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Nexstar Broadcasting Group, Inc., d/b/a WETM-TV and International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO. Case 03-CA-125618

October 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On January 15, 2015, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and 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 affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified and set forth in full below.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's findings, we do not rely on his citation to *Walt Disney World Co.*, 359 NLRB No. 73, slip op. at 4 (2013), a case decided when the Board lacked a quorum.

² In adopting the judge's finding that the Respondent unlawfully removed the positions of assignment editor and chief videographer from the unit, Member Miscimarra notes that an agreed-upon modification of the scope of the unit could lawfully result in the exclusion of certain positions from the unit. For the reasons stated by the judge, however, he finds that there was no such agreement here.

³ We amend the judge's remedy in two respects. First, we amend the remedy to provide that backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), because there was no cessation of employment. See, e.g., *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003). Second, we amend the judge's dues-reimbursement remedy to delete the requirement that dues amounts be computed in accordance with *Ogle Protection Service*, supra, and to add that interest on such amounts as prescribed in *New Horizons*, 283 NLRB 1173 (1987), must also be compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent may offset from its dues liability any dues payments the Union actually received from John Doland and George Kastenhuber, but the Respondent may not recoup from those

ORDER

The National Labor Relations Board orders that the Respondent, Nexstar Broadcasting Group, Inc., d/b/a WETM-TV, Elmira, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally removing the positions of assignment editor and chief videographer from the following collective-bargaining unit:

All regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants and not any supervisor or managerial roles.

(b) Unilaterally removing the bargaining unit work of the assignment editor and chief videographer without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

(c) Failing and refusing to recognize the Union as the exclusive collective-bargaining representative of employees occupying the positions of assignment editor and chief videographer, and failing to apply the terms of the existing collective-bargaining agreement to such employees.

employees dues amounts it pays to the Union. See *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 1 fn. 1 (2015). Member Miscimarra would permit the Respondent to recoup from Doland and Kastenhuber any dues amounts it pays to the Union. In his view, the majority's recoupment bar is punitive and therefore exceeds the Board's remedial powers under Sec. 10(c) of the Act. See *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 7-8 and fn. 15 (Member Miscimarra, concurring in part and dissenting in part).

We shall also modify the judge's recommended Order in three respects. First, we shall insert par. 1(c) requiring the Respondent to cease failing and refusing to recognize the Union as the collective-bargaining representative of the employees occupying the positions of assignment editor and chief videographer. Second, we shall delete the portion of par. 2(c) requiring the Respondent to *bargain* with the Union regarding wages, hours, and other terms and conditions of employment of employees occupying the positions of assignment editor and chief videographer. That provision conflicts with par. 2(d), which requires the Respondent to *apply the terms of the existing collective-bargaining agreement* to employees occupying those two positions. Lastly, we shall modify the judge's recommended Order to reflect the Board's standard language for the tax compensation and Social Security Administration reporting remedies under *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the modified Order.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its March 26, 2014 removal of the unit positions of assignment editor and chief videographer and its consequent removal of the bargaining unit work of those two positions outside the collective-bargaining unit.

(b) Reinstate John Doland and George Kastenhuber to the bargaining unit represented by the Union.

(c) Recognize the Union as the exclusive collective-bargaining representative of the employees occupying the positions of assignment editor and chief videographer.

(d) Apply the terms of the collective-bargaining agreement, effective February 26, 2014, through February 25, 2017, between the Union and the Respondent to employees occupying the assignment editor and chief videographer positions. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits and terms or conditions of employment that may have been afforded the assignment editor and chief videographer, as compared to the wages, benefits, and terms or conditions of employment of bargaining unit employees.

(e) Make John Doland and George Kastenhuber whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, as modified above.

(f) Compensate John Doland and George Kastenhuber for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(g) Remit all contributions it would have made on the employees' behalf to employee retirement, 401(k), and/or health care funds absent its unlawful unilateral changes, and reimburse John Doland and George Kastenhuber for any expenses they may have incurred as a result of its failure to make such benefit fund contributions, in the manner set forth in the remedy section of the judge's decision, as modified above.

(h) Reimburse International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artist and Allied Crafts of the United States, its Territories, and Canada, AFL-CIO, for any dues that it would have deducted from Doland and Kastenhuber and remitted to the Union under the collective-bargaining agreement absent

its unlawful unilateral changes, as set forth in the remedy section of the judge's decision, as modified above.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Elmira, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2014.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally remove the positions of assignment editor and chief videographer from the following collective-bargaining unit:

All regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants and not any supervisor or managerial roles.

WE WILL NOT unilaterally remove the bargaining-unit work of the assignment editor and chief videographer without prior notice to International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO (the Union), and without affording the Union an opportunity to bargain with respect to this conduct.

WE WILL NOT fail and refuse to recognize the Union as the exclusive collective-bargaining representative of our employees holding assignment editor and chief videographer positions, and WE WILL NOT fail and refuse to apply the terms of the existing collective-bargaining agreement to those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our March 26, 2014 removal of the unit positions of assignment editor and chief videographer and our removal of the bargaining-unit work of those two positions from the unit.

WE WILL reinstate John Doland and George Kasthuber to the bargaining unit represented by the Union.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees occupying the assignment editor and chief videographer positions.

WE WILL apply the terms of the collective-bargaining agreement, effective February 26, 2014, through February 25, 2017, between the Union and us to employees occupying the assignment editor and chief videographer positions. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment that may have been afforded the assignment editor and chief videographer.

WE WILL make John Doland and George Kasthuber whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL compensate John Doland and George Kasthuber for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remit all contributions we would have made on the employees' behalf to employee retirement, 401(k), and/or health care funds absent our unlawful unilateral changes, and WE WILL reimburse John Doland and George Kasthuber for any expenses they may have incurred as a result of our failure to make such benefit fund contributions.

WE WILL reimburse the Union for any dues we would have deducted from John Doland's and George Kasthuber's wages and remitted to the Union under the collective-bargaining agreement absent our unlawful unilateral changes.

NEXSTAR BROADCASTING GROUP, INC. D/B/A
WETM-TV

The Board's decision can be found at www.nlr.gov/case/03-CA-125618 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1015 Half Street, S.E., Washington, D.C., or by calling (202) 273-1940.



Claire T. Sellers, Esq., for the General Counsel.
Charles W. Pautsch, Esq. (Pautsch, Spognardi & Baiocchi Legal Group, LLP), of Buffalo, New York, for the Respondent.
Samantha Dulaney, Esq., of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on April 1, 2014,¹ by the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada (Union), a complaint was issued against Nexstar Broadcasting Group, Inc. d/b/a WETM-TV (Respondent or Employer) on July 22.

The complaint alleges that on March 26, the Respondent unilaterally removed the positions of Assignment Editor and Chief Videographer from the collective-bargaining unit without the Union's consent. The complaint also alleges that the Respondent unilaterally removed the bargaining unit work of those positions from the unit without prior notice to the Union and without affording it an opportunity to bargain with it regarding such conduct. The remedy sought includes requiring the Respondent to restore the positions and job duties of assignment editor and chief videographer to the unit as they existed prior to March 26.

The Respondent's answer denied the material allegations of the complaint and asserted that the (a) complaint is barred by Section 10(b) of the Act (b) remedy sought is not authorized by the Act as it would force it to agree to and implement a term in a collective-bargaining agreement that it did not agree to and (c) assignment editor and chief videographer are statutory supervisors and cannot be included in the unit.

