was selected as a comprehensive "asset management system" that would allow the user to gather material, including text, video, and information from all sources, write, edit, and distribute stories to all platforms, generate rundowns for broadcasts and make work assignments using a single system.

Although the launch of the Content Center at WNBC was initially projected for August 2008, it appears that the Content Center did not actually "go live" at WNBC until

⁵ Employer Vice President of Human Resources Midouin testified that the Content Producer position was "at core...a producer function" and that the Content Producer was conceived as "someone who could produce a good story from soup to nuts."

January 2009. Meanwhile, in September 2008, the Employer began national negotiations with NABET for a new Master Agreement, which negotiations are ongoing.⁶ Also, on September 19, the Employer signed an agreement with NABET Local 11 President Ed McEwan providing that NABET-represented employees who successfully applied for Content Producer positions at WNBC would be given the choice of remaining NABET-represented but that the position would otherwise be unrepresented.

In December 2008, the Employer made the decision to rollout the Content Center model in several other local media cities, specifically Washington DC, Chicago and Los Angeles. Employer Vice President of Labor Relations Herzig testified that the new positions of Content Producer, Platform Manager, and Day Part Manager, created with the Content Center, were the same in all locations where the Content Center was launched. Shortly thereafter, in or about January 2009, the Employer's Washington DC local news station, WRC, entered negotiations with AFTRA for a new collective-bargaining agreement. A Sideletter to the agreement, signed on June 17, 2009, covers WRC's Content Producers.

The Master Agreement:

It appears that NABET-CWA was certified as the representative of the Employer's technical and engineering employees in 1944. At the time, the Employer's Newswriters at various locations were represented by another union, the Writers Guild of America (WGA). According to Employer Senior Vice President of Labor Relations and Talent Negotiations, Day Krolik, the Newswriters at the Employer's various locations over time decertified WGA and selected NABET as their collective-bargaining representative. There is no evidence in the record regarding the process by which the Newswriters came to be covered by the NABET-NBC CBA.

⁶As provided in Art. VI Sec. 7.6 (F) of the NABET-CWA By-Laws, the NABET Sector is represented in its negotiations with NBC by a negotiating committee comprised of one elected representative from each network Local Union. According to NABET Local 41 former-President Ray Taylor, the negotiating committee at the time the current negotiations began included former Sector President Clark, Local 11 President McEwan, Local 31 representative Rich McDermott, current Local 53 President Steve Ross, and himself. According to Mr. Taylor, Mr. Clark raised the subject of the new positions to be implemented with the Content Center in December 2008 but Employer Vice President of Labor Relations Herzig, who was also involved in the negotiations, responded that it was too early to discuss the matter. Nevertheless, the parties have since exchanged proposals in regard to representation of the Content Producers. See Pet.L31 Exh. 1.

The most recent NABET-NBC CBA contains a Recognition Clause stating that “[t]he Union represents... for collective bargaining purposes all of the employees of the Company as defined in the applicable SCOPE OF UNIT clause, and the Company recognizes the Union as the exclusive bargaining agent for all such employees of the Company.” The first twenty-six Articles, referred to as “General Articles,” are applicable to all employees covered by the Master Agreement. The NABET-NBC CBA also contains fifteen “Individual Articles” (hereafter “Individual Articles” or “sub-agreements”)—including Articles A, H, M and N—that set forth terms and conditions of employment for employees working in specified job classifications and also, in some cases, specified locations. The Master Agreement defines the “Individual Articles” as “contain[ing] the description of each bargaining unit...the rates of pay and any unusual working conditions which have no general application.” Thus, while all employees are subject to the same grievance and arbitration provision, the same dues check off provision, the same benefits provisions, the same severance pay provisions, etc., laid out in the General Articles, specified categories of employees covered under the “Individual Articles” have their own seniority lists⁷, different wage rates, meal period and work hours provisions, and other distinct terms and conditions of employment. The “Individual Articles” are not separately signed and appear to have been negotiated at the same time as the rest of the Master Agreement, which is signed only by NABET-CWA Sector President John Clark and Employer’s Senior Vice President of Labor Relations and Talent Negotiations, Day Krolik. Although the employees covered under each of the sub-agreements have separate ratification procedures, according to Mr. Krolik, the Master Agreement must be approved by the employees covered by each sub-agreement in order to be “ratified.”

Articles A, H, M and N contain separate “SCOPE OF UNIT” provisions indicating the grouping of employees to which the terms stated in each Article are applicable. Article A (“The Engineering Agreement”) covers a national unit of technical employees, described as follows:

SCOPE OF UNIT Section ALI

The term "employee" as used in this Agreement applies to all the technical employees of the Company wherever located, employed in the Engineering

⁷All employees covered by the Master Agreement have both Company seniority and seniority within their own subgroup as defined by the Individual Articles. However, in regard to employees under the A Agreement, seniority is according to geographic location even though this sub-agreement is national in scope.

department of the Company, and shall be deemed to include all of the employees who are in the classifications set forth in Article A-III and all employees in additional classifications which may be added to Article A-III during the term of this Agreement pursuant to the jurisdiction of the Union as defined in this Agreement. ...

The subsequent provisions of Article A specify the kinds of technical equipment that fall within the Union's jurisdiction and identify circumstances in which other individuals may operate specified equipment:

Notwithstanding the foregoing, other than employees covered by this Agreement (i) may operate keyboard or other input devices for the purpose of visually determining the format, layout, size of font, or design of material, provided that any decisions reached on such matters by such other persons will be presented to employees covered by this Agreement for entry into the memory or storage of the device or for use live, provided further that such other employees may enter material into the memory or storage of the device on a temporary basis for the purpose of making the determinations described above, and provided further that a tape, cassette or similar memory or storage medium prepared by such other persons may be utilized only for the purpose of conveying information to the NABET-CWA-represented employee who will make entry into the memory or storage, or to others for the purpose of making the determinations described above, but such tape, cassette or similar memory or storage medium will in no case be used for such entry or for use directly to air or for any other purposes...; or (ii) may operate keyboard or other input devices for the purpose of creating, composing, or producing sophisticated, complicated or advanced graphic or scenic displays or effects, which require operation by a person with special knowledge of the subject matter, and where the proper artistic effect requires the operation of the keyboard or other input devices by such person and such person has been responsible for the creation of a similar type of product or effect by other than electronic means; ...

Individuals described in subparagraphs (i) and (ii) above may utilize the operating control of the devices described herein ...during other than on-air performance. Such individuals may also utilize such operating control on-air if it is for their own performance. In addition, such individuals may operate the keyboard and/or operational controlling device(s) of any or all devices described herein for the purpose of completing his or her creation, composition, production or modification when such equipment is used in conjunction with any other device(s) described herein.

It is clear that operation of specified equipment during on-air performance is reserved to covered employees, except where noncovered employees may be operating such equipment in regard to their own performance. Moreover, noncovered employees may operate specified equipment in order to finish material they are creating, composing, producing or modifying.

Article H, which applies to the Employer's Chicago location, covers employees engaged in news writing, defined as follows:

...[A]ll News and News Special Events Writer(s) now or hereafter engaged by the Company at its Chicago office to write, rewrite, condense, process, or edit news material. Not included are persons, who under individual contract with the Company, write and broadcast their own material (referred to herein as "newspersons"⁸), provided, however, that nothing shall preclude such individuals from writing and/or otherwise preparing news material...for their own and/or others' on-the-air use....

Subsequent provisions define the duties of the employees covered:

The only exclusive duties of News and News Special Events Writer(s) shall be the original writing of news material for news programs produced by the News and News Special Events Department of the Company (excluding news documentary programs or auditions, and programs prepared by newspersons), except that (i) newspersons may write and/or otherwise prepare news material ...for their own and/or others' on-the-air use, and (ii) Senior Producers in Network and Local News; the Assistant News Director, Producers (of shows) and Managing Editor in Local News, and Executive Producers in Network and Local News may write any such material for any use or purpose, and (iii) other Producers, including, but not limited to Field Producers, may also write any such material, but only for any elements, portions, segments, inserts, stories or pieces arising out of or in connection with their producing work. It is understood that the exceptions in (ii) and (iii) apply to successor titles and persons performing similar functions.

Nothing in this Agreement shall preclude the Company from assigning any non-exclusive duties to News and News Special Events Writer(s), including but not limited to producing...news material, supervising its editing, and taking any notes ...with respect to such material.

Article M applies to News writers at the Employer's Los Angeles location, defined as follows:

...[A]ll News and News Special Events Writers now or hereafter engaged by the Company at its Los Angeles office to write, rewrite, condense, process or edit news material and to all Editorial Assistants now or hereafter engaged by the Company in the News Department at its Los Angeles office. Not included are commentators who under individual contract with the Company write and broadcast their own material (referred to herein as "newspersons"), provided, however, that nothing shall preclude such individuals from writing and/or otherwise preparing news material...for their own and/or others' on-the-air use...

⁸ Unfortunately, there is no record testimony clarifying the meaning of the designation "newspersons" here. However, I think it may be understood that this designation includes Anchors and reporters who, according to the testimony of several Employer witnesses, may negotiate individual employment contracts with the Employer.

As in the H Agreement, subsequent provisions elaborate the “exclusive duties” of the covered employees, the circumstances in which such duties may also be performed by non-covered employees, and additional duties that the covered employees may perform:

The only exclusive duties of News and News Special Event Writer(s) shall be the original writing of news material for news programs produced by the News and Special Events Department of the Company (excluding 'news documentary programs or auditions, and programs prepared by newsmen), except that (i) newsmen may write and/or otherwise prepare news material...for their own and/or others' on-the-air use..., and (ii) Senior Producers in Network and Local News; the Assistant News Director, Producers (of shows) and Managing Editor in Local News; and Executive Producers in Network and Local News may write news material for any use or purpose, and (iii) other Producers, including, but not limited to, Field Producers, may also write any such material, but only for any elements, portions, segments, inserts, stories or pieces arising out of or in connection with their producing work. It is understood that the exceptions in (ii) and (iii) apply to successor titles and persons performing similar functions.

Nothing in this Agreement shall preclude the Company from assigning any non-exclusive duties to News and News Special Events Writer(s), including, but not limited to, producing (including field producing)...news material, supervising its editing, and taking any notes...with respect to such material.

Finally, the N Agreement covers the News writers at the Employer's New York location, defined as follows:

This Agreement covers all staff Radio and Television Newswriters (including those staff Newswriters assigned to perform the functions of a News Editor or a Producer), and all staff News and Feature Assistants, and all Desk Assistants, now or hereafter employed by the Company's New York office, who perform the duties set forth in Article N-II of this Agreement.

The scope of this Agreement does not cover:

...(5) Persons who write and/or otherwise prepare news material for their own on-the-air use, including previewing and supervising the editing of film or tape gathered by themselves for which they write and narrate a report (referred to herein as "newsmen"); provided, however, that nothing shall preclude such individuals from writing and/or otherwise preparing news and/or feature materials...for their own and/or others' on-the-air use....

Again, subsequent provisions elaborate the “exclusive duties” of the covered employees, circumstances in which such duties may be performed by non-covered employee, and additional work that may also be performed by covered employees:

The only exclusive duties of Newswriters shall be the original writing of news and feature materials for live and recorded...news, news special events and other news actuality programs (excluding documentaries and auditions), except that (i)

newspersons may write and/or otherwise prepare news and/or feature materials... for their own and/or others on-the-air use...; and (ii) Senior Producers in Network and Local News, the Assistant News Director, Producers (of shows) and Managing Editor in Local News, and Executive Producers in Network and Local News may write news and/or feature materials for any use or purpose; and (iii) other Producers, including, but not limited to Field Producers, may also write such materials, but only for any elements, portions, segments, inserts, stories or pieces arising out of or in connection with their producing work. It is understood that the exceptions in (ii) and (iii) apply to successor titles and persons performing similar functions.

...Nothing in this Agreement shall preclude the Company from assigning any non-exclusive duties to news writers, including but not limited to, producing (including field producing)...news and/or feature materials, supervising its editing, and taking any notes...with respect to such materials.

The H, M, and N Agreements also contain nearly identical provisions allowing any person employed at any other office of the Employer primarily for the purpose of preparing news material to temporarily perform that work at the location covered by the relevant sub-agreement as long as such interchange is not for the purpose of replacing Newswriters at the location covered by the relevant sub-agreement.

As described, it is clear that the A, H, M and N Agreements permit unit employees to do some amount of “nonexclusive” work and also permit non-covered employees to do unit work under limited circumstances. For example, the “Scope of Unit” provisions of the H, M and N Agreements allow Field Producers to perform news writing but only in connection with their producing work. (There does not appear to be any limitation on the amount of non-exclusive “field producing” work that may be performed by covered employees.) The Master Agreement places additional limitations on the transfer of work that has previously been performed by covered employees out of the unit. Article VI, “Transfer of Work,” states that “in respect to work or functions which in the past have been performed for the Company both by persons within and without the Unit the Company may continue to have such work performed outside the bargaining unit *to a degree no greater than heretofore* (emphasis added).”⁹

⁹ The H, M, N, and A Agreements also provide wage rates for various specified job classifications and contain specific provisions regarding seniority, work hours, credits, vacations, use of materials, and meal periods. The wage rates in the H and N Agreements for comparable job classifications appear to be identical, while the wage rates in the M Agreement are somewhat lower. The H, M and N Agreements all include wage rates for some “producer” positions. For example, all of these sub-agreements provide wage rates for “Producers” of ½ hour and 1 hour long shows or segments, while the “M” Agreement also includes wage rates for “Sky News Producers” and the “N” Agreement includes wage rates for “Field Producers” and “Associate Producers” of ½ hour and 1 hour long shows or segments. The sub-agreements’ provisions in

The Master Agreement also contains numerous Sideletters¹⁰, several of which address the performance of "nonexclusive" work by unit employees and unit employees' performance of work in job classifications other than their own. Thus, Sideletter 50, negotiated by the parties in 1990 and referred to as the Crossover Sideletter, defines the circumstances in which employees covered by the H, M, and N Agreements may perform work covered by the A Agreement and vice versa. Sideletter 50 provides:

Newsriters (hereafter referred to as "employees") under the H, M and N Contracts may, in combination with their normal work functions, be assigned to operate any technical equipment in connection with the shooting, recording and/or technical editing; Employees under the A Contract (hereafter referred to as "employees") may, in combination with their normal work functions, be assigned to perform any Newswriter functions. ...

Nothing in this Sideletter shall enable an employee to "crossover," i.e., to perform any work which would otherwise fall within the exclusive duties of a NABET CWA-represented unit other than his or her own..., unless the work is combined with...other work or functions which [] such person normally performs, and [] are in connection with the same program or the same material. Such person need not perform all of the work in connection with such program or material.

It is clear that the Crossover Sideletter permits employees covered by the A agreement to perform work covered by the H, M, and N Agreements (and vice versa) in regard to material as to which the employee is also performing his habitual work. Indeed, Employer Senior Vice President of Labor Relations and Talent Negotiations Krolik testified that the term "video journalist" first appeared in the Master Agreement in this Sideletter in order to designate covered employees who "performed both M contract Newswriter functions and A contract technical functions."

regard to seniority, use of materials, and credits are very similar, while provisions in regard to meal periods, work hours, and vacation differ more markedly. The M Agreement contains unique provisions in regard to the use of Editorial Assistants and the A Agreement contains numerous unique work-specific provisions, for example a provision concerning "Equipment Excessive in Weight," not found in the other Agreements.

¹⁰ Because the most recent Master Agreement has expired and the parties are in the process of negotiating a successor agreement, there appears to be some uncertainty as to whether these Sideletters remain in effect. Sideletter 4 states that the sideletters in the contract are "deemed to be in effect for the period of the current contract." However, Employer Executive Vice President of Labor Relations Herzig testified without contradiction that in practice the parties continued to abide by the Sideletters even after the expiration of the contract.

Sideletter 54, also negotiated in 1990 and referred to as the Hyphenate Sideletter, addresses circumstances in which covered employees may be assigned “non exclusive” work in addition to their regularly assigned work:

Either management or a NABET-CWA-represented employee may initiate discussions which could lead to the assignment of functions to such employee other than those which he or she usually performs, which functions may or may not be covered by another collective bargaining agreement. ...It is agreed that such assignments shall not constitute a precedent nor an expansion or diminution of the jurisdiction set forth in this Agreement, nor shall such assignments entitle any employee to continue to be given such assignments.

...

Working conditions for employees assigned such additional functions shall be as follows:

(a) In any week in which an employee performs functions which are reserved exclusively to employees covered by this Agreement and other additional functions..., the employee shall, if the additional functions are not covered in a collective bargaining agreement, other than this Agreement,...work under the conditions of this Agreement.

(b) In any week in which an employee performs functions which are reserved exclusively to employees covered by this Agreement and other additional functions..., the employee shall, if the additional functions are covered in a collective bargaining agreement, other than this Agreement,... receive no less than the minimum provided in this Agreement or the other agreement, whichever is higher....¹¹

Employer witnesses and Petitioner witnesses testified that unit employees were assigned producing work under the Hyphenate Sideletter and received a “producer’s upgrade” in pay whenever this occurred. In contrast to Sideletter 50, the Hyphenate Sideletter, in allowing unit employees to perform non-exclusive work, does not appear to require that the assignment be limited to material as to which the unit employee is also performing his habitual functions. Moreover, it is clear that such assignments will not be construed as expanding or diminishing the jurisdiction set forth by the Master Agreement, although this Sideletter must of course be read in conjunction with the Master Agreement’s “Transfer of Work” provision, discussed above.

Also significant here are Sideletters 11, 14 and 70 which deal with the use of particular technologies by unit and nonunit employees. Sideletter 11 concerns the use of handheld digital camera (herein Prosumer cameras):

¹¹ This Sideletter also provides that in any week in which a covered employee performs only work not covered by the Master Agreement, the basic economic provision of the Agreement (wages and benefits) and specified additional provisions will continue to apply to that employee but the rest of the Agreement will not.

The Company recognizes and appreciates the unique contribution its NABET-CWA represented engineers have made on a daily basis throughout the years in gathering material for broadcast by the Company, and it is committed to continuing to use its NABET-CWA-represented engineers as its primary workforce in the future for such work. However, the parties recognize that, due to technological advances, it may be desirable for the Company to assign other than NABET-CWA-represented engineers at times to gather material for broadcast utilizing digital cameras capable of being hand-held (including, but not limited to... cameras generally marketed as "consumer," or "prosumer" or "professional consumer"). Therefore, the parties agree as follows regarding the utilization of such digital cameras by such non-unit personnel:

1. Non-unit persons...may use such cameras when such use is combined with ...other work or functions which (i) such person normally performs, (ii) are outside the scope of duties of a NABET-CWA-represented Engineering employee, and (iii) are in connection with the same program or same material.
2. ...[S]uch person need not perform all of the work in connection with such program or material....
- ...
7. No NABET-CWA-represented engineer on regular staff as of March 31, 2006 shall be laid off during the period April 1, 2006 through March 31, 2010 as a direct result of the use of such cameras by non-unit persons in accordance with the terms this Sideletter.

Once again, Sideletter 11 makes clear that while nonunit employees may be assigned to use handheld cameras such assignment must be in connection with the same material or program as to which the employee is also performing his habitual functions.

Sideletter 11 also contains a provision reiterating the allowance established by the Hyphenate Sideletter for unit employees, specifically those covered by the A Agreement, to perform "producer" duties "in combination with their normal work functions." (It is not entirely clear whether this language limits such assignments to material in regard to which the unit employee is also performing his habitual functions.)

Sideletter 14, referred to as the Computer Sideletter, establishes the freedom of unit and nonunit employees to operate computer systems in the performance of their work and makes clear that such equipment is not included in the "technical equipment" covered by the A Agreement of the Master Agreement. The issues covered in this Sideletter are elaborated in Sideletter 70, known as the Nonlinear Editing Sideletter, which specifically concerns the use of computer editing technology by both unit and non unit employees.

The Nonlinear Editing Sideletter enables the use of new computer editing technology by both unit and non unit employees while protecting the performance of unit

work from too great incursions by nonunit employees. Specifically, the Sideletter recognizes the desirability of having unit employees perform nonlinear editing work and employs the concept of "editorial responsibility" to delineate the circumstances in which such work will be covered by the Master Agreement. Thus, the Nonlinear Editing Sideletter, states:

During the 1994 negotiations for a new Master Agreement, the parties agreed that the Computer Sideletter [14] gives the Company full discretion in making assignments to nonlinear computer editing systems such as AVID, ImMIX, Lightworks and Quantel Editbox which, it is agreed, are included in the definition of computer systems as set forth in [] that Sideletter. To encourage the Company to assign NABET-CWA represented engineers to operate such non-linear computer editing systems, the parties agree as follows:

1. The Company recognizes the value in having NABET-CWA-represented engineers operate such non-linear computer editing systems. Toward this end, the Company will provide training, as necessary, to engineers, and any staff engineer not so trained may seek training pursuant to Sideletter 58.

2. Persons employed by NBCU who are assigned by the Company to operate such non-linear computer editing systems to "edit" material for broadcast as part of a program covered by the Master Agreement, but who at no time are responsible for the editorial content of program material which they are "editing" (hereinafter "editorial responsibility"), shall be covered by the "A" Contract when they perform such function. When NABET-CWA-represented engineers are given editorial responsibility, they shall continue to be covered by the "A" Contract while exercising such responsibility. ...[N]othing herein precludes NABET-CWA-represented engineers from being assigned such functions or given some editorial responsibility.

"Editorial responsibility" is the duty to make a decision(s) and/or a judgment(s) (which decision(s) and/or judgment(s) may include elements of an artistic or creative nature) with respect to the content of program material during the process of assembling or producing a program, or any segment thereof.

It is clear that unit employees assigned nonlinear editing work that does not involve the exercise of "editorial responsibility" will be covered by the "A" Agreement and will remain covered by that Agreement in the event they are assigned editing work that involves exercise of editorial responsibility, as defined by this Sideletter.

Finally, Sideletter 55 regards revisions to the Master Agreement during the 1987 negotiations, limiting coverage of the Agreement to certain television and radio stations and operations as well as other entities and operations covered by the previous agreement. This Sideletter specifies as follows:

[A]mong other operations and entities excluded from coverage of the Master Agreement are (i) any direct broadcast satellite operations or business, (ii) Videotext or similar systems or operations (except Teletext), (iii) any form of cable or other non-over-the-air operation or business including but not limited to, CNBC, Cablevision and regional cable news operations...and (iv) any subscription or home video business or operation.

