

**WCCO-TV and National Association of Broadcast Employees & Technicians-Communications Workers of America, AFL-CIO (NABET-CWA). Case 18-CA-100535**

May 28, 2015

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On July 22, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the General Counsel filed a letter in lieu of an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to reverse the judge's rulings, findings, and conclusions and to dismiss the complaint.

*A. Facts*

The Respondent operates a television station in Minneapolis, Minnesota, where it produces and broadcasts local news programs.<sup>1</sup> The National Association of Broadcast Employees and Technicians-Communications Workers of America (NABET) is the exclusive bargaining representative of "[a]ll individuals employed by Respondent as a full-time Photojournalist and/or a Temporary Photojournalist in the news department or any successor department[,] excluding all other employees, guards, and supervisors as defined by the Act." A photojournalist's primary function is operating a camera, sound recording device, and related equipment for news events.<sup>2</sup> The Respondent's other employees are repre-

<sup>1</sup> The parties stipulated, and we find, that the Respondent is "a television station owned by CBS Broadcasting Inc., a New York corporation, which is a wholly-owned subsidiary of CBS Corp., a Delaware corporation."

<sup>2</sup> Sec. 1.04 of the applicable collective-bargaining agreement defines "photojournalist" as:

A Photojournalist operates cameras, recorders and related equipment, and/or edits videotape (or its successor recording medium/media, e.g., video disc), used in electronic newsgathering. A Photojournalist may also be assigned to perform other duties associated with the gathering, recording and producing news programs and documentaries, such as but not limited to preparing, interviewing, writing and transmitting news material. It is understood that on a non-exclusive basis, Photojournalists will continue to be assigned to perform such functions for the Internet, including the Company's website (wcco.com at the time this agreement is entered into), provided that the making of such assignments, even on a frequent basis, shall not be established or result in jurisdiction becoming exclusive, and shall not result in a binding

sent by the International Brotherhood of Electrical Workers (IBEW) Local 292, Teamsters Local 792, and American Federation of Television and Radio Artists (AFTRA), which represents the news operation's reporters and producers.

In 1992, the Respondent and NABET entered into a Letter of Agreement #3 (LOA3) allowing nonunit employees represented by other unions to perform a limited amount of bargaining-unit work under certain circumstances. Specifically, LOA3 states:

It is also understood that other WCCO-TV Employees covered by IBEW and AFTRA Agreements may perform the "principal purpose" functions under this Agreement, including by way of example, the operation of lightweight, professional or home-type electronic cameras outside of studios, but only if such functions are performed in support of their own principal functions. Such assignments will not be made on a routine basis but will be limited principally to the following:

- A. In a situation where the nature of the assignment calls for unconventional reporting techniques.
- B. The assignment is an undercover assignment, or one which requires the use of a hidden camera.
- C. There is a limited access to the event.
- D. The assignment involves coverage of a sensitive or private event.

Where a Reporter, Producer or Technician operates a camera under the circumstances described above, he/she may also operate equipment related to the assignment, such as a video tape recorder or edit equipment.

It is understood that the Company may not assign a Reporter or Producer under 6 or 7 herein to operate a camera for another Reporter or Producer. In no event will a Reporter or Producer operate a camera or associated equipment on a story with which the Reporter or Producer is not directly involved.

The parties incorporated the LOA3 into each of their successive collective-bargaining agreements from 1992 to 2009.

In the 2009–2012 collective-bargaining agreement, the Respondent and NABET again included the LOA3, but added language allowing the Respondent to cross-utilize two AFTRA-represented reporters or producers to perform NABET bargaining-unit work on a daily basis.<sup>3</sup>

past practice that would preclude the Company from assigning such work to others in the future.

<sup>3</sup> The relevant amended LOA3 language is as follows:

[Notwithstanding] paragraph 6, the parties agreed that beginning April 1, 2011 the Company may assign up to two (2) AFTRA employees (Reporters or Producers) per day to perform the "principal purpose"

The Respondent also agreed to “use its best efforts” to obtain a reciprocal agreement with AFTRA to permit NABET-represented employees to do AFTRA bargaining-unit work. During subsequent successor negotiations with AFTRA, the Respondent proposed such a provision, but AFTRA rejected it.