On October 6 and 7, a hearing was held before me in Horseheads, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a corporation having an office and place of business in Elmira, New York, has been engaged in the opera-

tion of a television station. Annually, the Respondent derives gross revenues in excess of \$100,000 and purchases and receives at its Elmira, New York facility, goods valued in excess of \$5000 directly from points outside New York State. The 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.

The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Television station WETM-TV was purchased by Smith Television in 1986. Ten years later, in January 1996, the Union's predecessor was certified as the exclusive collective-bargaining representative of Smith Television's employees in the following unit:

Included: All full-time and part-time assignment editors, promotions manager, directors, anchors, reporters, producers, videographers, photographers, maintenance engineers, audio technicians, assistant chief engineers, master control operators, traffic persons, production coordinators, and office staff employed by the employer at its WETM-TV station in Elmira, New York.

Excluded: All other employees, including sales persons, general managers, account executives, news directors, business managers, program directors, chief engineers, confidential employees, and all other managers and supervisors and guards as defined in the Act.

In 2005, the station was purchased by Clear Channel Communications. It was then acquired by Newport Television in 2008. In December 2012, it was purchased by the Respondent.

Newport had a collective-bargaining agreement with the Union which ran from March 2010 to March 19, 2013. The Respondent assumed that contract upon its purchase of the facility, and operated under that agreement until its expiration in March 2013.

That contract's "Recognition—Scope of Jurisdiction" clause is as follows:

The Station recognizes the Union as the exclusive bargaining representative of all regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, excluding all sales managers, general managers, account executives, department heads, including managing editor, production manager, traffic manager, promotions manager, station events coordinator, executive producer, chief meteorologist, news director, sports director, chief engineer, and all other supervisors and guards as defined in the Act.

The parties began negotiations for a new contract in February 2013. They met about once per month for about 7 months. Present for the Respondent were Timothy Busch, executive

¹ All dates hereafter are in 2014 unless otherwise stated.

vice president and chief executive officer, Scott Iddings, director of creative services and programming, and Don Hunt, chief engineer. The Union was represented by David Hartnett, lead negotiator and assistant department director of the Union, David Siskin, union president, and John Doland, the chief videographer employed by the Respondent.

Busch testified that of the Respondent's many proposals relating to language and economic issues was one to amend the contract's recognition clause to eliminate the extensive list of unit exclusions set forth therein.

It was the Employer's belief that the clause should specifically list which classifications are included in the unit rather than those excluded therefrom. Busch reasoned that, if the clause did not identify specifically who was covered, the parties would be unclear as to which other jobs it would cover. Busch explained that if the Employer acquired another company whose job classifications are not specifically named as being excluded from this unit, they could automatically be considered as being part of the unit.

2. The negotiations

a. *The Employer's version*

At one of the first bargaining sessions in February 2013, the Employer proposed the following "Recognition—Scope of Jurisdiction" clause:

The Station recognizes the Union as the exclusive bargaining representative of all regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants and not any supervisor or managerial roles.

The parties agreed to table a discussion of this proposal until the next meeting. In the interim, the Respondent gave the Union a list of bargaining unit members it had requested. That list included the names of John Doland, the chief videographer, and George Kastenhuber, the assignment editor.

According to Employer Official Busch, there was an extensive, one-half day discussion concerning a statutory supervisor's responsibilities and the Employer's intent in changing the clause. Busch explained to the bargainiers his view of a supervisor's role based on his 30 year experience in the broadcasting business and as the chief operating officer of the Employer. He stated that he spoke about the supervisory roles of John Doland, the chief videographer, and George Kastenhuber, the assignment editor. Nicole Chorney was also mentioned as someone who should be excluded from the unit as a confidential employee. Busch's notes indicate that production assistant Sydney should be included in the unit.

Busch testified that he "pointed out that John Doland, who was at the table as a supervisor, has responsibilities and oversight that included training and evaluations We talked about specific folks, we talked about John. We talked about George [Kastenhuber]. We talked about others that could be supervisors I specifically talked about John at that table." According to Busch, when he was making his presentation,

Doland nodded his head when he characterized him as a supervisor.

Although Busch testified on direct examination that George Kastenhuber was discussed during bargaining, he testified, inconsistently on cross examination, that Kastenhuber, specifically, was not referred to during bargaining. "You're assumption is that George was thought of during bargaining. That's not the case. Supervisors were to be excluded from the bargaining unit. It had nothing to do with any specific person." He further stated that the Employer decided to remove the two men from the unit "after the contract was ratified and signed." In addition, Busch denied that Kastenhuber was mentioned by name during the bargaining, noting that Iddings wrote him a note with Kastenhuber's name at a time when they were away from the bargaining table.

Busch conceded that he did not know specifically what Doland did each day, but stated that he is familiar with the duties of a chief videographer based on his knowledge of how a station is run.

Busch stated that the union agents asked for a definition of the term "supervisor." Busch called his attorney who sent him a memo entitled "The Definition of 'Supervisor' Under the National Labor Relations Act" prepared by the Congressional Research Service. Busch testified that he read from the memo that *Oakwood Healthcare*² "established new definitions for three key terms that are used to identify supervisors for purposes of the NLRA: to 'assign' and 'responsibly to direct' employees and to exercise 'independent judgment.'"

He then told the union agents that the Respondent's hierarchy includes general managers, department heads, supervisors and line staff, and that supervisors cannot be part of the unit since they direct and assign unit employees.

Busch stated that during the bargaining he wrote on his copy of the memo that he reviewed it with the Union. He testified that no questions were asked by the Union and no counterproposals were made by it. His notes state that the Union rejected this proposal, wanted to retain the "original language," and offered to provide alternative language.

Apparently, no additional language was proposed by the Union and, according to Busch and his notes, the Union tentatively agreed to the proposal at the May 10 session.

b. *The Union's version*

According to Doland, a "vast" number of topics were discussed during bargaining. He conceded that the Employer wanted Chorney removed from the unit and the Union agreed that she was a confidential employee. Doland testified, however, that there was no specific mention that he and Kastenhuber would be removed from the unit, adding that their terms and conditions of employment were not discussed.

Union Agent Hartnett conceded that the Employer sought a "complete overhaul" of the contract, its intent being to change the "scope and jurisdiction" language. However, he stated that the parties discussed only the duties of Chorney, and not those of Doland or Kastenhuber.

² 348 NLRB 686 (2006). I already

Hartnett testified that when the scope of jurisdiction clause was discussed, the parties did not discuss Doland or Kastenhuber or their removal from the unit, and it was not the parties' intention to remove them from the unit. He denied that Busch spoke about the *Kentucky River*³ or *Oakwood Healthcare* decisions, or described the definition of supervisor discussed therein.

Hartnett further stated that the two men's terms and conditions of employment were not spoken about, except that it was agreed that Kastenhuber's vacation allowance would be "grandfathered" at 4 weeks annually. That agreement was set forth in a side letter to the contract, dated January 31. Agreement was reached because the parties considered moving the "vacation language" from the Employer's handbook to the collective-bargaining contract. Such a change would have resulted in Kastenhuber's losing 1 week's vacation.

3. The agreed-upon contract

A tentative agreement was reached on January 31. A draft copy of the new agreement including all the language in the prior contract that was omitted, and the changes and additions to the original contract, were sent to the Union for review. The proposed contract was voted on by the union membership and ratified.

