

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

NBCUNIVERSAL MEDIA, LLC
Employer

and

Case 02-UC-000625

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS- COMMUNICATION
WORKERS OF AMERICA, AFL-CIO
Petitioner

SUPPLEMENTAL DECISION

I. Summary of the Case

On December 20, 2010, National Association of Broadcast Employees & Technicians - Communication Workers of America, AFL-CIO (NABET or the Union) filed the above-captioned petition seeking a clarification that the newly designated Content Producer classification remains in the unit or units represented by the Union because they performed the same basic work previously performed by bargaining unit employees whose positions have been eliminated. To the contrary, NBCUniversal Media, LLC (NBC or the Employer) argued that the Content Producers should not be accreted to the unit(s) because they have been historically excluded as “Producers” and do not share a community of interest with any classifications represented by NABET.

On October 26, 2011, an Acting Regional Director issued a Decision on Unit Clarification Petitions (Clarification Decision)¹ finding that NABET represented a single nationwide bargaining unit of employees at the Employer. In reaching this conclusion, the Acting Regional Director first considered the contract language regarding unit scope. Due to the complexity of the contract, he found the language ambiguous and therefore, inconclusive. The Acting Regional Director then considered the bargaining history and found that a single unit had been established by the parties’ conduct over the years. Next, the Acting Director examined the work performed by the newly created Content Producer classification and found that the Content Producer position remained a unit position.

After subsequent appeals and review, on February 23, 2016, the United States Court of Appeals for the District of Columbia Circuit, remanded the case to the Board for further explanation and analysis regarding whether NABET represented a single unit or multiple units. Specifically, the Court questioned the Acting Regional Director’s use of what it

¹ All other unit clarification petitions in this matter were dismissed: Case Nos. 02-UC-000619; 05-UC-000403; 05-UC-000407; 13-UC-000417; and, 31-UC-000323. In the subsequent “test of certification” charge, Case No. 02-CA-115732, the Board’s reference to the instant petition as 02-UC-000619, should have read 02-CA-000625.

described as a “two-step bifurcated” approach, as distinguished from what the Court termed the “wholistic” approach used by the Board in examining master contracts, citing *Columbia Broadcasting Systems*, 208 NLRB 825 (1974), *National Broadcasting Co.*, 114 NLRB 1 (1955), and *American Broadcasting Co.*, 114 NLRB 7 (1955). The Court further asked the Board to address: (1) what significance voluntary recognition, as opposed to recognition pursuant to certification, may have on the unit determination; (2) the application of factors referenced in *CBS*, 208 NLRB 825 (1974); (3) the application of *NBC*, 114 NLRB 1 (1955) (in which the Board found a group of Los Angeles film employees to be a separate appropriate unit), and (4) whether the agreement regarding Content Producers reached by NABET’s Local 11 and NBC bound NABET’s National Union (known as the “Sector”).

On March 7, 2017, the Board found that the “wholistic” approach should be followed in cases involving master agreements and remanded the case to the Region for further appropriate action. At the Employer’s request, the record was re-opened to allow the parties to present additional evidence.

On remand, NABET contends that it represents a single unit of employees at NBC and that all Content Producers are properly included in that unit. To the contrary, the Employer argues that the Union represents multiple units corresponding to the Individual Articles contained in the parties’ Master Agreement. Further, the Employer contends that “[f]ailing to prove that it represents a single, unified bargaining unit means, of course, that there is absolutely no basis for adding Content Producers to the (non-existent) unit that NABET seeks to clarify.” The Employer argues that because the Content Producers perform work that may have elements of work covered by several Individual Articles, no evidence has been adduced to justify their accretion into any one of the specific units that NABET represents. The parties have consistently disagreed on whether the agreement reached between Local 11 and the Employer binds the Sector.

Based on the record and the parties’ additional briefs, I affirm all of the findings of fact in the underlying Clarification Decision. In conducting a “wholistic” analysis and using all of the factors that the Board considered relevant in *CBS*, I conclude that the Union represents one nationwide unit. Further, I conclude that the Content Producers remain in the unit because they are performing the same basic functions historically performed by the unit and therefore, should remain represented as members of the unit, covered by the terms and conditions the parties negotiate on a nationwide basis. I further conclude that the Local 11 Agreement is not a waiver of the Sector’s right to claim jurisdiction over the Content Producers.

Briefly, the record demonstrates that the parties have circumstantially bargained accommodations for work that may be covered under the terms of more than one of the Master Agreement’s “Individual Articles.” Through the years, the parties have also bargained over mutations in the work performed by NABET-represented employees, which have come about as a result of technological advances and/or organizational changes. The cumulative effect of this bargaining has been a blurring of distinctions between classifications covered by the different Individual Articles, as well as, an accelerating consolidation of classifications under Individual Article “A,” such that vanishingly few NABET-represented employees are covered by the terms of any other Individual Article.

The Employer introduced into this framework the newly styled classification of Content Producer. The work of any single Content Producer includes tasks previously performed by employees in several NABET-represented classifications. Thus, the work of the Content Producers straddles that of several former job classifications historically covered by the Master Agreement. The parties may nationally bargain the terms and conditions that apply to this unit position.

II. Procedural History

On October 11, 2011, an Acting Regional Director issued the Clarification Decision finding that the newly created Content Producer position at the Employer's New York, Chicago, and Los Angeles local news stations was a bargaining unit position properly included in a single, nationwide bargaining unit. On September 25, 2013, the Board denied the Employer's Request for Review of the Clarification Decision.

On October 28 and 30, 2013, the Union filed a charge and amended charge in Case 02-CA-115732, alleging that the Employer refused to bargain and refused to provide requested information concerning the Content Producers based in New York, Chicago, and Los Angeles. On December 4, 2013, Complaint issued alleging that the Employer failed to bargain in good faith. On April 7, 2014, the Board granted General Counsel's Motion for Summary Judgment.

