

No. 16-52

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**NEXSTAR BROADCASTING GROUP, INC.
d/b/a WETM-TV**

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order against Nexstar Broadcasting Group, Inc. d/b/a WETM-TV (“the Company”). The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board’s Decision and Order issued on October 30, 2015, and is

reported at 363 NLRB No. 32 (A 129-44).¹ This Court has jurisdiction because the order is a final order within the meaning of Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Sections 10(e) of the Act, because the unfair labor practices occurred in New York. The Board filed its application for enforcement on January 7, 2016. The filing was timely; the Act imposes no time limit on such filings.

RELEVANT STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are contained in the Addendum.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally removing the positions of assignment editor and chief videographer from the collective-bargaining unit and unilaterally removing the bargaining unit work of those positions.

¹ "A" refers to the appendix filed on May 25, 2016. "SA" refers to the supplemental appendix that the Board filed simultaneously with this brief. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. Procedural History

Based on unfair labor practice charges filed by the 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”), the Board’s General Counsel issued a complaint alleging that the Company violated the Act by unilaterally removing the positions of assignment editor and chief videographer from the collective-bargaining unit without the Union’s consent. The complaint further alleged that the Company violated the Act by unilaterally removing the bargaining unit work of those positions without notifying the Union and affording it an opportunity to bargain over the removal. (A 132; 1-13.)

Following a hearing, an administrative law judge issued a decision finding that the Company violated the Act as alleged. (A 140, 142.) The Company filed exceptions to the judge’s decision with a supporting brief. (A 129; 109-28.)

The Board issued a Decision and Order affirming the judge’s rulings, findings, and conclusions, and adopting the judge’s recommended order, as modified. (A 129-30.) The facts relevant to the Board’s findings are detailed below, followed by a summary of the Board’s Decision and Order.

II. THE BOARD'S FINDINGS OF FACT

A. The Company Purchases a Television Station and Assumes a Contract Covering All Employees with Certain Listed Exclusions

The Company operates a television station in Elmira, New York. When it purchased the station in December 2012, the Company assumed and operated under a collective-bargaining agreement with the Union that was set to expire in March 2013. (A 132; 47-48, 77-92.) That contract's recognition clause read 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.

(A 132; 77.)

B. The Parties Negotiate a New Contract; the Company Proposes a Revised Recognition Article and Provides a List of Unit Members; the Parties Discuss and Agree to Remove a Confidential Employee from the Unit

In early 2013, the parties began negotiations for a new contract and met approximately once per month for seven months. (A 132; 48.) The Company sought to amend the contract's recognition clause to eliminate the list of position-specific unit exclusions. Executive vice president and chief executive officer

Timothy Busch, who was on the Company's negotiating team, believed that the recognition clause should specify which job classifications were included in the unit rather than enumerating exclusions. (A 133; 49.) Busch explained, for example, that under the existing language if the Company acquired another business whose job classifications were not named as specifically excluded from the unit, employees in those classifications could automatically be considered unit employees. (A 133; 49-51.)

Thus, in February 2013, the Company proposed the following recognition clause language:

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.

(A 133; 51, 93.) The Union rejected this proposal and offered to provide alternative language. (A 133; 54-55.)

At a subsequent February 2013 bargaining session, the Company gave the Union a list of bargaining unit members it had requested. That list included John Doland, the chief videographer, and George Kastenhuber, the assignment editor. (A 133; 54, SA 2.)

During negotiations, the parties discussed excluding employee Nicole Chorney from the unit as a confidential employee and the Union agreed. (A 133; 19-20, 25.) The parties did not discuss the duties of, terms and conditions of employment for, or exclusion from the unit of any other unit employee. (A 133-34; 20, 24, 35, 69.)

C. The Union Agrees to the Proposed Recognition Article; the Parties Agree to and Execute a Collective-Bargaining Agreement

On May 10, the Union tentatively agreed to the Company's proposed recognition clause language. (A 133; 60.) On January 31, 2014, the parties tentatively reached agreement on a full contract. Also on that date, the parties agreed to a side letter stating that Kastenhuber's vacation allowance would be "grandfathered" in at 4 weeks annually rather than the 3 weeks that he would have received under the contract. (A 134; 61, 63, 98, 107.) On March 18, the contract was executed. (A 134; 105.)

D. The Following Week, the Company Removes Doland and Kastenhuber from the Bargaining Unit; the Employees Continue to Perform the Same Work

About a week after the contract was signed, Busch directed General Manager Bob Grisson to withdraw Doland, Kastenhuber, and Chorney from the bargaining unit. (A 134; 63.) On March 26, director of creative services and programming Scott Iddings informed Doland and Kastenhuber that they were no

longer included in the bargaining unit because they were supervisors. (A 134; 26-27.) Doland called union agent David Hartnett, who immediately phoned Iddings and stated that this was not what was collectively bargained. (A 134; 21.)

Following their removal from the unit, Doland and Kastenhuber's job duties and working conditions remained the same, except that the Company no longer made contributions to their pensions. (A 134, 137; 34, 43.)

E. Doland's Functions and Duties as Chief Videographer

Since 1996, Doland has been the chief videographer at the station and a union member. (A 134; SA 2.) He primarily videotapes news stories with reporters and edits those stories. (A 134; 28, SA 16-17, 21, 25.) When he arrives at work each day, he checks email and visits news websites to determine if there are stories that the Company should cover. Doland then attends the morning meeting, run by producer Kaleigh Morrison, which is also attended by news director Bob Rockstroh and assignment editor Kastenhuber, as well as other videographers and reporters. Morrison posts the stories to be covered that day including the location, time, and who is assigned to them. Doland does not make these, or any other, assignments. (A 134; SA 23-25.)

Doland shoots about three stories per day then returns to the station around 3 p.m. to edit those stories. Along with other videographers, he also edits national

stories to “localize” them by interviewing individuals in the community concerning the local impact of the news. (A 134; SA 25-26.)

When out in the field on an assignment with another videographer, for example where a live shot is done with a live truck, he may offer guidance and advice on making a shoot. He may also critique videos of the other four videographers at the station when his time permits. (A 134; 31, SA 16.) If he sees poor editing or lighting in a video when he walks through the editing bay or in a broadcast, he gives the videographer pointers on how he can improve. (A 135; 31-32.) The other videographers tell Doland when equipment is not working and either the videographer or Doland take it to the engineering department for repair. (A 136; 29-31.)

When videographer Richard Tanner applied for a job at the Company, Doland knew him from another station and knew his abilities. After going on a mock shoot with Tanner, Doland recommended that Tanner be hired. Doland also went on a shoot with Chuck Brame, who was hired as a videographer without Doland’s recommendation. Doland did not go on a shoot with Jaran Reid or Jesse Martin, who were also hired as videographers during Doland’s tenure as chief videographer. (A 135; SA 27-30.)

