

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 15, 2017

TO: Mori Rubin, Regional Director
Region 31

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Fox Television Stations, Inc. d/b/a KTTV-TV
Case 31-CA-175706

530-6050-0825-3300
530-6067-4011
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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) and (1) when it contracted to use a third-party smartphone application to solicit video footage of news events without notifying and bargaining with the Union. We conclude that the Employer's decision to enter into the subscription contract with Fresco was a mandatory subject of bargaining, and that the Employer made a material change in employees' terms and conditions of employment when it unilaterally entered that agreement. We further conclude that the Union did not waive its right to bargain over this issue, as any arguable contractual waiver did not survive the expiration of the parties' collective-bargaining agreement and the Employer's conduct was not consistent with its past practice. Therefore, the Employer's conduct violated Section 8(a)(5) of the Act.¹

FACTS

Fox Television Stations, Inc. ("Employer") operates a local broadcast television station, known as KTTV-TV Fox 11, in Los Angeles, California. The Employer

¹ Because the contract has expired and the Employer is not willing to take grievances to arbitration, deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), is inappropriate.

broadcasts programming twenty-four hours a day. The Employer produces and broadcasts a total of nine hours of live news programming on weekdays and two hours of news programming on weekends. In addition to the Employer's news programming, the Employer broadcasts programs that it does not produce such as sporting events and syndicated television programs. The International Alliance of Theatrical Stage Employees, Local 600 ("Union") represents the Employer's field news photographers, who operate motion camera equipment and drive the Employer's equipment trucks in conjunction with the Employer's production of live news programming outside of its news studio.² The Employer currently employs approximately thirteen to fifteen full-time unit news photographers. News photographers are paid \$1848.51 per forty-hour workweek and earn overtime when they work in excess of eight hours per day.

Each live news program produced by the Employer is a series of individual news stories that are introduced or presented by one or more anchors located in the Employer's Los Angeles studio. Each news story may include either live news presented by a reporter "in the field" or a pre-recorded segment featuring a field reporter. The unit photographers have exclusive jurisdiction over live and recorded photography produced in the field that involves the Employer's reporters.

A. The Parties' Expired Collective-Bargaining Agreement

The Employer and the Union are parties to a collective-bargaining agreement that, by its terms, expired September 30, 2013. Pursuant to an evergreen clause within the contract, the agreement remained in full force and effect from year to year after September 30, 2013, unless either party gave the other party sixty days written notice prior to October 1 of any given year.

The 2013 collective-bargaining agreement settles several important terms and conditions of employment with regard to the field news photographers' jurisdiction over various types of programming.

"Section 1.07 Jurisdiction" provides the following:

The jurisdiction of Employees covered hereunder shall be all news and news documentary work produced by and for the KTTV/KCOP News Department in the area within seventy-five (75) miles of the main studio location of the Station. The Station may broadcast news

² The camerapersons who work inside the Employer's news studio are part of a different bargaining unit represented by a different union, National Association of Broadcast Employees and Technicians, Local 53.

programs and material purchased or acquired from any source, including but not limited to amateur video, pool feeds with or from other broadcasting or cable stations, broadcasting and/or other cable networks or satellite stations, or from stringers whether assigned or not by the Station. Stringers may not be assigned to work with the Station's reporter except in emergency situations. The provisions of this Section shall not diminish the rights of the Station under any other Section(s) of this Agreement.

The agreement has a number of contemporaneously signed sideletters, including "Sideletter # 8 – Portable Handheld Camera Work Assignments," which provides:

The operation of mobile camera technology including but not limited to wireless communication devices (e.g. video phones) and other portable handheld video/audio acquisition devices (herein after referred to as "portable cameras") may be assigned to and utilized by both bargaining unit and non-bargaining unit employees in accordance with the provisions listed below. Also, the use of video/audio material acquired by such devices in accordance with the provisions set forth below may be used by the Employer without restriction. . . .