The renewal contract was executed on March 18. It is effective from February 26, 2014, to February 25, 2017. The unit set forth in the contract, which is the same as that initially proposed by the Employer 1 year before, is as follows:

The Station recognizes the Union as the exclusive bargaining representative of all regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants and not any supervisor or managerial roles.

Busch stated that shortly after the execution of the contract, he directed General Manager Bob Grisson to withdraw Doland and Kastenhuber from the bargaining unit since they were supervisors, and to withdraw Chorney as the administrative assistant "under the exclusionary language."⁴

Immediately after the renewal contract was signed, Doland and Kastenhuber were informed on about March 26 by Employer Official Iddings that they were no longer included in the bargaining unit because they were supervisors.

Doland called Union Agent Hartnett and told him what had just occurred. Hartnett stated that they were all "shocked" at this turn of events. He immediately phoned Iddings, being "quite adamant that this was not what was collectively bargained and I would have to look into legal remedies regarding this." Hartnett stated that Iddings was shocked that he (Hartnett) was shocked. Hartnett filed the instant charge on April 1.

³ *NLRB v. Kentucky River Community Care, Inc.*, 432 U.S. 706 (2001).

⁴ Busch conceded, however, that the contract does not exclude Chorney's job title from coverage therein but rather includes only those titles specifically mentioned.

Hartnett considered the removal of Doland and Kastenhuber from the unit as an unfair labor practice and not a violation of the contract. He accordingly did not file a grievance.

Busch stated that the Employer's objective in amending the contract was not to remove Doland and Kastenhuber from the unit. Rather, the objective was to remove supervisors from the unit.

Following their removal from the unit, Doland's and Kastenhuber's job duties and working conditions remained the same. Their compensation also remained the same, except that no contributions were made to their pensions by the Employer.

4. The job duties of John Doland and George Kastenhuber

a. John Doland

Doland has been the chief videographer at the facility since 1996 at which time he became a member of the Union. In addition to Doland, there are four other videographers--Chuck Brame, Jesse Martin, Jaran Reid, and Richard Tanner.

Doland testified that his duties include overseeing the equipment and ensuring that it is workable. He videotapes a story with a reporter, and edits video news stories. He critiques the videos of the other videographers when he has the time to do so.

Upon arriving at work he checks his emails at another employee's desk since he does not have a desk. He visits news websites in order to determine whether the stories he sees there should be covered by the Employer.

Doland attends the morning meeting run by Producer Kaleigh Morrison. In attendance are Doland, News Director Bob Rockstroh, Assignment Editor Kastenhuber, the videographer and a reporter. Occasionally, another videographer and more reporters are also present.

Doland testified that Morrison posts what stories the station should be covering that day. Significantly, the posting, done by Morrison, lists the location, time, and the name of the videographer and the reporter assigned to the story. Those present discuss the stories.

Employer Official Iddings confirmed that at the morning meeting, Doland does not assign videographers or reporters stories to cover. However, according to Iddings, Doland has the authority to direct them in the field. For example, where a live shot is done with a live truck, two people would be assigned to one camera. Doland offers them guidance and advice on making that shoot.

Following the meeting, each person undertakes his assignment for the day. Doland may call another source who is aware of a story. He then takes his equipment and leaves the office, accompanied by a reporter, to cover a story.

Doland shoots about three stories per day, explaining that the duration of the story depends on its location. He returns to the station at about 3 p.m. when he edits the stories he shot and other, national stories which he receives from the computer. Two other videographers who arrive at 3:30 pm. also edit the national stories. Those national stories are "localized" by the team by interviewing individuals in the community concerning the impact of those news items on them.

Doland stated that when a "breaking news story occurs," the person who learns about it advises the producer who assigns or

reassigns the team closest to that story to cover it. Iddings confirmed that the chief videographer does not reassign individuals to cover such stories.

What follows is the job description of the chief “photographer” which is an alternative title to that of chief videographer, and Doland’s testimony concerning each task:

(a) With the news director, establish, enforce and update rules and guidelines for proper use of all video equipment and give the news director an annual report on the state of the equipment.

Doland testified that he attempts to perform these tasks, but that he does not have time to establish, enforce and update rules and guidelines.

(b) Maintain a sign-out system for all equipment and vehicles assigned to the news department.

Doland attempts to maintain a sign-out system for all equipment and vehicles assigned to the news department. He checks it once per day. Last month, for the first time in five years, he performed an inventory of cameras, records and other equipment.

(c) Maintain records of inventory and distribution of tapes. With the news director and program director, establish needs for tape replacement.

Doland denied performing this task.

(d) Establish programs with the news director and chief engineer for preventive maintenance programs for video equipment.

If Doland is informed that equipment is faulty he tells the person reporting the matter to bring it to the shop. Alternatively, the informant takes it to the shop himself. He usually emails the news director and chief engineer regarding what should be done with broken equipment.

(e) Meet with each photographer to critique shoots once per month or more as needed.

Doland stated that he does not meet once per month with each photographer because he does not have the time. However, if he sees poor editing or lighting as he walks through the editing bay or in a broadcast, or if he sees a poorly shot story, he gives the videographer “some pointers” on how he can improve. Doland stated that “nothing would happen” as a result of these “pointers.”

(f) Establish and maintain records with the chief engineer on vehicle maintenance and cleaning. Establish and oversee programs involving all news personnel for interior and exterior cleaning of vehicle once per week.

Doland does not do this task which is the province of the engineering department.

(g) Work with the news director on performance evaluation of all photographers and take responsibility for discipline of photographers, as necessary.

Doland evaluated the videographers in 2013 and 2014. His evaluations are discussed below. Doland stated that about two years ago he attempted to discipline those who “sat around and did nothing” by reporting them to his supervisor, Bob Grisson, the general manager. However, “nothing happened”

to them and they were not discharged. Grisson’s response was that the lazy employee’s father “brings a lot of money into the station.”

(h) Establish membership in a press photographers association.

Doland denies performing this task.

(i) Hold seminars annually for photographers and reporters to focus on shooting, editing, equipment maintenance and related topics.

Doland denies performing this task.

(j) Perform additional duties as assigned by the news director.

Doland performs this task. He does special assignments such as shooting and editing as assigned by the editor.

Scott Iddings, the director of creative services and programming, testified that he is familiar with the duties of a chief videographer based on his 20 year history in the broadcasting industry.

Iddings stated that as the chief videographer, Doland shoots stories, goes in the field with new videographers or candidates for hire and has the individual shoot a “mock story.” Doland evaluates how the candidate handles his equipment and interacts with the public. Doland returns to the studio with the individual and watches while he edits the shoot.

Iddings further stated that Doland observes the individual performing these tasks, getting a “feel for how he thought he did” and whether he “passes muster on the various skills that are required for the position.” Doland then makes a recommendation to the news director as to whether he should be hired. Iddings stated that Doland has made such recommendations on various occasions at meetings of the station’s department heads, including recommending that Brame and Martin be hired. Iddings further stated that he believed that, on occasion, Doland recommended that candidates not be hired, but he could not recall any specific instances. Nor did he say whether Doland’s negative recommendations were followed.

Doland testified that he worked with videographer Tanner at another station and was aware of his ability. Tanner applied for a job with the Employer and Doland accompanied him on a shoot. Doland stated that Tanner “knew what he was doing” and he recommended that Tanner be hired. Doland did not take Jaran Reid on a shoot but he was hired. Doland speculated that Reid was hired because his father was the general manager of the station.