In 2013 and 2014, after the Company purchased the station, Doland prepared written evaluations of the other videographers. (A 135; 32.) Doland rated them on

a scale of 1 to 5 in five areas of review, giving ratings of 4 on everything except for one employee in one category. (A 135-36; SA 4-15.) Doland made positive comments, noted progress toward goals set 6 months before as well as listing goals for the next 6 months, and listed strengths and areas that needed improvement. (A 136; SA 4-15.) Doland reviewed the evaluation with each videographer and asked them to sign it, then Doland signed as supervisor and gave the evaluations to the news director. (A 136; SA 6, 9, 12, 15, 18.) The evaluation process was limited to filling out the form, did not lead to any benefit for employees, and no employee had been fired for a poor evaluation. (A 136; SA 18-19.)

In or around 2012, Doland reported to the station's general manager a videographer who "sat around and did nothing." Nothing happened to the employee as a result of Doland's report; the general manager told Doland that the employee's father brings a lot of money into the station. (A 135; SA 19-20.)

Doland is paid \$18/hour; other videographers receive an average of \$10.50/hour. This disparity was created because under a former station owner, Doland resigned from his job and thereafter negotiated a higher wage rate to stay in his position. The Union negotiated periodic unit-wide wage increases that further increased Doland's rate. (A 136; SA 32-35.)

F. Kastenhuber's Functions and Duties as Assignment Editor

For more than 12 years, George Kastenhuber has been assignment editor at the station and a union member. (A 136; 36.) Kastenhuber has lived in the Elmira area for nearly 60 years and has extensive knowledge of the station's market. (A 137; 45.)

Kastenhuber begins his work in the evening by identifying stories that need to be covered the following day and sending an email to the news team with a brief description of the stories. In the morning, Kastenhuber checks his email, hears from the morning producer about any newsworthy events of the night before, calls police agencies to learn of stories, and checks the newspaper and social media. Kastenhuber then prints a grid of potential stories for the day, which is then posted on a board at the morning meeting. (A 136; 40, SA 38, 42.)

At that meeting, run by producer Morrison, everyone discusses the story ideas and options. Morrison and news director Rockstroh then assign reporters and videographers to all stories from the list that are going to be covered. Kastenhuber assists reporters by supplying them with background facts and figures, and offering ideas and suggestions on how to cover their stories, including with whom to speak to in the community. (A 136; 39-40, SA 36-37, 42-45.) At 11 a.m., Kastenhuber participates in a daily conference call with the assignment editors of other

Company stations in the upstate New York area to discuss stories each will cover that day. (A 136; SA 40-41.)

Throughout the day, Kastenhuber checks news sources, including local newspaper websites, police scanners, other television stations, and viewer email, for any breaking news. When breaking news comes in, Kastenhuber consults with Morrison and Rockstroh to help them determine who should go to a breaking story. Kastenhuber's role is to determine, based on his knowledge of the surrounding area, which crew is closest. If no one else is present in the newsroom to make a reassignment, Kastenhuber can call the closest crew and have them go to the scene, then advise the news director later. (A 136-37; 38, 41-42, 45-46.)

Kastenhuber is not authorized to assign overtime or ask an employee to stay past a shift without the news director's consent. (A 137; 45.) Kastenhuber is paid \$12.67/hour; reporters are paid from \$10.50 to \$11.50/hour. (A 137; 74, SA 46.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) affirmed the judge's findings. Accordingly, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally removing the positions of assignment editor and chief videographer from the collective-bargaining unit and unilaterally removing the unit work of those positions. (A 129.)

To remedy those violations, the Board ordered the Company to cease and desist from the violations found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them under the Act. (A 129.) Affirmatively, the Board's Order requires the Company to rescind its removal of the unit positions of assignment editor and chief videographer and rescind its consequent removal of the bargaining unit work of those two positions, recognize the Union as the exclusive collective-bargaining representative of the employees in those positions, and apply the terms of the collective-bargaining agreement to employees occupying those positions. (A 130.)

The Board further ordered the Company to reinstate John Doland and George Kastenhuber to the bargaining unit and make them whole for any loss of earnings or other benefits suffered as a result of their removal from the unit. The Company must remit contributions on their behalf to retirement or other benefit funds and reimburse them for any expenses incurred as result of its failure to make such contributions. Additionally, the Board ordered the Company to reimburse the Union for any dues it would have deducted from the employees' pay and remitted to the Union. Finally, the Board ordered the Company to post a remedial notice. (A 130.)

SUMMARY OF ARGUMENT

Under settled Board law, recognized by this Court, it is unlawful for an employer to unilaterally modify the scope of an existing bargaining unit. The Board's finding that the Company thus unlawfully removed the positions of assignment editor and chief videographer from the bargaining unit here is fully supported by substantial evidence in the record. There is no dispute that those positions were in the unit. The Company did not obtain the Union's consent to remove them. While the Company negotiated a change to the existing contract's recognition clause, language specifically excluding supervisors from the unit was contained in both the old and new versions of the recognition article. The Board found no evidence that the negotiated changes related to assignment editor Kastenhuber or chief videographer Doland. Furthermore, the Company did not even decide to remove them from the unit until after the contract was executed. Shortly thereafter, it did so. On those facts, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the scope of the unit.

The Board further found that, because Doland and Kastenhuber continued to do the same work after being removed from the unit, the Company failed to bargain with the Union over the decision to transfer that work out of the unit. As the Board reasonably found, the Company presented its decision as a *fait accompli*,

unilaterally changing the terms and conditions of employment for the bargaining unit by removing work from the unit.

The Company does not address the Board's application of settled principles holding that an employer cannot unilaterally modify the scope of an established, agreed-upon bargaining unit. Instead, the Company states that the Board cases, including as enforced by this Court, are wrongly decided. The Company espouses its own theory that it was privileged to change the scope of the unit as a permissive subject of bargaining, despite the weight of case law stating that an employer may not do so. The Board reasonably rejected that view, and the Company's cited cases involving midterm contract modifications, as inapplicable because the Company did not make a midterm modification of any contract term including the recognition clause.

The Company also argues unpersuasively that it did not act unilaterally because the parties agreed to the removal of the unit positions. As the Board reasonably found, the record does not bear out that assertion.

The Company additionally contends that, because the assignment editor and chief videographer are supervisory positions, it was privileged to exclude from the unit. However, the Company failed to meet its burden of showing that Doland and Kasthuber exercise any statutory supervisory authority.