The following sets forth circumstances where video/audio material provided to the Company by non-bargaining unit employees through the use of "portable cameras" may be utilized by the Company in whatever manner the Company, at its sole discretion, deems appropriate:

1. Writers/Producers may be assigned by the Employer to gather supplemental video/audio material utilizing "portable cameras" when there is a direct editorial connection to the Writer/Producer assignment. Supplemental audio/video shall not be captured at the Employer's facilities (e.g., facilities under control of the Employer).

[. . .]

3. Video/audio material provided to the Employer by non-bargaining unit employees utilizing "portable cameras" when such non-bargaining unit employees are not directly assigned by the Employer to gather such video/audio material may be utilized by the Employer without restriction.

[. . .]

7. Non-bargaining unit employees may be assigned to utilize “portable cameras” where there is a bona fide breaking news story of significant or national importance.

[. . .]

9. Any provision(s) in the current Agreement which restricts or otherwise is in conflict with the provisions of this Sideletter are superseded by the language contained herein.

On August 1, 2015, the Union informed the Employer that it was terminating the collective-bargaining agreement and opening contract negotiations for a successor collective-bargaining agreement. Although the Employer and the Union met several times to exchange proposals, they have not reached a successor collective-bargaining agreement. Both the Employer and the Union agree that the 2013 collective-bargaining agreement has expired and is no longer in effect.

B. The Employer’s Assignment and Use of its Unit News Photographers

The Employer maintains an assignment desk in its newsroom where assignment editors monitor news to determine what events or stories the Employer will cover in its news programs. Assignment editors continually monitor information sources, including law enforcement communications, the internet, and other news organizations to gather leads on developing news stories. The assignment desk also receives unsolicited news material sent to it by the public, including viewers, who send video material to the Employer’s email address.

The unit news photographers receive work in one of two ways. First, rarely, news photographers will stumble upon a story themselves when they are already in field (e.g., while returning from assignment, a news photographer sees a car accident and films it). The second, and principle, way news photographers receive stories is by assignment from a newsroom manager via the Employer’s assignment desk.

When the assignment desk decides to have a news reporter cover a particular news story, it determines which resources to assign to it. For major news events, the assignment desk generally assigns a reporter and field news photographer team to the event either for a live shot from the field or a recorded package featuring the reporter and video shot by the news photographer. Sometimes, however, news photographers are sent into the field without reporters. When a field news photographer is assigned to a story, the assignment desk also typically provides a “situationer” for the news assignment. A situationer is a document prepared by the assignment desk’s personnel that contains the details of the story, background

information, names of people to contact who are either the source of the story or who should be contacted for interviews, and directions related to how and what the assignment desk wants the news photographer to shoot.

While in the field covering a story, news photographers remain in contact with and receive additional direction from the assignment desk. When news photographers are working with reporters, the reporters give direction on which angles to use in covering the story. News photographers are also responsible for sending either fully- or partially-edited segments back to the assignment desk from the field. News photographers edit their footage under the supervision of the field reporters. Finally, news photographers are responsible for setting up live broadcasts of news reporters from the field under the supervision and direction of the assignment desk and the Employer's technical engineers back in the station.

C. The Employer's Acquisition and Use of Video News Material from Non-Unit Sources

Pursuant to Section 1.07 of the expired collective-bargaining agreement, the Employer routinely acquires and broadcasts video from sources other than its unit news photographers. These sources include, but are not limited to: 1) traffic helicopter video, 2) video of concerts and live performances made available by performance venues, 3) narrative film and television promotional material obtained from television and motion picture production companies, 4) TMZ video of celebrities, 5) traffic camera footage obtained from the California Department of Transportation, 6) sports highlight footage from local professional and college sports organizations, 7) pool feeds in conjunction with other television stations and networks (such as press conferences and courtroom proceedings), 8) video obtained from "stringers," and 9) amateur video.