Following those negotiations with AFTRA, the Respondent began assigning AFTRA-represented employees to perform daily camera work consistent with the 2009–2012 agreement. NABET filed a grievance, which the Respondent rejected. NABET subsequently withdrew the grievance prior to arbitration and took the position that the provision was a permissive subject of bargaining and would not survive the expiration of the agreement on December 31, 2012. In response, the Respondent asserted that the provision is a mandatory subject of bargaining. Negotiations for a successor agreement began in January 2013. The judge found, and the parties agree, that they reached impasse over the inclusion of LOA3 or similar language in a successor agreement.

#### B. Discussion

The only issue presented is whether the Respondent’s bargaining proposal, which would continue to allow daily cross-utilization of nonunit employees to perform unit work, is a mandatory or permissive subject of bargaining. The judge found the proposal was a permissive subject and that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting on it to impasse. We reverse.

#### Applicable Principles

It is well established that the assignment of work is a mandatory subject of bargaining. Accordingly, a party may insist to impasse upon the inclusion in a collective-bargaining agreement of a proposal dealing with assignment of work. That is so even if the work is currently assigned to employees outside the unit because such an assignment affects the bargaining-unit employees’ terms and conditions of employment by reducing the amount of unit work. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (finding that subcontracting is a mandatory subject of bargaining). See also *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993); *Antelope Valley Press*, 311 NLRB 459, 460 (1993); *Storer Communications*, 295 NLRB 72, 78 (1989), *enfd. sub nom. Stage Employees IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990). It is equally well established that “[u]nit scope is not a mandatory bargaining subject.” *Bozzuto’s, Inc.*, 277 NLRB 977, 977 (1985). Thus, a party to a collective-bargaining agreement may propose to bargain over the scope of the unit, but may not insist to impasse on that subject. *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

In *Antelope Valley*, *supra*, the Board recognized that in a situation where the unit is defined in terms of the work performed, a contract proposal concerning work assignment might well have ramifications for the scope of the unit, and vice versa, and that determining whether such a proposal is mandatory or permissive can present difficulties. 311 NLRB at 461. Therefore, the Board adopted a two-part test to deal with this situation. The Board first looks at whether the employer has insisted on a change in unit description. If so, then the proposal is a permissive subject. If the employer’s proposal does not purport to change the description of the unit, the Board considers whether the proposal nevertheless deprives the union of the right to contend that the persons performing the work after the transfer are to be included in the bargaining unit. If so, then the proposal is a permissive subject. A proposal that does neither of the above, and instead grants the employer the right to transfer work out of the unit, is a mandatory subject of bargaining and the employer’s insistence on it to impasse is lawful. *Id.*

#### The Judge’s Decision

The judge, relying on section 1.04 of the parties’ collective-bargaining agreement, observed that the NABET unit is defined by work performed rather than by job classification, and that Respondent’s proposal arguably contained elements of both work assignment and unit scope; accordingly, he found that the Board’s test in *Antelope Valley* applies here. The judge then found that under prong one of *Antelope Valley*, the Respondent’s proposal did not alter the unit description. Turning to the second prong, the judge found that the Respondent’s proposal would allow the Respondent to assign unit work to employees represented by AFTRA, and that the proposal would effectively preclude NABET from asserting jurisdiction over employees who performed unit work because those employees were already represented by another union. The judge therefore concluded that the proposal was a permissive subject, and that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting on it to impasse.

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functions under this Agreement, including by way of example, the operation of lightweight, professional or home-type electronic camera outside of studios, but only if such functions are performed in support of their own principal functions (also called “one-man bands”).

It is understood [that] the Company may not assign an AFTRA member (Reporters or Producers) to operate a camera for another AFTRA member (Reporters or Producers). In no event will an AFTRA member (Reporters or Producers) operate a camera or associated equipment on a story which the AFTRA member (Reporters or Producers) is not directly involved.