Finally, the Company fails to show that any aspect of the Board's remedy was improper. The Board did not compel the Company to agree to any contract term because the negotiated recognition clause remains in effect. Likewise, the Board's make whole remedy is proper as any relief to the employees is contingent on actual losses being shown and reimbursement of dues to the Union is not impermissible in this circumstance. The Board acted within its remedial power to restore the status quo and effectuate the policies of the Act.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY REMOVING THE POSITIONS OF ASSIGNMENT EDITOR AND CHIEF VIDEOGRAPHER FROM THE COLLECTIVE-BARGAINING UNIT AND UNILATERALLY REMOVING THE BARGAINING UNIT WORK OF THOSE POSITIONS

A. Standard of Review

The Board's findings of fact are conclusive if supported by substantial evidence in the record. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; *accord G&T*, 246 F.3d at 114. Thus, the Board's reasonable inferences may not be displaced on review even though this Court might justifiably

have reached a different conclusion had the matter been before it *de novo*; as this Court has explained, “[w]here competing inferences exist, we defer to the conclusions of the Board.” *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988); *see also Universal Camera*, 340 U.S. at 488. In other words, this Court will reverse the Board based on a factual determination only if it is “left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *G&T*, 246 F.3d at 114 (citation omitted); *accord Local 917, Int’l Bhd. of Teamsters v. NLRB*, 577 F.3d 70, 76 (2d Cir. 2009). Additionally, this Court will not disturb the Board’s adoption of a judge’s credibility determinations unless they are “hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony.” *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (quotation omitted).

This Court “reviews the Board’s legal conclusions to ensure that they have a reasonable basis in law [, and] ... afford[s] the Board a degree of legal leeway.” *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *see also Office & Prof’l Emps. Int’l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992) (“Congress charged the Board with the duty of interpreting the Act and delineating its scope.”). In its review, this Court “cannot displace the Board’s choice between two fairly conflicting views.” *Local 917*, 577 F.3d at 76-77 (quotation omitted).

Accordingly, this Court will only reverse the Board’s legal determinations if they

are arbitrary and capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008). Indeed, legal conclusions “based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference.” *Caval Tool*, 262 F.3d at 188.

B. An Employer Violates the Act by Unilaterally Removing Positions and Work from a Bargaining Unit

Once a bargaining unit is established, an employer “may not remove a job within the unit without either the approval of the Board or consent by the union.” *NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989); *see also Dixie Elec. Membership Corp. v. NLRB*, 814 F.3d 752, 755-56 (5th Cir. 2016); *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 963 (10th Cir. 1980). An employer therefore violates Section 8(a)(5) and (1) of the Act by unilaterally altering the scope of the unit.² *See, e.g., United Techs.*, 884 F.2d at 1572; *Dixie Elec.*, 814 F.3d at 756; *Holy Cross Hosp.*, 319 NLRB 1361, 1361 n.2 (1995); *Arizona Elec. Power*, 250 NLRB 1132, 1133 (1980).

² Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) prohibits an employer from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise” of their statutory rights. An employer who violates Section 8(a)(5) commits a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

The Supreme Court recognizes a distinction between mandatory and permissive subjects of bargaining. *See NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958). Section 8(d) of the Act (29 U.S.C. § 158(d)) requires the parties to meet and bargain over employees' "wages, hours, and other terms and conditions of employment," which are mandatory bargaining subjects. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964). All other lawful subjects are permissive, and parties are not required to bargain over them. *Id.*

With respect to mandatory bargaining subjects, "neither party is legally obligated to yield." *Borg-Warner Corp.*, 356 U.S. at 349. Absent an agreement, an employer may implement a proposal concerning a mandatory subject only if the parties bargain in good faith to impasse. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Regarding permissive bargaining subjects, an employer may not unilaterally implement a proposal, without union or Board approval. *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 475, 478 (D.C. Cir. 1988). It is settled that the scope of an existing bargaining unit is a permissive subject of bargaining. *Id.* at 474-75.

As this Court recognized nearly 50 years ago, "parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." *Douds v. Longshoremen ILA*, 241 F.2d 278, 282 (2d Cir.

1957); *see also Hill-Rom Co.*, 957 F.2d at 457; *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 602 F.2d 73, 76 (4th Cir. 1979); *Hess Oil & Chem. Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969). Furthermore, “if an employer could vary unit descriptions at its discretion, it would have the power to sever the link between a recognizable group of employees and its union[,]...in turn[,]...undermining a basic tenet of union recognition...and greatly complicating coherence in the negotiating process.” *Boise*, 860 F.2d at 475. Thus, “neither an employer nor a union has the unilateral power to modify the scope of the bargaining unit as determined by the Board, whether following bargaining to impasse or otherwise.” *Id.*; *see also Newspaper Printing Corp.*, 625 F.2d at 963-64. Allowing the alteration of existing units only through mutual consent or through the Board’s administrative processes encourages rather than disrupts collective bargaining. *Douds*, 241 F.2d at 282. On the other hand, when an employer, over the objection of the union, demands a change in the bargaining unit, the “demand interferes with the required bargaining with respect to rates of pay, wages, hours and terms and conditions of employment in a manner excluded by the Act.” *Id.* at 283 (quotation omitted).

Furthermore, it is well settled that an employer violates Section 8(a)(5) and (1) of the Act “if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” *Litton Fin. Printing*, 501 U.S. at 198.

When work is removed from a bargaining unit, “[t]hat is a change in the bargaining unit’s terms and conditions of employment, giving rise to the employer’s bargaining obligation.”³ *NLRB v. Mt. Sinai Hosp.*, 8 F. App’x 111, 115 (2d Cir. 2001) (quoting *Hampton House*, 317 NLRB 1005, 1005 (1995)); accord *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 311 (D.C. Cir. 2003). As a result, “an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain.” *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982).

C. The Company Violated the Act by Unilaterally Removing Employees Doland and Kastenhuber from the Bargaining Unit

The Board reasonably found (A 139) based on substantial evidence in the record that the Company’s removal from the bargaining unit of the positions held by Doland, chief videographer, and Kastenhuber, assignment editor, was unlawful. The positions were recognized as being in the unit both before and during the

³ In contrast to an alteration in the scope of a bargaining unit, a transfer of unit work is a mandatory subject of bargaining. *Regal Cinemas*, 317 F.3d at 312; *Solutia, Inc.*, 357 NLRB 58, 64 (2011), *enforced*, 699 F.3d 50 (1st Cir. 2012); *Wackenhut Corp.*, 345 NLRB 850, 853 n.8 (2005). Though distinguishing between the two subjects can be difficult, “whatever the difficulty, it is clear that an employer may not, ‘under the guise of the transfer of unit work...alter the composition of the bargaining unit.’” *Boise*, 860 F.2d at 475 (quoting *Newport News*, 602 F.2d at 77-78). The Board has rejected attempts to characterize a change in unit scope as a transfer of work where “[t]he same employees continue to do the work.” *Beverly Enters., Inc.*, 341 NLRB 296, 296 (2004).

parties' collective-bargaining negotiations. Following execution of a collective-bargaining agreement, the Company removed the employees in those positions from the unit. The Company did not obtain the Union's or the Board's consent to do so and thus the Company's unilateral action constituted an unlawful alteration in the unit's scope.