Doland took Brame on a shoot and he was also hired, but Doland stated that it was not his decision that Brame be hired. Doland stated that he did not take Jesse Martin on a shoot and was not involved in his hire. However, Iddings stated that Doland recommended the hire of Brame and Martin.

Doland was given the task of performing evaluations for the other videographers for the first time when the Employer purchased the facility. Doland prepared written performance evaluations for the four videographers, Brame, Martin, Reid and Tanner, in 2013 and 2014. He gave each a score of 4 (exceeds expectations) on a scale of 1 to 5 in five areas of review:⁵ initia-

⁵ Reid received a score of “3” in the area of performance.

tive, performance, communication, knowledge, and dependability. Doland made positive comments in each of the performance areas for each of the videographers. He also noted their progress toward goals set 6 months before, and listed the goals for the next 6 months. He further listed their strengths and areas that need improvement. Doland reviewed the evaluation with the videographer and asked him to sign it. He then signed the form as “supervisor” and “evaluator,” and then gave the form to Rockstroh. Rockstroh did not testify.

Doland denied that “there is anything more to the evaluation process than filling out the form.” He also denied that the evaluation led to any benefit such as a raise in pay, promotion or a bonus. He did not believe that a negative evaluation could lead to the employee being fired, noting that no one has been fired due to a poor evaluation.

Iddings stated that Doland assigns specific videographic equipment to each videographer. If a videographer needs equipment for a shoot which is in use by another, Doland reassigns that gear to the individual in need of that equipment. If equipment is broken, Doland is notified and the gear is removed from service and either Doland or the videographer takes it for repair to the engineering department. Iddings stated that Doland gives the order to the engineering department to have the vehicle cleaned.

Iddings stated that Doland is paid nearly \$18 per hour, while the other videographers earn an average of \$10.50. Iddings based Doland’s higher salary on the facts that he has long tenure at the station, his general experience level, and the fact that he is the chief videographer.

In contrast, Doland attributed his higher salary to the fact that when the station was owned by Clear Channel he informed that company that he was resigning his job, and he thereafter negotiated a higher wage rate through his own individual contract. He kept the same rate thereafter and his salary was increased through periodic union wage raises. Doland denied that his higher salary was related to his alleged supervisory responsibilities.

b. George Kastenhuber

Kastenhuber has been the assignment editor for 12 years, becoming a member of the Union in 2002. His duties begin in the evening by locating stories that need to be covered the following day. He obtains those stories from other staff members, local newspapers, government agencies and wire services. However, he is not the only person engaged in that endeavor. It is a “collaborative effort by all . . . to gather these story ideas.” He sends an email that evening with a cryptic description of the stories that may be covered the following day.

He described his job as being able to “take what we know exists and be able to assign crews, take stories, and gather information just to make sure we have a constant workflow throughout the day.”

The following morning, Kastenhuber checks his emails and faxes. His morning producer, Zach Wheeler, informs him of any newsworthy stories that occurred the night before, or any follow-up that needs to be done, which “points him in the right direction.” He then calls police agencies to learn of any stories, and checks the newspapers and social media sources.

Kastenhuber then prints a “grid” or chart outlining the stories in greater detail, which may or may not be covered that day and emails it as an update to the station’s employees. Pursuant to a request by his producers he updates that list. The list, prepared by the producer, contains the names of reporters and photographers assigned to those stories.

The stories which may be covered are posted on a board. At the morning meeting, run by producer Morrison, the stories are discussed with input from everyone present. Morrison works from the grid that Kastenhuber distributed and asks the participants for suggestions for a “lead story.” Kastenhuber characterized his job duties as that of a “traffic cop in the newsroom.” Those present offer their ideas, and the group decides whether the stories on the grid should be reported. Kastenhuber stated that not all the stories he posts to the grid are covered. He provides them as an “option.”

Kastenhuber testified that at the meeting, News Director Rockstroh and Producer Morrison “assign reporters and videographers to the stories listed in the summaries.”

Employer official Iddings testified that the assignments editor works with the reporters and videographers, assigning them to various locations to cover news stories. In addition, Iddings stated that Kastenhuber “is part of that process of let’s assign who goes where. He is the assignment editor so he is making assignments.” In contrast, Kastenhuber stated that at that meeting, Morrison and News Director Bob Rockstroh assign the reporters and videographers to the stories listed in the summaries, while Kastenhuber helps the reporters by supplying them with background facts and figures, and offering ideas and suggestions concerning how to cover their stories.

Iddings stated that if Morrison or Rockstroh are not present, he believes that Kastenhuber runs the meeting because he has the highest seniority, having been at the station for 12 years, and having been in the industry for 30 years. Although he has no personal knowledge that that has occurred, he reasoned that “someone has to run the meeting.” Kastenhuber denied leading that meeting at any time.

Following the meeting, Kastenhuber again checks the local newspapers for breaking news, and also checks other television stations for stories.

At 11 a.m., Kastenhuber participates in a brief conference call with the assignment editors of other Nexstar stations located in other areas of the station’s coverage such as Burlington, Rochester, Syracuse, and Utica. They discuss the stories each will cover that day and consider running a story that another location has prepared. Following the conference call, Kastenhuber checks news websites and considers updating the story roster. He helps the producers or reporters with information they may need.

The Employer is informed of breaking news, which occurs about twice per week, from police scanners monitored by Kastenhuber, newspaper websites, and viewers who email the station. Iddings stated that when a breaking news story occurs, Kastenhuber is informed and he decides that that story be covered immediately. He then determines which crew is closest to the breaking story and directs that team to conclude its assignment and cover the breaking story.

Kastenhuber confirmed that he assigns crews in a breaking story by calling the closest news team and asking them to go to the scene. However, he advises his news director later that he took such action. He further testified that he, the news director and producer together decide who is closest to a breaking story and how they need to “shift gears” to have that story covered. Indeed, he testified that Morrison and Rockstroh decided who to send to cover a breaking story about area flooding.

He stated that his role is to try to help Morrison and Rockstroh determine, logistically, which team is closest to the breaking story. He stated that he can reassign someone to work on a breaking news story if no one is present in the newsroom to make that assignment.

Kastenhuber noted that when he is in the newsroom in the morning he sends the morning editor who is already near the scene, with a reporter, but he checks with the news director in those instances where a morning producer has to be shifted with another producer.

Kastenhuber stated that he is paid \$12.67 per hour. Iddings stated that the reporters are paid from \$10.50 to \$11.50. Kastenhuber stated that following his removal from the unit his job duties have not changed, and he received the 1 percent raise provided in the union contract. However, no contributions have been made by the Employer to his union pension.

In his 2014 evaluation of Kastenhuber, News Director Rockstroh stated that Kastenhuber “helps with staffing and helps keep overtime under control.” Kastenhuber explained that he does that by making certain that Rockstroh is aware of any situation which may require overtime. For example, Kastenhuber informs him of an event and inquires “do we want to cover it with overtime?” Kastenhuber stated that he is not authorized to assign overtime or ask an employee to perform overtime work without Rockstroh’s consent.

Kastenhuber agreed with his evaluation which characterized him as the “gateway” to the information that comes into the newsroom. He based that on his experience, his having lived in the community for nearly 60 years, and his extensive knowledge of the market. He emphasized that he does not manage the news. Rather, he supplies information to reporters and makes suggestions as to who the reporters should speak with. He noted that he does not tell the reporters how to write their stories. Rather, he gives them the information and informs them as to how to “further” their stories.