On April 15, 2014, the Employer filed its petition for review with the Court of Appeals for the District of Columbia Circuit, specifically with respect to the finding of a single, nationwide unit. The Board filed a cross-application for enforcement of its April 7 Order. On February 23, 2016, the Court denied both the petition for review and the application for enforcement, and remanded the instant proceeding to the Board.² The Court specifically instructed the Board to explain the application of its precedent in reaching the conclusion that the NABET-represented employees covered by a Master Agreement between the Employer and the Union constituted a single nationwide bargaining unit, as opposed to multiple units, as urged by the Employer.

On March 7, 2017, the Board remanded the matter to the Regional Director for further analysis in light of the court's decision. By Order dated March 28, 2017, at the Employer's request, the Regional Director reopened the hearing for receipt of supplemental evidence. The hearing was conducted on May 22 through 26, 2017, and briefs were subsequently filed on September 8, 2017.³

² The citation to the court's decision is: *NBCUniversal Media, LLC v. NLRB*, 815 F.3d 821 (D.C. Cir. 2016).

³ Based on the entire record in this proceeding, I find:

a. The hearing officer's rulings and conduct at the hearing are free from prejudicial error and are hereby affirmed.

b. I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. I find that NABET is a labor organization within the meaning of the Act.

III. Relevant Case Law

In its remand, the Court asked the Board to explain its precedent and how it was applied to the instant facts. Merging separate groups of employees into a single unit arises in a number of different situations. In the representation case context, the fact patterns usually involve rival unions seeking to represent the same group of employees. Another common scenario concerning merger arises where the appropriate unit is called into question following an employer's purchase or acquisition of another company. In these situations, the Board is attempting to balance the statutory goal of stability in labor relations by maintaining the historical unit represented by the incumbent union, with the right of employees to choose whether to be represented by a competing union.

In newly formed units, the Board generally leans in favor of conducting an election. As an example, in *NBC*, 114 NLRB 1 (1955), IATSE filed a petition seeking to represent a unit of film editors and associated employees in Los Angeles. NABET intervened in that proceeding and claimed that their contract (a predecessor to that in the instant case) covered the petitioned-for employees as part of a single nationwide unit. The Board considered NABET's contract at the time which included General Sections and Individual Sections, with separate scope of unit provisions and multiple references to separate bargaining units and "agreements." The Board acknowledged that many provisions of the agreement applied to all employees, but found that the terms of the contract clearly preserved separately identifiable groups. Of particular importance, the Board considered the brief bargaining history to find that the petitioned-for unit had not been merged with the larger unit. The Board ordered an election so that the employees could choose which union, if any, would represent them.⁴

Similarly, in *ABC*, 114 NLRB 7 (1955), the Board was faced with an IATSE petition seeking to represent film services employees who were already represented by NABET in New York. NABET had been certified as bargaining representative of the employees five years earlier and reached an agreement with ABC over their terms and conditions of employment. Shortly thereafter, in 1953, the parties prepared a "Master Contract" divided into general sections and individual sections. This master contract referred to separate "collective bargaining agreements" and units, with individual sections prevailing over general in the event of any conflict. Again, the brief five-year bargaining history supported the conclusion that the parties had been bargaining for the employees on the basis of separate units, "as was certified in 1950." *Id.* at 9.

In contrast, in *CBS*, 208 NLRB 825 (1974), the Board dismissed NABET's petition, which sought to represent a unit of writers at one television station in Los Angeles, in an attempted raid of the Writers' Guild nationwide unit. The Board found that the facts favored maintaining the historical unit and in doing so, promoted industrial stability. There, the Guild's national staff agreement was supplemented by local agreements covering several cities, including Los Angeles. The Board noted that the master agreement provided

⁴ I find that the Board's conclusion regarding multiple units represented by NABET in 1955 is not controlling with respect to the unit issue presented here, due to the subsequent decades of bargaining and changes in the parties' treatment of employees under the Master Agreement since that time.

for a “unit” which was not modified by the local agreements. While local negotiations were extensive and covered significant provisions, such as wages and hours, the parties had signed a single agreement, extending the national and supplemental agreements which provided for across-the-board wage increases. Further, the parties conducted local bargaining centrally and the employer’s negotiating team was the same for all locations. *Id.* at 826, fn 10. The Board noted its reluctance to disturb a multi-station bargaining unit which had existed for about twenty years.

Unlike rival unions competing to sever or preserve the represented group of employees, unit clarification petitions typically arise in the context of an established collective-bargaining relationship, where during the term of the contract, a new classification appears that was not clearly included or excluded from the unionized group. Often the new position results from a reorganization or technological changes.⁵ Either party to the contract may ask the Board to clarify whether the new position should accrete to the represented group, or whether the employees in the new classification constitute a separate appropriate unit.

In some circumstances, an accretion analysis is inapplicable depending on the work performed in the newly created position. Where the employer has transferred work to non-unit positions so that the number of employees working in unit positions is either diminished or eliminated, the Board will determine whether the new classification should remain in the unit by examining the work performed. In such cases, a community-of-interest analysis is superfluous because the new classification necessarily shares the same interests as the unit employees. *Premcor*, 333 NLRB 1365 (2001). The policy concern in this context is preserving the existing unit from erosion, while also weighing the right of the new group to vote on representation.

Specifically, the employer in *Premcor* operated an oil refinery at which six unit employees known as “operator 1s” monitored various functions on six control boards. The employer took advantage of new technology to establish a new control room where monitoring could be performed more efficiently. The employer then hired six former “operator 1s” to fill the monitoring positions in the new control room, placing them in a newly created nonunit position, with the plan of phasing out represented “operator 1” positions. Although the responsibilities of the employees in the new positions differed in some respects from those of “operator 1s,” the Board found that those in the new positions were, “essentially performing bargaining unit work.” Thus, the Board found that they should properly be viewed as, “remaining in the unit,” rather than being added to it by accretion.