Since at least 1993, the Employer has routinely acquired and broadcast video material from "stringers" on both an assigned and unassigned basis. Stringers are professional photographers who are not employees of any particular television station or network and typically use their own professional equipment to record news events. Stringers are ordinarily paid on a per-piece basis. There are generally two types of stringers: 1) individuals who perform this type of work (individual stringers); and 2) independent companies that perform this type of work who employ either a staff of professional stringer photographers or hire their own freelance stringer photographers (stringer companies).

The Employer regularly purchases and broadcasts both raw video and edited pieces from individual stringers and stringer companies. The Employer regularly

uses the services of least twenty-seven different stringers.³ Both types of stringers usually use large professional cameras to record footage of news events, similar to those used by the Employer's unit news photographers. The Employer's assignment desk manages the Employer's procurement of material shot by all stringers depending on the Employer's needs and available resources. The Employer's assignment editors will contact individual stringers and assign them to shoot video of a particular news event when its unit news photographers are either off duty or occupied on other assignments. The Employer will also sometimes contract with stringer companies to gather footage in advance of a particular segment. Both individual stringers and stringer companies will also contact the Employer's assignment editors to notify them of a news event and either propose to shoot video for the Employer or offer video that they have already gathered on their own initiative. Pursuant to Section 1.07, neither individual stringers nor stringer companies are ever assigned to work with or shoot footage of the Employer's field reporters.

Many of the stringer companies are large and technologically sophisticated. These stringer companies employ multiple staff and freelance photographers and use their own resources to identify news to shoot. These stringer companies post video shot by their photographers on their own websites where the video is available for purchase by the Employer and other news organizations. If the Employer decides to use video material from a stringer company, it typically pays the company \$150.00 per clip. If material is particularly exclusive or of a high quality, the stringer company may demand, and the Employer may agree to, higher compensation for a particular clip.⁴ Once the Employer purchases the footage, the stringer company either sends the material via e-mail or arranges for the Employer to directly download the footage from its website.

Since at least 1993, the Employer has also acquired, purchased, and broadcast raw unedited video material shot by the general public. This material is often referred to as amateur video or viewer-generated material. The Employer obtains this video in numerous ways. First, when a reporter and news photographer team arrives at the scene of a news event, they will ask witnesses if they have any video of the event on their smartphone. If so, the reporter or news photographer obtains permission to broadcast the smartphone video. The Employer also obtains amateur video from the internet, including YouTube and social media. Assignment editors locate amateur video online and, if the Employer wishes to air it, the assignment editors will contact the owner/copyright holder for permission to broadcast the video.

³ Approximately ten of the Employer's regular stringers appear to be individuals, while the remaining seventeen appear to be stringer companies of varying sizes.

⁴ In 2015, the Employer paid individual stringers and stringer companies alike between \$900.00 and \$3000.00 on thirty-one different occasions and paid a stringer company \$5400.00 one occasion.

If the owner asks for compensation, the Employer usually pays \$150.00, the same per-clip rate it pays professional stringers. Finally, the Employer obtains amateur video through its “Fox 11” mobile smartphone application. This application is used primarily for viewers to access the Employer’s content on their mobile devices. However, the Employer routinely instructs viewers to use the app to submit their amateur video through direct solicitation by the Employer’s on-air anchors and more passively through the “crawl” displayed periodically at the bottom of the screen throughout a broadcast. The Employer also locates amateur footage online by having its assignment desk search sites such as YouTube for relevant clips shot by members of the public and request permission to use them in its broadcasts. In the field, each reporter and unit news photographer team asks bystanders if they have footage related to the news event being covered and seeks permission to air anything deemed worthy.