The Board recognized here its longstanding principle that "once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action." (A 139 (quoting *Arizona Elec.*, 250 NLRB at 1133).) There is no dispute that both positions had been included in the scope of the unit by consent of the parties. When, as the Board found, the Company purchased the station and assumed the existing contract, "that contract's unit description...broadly included all of its employees" with both Doland and Kastenhuber "admittedly included in the unit and...considered and treated as unit employees represented by the Union." (A 139.) Indeed, the Company gave the Union a list of unit members that included Doland and Kastenhuber. (A 133; SA 2.)

Moreover, as the Board found, "[i]t is clear that the [Company] did not first secure the consent of the Union" when it removed the employees from the unit. (A 139.) As the Board stated, "[t]here can be no doubt" that the Company acted without the Union's consent as there was "no agreement by the Union that those positions be removed from the unit." (A 140.) Furthermore, as the credited

testimony demonstrates, “there was no discussion during negotiations about the two men’s positions” let alone consent to their removal. (A 140; 20, 24, 35, 69.) “Because the [Company] took this action without the Union’s consent, it violated Section 8(a)(5) and (1) of the Act.” (A 139.) *See Dixie Elec.*, 814 F.3d at 755-56 (employer unlawfully modified unit’s scope by claiming certain positions were supervisors and removing them from unit without union’s consent); *Wackenhut*, 345 NLRB at 852 & n.7 (employer unlawfully altered bargaining unit by eliminating sergeant position and its duties from unit without union’s consent); *Beverly Enters.*, 341 NLRB at 296 (employer unlawfully changed scope of unit by moving work performed by unit employees to another part of its business while having same individuals perform it as nonunit employees without union’s consent).

Additionally, as the Board found, the Company cannot rely on Doland and Kastenhuber’s “alleged supervisory status as a justification for its elimination of the two disputed positions from the bargaining unit.” (A 140.) Both the new recognition article and the old one excluded supervisors, so the new contract does not itself justify the removal of the positions. Likewise, to the extent that the Company intended to exclude any current unit employees under the new contract, and “[e]ven if there was discussion about supervisory responsibilities” during negotiations, there is no evidence that such discussion was linked to Doland and Kastenhuber. (A 140.)

At no time during their employment, prior to the day they were removed from the unit, did the Company contend that they were statutory supervisors who should be excluded from the unit. (A 139.) The Company made that claim only after bargaining concluded and the parties signed a contract.⁴ Even vice president Timothy Busch testified that, while he spoke at negotiations about supervisors being excluded from the unit, “it had nothing to do with any specific person.” (A 140; 69.) Not only did the parties not discuss the alleged supervisory status of Doland and Kastenhuber, but, again according to Busch, the Company did not even decide to remove them from the unit until “after the contract was ratified and signed.” (A 140; 70, SA 48.)

In the absence of consent to remove the positions from the bargaining unit as supervisory positions, the Company unlawfully altered the scope of the unit by declaring employees who were specifically included in a bargaining unit were supervisors in order to remove them from the unit while they continued to perform the same work. This Court has specifically upheld a Board finding that such unilateral action violates Section 8(a)(5) and (1) of the Act. *Mt. Sinai*, 8 F. App’x at 112-13, 116 (employer unilaterally reclassified unit sous chef employees as nonunit assistant culinary manager positions but they continued to perform same

⁴ The Company’s failure to meet its burden of showing that Doland and Kastenhuber are statutory supervisors is addressed below at pp. 34-44.

work outside unit as they had previously); *see also Holy Cross Hosp.*, 319 NLRB 1361, 1361 n.2, 1363-64 (1995) (employer's unilateral replacement of unit house supervisor position with new manager position involving same duties found unlawful); *Facet Enters., Inc.*, 290 NLRB 152, 159-60 (1988) (employer's "sham" transfer of unit employee to newly created supervisory position, where employee continued to perform same functions, was unlawful change in unit scope), *enforced in relevant part*, 907 F.2d 963 (10th Cir. 1990). That is no different than the Board's finding here that the Company removed Doland and Kastenhuber from the unit, allegedly because they were supervisors, while they continued to perform the same functions and duties as they had while in the unit.

D. The Company Violated the Act by Unilaterally Removing Unit Work

In addition to modifying the scope of the bargaining unit by removing Doland and Kastenhuber, the Board reasonably found that the Company further violated Section 8(a)(5) and (1) of the Act by "unilaterally remov[ing] the bargaining unit work of the assignment editor and chief videographer from the unit...without prior notice to the Union and without affording the Union an opportunity to bargain with it regarding such conduct." (A 140.) It is undisputed that Doland and Kastenhuber continued to perform the same duties under the same working conditions after they were removed from the unit. (A 140; 34, 43.) Thus,

by removing their work from the unit, the Company changed the “bargaining unit’s terms and conditions of employment, giving rise to...[a] bargaining obligation under Section 8(d) of the Act.” *Hampton House*, 317 NLRB 1005, 1005 (1995). In that circumstance, the Company must “bargain with the [U]nion in good faith and may unilaterally change the bargaining unit’s work only after a lawful impasse.” *Id.*; *accord Mt. Sinai*, 8 F. App’x at 115.

However, as the Board found, “[n]o notice was given to the Union that the removal of Doland and Kasthuber’s work from the unit was being contemplated or considered by the [Company].” (A 140.) “Rather, their elimination from the unit was presented as a *fait accompli*, following the execution of the new contract.” (A 140.) The Board will find a *fait accompli* where an employer conveys that it intends to implement a change and considers the change to be final and non-negotiable. *See, e.g., Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003); *Dixie Elec. Membership Corp.*, 358 NLRB No. 120, slip op. at 1092 (2012), *enforced*, 814 F.3d 752 (5th Cir. 2016); *Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993) (finding *fait accompli* where employer announced unit positions to be transferred, communicated decision was “management’s right” to implement, and unilaterally made transfers).

The Board has found an unlawful transfer of unit work when an employee is removed from a bargaining unit but continues to perform the same work, now as a

non-unit employee. For example, in *Hampton House*, which the Board relied upon here (A 140), the Board found an unlawful transfer of bargaining unit work when the employer, without bargaining, promoted some of its nurses to the position of nurse supervisor and the nurse supervisors performed the same patient care tasks as before. *Id.* at 1005; *see also Luther Manor Nursing Home*, 270 NLRB 949, 959-60 (1984) (unlawful transfer where LPNs promoted to supervisory nurse status continued same LPN duties), *enforced*, 772 F.2d 421, 424 (8th Cir. 1985); *Lutheran Home of Kendallville, Ind.*, 264 NLRB 525, 536-37 (1982) (same); *Fry Foods, Inc.*, 241 NLRB 76, 88 (1979) (violation where group leaders whom employer promoted to supervisor continued bargaining unit work), *enforced*, 609 F.2d 267, 270 (6th Cir. 1979); *Kendall College*, 228 NLRB 1083, 1088 (1977) (division chairs, reclassified as supervisory division director positions, unlawfully continued bargaining unit work), *enforced*, 570 F.2d 216 (7th Cir. 1978). By removing Doland and Kastenhuber from the bargaining unit, the Company also removed their work, including gathering, shooting, and editing news stories, from the unit. Because it did so without giving the Union notice or an opportunity to bargain, the Company violated the Act.