The *Premcor* analysis is in line with the Board’s demonstrated interest in tailoring its analysis in UC cases to the particular circumstances of the case, rather than performing a rote community-of-interest analysis. As an example, in *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166 (2001), the Board applied *Premcor* and decided that the new “therapy

⁵ *Montgomery Ward & Co.*, 195 NLRB 1031 (1972)(an employer cannot have employees clarified out of the unit by transfer to a new location); *Swedish Medical Center*, 325 NLRB 683 (1998)(corporate reorganization where employees continue to perform the same type of functions remain in the unit); *Cal-Central Press*, 179 NLRB 162 (1969) (Lithographers excluded from historical mechanical employee unit due to a change in the method of operation).

assistant” was included in the unit. The Board found that the Regional Director had improperly performed a community of interest analysis because the therapy assistants performed the same basic functions historically performed by a bargaining unit of instructional employees. Indeed, as in *Premcor*, the employer had hired unit employees to fill the new positions. *Id.* At 1167.

Here, the Acting Director in the underlying Clarification Decision found that an accretion analysis was unnecessary because the new classification was performing the “same basic functions historically performed by the members of the bargaining unit.” Thus, the Content Producer classification “remains in” the unit, rather than being accreted into it. The Content Producers, as was true of the employees in new classifications in *Premcor* and *Developmental Disabilities*, were hired from among the ranks of former unit employees to perform the same basic functions as the bargaining unit members. Accordingly, the NABET unit should be clarified to include them.

The Employer’s reliance on *AT Wall*, 361 NLRB 695 (2014), is misplaced, as that case is distinguishable. There, the employer manufactured metal products. It acquired another company and moved the acquired company’s production of gun magazines to the employer’s facility in another city. The employer had not previously manufactured gun magazines. The incumbent employees declined job offers and the employer hired new employees to work in four new job classifications in a non-unit Metalform department. In declining to apply *Premcor*, the Board noted that the contractual unit description listed 21 job classifications, labeled by department and sometimes by product. The Board found that since the new employees produced an entirely different product, and used different equipment and processes than any of the unit employees, the Metalform department employees were not performing the same basic functions that unit employees performed. The Board found significant, in distinguishing *Premcor*, “the fact that no Metalform employees have either displaced any unit employees or performed their work.” Having rejected *Premcor* as the appropriate precedent, the Board performed a community of interest analysis and rejected an accretion having found no overwhelming community of interest between the unit employees and the new Metalform employees.

The instant case is factually closer to *GM, Cadillac Motor Car Division*, 120 NLRB 1215 (1958). Unlike *NBC* and *ABC*, the UAW had represented all of GM’s workers for twenty years. Based on this long course of bargaining, the Board found that the UAW represented a single, multi-plant unit which was national in scope. Starting in 1938, the UAW won successive single plant elections and was certified by the Board as the exclusive representative in each plant as a separate bargaining unit. However, UAW and GM engaged in common centralized bargaining for all the plants, from which there emerged a single contract - nationwide and companywide in scope. The UAW-represented employees were divided into eleven groups. The groupings followed in some cases job classifications, in some cases type of plant involved, and in some cases kind of car assembled. Some groups included a few entire plants, plus certain parts of other plants. In the case of the “tool and die maintenance” group, some employees worked in the vast majority of the 120 plants. Thus, the old unit lines based on Board certifications were totally disregarded. Although the national contract provided for separate supplemental negotiations and signed supplemental agreements that dealt with special problems affecting that location, the Board held that the total picture left no doubt that the parties carried on their collective-bargaining

on the basis of a single, company-wide, multi-plant unit.

The Board's decision in *GM* is further instructive on the *Premcor* issue. The Board found that the newly constructed modern assembly plant in Lorraine, Ohio, was essentially just the relocation of the Buffalo plant because the same work was performed, by the same employees, manufacturing the same product. The Board noted that although the employer planned eventually to add substantially to the overall group from the local labor market, the first jobs, and consequently the more certain positions, were occupied by transferees from Buffalo. Thus, the Board concluded that the employees at the new plant were covered by the GM/UAW national agreement.

Here, for the reasons more fully discussed below, I reach the same conclusion. The Content Producers are NABET-represented employees covered by the national contract.

IV. Factors Related to Unit Scope

As noted above, the Board remanded this matter to the undersigned to conduct a "wholistic" analysis to determine the scope of the unit(s). I have considered and weighed the following relevant factors and based thereon, conclude that the unit is one nationwide bargaining unit.⁶

A. The Structure of the Master Agreement

The Master Agreement in effect at the time of the creation of the Content Producer position was effective from 2006 to 2009. The Preamble, which has been a part of the parties' contract over decades of successor agreements, explains that the parties intend, "to set forth herein the basic collective bargaining agreements between the parties..." The Recognition Clause states that "[t]he Union represents ... for collective bargaining purposes all of the employees of the Company as defined in the applicable SCOPE OF UNIT clause; and the Company recognizes the Union as the exclusive bargaining agent for all such employees of the Company." The Master Agreement is signed only by national representatives of the parties.

1. The General Articles

The first twenty-six "General Articles" apply to all employees covered by the Master Agreement, including, for example, the same grievance and arbitration provision, the same dues check off provision, the same benefits provisions, and the same severance pay provisions.

As detailed in the underlying Clarification Decision, General Article VI refers to all represented employees as part of a single unit for purposes of transferring or subcontracting out work: "In respect to work or functions which in the past have been performed for the Company both by persons within and without the *unit* the Company may continue to have

⁶ The Employer contends that the *Premcor* doctrine applies only in a single overall unit situation. I disagree. Neither *Premcor* nor its progeny limit its application based upon the scope of the unit.

such work performed outside the bargaining *unit* to a degree no greater than heretofore.” (emphasis added).