D. The Employer Contracts With Fresco News for Subscription Access to its User-Generated News Video Content

In 2015, Fresco News, Inc. launched a mobile smartphone application called Fresco News (“Fresco”). Fresco advertises itself as a platform for individuals to sell footage of news events to news organizations for profit. Fresco posts news assignments (“news alerts”) for its users requesting footage from a particular event, based on alerts that it receives from news organizations. The Fresco application notifies users when a news organization’s news alert is in their geographic vicinity. Fresco users then upload their footage to Fresco via their smartphone. If news organizations utilize their footage, the Fresco user is compensated. Fresco’s website offers tips for its users in generating their content to make it more marketable to their news organization clients.⁵

On February 29, 2016, the Employer entered into a subscription contract with Fresco for access to Fresco’s user-generated content. Pursuant to the Employer’s agreement with Fresco, the Employer is required to post one news alert on Fresco per day. The Employer is entitled to an exclusive first look period of at least three hours for any footage submitted to Fresco in response to the Employer’s news alerts on the application. If the Employer decides to purchase the footage, the Employer may also pay an extra fee for an exclusive license to the footage. Additionally, the Employer is permitted to view and purchase other footage from Fresco’s video library. The Employer also pays a contract-specified monthly subscription fee that was waived for the first six months of the contract’s term and fees for each video and photograph

⁵ <https://www.fresconews.com/faq>

request it makes through the Fresco app.⁶ Fresco also charges an undisclosed commission for each video the Employer purchases.

During the period from February 29, 2016 through July 31, 2016, the Employer sent an average of seven or eight alerts each week to Fresco. The Employer's assignment desk generates and submits the Fresco news alerts. The Employer's Fresco alerts usually seek footage of traffic, crime, and weather incidents as they are happening. However, the Employer has also sent prospective alerts requesting footage of rallies, festivals, concerts, and human-interest stories before the events are scheduled. The Employer's Fresco alerts usually identify the Employer, the content sought by the Employer with some specificity as to the extent of coverage that the Employer desires, the compensation for purchased footage, and the address of the news event. The Employer usually pays \$50 per video clip and \$20 per photograph to Fresco users. The Employer never notified the Union of its intention to contract with Fresco News or that it had executed a contract.

On April 1, 2016, several unit news photographers observed footage in the Employer's news broadcast that it acquired from Fresco users. The news photographers notified the Union. On April 15, 2016, the Union filed a grievance with the Employer and an information request for more information about the Fresco application. To this day, the Employer is refusing to process the grievance on the grounds that its collective-bargaining agreement with the Union has expired.

E. Effects of Fresco Application

From February 2016 through the end of July 2016, the Employer proffers that, on average, it broadcast daily 107 minutes of unit news photographer video, 2.84 minutes of stringer video, and 1.79 minutes of Fresco user-generated video. During this period of time, the Employer purchased 505 clips or segments of professional stringer-produced footage at a total cost of \$88,680 (or \$175 per video). In contrast, the Employer purchased 79 videos from Fresco users at a total cost of \$5925 (or \$75 per video). During this period of time, Fresco user-generated video accounted for approximately 39% of all non-bargaining unit stringer video obtained by the Employer.

During this same period of time, there was a several month decline in overtime from March 2016 into May 2016 amongst unit photographers. However, there was a sharp increase in overtime during several weeks of June and July 2016. These

⁶ The cost of the Employer's monthly subscription fee and its news alert fees is unknown as the relevant figures were omitted from page 18 of the Employer's contract with Fresco that the Employer provided to the Region.

increases in overtime usually coincided with events of local and national importance (such as California's 2016 presidential primary). The Union has also observed the Employer's assignment desk preplanning stories on its storyboards with Fresco users as the planned source of footage where, traditionally, this would either be allotted to news photographers or stringers utilizing professional, rather than portable, cameras.

The Union argues that the Employer's use of the Fresco application constitutes an assignment of bargaining unit work by the Employer's assignment desk to Fresco and its users. The Union does not contest the Employer's ability to obtain video that Fresco users submit to the application of their own volition. The Union only takes issue with the news alerts that the Employer sends to Fresco for user-generated video. The Employer argues that Section 1.07 of the expired agreement gives it the right to acquire and broadcast video "from any source" so long as it is not acquiring video of *reporters* shot by stringers and that it has a long-standing past practice in conformity with this contractual language. The Employer also argues that the use of Fresco does not constitute a material, substantial, or significant change in its practice.