This will further confirm our understanding that the Master Agreement also has no application to any material produced by the Company for any such operations or entities or to any service provided by the Company for any such operations or entities.

There is no record evidence in regard to the background to the negotiation of this Sideletter, and it is unclear to what extent, if at all, the “operations,” “entities” or “business” referred to include or are in any way related to “content” produced by the Employer for various platforms other than television broadcast.¹²

Under previous versions of the Master Agreement, the parties have participated in many grievances over the years in regard to jurisdictional issues, in particular the performance of field production work.¹³ This matter was the subject of an arbitration proceeding in Burbank in February 1971. The grievance concerned the assignment of a former KNBC Newswriter who was promoted to the non-bargaining unit position of Senior Producer but continued to perform “line producer” work that he had also performed while a NABET-represented News Writer. The arbitrator determined that “producer” work was regularly performed by both unit and nonunit employees at KNBC and that the contract between the parties expressly permitted this, as evidenced by the

¹² Thus, Employer Senior Vice President of Labor Relations and Talent Negotiations Krolik testified generally that this provision has been understood as limiting NABET’s jurisdiction to the Employer’s broadcast operations. However, in my view, the scarcity of specific evidence in regard to the application of this provision does not permit a finding as to whether or to what extent it may limit NABET’s jurisdiction over unit employees who create “content” for use on various non-broadcast platforms.

¹³ Article XX, Section 20.10 of the Master Agreement, gives the parties the right to use their grievance and arbitration procedures to address disputes in regard to, inter alia, the “Transfer of Work” provision of the parties Master Agreement. Moreover, Stipulation 12 of the Master Agreement states that “[a]ny claim by NABET-CWA that the jurisdiction of NABET-CWA has been...impaired, altered or limited...shall be submitted under the grievance and arbitration provisions of the Master Agreement” and that “[i]n the event the Company assigns work claimed by NABET-CWA to come within its jurisdiction to employees other than NABET-CWA members, the Union has the right to file a grievance and process the grievance under the grievance and arbitration provisions of the Master Agreement.” The Master Agreement does not state that the parties will seek a remedy to jurisdictional disputes only through the grievance and arbitration process.

“Transfer of Work” provision.¹⁴ An arbitration in September 1973 took up the question whether a WNBC managerial employee could be permitted to perform “field producer” work which was often assigned to NABET-represented Newswriters. The Arbitrator in that matter reached a similar conclusion that the parties’ practice and the express terms of their contract made clear that such work could be performed by both represented and nonrepresented employees, so long as the distribution of that work was consistent with the Employer’s past practice.

The parties have also participated in grievances regarding the application of the Master Agreement’s “Transfer of Work” provision. Thus, in May and June 1988, NABET Local 41 and the Employer arbitrated a grievance concerning the Employer’s layoff of a NABET-represented Assignment Desk Assistant and its assignment of all work previously performed by her to an unrepresented Researcher. The arbitrator concluded that, although various tasks performed by the Desk Assistant have on occasion been assigned to nonunit employees, nevertheless the Union had “exclusive jurisdiction” over the position of Desk Assistant. The arbitrator further concluded that the Employer’s transfer of the Desk Assistant functions to a nonrepresented Researcher while laying off the unit employee who previously performed that work violated the “Transfer of Work” provision of the Master Agreement.

In addition, the parties have on occasion entered into agreements regarding work that is not covered under the Master Agreement in particular instances. For example, in July 2007, Employer Executive Vice President of Labor Relations Herzig and NABET Sector President John S. Clark signed an “Olympics Agreement” establishing terms and conditions for bargaining unit employees who were assigned to cover the Beijing and Vancouver Olympics on location. The Agreement specifies the minimum number of bargaining unit employees to be offered this work, as well as hours, compensation, per

¹⁴ Although the arbitration was brought under a much earlier version of the parties’ Master Agreement, certain general observations of the Arbitrator in regard to jurisdictional complexity are still relevant to the parties’ most recent Master Agreement:

The nature of this industry makes it particularly difficult to draw “hard and fast” jurisdictional lines. The record...reveals that some work assignments, both within and outside the unit; [sic] merge into one another in almost imperceptible ways. This blurring of jurisdictional lines becomes especially apparent as one ponders the pertinent Contract provisions dealing with work assignment. There are several provisions...which contain language giving NABET exclusive jurisdiction over certain kinds of work. Many other areas, particularly those involving basic decisions as to program content, are clearly within the province of Management. In between this clear demarcation between Company and Union jurisdiction is a twilight zone where work might properly be assigned to NABET employees, to non-represented employees or to both...

diem rates and other terms and conditions unique to the performance of this overseas work.

The NABET Local 11 Agreement:

In or about September 2008, as the rollout of the Content Center initiative at WNBC was getting underway, the Employer approached NABET Local 11 to discuss the changes that the launch of the Content Center would create. Employer Executive Vice President of Labor Relations Andrew Herzig met with NABET Local 11 President Ed McEwan. Mr. Herzig explained that the Employer viewed the newly-created "Content Producer" position as essentially a "producer" position, hence outside the unit, but also as a position that would involve shooting, writing and editing. Mr. Herzig and Mr. McEwan discussed the likely reduction in the need for Newswriters, Editors, and Photographers that would result and the benefit of encouraging employees in those classifications to apply for the new positions.

As previously indicated, Mr. Herzig and Mr. McEwan signed an Agreement on September 19, 2008. According to this Agreement, NABET-represented employees who successfully applied for "Content Producer" positions would be given the choice of remaining NABET-represented but the position would otherwise be unrepresented. The Agreement provided that employees who elected to remain NABET-represented would be covered by the "D" Agreement with certain modifications. Specifically, the Local 11 Agreement recognized the "Content Producer" position as an "exempt" position under the FLSA, thus not entitled to overtime, night shift differential, short turnaround, holiday or any other premium pay or penalties as Section D4.1 of the "D" Agreement would otherwise require. The Local 11 Agreement also provided that the application of the "D" Agreement would be consistent with the other contract provisions regarding assignment of non-unit persons, including specifically the "A" and "N" Agreements and Sideletters 11, 14 and 70. In regard to seniority, the Local 11 Agreement provided that the employees would retain already-accrued and continue to accrue company seniority and would retain but cease to accrue seniority under the "A" or "N" Agreements.

Finally, the Agreement contained a provision stating that "NABET-CWA agrees that it will make no claims to represent any non-NABET-represented Content Producers employed by WNBC except in the event such employees elect NABET-CWA as their bargaining agent in an election supervised by the NLRB." The Agreement was not signed by NABET-CWA Sector President John Clark and it does not appear that it was reviewed or approved by Mr. Clark. Indeed, according to NABET Local 31 President Carl

Mayers, Mr. Clark held a telephone conference in October or November 2008 with the various Local Presidents, including Local 11 President McEwan, Local 53 President Michael Peterson, then-Local 41 President Ray Taylor, and himself to discuss the Local 11 Agreement. According to Mr. Mayer, Mr. Clark informed them during the conference call that they must not sign any such agreement with the Employer. Mr. Clark explained that the representation of the Content Producers was a national issue to be handled by the NABET-CWA Sector (hereafter “the Sector”) during national negotiations then underway.¹⁵

The parties dispute whether NABET Local 11 President McEwan had authority to sign this agreement either on behalf of Local 11 or on behalf of the Sector as a whole. According to NABET-CWA’s By-Laws, describing the organizational structure of NABET, “[t]he Unit of organization within the Sector shall be the Local Union. All groups of members chartered as Local Unions shall be entitled to all the rights, powers, and privileges pertaining thereto as provided in the By-Laws and Rules of NABET-CWA.” The By-Laws state that all collective-bargaining agreements shall be “entered into in behalf of the membership affected thereby solely by NABET-CWA as the contracting party” and signed by the Sector President “or his designee” but further specify that “[i]n the event that only one (1) Local is involved in the agreement, it shall *also* be signed by the Local President (emphasis added).”

Although it is clear that Local Unions routinely resolve grievances regarding their members, the record provides limited evidence in regard to the Locals’ independent authority to enter into agreements with the Employer. Employer Vice President of Labor Relations Herzig testified in regard to three such agreements between NABET Local 11 and the Employer.¹⁶ Mr. Herzig conceded that these agreements did not remove

¹⁵ Mr. Mayers’ testimony regarding the telephone conference is unrebutted, although Local 41 President Taylor did not recall the telephone conference when he was asked about it during his testimony.

¹⁶ Specifically, the Employer signed an agreement with Local 11 referred to as the “Telemundo Agreement” in 2008, that permitted NABET represented engineers at WNBC to perform work of the kind generally performed by those employees but in connection with a network program, Telemundo, that the Employer had temporarily decided to operate out of the WNBC location. In July 2009, the Employer and Local 11 entered into another agreement, referred to as the “Wake Up with Al” agreement, regarding a program produced out of the Employer’s Atlanta location but whose host, Al Roker, was located at WNBC in New York. The Agreement allowed NABET represented employees located in New York to perform work in connection with this Atlanta-based program. In addition, the Employer and Local 11 signed an agreement in regard to “The Dr. Oz Show,” a program produced by another company that rented studio space at the

NABET-represented employees from the bargaining unit or permit them to opt out of the unit but simply enabled them to perform work that the Employer was not obligated by the Master Agreement to assign to them.¹⁷

AFTRA-WRC Negotiations:

In January 2009¹⁸, WRC Director of News Edwards, Employer Vice President of Human Resources Manning and Employer Vice President of Labor Relations Andrew Herzig met with AFTRA Executive Director Patricia O'Donnell to negotiate a new collective-bargaining agreement. The previous collective-bargaining agreement between AFTRA and WRC had expired in 2004. At the outset of the negotiations, Mr. Edwards, Ms. Manning and Mr. Herzig described the plans for the launch of the Content Center and the new positions that would be created. They informed AFTRA Executive Director Patricia O'Donnell that the new Content Producer position would be an exempt position and took the view that the position should be unrepresented. According to Ms. O'Donnell, the WRC representatives further indicated that the Content Producer position would be a writing position and might involve some on-air work.¹⁹ AFTRA took the position that it had exclusive jurisdiction over news writing and that the Content Producer position, as described, would thus necessarily be AFTRA-represented.

During a negotiation session towards the end of January, Mr. Herzig mentioned the agreement reached with NABET Local 11 in New York and proposed that a similar agreement be reached with AFTRA. Although Ms. O'Donnell agreed that current AFTRA-represented employees who became Content Producers should continue to be AFTRA represented and that current NABET-represented employees who became Content Producers should continue to be NABET represented, she

Employer's New York location. This agreement enabled NABET represented technical employees at the Employer's New York location to support the show's operations.

¹⁷ Employer Vice President of Labor Relations Herzig also conceded that, apart from "The Dr. Oz Show" agreement, the local agreements did not alter the terms of the Master Agreement in any way. [According to Mr. Herzig, "The Dr. Oz Show" agreement provided that NABET represented technical employees assigned to work on the show be covered by the A Agreement but altered the meal period provision, which was incompatible with the taping schedule for the show.]

¹⁸ All dates hereafter are in 2009 unless otherwise indicated.

¹⁹ In response to the question whether the Content Producer position was described by the Employer as essentially a "Producer" job, Ms. O'Donnell stated: "No. In fact, the duties on the [job description] sheets said desktop editing, writing, producing and gathering content."

rejected the Local 11 Agreement to the extent it allowed such represented employees' continued representation to be at the employees' option. Moreover, Ms. O'Donnell insisted that new hires for the Content Producer position would have to be AFTRA represented.

AFTRA Executive Director O'Donnell's instructed AFTRA Deputy Executive Director George Wright to contact the NABET Sector President John Clark on February 5 via email to obtain further information about the background to the Local 11 Agreement. In a reply email, Mr. Clark explained that Local 11 President McEwan had signed an agreement that "isn't very favorable to us" and also stated that he viewed the creation of the Content Producer position as an attempt by the Employer to de-unionize its local news stations. On or about February 9, Mr. Wright and Ms. O'Donnell contacted NABET Local 31 President George Mayers to discuss the representation of the Content Producers at WRC.

There is competing testimony regarding the content of this conversation. It is undisputed that AFTRA Executive Director O'Donnell proposed that formerly represented employees who became Content Producers should continue to be represented by whichever union had previously represented them but that new hires would be represented by AFTRA. AFTRA Deputy Executive Director Wright and Ms. O'Donnell both testified that NABET Local 31 President Mayers responded by stating that the proposal was fine with him but that the Employer would never agree. In contrast, Mr. Mayers denies that he indicated acceptance of Ms. O'Donnell's proposal. On the contrary, Mr. Mayers testified that he told Ms. O'Donnell that he could not discuss the Content Producer issue because it was a subject to be handled by the Sector, which was at that time in negotiations with the Employer for a new Master Agreement. Ms. O'Donnell and Mr. Wright deny that Mr. Mayer made any mention of the Sector during this conversation.²⁰ It is undisputed that Ms. O'Donnell had no further discussions with Mr. Mayer regarding her proposal and that no agreement was ever set down in writing between the unions in regard to the representation of Content Producers at WRC.

²⁰ In light of Mr. Mayers' un rebutted testimony regarding the October/November 2008 telephone conference with NABET Sector President Clark concerning the Local 11 Agreement, it seems unlikely that he would have accepted AFTRA Executive Director O'Donnell's proposal made only a few months later.

During discussions in mid-February, AFTRA Executive President O'Donnell proposed to the WRC representatives the same arrangement she had proposed to Local 31 President Mayer and indicated that Local 31 had already agreed to it. WRC agreed to Ms. O'Donnell's proposal and the parties continued to meet over several months to arrive at terms and conditions of employment for the Content Producers and to complete negotiations of a new collective-bargaining agreement. Employer Vice President of Labor Relations Herzig and Employer Vice President of Human Resources Manning conceded that they made no effort to contact Mr. Mayers to confirm his purported agreement to AFTRA's proposal.

Both Employer Vice President of Human Resources Manning and NABET Local 31 President Mayers testified that they met at Ms. Manning's office in early 2009 to discuss the upcoming changes that would result from implementation of the Content Center at WRC. According to Ms. Manning, the meeting occurred in or about the beginning of February 2009. According to Mr. Mayers, Ms. Manning indicated during this meeting that the newly-created position of Content Producer would be unrepresented. At some point, Ms. Manning offered Mr. Mayers a copy of the Local 11 Agreement, but Mr. Mayers did not accept it.²¹

In or about early-March, Ms. O'Donnell received a call from Local 31 counsel Brian Powers, notifying her that Local 31 was filing unfair labor practice charges and a unit clarification petition with the Board in regard to the Content Producers. Ms. O'Donnell conceded that, when she informed Mr. Powers that she believed AFTRA and Local 31 had reached agreement on the Content Producer issue, he indicated that he was unaware of any such agreement. Indeed, in a follow-up conversation, Mr. Powers stated that Local 31 President Mayer denied the existence of an agreement and was, in any case, without authority to make such an agreement because the matter was a Sector-level issue to be resolved during national negotiations that were then on-going.

Ms. O'Donnell informed Employer Vice President of Labor Relations Herzig and Employer Vice President of Human Resources Manning that Local 31 was no

²¹ NABET Local 31 President Mayers testified that when Employer Vice President of Human Resources Manning offered him the Local 11 Agreement, he informed her that he had been instructed that he had no authority to consider any such agreement. This testimony was corroborated by Mr. Mayer's Assistant, Alfred Zodun, a former WRC Photographer who was present at the meeting; however, Ms. Manning denied that Mr. Mayers expressed an opinion in regard to the Local 11 Agreement when she offered it to him.

longer in agreement with AFTRA's proposal. Nevertheless, WRC and AFTRA signed a Sideletter on June 17 covering the WRC Content Producers, described in detail below.

The AFTRA-WRC Agreement:

The new collective-bargaining agreement between AFTRA and WRC covers "all staff TV Reporters, TV Newswriters, and TV Desk Assistants of the Local News Departments of the Company at its Washington station who are primarily engaged in reporting, gathering, writing, preparing and/or broadcasting news material for local news programs produced by the Company in Washington, D.C." Although the "People Covered" clause does not mention the position of Content Producer, there is a separate Sideletter describing the terms and condition of Content Producers.

The AFTRA-WRC CBA elaborates the duties of "Newswriters" and defines the circumstances in which nonunit employees may perform such duties as follows:

The duties of TV Newswriters shall include writing and rewriting news stories, editing tapes and films and gathering factual information from news sources.

However,

... 2. Those assigned as Producers (of shows) (including Platform Managers) may write and rewrite news stories, edit tapes and films and gather factual information. However, nonrepresented Show Producers may not be prescheduled to write on a Newswriter shift unless the scheduled Newswriter is absent due to illness or injury, vacations or leaves of absence. At times when the Company maintains at least ten (10) full-time staff Newswriter and/or Content Producer positions who are not regularly assigned as Show Producers, the foregoing limitation on non-represented Show Producers shall not be applicable. However, staff Show Producers regularly scheduled to produce weekend newscasts may be prescheduled to write on Newswriter shifts.

3. Newsroom personnel temporarily assigned as Field Producers may also write and rewrite news stories, edit tapes and films and gather factual information but only for any elements, portions, segments, inserts, stories or pieces arising out of or in connection with their field producing work.

The term "write" shall include writing, rewriting, condensing, processing, editing, or otherwise treating news, feature and other material and correlating news sources such as teletype, newspapers, magazines, personal interviews, etc.

These provisions are similar to those that appear in the in the H, M and N Agreements of the NABET-NBC CBA, except that Show Producers, other than those that regularly produce a weekend newscast, may not be prescheduled to perform Newswriter duties unless a minimum number of fulltime Newswriters and/or Content Producers are on staff.

In addition, the AFTRA-WRC CBA permits Newswriters to be assigned as Show Producers and establishes specific terms and conditions in regard to compensation and scheduling of employees so assigned. A separate Sideletter covering non-linear editing, Sideletter 7, allows nonlinear editing work to be assigned to Newswriters (and Reporters) but only in regard to stories with which they have “an editorial connection.”

The duties of the Content Producer position are elaborated in the June 17 Sideletter as follows:

Content Producer positions involve producing (including, by way of example only, enterprising story ideas, researching, interviewing subjects/witnesses, determining the perspective from which the story will be covered and the content of the story and selecting graphics, music and other audio and video elements) in conjunction (but not necessarily simultaneous) with one or more of the following: writing of interview questions, scripts, transitions, articles or other material; editing material on non-linear editing systems; creating and/or inserting graphics, audio, effects or other elements for inclusion in the material; shooting with a consumer/prosumer digital camera and performing associated functions; transmitting material from the field; and performing desk assistant duties.

Recognizing that AFTRA lacked “exclusive jurisdiction” over at least some of these duties and that NABET-represented employees who were performing those duties might apply for and be hired into Content Producer positions, the Sideletter also provides that such NABET-represented employees remain NABET-represented at least until the Content Center “go-live” date. The Sideletter further provides that if the Employer and NABET fail to reach an agreement by the “go live” date in regard to those Content Producers, they would thereafter be represented by AFTRA as would all other Content Producers hired after June 4.²²

²² Thus, Sideletter 9 states:

....It is acknowledged that certain of the functions required by these positions fall within the duties of newswriters as set forth in Article 2 of this Agreement, while the other Content Producer functions are not within the exclusive jurisdiction of AFTRA or any other union representing WRC employees. Accordingly, it is understood that all Content Producers hired on or after June 4, 2009, except as set forth in the next paragraph shall be covered by the terms and conditions of the AFTRA-WRC Staff News Personnel Agreement, as modified by this Sideletter.

Based on the duties to be performed by a Content Producer, the parties recognize that there may be qualified NABET-represented employees currently employed at WRC-TV as of June 4, 2009 who have applied for the position of Content Producer. The parties agree that such NABET represented employees who accept Content Producer positions will continue to be represented by NABET and covered by the NABET-NBC Master Agreement during the transition period prior to the Content Center “go live” date (currently projected to be August 2009). In the event NABET and NBC do not reach an agreement permitting employment of Content Producers as NABET-represented employees by the

The AFTRA-WRC CBA excludes Content Producers from coverage by certain of the contract's provisions. Specifically, the provisions regulating covered employees' work week and overtime are expressly inapplicable to Content Producers. Similarly, the provision in regard to minimum rest between staff assignments is inapplicable to Content Producers. Content Producers are also expressly excluded from salary and shift differential provisions and from provisions concerning full-time, part-time, and daily hire work.

Content Center Launched at WNBC: Project Phoenix

As previously indicated, the Content Center was officially launched at WNBC in January 2009.²³ Sometime prior to September 2008, newly-appointed Vice President of News & Content Burns held a series of "town hall" meetings for the employees working at WNBC. During these meetings, Ms. Burns explained the new Content Center concept that would be implemented at the station. Ms. Burns explained that many of the employees' jobs would disappear but that the new jobs of Content Producer, Platform Manager, and Day Part Manager would be created. Ms. Burns encouraged employees to apply for the new positions.

At the time, WNBC already had a website, maintenance of which was outsourced to a subcontractor, and had begun developing taxi casts and other "out of home platforms."²⁴ There was an Internet Executive Producer and a Web Producer who oversaw the Employer's website and an Out of Home Producer who oversaw the taxi casts and other emerging out-of-home platforms. However, the local news stations remained focused primarily on producing news specifically for broadcast news programs. An Executive Producer was in charge of the production process for one or, in some cases, several broadcast news programs. Show Producers, Field Producers,

"go live" date, then such NABET-represented employees will be covered under the AFTRA WRC Local Staff News Personnel Agreement, as modified by this Sideletter.

²³ The record is somewhat confused regarding the launch of the Content Center at WNBC. President of Local Media Wallace testified that the Content Center was launched at WNBC in late 2008, and Senior Vice President of Broadcast Operations Braatz testified that the launch date was in September 2008. However, WNBC Director of News and Content McGinn and Vice President of Human Resources Midouin both testified repeatedly that the Content Center went "live" in January 2009. The confusion may be due in part to the fact that, according to Mr. Braatz, the hiring for the Content Center was done well before the "go live" date. As it is clear that the Content Center was not fully up and running until the "go live" date, I find that the Content Center was effectively launched on that date.

²⁴ The Employer did not at this time have a 24/7 cable presence or any cell phone presence.