With respect to transferring work within the ranks of all NABET-represented employees, General Article XII provides that employees transferred to higher-paid classifications retain Employer and “unit” seniority [with consent of involved locals] when transferred between offices. The use of the word “unit” here refers to work covered under a single Individual Article.⁷ General Article VI, states that “in respect to work or functions which in the past have been performed for the Company both by persons within and without *the Unit* the Company may continue to have such work performed outside the bargaining unit *to a degree no greater than heretofore* (emphasis added).”

The Master Agreement does not have a single clear provision setting out the way seniority functions. All covered employees have both Company seniority and seniority within subgroups, as defined in the Individual Articles. Seniority for employees working under Article A is according to geographic location, even though Article A is national in scope.

2. The Individual Articles

The Master Agreement defines the “Individual Articles” as “contain[ing] the description of *each bargaining unit*... the rates of pay and any unusual working conditions which have no general application.” (emphasis added). Most of the Individual Articles, including Articles A, H, M, and N, contain separate “SCOPE OF UNIT” provisions indicating the grouping of employees to which the terms stated in each Article apply. Each of the fifteen Individual Articles have their own seniority lists, wage rates,⁸ meal periods, work hours, and other distinct terms and conditions of employment that are markedly different.

Article A (‘The Engineering Agreement’) covers a national unit of technical employees. It includes provisions specifying the kinds of technical equipment that fall within the Union’s jurisdiction and identifying circumstances in which other individuals may operate specified equipment. The operation of specified equipment during on-air performance is reserved to covered employees, except where noncovered employees may be operating such equipment in regard to their own performance. Likewise, noncovered employees may operate specified equipment in order to finish material that they are creating, composing, producing or modifying. Article A contains numerous unique work-specific provisions, for example, a provision concerning “Equipment Excessive in Weight,” not found in the other Agreements.

⁷ Transfers between jobs covered by different Individual Articles are addressed in other sections of the Master Agreement, including, for instance, Sideletters 50, 51 and 53, as discussed below.

⁸ The wage rates in Articles H and N for comparable job classifications appear to be identical, while the wage rates in Article M are somewhat lower. Notably, Articles H, M and N include wage rates for some “producer” positions. For example, all of these sub-agreements provide wage rates for “Producers” of 1/2 hour and 1 hour long shows or segments, while the “M” Agreement also includes wage rates for “Sky News Producers” and the “N” Agreement includes wage rates for “Field Producers” and “Associate Producers” of 1/2 hour and 1 hour long shows or segments.

Articles H, M, and N, describe units of Newswriters in Chicago, Los Angeles, and New York, respectively. As is true of Article A, the Newswriter Articles include provisions elaborating “exclusive” duties of the covered employees, the circumstances in which such duties may also be performed by non-covered employees, and additional duties that the covered employees may perform.

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

Articles A, H, M and N permit covered employees to do some amount of "nonexclusive" work and also permit non-covered employees to do unit work under limited circumstances. For example, the "Scope of Unit" provisions of the H, M and N Agreements allow Field Producers to perform news writing but only in connection with their producing work. (There does not appear to be any limitation on the amount of non-exclusive "field producing" work that may be performed by covered employees.)

Although the Individual Articles usually include a “scope of unit” section, listing classifications to which the Article applies, these classifications are not always unique to a single Article. For example, the “Videojournalist” classification is listed as a covered position under Article A, which generally applies to engineering and technical employees, as well as, in Articles H, M, and N, which apply to Newswriters in Chicago, Los Angeles, and New York, respectively. There is no evidence regarding the circumstances in which a video journalist would work under one Article or another.⁹

Notwithstanding the continued existence of the Individual Articles, the vast majority of employees represented by NABET have been, for some time, working under the terms of Article A. There is no evidence of employees currently working under any other Articles, except for Article C (two employees) and Article P (ten employees). In some cases, the parties have agreed that job classifications previously covered under the terms of now “empty” Individual Articles, are now covered under the terms of Article A (this is apparently true of former Article B traffic coordinators and former Article O building maintenance employees).

The Individual Articles do not have their own expiration dates and are not separately signed. Although the Master Agreement provides that Individual Articles prevail in the event of a conflict between any of them and the General Articles, none of the Individual Articles stand on its own as a complete contract.

3. The Sideletters

The Master Agreement also contains numerous Sideletters, which are an integral part of the Agreement. Some Sideletters set terms of employment that are broadly

⁹ At least one Content Producer had formerly worked as a NABET-represented videojournalist.

applicable to all covered employees (like the General Articles). Other Sideletters address issues only relevant to employees in a particular classification, while still others set terms for employees when they are temporarily performing work covered by a different Individual Article. Several Sideletters address the performance of "nonexclusive" work by unit employees. Thus, over time, the Sideletters bend the demarcations of work between the Individual Articles, in some cases, to address how technological change can create a need for adjustments in work jurisdiction.

As an example of general application, Sideletter 6 provides for sleeping accommodations for all employees on remote assignments, regardless of job classification or "Individual Article" jurisdiction. Likewise, Sideletter 10 sets forth additional benefits to all represented employees assigned to work outside the continental United States. Sideletter 32 modifies General Articles pertaining to "Daily Hires," or freelance employees, regardless of the Individual Article under which they may work.

The following are examples of blended job functions. Sideletter 11 allows the Employer to take advantage of "technological advances" and assign non-unit employees to gather material for broadcast using hand-held digital cameras, even though this is work in the jurisdiction of NABET engineers. Sideletter 11 makes clear that assignments of non-unit employees to use handheld digital cameras, must be made only when the use is in connection with the employee's habitual functions. It also echoes the provision of the "Hyphenate Sideletter" (54, reviewed below) that broadens unit work, in that employees covered by Article A may perform "producer" duties "in combination with their normal work functions."