### Analysis

To begin, we assume for purposes of our analysis that the unit here was defined by work performed, and we agree with the judge that the Respondent's proposal did not alter the actual unit definition. That is, after the Respondent implements its proposal, NABET still represents a unit of photojournalists. The issue, therefore, is whether the assignment of unit work to employees represented by another union precludes NABET from contending that those employees should be included in the unit. We find that it does not. If a question arises in the future about the unit placement of employees assigned to perform unit work, nothing in the proposal precludes NABET from challenging the unit placement of those employees, whether through an unfair labor practice proceeding, a unit clarification proceeding, a contractual grievance and arbitration procedure, or any other avenue lawfully available to it. *Bremerton Sun Publishing Co.*, 311 NLRB 467, 470–471 (1993). In this regard, the facts here are distinguishable from *Taylor Warehouse Corp.*, 314 NLRB 516, 527–528 (1994), *enfd.* 98 F.3d 892 (6th Cir. 1996), cited by the judge. In *Taylor Warehouse*, the employer proposed to assign unit work to nonunit employees who were specifically excluded from the unit. The proposal, therefore, was a permissive subject of bargaining because it would have precluded the union from contending that the persons performing unit work should be included in the unit. *Id.* Notably, no such specific exclusions exist here.

Instead, the Respondent's proposal here is nearly identical to the proposal in *Storer Communications*, *supra*, which the Board found to be a mandatory subject of bargaining.<sup>4</sup> 295 NLRB at 78. The proposal in *Storer Communications* removed work from the union's exclusive jurisdiction and permitted employees represented by another union to perform it. The Board found that the proposal was a mandatory subject of bargaining because it “does not address the subject of the scope of the bargaining unit (who is represented) but rather the work assignments and exclusive work jurisdiction of the employees represented by [the union].” *Id.*

In *Batavia Newspapers Corp.*, *supra*, decided the same day as *Antelope Valley*, the Board rejected an argument that a proposal granting sole discretion to the employer

<sup>4</sup> To the extent the General Counsel implies that *Storer Communications*, which predated *Antelope Valley*, is no longer valid precedent, we disagree. As evidenced by the Board's reliance on *Storer Communications* in deciding *Antelope Valley* and its companion cases, the Board's decision in *Antelope Valley* clarified the law; it did not overturn *Storer Communications*. See *Antelope Valley Press*, *supra*, 311 NLRB at 461 fn. 7; *Bremerton Sun Publishing Co.*, *supra*, 311 NLRB at 471 fn. 13; *Batavia Newspapers Corp.*, *supra*, 311 NLRB at 480.

to assign unit work to nonunit employees was a permissive subject. 311 NLRB at 480. Relying on subcontracting cases that rejected the identical argument, the Board held that a proposal to reassign unit work was a mandatory subject of bargaining because it affected only the work that employees performed, not who the union represented. *Id.* The Board also held that the proposal did not preclude the union from contending in unit clarification or other Board proceedings that the nonunit employees should be in the unit. *Id.*

Similar to the Board's conclusions in *Batavia Newspapers Corp.* and *Storer Communications*, the Respondent's proposal here is a mandatory subject of bargaining because the proposal would not alter who the Union represents, but would only affect the assignment of unit work. Notwithstanding the Respondent's proposed transfer of work to nonunit employees, NABET still (and exclusively) represents the Respondent's photojournalists.<sup>5</sup> Moreover, if the principal function of the employees assigned to perform unit work becomes photojournalist work, as defined in section 1.04 of the parties' collective-bargaining agreement, the proposal does not preclude the Union from asserting jurisdiction over those employees through an unfair labor practice charge, unit clarification proceeding, or contract grievance.

In sum, because the Respondent did not insist on changing the unit description, and because its proposal does not deny the Union the right to assert that any individuals to whom unit work might be assigned were unit members, we find that the Respondent's proposal was a mandatory subject of bargaining. Accordingly, the Respondent did not violate Section 8(a)(5) and (1) of the Act by bargaining to impasse over, and then implementing, its proposal.

### ORDER

The complaint is dismissed.