Segment Producers, Line Producers and Production Assistants were responsible for overseeing and coordinating all aspects of production and worked closely with the Reporters.²⁵ WNBC also employed staff and daily hire Photographers and Editors, who worked closely with the Producers and Reporters in shooting, selecting and assembling the material for stories assigned to them, and Newswriters, who wrote scripts for the stories based on the material provided.²⁶

According to Vice President of News & Content Burns, the Day Part Manager under the Content Center model replaced the Executive Producer, while expanding the functions contained in that role. Thus, the Day Part Manager is responsible for all editorial decisions in regard to all shows during his/her 4 to 6 hour shift but also for ensuring that content is distributed appropriately to the internet, out-of-home, and all other platforms. The Platform Managers and Content Producers report to the Day Part Manager, who has final decision-making authority over which stories would be covered. The Day Part Manager may also communicate instructions to NABET Photographers

²⁵ The record does not contain clear description of all of the numerous “producer” classifications. However, WNBC Manager of News Operations Vern Gant described the position of “producer” generally as follows: “The producer is the person that comes up with the idea or the concept of the story...[,] does the research necessary to flush out the story [sic]...[,] makes the phone calls to find... who we’re going to interview, sets up those appointments, schedules crews to meet them in a certain location, writes the question[s]. Then the producer is the one that takes this material and crafts it into a finished piece in conjunction with...an editor..., writes the piece, and ...presents the finished package then to someone who will then put it on air.” Director of News and Content at KNBC, Keith Esparros testified that Show Producers oversee all aspects of the production an entire show, including deciding what stories will be covered, how they will be covered, making assignments, deciding the time and sequence of the stories for the show, and working with the Control Room to get the show on the air. In contrast, the Field Producer oversees all aspects of production of an assigned story including setting up interviews, going out with a crew to gather content, writing the story and working with the editor to put the story together. Based on the testimony of Content Producer and former Newswriter Robert Ray, it appears that Segment Producers have a similar role to Field Producers, working on a single story and going out in the field with a crew to gather material.

²⁶According to the testimony of Employer Vice President of Labor Relations Herzig, there were approximately 15 to 17 staff News writers as well as 15 to 20 daily hire News writers at WNBC in New York, although not all of these daily hires worked all the time. In addition, there were approximately 9 to 12 staff Editors, including Louis Marinaro, and about 10 to 12 daily hire Editors. [Mr. Herzig’s testimony is inconsistent with an exhibit, Er exh. 25, which was not introduced into evidence until after the close of the testimony. According to Er exh. 25, there were a total of 11.5 staff and full-time equivalent daily hire News writers and 22 staff and full-time equivalent daily hire Editors at WNYC just prior to the launch of the Content Center. In addition, there were 21 staff Photographers and 12 full-time equivalent daily hire Photographers.]

and Editors, although this is generally done indirectly through the Assignment Desk.²⁷ The Platform Managers replaced the Show Producers but also have some additional responsibilities, including working closely with the Content Producers to adapt their stories for particular platforms in accordance the Day Part Manager's editorial vision.

According to the job description created by the Employer, "Content Producers work closely with Platform Managers, Day Part Managers and Assignment Editors, as well as Reporters and Anchors to desktop edit, write, produce and gather content on all of WNBC's platforms" and are "responsible for the overall coverage of assigned stories on all platforms throughout the day." Content Producers receive field work assignments from the Assignment Desk but otherwise get their assignments at the beginning of the day from the Day Part Manager. Platform Managers may also assign stories to the Content Producers throughout the day. According to Vice President of News and Content Burns, the Content Producer position was conceived as "a role...[that] could have ownership of a story" which "could include pitching an idea, it could include setting up the story; who's going to be interviewed,...[i]t could include going an shooting the interview and the pictures for the story...[w]riting the story, editing the story, writing the anchor intro and tag for the story, creating a web version of the story, pitching a taxi-cast iteration of the story." As the position was conceived, the Content Producer is expected to be able to build a story from "soup to nuts" and to have editorial responsibility for developing a story during her shift.²⁸

Starting in the summer of 2008, the Employer began hiring Content Producers to staff the Content Center at WNBC. Vice President of News and Content Burns was the ultimate decision maker in these hiring decisions. The Employer hired about 20 to 21 Content Producers in total.²⁹ Ten to 11 of these were hired internally from the

²⁷ However, according to NABET Editor Louis Mariano, who was the only staff Editor remaining after the implementation of the Content Center, he reported directly to Day Part Manager Ozzie Martinez.

²⁸ Thus, Employer Vice President of Human Resources Midouin testified that the Content Producer position was "at core...a producer function" and that the Content Producer was conceived as "someone who could produce a good story from soup to nuts." Although several Employer witnesses testified that the Content Producer has complete "editorial control" and "editorial responsibility" for her stories, it is clear that responsibility for on-going stories was limited to a Content Producer's shift and thereafter transferred to whatever Content Producer was assigned to follow the story on the following shift.

²⁹ Based on Er exh. 25, it appears that at some point after the launch of the Content Center at WNYC, the number of Content Producers went up to 30.

Employer's NABET-represented employees, including former NABET Photographers Keith Feldman and Jeffrey Richardson. The remainder were external hires, some of whom, like Kori Lynch, had previously held "producer" positions. According to Ms. Burns, "the idea was that you could have a large pool of Content Producers, where you would have a wide spectrum of experience."³⁰ A several-day training course in the use of DALET was provided to internal and external hires, and internal hires received some writing training, but there was no formal "producer" training. Rather, according to Employer Vice President of Human Resources Midouin, Content Producers learned production skills on-the-job and received coaching in this area from the Day Part Managers.

WNBC also hired Day Part Managers and Platform Managers. Currently, there is a Day Part Manager for the morning, another Day Part Manager for the day, and a Day Part Manager for the evening, who is Ozzie Martinez. Initially, there were about nine Platform Managers³¹, one who is responsible for the Web, two who handle the "out-of-home" platforms and six who work on the broadcast platform and/or the 24/7 cable platform. Of the six Platform Managers to broadcast, two work on the Morning Show, one works on the 6:00 pm news, one works on the 7:00 pm news, and one works on the 11:00 pm news. Shortly after the Content Center went into effect, the number of staff Newswriters at WNBC went to zero and only one staff Editor (Luis Marinaro) remained, along with two full-time equivalent daily hire Editors. There are about 27 staff and full-time equivalent daily hire Photographers.

According to Senior Vice President of Broadcast Operations Braatz, Content Producers "gather" content for a story either by going out into the field themselves or by accessing material using DALET. Mr. Braatz described DALET as "basically a giant database of assets of all types, text, video, pictures, just information coming in from all

³⁰ A job description entered into evidence by the Employer indicates that there was no previous work experience requirement but stated as "desired" a minimum of "1 year experience in news gathering and/or production" and "1 year experience writing, producing and desk top editing." A job description entered into evidence by the Petitioner also indicates no prior work experience requirement but states as "desired" a minimum of "3 years experience in news gathering and/or production" and "3 years experience writing, producing and desk top editing." None of the witnesses who testified was able to say with certainty which of these was the final job description implemented by the Employer. However, as the former is closest to the Content Producer job descriptions in evidence from other locations, I will assume that it is accurate particularly in light of Employer Vice President of Labor Relations Herzig's testimony that the job was essentially the same at all locations.

³¹ According to Er exh. 25, the number of Platform Managers increased to 14 at some point after the launch of the Content Center at WNBC.

over” with “tools...to then manage and distribute the content to various platforms.” Content Producers are not sent out to shoot breaking news stories. When Content Producers do shoot video, they use a hand-held Prosumer camera rather than the professional grade, shoulder-supported camera used by NABET Photographers.

Kori Lynch, who formerly worked as an Associate Producer at ABC, was one of the Employer’s external hires for the Content Producer position. According to Ms. Lynch, she was told when she applied for the position that “[t]here would be shooting involved...[and] writing involved...[b]ut ideally it was a Producer position.” According to Ms. Lynch, she does not generally shoot “breaking” news stories but does shoot “promotables”—that is, stories that are held for release but promoted in advance with a brief preview or announcement. Nevertheless, Ms. Lynch stated that she is generally “in-house...getting other elements and talking to my Assignment Desk.” According to Ms. Lynch, she does not have much direct contact with NABET Photographers because “whatever I need to relay to them, either my Reporter or the Assignment Desk will get to them.” Ms. Lynch works frequently with Reporters and stated that in those cases, it is generally the Reporter who writes the story and “takes the lead” in shaping the story. Ms. Lynch was unable to give any estimate regarding the relative amounts of time she spends on various aspects of her work.

Content Producer Doreen Geiger, who worked as a Segment Producer for WNBC prior to the implementation of the Content Center, was one of the Employer’s internal hires. According to Ms. Geiger, the job of a Producer involves working with Reporters, making phone calls to arrange interviews, going out to the shoot with the assigned Photographer, choosing which sound bytes to use, coordinating with the Reporter to do the voice over, and collaborating with the Editor to create a finished product of appropriate length, tone, and quality. As a Content Producer, Ms. Geiger spends about one-and-a-half to two days per week producing a show called Day Brief, which is shot by a NABET Photographer. According to Ms. Geiger, her current position as a Content Producer is “a lot of what I did before...the only difference now is I also shoot and I also edit.” Although almost all of her projects involve video, Ms. Geiger stated that “a small number” involved video she has shot herself. Thus, she is often assigned to work “in house” on “bo-sots”—that is, stories that do not require her to shoot her own material and don’t involve a Reporter but rather an Anchor who does a voice over. In addition, Ms. Geiger regularly provides written content for a show called Daily

Connection for which she does not do any editing or shooting. Ms. Geiger was unable to estimate the amount of time she spends on the various aspects of her work.

Content Producer Keith Feldman, also an internal hire, was formerly a NABET daily hire Photographer at WNBC and elected to remain NABET-represented when he was hired as a Content Producer. According to Mr. Feldman, the Employer, in discussing the Content Producer position with employees, indicated that the goal was to “use us for strength, so the shooters primarily shoot, the writers would primarily write” but that shooting, writing, editing, and producing were all part of the job. Mr. Feldman stated that, as a Content Producer, “I shoot, I edit, I write for my own stories as well as stories for the newscast, I help put stories on the air” and “[p]roduce pretty much everything.” However, Mr. Feldman stated that there have been only “a handful” of times “when I’ve set up stories, and gone out and covered them, you know from top to bottom, shoot them, edited them and got them on the air.” According to Mr. Feldman, he spends 80 percent of his time as a Content Producer shooting and editing and the remaining 20 percent on his other duties.³² Mr. Feldman no longer uses the professional grade camera equipment he used in his former position as a Photographer, but instead uses the hand-held Prosumer camera used by all Content Producers. However, according to Mr. Feldman, he has been used to fill day-length “A” contract positions as a Photographer “a couple of dozen times” since being hired as a Content Producer. According to Mr. Feldman, he frequently collaborates with Reporters in his position as a Content Producer and, “[w]hether an “A” contract Photographer or a Content Producer, the collaboration is the same.”

Content Producer Jeffrey Richardson was also a NABET Photographer who elected to remain NABET-represented upon being hired into his current position. According to Mr. Richardson, as a Content Producer, “I shoot news stories, I edit news stories, I’m asked to write news stories, decide what pieces of interviews are going to be used...[,] write...for our website[,]...upload stories and packages to our website[,] input

³² Thus, Mr. Feldman testified that he produces a show call Thrillers in collaboration with a website that sells items for men. In describing this work, Mr. Feldman stated: “They send me a list of what they’re going to promote for the show, I will go down there, and they have a script that is already written out by them, but I shoot the segments that they wrote, I come back and I edit them, and put them on the web.” In addition, Mr. Feldman testified that he frequently worked with reporter Gabe Pressman and that, in these collaborations, Mr. Pressman usually came up with the story idea and did the writing. Mr. Feldman’s 2010 performance evaluation indicates that he needs to continue to develop his writing ability to the same level as his photography and editing skills.

data...[and] develop stories myself.” However, according to Mr. Richardson, he has performed all of these functions on a story “less than a dozen” times since becoming a Content Producer. Mr. Richardson agreed with Content Producer Feldman that he spent 80 percent of his time as a Content Producer shooting and editing.³³ In addition, Mr. Richardson agreed that the position of Content Producer involved frequent collaboration with Reporters, and, in those collaborations, “[f]or the most part, we’re shooting the story, we’re editing the story” although he also has some input in selecting which interviews or excerpts of interviews are used.

Both Content Producers Feldman and Richardson testified that they often pitched their own stories as well as working on stories assigned to them by the Assignment Desk prior to the implementation of the Content Center. Both Mr. Feldman and Mr. Richardson stated that, as NABET Photographers, they regularly collaborated with Reporters and that the collaboration was essentially the same as in their role as Content Producers. According to Mr. Richardson, he in some cases conducted interviews for a story with only minimal or no guidance from a Reporter or Producer when he worked as a NABET Photographer. According to Mr. Feldman and Mr. Richardson, they frequently edited their material from their trucks while in transit from a shoot using non-linear editing systems (either AVID or Final Cut Pro) with which many of the Employer’s trucks are equipped, sending the edited product back to the station.³⁴ Indeed, according to both Mr. Feldman and Mr. Richardson, they spent only 50 percent of their time shooting and the remainder editing and operating the truck. According to Mr. Feldman, he did not have any role in deciding the “run down” for a show—that is, what stories would in fact appear in what order on the air --as he does in his position as a “Content Producer.” Rather, these decisions were handled by the show’s editorial team.

Both before and after the rollout of the Content Center, Photographers, Editors and Newswriters were in some cases assigned to do “producer” work. According to former-Editor Louis Marinaro, he produced an award-winning news segment and promo work prior to the implementation of the Content Center. According to Vice President of News and Content Burns, News writer Bob Ray regularly served as the Producer of a

³³ Mr. Richardson’s 2009 performance evaluation notes that he needs to work on pitching more of his own story ideas and on “fine tuning his longer form writing so that he could eventually start writing more of the reports he already produces, shoots and edits.”

³⁴ The Employer has continued to use these editing systems, as well as DALET, after implementing the Content Center.

medical news segment prior to the Content Center. In addition, both before and after the implementation of the Content Center, NABET Photographer Thomas Cooke produced and edited various shows. In the early 1990s, Mr. Cooke served as the Producer and Editor for Reporter Gabe Pressman in Israel and also produced feature stories, including an award winning piece about sexual harassment. Currently, Mr. Cooke spends about 40 percent of his time producing a segment called "Wednesday's Child," a weekly profile about children in need of adoption and is classified as a Group 8 Video Journalist under the "A" Agreement in performing this work. It is unclear how many Photographers, Editors or Newswriters at WNBC spent significant portions of their time doing "producer" work prior to the implementation of the Content Center.³⁵

WRC Transitions to the Content Center Model:

As previously discussed, the Editors and Photographers (also referred to as electronic journalists or "EJs") at WRC are represented by NABET Local 31. They are covered by the "A" Agreement of the Master Agreement, which also covers control room employees, Acquisitions employees, and maintenance employees. Prior to the launch of the Content Center at WRC, it appears that there were about 58 NABET represented employees under the "A" Agreement³⁶, of which 16 were Editors. As previously described, the Reporters, Newswriters, and Desk Assistants are represented by AFTRA. Currently, there are about 70 AFTRA represented employees at WRC, and, prior to the implementation of the Content Center, about 10 of these were Newswriters.³⁷ For the

³⁵ Although WNBC VP of News and Content Burns testified on cross examination that "outside of [Bob Ray], news writers were news writers," Ms. Burns disagreed with the characterization of Ray as an "exception" and clarified that he was the only Newswriter she could recall serving as a Producer.

³⁶ I have arrived at this number based on Er exh 25, which indicates that there were a total of 36 Photographers and Editors prior to the implementation of the Content Center, and on Employer Vice President of Human Resources Rachel Manning's testimony that there are also six maintenance employees and 15 control room and studio employees represented by NABET (there is no indication that the number of maintenance and studio/control room employees changed with the implementations of the Content Center). It is unclear whether the number of Editors includes several web editors who were principally responsible for creating on stories for WRC's website. [Daily hires are included in these figures in terms of "full time equivalents" rather than by the number of individuals, full or part time, who worked at WRC as daily hires.] In addition, NABET represents floor managers and other staging services employees at WRC under the C Agreement of the Master Agreement.

³⁷ Employer Vice President of Human Resources Manning indicated that this estimate included staff and daily hires, with daily hires counted in terms of "full time equivalents."

most part, the Producers at WRC were unrepresented and there were about 10 Show Producers employed prior to the implementation of the Content Center.³⁸

The Director of News at WRC before and after the implementation of the Content Center was Camille Edwards. Reporting to Ms. Edwards since November 2008 is Senior Manager of Content Catherine Snyder.³⁹ Before the implementation of the Content Center, WRC also had two Executive Producers, Jeff Greenberg and Thomas Tobin, who reported to Ms. Edwards and who, subsequent to the implementation of the Content Center, became Day Part Managers and reported to Ms. Snyder. The Director of Operations and Engineering, before and after the implementation of the Content Center was Bill Nardi, to whom the Photographers report directly. However, Ms. Snyder testified that she indirectly supervised the Photographers as well, coordinating as necessary between them and Reporters to whom they were assigned.

According to Employer Vice President of Human Resources Manning, prior to the Content Center, the Executive Producers reported directly to the Director of News and had overall responsibility for all newscasts in their part of the day. Reporting to the Executive Producers were the Show Producers who were primarily responsible for the “dedicated” broadcast show to which they were assigned (e.g., 5:00 pm news, 11:00 pm news, etc.). Newswriters reported on a day-to-day basis to the Show Producers and also to the Executive Producers. After Senior Manager of Content Snyder was hired, she had some direct supervision of the Newswriters as well. It is clear that Newswriters were permitted under the AFTRA-WRC contract to be assigned as Producers and that Producers were permitted, under specified circumstances, to perform news writing work. However, there is no record evidence in regard to how often this occurred. It is also clear that Newswriters (and Reporters) were permitted to perform non-linear editing work. The record evidence makes clear, however, that prior to the implementation of the Content Center that work was limited in quantity (WRC was still mostly working in a linear editing system) and performed exclusively by NABET-represented employees.

³⁸ It appears that AFTRA represented Show Producers until the mid-1990s and that they continue to represent a few Anchors who have the dual title of Producer in Sports and Weather.

³⁹ Frank Caskin and Matt Glassman also held News Management positions above the Day Part Managers after the implementation of the Content Center. It is not entirely clear whether they had the same title as Ms. Snyder, but Mr. Glassman was referred to by several witnesses as a “Senior Content Producer.” Prior to the implementation of the Content Center, Mr. Caskin was the Assistant Director of News.

Prior to the launch of the Content Center, WRC's Reporters were responsible for pitching story ideas and covering assigned stories by going out into the field with a field crew to gather facts, conduct interviews, and obtain video. Reporters worked closely with Photographers in obtaining necessary video to tell their stories. Unlike Anchors, who generally did on-air delivery of stories written by Newswriters, Reporters generally wrote their own scripts and collaborated closely with the Editors in determining how to put their stories together. Most editing was "linear" but some "non-linear" editing was performed by a handful of NABET-represented Editors, Perkins Broussard, Tom Hamerski, and Joe Hearn, who were familiar with Final Cut Pro and AVID (the non-linear editing tools available in the newsroom at the time). Photographers also did nonlinear editing of their material on laptops while out in the field using a nonlinear editing system called EDIUS. Although Editors often received detailed instruction from Reporters, the edited final product was not systematically reviewed by either the Reporter or the Producer before going on the air, according to former NABET Editors Broussard and Scott Eisenhuth, due to time constraints.

Beginning in January, WRC held a series of "town hall" meetings to apprise employees of the upcoming roll out of the Content Center. During these meetings, employees were notified that WRC would be eliminating its Newswriter and Editor positions and creating the new position of Content Producer.⁴⁰ In addition, Executive Producers and Show Producers would be eliminated, and the new positions of Day Part Manager and Platform Manager would be created in their place. Employees were encouraged to apply for these positions.

Meanwhile, in preparation for the launch of the Content Center, WRC provided training in editing and news writing to all employees interested in applying for the new positions and then gave applicants a sample writing/editing project to perform which was used to evaluate applicants for the positions. In June, WRC sent offer letters to selected internal applicants. In addition, WRC hired several

⁴⁰WRC Reporter Joe Krebs testified that, when the Employer announced the transition to the Content Center, the Employer explained that "the people who were currently News writers under the AFTRA contract and people who were video editors under the NABET contract, those jobs would disappear and that new job would be created called Content Producers...[who] would be a combination of news writers and—who also edited digital video." Similarly, former NABET Editor, now Content Producer, Scott Eisenhuth testified that, during the town hall meetings, the Content Producer position was not described as a "producer" position. Rather, employees were told that Content Producers "could potentially write, shoot and edit."

external applicants. Shortly thereafter, the applicants who had received offers were provided with training in DALET, the new technology, previously deployed at WNBC, to allow assignment of work, gathering together of content, editing of content, and delivery of content to various platforms using a single computer system.

According to Employer Vice President of Human Resources Manning, the Day Part Manager was envisioned as being responsible for supervising all content produced during his “day part” (or shift), much like the Executive Producer position before the implementation of the Content Center, but with the added responsibility of considering how that content could best be used and distributed across all platforms.⁴¹ The Platform Managers would be responsible for the content on the particular platform or platforms to which they were assigned.⁴² The Content Producer would be responsible for producing content and “really own[ing] it”

⁴¹ The record does not contain a job posting for the Day Part Manager position dating from the time the Content Center was launched. However, the job description and posting from February 2009 and February 2010, which are identical, describe the position as follows:

As Daypart Manager, you will be responsible for overall editorial content on all platforms produced by KNBC, including but not limited to Out-of-Home, web and broadcast.

- The DayPart Manager will oversee the Platform Managers and the pool of Content Producers creating content for all platforms.
- Collaborate with other newsroom managers, and all divisions of NBC for special events planning as well as day-to-day coverage.
- Will work with all facets of the organization, including production, IT and engineering and the newsroom as a whole to ensure the most accurate and compelling local coverage.
- Responsible for tracking coverage related costs and ensuring fiscal responsibility in the news division.
- Responsible for scheduling all Content Producers to ensure proper coverage.
- Responsible for hiring quality talent when needed, as well as coaching and mentoring current employees.