E. The Company's Arguments Provide No Basis for Disturbing the Board's Findings

The Company presents three arguments as to why the Board's findings are incorrect. First, the Company proffers an alternate theory of the case that it lawfully changed a permissive subject of bargaining when it altered the scope of the unit. Second, the Company asserts that the Union agreed to the removal of the disputed positions from the unit during contract negotiations. Third, the Company argues that it was privileged to remove Doland and Kasthuber from the unit because they are statutory supervisors. As explained below, the Board properly rejected each of these arguments. Similarly, the Company fails to show that any aspect of the Board's remedy is improper.

1. The Company did not make a lawful change to a permissive subject of bargaining

The Company incorrectly asserts (Br. 13-20) that it lawfully made a change to a permissive subject of bargaining when it removed the employees from the unit. The Company's view rests on the premise that it made a midterm modification to a contract term—specifically the recognition clause of the contract. In support of its theory, the Company relies (Br. 16-18) on *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), in which the Supreme Court held that unilateral modification of a contract term is “a prohibited

unfair labor practice only when it changes a term that is a mandatory subject of bargaining.” *Id.* at 185.

The Company, however, fails to acknowledge that, as the Board found, there was no alleged or actual modification of a “contract term” that would fit this case into the theoretical framework espoused by the Company. (A 140.) Rather, the Company changed the scope of the bargaining unit by removing employees while the recognition clause “remained intact and unchanged.” (A 140.) The clause was “not modified at all” after it was proposed early in negotiations “nor after the contract was executed.” (A 140.) The Company unilaterally removed two positions from the unit but the “clause itself was not modified.” (A 140.) Thus, as the Board found (A 140), the Company’s reliance on *Pittsburgh Plate Glass* and its progeny is misplaced. *See id.* at 188 (midterm modification of retirees’ benefits lawful change to contract term); *Star Tribune*, 295 NLRB 543, 543 (1989) (midterm implementation of drug and alcohol screening for prospective employees lawful change to contract).

While the scope of an existing bargaining unit is a permissive subject of bargaining, the Company is wrong to state that it can unilaterally modify the scope of the unit under *Pittsburgh Plate Glass* or any other case. *See Dixie Elec. Membership Corp. v. NLRB*, 814 F.3d 752, 755-56 (5th Cir. 2016); *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); *Boise Cascade Corp. v. NLRB*, 860 F.2d

471, 475 (D.C. Cir. 1988). An employer may not unilaterally implement a proposal as to the permissive subject of unit scope without union or Board approval. *See NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989) (“once the bargaining unit is established by the collective bargaining agreement or by [Board] action, an employer may not remove a job within the unit without either the approval of the Board or consent by the union”); *accord Hill-Rom*, 957 F.2d at 457; *Boise*, 860 F.2d at 475.

Indeed, the Company’s reading of *Pittsburgh Plate Glass* to fit the removal of unit positions and work is, as demonstrated by its lack of citation to any case involving a midterm alteration in the scope of a bargaining unit, theoretical and ignores well-established Board precedent on the subject. In its brief, the Company fails to contend with or distinguish that precedent, upheld by this Court and others, finding alterations to the scope of a bargaining unit unlawful absent union consent. The Company simply states those cases are “wrongly decided” with no further analysis. (Br. 19.) As the Board reasonably found, and as discussed above, the elimination of the two positions from the unit was “clearly an alteration in the scope of the unit.” (A 140.) It is undisputed that the two positions at issue were included in the bargaining unit which was recognized by the Company. (A 140-41.) Thus, by eliminating those positions from the unit, the Company “changed

the scope of the bargaining unit” rather than the recognition clause or any other contract term.⁵ (A 141.)

2. The parties did not have a “bilateral” agreement to remove Doland and Kastenhuber from the unit

The Company argues that it “at all times bargained in good faith” with the Union including in implementing the parties’ collective-bargaining agreement. (Br. 20.) The Company therefore contends that it did not violate the Act because the Union waived its right to contest the removal of Doland and Kastenhuber from the unit as a participant in those good-faith negotiations. The Company thus terms the removal of the employees from the unit “bilateral” (Br. 16) as opposed to a unilateral action. The Board reasonably found (A 141), however, that despite good-faith negotiations for a collective-bargaining agreement, those negotiations did not include discussion of an alteration to the unit at issue here and the Union

⁵ The Board likewise will dismiss, during the term of a contract, unit clarification petitions to exclude alleged supervisors “on the ground that to entertain them would be disruptive of established bargaining relationships.” *Arizona Elec. Power*, 250 NLRB 1132, 1133 (1980). Therefore, “it would be anomalous were [the Board] here to permit [the Company] to engage in the far more disruptive practice of unilaterally modifying the scope of a unit during the life of a contract covering that unit.” *Id.*

was not on notice of the Company's intention to remove Doland and Kastenhuber and their work from the unit.⁶

The Company asserts (Br. 23) that because the Union chose to bargain over recognition, it should be held to the consequences of its choice. While the Company correctly claims (Br. 24) that a bargain was struck on the language of the recognition clause, it does not follow that the Union made a bargain as to Doland and Kastenhuber. Indeed, the Board found based on credited testimony that the Union did not make a choice as to Doland and Kastenhuber because the parties did not even discuss their positions or their terms and conditions of employment at the bargaining table.

As the Board noted, Busch "did not testify that there was a specific discussion during negotiations in which he identified Doland and Kastenhuber as

⁶ The Company relies on its "version of the facts" in making this argument. (Br. 21.) However, its "version" was discredited by the judge, and the Company has not challenged the judge's credibility determinations as to what transpired during the parties' negotiations. Therefore, the Company has waived any argument before this Court that the Board's statement of the facts is incorrect. *See Sherman v. Town of Chester*, 752 F.3d 554, 568 (2d Cir. 2014). In any event, the Court's role is not to accept one party's version of what happened, it is to review the Board's factual findings to determine if they are supported by substantial evidence in the record, while giving deference to the judge's credibility findings. *See NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001); *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999).

being supervisors who therefore must be excluded from the unit.”⁷ (A 141.) At most, Busch mentioned Doland, who was present at negotiations,⁸ as someone who could be a supervisor because he had training and evaluation responsibilities.⁹ (A 141; 55.) As to Kastenhuber, Busch gave contradictory testimony by stating both that he referred to Kastenhuber during bargaining, when talking about how supervisory roles could arise in the unit, and that Kastenhuber was not referenced during bargaining but that Busch and company official Iddings discussed him in a private conversation. (A 133, 141; 60, 70.) Furthermore, Busch was questioned as to why, if it was understood by the parties at the table that Kastenhuber was going to be removed from the unit, the parties signed a side letter as to his vacation time.