*Rachel A. Centinario, Esq.*, for the General Counsel.  
*Mark W. Engstrom, Esq.*, of New York, New York, for the Respondent.  
*Judiann Chartier, Esq.*, of Washington, D.C., for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was submitted to me on a stipulated record on June 15, 2013. The National Association of Broadcast Employees and Techni-

<sup>5</sup> Compare *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2, 906 (2000) (finding that employer's unilateral reclassification of employees as supervisory, where the duties remained essentially same, constituted an alteration in the scope of the unit), *enfd.* 8 Fed. Appx. 111 (2d Cir. 2001).

cians-Communications Workers of America (NABET) filed the charge on May 7, 2013. The General Counsel issued the complaint on May 17, 2013. The issue before me is whether Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse in collective-bargaining negotiations on an allegedly permissive subject of bargaining.

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent is the Columbia Broadcasting System's Minneapolis, Minnesota affiliate. For the calendar year 2012, Respondent derived gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$5000 directly from points out of Minnesota. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that NABET (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

NABET is the exclusive bargaining representative of a unit defined as, "all individuals employed by Respondent as a full-time Photojournalist and/or a Temporary Photojournalist in the news department or any successor department, excluding all other employees, guards and supervisors as defined in the Act."<sup>1</sup> The Union has represented this unit at least since 1992.

Since 1992, the Union and Respondent have agreed to permit employees of Respondent, who are represented by other unions, to perform a limited amount of bargaining unit work. Some of Respondent's employees are represented by the International Brotherhood of Electrical Workers (IBEW) Local 292, the American Federation of Television and Radio Artists (AFTRA) and Teamsters Local 792. Letter of Agreement #3 in the 1992–1995 collective-bargaining agreement between Respondent and the Union provided:

7. It is also understood that other WCCO-TV Employees covered by IBEW and AFTRA Agreements may perform the "principal purpose" functions under this Agreement, including by way of example, the operations of lightweight, professional or home-type electronic cameras outside of studios, but only if such functions are performed in support of their own principal functions. Such assignments will not be made on a routine basis but will be limited principally to the following:

- A. In a situation where the nature of the assignment calls for unconventional reporting techniques.
- B. The assignment is an undercover assignment, or one which requires the use of a hidden camera.
- C. There is a limited access to the event.
- D. The assignment involves coverage of a sensitive or private event.

<sup>1</sup> A definition of the term "photojournalist" is set forth in sec. 1.04 of the 2009–2012 collective-bargaining agreement. Suffice it to say that a "photojournalist" is an employee whose primary function is to operate a camera, sound recording device and related equipment and/or edits videotape or its successo media.

Where a Reporter, Producer or Technician operates a camera under the circumstances described above, he/she may also operate equipment related to the assignment, such as video tape recorder or edit equipment.

It is understood that the Company may not assign a Reporter or Producer under 6 or 7 herein to operate a camera for another Reporter or Producer. In no event will a Reporter or Producer operate a camera or associated equipment on a story with which the Reporter or Producer is not directly involved.

Exhibit G, Letter of Agreement #3, pp. 20–21.

The April 6, 2009–December 31, 2012 collective-bargaining agreement contained the identical or almost identical provision.<sup>2</sup> However, it added the following language:

During the 2009 negotiations the parties agreed to cross utilization of functions between AFTRA and NABET-CWA.

Notwithstanding paragraph 6, the parties agreed that beginning April 1, 2011 the Company may assign up to two (2) AFTRA employees (Reporters or Producers) per day to perform the "principal purpose" functions under this Agreement, including by way of example, the operation of lightweight, professional or home-type electronic camera outside of studios, but only if such functions are performed in support of their own principal functions (also called "one-man bands").

It is understood the Company may not assign an AFTRA member (Reporters or Producers) to operate a camera for another AFTRA member (Reporters or Producers). In no event will an AFTRA member (Reporters or Producers) operate a camera or associated equipment on a story which the AFTRA member (Reporters or Producers) is not directly involved.