⁴² The record contains several variations on the Platform Manager job description, however an August 2009 posting described the position as follows:

As a Platform Manager, you will be responsible for the overall editorial content for *one* or more of the content platforms produced by WRC. Platform Managers will be required to work effectively in all platforms, including but not limited to Out-of-Home, web, and broadcast and are expected to seamlessly move from one platform to the next. Additional duties include:

- Work with Content Producers to select the most compelling and relevant stories
- Work with the production team to ensure smooth and seamless productions as well as with a Daypart Manager and other Platform Managers to ensure the most complete local news coverage.
- Play an active role in the editorial process and be advocates for their particular platform
- Responsible for writing, producing, desktop editing and gathering content for all platforms
- Responsible for effectively managing a pool of *Content Producers*, coaching and mentoring as needed

The posting indicated that a Bachelor’s degree in Journalism, Communications or equivalent work experience as the only required qualification.

throughout the day and across all platforms and “could do everything from writing to editing to shooting.”⁴³

The Content Center was officially launched at WRC in August. At that time, the Employer had hired two Day Part Managers (former Executive Producers Tobin and Greenberg) and ten Platform Managers. The Platform Managers were principally employees who had formerly been WRC Show Producers or Newswriters. The Employer offered Content Producer positions to approximately 10 former NABET Editors and Photographers, approximately 14 formerly AFTRA-represented employees, and 16 external applicants. As of August 17, the “go live” date, the Employer had hired a total of 24 Content Producers.⁴⁴ Eleven of the original hires were former AFTRA-represented employees while seven were former NABET-represented employees. The remaining six Content Producers hired were formerly unrepresented. At that time, there were no Newswriters, Executive Producers, or Show Producers employed at WRC and only one Editor, Joe Hearn, who remained in that position only until the end of 2009.

WRC redid its newsroom as part of the implementation of the Content Center. As renovated, the newsroom is a large room with desks in pairs, each desk having a computer with monitors on which all employees can have access to the DALET system. At least two of the work stations are equipped with more sophisticated non-linear editing systems, including Final Cut Pro and AVID, which were used for nonlinear editing prior to the implementation of the Content Center. The Content Producers, Reporters and Anchors all work in this area. Behind these work stations is the Assignment Desk, which keeps track of breaking news and has a significant role in making assignments. Acquisitions, which receives all of the

⁴³ The record contains numerous variations on the Content Producer job description. However, the internal WRC job posting for the position dated August 17, 2009 (the Content Center launch date) states the job responsibilities as follows:

- Work closely with Platform Managers, Day Part Managers and Assignment Editors, as well as Reporters and Anchors to desktop edit, write, produce and gather content on all of WRC's platforms, including but not limited to Out-of-Home, web and broadcast
- Responsible for the overall coverage of assigned stories on all platforms throughout the day

The posting states the required qualifications for the positions as:

- Bachelor's Degree.
- Minimum 1 year experience in newsgathering and/or production
- Minimum 1 year experience writing, producing and desktop editing

⁴⁴ According to Er Exh. 25, that number had increased to 28 by January 2010.

various local and network incoming feeds including satellite feeds, line feeds, and microwave feeds from the various field crews, is a glass enclosed room located behind the Assignment Desk. At the far right-hand side of the newsroom are several work stations where Photographers can ingest video into a server and edit it. The Sports Content Producer, Cal Baxter, and the Sports Anchors and Reporters are grouped together at work stations adjacent to this area. Photographers spend some time editing in the newsroom and also have a field shop in the basement where they keep their equipment, but they spend the majority of their work time in the field.

Senior Manager of Content Snyder testified that, in the Content Center, she supervises the Platform Managers and the Content Producers but also works in coordination with the Assignment Desk, Reporters, and Photographers and other staff that comprise WRC's news operations. Most of the Platform Managers are assigned to the broadcast platform and more specifically to a particular news show; however, there is also one Platform Manager assigned to the Web and one assigned to the digital cable platform (also known as "Nonstop"). Several Platform Managers meet with Ms. Snyder and other newsroom personnel, including the Assignment Desk, at 9:00 am each morning to decide which Reporters and Photographers are going to be sent out and how the day's stories will be covered. After this meeting the Content Producers are given their assignment either by the Day Part Manager or the various Platform Managers. Photographers and Reporters receive their assignments from the Assignment Desk, although Platform Managers sometimes also discuss assignment with Reporters before they go out into the field. Ms. Snyder may also occasionally discuss assignments with Reporters and/or Photographers and may contact them in the course of their work if it appears that they are having technical difficulties while gathering video or transmitting it from the field.

On a regular basis, Content Producers are paired with Reporters and assist them with various aspects of their work for the day. Reporter/Anchor Joe Krebs testified that this may include creating graphics requested by the Reporter and dropping these into the Reporter's package when it is sent back to the station, writing lead-ins for a piece, or occasionally doing some editing. When a Reporter's material is sent to the station from the field, it is received by Acquisitions which loads (or "ingests") the "package" into DALET and then notifies the assigned

Content Producer over a P.A. system that can be heard throughout the newsroom that the package is in. NABET-represented Transmissions Operator Renee Wheeler testified that she interacts daily with Content Producers who call, email or speak to her in person to find out whether a Reporter's package has come in and to request material that may be needed from other sources.⁴⁵ Although the Content Producer assists the Reporter in finalizing his package for air, Reporter Krebs testified that the Reporter is "ultimately responsible" for his stories.

Content Producer Teneille Gibson testified that, as a Content Producer, she conducts interviews and shoots material for stories assigned to her on Sundays, then imports the material into DALET so that the Platform Manager can assign it to another Content Producer who "puts the story together." Ms. Gibson testified that she spends Tuesdays and Wednesdays shooting material for stories she has pitched or that have been assigned to her using a handheld digital camera and producing those stories for Nonstop. In regard to her work on Nonstop, Ms. Gibson testified that "[s]ometimes I set up the interviews for it, and I go out and shoot the story, come back in,...write it, edit it and feed it into DALET for it to air."⁴⁶ Ms. Gibson testified that on Mondays and Thursday she is assigned to write and edit stories for the news shows, as many as 10 stories a day. Ms. Gibson testified that she edits using both Final Cut Pro, where more sophisticated editing is required, and DALET for simpler editing tasks. On days when she is writing news, Ms. Gibson may also be assigned to assist a Reporter, receiving material that has been shot and edited by a NABET Photographer out in the field, dropping a graphic into the package if requested by the Reporter, and placing the package in the run down so that it is ready to air. Ms. Gibson testified that, in her view, the Reporters did not "own" their stories because "they depend on someone to edit it and they

⁴⁵ Ms. Wheeler testified that she had similar communications with the Editors who were assigned to edit a particular Reporter's package in the pre-Content Center system. Ms. Wheeler indicated that she had minimal contact with Newswriters prior to the launch of the Content Center.

⁴⁶ Specifically, Ms. Gibson testified that she had pitched, researched, wrote, and done the interview and shooting for a story for Nonstop about a special kind of beer dispenser used by only one concession stand in D.C. Ms. Gibson was unable to estimate how frequently she has done this kind of project as a Content Producer, and it is unclear whether this is typical of the work she generally does for Nonstop. Ms. Gibson described Nonstop generally as follows: "Basically, we highlight things to do, places to eat in Washington, D.C., highlight the cool stories about people you should know. ...Just highlighting...the other side of D.C. that we normally do not see in our regular newscasts."

depend on a NABET photog to shoot it for them.” Ms. Gibson was unable to estimate how much of her time was spent shooting, how much of her time was spent editing and how much of her time was spent writing. However, Ms. Gibson testified that whether she was shooting, writing or editing, she was always “producing.”⁴⁷ Ms. Gibson testified generally that the work of a Content Producer is very dissimilar to the work of a Photographer.⁴⁸

Content Producer Arlene Borenstein testified that she spends Mondays shooting with a handheld digital camera, writing and editing stories assigned to her or pitched by her for Nonstop. On Tuesdays, Wednesdays and Fridays, Ms. Borenstein writes and edits stories for WRC’s court channel and for the newscasts, as well as assisting Reporters in getting their packages in, dropping in graphics as requested and writing brief introductions to the stories where necessary. According to Ms. Borenstein, she rarely shoots or goes into the field on those days but works with material that is sent in by the field crews and received by Acquisitions. She may be assigned to do Voice Over/Sound on Tape (VO/SOTs) work, which involves updating an on-going news story as new information comes in and which she described as follows: “I have to find the interview..., make sure we have it whether it’s in the feeds or through our network channel or something, and then make sure I’m picking the sound bite that is—what’s going to matter to you at the end of the day and not old information.” Ms. Borenstein also testified that she was one of two Content Producers who do some “on-air” work.⁴⁹ Specifically, Ms. Borenstein

⁴⁷ It is not entirely clear what this means. Ms. Gibson described a story she pitched and produced for a half-hour long Black History show, for which she did the research, decided whom to interview, and conducted the interviews. Ms. Gibson stated that she “decided...what order the stories would air [in] within the half hour, the overall look of the show, [] the interviews and also the editing and shooting as well.” Ms. Gibson described her work on this story as “field producing” and indicated that several Content Producers assisted her in putting the story together. According to Ms. Gibson, she also collaborated with a NABET Photographer who shot footage for the show. Ms. Gibson was unable to estimate how often she had done this kind of “field producing” work as a Content Producer.

⁴⁸ It does not appear that Ms. Gibson has held the position of Photographer, and she rarely works with the Photographers at WRC. However, before coming to work for WRC, Ms. Gibson interned at NBC’s Chicago local news station, WMAQ, where she did segment producing and worked regularly with Photographers and Reporters.

⁴⁹ Ms. Borenstein referred to the other Content Producer who does some “on air” work for Nonstop as Jenny. It appears from the Staffing Chart introduced into evidence as Petitioner Local 31 Exh. 4 that this must be Jennifer Gastwirth.

works with the sales department, doing “commercials that look like more like human interest stories for our clients.” This work may involve collaborating with NABET Photographers; however, according to Ms. Borenstein, she had only done so on two of the five occasions when she has done “on air” stories. Ms. Borenstein also testified that she has worked with NABET Photographers on occasions when she has been asked to serve as a “Field Producer,” about six times overall since she became a Content Producer. Ms. Borenstein testified generally that the jobs of Photographers and Editors were “very dissimilar” to the job of a Content Producer.⁵⁰ Ms. Borenstein testified that “[o]ut of everything I do, I write the most.”

Scott Eisenhuth, a former NABET Editor at WRC who became a Content Producer, testified that he works from 2:30 am until 11:30 am and spends the first 1 ½ hours of each day doing Acquisitions work. [This includes ingesting any material that was brought in on “P2” cards by Photographers late in the evening that may not have been ingested the day before, checking the news feeds for any particular significant news events, setting up DALET to receive those feeds if anything of particular significance is going on, and assisting Reporters who may start work as early as 3:00 am.] Transmissions Operator Wheeler takes over this role when she arrives at 4:00 am. Mr. Eisenhuth testified that he spends the rest of his time editing and doing some writing. He estimated that he spends about 5 percent of his time writing, usually VOs, and the remainder of the day editing frequently using Final Cut Pro, the editing system used for nonlinear editing at WRC prior to the launch of the Content Center. According to Mr. Eisenhuth, he often assists other Content Producers, who have significantly less editing experience, with their editing work. He never does any shooting and never goes into the field. Moreover, in regard to the expectation that Content Producers build stories from “top to bottom.” Mr. Eisenhuth testified that “almost nobody does that...[m]aybe the people with Nonstop would be the only ones...--Teneille and Jenny⁵¹.” According to Mr. Eisenhuth, his work as a Content Producer is substantially similar to the work he

⁵⁰ Ms. Borenstein does not appear to have worked as a Photographer. However, she worked as an Assignment Desk Editor and Reporter at an NBC affiliate in South Florida before coming to work at WRC.

⁵¹ Although Mr. Eisenhuth did not identify the last names of Teneille and Jenny, it is clear from reviewing the staffing chart entered into evidence by Petitioner Local 31 that the former is Teneille Gibson and the later is Jennifer Gastwirth.

did prior to the launch of the Content Center as an Editor, except that he now does some writing.⁵² Mr. Eisenhuth testified that there was one other Content Producer who did as much editing as he did, Perkins Broussard, also a former NABET Editor at WRC.

Content Producer Broussard also testified that he spends 90 percent of his time as a Content Producer performing nonlinear editing work and does a significant amount of editing for other Content Producers, as well as for Anchors and Reporters. Both before and after the launch of the Content Center, Mr. Broussard did much of his editing using Final Cut Pro. Mr. Broussard testified that he has not done any shooting as a Content Producer and “little to no[]” writing but spends about five percent of his time “producing.”⁵³ Mr. Broussard conceded that, as compared with himself and Scott Eisenhuth, most Content Producers did significantly more writing and less editing. Mr. Broussard also testified that he on several occasions requested of management to be allowed to do some shooting and was told that “it wouldn’t happen because I was needed in the newsroom in other capacities.” Although conceding that his 2009 evaluation indicated that that he should try “generating story ideas, and attempt to complete them from start to finish—setup, shooting, writing and editing” and that this was the concept of a Content Producer’s function, Mr. Broussard testified that he was not in practice given the time to do so and was never asked to build a story from “top to bottom” in this way. On the contrary, the vast majority of his assignments were editing assignments, including editing of other Content Producers’ work. In May 2010, Mr. Broussard was awarded the employee of the month award for his work, on the nomination of Senior Manager of Content Matt Glassman.

Former-Content Producer Ambrose Vurnis also testified regarding his work in that position for one year before returning to the position of NABET Photographer, a position he had held prior to the launch of the Content Center at WRC. Prior to the launch of the Content Center, Mr. Vurnis worked as a NABET daily hire Photographer, shooting material in the field and editing it on his laptop

⁵² Mr. Eisenhuth conceded that his 2009 evaluation indicated that he needed to work on his writing and encouraged him to be more proactive in pitching story ideas.

⁵³ Mr. Broussard testified that his 2009 evaluation indicated that he should do more writing and that, on discussing the matter with Senior Manager of Content Snyder and Director of News Edwards, they stated that “they are going to try to fit me into the writing schedule more on a regular basis.”

using the nonlinear editing program EDIUS. As a Content Producer, Mr. Vurnis spent one day, Saturdays, conducting interviews and shooting with a handheld digital camera and spent Tuesday through Friday working in the newsroom.⁵⁴ However, according to Mr. Vurnis, he was with some frequency asked to go out with various Reporters to serve as a Photographer on a shoot, using the handheld Prosumer camera used by all Content Producers. Mr. Vurnis stated that the principal difference between his work as a Content Producer and his work as a NABET Photographer was writing, which he did not do at all as a Photographer, and conducting interviews. Since returning to the position of a NABET Photographer, Mr. Vurnis testified that he has on occasion worked as a Photographer for a Content Producer. It is unclear how often such collaborations occur.

Cal Baxter, former Sports Editor/Photographer for WRC, testified as well about his position as Content Producer for Sports. Day Part Manager Jeff Greenberg supervises Sports as he did prior to the launch of the Content Center, when he held the position of Executive Producer. There are three Sports Anchors, Haken Dermish, Dan Hellie and Lindsay Czarniak who also worked as Sports Anchors/Reporters prior to the launch of the Content Center. Dan Buckley and Chris Kerwin, who were NABET Photographers for Sports prior to the launch of the Content Center, are now NABET Sports Photographers/Editors. According to Mr. Baxter, in his role as Editor/Photographer for Sports before the launch of the Content Center, he pitched story ideas and did research, edited material for the sportscast, did some shooting, collaborated with Reporters and Producers, and, on several occasions, produced an entire weekend sportscast. Regarding his work as Content Producer for Sports, Mr. Baxter testified that he continues to pitch story ideas, write and edit material for the sportscasts, and also is responsible generally for selecting the content for the sportscasts and making sure to fill the allotted time and get off the air on time. Mr. Baxter testified that he writes and produces on a daily basis. Although he rarely goes out to the field, Mr. Baxter interacts daily with the Sports Photographers/Editors to identify the best footage that they have gathered or to give them some guidance regarding questions to ask when they are out in the field. Mr. Baxter testified that, in his

⁵⁴ Mr. Vurnis's 2009 evaluation indicated that he "embodies the concept of Content Producing with his "triple threat" talents—shooting, editing and writing."

absence, his position is often filled by NABET-represented Sports Photographer/Editor Chris Kerwin or, more recently, by Content Producer for news Mark Stephens.

KNBC Transitions to the Content Center Model:

In July, the Employer's Los Angeles local news station, KNBC, launched the Content Center. At the time, the President and General Manager of KNBC was Craig Robinson. In January 2010, Assistant Director of News Keith Esparros was promoted to the position of Director of News and Content. The Vice President of News at the time was Bob Long who was replaced by Vicki Burns in August 2010, nearly a year after the Content Center went "live." Prior to the launch of the Content Center, the Newswriters, Photographers and Editors at KNBC were represented by NABET Local 53, the Newswriters under the K Agreement and the others under the A Agreement of the NABET Master Agreement. In addition, the Control Room Operators, several Assignment Desk personnel, the NOC area personnel (who bring in feeds), the Maintenance Engineers, and studio employees are NABET represented.⁵⁵ Prior to the launch of the Content Center, KNBC also employed a variety of Producers, most of whom were not represented by any union.⁵⁶

Both before and after the implementation of the Content Center, the field crews were supervised by Operations Director Jodie Mena. Prior to the Content Center, the Reporters were supervised by the Managing Editor. Photographers and Reporters received assignments from the Assignment Desk. There were three Executive Producers who had overall editorial responsibility for and control over particular news shows. Show Producers, who reported to the Executive Producers, oversaw the editorial content of particular newscasts and decided the order of stories and the time

⁵⁵ It appears from Er exh 25 that there were at least 73 NABET represented employees at KNBC prior to the implementation of the Content Center. According to Er exh. 25, there were four staff and 9 full-time equivalent daily hire Newswriters, 15 staff and 7 full-time equivalent daily hire Editors, and 15 staff and 14 full-time equivalent daily hire Photographers. KNBC Vice President of Human Resources, Enrique Caballero, testified that in addition to the Newswriters, Photographers, and Editors, there were a "handful" of Maintenance Engineers, five or six NOC area employees, a "handful" of Studio employees, and two "grandfathered NABETs" at the Assignment Desk.

⁵⁶ There is conflicting testimony as to whether Associate Producers were represented by NABET at KNBC, and Er exh. 25 indicates that there were six NABET represented Producers at KNBC prior to the implementation of the Content Center. However, it is clear that Executive Producers and Show Producers were unrepresented. According to Director of News and Content, Keith Esparros, there were three Executive Producers and eight Show Producers employed at KNBC prior to the launch of the Content Center.

budgeted for each story. Reporters generally wrote their own scripts, and Show Producers and Associate Producers also did some writing. In addition, Show Producers worked closely with and gave direction to the Newswriters, Photographers and Editors assigned to the stories in their newscast. Photographers edited the video gathered in the field and did some editing in the newsroom. Producers also did some rough editing, and Reporters and Newswriters occasionally did some nonlinear editing as well. Newswriters filled the role of “producer” on weekends and filled in as producers as necessary at other times.

The transition to the Content Center was announced to KNBC employees in early December 2008. According to Vice President of Human Resources Carballo, in February, a series of town hall meetings was held for employees to inform them of the new positions that would be available in the Content Center. Job descriptions for the positions of Day Part Manager, Platform Manager, and Content Producer were posted soon thereafter.⁵⁷ All employees who applied for positions in the Content Center were given the opportunity to go through training in editing and writing. At the end of the training, applicants were tested. All of the Employer’s 34 hires for the Content Center were from the internal applicant pool. Of 20 Content Producers hired, most were former KNBC Newswriters and Editors.⁵⁸ The Employer also hired 10 Platform Managers and four Day Part Managers, including Dave Kirkland. After the launch of the Content Center, there were no Newswriters and only one Editor⁵⁹ employed at KNBC.

Several Employer witnesses testified regarding their understanding of the new Content Producer position as compared with the positions that existed prior to the Content Center. According to KNBC Vice President of Human Resources Carballo, the Content Producer position was different from a Newswriter position in that the Content Producer is “responsible for not just what their writing, not just what they’re editing, but

⁵⁷ The internal postings for the job of Content Producer, Platform Manager, and Day Part Manager at KNBC contain job descriptions for these positions that are identical to those that were posted for the positions at WRC (see supra fn. 41, 42 & fn. 43).

⁵⁸ Er exh. 25 indicates that there are also 3 additional Content Producers that are part of its “Web Core Team.”

⁵⁹ Although Director of News and Content Esparros testified that there were no editors employed at KNBC after the implementation of the Content Center, Vice President of News Burns testified that there was in fact one NABET editor remaining, who edited a weekly “news conference on public affairs” program. Er exh. 25 indicates that there were 2 NABET-represented Editors remaining as of January 2010.

they're accountable to the platform manager and the Day Part Manager for editorially making [sure] that it all comes together." Platform Manager Ameer Moir testified that, while some elements of the Content Producer and News writer positions are similar, "the Content Producer is responsible for many more duties than they were before as news writers." In comparing News writers to Content Producers, Vice President of News Burns testified that, although Newswriters did some writing for web as well as broadcast platforms prior to the launch of the Content Center, "they weren't trained to write for the web appropriately for that audience" as Content Producers were expected to do.⁶⁰ According to KNBC Platform Manager Kim Liponi, the Content Producer has "every single aspect of th[e] story... you're producing one story for all the different platforms...[a]nd you're responsible for constantly updating it throughout the day."⁶¹

Content Producer Yvonne Beltzer, who worked as a Newswriter and weekend Producer prior to the launch of the Content Center, testified that "[b]asically a Content Producer would be a news writer with some additional skills." Specifically, Ms. Beltzer explained that, in becoming a Content Producer, she "added the skill of being able to cut my own video" but conceded that "if it was complicated, it usually went to someone who's a Content Producer who had an editing background." Ms. Beltzer testified that she receives assignments at the beginning of the day from Day Part Manager Kirkland, who decides which Content Producers will work with which Reporters, and also gets assignments throughout the day from the Platform Managers. She spends most of her time writing news and editing the video that goes with it. She writes for the 5:00 pm and 6:00 pm news casts, which she also wrote for as a Newswriter, and continues to produce stories in collaboration with Frank Snapp,⁶² as she did prior to the launch of the Content Center when she served as his Associate Producer. Ms. Beltzer testified that, more recently and on her own initiative, she has begun doing some shooting using a hand held digital camera and that she has shot material for California Non-Stop on "five or six" occasions. Although Ms. Beltzer testified that, as a Content Producer, she

⁶⁰ Former News writer Yvonne Beltzer, whom Ms. Burns cited as a model in her current position as Content Producer, also testified that she had done writing for the web before the implementation of the Content Center.