Kastenhuber stated that he is not a producer, did no producing, and did not write any newscasts. He works with a new producer, making certain that he was aware of certain emails and posts to Facebook. When he is asked to look at a script for suggestions, he gives his opinion and suggests revisions.

The job description of the “assignments editor or manager,” and Kastenhuber’s testimony concerning each task follows:

- (a) Tracking stories from all sources.

Kastenhuber does that task as part of his evening compilation of news stories to cover the following day.

- (b) Dispatching photographers, reporters and others to cover stories.

Kastenhuber denies performing this task. He stated that this task is the responsibility of the producer and news director.

- (c) Coordinates logistics for news personnel.

Kastenhuber performs these tasks.

- (d) Participates in daily story meetings and supplies a comprehensive list of all possible news stories, and works with the News Director to develop plans for all broadcasts.

Kastenhuber performs these tasks.

- (e) Assists in development, planning and follow-up of all news stories.

Kastenhuber testified that he performs these tasks and explained that occasionally the news director informs him that he saw a news item and asks Kastenhuber to gather some information for a story.

- (f) Edits video clips as assigned.

Kastenhuber stated that he “very rarely” edits video clips.

- (g) Writes stories for the web and other eMedia platforms.

Kastenhuber stated that he is responsible for about two web items. He posts videos for franchise items and other feature items such as an attorney speaking on a legal subject.

- (h) Interacts with viewers/users on social media sites.

Kastenhuber occasionally, but not generally, interacts with individuals on such sites. He does not interact with viewers using Facebook or Twitter.

The requirements for the position include a Bachelor’s degree in journalism, or an equivalent combination of education and work related experience, fluency in English, excellent communication skills, 2 years’ experience in news operations, proficiency with computers and other office equipment, ability to meet deadlines, prioritize assignments and multitask, and flexibility to work any shift.

Kastenhuber meets the educational requirement through a combination of education and work-related experience, and meets all the other criteria.

Analysis and Discussion

II. THE SUPERVISORY STATUS OF DOLAND AND KASTENHUBER

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of the above criteria is sufficient to prove the supervisory status of the disputed individual. The burden of proving that an employee is a statutory supervisor is on the party which asserts his supervisory status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). The Board has cautioned that the supervisory exemption should not be construed too broadly because the consequence of such a construction would be to remove individuals from the protec-

tion of the Act. *Providence Alaska Medical Center*, 320 NLRB 717, 725 (1996).

A. John Doland

Doland has been the chief videographer at the facility for 18 years. His work, shooting news stories with a reporter which is then aired by the Respondent, is essentially the same as that performed by the four other videographers. One of his responsibilities which can arguably be described as supervisory is occasionally critiquing the video shoots of other videographers when he has the time to do so, giving “pointers” on making more effective videos. However, advice by an experienced employee to a worker with less time on the job does not constitute Section 2(11) supervisory authority. *Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989); *Sanborn Telephone Co., Inc.*, 140 NLRB 512, 515 (1963).

Doland performed evaluations of the other videographers twice, in 2013 and 2014. He stated that he reviewed the evaluation with the employee, signed it as his supervisor, and then gave the form to supervisor Rockstroh. Rockstroh did not testify. Doland denied that the evaluation process led to any benefit for the employee being evaluated. The authority to “evaluate” is not one of the indicia of supervisory status set out in Section 2(11). *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). “When an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.” *Elmhurst*, above, at 536. “The authority simply to evaluate employees without more is insufficient to find supervisory status.” *Passavant Health Center*, 284 NLRB 887, 891 (1987).

Other evidence, that Doland’s name appears as “supervisor” on his evaluations of employees and his higher salary, do not establish that he is a statutory supervisor. *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). His undenied testimony that his salary, which was higher than other videographers, was obtained by agreement with a former employer similarly does not support a finding that such salary was attributed to his supervisory responsibilities.

The Respondent also asserts that Doland recommended the hire of certain videographers. There was some dispute as to whether Doland recommended the hire of Brame and Martin. Iddings stated that he did but Doland denied doing so.

Doland has a prospective videographer shoot a “mock” story and then recommends to news director Rockstroh whether he should be hired. Rockstroh did not testify. There is no evidence as to what weight Rockstroh gave to Doland’s alleged recommendation. Doland’s participation in part of the interview process is “insufficient to establish supervisory authority under the Act because there is no evidence that the [disputed supervisor] effectively recommended that the [candidate] be hired.” *North General Hospital*, 314 NLRB 14, 16 (1994).

The one instance in which he reported an employee for laziness was dismissed and no discipline was taken against the employee. Doland does not assign employees to cover breaking news stories.

The assignment of equipment to a videographer, taking the equipment to be repaired, directing that vehicles be cleaned,

even assuming that Doland performed all those tasks, does not establish that he is a statutory supervisor where there is no showing that he exercised independent judgment in the execution of those tasks. Those jobs are simply routine in nature.

B. John Kastenhuber

Kastenhuber has worked as the assignment editor for 12 years. He locates stories which the Respondent may be interested in covering and circulates those stories to other staff members. His producer leads a meeting at which those present, including Kastenhuber, give their opinions as to which stories to report.

I find, in contrast to Iddings’ testimony, that the news director and producer, and not Kastenhuber, assign those stories to the reporters and videographers. At most, the assignments are part of a collaborative effort. Even as Iddings testified, Kastenhuber “is part of that process of let’s assign who goes where.” It is more likely, as the morning meeting is a group effort of determining which stories to cover, that the assignments are also part of a combined exercise, where the two undisputed supervisors, the news director and producer, are actually making the assignments.

Kastenhuber conceded that he assigns the closest team to a breaking news story. However, such assignment does not constitute the exercise of independent judgment. Rather, he mechanically determines which team is geographically closer to the story. Moreover, he later tells his news director that he took such action. Furthermore, he stated that he only makes such an assignment if no one else is in the newsroom at that time. Such routine, mechanical assignments, involving only the determination of which team is closer to a breaking news story, does not involve the exercise of independent judgment and is not evidence of supervisory authority. *Sears, Roebuck*, above, at 754. Kastenhuber is not authorized to assign overtime work without his news director’s agreement.

In *King Broadcasting Co.*, 329 NLRB 378, 381 (1999), the Board found that assignment editors working at a television station were not statutory supervisors. Many of their responsibilities were similar to Kastenhuber’s, including their selection of stories as prospective news items to be covered and participation in group meetings to determine which stories should be aired. In *King*, and here, the editor was described as a “traffic cop” who monitors information coming into the newsroom.

In *King*, the Board held that the assignment editor was not a supervisor, notwithstanding that he made assignments. The Board found that such assignments were not based on the exercise of independent judgment even though they were based on an assessment of employees’ skills. 329 NLRB at 381. Here, likewise, there was no evidence that any assignment made by Kastenhuber was based on his exercise of independent judgment, or his assessment of the assignee’s skills.

Conclusion

I accordingly find and conclude that John Doland and George Kastenhuber are not supervisors within the meaning of Section 2(11) of the Act.

II. THE ALLEGED REFUSAL TO BARGAIN

The complaint alleges that on about March 26, the Respondent unilaterally removed the positions of assignment editor and chief videographer from the bargaining unit without the Union's consent, and also unilaterally removed the bargaining unit work of the assignment editor and chief videographer from the unit without prior notice to the Union and without affording it an opportunity to bargain with it with respect to such conduct.