The Company agrees that it will seek agreement from AFTRA for at least an equal (up to two (2) per day) of cross utilized NABET-CWA employees to perform the "principal purpose" functions in the AFTRA agreement. Further the Company agrees that any NABET-CWA employee shall be upgraded to the applicable AFTRA rate (if the rate is higher than the applicable NABET-CWA rate) for the functions performed.

The Company will use its best efforts to obtain an agreement with AFTRA to allow an equal number of NABET-CWA employees to be cross-utilized. The Company further agrees to provide cross-training to any NABET-CWA employee assigned to perform such duties, in addition the Company also agrees to provide follow-up training to any NABET-CWA employee who requests it.

Exhibit E.

This new language was added to the 2009–2012 collective-bargaining agreement after Respondent rejected the following paragraph proposed by the Union in 2009:

This paragraph shall expire on December 31, 2011 unless the Company has obtained an agreement with AFTRA to allow

<sup>2</sup> This agreement was extended to March 31, 2013, but has now expired.

up to an equal number of cross utilized of NABET-CWA employees as described above. If the Company has obtained agreement with AFTRA to allow up to an equal number of cross utilized NABET-CWA employees, this paragraph shall remain part of the Agreement.

In its collective-bargaining negotiations with AFTRA in 2011, Respondent proposed on three occasions that the agreement include cross-utilization of NABET employees for “principal purpose” functions in the AFTRA agreement. AFTRA rejected these proposals and cross-utilization language was not included in the AFTRA contract which became effective on July 1, 2011.

After negotiations with AFTRA were completed, Respondent assigned its AFTRA employees to perform camera functions consistent with Letter of Agreement #3 in the contract with NABET. NABET filed a grievance, which was rejected by Respondent. On October 16, 2012, NABET withdrew from arbitration of the grievance and informed Respondent that Letter of Agreement #3 would expire upon expiration of the 2009–December 31, 2012 contract. NABET also informed Respondent that it viewed Letter of Agreement #3 to be a permissive subject of bargaining. Respondent replied by informing the Union that it regarded Letter of Agreement #3 to be a mandatory subject of bargaining.

In negotiating for a successor collective-bargaining agreement, Respondent has proposed and insisted since January 14, 2013, that the Union agree to include Letter of Agreement #3 in a successor collective-bargaining agreement.<sup>3</sup> On March 12, 2013, Respondent’s Chief Negotiator Ron Terrone informed the Union that there would be no successor agreement without the Letter of Agreement #3 language.<sup>4</sup> The Union informed Respondent that it would not agree to include Letter of Agreement #3 in any successor collective-bargaining agreement. The parties agree that Respondent and the Union have bargained to impasse.

#### Analysis

In the instant case, the parties agree on the facts and the applicable legal standard. They differ on how that standard is to be applied to the facts of this case.

The General Counsel and NABET contend that Respondent has bargained to impasse on a permissive subject of bargaining. If Respondent did so, it violated Section 8(a)(5) and (1), *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 (1958), *Taft Broadcasting Co.*, 274 NLRB 260 (1985). The General Counsel and the Union characterize Respondent’s conduct as insisting on a change or modification in the scope of the bargaining unit, which constitutes a permissive subject of bargaining, *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993).

Respondent contends that it bargained to impasse only on mandatory subjects of bargaining. It characterizes its proposals concerning Letter of Agreement #3 as a matter of work assign-

ment. Respondent argues that a transfer of work assignments from unit employees to nonunit employees is a mandatory subject of bargaining on which it is entitled to bargain to impasse.<sup>5</sup>

All three parties rely on the Board’s decision in *Antelope Valley Press*, 311 NLRB 459 (1993), and *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993). In *Antelope Valley Press* the Board dismissed the complaint, finding that the employer did not insist on changing the unit description and did not attempt to deny the Union the right to assert that any individuals to whom unit work might be assigned were unit members. In *Bremerton* it reached the opposite conclusion on the grounds that the employer bargained to impasse on a proposal that precluded inclusion of the employees to whom work was being transferred from being in the bargaining unit.