⁶¹ Ms. Liponi conceded that she also updated her stories throughout the day when she was a Newswriter, prior to the implementation of the Content Center.

⁶² Mr. Snapp's title is not clear from the record, but it appears that, both before and after the launch of the Content Center, he heads the Special Investigative Unit at KNBC.

reports to Director of News and Content Esparros, she stated that she was taught to shoot by Operations Director Jodie Mena and consults him for technical advice.

Content Producer Mary Harris, who was formerly a NABET-represented Producer in Special Projects, compared her work before and after the advent of the Content Center. Ms. Harris testified that, as Special Projects Producer, she worked on bigger “promotable” stories rather than “day of” news. She pitched story ideas, researched the stories, did most of the interviews and all of the writing, and was involved in all aspects of the shooting and editing (although she did not do the actual shooting or editing herself). In this role, Ms. Harris testified that she “was responsible for the story, so [she] did whatever it took to get the story done.” According to Ms. Harris, her job changed when she became a Content Producer in that “I do a lot more technical stuff than I ever did before...[t]here’s less producing and more buttons.”⁶³ Since January 2011, Ms. Harris has also been working as a Platform Manager doing “cut ins” for the Today Show, a role in which she feels “a little bit more like a Producer...because I am picking the stories, I’m writing the copy,...I’m crafting those precious little minute, 20 inserts.” In describing the work of a Content Producer, Ms. Harris testified that “the writing tends to be daily news writing as opposed to package writing...[a]nd writing leads for somebody else’s package, writing tags for somebody else’s package.” Although Ms. Harris conceded that “owning the story” is “the ideal that we’re striving for” she testified that “most of the Content Producers spend their day in the newsroom writing stories assigned to them, working with Reporters to do their leads, to do their tags, to post their stories to the web.” Ms. Harris testified that shooting was not something the Content Producers did on a daily basis and that, when she was sent out to shoot, she had to go to Operations Director Mena for a camera.

Content Producer John Alarid, formerly a NABET-represented Editor at KNBC, testified that his job as a Content Producer involved “obtain[ing] the video⁶⁴ and writ[ing]

⁶³ Specifically, Ms. Harris explained that editing is now part of her job and that she views this as “technical” in that “there’s a whole bunch of procedures to get what you edit actually on air, which requires moving packages technically through the system.”

⁶⁴ Mr. Alarid did not explain whether “obtaining video” meant shooting video; however, his subsequent testimony, discussed infra--that he began shooting a couple of months ago and that none of the material he has shot has been for his own stories--makes this meaning improbable. Rather, “obtaining video” likely refers to finding already ingested video in DALET or through LNS, a local news service in which KNBC participates that enables local news stations to share video resources. Mr. Alarid testified that as an Editor, prior to the Content Center, he would often “go

the copy” for stories assigned to him and then “edit[ing] to your copy.” Mr. Alarid, who has done nonlinear editing at KNBC since 2002, testified that he is “doing everything I was doing before except now I’m writing.” Mr. Alarid testified generally that “I probably do about 55, 60 percent editing and then, you know, 40 percent writing.” Mr. Alarid testified that he probably does more editing than other Content Producers and occasionally edits other Content Producers’ videos, because he has a strong background in editing. However, he also testified that, starting a couple of months ago, he began shooting video and that he now does this two to three times per week although not for his own stories. Regarding the introduction of DALET to the newsroom, Mr. Alarid testified that “[t]he technological change was basically incorporating what I would call two computers into one computer.” Mr. Alarid explained that, prior to the Content Center, non-linear editing was performed on particular computers outfitted with the Employer’s then-current non-linear editing systems.

WMAQ Transitions to the Content Center:

Also in July 2008, the Employer launched the Content Center at its Chicago owned and operated local news station, WMAQ. At the time, NABET Local 41 represented the Newswriters, Editors and Photographers employed by WMAQ. There were seven staff Newswriters and numerous daily hires⁶⁵, covered by the H Agreement of the NABET Master Agreement, and 14 staff Editors, two daily hire Editors, 14 staff and 5 daily hire Photographers, all covered under the A Agreement of the NABET Master Agreement. NABET Local 41 also represented the control room engineers, the ingest area personnel, the transmission area personnel, and the Assignment Desk personnel at WMAQ and continues to represent those employees after the implementation of the Content Center.⁶⁶ In addition, there were seven to eight Show

out on his own” and try to find additional video to supplement whatever he was editing, using VOD (Video on Demand), KNBC’s video library (called “Oasis”) and various stringer sources.

⁶⁵ Employer Vice President of Human Resources Sandra Hasan testified that there were five to six “full time equivalent” daily hire News writers before the launch of the Content Center. Ex. 25 indicates that as of June 2009, there were 5 staff Newswriters and 8 full-time equivalent daily hire Newswriters.

⁶⁶ It appears, according to Petitioner Ex. 7, that there were a total of 65 NABET represented employees at WMAQ as of March 26, 2009, a few months prior to the launch of the Content Center. Vice President of Human Resources Hasan testified that, after the launch of the Content Center, there were a total of 45 NABET represented employees who remained, including 13 Photographers, seven to eight transmission employees, two “studio ops,” four to five control room employees, and 10 Assignment Desk employees.

Producers, three Executive Producers and numerous Reporters at WMAQ prior to the Content Center, none of whom was represented by any union.

Prior to the launch of the Content Center and thereafter, the WMAQ's Vice President of News/Station Manager was and is Frank Whittaker. Mr. Whittaker is in charge of the newsroom and assists the General Manager in maintaining and overseeing the functioning of the newsroom on a daily basis. Reporting to Mr. Whittaker is former-Assistant News Director Chris Pena, who oversaw the Newswriters before the Content Center and who currently, as Day Part Manager, oversees the Platform Managers and Content Producers. There are three other Day Part Managers, all of whom were Executive Producers prior to the launch of the Content Center. Before the launch of the Content Center, there was a Managing Editor, who oversaw the Reporters, and a Managing Editor of the Web, Zach Christman, who oversaw the creation and distribution of content to WMAQ's website, work now performed by a Platform Manager. Prior to the Content Center, Editors and Photographers reported to the Vice President of Broadcast Operations, Jan Golden, who continues to hold that position after the implementation of the Content Center.

Prior to the launch of the Content Center, the Show Producers and Assignment Desk Editors attended daily morning editorial meetings with the Executive Producers during which decisions were made about the range of news reports and stories to be covered throughout the day. The Executive Producers assigned Reporters and Show Producers assigned Newswriters to write stories for the Show Producers' dedicated broadcast shows. Assignment Desk Editors would match Photographers with Reporters to cover assigned stories. Segment Producers and/or Field Producers did research on particular stories and went out with the Reporter and Photographer to gather footage. Photographers often edited video footage in the field, using a laptop nonlinear editing system called EDIUS. When a Reporter was assigned to a story, the Reporter generally wrote the script for the story. Otherwise, the Newswriters wrote scripts, working closely with the Producer. Either the Newswriter or the Producer worked closely with the video Editor assigned to put the story together, using nonlinear editing systems Final Cut Pro or Grass Valley. Editors also sometimes searched for video from other sources (satellite feeds, VOD, LNS, etc.) when additional footage was needed to cover a story. Show Producers were responsible for producing all content and making all decisions regarding their dedicated show, including the order of stories and the time allotted for each story. They also did some writing, including leads and teases and an occasional story. In

addition, Newswriters worked as Producers on weekends and on an ad hoc basis as necessary.⁶⁷

According to Vice President of News/Station Manager Whittaker, the launch of the Content Center was first announced to employees at WMAQ in December 2008. In February, WMAQ management held another meeting for employees, at which the new positions of Content Producer, Platform Manager and Day Part Manager were explained.⁶⁸ As at other Employer owned and operated stations where the Content Center had been implemented, WMAQ employees were encouraged to apply for the new positions. WMAQ provided training in news writing, writing for the web, and editing to all internal applicants.⁶⁹ The training was followed by an evaluation that was used by WMAQ management in determining which internal applicants should be hired for the new positions. The Employer made offers to those internal applicants who were successful. The Employer offered Content Producer positions to 16 WMAQ NABET represented employees and 10 nonunion applicants (some of whom were also internal hires).⁷⁰ The Employer hired nine Platform Managers, most of whom were former WMAQ Show Producers and three of whom were former NABET-represented employees. All of WMAQ's Executive Producers were hired as Day Part Managers.⁷¹

⁶⁷ According to Vice President of Human Resources Hasan, Newswriters who served as Producers were not required to have any kind of "producer" training in order to do so. News writers who served as Producers received a "producer's upgrade" in salary for this work.

⁶⁸ The job descriptions provided by WMAQ in response to a NABET Local 41 information request made in April 2009 for the positions of Content Producer, Platform Manager, and Day Part Manager are essentially identical to those that were posted for the positions at WRC (see supra fn. 41, 42 & fn. 43). The only significant difference is that the WMAQ job description for Content Producer does not have any job experience requirement, but indicates as "desired" the job experience required by the WRC job description for this position (see supra fn. 43).

⁶⁹ Vice President of Human Resources Hasan testified that there was no formal Producer training but rather that "[i]t's something you would gain as you did the job."

⁷⁰ According to Vice President of Human Resources Hasan, the final head count at the end of the hiring process was 23 Content Producers. This included 14 former NABET-represented employees, of whom two were former Newswriters and 10 or 11 were former Editors.

⁷¹ It appears that the Employer also hired four WMAQ NABET represented Engineering employees, including Nancy Yangidate, to the position of Media Manager; however, it is not entirely clear when the position of Media Manager was created. According to Ms. Yangidate, the Media Manager position was offered to her sometime in 2008, prior to the launch of the Content Center. Ms. Yangidate also testified that one of her responsibilities in the new position was uploading video to the web, work that she began to perform in February 2009. Other responsibilities of the Media Manager include looking for archival footage, watching feeds as they come in, alerting the Assignment Desk of anything newsworthy, and then cutting it, writing small

There are no Newswriters and only one Editor remaining after the launch of the Content Center.

Vice President of News/Station Manager Whittaker testified regarding the role of the Content Producer as that position was conceived: “[T]he Content Producer is really the owner of a news story.” In distinguishing the role of the Content Producer from the newsroom staff prior to the Content Center, Mr. Whittaker explained that “before we had...Newswriters, Editors, Show Producers, and now there’s Content Producers who are responsible for multiple skills...and multiple platforms.” Manager of News and Content Matthew Piacente testified that “[t]he Content Producer would be...someone who’s actually a Producer, someone who takes a piece of content and it’s their responsibility to (a) follow it all the way through and (b) distribute it to other platforms.” In distinguishing the role of the Content Producer, Mr. Piacente explained that “[y]ou have so many different outlets now, and that’s the big difference.”

After the launch of the Content Center, there has been one Platform Manager assigned to each news broadcast, just as Show Producers were prior to the Content Center. However, certain Platform Managers have the additional responsibility of producing half-hour shows on WMAQ’s digital cable platform, Chicago Nonstop (herein Nonstop).⁷² In addition, there are several Platform Manager/Content Producers, who divide their time between the two positions.⁷³ Content Producers receive story assignments from the Platform Managers and are also regularly assigned to work with a Reporter. Generally, when Content Producers are assigned to work with a Reporter, the Reporter writes the story while the Content Producer may write a tag or introduction for the Reporter’s package or may create or obtain graphics for the story at the direction of

synopses with headlines, and pushing this material to the website. In addition, the Media Managers assist Content Producers who are having problems with DALET or who may require assistance in recording a feed. The Media Manager is a NABET-represented position.

⁷² Manager of News and Content Piacente testified in regard to Nonstop that “instead of having a reporter tracking a story, a news story, it’s something where maybe somebody goes and tells something in their own words and we put video and pictures to that.”

⁷³ Thus, Platform Manager/Content Producer Courtney Copenhagen testified that she works at least one day per week as a Platform Manager and fills in as needed for other Platform Managers and Day Part Managers. Ms. Copenhagen testified that several of her co-workers have similarly hybrid positions, specifically Ben Bowman, Katy Moore, Franci Feirstein, Susan Rivera, Natalie Templeton, Bridgette Minogue and Carol Ash. Content Producer/Platform Manager Templeton, who also testified, stated that she spends approximately 60 percent of her time as a Platform Manager.

the Reporter. The Content Producer's news writing assignments may include VOs or VO-SOTs. Some Content Producers also produce stories for Nonstop. Those stories do not involve a Reporter and do not require much writing but primarily involve "cutting content" and, in some cases, shooting video with a handheld digital camera. There are only about five Content Producers who shoot with regularity.⁷⁴ According to Vice President of News/Station Manager Whittaker, most Content Producers spend the majority of their time in the news room and "gather content" using DALET. Content Producers are also responsible for rewriting stories for use on the WMAQ website, and about 50 percent of WMAQ's web content is contributed by Content Producers.

Content Producer Zach Christman, who was the Managing Editor of the Website at WMAQ prior to the Content Center, described his work in the Content Center. On Sundays, he focuses primarily on producing stories for the website, much as he did prior to the launch of the Content Center. He spends Monday through Wednesday working on stories for the evening news casts. According to Mr. Christman, he does not write all of the stories that he edits for the news casts during those days, although he generally does at least some writing in connection with each story "whether it be an intro or a tag for the piece."⁷⁵ Mr. Christman stated that he does a lot more writing for news casts and editing video as a Content Producer than he had done in his previous position. For the past month, since being trained to shoot, Mr. Christman spends Thursdays out shooting video for stories he has pitched using a handheld digital camera and editing that material for Nonstop. He testified that he has done this four times since becoming a Content Producer. According to Mr. Christman, he is also regularly assigned to work with a

⁷⁴ Thus, Vice President of News/Station Manager Whittaker testified that Content Producer Rich Moy has been shooting for about a year and Zach Christman received training to do so about one month ago. According to Mr. Whittaker, Content Producer Marcus Riley also shoots content for the WMAQ website and Nonstop as does Courtney Copenhagen, who has the dual title of Content Producer and Platform Manager. Content Producer/Platform Manager Natalie Templeton, who also works on stories for Nonstop, testified that she does not shoot the footage for these stories but instead edits video shot by a Photographer. According to Content Producer Zach Christman, there are only four handheld digital cameras available for use by Content Producers, and these must be obtained from locked cages in the Photographer's shop below the news room.

⁷⁵ Mr. Christman explained that an "intro" is "the thing that the Anchor reads on camera or reporter reads on camera just before the piece airs, so say...now we're going to Lombard where there's...a big fire." A "tag" is some bit of information at the end that wasn't included in the story, for example "a fund had been set up for the assistance of the [fire] victims."

Reporter, and, in such circumstances, the Reporter does most of the writing though he might contribute an “intro” or a “tag.”

Content Producer Robert Ray, formerly a Newswriter at WMAQ, testified about the differences between his work prior to the Content Center and thereafter. While in the title of Newswriter, Mr. Ray spent several years as an Assignment Desk Editor⁷⁶ and thereafter worked as a Show Producer and a Segment Producer for WMAQ’s Health and Medicine segments. In the later role, Mr. Ray worked with a Reporter with whom he would divide up the health stories they were covering according to who was most familiar with particular stories. According to Mr. Ray, he and the Reporter would then research the stories for which they were responsible, going out with Photographers to shoot footage for the stories, writing the scripts, and working closely with the Editor who was editing the video. Mr. Ray testified that he did not do any actual editing or shooting although he regularly oversaw the shooting and editing of stories he had written and for which he was responsible. Mr. Ray conceded that his work as a Newswriter prior to the Content Center was different from the typical Newswriter work of writing stories assigned by a Producer, although he also testified that other Newswriters served as Producers. According to Mr. Ray, his current position as a Content Producer is more like the typical Newswriter job.⁷⁷ As a Content Producer, Mr. Ray continues to work as a Segment Producer for Health and Medicine but “whereas I used to do that almost exclusively before, ...now about 40 percent of my day is taken up with writing and video editing general news.” Mr. Ray testified that 90 percent of the writing he does is for broadcast and 10 percent is for the web. Regarding his fellow Content Producers, Mr. Ray testified that there were several who did mostly editing because they have been trained to use Final Cut Pro, a more sophisticated editing system.⁷⁸

⁷⁶ According to Mr. Ray, all Assignment Desk Editors have the title of Newswriter.

⁷⁷ Thus, Mr. Ray testified in regard to his work prior to the Content Center and after the implementation of the Content Center: “As a Newswriter...I didn’t have what many Newswriters had, which was basically writing the stories that the Producer asked you to write. I’m doing that now, however.”

⁷⁸ Platform Manager/Content Producer Natalie Templeton also testified that in the Content Center world “you kind of have to play off...each other’s strengths[:] For example, I have a Content Producer who is...a great editor...so I know what to give him, which stories to give him versus some of the other writers who might be better at writing...” Ms. Templeton did not identify the individual about whom she was speaking. However, Mr. Ray named Rich Moy, Suzanne Richter, and Zach Christman as Content Producers who did predominantly editing work.

Content Producer Suzanne Richter, formerly a Photographer/Editor and Editor in the Special Projects unit at WMAQ, also testified about the differences between her work prior to the Content Center and thereafter. As a Photographer/Editor, Ms. Richter pitched and researched stories, arranged and conducted interviews or accompanied a Reporter who conducted the interviews, and worked closely with an Editor who edited the footage. As an Editor in Special Projects, Ms. Richter performed non-linear editing using the Final Cut Pro editing system and also worked as a Producer with Health Reporter Nesita Kwan on a segment called Care Pages, in some instances pitching and writing stories and conducting interviews for the segment on her own.⁷⁹ Ms. Richter was classified as a Group 8 Video Journalist. Ms. Richter testified that, since becoming a Content Producer, she has continued to perform editing on Special Projects using Final Cut Pro, although she also writes and edits general assignment daily news using the DALET system. Ms. Richter testified that, when working on general assignment news, she spends about half her time editing and half her time writing. Nearly all of her afternoons are spent editing a daily “package” for the entertainment Reporter. In comparing her work before and after the launch of the Content Center, Ms. Richter testified that it is “virtually the same” in that she is still writing, editing and producing, but that she had more time to work on assigned stories when she worked exclusively as a Special Projects Editor rather than doing “day of” news.

ANALYSIS

This case concerns the unit placement of the Employer’s Content Producer position, a newly created job classification. There are six unit clarification petitions involved herein. Five of these are filed by NABET: One was filed by the Sector and four by each of four NABET Local Unions (Local 11, Local 31, Local 41, and Local 53) that represent employees covered by the parties’ Master Agreement at particular Employer locations for which the Locals are geographically responsible (New York, Washington DC, Chicago, and Los Angeles, respectively).⁸⁰

⁷⁹ According to Ms. Richter, she became an Editor for Special Projects in 2005. Prior to that time, she worked for several years as a regular news Editor, a role that did not involve any writing in contrast with her subsequent position in Special Projects. [Both positions were covered by the A Agreement of the NABET Master Agreement.] In distinguishing the work in Special Projects, Ms Richter explained that, unlike “day of” news, Special Projects stories tended to be longer and more complex and were completed under less deadline pressure because they were not for immediate release.

⁸⁰ The unit clarification petitions filed by various Locals seek specifically to clarify the “Scope of Unit” clauses of the Master Agreement that cover the employees in the Locals’ respective

In addition, a competing unit clarification petition has been filed by AFTRA, specifically in regard to the unit placement of the Content Producers at the Employer's Washington DC owned and operated local news station, WRC. Because the circumstances at WRC are unique, the unit placement of the WRC Content Producers is addressed separately below.

I. Unit(s) Sought to be Clarified:

As an initial matter, the parties disagree as to the "unit" or "units" for which clarification is sought.⁸¹ The Master Agreement has twenty-six Articles applying to all employees generally, including dues checkoff, grievance and arbitration, overtime and discharge provisions, as well as numerous sub-agreements. While the sub-agreements do not appear to stand on their own, each has a separate "Scope of Unit" provision. The Union's position, consistent with its unit clarifications petitions, is that all employees covered by the Master Agreement constitute a single unit. The Employer, in contrast, takes the position that the individual sub-agreements in the Master Agreement designate separate units and that the unit clarification petitions must be dismissed based on NABET's failure to specify with sufficient particularity which of these units it seeks to clarify.

Neither party has introduced the certification(s) of representation, which presumably would contain a clear statement of the unit or units for which the Union has been certified as the exclusive collective-bargaining representative.⁸² The Board has

geographical regions. Thus, the each petition seek to include the "Content Producer" position in the "Scope of Unit" clause of the A Agreement, which is national in scope and thus covers employees in each of the Locals' regions, as well as to the "Scope of Unit" clauses of those sub-agreements that cover NABET-represented employees specifically within each Local's geographic region. For example, the Local 11 petition seeks to include the Content Producers in both Section A1.1 and Section N.1.1 while the Local 41 petition seeks to include the Content Producers in both Section A1.1 and Section H1.1. [The copies of the Local 53 and Local 31 petitions in the record do not include their attachments specifying the clarifications sought.] The Sector petition seeks to include the Content Producers in Section A1.1, H1.1, M1.1. and N1.1. All of the NABET petitions with attachments in the record include a footnote indicating that the Employer's NABET-represented employees constitute a single bargaining unit.

⁸¹ This question is unproblematic in regard to Washington DC, as the NABET-represented employees at this location are all under the "A" Agreement of the Master Agreement and it is undisputed that the AFTRA-represented employees at this location comprise a single unit. The parties' disagreement is more significant in regard to the Employer's other locations, where NABET-represented employees fall under multiple sub-agreements of the Master Agreement.

⁸² Petitioner Local 41 asserts that NABET was certified as the representative of the Employer's engineering and technical employees in 1944, citing National Association of Broadcast Engineers and Technicians, 59 NLRB 478 (1944). Although the case tends to support the Employer's

previously held that in the absence of certification, the parties' agreement governs the scope of the unit. Louisiana Dock Company, Inc., 293 NLRB 233 (1989), enf. denied on other grounds, 909 F.2d 281 (7th Cir. 1990).⁸³ When there is no clear and unambiguous contract provision setting forth the parties' agreement, the Board will rely on bargaining history or a pattern of bargaining. Sambo's Restaurants, 212 NLRB 788 (1974). Here, the Employer contends that the language of the Master Agreement and the parties' history of collective bargaining generally establishes that the covered employees comprise multiple units.