Sideletter 14, the "Computer Sideletter," provides for use of computers in the course of work functions by employees, regardless of whether or not they are represented by NABET. Computers are not included in the "technical equipment" covered by Individual Article A. The issues covered in this Sideletter are elaborated in Sideletter 70, the "Nonlinear Editing Sideletter," which specifically concerns the use of computer editing technology by both unit and non-unit employees.

Sideletter 70, the "Nonlinear Editing Sideletter," broadens the Computer Sideletter to allow the Employer "full discretion" in assigning work with nonlinear editing computer editing systems, including to employees not represented by NABET and/or working under Article A. Sideletter 70 recognizes the desirability of having unit employees perform nonlinear editing work and employs the concept of "editorial responsibility" to delineate the circumstances in which such work will be covered by the Master Agreement.

Sideletter 50, the "Crossover Sideletter," provides that Newswriters working under Articles H, M, and N may, in combination with their normal work functions, be assigned to operate technical equipment of the sort typically operated by employees working under Article A, and vice versa. Specifically, it provides:

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

Contract (hereafter referred to as "employees") may, in combination with their normal work functions, be assigned to perform any News writer functions

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

It appears that the "video journalist" classification was included in the unit via this Sideletter because video journalists performed both Newswriter functions under Article M and technical functions under Article A.

Sideletter 54, the "Hyphenate Sideletter," addresses circumstances in which covered employees may be assigned "non-exclusive" work in addition to their regularly assigned work. The Employer or a Union-represented employee may initiate discussions which could lead to assignment of functions other than those usually performed, which functions may or may not be covered by another collective bargaining agreement. "[S]uch assignments shall not constitute precedent nor an expansion or diminution of the jurisdiction in the Master Agreement."

As noted in the underlying Clarification Decision, the record demonstrates that unit employees had been assigned producing work under the Hyphenate Sideletter and received a "producer's upgrade" in pay whenever this occurred. Unlike the Crossover Sideletter (50), this Hyphenate Sideletter, in allowing unit employees to perform non-exclusive work, does not appear to require that assignments of non-exclusive work be limited to situations in which the work is being performed in conjunction with the employees' habitual functions.

Sideletter 55, as related in the Clarification Decision, concerns revisions to the Master Agreement during the 1987 negotiations, limiting coverage of the Agreement to certain television and radio stations, as well as, other entities and operations covered by the previous agreement. It is unclear to what extent, if at all, the "operations" excluded from coverage of the Master Agreement by this Sideletter might relate to "content" produced by the Employer for various platforms other than television broadcast. Employer Senior Vice President of Labor Relations Krolik testified generally that this provision has been understood as limiting NABET's jurisdiction to the Employer's broadcast operations. However, there is little specific evidence about how this provision has been applied and how it might operate to limit NABET's jurisdiction.

Regarding temporary transfers, Sideletter 51 allows for temporary transfers of Union-represented Newswriters between Chicago, Los Angeles, and New York, provided they are paid by check from the transferring office and "remain a member of the bargaining unit" of the transferring office.

Sideletter 53 provides that when Staging Service employees, who worked in

Washington, DC under Article C, are unavailable, employees working under Article A may be assigned to perform their duties. It further provides that such engineering employees will perform those duties “when there are no longer any Staging Services employees on staff or with rehire rights.” Sideletter 53 also allows for Staging Services employees to perform Article A work, and be paid the applicable Article A rate while working on such an assignment.

In conclusion, the terms of employment of NABET-represented employees at NBC are set by the Master Agreement as a whole – the General and Individual Articles, along with the Sideletters. While the contract refers in several places to coverage of multiple units, it also in some instances references all represented employees as a part of a single unit. As will be described further below, this is in accord with the parties’ treatment of covered employees as a unified group for some purposes, some of the time, and as segregated subgroups for other purposes and at other times.

Based on the record evidence, the Individual Articles do not and cannot stand alone as descriptors of working conditions for classifications listed within them. Rather, contract terms relevant to employees in these classifications may be found not only in the General Articles, but also in multiple Sideletters, some of which are specifically designed to address instances in which an employee in a single classification may be performing work under more than one Individual Article, and sometimes performing work not clearly covered by any Articles.

Thus, while superficially there is significant language in the Master Agreement indicating the existence of multiple units, a deeper reading shows significant blurring of the lines which would separate the employees working under different Individual Articles. As noted, in practice there are also almost no employees currently working under any Individual Article other than “A.” Accordingly, I find that since the terms of the Master Agreement, as currently applied to the represented workforce, create a single unit of employees, this factor weighs in favor of finding a single unit.

B. The Bargaining History

1. The Master Agreement

Contract negotiations occur between national representatives with input from local representatives and subject-matter experts. Party representatives during contract bargaining were largely consistent over multiple negotiation sessions for a given contract. The Union’s brief exhaustively relates the party representatives present for bargaining sessions during forty seven sessions of 1987 contract negotiations. Testimonial and documentary evidence demonstrates that the parties were consistent with this approach throughout the 1970s, 80s, and 90s and into the 2000s.

The Union’s contract bargaining team includes representatives from each network local Union, as well as, national representatives. Not only have essentially the same bargaining teams negotiated the Master Agreement, the same teams also negotiated specific proposals that covered all aspects of the Master Agreement – the General Articles, the Individual Articles, and the Sideletters.