A. Alteration of the Unit's Scope

In *Hill-Rom Co., Inc., v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992), the court defined permissive subjects of bargaining as those "which fall outside the scope of Section 8(d) of the Act and cannot be implemented by the employer without union or Board approval." The court stated, as adopted by the Board in *Hampton House*, 317 NLRB 1005, 1005 (1995):

There is no doubt that the scope of the employees' bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed upon by the parties. Accordingly, once a specific job has been included within the scope of the bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board. The reason why the law disfavors unilateral changes in the unit description is as simple as it is fundamental: if an employer could vary unit descriptions at will, it would have the power to sever the link between a recognizable group of employees and its union as the collective bargaining representative of these employees. This, in turn, would have the effect both of undermining a basic tenet of union recognition in the collective bargaining context and of greatly complicating coherence in the negotiation process.

"If the subject is a permissive one, the other party may refuse to discuss it; a proposal cannot thereafter be implemented absent an agreement to do so. A proposal to alter the scope (composition) of an existing bargaining unit is a permissive subject of bargaining. Thus, an employer cannot unilaterally change a bargaining unit, even after bargaining to impasse." *Aggregate Industries*, 359 NLRB No. 156, slip op. at 3 (2013).

The positions of assignment editor and chief videographer were included within the scope of the bargaining unit by the consent of the parties.

The job classification of "videographers" was included in the collective-bargaining unit certified by the Board in 1996. The Union was recognized by two successive employers. The unit contained in the Respondent's immediate predecessor's (Newport) contract, was broad. It included all the station's employees, but excluded 14 specific titles, and supervisors. That contract was assumed by the Respondent which operated pursuant to it from the time it purchased the Station in December 2012 until its expiration in March, 2013.

Accordingly, that contract's unit description which broadly included of all of its employees, of course included Doland and Kastenhuber. The Respondent claims that they are supervisors. However, during that period of time, and indeed, during their entire lengthy employment at the Station, they were admittedly

included in that unit and were considered and treated as unit employees represented by the Union.

Indeed, the Respondent, at the start of negotiations, gave the Union a list of union members which included the names of Doland and Kastenhuber. The Respondent apparently made no claim during their employment that they were statutory supervisors who should be excluded from the unit. Rather, that claim was made for the first time after the bargaining concluded and the contract was signed.

As set forth above, immediately following the execution of the renewal contract, the Respondent informed Doland and Kastenhuber that they were no longer in the bargaining unit. It is clear that the Respondent did not first secure the consent of the Union when it took such action. It could not lawfully do so.

Once a specific job has been included within a bargaining unit, the employer cannot remove it without the consent of the union or action by the Board. *Hampton House*, 317 NLRB 1005, 1005 (1995). Where the same employees continue to perform the same work that they had, an employer may not lawfully attempt to change the scope of the bargaining unit by taking the position that these represented employees and their work were now outside the bargaining unit. *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140–1141 (1982), *enfd.* 721 F.2d 187 (7th Cir. 1983). An employer may not, under the guise of transferring unit work, alter the scope of the bargaining unit. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 975–976 (10th Cir. 1990); *Aggregate Industries*, above, slip op. at 3.

Because the Employer took this action without the Union's consent, it violated Section 8(a)(5) and (1) of the Act. *Aggregate Industries*, above.

In *Arizona Electric*, 250 NLRB 1132 (1950), the employer withdrew recognition from the union, during mid-term negotiations, for previously included unit employees on the ground that they were statutory supervisors. The Board, in finding a violation, stated:

It is axiomatic that parties to a collective-bargaining relationship cannot bargain meaningfully unless they know the scope of the unit for which they are to bargain. Thus, it is well established that the integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action. 250 NLRB 1132, 1133.

Here, as in, *Arizona Electric*, "where a contract executed with full knowledge of the nature of the present duties of the [disputed employees] is currently in force, to permit Respondent to alter unilaterally the scope of the established bargaining unit would unnecessarily encourage parties to productive and viable collective-bargaining relationships to refuse to bargain over wages and other terms and conditions of employment of individuals who were intended to benefit from these relationships." 250 NLRB at 1133.

Later cases have affirmed this long-standing policy. In *Dixie Electric Membership Corp.*, 358 NLRB No. 120, slip op. at 3–4 (2012), *affd.* in 361 NLRB No. 107, fn. 1 (2014), the Board found that the employer violated the Act by modifying the unit's scope by eliminating certain positions from the unit without the union's consent. The Board also found that the

employees, who were removed from the unit allegedly because they were supervisors, continued to perform essentially the same work as they did prior to their removal. Here, as in *Dixie Electric*, it is undisputed that the positions were covered by the expiring collective-bargaining agreement. *NLRB v. Quinn Restaurant Corp.*, 14 F.3d 811, 815 (1994); *Wackenhut Corp.*, 345 NLRB 850, 855 (2005); *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2. (2000).

As discussed above, the Respondent has not met its burden of proving that the assignment editor and the chief videographer were statutory supervisors. As a result, the Respondent cannot rely on their alleged supervisory status as a justification for its elimination of the two disputed positions from the bargaining unit. *Wackenhut*, above, at 855.

The Respondent withdrew recognition from the Union as the representative of unit positions assignment editor and chief videographer by unilaterally removing their positions from the unit. There can be no doubt, as the complaint alleges, that such action was done without the Union's consent.

There was no agreement by the Union that those positions be removed from the unit. I find, as testified by the Union's witnesses, that there was no discussion during negotiations about the two men's positions. I cannot credit Busch's less than definitive testimony that the two men were discussed. Even if there was discussion about supervisory responsibilities, there is no credible evidence that the Union was on notice, or that it gave its consent to the removal of Doland and Kastenhuber from the unit. Indeed, Busch testified that he spoke about supervisors being excluded from the unit, but that "it had nothing to do with any specific person," and that the Employer decided to remove the two men from the unit "after the contract was ratified and signed."

I accordingly find and conclude, as alleged in the complaint, that the Respondent violated Section 8(a)(5) and (1) of the Act by the removing the positions of assignment editor and chief videographer from the bargaining unit without first obtaining the Union's consent to such actions.

The Respondent's argument that the Union consented by participating in negotiations and signing the contract will be addressed, below.

B. *The Unilateral Transfer of Unit Work Outside the Unit*

I also find, as alleged in the complaint, that the Respondent unilaterally removed the bargaining unit work of the assignment editor and chief videographer from the unit. The Respondent did so with respect to such mandatory subjects of bargaining, without prior notice to the Union and without affording the Union an opportunity to bargain with it regarding such conduct.

After the contract was signed, Doland and Kastenhuber were informed that they were supervisors and were removed from the bargaining unit. It is undisputed that they continued to perform their duties, under the same working conditions, as they had before they were removed from the unit.

The Board in *Hampton House*, 317 NLRB 1005, 1005 (1995), stated:

When an employer promotes an employee to a supervisory position and the new supervisor continues to perform former

bargaining unit work, however, the work is removed from the bargaining unit. That is a change in the bargaining unit's terms and conditions of employment, giving rise to the employer's bargaining obligation under Section 8(d) of the Act. In those circumstances, the employer must bargain with the union in good faith and may unilaterally change the bargaining unit's work only after a lawful impasse.