The Recognition Clause of the parties' Master Agreement does little to clarify the issue. Thus, this provision states that "[t]he Union represents... for collective bargaining purposes all of the employees of the Company as defined in the applicable SCOPE OF UNIT clause, and the Company recognizes the Union as the exclusive bargaining agent for all such employees of the Company." Although clearly recognizing the Union as the exclusive collective-bargaining representative for all employees covered under the Master Agreement's various sub-agreements, this clause does not expressly indicate whether those represented employees should be treated as a single unit or as comprising multiple units defined by the sub-agreements. Cf. Louisiana Dock Company, Inc., 293 NLRB at 234.

The language of other provisions of the Master Agreement only perpetuates the ambiguity. Thus, in describing the purpose of its sub-agreements, referred to as "Individual Articles," the Master Agreement states that they "will contain the description of *each bargaining unit* ...(emphasis added)." While this language appears to clearly indicate the existence of multiple units, other provisions of the Master Agreement as clearly treat all covered employees as part of a single overarching unit.⁸⁴ Thus, the

position that there exist multiple units, the case is not conclusive. Thus, the Board has found that even where parties have initially treated a group of employees at a particular location as a separate unit, the parties may subsequently establish a single national unit by a practice of joint bargaining, repeated negotiation of a national agreement, and other indicators of such intention. See Columbia Broadcasting System, Inc., 208 NLRB 825 (1974).

⁸³ Of course, Louisiana Dock Company, Inc. concerned a "voluntary recognition" situation, in which no Board certification existed. On the current record, it is unclear whether that is the case in regard to (any of) the asserted unit(s) here. Thus, it cannot be determined whether the parties' clear intent in regard to the unit scope may be gleaned in any such documents, nor can it be established that a unit clarification petition is inappropriate to alter such clearly expressed intent presuming such exists.

⁸⁴ In this regard, the instant case differs from American Broadcasting Company, 114 NLRB 7 (1955), in which the Board was presented with a NABET "master agreement" that contained

“Transfer of Work” provision (Article VI) states that “[t]he Company agrees that it will not transfer or subcontract any work or functions covered by this Agreement and presently being performed by employees *in the bargaining unit*...to persons *outside the bargaining unit*, provided that with respect to work or functions which in the past have been performed for the Company both by persons *within and without the Unit* the Company may continue to have such work performed *outside the bargaining unit* to a degree no greater than heretofore (emphasis added).” Moreover, Sideletter 50 of the CBA, negotiated by the parties in 1990, permits employees covered by one sub-agreement to perform work habitually performed by employees covered by another sub-agreement, further suggesting a single unit.⁸⁵ I conclude that the parties’ agreement is contradictory and thus ambiguous as to the existence of a single or multiple units.

The extrinsic evidence bearing on the single unit/multiple units question is limited. Employer Vice President of Labor Relations Herzig and Employer Senior Vice President of Labor Relations and Talent Negotiations Krolik, both of whom have participated in negotiations for the Master Agreement with the Union, testified summarily that the Master Agreement covered multiple units. The only specific basis Mr. Krolik gave for this view was that each of the “units” covered by the Master Agreement’s various sub-agreements has its own ratification process. However, Mr. Krolik also testified that ratification of the Master Agreement required the approval of all “units.” Moreover, there is no indication that the sub-agreements were negotiated separately, at a different time, or by different representatives than those who negotiated the Master Agreement. Cf. Louisiana Dock Company, Inc., 293 NLRB at 235. Only the General

“General Sections,” covering all of the employer’s represented employees, and “Individual Sections”—referred to in the master agreement as “collective bargaining agreements”—that covered each of multiple “bargaining units” and contained their own “Scope of Unit” provisions. The Board concluded based on the clear language of the agreement and the absence of evidence of a contrary practice or intent that the “bargaining units” were indeed separate and had not been merged into a single unit. Id at 9. As discussed below, that is not our case in light of the ambiguous language of the Master Agreement and the, albeit limited, record evidence in regard to bargaining history.

⁸⁵ Although Employer Senior Vice President of Labor Relations and Talent Negotiations Krolik testified that even where such crossover occurred the employees retained their “unit seniority” as defined in terms of the sub-agreement covering their original job classification, I find this “sub-agreement” seniority to be of limited assistance in parsing the single unit/multiple unit question here. Mr. Krolik further testified that the “unit seniority” of employees covered under the “A” Agreement was by geographic region, although it is uncontroverted that this sub-agreement is national in scope. Thus, I am reluctant to rely on “seniority” as a benchmark for defining the scope of the existing unit(s).

Articles of the most recent Master Agreement are signed, and those only by Mr. Clark and Mr. Krolik. Indeed, the evidence appears to indicate that the Master Agreement is currently being renegotiated by NABET Sector President Clark and a committee of representatives from each of the Local Unions that represents covered employees at various Employer locations. There is no indication that the Local Union representatives on the negotiating committee are currently or have in the past negotiated collective-bargaining agreements or even sub-agreements such as those contained in the Master Agreement independently in regard to the “unit” of employees within their geographic area of responsibility.⁸⁶ The Board has previously held that the mere existence of supplemental agreements covering specific groupings of employees does not undercut the existence of a single unit where the parties’ course of conduct otherwise supports a single unit. See Columbia Broadcasting System, Inc., 208 NLRB at 826; but see National Broadcasting Company, Inc., 114 NLRB 1, 2 (1955).⁸⁷

In my view, the extrinsic evidence supports the conclusion that the parties have historically treated the employees covered by the Master Agreement as a single unit for purposes of collective bargaining. I have concluded that all of the unit clarification petitions herein seek clarification of this single unit, with its multiple “Scope of Unit” clauses, to include the new classification of Content Producer. Thus, I will treat the

⁸⁶ Although Mr. Krolik testified that Local Unions frequently negotiated and signed agreements independently with the Employer, he was unable to provide examples. Employer Vice President of Labor Relations Herzig described several such agreements, between Local 11 and the Employer. All of these enabled NABET-represented employees to perform additional work of the kind they habitually performed when such additional work became available, for various circumstance-specific reasons, at their location (New York). Mr. Herzig conceded that none of these agreements altered the scope of the bargaining unit(s) as set forth in the Master Agreement and cited only one instance in which any term of the Master Agreement was altered by these local agreements (specifically, the meal period provision in the Dr. Oz Agreement).

⁸⁷ In National Broadcasting Company, Inc., the Board was faced with a contract between the Employer and the International Alliance of Theatrical Stage Employees (IATSE), which represented the Editors prior to the industry’s transition from film to tape. In that case, the parties had a master agreement, similar to the one at issue here, containing General Articles and Individual Articles, the latter of which included a “contract” covering “film service” employees employed by the Employer in Los Angeles. In concluding that the Los Angeles “film service” employees constituted a separate unit, the Board relied on testimony from the union attorney that, following the certification of the union as the exclusive representative of these employees, the parties had agreed that the collective-bargaining agreement covering them would be added to the master agreement and that bargaining thereafter would be done in conjunction with nationwide negotiations. In this context, the Board viewed the mere fact of nationwide negotiations as insufficient to undercut the initial intent of the parties that the Los Angeles “film service” employees would exist as a separate unit. There is no comparable evidence here.

petitions separately filed by the various NABET Local Unions here as subsumed within the NABET Sector's petition. I will address AFTRA counter petition in regard to the unit placement of the Washington DC Content Producers separately.

II: Historical Exclusion:

The Employer argues that the unit clarification petitions must be dismissed because they seek to reverse the parties' historical exclusion of Producers from the unit. It was well-established that a unit clarification petition may not be used to upset an agreement between a union and an employer or an established practice of such parties concerning the unit placement of various individuals or preexisting job classifications. Al J. Schneider & Associates, Inc., 227 NLRB 1305, 1305-1306 (1977) (citing Union Electric Co., 217 NLRB 666, 667 (1975)). The Board has made clear that this principal applies even where the historically excluded group of employees is not distinguishable by job classification, job function, or geographic location from employees who have been traditionally included in the unit. United Parcel Service, 303 NLRB 326, 327 (1991). At the same time, a unit clarification petition is appropriate for resolving ambiguities concerning unit placement that arise when a new job classification is created or when an existing classification undergoes recent, substantial changes in duties and responsibilities that raise a real doubt whether the classification continues to fall in its previously excluded or included category. Union Electric Co., 217 NLRB at 667; Bethlehem Steel Corp., 329 NLRB 241 (1999).

A. Are the Content Producers "Historically Excluded"?:

In support of its argument that the Content Producers are "historically excluded" from the unit as "Producers," the Employer cites Union Electric Co., 217 NLRB 666 and United Parcel Service, 303 NLRB 326. The Employer relies on the testimony of Employer Senior Vice President of Labor Relations and Talent Negotiations Krolik and Vice President of Labor Relations Herzig that producers have been historically unrepresented and argues that, because the Content Producers are essentially "producers," a unit clarification petition would be an inappropriate vehicle for including them in the unit. The Union does not appear to dispute that certain producer positions, such as the positions of Executive Producer and Show Producer, have been historically excluded from the unit and does not deny that the Content Producers perform some amount of "producer" work. Rather, the Union contends that Content Producers spend most of their time performing work historically performed by bargaining unit employees and that, because bargaining unit employees have in the past also performed "producer"

work, the fact that Content Producers do so does not render the unit clarification petitions improper.⁸⁸

As an initial matter, the cases relied upon by the Employer, Union Electric Co. and United Parcel Service, to support its position are inapposite. In both cases, unions sought to have included in their existing units *pre-existing* job classifications or groups of employees who were either expressly excluded from the unit by contract or who had historically been unrepresented. Thus, in Union Electric Co., 217 NLRB 666, the Board found unit clarification inappropriate with regard to most employees whose placement was at issue because their job classifications had been in existence during some part of the parties' bargaining history and fell within the express exclusions of the parties' collective-bargaining agreement. In so concluding, the Board noted no evidence of "recent creation" of classifications and no evidence of "relevant changes" affecting unit placement. *Id.* at fn. 6 & fn. 10. Our case is clearly distinguishable. Not only was the Content Producer classification newly created during the term of the parties' now expired collective-bargaining agreement, but the classification's creation was, by the Employer's own admission, part and parcel of a substantial change in the Employer's operations and work flow.

Similarly, in United Parcel Service, which was not a unit clarification case, the union sought to include in its nationwide bargaining unit of "operations clerks" a *pre-existing* group of "operations clerks" at several facilities who had historically been unrepresented. Without inquiring into the nature of the work performed by these employees, the Board specifically held that even where employees have the same job classification, the same job function, and the same location as employees traditionally included in the unit, accretion is inappropriate if those employees have been "historically excluded" by the parties' express agreement and past practice in bargaining. 303 NLRB at 327. The instant case is clearly distinguishable, as it involves a newly created job classification that came into existence after the Employer and NABET commenced their current collective-bargaining negotiations in which unit placement of that classification is

⁸⁸ The Employer further asserts that an adverse inference should be drawn against the Petitioners on the question of "historical exclusion" because the Petitioners have failed to produce NABET-CWA Sector President Clark to testify on this issue. Although I agree that the record evidence in regard to this issue is spotty, the parties in my view share the responsibility for any inadequacies in the record. I do not think an adverse inference is appropriate in the context of this non-adversarial proceeding for unit clarification, nor has the Employer cited any unit clarification cases in support of its position.

at issue. Cf. *id.*; see also Plough, Inc., 203 NLRB 818, 819 fn. 4 (1973) (policy of deferring to historical exclusion in unit clarification proceeding applicable not only where classification at issue existed but was not included in the unit at time of certification but also where the classification came into existence thereafter and bargaining continued to be conducted on a basis that did not include the disputed classification). Thus, there is no previous history of bargaining or practice between the parties on which to rest a finding of “historical exclusion.”

To the extent the Employer would argue that the “Content Producer” title was simply a new name for a preexisting, historically excluded classification, the Employer has failed to identify that classification with specificity. Although it is clear from the record testimony that the historically unrepresented positions of Show Producer and Executive Producer ceased to exist with the implementation of the Content Center, the Employer has not argued, nor could it on this record, that the Content Producer classification is simply a new title for either of these positions. On the contrary, it is clear based on the testimony of Employer Vice President of News and Content at KNBC Burns that the Executive Producer role in the pre-Content Center world was transposed to the Day Part Manager position after the implementation of the Content Center.⁸⁹ Similarly, Ms. Burns testified that the Platform Manger role in the Content Center “is the new title for someone who in the previous iteration would be called a Show Producer,” although Platform Managers also exercise additional functions connected with their responsibility for particular platforms.

It is less clear whether or to what extent there continue to be Field Producers or Segment Producers employed at the Employer’s owned and operated local news stations.⁹⁰ In addition, it is not entirely clear whether the classification of Field Producer

⁸⁹ Indeed, at WMAQ and WRC, the Employer’s Chicago and Washington DC owned and operated local stations, respectively, the Day Part Managers hired were the same individuals who had previously held the positions of Executive Producer.

⁹⁰ Employer’s exhibit 25 is of limited use in clarifying this question. Although the exhibit lists the number of employees in various job categories at the different locations pre- and post- Content Center, it does not in any consistent way indicate which job classifications comprise the general category of “Producer” as used in the Exhibit. Thus, for the Employer’s New York location, Er Exh. 25 indicates the existence of the categories of “Executive Producer,” “Investigative Unit Producer,” “Sports Producer” and “Producer” prior to the implementation of the Content Center. In contrast, for the Employer’s Washington DC and Chicago locations, Er Exh 25 simply lists the general category of “Producer” as existing prior to the Content Center although it is clear from the testimony that Executive Producers also existed at these locations at that time. For the Employer’s Los Angeles location, the categories of “Executive Producer” and “Producer” are listed, and the exhibit further indicates the existence of several NABET-represented “Producers”

has been historically excluded from the unit.⁹¹ Regardless, the evidence does not permit a conclusion, nor does the Employer specifically contend, that the Content Producer position has taken the place of the Field Producer classification. The record indicates that Field Producers generally arrange interviews and go out into the field with crews to oversee the gathering of content for the story assigned to them, as well as overseeing all aspects of the story's production, including writing the script, editing the footage, and writing teases and intros where necessary. Although there is evidence that some Content Producers go into the field to gather content, it is clear that they rarely work with a crew when they do so. Moreover, although Content Producers do perform many of the above-listed "producer" functions to some extent, it is clear that, in contrast with Field Producers, they rarely do all of these functions for a single story.⁹²

In any case, for reasons discussed more fully below, the evidence fails in my view to demonstrate that Content Producers are essentially "producers." The Employer relies primarily on testimony by management personnel that the position was conceived as a "producer" role. However, AFTRA Executive Director O'Donnell testified that, during her February 2009 negotiations with the Employer regarding the Content Producers at WRC, the position was not described to her as a "producer" position. Indeed, the job description states the Content Producer's essential responsibilities as "[w]ork[ing] closely with Platform Managers, Day Part Managers and Assignment Editors, as well as Reporters and Anchors, to desktop edit, write, produce and gather content on all of WRC's platforms." The job description does not specifically require

and "Special Projects Producers" prior to the Content Center. Thus, it is impossible to discern precisely which producer classifications are comprised in the general category of "Producer" as variously used in Er Exh 25. Under these circumstances, I cannot infer from the apparent absence of any "Producers" at the various locations after the implementation of the Content Center that Field Producers and Segment Producers were no longer employed.

⁹¹ Thus, the classification of "Field Producer" is listed in the "N" Agreement provision establishing wage rates. Moreover, a September 1973 grievance award entered into evidence by the Employer makes clear that, under the parties' then-current Master Agreement, "field producer" work could be performed by both unit and nonunit employees as long as the distribution of that work was consistent with past practice. Further support for that view may be found in the various Sideletters to the Master Agreement, indicating that bargaining unit employees may perform "field producer" work, apparently without limitation, although also without any expansion of the Union's jurisdiction.

⁹²This is a distinction based not merely on practice but, to some extent, on the express language of the parties' Master Agreement. Thus, the "Scope of Unit" provisions of the "K," "M," and "N" Agreements specifically state that Field Producers are permitted to do news writing work only for material "arising out of or in connection with their producing work."

“producer” experience, and the Employer did not provide any “producer” training although well over half of the Content Producers hired were former Employer Newswriters and Editors rather than Producers.

For the reasons discussed, I find no basis to conclude that the Content Producers have been “historically excluded” from the unit as “Producers” and would not dismiss the unit clarification petitions on that basis.⁹³

B. The Local 11 Agreement:

The Employer argues that, in any case, its September 19, 2008 Agreement with NABET Local 11 President McEwan renders those unit clarification petitions that would include the New York Content Producers in the unit untenable. The Local 11 Agreement provided that the Content Producers at WNBC, excluding those formerly represented by NABET who chose to remain NABET-represented, would be unrepresented and provided that “NABET-CWA agrees that it will make no claims to represent any non-NABET-represented Content Producers employed by WNBC except in the event such employees elect NABET-CWA as their bargaining agent in an election supervised by the NLRB.” The Employer asserts that the Agreement vitiates not only Local 11’s unit clarification petition but also the NABET Sector’s petition, at least in so far as it includes the New York Content Producers. Because I find no basis to conclude that the Local 11 Agreement was binding on the NABET Sector, I reject the view that this Agreement fatally undercuts the Sector’s unit clarification petition.⁹⁴

There is nothing in the NABET-CWA By-Laws tending to establish that Local Union Presidents have authority to sign agreements with the Employer concerning who will and will not fall within the Union’s representation. It is undisputed that all collective-

⁹³To the extent the Employer suggests that the Petitioners’ contravention of the parties’ historical practice is signaled by the Sector’s failure to grieve the Content Producer dispute, as the parties’ practice in regard to jurisdictional disputes requires, I find this observation irrelevant. Moreover, the question whether the Sector may have violated the Master Agreement’s provision that jurisdictional disputes “shall be submitted under the grievance and arbitration provisions” by failing to grieve the Content Producer issue has no bearing on the validity of the unit clarification petitions. The Employer does not contend and, in any case, I find nothing in the Master Agreement to support the view that the Petitioners have waived their right to file a representation petition.

⁹⁴ Having found that the pending NABET petitions seek clarification of a single unit, I conclude that the NABET Sector petition subsumes the others. Thus, it is unnecessary to resolve the question whether Local 11 President McEwan, in signing the Local 11 Agreement, in fact had authority to do so on behalf of Local 11, nor is it necessary to determine whether the existence of this Agreement vitiates Local 11’s unit clarification petition.

bargaining agreements are between the Sector and the Employer. Although a Local Union President may sign off on such an Agreement if it exclusively concerns that Local, it is clear that, in such instances, the Agreement must also be signed by the Sector President "or his designee."⁹⁵ Moreover, there is no evidence that NABET-CWA President Clark even knew of Local 11 President McEwan's negotiations with the Employer, let alone designated Local 11 President McEwan to negotiate in regard to the representation of the New York Content Producers on the his behalf. Nor is there any evidence of communication from either Mr. McEwan or Mr. Clark to the Employer suggesting that the Sector designated Mr. McEwan or otherwise endorsed his authority to negotiate such an agreement. Cf. Consolidated Chemical Industries, Inc., 44 NLRB 985, 987-988 (1942).⁹⁶ In short, there is no evidence to warrant the conclusion that Mr. McEwan had actual or apparent authority to bind the Sector in regard to the unit placement of the Content Producers.⁹⁷

⁹⁵ Although the evidence indicates that Local 11 has previously negotiated agreements with the Employer that allowed unit employees in New York to perform additional work of the kind they generally performed in particular instances where such additional work became temporarily available, there is no evidence that 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 President.

⁹⁶ In Consolidated Chemical Industries, Inc., 44 NLRB 985, 987-988 (1942), cited by the Employer in support of its position, the Board concluded that a Local Union acted with "apparent authority" in terminating an existing collective-bargaining agreement, although the agreement was between the Union's District Council and the Employer. In that case, unlike this one, the Local Union had sent a "notice of termination" letter to the employer within the collective-bargaining agreement's 30-day window period, stating that "the union" desired to begin negotiations for a new contract and copying the District Council. The Local Union commenced negotiations, with a representative of the District Council periodically in attendance. The District Council did not challenge the Local Union's "notice of termination," claiming that the predecessor collective-bargaining agreement remained in effect, until the Local sought to sever itself from the District and filed an election petition. That is not our case.

⁹⁷ Any implication that the Sector waived its right to seek a unit clarification that included the New York Content Producers by virtue of the Local 11 Agreement is likewise untenable in my view. Such a waiver must be clear and unmistakable. The fact that NABET Sector President Clark delayed two months after the existence of the Local 11 Agreement was raised by Employer Vice President of Labor Relations Herzig during national negotiations to file the Sector's unit clarification petition does not meet this threshold, nor does the Sector's failure to exercise its right to challenge the Agreement on jurisdictional grounds through the parties' grievance and arbitration process. Cf. Shipbuilders (Bethlehem Steel), 277 NLRB 1548 (1986). Furthermore, there is no indication that the Sector has "invoked" the Local 11 Agreement in any sense that might estop the Sector from proceeding on its unit clarification petition covering the New York Content Producers. Cf. Verizon Information Systems, 335 NLRB 558 (2001).

I find no basis to conclude that Content Producers have been historically excluded from the bargaining unit, whether in New York or at any other location where the unit placement of the Employer's Content Producers is at issue.

III. Analytical Framework for Unit Clarification:

A unit clarification proceeding is appropriate where new groups of employees have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement, as such circumstances may create an ambiguity in regard to unit placement or unit scope. Union Electric Co., 217 NLRB at 667. Where such an ambiguity exists, the Board will generally examine whether the new employees share a sufficient "community of interest" with employees of the existing unit to warrant their accretion to the unit.⁹⁸ However, the Board has declined to perform an accretion analysis in some cases, even when presented with a valid unit clarification petition based on an employer's creation of a new job classification. Premcor, Inc., 333 NLRB 1365, 1366 (2001); Developmental Disabilities Institute, Inc., 334 NLRB 1166, 1168 (2001). Where it may be established that the new classification is performing the "same basic function" that a unit classification historically has performed, the new classification is simply treated as properly remaining in the unit and, thus, no accretion analysis is appropriate.