ACTION

We conclude that the Employer's decision to enter into the subscription contract with Fresco was a mandatory subject of bargaining, and that the Employer made a material change in employees' terms and conditions of employment when it unilaterally entered that agreement. We further conclude that the Union did not waive its right to bargain over this issue, as any arguable contractual waiver did not survive the expiration of the parties' collective-bargaining agreement and the Employer's conduct was not consistent with its past practice. Therefore, the Employer's conduct violated Section 8(a)(5) of the Act.⁷

A. The Subscription Contract Involved a Mandatory Subject of Bargaining

The Employer's decision to enter into the subscription contract with Fresco News constituted a mandatory subject of bargaining.

It is "well established that contracting out of work regularly performed by unit employees is a mandatory subject of bargaining" and that "an employer who unilaterally subcontracts unit work without first bargaining with its employees' representative about its decision, as well as the effect such contracting will have on

⁷ Because the contract has expired and the Employer is not willing to take grievances to arbitration, deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), is inappropriate.

unit employees, frustrates collective bargaining, and thereby violates Section 8(a)(5).”⁸ The controlling case on this point is *Fibreboard Paper Products Corp. v. NLRB*.⁹ There, the Supreme Court held that an employer’s decision to subcontract out its maintenance work, in such a way that it “merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment,” was a mandatory subject of bargaining.¹⁰ As the Court explained, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment and had not altered the employer’s basic operation, requiring the employer to bargain about that decision “would not significantly abridge [its] freedom to manage the business.”¹¹ The Court also noted that the employer’s decision turned on workforce size, fringe benefits, and overtime pay, which it deemed matters “peculiarly suitable for resolution within the collective-bargaining framework.”¹²

The Board streamlined this analysis in *Torrington Industries*,¹³ holding that an employer’s decision to engage in “*Fibreboard* subcontracting” is a mandatory subject of bargaining, regardless of whether it is motivated by labor costs in the “strictest sense of the term.”¹⁴ The Board concluded that *Fibreboard* controls when the decision involves “unit employees’ terms of employment and [does] not ‘lie at the core of entrepreneurial control.’”¹⁵ The Board explained that if “virtually all that is changed through the subcontracting is the identity of the employees doing the work,” the decision does not involve a change in the scope and direction of the enterprise and thus is not a core entrepreneurial decision outside the scope of mandatory bargaining.¹⁶ Therefore, in cases factually similar to *Fibreboard*, “there is no need to

⁸ *Public Service Co.*, 312 NLRB 459, 460 (1993).

⁹ 379 U.S. 203 (1964).

¹⁰ *Id.* at 213.

¹¹ *Id.*

¹² *Id.* at 213–14.

¹³ 307 NLRB 809 (1992).

¹⁴ *Id.* at 811.

¹⁵ *Id.* (citing *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring)).

¹⁶ *Id.*

apply any further tests” because the Supreme Court in *Fibreboard* “already determined” that bargaining is appropriate.¹⁷

The Board applied this approach in *O.G.S. Technologies, Inc.*,¹⁸ which involved an employer’s decision to outsource die-cutting work to a subcontractor that utilized more advanced equipment.¹⁹ In finding that the decision was “*Fibreboard* subcontracting” and thus a mandatory subject of bargaining, the Board explained that, both before and after the decision to subcontract, the employer’s enterprise was devoted to producing and supplying brass buttons to the same range of customers.²⁰ Even though the subcontracting entailed some operational changes, no line of business was abandoned or contracted.²¹ Rejecting the employer’s argument that the decision turned on technological considerations rather than employee wages, the Board noted the broad conception of labor costs under *Torrington* and concluded that the decision to subcontract “turned on how fast the employees could perform their work.”²²