⁷ The Company’s argument as to a purported agreement to remove Doland and Kastenhuber from the unit, as well as the argument addressed below at pp. 34-44 that the Company was privileged to do so under the recognition article language, both rely exclusively on the Company’s unsupported position (Br. 10) that the two employees are supervisors.

⁸ The Board also noted that the Company “could not have believed” that the Union would have consented to the removal of Doland, who took part in all negotiations on behalf of the Union, because “[i]f he was a supervisor he would not have been present as a member of the Union’s bargaining team.” (A 141.)

⁹ Busch further testified that Doland “nodded” when Busch characterized him as a supervisor. (A 141; SA 47.) As the Board stated, Busch’s testimony “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.” (A 141.)

(A 133-34; 69.) Busch responded that “your assumption that [Kastenhuber] was thought of during bargaining is incorrect.” (A 133; 70.)

The Board contrasted this conflicting and vague testimony with the union bargaining team’s credited testimony that there was no mention of removing either Doland or Kastenhuber from the unit. (A 141.) Furthermore, the judge specifically credited union agent Hartnett’s statement that “it was not the intent of the parties to do so.” (A 141; 22-23.) Based on that testimony, the Board reasonably found 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.’” (A 141 (quoting *Land O’Lakes, Inc.*, 299 NLRB 982, 982 n.1 (1990).) As the Board stated, there is “no evidence” that the issue of these two positions and employees was “mentioned at all during contract negotiations.”¹⁰ (A 141.)

The Company’s assertion that the Board “ignored Hartnett’s testimony wherein he acknowledged that he quite frankly erred in agreeing to the new language in the contract” is both immaterial and incorrect. (Br. 8.) The Company

¹⁰ The Board’s determination is further supported by the Union’s response to the Company’s removal of Doland and Kastenhuber from the unit almost immediately after the contract was signed. Union agent Hartnett “told Iddings that he was ‘shocked’ and ‘adamantly’ protested that ‘this is not what was collectively bargained’ and that he would pursue his legal remedies,” which he subsequently did. (A 141; 21-22.)

is not relying on any change in the recognition clause language to justify its actions. Rather, the Company relies solely on the supervisory exclusion and such an exclusion was contained in the prior contract's recognition article. Therefore, any alleged error by the Union in agreeing to revised language is inconsequential. In any event, the only testimony that the Company could possibly be referring to is Hartnett's statement that he did not consult legal counsel about the recognition article whereas he did as to some other contract matters. (A 23.) Hartnett went on to say that he now considers the language of a unit description more significant than he did before the Company's removal of Doland and Kastenhuber from the unit. (A 23.) These statements have no bearing on the Board's finding (A 141) that the parties did not discuss the removal of the positions from the unit and nor did they intend to remove Doland and Kastenhuber.

3. The Company failed to meet its burden of showing that Doland and Kastenhuber are statutory supervisors

The Company argues (Br. 25-34) that Doland and Kastenhuber are supervisors and thus it lawfully removed them from the unit under the recognition article of the collective-bargaining agreement. As the Board reasonably found (A 138), and as explained fully below, the Company did not meet its burden of proving that they are statutory supervisors. Therefore, the Company "cannot rely on their alleged supervisory status as a justification for its elimination of the[ir]

two disputed positions from the bargaining unit.” (A 140.) *See NLRB v. Mt. Sinai Hosp.*, 8 F. App’x 111, 112 (2d Cir. 2001) (enforcing Board order finding unlawful alteration of unit scope without union’s consent where substantial evidence supported Board’s finding that disputed employees were not statutory supervisors).

a. Applicable Principles of Statutory Supervisory Status

Section 7 of the Act (29 U.S.C. § 157) guarantees collective-bargaining rights to all workers who meet the Act’s definition of “employee.” The term “employee” in the Act excludes “any individual employed as a supervisor.” 29 U.S.C. § 152(3). In turn, Section 2(11) of the Act provides, in pertinent part, that a “supervisor” is “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” provided that “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11). Thus, the Act dictates that individuals are not statutory supervisors, even if the employer refers to that employee by such a title, unless (1) they have the authority to engage in at least one of the listed supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686,

687 (2006); accord *Mt. Sinai*, 8 F. App'x at 113 (citing *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 264 (2d Cir. 2000)).

In *Oakwood*, the Board construed the term “assign” as the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” 348 NLRB at 689. The Board further explained that “assign,” for purposes of Section 2(11), does not refer to “ad hoc instruction that the employee perform a discrete task.” *Id.*

The Board went on to describe “responsible direction” as occurring when a “person decides what job shall be undertaken next or who shall do it...provided that the direction is both ‘responsible’ ...and carried out with independent judgment.” *Id.* at 691. Furthermore, an individual has the authority to responsibly direct other employees only if that individual is accountable for the performance of tasks by those employees. In other words, the individual must face the prospect of adverse consequences if the employees under his command fail to perform their tasks correctly. *Oakwood*, 348 NLRB at 692.

The individual must also exercise independent judgment in assignment and responsible direction for a finding of supervisory status. *Id.* at 693. To exercise independent judgment, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation

by discerning and comparing data.” *Oakwood*, 348 NLRB at 693. Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* at 693. *See also Kentucky River*, 532 U.S. at 713 (“Many nominally supervisory functions may be performed without the exercis[e of] such a degree of...judgment or discretion...as would warrant a finding of supervisory status under the Act”) (citation omitted).

The burden of demonstrating Section 2(11) supervisory status is on the party asserting it. *Kentucky River*, 532 U.S. at 711-12; *accord New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998). To meet this burden, the party seeking to prove supervisory status must support its claim with specific examples, based on record evidence. *See Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). A party cannot meet its burden with “inconclusive or conflicting evidence.” *New York Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998). Further, it is settled that designations of theoretical or “paper power”—as in a job description—are insufficient to prove supervisory status. *New York Univ. Med. Ctr.*, 156 F.3d at 414 (citing *Food Store Emps. Union Local 347 v. NLRB*, 422 F.2d 685, 690 (D.C. Cir. 1969)). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 n.8 (1999). Given the

Board's expertise in evaluating the "infinite variations and gradations of authority" that may exist in the workplace, the Board's findings with regard to supervisory status are "entitled to great weight." *Oil Workers*, 445 F.2d at 241 (quoting *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968)).

b. The Company failed to prove that Doland responsibly directs other videographers, performs evaluations that affect their job status, or effectively recommends videographers for hire

Doland performs work shooting news stories like the other videographers. The Company contends (Br. 30-32), but failed to prove, that Doland responsibly directs the work of the other videographers and that his evaluations of them demonstrate supervisory status. Likewise, the Company failed to prove that Doland effectively recommends new videographers for hire.