The Board has also departed from a traditional accretion analysis in cases where a new classification has been created that performs some unit functions and the unit is defined in terms of work performed rather than covered job classifications. The Sun, 329 NLRB 854, 857 (1999). In such circumstances, the Board has found a presumption of inclusion unless the unit functions performed by the employees in the new job classification are "merely incidental to" or "an otherwise insignificant part of" their work. *Id.* at 254. Applying this standard, the Board has found that, where a new classification's "primary function" is essentially identical with that of an unrepresented group of employees and unit work performed by the new classification is merely incidental to that primary function, the first prong of the The Sun analysis cannot be met, and, thus, no

⁹⁸ In making this assessment, the Board considers the following "community-of-interest" factors: interchange and contact among employees, degree of functional integration, geographic proximity, similarity of working conditions, similarity of skills and functions, supervision, and collective bargaining history. E.I. Du Pont de Nemours, Inc., 341 NLRB 607, 608 (2004). Because "accretion" by definition oversteps the employees' choice of representative, the Board will find an accretion only when the employees sought to be added to the unit have "little or no separate identity and share an overwhelming community of interest with the preexisting unit." Safeway Stores, 256 NLRB 918 (1981).

presumption of inclusion is warranted. WLVI, Inc., 349 NLRB 683, 684-685 (2007). In circumstances where a presumption of inclusion does obtain, it may be rebutted by a showing that the new classification is “sufficiently dissimilar” from the unit employees that a unit including the new classification would be inappropriate. The Sun, 329 NLRB at 254.⁹⁹

Finally, the Board applies a variant of the “community of interest” test for accretion in regard to employees who regularly perform work in both included and excluded job classifications whose unit placement is at issue. See Berea Publishing Company, 140 NLRB 516 (1963) (reverting to standard that dual function employees are included in unit if they regularly devote sufficient periods of time to unit work to demonstrate a substantial “community of interest” in unit terms and conditions). Rather than evaluating the traditional factors, the Board focuses instead on whether the employees in question regularly perform a substantial amount of unit work. An employee need not spend 50 percent of her time performing unit work to be included in the unit as a dual function employee. See Oxford Chemicals, Inc., 286 NLRB 187-188 (1987) (employee who spends between 25 and 37-1/2 percent of his time performing unit work is a dual function employee and consideration of other traditional community of interest factors inappropriate); see also WLVI, Inc., 349 NLRB at fn. 5 (citing Avco Corp., 308 NLRB 1045 (1992), for the proposition that an employee who spends 25 percent of his time performing unit work should be included in the unit as a dual function employee).

A. Is the Unit Functionally Defined?:

The Petitioners asserts that the Board’s analysis in The Sun, 329 NLRB at 857, should be applied to this case because the unit is “functionally defined.” In contrast, the Employer asserts that the unit is not “functionally defined” and that, even assuming the Board’s analysis in The Sun were applicable, the evidence would fail to warrant a presumption of inclusion because the unit work performed by Content Producer’s is

⁹⁹ The Board made clear in The Sun that, in assessing whether the rebuttal burden is met, some but not all of the traditional “community of interest” factors will be considered, specifically those that relate to changes in the nature and structure of the work. To the extent such operational changes relate to technological innovation, they will not suffice to warrant exclusion of the new classification from the unit unless the work has changed to such an extent that the unit would no longer be appropriate if the new classification were included. The Board will not rely on community-of-interest factors to the extent that they may be deemed within the employer’s control or controlled in whole or part by collective bargaining, including wage rates, supervision, work situs, and interchange. *Id.* at 859, 862.

merely incidental to their primary function of “producing.” Although the Board’s analysis in The Sun seems well suited to the facts of the instant case in some respects, not least because the case involves the transfer of unit work to a new non-unit classification, the Board has signaled that this is not the linchpin of The Sun’s applicability. On the contrary, in Archer Daniel Midland Co., 333 NLRB 673, 673 fn. 1 & 2 (2001), the Board, in adopting the Regional Director’s finding that The Sun was inapplicable, declined to rely on the fact that there was no transfer of bargaining unit work but instead relied on the fact that the bargaining unit was not functionally defined. In my view, the unit whose clarification is at issue here also does not meet that requirement.

An examination of the “Scope of Unit” provisions contained in the NABET CBA in my view clearly establishes that the unit here is defined by job classification rather than by work performed. This is most clear from the Scope of Unit provision of the A Agreement, which expressly defines the covered employees in terms of job classification. Thus, the provision covers “all the technical employees of the Company wherever located, employed in the Engineering department of the Company, and shall be deemed to include all of the employees who are in the classifications set forth in Article A-III and all employees in additional classifications which may be added to Article A-III...” Cf. Tarmac America, Inc., 342 NLRB 1049, 1050 (2004)(holding that unit defined by collective-bargaining agreement to include “all Operating Engineers” at specified employer locations was not “functionally defined” where collective-bargaining agreement included an appendix listing covered job classifications).

The analogous provisions of the H, M, and N Agreements, also at issue here, are somewhat less straightforward, but in my view are most properly understood as defining unit scope in terms of job classification. The H Agreement covers “all News and News Special Events Writer(s) now or hereafter engaged by the Company at its Chicago office to write, rewrite, condense, process, or edit news material” while the M Agreement extends to “all News and News Special Events Writers...at its Los Angeles office...and to all Editorial Assistants...” Similarly, the N Agreement covers “all staff Radio and Television Newswriters (including those staff Newswriters assigned to perform the functions of a News Editor or a Producer), and all staff News and Feature Assistants, and all Desk Assistants” employed at the Employer’s New York location. Although each of these Agreements contains detailed provisions outlining the duties of covered employees, those provisions do not appear to be defining of the unit. Rather, these provisions specify the “only exclusive work” of the covered classifications, while detailing

circumstances in which other job classifications may perform news writing work and reserving to the covered classifications the ability to perform certain additional work, including producing. Cf. WLVI, Inc., 349 NLRB at 686 fn. 3.¹⁰⁰

Because the evidence cannot support a finding that the unit here is defined by work performed rather than job classification, I would not apply the Board's The Sun analysis to the facts of this case.

B. Unit Placement of WNBC, KNBC and WMAQ Content Producers:

The Petitioners argue in the alternative that the case is governed by the Board's decision in Premcor because the Content Producers spend the vast majority of their time performing work previously performed by unit employees. The Employer contends that Premcor applies only where an employer has created a new title that performs *exclusively* work previously performed by bargaining unit employees and that, because that is not our case, the traditional accretion analysis must apply. The Employer further argues that, under this analysis, the Content Producers cannot be accreted to the existing unit because they do not share an "overwhelming community of interest" with unit employees. In so arguing, the Employer contends that any attempt by the Petitioners to establish "a community of interest" between the Content Producers and the Newswriters and Editors formerly employed by the Employer is unavailing here because there are essentially no Editors and no Newswriters currently in the unit. In addition, the Employer contends that seeking an accretion on this basis is an

¹⁰⁰ The unit found "functionally defined" in WLVI, Inc. was described by the relevant collective-bargaining agreement provision as follows:

The work covered shall be work commonly performed by Technicians such as work in connection with the installation, operation, maintenance and repair of broadcast , television, and audio equipment and apparatus...This also includes all lighting work and studio and field operations work incidental to and necessary to television and audio, video and optical recording work...and all editing, splicing and projection work performed by the Employer....Work commonly performed by Technicians shall also include the work of building, maintenance, repair, placement, and any operation in connection with television performances of backgrounds, platforms, and other structures forming a part of the scenery or the set...

The collective-bargaining agreement also contained language stating that the above described provision was "non-exclusive," specifically that the provision "shall not be so construed as to restrict the Employer in making assignments of responsibilities, work and/or functions to Technicians or others out of the Bargaining Unit, as the Employer determines to be in its best interests." Unlike our case, the collective-bargaining agreement in WLVI, Inc. apparently did not include specific restrictions on the performance of unit work by non-unit employees, such as the "Transfer of Work" provisions in our case, the various Sideletters, and certain provisions of the "Scope of Unit" clauses themselves.

impermissible use of the unit clarification process to obtain a remedy to unfair labor practices that are the subject of pending charges.

In Premcor, the Board concluded that where a newly-created job classification performs the “same basic functions historically performed by the members of the bargaining unit” that classification is part of the unit and need not be accreted. The employer operated twelve oil refineries controlled by six on-site control boards that were monitored by union represented employees classified as “operator 1s,” who also spent 25 percent of their time on “field work.” The Employer acquired a new computer technology that could monitor up to six refineries simultaneously from a remote location and decided to establish a centralized control room in a facility outside its refinery complex. The Employer created a new nonunit position of “process control coordinator” (PCC) and hired six people to fill the positions, all former “operator 1s,” with the intention of phasing out the “operator 1” positions entirely and transferring the “operator 1s” field duties to a different unit classification, once the transition to the new control center was complete. The Board concluded that, although the responsibilities of the PCCs differed in some respects from the “operator 1s” the PCCs should remain in the unit, without the necessity for an accretion, because they were performing the same essential function historically performed by members of the bargaining unit.¹⁰¹

It is clear that a unit clarification petition is not inappropriate simply because, as in Premcor, it involves a removal of unit work and unit employees from the unit.¹⁰² See *id.* Moreover, when an employer makes a change in unit scope without the consent of

¹⁰¹ Interestingly, although the changes in the work of PCCs as compared with the unit employees they replaced was clearly a result of new technology acquired by the employer, the Board did not consider, let alone rely on, this fact in reaching its conclusion. Moreover, Premcor has been applied in cases where an employer created a new classification due to an organizational imperative that was not the result of any technological change either in the employer’s industry or the employer’s operation. See Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001).

¹⁰² Although the Board has held that a unit clarification petition cannot be used by a charged party in order to do an end-run around a pending unfair labor practice charge, see Al J. Schneider & Associates, Inc., 227 NLRB at 1305-1306, that holding does not fit these circumstances. In Al J. Schneider, the Board made clear that a unit clarification petition filed *by a putative employer* to resolve an 8(a)(5) allegation that was the subject of an unfair labor practice proceeding *against the putative employer* was inappropriate. Specifically, the union had filed an unfair labor practice charge alleging that a company with whom it had a collective-bargaining agreement violated Section 8(a)(5) by failing to apply the collective-bargaining agreement to employees of two other companies, because the three companies in fact constituted a single employer. The first company filed a unit clarification petition, seeking a declaration by the Board that the employees of the other companies were not part of its unit. Here, in contrast, the Petitioners are not charged parties but the charging parties in the pending unfair labor practice cases.

the union, the availability of a unit clarification proceeding may be a necessary predicate to the lawfulness of that change. See, e.g., Mt. Sinai Hospital, 331 NLRB 895 (2000), enfd. in an unpublished opinion at 2001 WL 533552 (2d Cir. 2001)(once a specific job classification has been included within the scope of the unit, an employer cannot remove the position without first securing the Board's consent, through a unit clarification petition, or the union's consent). The Board has previously found that an employer who replaces one or more unit classifications with a new non-unit classification that performs predominantly unit work changes the scope of the unit. See Hill-Rom Company, Inc., 297 NLRB 351, 358 (1989), enf. denied on relevant grounds, 957 F.2d 454, 457 (7th Cir. 1992).¹⁰³ Here, whether the Employer's elimination of the Newswriters and Editors and the assignment of that work to the Content Producers is characterized as a transfer of unit work or a change in the scope of the unit, it is clear that these circumstances do not render a unit clarification petition inappropriate.

Not only has the Board entertained unit clarification petitions in such circumstances, it has developed alternatives to the traditional accretion analysis. Thus, in The Sun, the Board applied an alternate analysis in circumstances where the employer had removed work (but not employees) from the unit, and, in Premcor, the Board applied yet another analysis to circumstances in which an employer had removed both work and employees from the unit. As previously discussed, the Board has indicated that the applicability of The Sun is limited to functionally defined units, see Archer Daniels Midland Co., 333 NLRB at 673 fn. 1 & 2; however, the Board has not

¹⁰³ Hill-Rom was not a unit clarification proceeding but an unfair labor practice case, in which the distinction between a transfer of unit work and a change in unit scope was determinative of the alleged 8(a)(5) violation. Nevertheless, the case offers some useful parallels. As in the instant case, the employer had created a new non-unit classification, quality assurance technician (QAT), in response to the increasing technological complexity of its product, hospital beds. The QATs performed work previously assigned to two unit classifications, inspectors 3 and 4, as well as performing additional technical and field work not previously performed by unit employees. The QATs hired were mostly but not exclusively former inspector 3s and 4s. Finding that the employer's action constituted a change in the scope of the unit, the ALJ concluded, citing United Technologies Corp., 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir 1989), that ordinarily in such circumstances the unit placement of the employees would turn on whether the QATs were "sufficiently dissimilar" from the unit to warrant removal from the unit. However, because both parties had conceded that the QATs could be appropriately included or excluded, the ALJ instead resolved the unit placement issue by determining that the new classification had a greater "community of interest" with the employer's inspectors (including the 3s and 4s whom they has replaced) than with non unit technicians.

clearly delimited the applicability of Premcor.¹⁰⁴ Nevertheless, I recognize that the instant case differs from Premcor, in part because the Content Producers have some responsibilities that do not appear to have been previously performed by bargaining unit employees.

At the same time, application of a traditional accretion analysis here is problematic in light of the Employer's contention that such an analysis cannot compare the Content Producers with bargaining unit classifications that no longer exist. Clearly, "community of interest" factors such as interchange between unit employees and the new classification, supervision, and even functional integration, are rendered meaningless, or in any case are substantially compromised, in circumstances where the most relevant bargaining unit classifications, here Newswriters and Editors, have been eliminated as a result of the very change in the Employer's operations that produced the new classification. This was the case in Premcor, and it is also the case here.

It is undisputed that newswriting and editing, which were previously performed by the Employer's NABET-represented Newswriters and Editors, respectively, are now being performed by the Content Producers, using a new computer system, DALET, that allows both functions to be performed at a single computer terminal. As a result of this transition, bargaining unit Newswriter and Editor positions have been essentially phased out. In addition, the Content Producers do some shooting, also performed by NABET-represented Photographers who continue to be employed by the Employer, but using a different, hand held digital camera. Finally, the Content Producers also perform some "producer" work as did some Newswriters before they were replaced by the Content Producers. Indeed, in some instances, the Content Producers are performing the same "producer" work that they previously performed as NABET-represented employees prior to the implementation of the Content Center. The Content Producers also perform other

¹⁰⁴ I find no basis to conclude that the Board's holding in Premcor is limited, as the Employer contends, to circumstances in which a new classification performs exclusively work previously performed by the bargaining unit, nor has the Employer cited any case law in support of this contention. Moreover, the Board has previously held that a new classification performing work previously performed by bargaining unit classifications must be included in the unit although the new classification also performed work not previously performed by the bargaining unit. See Hill-Rom Company, Inc., 297 NLRB 351 (adopting the ALJ's conclusion that the new classification of quality assurance technician that predominantly performed unit work must be included in the unit and noting that the non-unit work performed by the new classification "resulted from technological change").

work, not previously performed by bargaining unit employees, for example, creating content for the Employer's new digital cable channels and collaborating with Reporters.

The Employer nevertheless argues that the Content Producers cannot be deemed to perform the same basic functions previously performed by bargaining unit employees because they are essentially "producers"—that is, they are responsible for the creation of content "soup to nuts," from the idea pitch, to conducting the interviews, to shooting and editing the video, to writing and preparing the finished story for and delivering it to all platforms. Even assuming, as testified to by numerous Employer management personnel, that the Content Producer position was conceived as a position in which the employee might perform any or all aspects of the creation of "content," the evidence is clear that Content Producers in practice rarely perform all of these functions for a single story. Indeed, Content Producer and former-Photographer Keith Feldman testified that he had done this "a handful" of times since becoming a Content Producer while Content Producer and former-Photographer Jeffrey Richardson testified that he had done this "less than a dozen" times since becoming a Content Producer. Former Editor Scott Eisenhuth testified that at WRC "almost nobody" does this other than perhaps the two Content Producers (Teneille Gibson and Jenny Gastwirth) who work on Nonstop. This testimony is generally consistent with Employer Vice President of News/Station Manager of WMAQ Whittaker's estimate that only about five Content Producers shoot video with regularity and that most Content Producers spend the majority of their time in the newsroom "gathering content" using DALET.

It is difficult, based on the record here, to generalize the amount of time spent by Content Producers on the various aspects of their work. Rather, the evidence presented tends to suggest that the distribution of different news gathering and content creation tasks performed by Content Producers was determined to a significant extent by their particular areas of expertise.¹⁰⁵ Nevertheless, it is clear that most Content Producers spend a substantial majority of their time performing functions previously performed by bargaining unit employees. Thus, Content Producers Feldman and Richardson, both former Photographers, testified that they spent 80 percent of their time shooting and

¹⁰⁵ Thus, Content Producer Feldman testified that, before the launch of the Content Center, employees were informed that applicants for the position of Content Producer would be used "for strength, so the shooters primarily shoot, the writers would primarily write" although shooting, writing, editing, and producing were all part of the job. Similarly, WMAQ Platform Manager Natalie Templeton testified that in the Content Center world it was necessary to "play off each others strengths."

editing.¹⁰⁶ Mr. Feldman further testified that he has asked to fill in as a Photographer under the “A” Agreement, his pre-Content Center position, “several dozen times” since becoming a Content Producer. Content Producer Arlene Borenstein testified that she spends three days a week writing and editing stories for WRC’s court channel and for newscasts and that “out of everything I do, I write the most.” Content Producer Eisenhuth testified that he spent about 5 percent of his day writing, 65 percent of his day editing, and the rest of his time filling in for the NABET-represented Transmissions Operator while Content Producer and former-Editor Perkins Broussard testified that he spends 90 percent of his time performing non-linear editing. Content Producer and former-Newsreader Yvonne Beltzer testified that she spends most her time writing news for the 5:00 pm and 6:00 pm newscasts, as she did when she was a Newsreader, and editing the video to go with it, a skill she developed only after becoming a Content Producer. Similarly, Content Producer and former-Editor John Alarid testified that he spends about 55 percent of his day editing and 40 percent newsreading, a skill he developed after becoming a Content Producer. The fact that former-Editors are now performing some newsreading, while former-Newsreaders are now performing nonlinear editing, although indicative of the substantial change in the Employer’s organization of work flow, does not change the fact that the Content Producers spend the substantial majority of their time performing the same basic functions historically performed by bargaining unit members.

The fact that Content Producers also spend some amount of time in the role of “producer” does not alter this conclusion. Thus, several of the Content Producers who testified to performing significant “producer” work performed essentially that same work while occupying their former bargaining unit positions. For example, Content Producer Robert Ray testified that, as a former Newsreader, he spent most of his time producing WMAQ’s Health and Medicine segments, and that he continues to do so as a Content Producer. Mr. Ray further testified that the rest of his time as a Content Producer, about

¹⁰⁶ That the shooting performed as Content Producers involves a new handheld digital camera rather than the larger professional camera they used as Photographers is immaterial, as the essential work of gathering video content is the same. See Premcor, Inc., 333 NLRB at 1366; see also WLVI, Inc., 349 NLRB at 684. Similarly, in my view, the fact that the editing performed by Content Producers is nonlinear editing utilizing a new technology, DALET, that has replaced the previous linear editing systems, does not alter the fact that the same basic editing function, previously performed by bargaining unit employees, is now being performed by Content Producers. *Id.* In any case, Mr. Feldman and Mr. Richardson testified that they were both performing nonlinear editing, using Final Cut Pro and AVID rather than DALET, prior to the implementation of the Content Center and continue to use Final Cut Pro as Content Producers.

40 percent of his day, is spent writing and editing general news. Similarly, Content Producer Mary Harris, who was formerly a NABET-represented Producer in KNBC's Special Projects Unit continued to perform that work after becoming a Content Producer, although the quantity of the work has diminished. Content Producer Beltzer testified that she continued to produce stories in collaboration with Frank Snepp after the implementation of the Content Center, as she had done while a Newswriter. Thus, these Content Producers, even when performing "producer" work, are to a significant extent performing the same basic functions they previously performed as bargaining unit members.¹⁰⁷

It is also clear that Content Producers perform work that was not previously performed or was performed to a much lesser extent prior to the implementation of the Content Center. Some of this work is attributable to technological changes in the industry to which the Employer has adapted or to new technology the Employer has adopted. Thus, although the evidence indicates that the Employer's owned and operated local news stations had websites prior to the implementation of the Content Center, it is clear that the Employer's web presence has been expanded as the importance of that platform in the industry has expanded and that writing or rewriting stories for this platform is one of the Content Producers' responsibilities. In addition, it appears that for the most part the Employer's owned and operated local news stations did not have digital 24-hour cable channels, such as WRC's or WMAQ's Nonstop, prior to the implementation of the Content Center. Although it is unclear how many Content Producers produce content for the digital cable platforms on a regular basis, several Content Producers testified that they spend one or more days per week on this work.¹⁰⁸

¹⁰⁷ Of course, many of the Employer's Content Producers were not former bargaining unit employees. Thus, at WNBC, only about half of the Content Producers initially hired were former bargaining unit employees, while at, WMAQ, 61 percent of the Content Producers were former bargaining unit employees. At WRC, although three-quarters of the Content Producers initially hired were formerly represented employees, only 40 percent of those were NABET-represented (the remaining 60 percent were AFTRA represented). There is no evidence to indicate how many of the Content Producers hired were former Producers, although it is clear that at least some were (e.g., Doreen Geiger, who was a Segment Producer, and Mary Harris, who was a NABET-represented Special Projects Producers).

¹⁰⁸ Thus, Content Producer Gibson testified that she spends 2 days per week shooting, editing and producing stories for Nonstop, while Content Producer Borenstein and former-Content Producer Vurnis testified that they spent one day per week on that work. Content Producer Christman also testified that he spends one day per week shooting and producing for Nonstop but conceded that he had begun doing so only a month prior to his testimony and had only performed this work on 4 occasions. [Indeed, according to Content Producer Christman, there were only

Finally, even in regard to the traditional broadcast platform, Content Producers also perform some new tasks, such as locating and dropping requested graphics into a Reporter's package and placing the package in the run down for air, using DALET.

Although technological changes in the industry, specifically the expansion of alternate platforms for the distribution of news, as well as new technology acquired by the Employer, specifically DALET, have thus had an impact on the nature and structure of the work, I do not think that the Content Producers can be excluded from the unit on that basis. It is clear that a showing that technological innovation has affected unit work will not suffice to exclude a new classification performing that work from the unit unless the work has changed to such an extent that a unit including the disputed classification would no longer make sense. See The Sun, 329 NLRB at 854 (citing United Technologies Corp., 263 NLRB at 204). That writing for the web poses unique challenges as compared with writing for broadcast news does not change the fact that Content Producers performing this work are essentially writing news content, work previously performed by the bargaining unit. Similarly, the fact that Content Producers who do shoot material for Nonstop may be using a digital handheld camera rather than the professional camera used by Photographers or that the material has a different character than the footage shot by bargaining unit Photographers for broadcast news, does not in itself change the essential nature of the work. Finally, although the use of DALET has given all newsroom employees, including Content Producers, access to material as well as to some aspect of the Employer's operating infrastructure, I do not think the additional responsibilities Content Producers perform as a result of this increased access, such as searching for graphics or placing material in the run-down, render them so dissimilar to unit employees as to require their exclusion from the unit.