The arrangement between the Employer and Fresco News constituted *Fibreboard* subcontracting and was thus a mandatory subject of bargaining. There has been no major change in the Employer’s basic operation. It remains in the business of producing and broadcasting news reports to the Los Angeles, California area. As Section 1.07 and Sideletter #8 make clear, the Union and Employer have agreed to prohibit non-bargaining unit employees to cover “news and news documentary work” within seventy-five miles of the Employer’s studio absent “a bona fide breaking news story of significant local or national importance.” Thus, pursuant to the parties’ expired agreement, bargaining unit employees have exclusive jurisdiction to cover news events with video phones.²³ Under the terms of the Employer’s agreement with

¹⁷ *Id.* at 810; see also *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) (reaffirming *Torrington* framework), *affirmed in part and reversed in part*, 248 F.3d 1131 (3d Cir. 2000) (unpublished table decision).

¹⁸ 356 NLRB 642 (2011).

¹⁹ *Id.* at 643–45.

²⁰ *Id.* at 644.

²¹ *Id.*

²² *Id.* at 645.

²³ Sideletter #8 does have several other exceptions to this prohibition that the facts of this case do not implicate.

Fresco News, the Employer is required to send out daily news alerts through the Fresco app. Although the Fresco news alerts contain less detail than the typical situationer an assigned unit news photographer or individual stringer receives from the assignment desk, the Employer's Fresco alerts do include the Employer's identity, the content sought by the Employer with some specificity as to the extent of coverage that the Employer desires, the compensation for purchased footage, and the address of the news event. Situationers and Fresco news alerts, at their core, are functional equivalents because they both contain the location of the news event, a description of the event, as well as relevant information that the person recording the event—be they unit photographer, stringer, or Fresco user—will need in order to cover the event consistent with the Employer's expectations.

The Employer asserts that the Fresco contract is not “subcontracting,” and is not even a work “assignment,” because the Employer has no input into whether a Fresco user (and which Fresco user) will cover the event, has no control over the footage submitted, and is not under any obligation to purchase the material. However, when a Fresco user shoots footage pursuant to one of the Employer's alerts, the work clearly is being performed “for” the Employer, and this is work that will not be performed by unit employees. Moreover, the Employer's decision to assign unit work to Fresco users appears to be motivated by the desire to have a cheaper workforce that is readily available to cover news events more quickly—work that ultimately could have been performed by either utilizing unit news reporters to work overtime or by hiring more unit news photographers. There is no question, therefore, that the Employer's assignment of certain news events to Fresco and its users constituted a subcontracting of unit work, which is a mandatory subject of bargaining.²⁴

²⁴ Although we conclude that the Employer's assignment of unit work to Fresco and its users is subcontracting under *Fibreboard*, the Employer may argue that its subscription contract with Fresco is a change in the direction of its newsgathering enterprise akin to a decision that “focus[es] only [on] the economic profitability of the contract.” *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981). If the Employer raises such an argument, there is ample evidence to demonstrate, under *Dubuque Packing*, that the Employer's decision was “unaccompanied by a basic change in the nature of the employer's operation.” *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), *enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993). We further conclude that the Employer will not be able to meet its burden to demonstrate that labor costs were not a factor in the decision or that the Union could not have made concessions sufficient to change the decision. *Id.*

B. The Employer's Use of Fresco to Assign Bargaining Unit Work to Non-bargaining Unit Employees Constitutes a Material, Substantial, and Significant Change

The Employer asserts that there has been no change in its practices regarding assignment of work to stringers, i.e., that its assignment of news events to Fresco is no different from its previous use of individual stringers and stringer companies. We disagree. Prior to its adoption of Fresco, the Employer did not assign bargaining unit work to anyone outside of the bargaining unit who was utilizing a portable camera or smartphone to capture the footage. Indeed, Sideletter #8 prohibits the Employer from assigning anyone other than unit news photographers to record news events with portable cameras or smartphones, except in the event of "a bona fide breaking news story of significant local or national importance."²⁵ There is no evidence that the Employer ever deviated from this contractual prohibition or that the Union tolerated such a breach.