To be sure, there are multiple examples in evidence of peripheral negotiations which are related exhaustively in the Employer's brief. These include:

- “peripheral” unit bargaining in Chicago in 1967, while the bulk of the Master Agreement was being negotiated in New York.
- “peripheral” unit negotiations with different negotiators in 1987.
- different lead negotiators on each side for different Articles or groups of Articles in 1990 and 1994.
- In 1994, separate meetings about Air Conditioning and building maintenance employees in New York, Newswriter Articles in San Diego, and other “peripheral” Articles, as well as “sidebars” and subcommittee negotiations in connection with various articles in the course of the main negotiations.
- Separate discussions of non-engineering Articles during 1998-99 negotiations.
- In 2001, Chicago-based negotiations about E and K Articles, while main Master Agreement negotiations took place in New York.

Krolik testified to the extensive role played by a particular local Employer representative with respect to local Newswriter negotiations, noting that she had authority as a labor-relations representative to offer wage increases pertaining to Newswriters during those negotiations. He did not, however, recall her ever making a proposal without seeking his prior approval. He further admitted that he did not know whether small break-out groups bargaining for the Union had the authority to bind the national union. Employer representatives testified that nothing had changed about the general structure of bargaining during their many years with the Employer.

2. Miscellaneous Agreements

In addition to bargaining successor Master Agreements, the parties bargained to agreement on various issues over the years on the national and local levels.

a. National Supplemental Agreements

The national-level agreements were signed by the Union's President at the national level and his counterpart at NBC. The supplemental agreements deal with work performed on specified networks and/or for particular events. In most cases, the application of these agreements is not limited to employees working under particular Individual Articles.

- An August 31, 2007, “MSNBC Agreement” provides that the Union will make no claims to work performed in connection with material produced by or for MSNBC, unless employees of that entity elect the Union as their bargaining agent in an NLRB election or MSNBC produces full, regularly-schedule programs that originally air on the NBC Television Network. The agreement further provides that certain Union-represented engineers will cover certain stories for MSNBC. The agreement provides additionally that any Union-represented employees hired under Sideletter 32 for MSNBC work will not count toward the Employer's allotment under Sideletter 32.

- A May 9, 2008, “Telemundo Agreement” provides that work for Telemundo includes payments to be made to Union-represented employees of amounts no less than the applicable “A” Agreement Group 5 scale.
- An August 8, 2011, “Olympics Agreement” covering the 2012 and 2014 Olympics provides that assigned Union-represented employees will be paid their usual base rate; non-staff employees will be paid at a rate no less than the minimum rate per function as included in Sideletter 32; work days specified; per diem payments provided; eligible employees will continue to be covered by insurance programs in Master Agreement; and arbitration in accordance with Master Agreement.
- A March 7, 2012, “NBC Sports Agreement” provides that the Union will not make claims to work performed in connection with NBC Sports, except that NBC Sports shall assign Union-represented engineers to cover events “consistent with the jurisdictional provisions of the NABET-NBCU Master Agreement (“Master Agreement”) as if such work was under that Agreement.” The parties will meet “promptly in New York” to review implementation at request of either party.
- A May 2012 “Steve Harvey Show Agreement” provides that Union-represented employees will be assigned to work on that show per the terms of the Master Agreement with a few modifications specified.
- A July 21, 2014, “NBC Sports Cable Network Agreement” provides that Daily Hires will work under the terms of Article A or Article D, as determined by NBC Sports Group; specified employees will work, “without ever having to become a member of NABET-CWA or being covered by the Master Agreement.”
- A November 2015 “Olympics Agreement” covering the 2016 and 2018 Olympics provides for assignments to be offered to a specified minimum number of Union-represented employees and for arbitration of conflicts according to the terms of the Master Agreement.

b. Local 11 Agreements

- A May 15, 1989, letter confirms an agreement allowing Newswriters working under Article M (Los Angeles) to substitute for a New York Newswriter during his vacation weeks. The agreement is signed for the Union solely by the Local 11 President.
- A 1991 “pot settlement” resolved about forty grievances which included amendments to Article N covering New York Newswriters. The agreement is signed by representatives of the Employer and Local 11 only.
- A January 2000 settlement agreement concerning the assignment of Article A employees to work for the Discovery Channel is signed only by local representatives of the parties.
- A January 2006 agreement stated that work assignments to Article A engineers for a

CNBC show featuring Michael Eisner would be on a no-precedent, non-citable basis and not create jurisdictional claims. Such assignments would be made under the terms of the Master Agreement, with further such assignments in the Employer's sole discretion. Representatives signed on behalf of the Employer and Local 11.¹⁰

- A March 30, 2006 Agreement provided that any maintenance work done by union-represented employees on equipment utilized by non-broadcast entities would be non-precedential and create no jurisdictional claims. This applied only to New York Article A engineers and did not create any new job classifications.
- An August 2, 2006, "NY Giants Agreement" concerned payment of Article A rates for employees assigned to work on coverage of a NY Giants pre-season game.
- An August 14, 2008, agreement which settled two Article A grievances involving employees in New York. In part, the agreement provides that a particular employee who had been working without union representation would be given the option of becoming a NABET-represented employee covered under the "A" contract when another "A" contract employee severs employment in the applicable department. No new job classifications were created as a result of this agreement

c. Other Local Agreements

- In 2007, 2008, and 2009, the Employer entered into three agreements concerning Article A employees' work on a computer system known as "ROS." These agreements were signed only by representatives of the Union locals in Chicago (Local 41), Los Angeles (Local 53) and Washington D.C. (Local 31). The agreements provided that employees would make no less than the group 8 wage scale in Article A. No national NABET representatives signed these agreements. Importantly, no unit employees were removed from coverage of Article A as a result of the installation of the ROS system equipment.
- In December, 2012, NBC and Local 53 entered into a settlement concerning severance, reassignment, and various other issues which arose from the scheduled layoff of Article L employees (air conditioning workers at KNBC) when the Employer shut down its Burbank facility.
- In 2014, the Employer entered into an agreement regarding accretion of a large number of listed employees working on "E! Programs" into positions under Article A. The agreement was negotiated in New York and Los Angeles, with some discussions conducted by phone. It was signed by representatives of both Local 53 and the Sector.