Contrary to the Company's assertion that Doland "routinely directs" other videographers "in most, if not all, of their work assignments" (Br. 30), the record shows only that Doland may give pointers or occasionally critique the videos shot by other employees. (A 134; 31-32, SA 16.) As the Board reasonably found, "advice by an experienced employee to a worker with less time on the job does not constitute Section 2(11) supervisory authority." (A 138.) Similarly, this Court has stated that "authority to direct" that results "from [employees'] superior training, skills and experience...and [is] incidental to carrying out their tasks as [a]

lead...rather than their role as agents of the[ir] [e]mployer” does not confer supervisor status under the Act. *Mt. Sinai*, 8 F. App’x at 114 (internal quotation omitted); *accord NLRB v. Adco Elec., Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) (skilled worker’s guiding of less experienced employees is not statutory supervision); *Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989) (same). The Company produced no evidence showing, nor did it even assert, that Doland was held accountable for the work of the other videographers. Thus, the Company failed to show that Doland responsibly directed the work of other employees. *See Oakwood*, 348 NLRB at 692; *accord NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 18 (1st Cir. 2015); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 314-15 (6th Cir. 2012).

While Doland completed evaluations of videographers in the two years after the Company purchased the station, the authority to evaluate is not one of the indicia of supervisory status enumerated in Section 2(11) of the Act. The Company does not contend (Br. 31) that employees could receive any benefit or be subject to discipline as a result of these evaluations. As such, the Board reasonably determined that Doland’s participation in the process did not indicate supervisory status. (A 138; SA 4-15, 18-19). As this Court has stated, “[e]valuations that do not affect job status of the evaluated person are inadequate to establish supervisory

status.” *New York Univ. Med. Ctr.*, 156 F.3d at 413; *accord Elmhurst Extended Care*, 329 NLRB at 536; *Passavant Health Ctr.*, 284 NLRB 887, 891 (1987).

In terms of recommending videographers for hire, the Board found “no evidence as to what weight [the news director] gave to Doland’s alleged recommendation.” (A 138.) The Company offers (Br. 32) nothing more than a bare assertion that Doland plays an “important and extensive role” in the hiring process, while acknowledging that he only took two of four new hires out on shoots and providing no evidence as to how those outings impacted the selection of employees for hire. As the Board stated, Doland’s participation in part of the interview process, through taking a candidate on a “mock” shoot, is insufficient to establish supervisory authority in the absence of evidence that Doland effectively recommended the candidate for hire. *See North Gen’l Hosp.*, 314 NLRB 14, 16 (1994) (doctor who “participated in the evaluations of candidates” was not a supervisor, because “[m]ere participation in the hiring process” insufficient to establish supervisory authority). To the extent that Doland recommended a former colleague for a position, that isolated instance is also insufficient to establish supervisory status, particularly where there is no evidence as to the weight his recommendation held with the Company. *See Adco Elec.*, 6 F.3d at 1117 (employee not a supervisor even though he “recommended someone for hire”

on one occasion, because such a recommendation “is nothing more than what [any employer] would expect from experienced employees”).

Finally, even assuming that Doland performed certain administrative tasks such as taking equipment to the shop to be repaired, directing vehicles to be cleaned, or assigning equipment to videographers, the Board found no evidence “showing that he exercised independent judgment in the execution of those tasks” that are “simply routine in nature.” (A 138.)

c. The Company failed to prove Kastenhuber assigns employees using independent judgment

The Company asserts that Kastenhuber “routinely, and as his primary job function, assigns” stories to employees. (Br. 32.) However, the Board reasonably found, based on credited testimony, that the news director and producer, not Kastenhuber, assign stories to reporters and videographers. As the Board stated, “[a]t most, the assignments are part of a collaborative effort...where the two undisputed supervisors, the news director and the producer, are actually making the assignments.” (A 138.) While in a breaking news situation, Kastenhuber will assign the closest news team to the story, he “mechanically determines which team is geographically closer to the story,” and only does so if no one else is in the

newsroom to consult, and later tells his news director.¹¹ (A 138; 41-42, 45-46.)

Such action does not constitute the exercise of independent judgment as required to confer supervisory status. *See Oakwood*, 348 NLRB at 689; *see also NSTAR Elec.*, 798 F.3d at 14 (finding dispatchers not supervisors where routing of field employees “nothing more than a routine task” not involving independent judgment).

Overall, Kastenhuber’s job duties, including selection of prospective news items to be covered and participation in meetings and calls to determine which stories are covered, do not meet the criteria for statutory supervisory authority. The Board previously found that assignment editors working at a television station, with responsibilities similar to these duties of Kastenhuber’s, were not statutory supervisors. *King Broadcasting Co.*, 329 NLRB 378, 381 (1999). In *King Broadcasting*, as the Board observed here, a non-supervisory assignment editor was described as a “traffic cop” monitoring information coming into the newsroom—the same description that Kastenhuber used for his own role on the job. (A 138; 37.) *See id.* Furthermore, the assignment editor in *King Broadcasting* made assignments based on an assessment of employees’ skills,

¹¹ The Company’s assertion (Br. 32) that breaking news stories are reassigned based on who is closest because Kastenhuber decided that was the best way to do it is unsupported by record evidence. Rather, Kastenhuber testified that “in order to cover this breaking news, what the rule of thumb has been, is that we always try to divert the closest news team to the event.” (A 41-42.)

something that there is no evidence Kastenhuber has done. *Id.*; *see also Croft Metals, Inc.*, 348 NLRB 717, 718 (2006) (individuals not supervisors who did not prepare posted work schedules, appoint employees to departments, shifts, or overtime, or assign significant overall duties).

d. The Company errs in relying on secondary indicia of supervisory status to meet its burden

Finally, as to both Doland and Kastenhuber, the Company incorrectly relies (Br. 32-33) on so-called secondary indicia of supervisory status—ones that are “not included in the statutory definition of supervisor but that often accompany the status of supervisor.” *Public Serv. Co. of Colorado v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005). However, secondary indicia cannot substitute for “evidence of the actual possession of supervisory responsibility” as explicitly delineated in the Act. *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 242 (D.C. Cir. 1971); *accord VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1061 (2006). Accordingly, although the Board recognized (A 138) that the Company established that Doland and Kastenhuber earned higher salaries than their counterparts, that secondary indicia is not sufficient to overcome a lack of statutory authority. Furthermore, in Doland’s case, as the Board recognized (A 138), his higher salary was obtained by negotiating an agreement with a former owner of the station that was not based on

supervisory responsibilities. The Company's reliance (Br. 31) on Doland being listed with the title "supervisor" on employee evaluations also does not substitute for a showing that he performs the statutory function of a supervisor through the exercise of independent judgment. *See, e.g., New York Univ. Med. Ctr.*, 156 F.3d at 414 (affirming Board finding that "unit chiefs, their title notwithstanding, did not function as supervisors").