In *Antelope Valley*, the Board noted the tension between unit scope and the introduction of new technology. It recognized that bargaining proposals may sometimes have aspects of both a unit description and a work assignment provision. It purported to abandon an “either/or” approach to better enable it to resolve such matters while recognizing and accommodating the legitimate concerns of the parties. The Board adopted a two-step approach: First, the Board determines whether the employer has insisted on a change in the unit description. If it has done so, the proposal is clearly permissive. An employer may make changes with regard to a permissive subject of bargaining only with the union’s consent, *Aggregate Industries*, 359 NLRB 1419, 1423 (2013).

If the employer has not insisted on a change in the unit description, the Board will consider whether the transfer of work deprives the union of the right to contend that the persons performing the work after the transfer are to be included in the bargaining unit. If that is not the case, the employer’s proposal is a mandatory subject of bargaining about which the employer may bargain to impasse.

The General Counsel and Charging Party contend this is a simple straight-forward case. Respondent, in its brief, contends it is far more complicated. I leave it to the Board to consider what I deem to be the fairly complex issues raised by Respondent’s brief, which, if I understand them, are:

1. *Antelope Valley* and *Bremerton* are not applicable to this case because the unit in this matter is defined by job classification (photojournalist) rather than by the work performed. I conclude the opposite as one has to read Section 1:04 of the parties’ collective bargaining agreement to determine what constitutes a photojournalist. That section defines photojournalist by the work performed.
2. Letter of Agreement #3 modified the scope of the bargaining unit, so that it is actually the Union that is insisting on bargaining over a permissive subject by demanding a return to the contract language that existed prior to 2009. I reject this argument in that there was no change to sections 1.03 and

<sup>3</sup> Respondent proposed to include its IBEW employees in the terms of Letter of Agreement #3, but rescinded this proposal.

<sup>4</sup> Respondent’s proposal of March 12, 2013, is contained in Exh. K. It is not materially different from the language in the 2009–2012 agreement.

<sup>5</sup> The Board has held that the transfer of unit work to supervisors is a mandatory subject of bargaining. An employer may not make such a transfer without bargaining with the representative of the affected unit employees, *Regal Cinemas*, 334 NLRB 304 (2001).

1.04 of the collective bargaining agreement, which defines the scope of the bargaining unit.

3. Finding a statutory violation is bad public policy in that it locks Respondent into a pattern of work assignments that make no sense in light of changing technology. In this regard it strikes me as strange that contracting to another employer or independent contractor is a mandatory subject of bargaining, while shifting work to one's own employees who are represented by another labor organization is a permissive subject, *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 258 (2006); *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); *Torrington Industries*, 307 NLRB 809 (1992). Nevertheless, it is for the Board, not this judge to reconsider Board precedent, which I deem to lead to the conclusion that Letter of Agreement #3 is a permissive subject of bargaining.

In the instant case, WCCO made no attempt to change the unit description of photojournalists. However, by specifying that the employees to whom work is to be transferred are AFTRA members, it effectively precluded the Union from asserting jurisdiction over some of the employees performing the unit work of camera operation.

The General Counsel and the Union rely heavily on *Taylor Warehouse Corp.*, 314 NLRB 516, 527–528 (1994). In that case, the Board adopted the findings of the judge, who concluded that the employer bargained to impasse on a permissive subject. She relied heavily on the fact that although the em-

ployer did not alter the description of the bargaining unit, it transferred work to employees who never could be considered members of the bargaining unit. That is close to the situation presented in instant case. Although the unit description of the AFTRA bargaining unit does not appear in this record, I infer that there is a clear demarcation between employees in the AFTRA unit, i.e., Reporters and Producers, as opposed to "Photojournalists." Thus it appears that Letter of Agreement #3 from the 2009–2012 contract shifts unit work to employees who would never fall within the unit description in the NABET contract.

I conclude that under current Board law, Respondent violated Section 8(a)(5) and (1) by bargaining to impasse over a permissive subject of bargaining.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall, on request, bargain in good faith with the Union as the exclusive representative of its photojournalists, without bargaining to impasse over the inclusion of Letter of Agreement #3 in the collective-bargaining agreement.

[Recommended Order omitted from publication.]