¹⁰ While the record indicates that this agreement could have allowed an engineer in any part of the country to work for the show, the only assignments being made were in NY. Further, this agreement did not alter the compensation paid to employees assigned to work on this show, nor did it remove any employees from coverage of Article A.

In conclusion, the bargaining history shows that the parties bargained the Master Agreements at the national level with the help of small groups negotiating over issues of specific interest to subsets of represented employees. While subgroups engaged in discussions of local matters and matters pertaining to particular job classifications, there is no consistent division of bargaining by Individual Article. In some instances, the parties bargained over all non-Article A issues together. Further, the parties do not designate bargaining teams or individuals who are responsible for bargaining Individual Articles.

The supplemental agreements negotiated between NBC and various locals of the Union are not consistently applicable along the lines of Individual Articles but rather, along geographic lines. Where work has been undertaken in New York, for instance, pertaining to Article A employees, NBC has sometimes bargained with Local 11 over terms, despite Article A being national in scope. Likewise, Article A employees have been the subject of an agreement between an NBC West coast representative and the Union's (Los Angeles) Local 53, where the involved employees were located in California. There is no contention that Article A employees are themselves parts of different units. Thus, I conclude that where local bargaining has aligned with distinct Individual Articles, this is a matter of convenience rather than evidence that bargaining was separate for each Individual Article.

Based on the record, the bargaining history shows that when dealing with unique local issues, the parties exhibited an intention to minimize the identity of separate units and to maintain a single, comprehensive multi-location nationwide unit. Accordingly, I find that this factor weighs in favor of finding a single unit.

C. Contract Ratification

The Union conducts contract ratification votes among groups of employees working under Individual Articles. It appears that the contract is not considered ratified until each such group has accepted it by majority vote. In instances where Individual Articles have not been ratified, the parties have negotiated further about the terms pertaining to the relevant group(s) of employees.

Krolik testified that in 1990 the Employer chose not to put ratified Articles into effect while others were still pending ratification. However, in the mid-1990s, the Employer apparently put into effect the terms of some ratified provisions of the Master Agreement while others had not yet been ratified. This led to unfair labor practice charges being filed with the Board by both the Union, alleging the Employer had unlawfully implemented terms in this piecemeal manner, and the Employer, alleging that the Union was unlawfully refusing to execute the "contracts" which had been ratified. Both charges were dismissed by a Regional Director for non-effectuation because the parties subsequently reached agreement "on all contracts," including ratification and implementation. In his March 18, 1997, dismissal letter, the Regional Director noted that the Union represented "12 separate units." Contrary to the Employer's argument on brief, I do not find the former Director's musings based on an administrative investigation to be valuable in my analysis of the current unit question after extensive hearings and briefings. I do note that the Union's position that individually ratified Articles does not warrant separate implementation of those Articles to be consistent with their position that the Master Agreement covers a single

unit of employees.

No other evidence was proffered regarding implementation in the instances where some Articles have been ratified later than others, and no evidence was proffered showing that there is any general agreement or practice related to that situation. To the degree that the evidence establishes that employees working under each Article hold veto power over the parties reaching an overall Master agreement, I find that the ratification process conducted on a multi-unit basis weighs somewhat in favor of finding a multi-unit structure.¹¹

D. Administration of the Contract Through Grievance Processing

General Article XX of the Master Agreement provides that impartial umpires for arbitration are designated by office location and each office has its own “local grievance committee.” The contract identifies a specific arbitrator for cases involving more than one office. The Master Agreement, however, does not provide different mechanisms for processing grievances on a local or national level.

In certain circumstances, a local affiliate can file a grievance over an issue that involves employees at multiple locations, who are covered by different Individual Articles. The record does not reveal that specific individuals or teams were designated by the parties to handle grievances with respect to particular Individual Articles.

According to Senior Vice President of Labor Relations Operations Angel Ortiz, the practice is that the Union “designates” grievances as local or national; generally, the Employer accepts the Union’s designation. Similarly, Krolik testified that grievances were mostly handled by local personnel, with local representatives of the parties signing settlement agreements. With respect to Article A, which covers employees nationwide, Krolik testified that generally Article A grievances were handled locally by representatives of the parties who were in the city where the dispute arose. While a rarity, when national grievances arose, the National Union president submitted the matter and notified that National Employer representative.

Thus, the parties process grievances according to geographic convenience, which is not consistent with the national reach of employees working under Article A. Accordingly, the administration of the contract through the grievance procedure indicates that the jurisdiction set forth in each Article is mostly truncated by the particular city in which the grievance arose. This evidence militates against finding separate units based on the Individual Articles.

E. Arbitration Awards Construing Contract

The arbitration awards in evidence show that neutrals have struggled with jurisdictional issues. As discussed in the underlying Clarification Decision, a 1971 arbitration concerned a former KNBC Newswriter in Burbank, who was promoted to the

¹¹ I note that the Employer did not concede it could not implement notwithstanding the failure of each Article to ratify. Thus, this factor has not been fully tested.

non-bargaining unit position of Senior Producer, but continued to perform "line producer" work that he had performed as a NABET-represented Newswriter. The arbitrator determined that "producer" work was regularly performed by both unit and nonunit employees at KNBC and that the "transfer of work" provision expressly permitted this. The Arbitrator observed that,

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

In some "transfer of work" grievances, also reviewed in the Clarification Decision, the arbitrator's findings suggest that the Content Producer position should have remained a unit position. Specifically, a 1973 arbitration considered the question of whether a WNBC managerial employee could be permitted to perform "field producer" work, which was often assigned to NABET-represented Newswriters. The Arbitrator found that the parties' practice and the express terms of their contract made clear that such work could be performed by both represented and non-represented employees, so long as, the distribution of that work was consistent with the Employer's past practice.