The Company's related claim that "the parties agreed" Doland and Kastenhuber are "'supervisors' under [Section] 2(11) of the Act" is misplaced. (Br. 28.) As discussed above, the Board reasonably found that the parties came to no such agreement based on credited testimony that the parties never discussed Doland and Kastenhuber's job duties or alleged supervisory status in their contract negotiations.

4. The Company failed to meet its burden of showing the Board's remedy is improper

The Company asserts (Br. 34-37) that certain elements of the Board's remedy are improper. To the contrary, the Board's remedy is well within its remedial powers.

Section 10(c) of the Act empowers the Board to order a labor-law violator "to take such affirmative action...as will effectuate the purposes of the Act." 29 U.S.C. § 160(c). The Board serves that goal by crafting remedies that provide for

“a restoration of the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice].” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Board remedies are also designed to “guard against rewarding an employer for his own misconduct.” *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 101 (2d Cir. 1985).

The Board’s authority in formulating remedies “is a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Thus, the Board’s order directing the Company to restore the status quo must be enforced, unless the Company shows that it is “a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.” *Fibreboard*, 379 U.S. at 216 (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). The Company has not met this burden.

First, the Company errs in stating that “if a failure to bargain in good faith is established, the only proper remedy...is an order to bargain over mandatory subjects of bargaining.” (Br. 34.) Because the Company acted unilaterally to remove positions and work from the bargaining unit, the Board can remedy the Company’s unlawful acts by restoring the status quo to what it would have been but for the Company’s violations of the Act. *Phelps Dodge*, 313 U.S. at 194. Here, it did that by ordering the Company to reinstate Doland and Kasthuber to the bargaining unit thus restoring both their positions and their work to the unit.

The Company claims that by restoring the positions to the bargaining unit, it is being compelled to “agree to a specific term or provision.” (Br. 35 (citing *H.K. Porter v. NLRB*, 397 U.S. 99 (1971))). The Board has not compelled any such agreement because the recognition article in the contract, as proposed by the Company and agreed to by the Union, remains in force. The fact that the recognition article does not privilege the Company to remove positions and work from the unit does not implicate the Board’s remedial power. *See also TNT USA Inc. v. NLRB*, 208 F.3d 362, 367 (2d Cir. 2000) (enforcing order requiring employer to reinstate proposal of a collective-bargaining agreement as it stood prior to unlawful conduct because order “does not compel an agreement” but requires restoration of the status quo prior to violation of the Act) (citation omitted).

The Company argues (Br. 36) that the Board improperly ordered a make-whole remedy for Doland and Kastenhuber, in part because the record does not establish that they suffered any economic loss. As the Board stated, the Company is 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 Company’s actions. (A 142 (emphasis added).) The Board has yet to determine whether any losses have been shown because there has not yet been a compliance proceeding in this case. *See NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 771 (2d Cir. 1996)

(likening Board compliance proceedings to “damages phase of a civil proceeding”). Compliance determinations are routinely made “after entry of a Board order directing remedial action, or the entry of a court judgment enforcing such [an] order.” 29 C.F.R. § 102.52. Formal proceedings, including a hearing before an administrative law judge, are instituted when necessary to resolve compliance issues. 29 C.F.R. § 102.54(a); *see also Katz’s Delicatessen*, 80 F.3d at 771 (finding challenge to Board order requiring retroactive payments to pension fund premature where compliance proceeding had yet to take place).

The Company challenges (Br. 36) the Board’s order that the Company reimburse the Union for any dues that it would have deducted from Doland and Kasthuber’s pay and remitted to the Union. The Company incorrectly contends that the Board is “forcing” a violation of Section 302 of the Labor Management Relations Act (“the LMRA”) by requiring it to make a payment to a union. (Br. 36.) However, while Section 302 of the LMRA generally bars employers from making payments to unions, it sets forth a number of exceptions. These include payments “in satisfaction of a judgment of any court.” 29 U.S.C. § 186(c)(2). *See also Enter. Leasing Co. of Florida, LLC*, 362 NLRB No. 135, slip op. at 1 n.1 (2015) (ordering employer to reimburse union, without recoupment from employees, for dues it failed to deduct and remit to union after unlawfully withdrawing recognition from bargaining unit), *petition for review pending*, D.C.

Cir. Nos. 15-1200 & 15-1255. The Board's remedial order here is enforceable by this Court and therefore clearly falls within this statutory exception.

Finally, the Company's related, and repeated, statement that the Board acted "*ultra vires*" (Br. 35-36) in this case fails under settled law. The Company has not explained in its cursory allegations how the Board's remedy exceeds its authority, nor has the Company cited any legal precedent in support of its claim. Simply put, the Company has not met its burden of showing that the Board's remedy is, in any respect, "a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Fibreboard*, 379 U.S. at 216. Rather, the Board has ordered only those remedies necessary to restore the status quo prior to the Company's removal of positions and work from a long-established bargaining unit.

CONCLUSION

The Board respectfully requests that this Court enforce the Board's Order in full.

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National Labor Relations Board

August 2016

ADDENDUM

Relevant provisions of the **National Labor Relations Act**, as amended (29 U.S.C. § 151 et seq.):

Section 2(3) (29 U.S.C. § 152(3)):

The term “employee” shall include any employee...but shall not include...any individual employed as a supervisor....

Section 2(11) (29 U.S.C. § 152(11)):

The term “supervisor” means 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.

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees....

Section 10(c) (29 U.S.C. § 160(c)):

Reduction of testimony to writing; findings and orders of Board –

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action...as will effectuate the policies of this subchapter....

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States...wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order...No objection that has not been urged before the Board...shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business....

Relevant provisions of **the Board's Rules and Regulations**:

29 C.F.R. § 102.52

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director shall seek compliance from all persons having obligations thereunder. The Regional Director shall make a compliance determination as appropriate and shall notify the parties of the compliance determination. A charging party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

29 C.F.R. § 102.54

(a) If it appears that controversy exists with respect to compliance with an order of the Board which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 21 days after the service of the specification.

Relevant provision of the **Labor Management Relations Act** (29 U.S.C. § 141 et seq.):

Section 302(c)(2) (29 U.S.C. § 186(c)(2)):

The provisions of this section shall not be applicable...(2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court....

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

*

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Petitioner

*

* No. 16-52

v.

*

*

NEXSTAR BROADCASTING GROUP, INC.
d/b/a WETM-TV

* Board Case No.

* 03-CA-125618

*

Respondent

*

*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,248 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben

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Dated at Washington, DC
this 4th day of August, 2016

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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	*
Petitioner	*
	* No. 16-52
v.	*
	*
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d/b/a WETM-TV	* 03-CA-125618
	*
Respondent	*

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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