No notice was given to the Union that the removal of Doland and Kastenhuber's work from the unit was being contemplated or considered by the Respondent. Rather, their elimination from the unit was presented as a *fait accompli*, following the execution of the new contract, which, the Respondent believed would automatically operate to accomplish its goal of removing their work from the unit. *Wire Products Mfg Corp.*, 328 NLRB 855, 857 (1999).

I accordingly find and conclude, as alleged in the complaint, that by unilaterally removing the bargaining unit work of the assignment editor and chief videographer from the bargaining unit, the Respondent violated Section 8(a)(5) and (1) of the Act.

C. *The Respondent's Defenses*

1. Midterm Modification of a Permissive Subject of Bargaining

The Respondent argues that it was permitted to unilaterally change a permissive nonmandatory subject of bargaining, citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), and *Star Tribune*, 295 NLRB 543 (1989). In *Pittsburgh Plate Glass*, the Supreme Court held that a unilateral modification of a contract term is "a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." 404 U.S. at 185.

In both cases, the employers modified or implemented a contract term. In *Pittsburgh Plate Glass*, it changed retirees' benefits. In *Star Tribune*, it sought to implement a drug and alcohol program. Accordingly, the Respondent's reliance on those cases is misplaced.

It is not alleged that the Respondent modified a contract term. This is not a case involving a mid-term modification of a contract. The Respondent did not change a "contract term." It changed the scope of the bargaining unit. The "legal principles applicable to a change-of-unit-scope allegation differ from those applicable to a midterm contract modification." *Walt Disney World Co.*, 359 NLRB No. 73, slip op. at 4 (2013).

Here, the Respondent did not modify the recognition clause. That clause remained the same from the time it was proposed by the Employer in February, 2013 until it was included in the executed contract one year later. The clause remained intact and unchanged. It was not modified at all during that time, nor after the contract was executed.

Rather, the scope of the unit contained in the contract was altered by the Respondent when it unilaterally removed the two positions from that unit. The clause itself was not modified.

Here, the elimination from the unit of the positions of assignment editor and chief videographer were clearly an alteration of the scope of the unit. Those two positions were included in the bargaining unit which was recognized by the Employ-

er. The prior contract which was the subject of renewal bargaining was applied to those two positions. Accordingly, the Respondent's elimination of the two positions from the bargaining unit was a change in the scope of the unit. The Respondent's argument that the two men occupying those positions were statutory supervisors is unavailing since, as I have found above, it has not been proven that they were statutory supervisors.

By eliminating the two disputed positions from the unit the Respondent did not modify a term of the contract. It changed the scope of the bargaining unit. I accordingly reject the Respondent's argument that it lawfully, unilaterally changed a term of the contract.

2. The Alleged Supervisory Positions

The Respondent argues that it was permitted to alter the unit's scope because the disputed positions were supervisory. I have found, above, that the positions of assignment editor and chief videographer are not statutory supervisory positions. Even assuming, arguendo, that the two positions are supervisory, the Board has held that "where parties to a collective-bargaining agreement have voluntarily agreed to include supervisors in a bargaining unit, it will order the application of the terms of the collective-bargaining agreement to such supervisors." *Dixie Electric Membership Corp.*, above, slip op. at 3; *Arizona Electric*, above, at 1133.

Indeed, here the parties applied the terms of the expired collective-bargaining agreement to alleged supervisors Doland and Kastenhuber.

3. Waiver

The Respondent argues that it lawfully applied and implemented the terms of the new contract to Doland and Kastenhuber, and that the Union had an ample opportunity to submit proposals and counter proposals to the unit proposed by the Employer.

The Respondent also asserts that the Union waived its right to contest the removal of the two disputed positions from the unit because it participated in lengthy contract negotiations, it was given all the draft proposals leading up to the new agreement, and it signed the contract.

In this regard, the Employer argues that the changes it made in the scope of the unit were not unilateral. Rather, they were bilateral because the Union agreed to them by agreeing to the new "recognition" article in the contract.

It is true that the parties engaged in prolonged negotiations. Discussions began in February 2013 and the contract was executed one year later, in March 2014. In the interval, they met once per month for seven months. However, it is not the length of the negotiations which is the key. Rather, the question is whether the parties discussed the matter at issue, and whether the Union was on notice of the Respondent's proposed changes.

As noted above, Employer Official Busch did not testify that there was a specific discussion during negotiations in which he identified Doland and Kastenhuber as being supervisors who therefore must be excluded from the unit. The most that could be said was that he mentioned that "Doland, who was at the table as a supervisor, has responsibilities and oversight that included training and evaluations We talked about others

that could be supervisors . . . I specifically talked about John at that table." His testimony that Doland "nodded" when he characterized him as a supervisor could only be interpreted as an imprecise description of Doland's motion of his head which could have multiple meanings, and certainly not as Doland's affirmation that he was a statutory supervisor with all its ramifications.

Although Busch testified that he spoke about Kastenhuber during bargaining, he gave contradictory testimony by stating that Kastenhuber was not referred to during bargaining. Rather, he stated that his name came up in a private conversation with Iddings.

In contrast, union bargainers credibly testified that during the negotiations there was no mention of the removal of the two men from the unit. Union Agent Hartnett further credibly stated that it was not the parties' intent to do so.

Hartnett conceded that the Union was given the Respondent's proposals which changed the scope of the unit, and which included only certain job titles and eliminated the list of excluded job titles and "supervisors or managers." Nevertheless, Hartnett did not believe that those changes would result in the loss of the positions held by Doland and Kastenhuber because those job titles were always included in the bargaining unit, and they were not supervisory. Rather, according to Hartnett, the only person discussed as someone who should be excluded from the unit was Chorney.

I find that it would have been "unlikely that the Union intended to relinquish the right to bargain about what traditionally had been a bargaining unit position . . . with virtually no discussion of the issue" *Land O'Lakes, Inc.*, 299 NLRB 982, 982 fn. 2 (1990).

This finding is supported by the Union's actions when, immediately after being informed by the two men that they had been removed from the unit, Union agent Hartnett told Iddings that he was "shocked," and "adamantly" protested that "this was not what was collectively bargained" and that he would pursue his legal remedies. He immediately filed a charge. *Land O'Lakes*, above, at 982, fn. 2.

In addition, the Respondent could not have believed that the Union would consent to the removal from the unit of the positions occupied by Doland and Kastenhuber. Doland was at the bargaining table and took part in all the negotiations. If he was a supervisor he would not have been present as a member of the Union's bargaining team.

It is true that the Union did not request bargaining over this issue. It did discuss the removal of Chorney from the unit as a confidential employee and it agreed to such change. However, the Union did not request bargaining as to the removal of the two disputed positions because, as testified by Hartnett, there was no discussion of the subject. The Respondent presented the Union with a fait accompli. It was not presented with any notice, much less timely and meaningful notice under circumstances which at least afforded a reasonable opportunity for counter arguments or proposals. *Dixie Electric*, above, slip op. at 4.

There was no evidence that the issue of the removal of the two positions had been mentioned at all during contract negotiations, much less "fully discussed and consciously explored."

Provena St. Joseph Medical Center, 350 NLRB 808, 810 (2007). The Union was therefore relieved of its obligation to request bargaining as to the removal of the two positions. If any request to bargain was necessary, the Union did so in Hartnett's protest to Iddings and by its filing of the instant charge. *Solutia, Inc.*, 357 NLRB No. 15, slip op. at 7 (2011), enfd. 699 F.3d 50 (1st Cir. 2012). A waiver of the right to bargain must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983).