The Employer nevertheless argues that the Content Producers are essentially "producers" and, for that reason, cannot be included in the bargaining unit. The Employer asserts that producing is a required aspect of the Content Producer's position and hence not comparable with the ad hoc and weekend "producer" work performed by bargaining unit employees prior to the Content Center. Moreover, the Employer asserts that the Content Producer position is fundamentally dissimilar from bargaining unit positions because the Content Producer is responsible for producing content "soup to

four handheld digital cameras available to the station's 23 Content Producers.] Several Content Producers testified that they did no shooting or field work at all, for example Content Producers Eisenhuth and Broussard, and Content Producer Beltzer testified that she had only done shooting for Nonstop on 5 or 6 occasions.

nuts” and thus “owns”—in the sense of exercising complete editorial control over--the content she creates. Even assuming the Content Producer position was so conceived, the evidence fails to establish that Content Producers operate in this manner in practice. On the contrary, the evidence tends to support the conclusion that, similar to bargaining unit classifications, Content Producers spend the majority of their time performing one or two functions rather than overseeing or executing all aspects of production for any particular “content.”

As previously indicated, it is impossible to generalize on this record how often Content Producers perform the function of “producer.” It is clear that for at least some Content Producers who serve regularly as Producers, such as Robert Ray, most if not all of their producing work is the same as producing work they performed as bargaining unit employees. For other Content Producers, performing the role of “producer” appears to be more sporadic. Content Producer Gibson described “field producing” a story she pitched for a half-hour long Black History show but was unable to estimate how often she had done this kind of work during her time as a Content Producer. Although several Content Producers, including Ms. Gibson, also testified that they spend one day or more per week shooting, editing and producing stories for the Employer’s Nonstop channels, the evidence fails to establish that this is a norm for Content Producers generally. On the contrary, the Employer’s Chicago owned and operated local news station, WMAQ, has only four hand held digital cameras for use by its twenty-three Content Producers and WMAQ Vice President of News/Station Manager Whittaker named only five Content Producers who were shooting with any regularity. KNBC Content Producer Beltzer testified that she had shot material for Non-Stop on “five or six” occasions while others, such as WRC Content Producers Eisenhuth and Broussard, testified that they did no such work.

What is clear from the record is that all Content Producers spend a significant amount of their time performing functions previously performed by bargaining unit employees in regard to material that they do not “own.” Thus, Content Producer Geiger testified that she regularly writes content for a show called Daily Connection, for which she does no editing or shooting. Content Producer Gibson testified that she spends one day per week conducting interviews and shooting material for stories that are then

assigned to other Content Producers to “put together”¹⁰⁹ and two days per week writing and editing stories assigned to her for various newscasts. Similarly, Content Producer Borenstein spends three days per week writing and editing stories for WRC’s court channel and newscasts, using material sent in by field crews, or working on VO/SOTs updating ongoing news stories.¹¹⁰ Content Producer Christman testified that he spends three days per week writing and editing for the evening newscasts and conceded that he does not write all of the stories that he edits although he does generally do some writing in connection with each story “whether it be an intro or a tag.” Similarly, Content Producer Harris testified that, other than writing daily news, a lot of the writing performed by Content Producers was writing “leads” and “tags” for “somebody else’s package.” Finally, in their routine collaboration with Reporters, Content Producers may write an intro for the Reporter’s package or insert a graphic; however, this is done at the instruction of the Reporter who retains “editorial control.”

Although a Content Producer who is both writing and editing assigned stories may exercise more “editorial control” than, for example, an Editor, who, prior to the Content Center, generally edited stories written by others, this dual function does not amount to total “editorial control.” Moreover, it is clear that many bargaining unit employees perform such dual functions, for example the Photographers who, according to former-Photographers Feldman and Richardson, spend half their time shooting and the rest of their time editing their material in the field. In any case, it is clear that, just as Newswriters took direction from Show or Field Producers and Reporters, and Editors took direction from either Field Producers, Newswriters, or Reporters, so Content Producers take instruction from their Platform Managers and the Reporters to whom they are assigned. As testified by WMAQ Content Producer/Platform Manager

¹⁰⁹ Although Ms. Gibson testified that she communicates her views in regard to how the material should be put together to her Platform Manager, there is no indication that she communicates with or in any sense oversees the work of the Content Producer to whom the story is assigned.

¹¹⁰ Content Producer Borenstein described the work involved in VO/SOTs as locating relevant material using DALET or other feeds and selecting an appropriate sound bite providing the latest information. Many Content Producers testified that they spent some part of their time on VO/SOTs. According to Employer Vice President of Broadcast Operations Braatz, Reporters who gathered the content in the field also do VOs and, before the implementation of the Content Center, this work was done either by Newswriters or by the Reporters or Field Producers who had gathered the content in the field. (Former-Newswriter, now Platform Manager, Kim Liponi confirmed that, as a Newswriter prior to the Content Center, she updated her stories throughout the day.) The record is unclear as to whether Content Producers assigned VO/SOTs have done previous work on the “content” that they are updating.

Copenhagen, Platform Managers review the work of Content Producers and may make changes to it with or without consulting the Content Producer. Even assuming that Content Producers have more “editorial control” than some bargaining unit employees did prior to the Content Center, that does not undermine the conclusion that they are performing the same basic functions previously performed by the unit. Cf. Premcor, Inc., 333 NLRB at 1366 (the fact that PCCs had more responsibility and discretion than the unit classification they replaced did not alter the conclusion that they perform the same basic function).

Based on this evidence, it is clear that Content Producers are not primarily engaged in producing content “soup to nuts.” Although they may do this occasionally, for example, when producing material for Nonstop, they spend most of their time performing either writing and/or editing or, to a lesser extent, shooting functions. It is difficult to perceive the distinction between a Content Producer who writes and/or edits material pulled off of DALET or who shoots material that is ingested into DALET for use by a subsequently assigned Content Producer, and the Newswriters, Editors and Photographers who performed these functions prior to the Content Center. Because I find that evidence warrants the conclusion that the Content Producers perform the same basic functions previously performed by bargaining unit employees, I would include them in the bargaining unit.

In so finding, I am mindful of the evidence that at least some Content Producers serve as “producers” on a regular basis. For example, former WNBC Content Producer Geiger testified that she spends about one-and-one-half to two days per week (or 30 to 40 percent of her time) producing a show called Day Brief, and WRC Content Producer Gibson testified that she spends two days per week (or 40 percent of her time) producing stories for Nonstop. Ms. Geiger also testified that she regularly writes for a show called Daily Connection for which she does no shooting or editing, and Ms. Gibson testified that she spends two days per week (40 percent of her time) writing and editing stories for the daily newscasts. Thus, even assuming that Ms. Geiger and Ms. Gibson might be found to regularly occupy the positions of Show Producer and Field Producer, respectively, the evidence tends to suggest that they also regularly perform a substantial amount of unit work and hence should be included in the unit with other Content Producers as dual function employees. Cf. Avco Corp., 308 NLRB at 1047 (1992).

It is also clear that, at least at WMAQ, a significant number of Content Producers hold a dual title of Platform Manager. Thus, Platform Manager/Content Producer

Courtney Copenhagen testified that she regularly spent one day per week (or 20 percent of her time) in the position of Platform Manager and the remainder of her time as a Content Producer. Ms. Copenhagen named seven other Content Producers who also regularly filled in as Platform Managers.¹¹¹ One such employee, Platform Manager/Content Producer Natalie Templeton, testified that she spends 60 percent of her time as a Platform Manager, and the rest of her time in the role of Content Producer. Although no party has contended that Platform Managers are 2(11) supervisors nor is the record sufficient to make such a determination, the pending unit clarification petitions do not seek the inclusion of Platform Managers in the unit. Nevertheless, the record evidence indicates that individuals with the hybrid title Platform Manager/Content Producer spend at least 40 percent of their time as Content Producers. Thus, I would include them in the unit with the other Content Producers on that basis. See *id.*

C. Unit Placement of WRC Content Producers:

Although the NABET Sector unit clarification petition extends to all of the Employer's Content Producers, I have concluded that the unit placement of the WRC Content Producers must be dealt with separately in order to address the countervailing unit clarification petition filed by AFTRA in regard to this group. In contrast with the Employer's owned and operated local news stations, WRC's Newswriters, as well as its Reporter and Desk Assistants, have historically been represented by AFTRA, while its Editors, Photographers and numerous other engineering classifications are represented by NABET. Prior to the hiring of any Content Producers as WRC, AFTRA and the Employer entered into a new collective-bargaining agreement that contained a Sideletter including the Content Producers in AFTRA's bargaining unit.

The Petitioners contend that this agreement is an unlawful prehire agreement and that either the Content Producers must be accreted to the NABET bargaining unit or the Board must order an election in order to determine which union should represent this group. The Employer and AFTRA both argue that the Content Producers belong in AFTRA's bargaining unit because AFTRA has "exclusive" jurisdiction over newswriting as compared with NABET's "nonexclusive" jurisdiction in regard to non-linear editing. They also argue, in the alternative, that the Content Producers cannot be included in the NABET unit because they have no community of interest with WRC's NABET

¹¹¹ Thus, Ms. Copenhagen testified that the following Content Producers regularly filled the role of Platform Manager: (1) Ben Bowman; (2) Katy Moore; (3) Franci Feirstein; (4) Susan Rivera; (5) Natalie Templeton; (6) Bridgette Minogue; and (7) Carol Ash.

represented employees. Rather, according to AFTRA, the Content Producers share an overwhelming community of interest with WRC's Reporters and should remain in the AFTRA unit on that basis.

I do not address, as such, Petitioner Local 31's contention that the Agreement between the Employer and AFTRA covering the Content Producers is an unlawful prehire agreement. That is a question for an unfair labor practice proceeding. Regardless, such an agreement will not be unlawful where a new classification whose placement is at issue is in fact a proper accretion to the existing bargaining unit covered by the agreement. Safeway Stores, Inc., 256 NLRB 918, 918 (1981). That is the only question that need concern us here.¹¹²

The claim that AFTRA's representation of the Content Producers is mandated by AFTRA's "exclusive jurisdiction" over news writing is not supported by the record and in any case inaccurately casts the unit placement of the Content Producers as a matter of contract rather than statutory policy. Nothing in the AFTRA-WRC CBA indicates that AFTRA's jurisdiction over newswriting is "exclusive." On the contrary, as AFTRA and the Employer cannot but concede, that agreement provides for the performance of such work by nonunit employees under limited circumstances. The record offers no indication how frequently this was done. Similarly, it is clear that NABET does not have "exclusive" jurisdiction over nonlinear editing, although the evidence indicates that only NABET-represented employees did nonlinear editing prior to the implementation of the Content Center at WRC. The jurisdictional language of the collective-bargaining agreements does not resolve the question of the Content Producers' unit placement presented by the parties' unit clarification petitions. Marion Power Shovel Company, Inc., 230 NLRB 576, 577-578 (1977); see also WLVI Inc., 349 NLRB 683, 686 fn. 3 (2007).¹¹³

¹¹² I also reject the Employer's reliance on the AFTRA-WRC CBA as a basis for asserting that the preservation of "labor stability" requires that the Content Producers remain in the AFTRA bargaining unit, where the agreement has placed them. To adopt this argument would be to condone a form of circular reasoning, as it is the validity of this accretion that is the issue here. Moreover, to the extent unfair labor practice charges alleging that the agreement is unlawful may be pending against the Employer or currently on appeal, relying on the agreement here would in my view permit the Employer to do an end-run around the unfair labor practice charges, in contravention of Al J. Schneider & Associates, Inc., 227 NLRB at 1305-1306.

¹¹³ In WLVI, Inc., the unit description provided that the union had jurisdiction over technical work including shooting and editing, but also provided that the Employer had full discretion to assign this work to nonunit employees. In concluding that the new classification of video journalist was not included in the unit, although it involved regular shooting and editing work, the Board did not rely on or even aver to the "nonexclusive" language of the parties' collective-bargaining agreement. Rather, the Board concluded that the unit work performed by the video journalists

AFTRA also argues that the unit clarification petitions should be dismissed because the dispute amounts to a “work assignment” issue, inappropriate for resolution through a unit clarification proceeding. AFTRA cites The Cincinnati Gas and Electric Company, 235 NLRB 424 (1978), in support of its position. In that case, the employer employed gas service employees, who were represented by the Steelworkers, and electric service employees who were represented by IBEW. Because many of its clients had both gas and electric service, the Employer created a new job classification, “premise mechanic,” that combined into a single function the disconnecting and reconnecting of gas and electric lines in order that the Employer could cease sending out two separate employees, one from each unit, to perform the work. The Employer placed the new classification in the Steelworkers unit and filed a unit clarification petition to clarify the unit accordingly. In dismissing the petition, the Board rejected the Employer’s argument that its business had changed and noted that there was no new work being performed by the new classification. As discussed in detail above, that is not this case.

At the same time, it is clear that the Content Producers in Washington DC, as at the Employer’s other owned and operated local news stations, spend a very substantial part of their time performing editing and newswriting work. Both the Editors, represented by NABET, and the Newswriters, represented by AFTRA have been eliminated with the implementation of the Content Center at WRC. No party contends that the WRC Content Producers should be unrepresented, and there is a strong basis to conclude that the Content Producers, who are now doing the work formerly performed by NABET-represented Editors and AFTRA-represented Newswriters, could be included in either bargaining unit. Under these circumstance, it is necessary to determine, if possible, which of the two units is the most appropriate. It is clear that, where the evidence is in virtual equipoise as to the relative appropriateness of two possible units represented by separate unions, a question of representation exists that cannot be resolved through unit clarification. Marion Power Shovel Company, Inc., 230 NLRB at 578.

The parties have argued for the application of numerous different standards in regard to the unit placement of the WRC Content Producers. AFTRA argues that either the Board’s analysis in The Sun or a traditional accretion analysis should apply, while

was incidental to their “primary function,” which was essentially that of the employer’s unrepresented reporters.

Petitioner Local 31 would apply the Board's analysis in Premcor or a traditional accretion analysis. As before, I find The Sun analysis inapplicable in that both the NABET-NBC CBA and the AFTRA-WRC CBA¹¹⁴ define the units covered in terms of job classifications rather than function. However, I find Premcor equally inapposite in the circumstances presented here. Although Content Producers Eisenhuth and Broussard testified that they spend 80 percent of their time performing non-linear editing, thus essentially performing the "same basic function" they previously performed as NABET unit employees, Mr. Broussard conceded that most Content Producers spend a much more substantial portion of their time writing and less time editing. This testimony is corroborated by Content Producer Borenstein's assessment that "out of everything I do, I write the most." Although it is clear that Content Producers as a whole largely perform the same basic functions previously performed by both NABET-represented employees (Editors) and AFTRA-represented employees (Newswriters), this observation merely reiterates the unit placement issue here rather than resolving it.

The unit placement of the WRC Content Producers fares little better under a traditional accretion analysis. The Board has declined to rely on certain community of interest factors—for example, supervision, employee interchange, geographic proximity, and similarity of working conditions—that are within the control of the employer or are subjects determined in whole or part by collective bargaining. See The Sun, 329 NLRB at 854, 862. Thus, although the Content Producers share immediate supervision with the AFTRA represented Reporters rather than with the NABET-represented Photographers, have similar benefits to other AFTRA-represented employees under the AFTRA-WRC CBA, and work in the newsroom with the Reporters while Photographers work primarily in the field, I do not rely on these factors here.¹¹⁵ In addition, as

¹¹⁴ The AFTRA-WRC CBA defines the AFTRA bargaining unit as follows:

PEOPLE COVERED

This Agreement covers all staff TV Reporters, TV Newswriters, and TV Desk Assistants of the Local News Departments of the Company at its Washington station who are primarily engaged in reporting, gathering, writing, preparing and/or broadcasting news material for local news programs produced by the Company in Washington, D.C.

¹¹⁵ Even were I to consider those factors, they do not in my view lend significant clarity to the community-of-interest analysis here. Thus, although NABET-represented Photographers report to the Director of Operations Golden, unlike the Content Producers, who report immediately to the Platform Managers and Day Part Managers, Senior Manager of Content Snyder testified that she had indirect supervision of both Photographers and Content Producers. Moreover, although Photographers spend most of their time in the field and minimal time in the newsroom where the

previously discussed, factors such as employee interchange and functional integration are mooted to a significant extent by the fact that the most relevant NABET-represented and AFTRA-represented job classifications have essentially ceased to exist as a result of the creation of the Content Producer position.¹¹⁶ Thus, we are left with similarity of skills and functions as the basis for assessing whether the Content Producers share a greater community of interest with the AFTRA-represented employees or the NABET-represented employees. See E.I. Du Pont de Nemours, Inc., 341 NLRB at 608.

As discussed, the Content Producers share substantially similarity of skills and functions with the former NABET-represented Editors and have substantially similar skills and functions to former AFTRA-represented Newswriters. Of course, these two job classifications no longer exist as a result of the implementation of the Content Center and the creation of the Content Producer classification. Some Content Producers also perform similar functions to NABET-represented Photographers, for example Ms. Gibson and Ms. Borenstein who regularly shoot video, although they use a much simpler handheld digital camera. In addition, Ms. Borenstein has collaborated with NABET Photographers intermittently, on six occasions when she has filled the role of “field producer” and on several occasions when she has done “on-air” work. However, these collaborations do not occur on a regular basis. Content Producer Eisenhuth testified that he actually fills in for the NABET-represented Transmissions Operator for the first 1-1/2 of each day, but there is no evidence that other Content Producers perform those functions.

On the other hand, some Content Producers also appear to share certain skills and functions with WRC’s AFTRA-represented Reporters. Thus, Content Producers Gibson and Borenstein with some regularity conduct interviews for stories for WRC’s Nonstop digital cable channel, although they also shoot their own interviews, unlike the

Content Producers work, this was also true prior to the implementation of the Content Center, when Photographers and Editors were nevertheless part of the same NABET-represented unit in spite of their distinct work locations.

¹¹⁶The evidence in regard to these factors is, likewise, minimally clarifying here. Thus, the evidence that Content Producer Eisenhuth substitutes regularly for the NABET-represented Transmission Operator, during the first hour and a half of each day, and that Sports Content Producer Baxter is on occasion replaced by NABET-represented Sports Photographer/Editor Kerwin when he is out of the office, although suggestive, is too minimal to establish a conclusive pattern of interchange. On the other hand, although Content Producers are regularly assigned to assist Reporters in finalizing their “packages” for air, this “functional integration” is of limited probative value given that the tasks performed by Content Producers for Reporters appear to be a relatively insignificant part of their overall work.

Reporters. In addition, two Content Producers, Ms. Borenstein and Ms. Gastwirth, perform some “on air” work in the form of human-interest style “commercials.” This work bears some similarity to the on-air work of Reporters. However, it appears on this record that only Ms. Borenstein and Ms. Gastwirth perform this work, and Ms. Borenstein estimated that she has done this on only four or five occasions since becoming a Content Producer. Content Producers also regularly work with Reporters, but this collaboration appears to extend mostly to locating and inserting graphics requested by the Reporter, writing an occasional intro or tag, and placing the Reporter’s finished package in the run down.

In my view, the evidence is inconclusive as to whether an AFTRA unit including the Content Producers or a NABET unit including the Content Producers is the more appropriate. The Content Producers share substantial skills with classifications that formerly existed in each unit. Although Content Producers also do some shooting, like NABET Photographers, it is clear that this is not the Content Producers’ primary function. Similarly, although some Content Producers spend a portion of their time conducting interviews like AFTRA-represented Reporters, only Ms. Gibson testified that she did so more than one day per week and several Content Producers indicated that they never did so. Finally, although Content Producers appear to collaborate more regularly with AFTRA-represented Reporters than with NABET-represented Photographers, the evidence indicates that this collaboration is a relatively minimal, if routine, part of their day-to-day work.

I find that the unit placement of the WRC Content Producers raises a question concerning representation that cannot be decided in this unit clarification proceeding. The appropriate vehicle for resolving such a question is a Board election rather than a unit clarification proceeding.¹¹⁷ For that reason, AFTRA’s unit clarification petition

¹¹⁷ Although the Board, in Libbey-Owens-Ford Company, 169 NLRB 126 (1968), ordered an election in a unit clarification proceeding to determine the question of representation resulting from its finding that separate plant units and a single multiplant unit were equally appropriate, the Board subsequently expressly disavowed its statutory authority to do so and dismissed for that reason a subsequent unfair labor practice case based on the employer’s refusal to bargain with the Union for a collective-bargaining agreement covering all of its plants, see Libbey-Owens-Ford Company, 189 NLRB 871, 871 (1971). After a remand of the unfair labor practice case by the United States Court of Appeals for the Third Circuit affirming the Board’s initial finding that it possessed statutory authority to order an election in the context of a unit clarification proceeding, United Glass and Ceramic Workers of North America, AFL-CIO-CLC v. NLRB, 463 F.2d 31 (1972), the Board reversed its decision and found the unfair labor practice, relying on the Circuit Court’s remand as “law of the case.” Libbey-Owens-Ford Company, 202 NLRB 29, 29-30 (1973).

should be dismissed, and I would not include the WRC Content Producers in the NABET unit in granting the NABET Sector's unit clarification petition.

CONCLUSIONS AND RECOMMENDATIONS

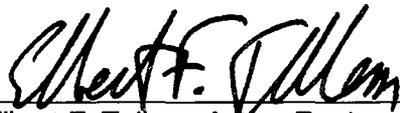
The NABET Sector's request for unit clarification in Case No. 2-UC-000625 hereby is granted. The NABET unit should be clarified to include all Content Producers at the Employer's New York, Los Angeles and Chicago owned and operated local news stations. All other unit clarification petitions in this matter hereby are dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by November 9, 2011. The request may be filed electronically through the Agency's website, www.nlr.gov, but may not be filed by facsimile.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlr.gov. Once the website is accessed, click on File Case Documents, enter NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at New York, New York,
October 26, 2011



Elbert F. Tellem, Acting Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

Thus, the Board did not ultimately resolve its own disagreement in regard to its statutory authority to order an election in the context of a unit clarification proceeding. I am unaware of any subsequent unit clarification cases, and no party has cited any, in which the Board has exercised such authority. I decline to do so here.