Moreover, the Fresco model has afforded the Employer a degree and type of flexibility it never previously enjoyed. Much like the Employer's directed assignments of individual stringers and stringer companies, the Employer can give Fresco and its' users direct notification of particular footage that it wants of a news event and specific direction as to the composition of the footage. And the Employer is only required to pay for Fresco clips it decides to broadcast, much like its arrangement with large stringer companies or individual stringers that offer the Employer footage they have already captured. However, Fresco allows the Employer to combine the most favorable aspects of both stringer models. Unlike professional stringers, Fresco users who accept the Employer's assignment of unit work have no guarantee that they will be compensated for doing so. There is currently no evidence that the Employer has ever pre-assigned either type of stringer to cover a news event where their payment was conditional on the Employer's decision to purchase the footage after it has been shot. Thus, Fresco and its users are essentially a hybrid between the stringer pre-assignment model and the stringer post-acceptance models the Employer has previously utilized where the Employer receives the added benefit of not being obligated to pay Fresco users until after it has had an opportunity to see the footage shot. The Employer and the Union currently have no past practice with respect to this sort of arrangement.

We further conclude that the Employer's decision to begin assigning bargaining unit work to Fresco and its users has a material, substantial, and significant impact on bargaining unit employees' terms and conditions because of the serious potential to

²⁵ As noted above, there are other narrow exceptions pertaining to employees who are not in the bargaining unit that are not implicated in this case.

erode their future work opportunities.²⁶ Under *Westinghouse Electric Corp. (Pittsburgh, Pa.)*, a unilateral subcontracting may not be violative of the Act if there is no significant detriment to the unit employees.²⁷ In *Westinghouse*, the Board dismissed the complaint because the “record fail[ed] to establish that if the subcontracts had not been awarded, the Respondent would have either recalled employees in layoff status or assigned overtime work to employees in the unit.”²⁸ There, the Board found the employer’s subcontracting newly-awarded bargaining unit work was lawful because the only articulable detriment potentially suffered by employees was to unidentified unit employees who had been laid off two years prior who might have been entitled to recall but for the subcontracting.²⁹

Here, the Employer contends that the decision to use Fresco has had no effect on bargaining unit employees in the form of lost work. However, its use of Fresco deprives unit employees of the opportunity to perform this work on overtime. Indeed, already the Fresco user-generated content has become the preeminent source of stringer-produced video. As the Employer’s evidence demonstrates, Fresco user-generated content now accounts for (on average) approximately 39% of all content produced by non-employees, including the other twenty-seven stringer individuals and companies the Employer regularly employs.³⁰ Indeed, unlike *North Star Steel*,

²⁶ See, e.g., *Brown-Graves Lumber Co.*, 300 NLRB 640, 641 (1990) (employer’s unilateral retention of non-unit casual employees beyond an agreed-upon time period was material, substantial, and significant change because subsequent work opportunities were no longer available to unit employees or performed under unit terms and conditions), *enforced* 949 F.2d 194 (6th Cir. 1991); see also *J&J Snack Foods Handhelds Corp.* 363 NLRB No. 21, slip op. at 15 (Oct. 1, 2015). Cf. *North Star Steel Company*, 347 NLRB 1364, 1367 (2006) (employer’s one-time subcontracting of .0006 percent of one month’s production lawful where there was “no evidence . . . that demonstrated a causal connection” between the minimal transfer of unit work and the reduction of unit employee hours that occurred the month before or the layoffs that occurred the month after).

²⁷ 153 NLRB 443 (1965).

²⁸ *Id.* at 447.