The Respondent also asserted the defenses that (a) the complaint is barred by Section 10(b) of the Act and (b) the remedy sought is not authorized by the Act as it would force it to agree to and implement a term in a collective-bargaining agreement that it did not agree to.

As to the 10(b) argument, the charge was filed on April 1, shortly after the contract's execution and after the Union was told that Doland and Kastenhuber were being removed from the unit as supervisors. Thus, the Union filed the charge immediately after such notice was given to it of this change. It cannot be argued that they had such notice prior to that time. Accordingly, the charge was filed within 6 months of the unlawful action taken by the Respondent.

I also reject the Respondent's argument that this decision would unlawfully force the Respondent to agree to and implement a term in the contract that it did not agree to. Here, the Respondent always treated the positions of assignment editor and chief videographer as being part of the recognized collective-bargaining unit. This decision does not require the Respondent to do anything more than to honor its agreement to continue to recognize those job positions.

CONCLUSIONS OF LAW

1. Nexstar Broadcasting Group, Inc., d/b/a WETM-TV, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories, and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants and not any supervisor or managerial roles.

4. By unilaterally removing the positions of assignment editor and chief videographer from the collective-bargaining unit set forth above, the Respondent has altered the scope of the unit without the Union's consent, and has violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

5. By unilaterally removing the bargaining unit work of the assignment editor and chief videographer without prior notice to the Union and without affording the Union an opportunity to

bargain with the Respondent with respect to this conduct, the Respondent violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

6. The positions of assignment editor and chief videographer are not statutory supervisory positions within the meaning of Section 2(11) of the Act.

7. The unfair labor practices of the Respondent, found above, affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In order to restore the status quo ante, the Respondent shall be required to rescind its March 26, 2014 removal of the unit positions of assignment editor and chief videographer and its consequent removal of the bargaining unit work of those two positions outside the bargaining unit. The Respondent shall also be ordered to reinstate John Doland and George Kastenhuber to the bargaining unit.

The Respondent shall also be required to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees occupying the positions of assignment editor and chief videographer, and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

The Respondent shall also be required to apply the terms of the collective-bargaining agreement, effective February 26, 2014, through February 25, 2017, between the Union and the Respondent, to employees occupying the positions of assignment editor and chief videographer. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment, which may have been afforded to the assignment editor and chief videographer employees, as compared to the wages, benefits, and terms or conditions of employment of bargaining unit employees.

Although the record does not establish that John Doland or George Kastenhuber suffered any economic loss as a consequence of the Respondent's actions, it nevertheless shall be ordered to make them whole, if it can be shown that they have suffered any loss of earnings and other benefits as a result of the discrimination against them. If backpay is warranted, it shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Don Chavas LLC d/b/a Tortillas Don Chavas*, NLRB No. 10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Doland and Kastenhuber, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse them for any additional Federal and State income taxes they may be assessed as a consequence

of receiving a lump-sum backpay award covering more than 1 calendar year.

There was testimony that, following the removal of Doland and Kastenhuber from the bargaining unit, the Respondent ceased making contributions to their pensions. Accordingly, the Respondent shall be required to remit all contributions it would have made on the employees' behalf to employee retirement, 401(k), and/or health care funds absent its unlawful unilateral changes, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse the employees for any expenses they may have incurred as a result of its failure to make such benefit fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), with interest as prescribed in *New Horizons*, above.

The Respondent shall also be required to reimburse the Union for any dues that it would have deducted from Doland and Kastenhuber and remitted to the Union under the collective-bargaining agreement absent its unlawful unilateral changes. Such sums shall likewise be calculated in the manner set forth in *Ogle Protection Service*, above, with interest as prescribed in *New Horizons*, above.

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB No. 9, slip op. at 5-6 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Nexstar Broadcasting Group, Inc. d/b/a WETM-TV, Elmira, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally removing the positions of assignment editor and chief videographer from the following collective-bargaining unit:

All regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station's facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters, newscast directors, production assistants and not any supervisor or managerial roles.

(b) Unilaterally removing the bargaining unit work of the

assignment editor and chief videographer without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its March 26, 2014 removal of the unit positions of assignment editor and chief videographer and its consequent removal of the bargaining unit work of those two positions outside the collective-bargaining unit.

(b) Reinstate John Doland and George Kastenhuber to the bargaining unit represented by the Union.

(c) Recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees occupying the positions of assignment editor and chief videographer, and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

(d) Apply the terms of the collective-bargaining agreement, effective February 26, 2014, through February 25, 2017, between the Union and the Respondent, to employees occupying the assignment editor and chief videographer positions. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits and terms or conditions of employment, which may have been afforded the assignment editor and chief videographer, as compared to the wages, benefits, and terms or conditions of employment of bargaining unit employees.

(e) Make John Doland and George Kastenhuber whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Remit all contributions it would have made on the employees' behalf to employee retirement, 401(k), and/or health care funds absent its unlawful unilateral changes, and reimburse John Doland and George Kastenhuber for any expenses they may have incurred as a result of its failure to make such benefit fund contributions, in the manner set forth in the remedy section, above.

(g) Reimburse International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artist and Allied Crafts of the United States, its Territories, and Canada, AFL-CIO, for any dues that it would have deducted from Doland and Kastenhuber and remitted to the Union under the collective-bargaining agreement absent its unlawful unilateral changes, as set forth in the remedy section, above.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Elmira, New York, copies of the attached notice

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2014.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 15, 2015

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally remove the positions of assignment editor and chief videographer from the following collective-bargaining unit:

All regular full and part-time employees of the Station engaged in television broadcasting and web streaming at its television station WETM in Elmira, N.Y. and said station’s facilities, including only master control operators, videographers, creative services producer/directors, anchors, reporters,

newscast directors, production assistants and not any supervisor or managerial roles.

WE WILL NOT unilaterally remove the bargaining unit work of the assignment editor and chief videographer without prior notice to International Alliance of Theatrical State Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our March 26, 2014 removal of the unit positions of assignment editor and chief videographer and our removal of the bargaining unit work of those two positions outside the unit.

WE WILL reinstate John Doland and George Kastenhuber to the bargaining unit represented by the Union.

WE WILL recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees occupying the positions of assignment editor and chief videographer, and, upon request, bargain with the Union regarding those employees’ wages, hours, and other terms and conditions of employment.

WE WILL apply the terms of the collective-bargaining agreement, effective February 26, 2014, through February 25, 2017, between the Union and the Respondent, to employees occupying the assignment editor and chief videographer positions. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment, which may have been afforded the assignment editor and chief videographer, as compared to the wages, benefits, and terms or conditions of employment of bargaining unit employees.

WE WILL make John Doland and George Kastenhuber whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remit all contributions we would have made on the employees’ behalf to employee retirement, 401(k), and/or health care funds absent our unlawful unilateral changes, and reimburse John Doland and George Kastenhuber for any expenses they may have incurred as a result of our failure to make such benefit fund contributions.

WE WILL reimburse International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artist and Allied Crafts of the United States, its Territories, and Canada, AFL–CIO for any dues that it would have deducted from John Doland and George Kastenhuber and remitted to the Union under the collective-bargaining agreement absent our unlawful unilateral changes.

NEXSTAR BROADCASTING GROUP, INC. D/B/A
WETM-TV

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”