²⁹ *Id.* at 447–48 (the Board also found it significant that the employer had never refused to negotiate with the union over specific subcontracts when the union requested it).

³⁰ Cf. *Mi Pueblo Foods*, 360 NLRB 1097, 1098–99 (2014) (decision to assign bargaining unit work outside the unit by ceasing cross-docking of products in favor of having contracted supplier deliver goods directly to employer’s stores had a “material,

where the small volume of unit work transferred for one month only was not a substantial, significant material change, the Employer has contracted with Fresco on an indefinite basis. Unlike *Westinghouse Electric*, where the subcontracted work at issue was new unit work that came to the employer, in this case, the Employer has subcontracted out *existing* unit work on an indefinite basis in such a way that the entire bargaining unit is affected by the potential for lost overtime. Furthermore, as cellphone video technology improves and Fresco and its users become more skilled, the Employer is not limited from purchasing more content from Fresco. If the Employer's ability to assign unit work were to be deemed lawful, then there would be no limitation on its ability to substitute bargaining unit news photographers with Fresco user-generated content.³¹

C. The Union Did Not Waive Its Right to Bargain Over the Use of the Fresco Application

The Employer's arguments that it was privileged to begin assigning unit work to non-unit employees through the Fresco app because the Union waived its right to bargain over the issue contractually and through the parties' past practice are unavailing. The Union did not contractually waive its right to bargain over the Employer's assignment of bargaining unit work to non-employees via the Fresco app because, even assuming, *arguendo*, that Section 1.07 of the parties' expired collective-bargaining agreement constituted a waiver of the Union's right to bargain over such assignment,³² that waiver expired with the agreement.³³ Accordingly, any such

substantial and significant" impact, notwithstanding fact that there were no layoffs and wages and hours did not significantly change).

³¹ See, e.g., *Mi Pueblo Foods*, 360 NLRB at 1099 (“[a]bsent an obligation to bargain, an employer could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the Union's bargaining strength.”).

³² In fact, the terms of the parties' expired agreement appear to expressly have *prohibited* the Employer's reassignment of bargaining unit work to members of the public who capture the requested footage using smartphones. Although Section 1.07 stated that the Employer “may broadcast news programs and material purchased or acquired from any source, including but not limited to amateur video . . . or from stringers whether assigned or not by the Station[,]” Sideletter #8 placed limitations on the Employer's ability to assign non-bargaining unit employees to capture video on “video phones.” Specifically, Sideletter #8 only permitted the use of such material captured by portable devices by non-bargaining unit employees when they “are not directly assigned by the Employer to gather such video/audio material,” except where they're assigned on “breaking” news stories of “significant local or national importance.”

waiver of the Union's right to bargain over the assignment of bargaining unit work was no longer effective when the Employer contracted to use the Fresco application on February 29, 2016.

With regard to waiver by past practice, as discussed above the Employer's adoption of the Fresco application to assign bargaining unit work was not consistent with its past practice of soliciting and broadcasting amateur video. While the Union concedes that the Employer has long utilized amateur video footage submitted in response to its general on-air solicitations, there is no evidence that the Employer prospectively directed non-unit employees to obtain footage of particular events on portable cameras or smartphones prior to its adoption of the Fresco application.³⁴

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) by unilaterally implementing the Fresco News application and assigning bargaining unit work to Fresco's users.

/s/
B.J.K.

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³³ *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). *Cf. E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 4 (Aug. 26, 2016) (returning to the rule that unilateral, post-expiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001) (“[T]he essence of the management-rights clause is the union’s waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls.”), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003).

³⁴ Neither the Employer's practice of having its assignment desk locate already-shot amateur footage on the internet nor the Employer's practice of having reporter and unit news photographer teams seek amateur footage from spectators at the scene of a news event involve an actual assignment from the assignment desk. Thus, both of these practices are irrelevant to the issue of whether the Employer was privileged to begin assigning unit work to Fresco and its users.