Similarly, in 1988, NABET Local 41 and the Employer arbitrated a grievance concerning the Employer's layoff of a NABET-represented Assignment Desk Assistant and the Employer's subsequent assignment of all work previously performed by her to a non-unit position called, Researcher. The arbitrator concluded that, although various tasks performed by the Desk Assistant have on occasion been assigned to non-unit employees, the Union had "exclusive jurisdiction" over the position of Desk Assistant. Thus, the arbitrator concluded that the Employer's transfer of the Desk Assistant functions to a non-represented Researcher position - while laying off the unit employee who previously performed that work - violated the "Transfer of Work" provision of the Master Agreement.

Regarding the issue of single v. multiple units, the record contains a smattering of arbitral decisions. The earliest example is a 1958 Award, wherein the arbitrator considered issues arising out of joint bargaining that NBC and ABC had conducted with NABET. The companies took the position that the negotiations encompassed one agreement covering all units represented by the Union, while the Union argued that the negotiations encompassed separate and distinct contracts between each of the companies and each of the groups of employees represented by the Union. The issue in the decision was not precisely the existence of multiple units under the NBC contract, but the Arbitrator concluded that: "[t]he 1958 negotiations were consummated by one contract referable to all of the separate units covered by the Master Agreement at each Company. The signing encompassed one contract

for all groups without disturbing the separateness of the several units and agreements.”

In a 1979 award, the arbitrator found that “desk men” (Newswriters) working under Article M have the authority to reschedule meals of camera crews working under Article A because the camera crews work in “a different bargaining unit,” than the Newswriters, “even though all such employees are represented by NABET and all are subject to the terms and conditions of the Master Agreement.” In three decisions issued in 1980 and 1981, an arbitrator repeatedly referenced NABET’s representation of employees at NBC in separate bargaining units delineated in the Individual Articles of the Master Agreement.

The arbitration awards in evidence are difficult to parse and the arbitrators have acknowledged the inherent difficulty in determining whether work is, or is not, covered by the Master Agreement. On the issue of merged units, the 1958 award is of little value to a present determination of unit scope. But more generally, the arbitrators’ decisions are limited to the granular issue presented in that grievance and therefore, do not establish an overarching rubric from which to draw guidance. Thus, I find this factor to be neutral.

F. History of Recognition and NLRB Certifications

The Board first certified NABET as the representative of the Employer’s employees in 1944, with a Decision and Certification for a unit of technical employees and engineers.¹² These employees are now covered by Individual Article A in the Master Agreement.

In 1953, NABET was certified to represent publicists working in Los Angeles. However, the Union was decertified from representing those employees after a 1964 election.

In 1955, the Board directed an election in a segment of the NABET-represented employees, for a unit of film editors located in Los Angeles, as sought by the International Alliance of Theatrical Stage Employees (IATSE). As discussed previously, the Board rejected NABET’s argument that the employees at issue had been merged with a larger unit. *NBC*, 114 NLRB 1 (1955).

In 1956, Local 11 was certified to represent air conditioning employees in New York. This group is covered under Article P in the current Master Agreement.

¹² In *National Broadcasting Company, Inc.*, 59 NLRB 478 (1944), the Board certified a nationwide unit of technical and engineering employees, excluding turntable operators located at its Chicago local station. In finding the unit appropriate, the Board acknowledged that the earliest collective bargaining agreement in evidence between Respondent and NABET’s predecessor, dated November 27, 1940, covered technical employees, including turntable operators, on a “system-wide basis,” but that historically the parties had excluded the turntable operators in Chicago. *Id.* at 482. After considering, *inter alia*, the nature of the work and the skills needed to perform it, the Board concluded that, “in the absence of other compelling circumstances.. the collective bargaining history is determinative” and that a nationwide engineering unit excluding the Chicago turntable operators but including turntable operators at all other locations was appropriate. In short, the Board considered not only the language of the parties’ collective-bargaining agreement, but the collective bargaining history and the nature of the work at issue in determining the appropriate unit.

In 1964, the Union argued in response to a decertification petition that a unit of film editors in Chicago was inappropriate, because those employees had been merged into a nationwide unit. The Regional Director did not agree, and ordered an election.¹³ The Union won and was then certified as the representative of the Chicago film editors. Presently, all NABET-represented editors are covered under Individual Article A, irrespective of location.

In 1971, NABET won an election against the incumbent union, Writers Guild of America, as the certified representative of Newswriters in New York. The certification is to NABET without any mention of a local affiliate. These Newswriters were ultimately covered in Article N of the parties' contract.

In 1979, Local 41 was certified to represent messengers in Chicago; the messengers are covered in Article J of the parties' agreement.

In 2015, NABET won an election to represent a unit of credit technicians in Los Angeles.

The certifications in evidence show that through secret-ballot elections, the Union won representative status of some classifications on an individual basis. On the other hand, there are a wide range of classifications covered under the Master Agreement for which there are no individual certifications in the record and no other evidence about how the Union came to represent these employees.¹⁴ Accordingly, although separate certifications suggest multiple units, I cannot generalize from this evidence regarding the overall relationship. Thus, I find that this factor is neutral.

G. Union Documents Referencing Multiple Units

The Employer introduced a number of letters and other documents in which the Union referenced "multiple units" that it represents at NBC. These include 8(d) notices from the 1980s and 1990s, where the Union provided notice to the Employer of its intent to terminate "contracts" covering employees of NBC and expressing the wish for the parties to meet and confer, "for the purpose of negotiating new Agreements to cover your employees in Bargaining Units," of employees represented by NABET. Further, a 2009 notice, which the Employer notes was sent less than a month before the Union filed the instant unit clarification petition, references a single new "Agreement" to be negotiated, but repeats the prior references to "Bargaining Units." Finally, documents regarding ratification that the Union sent to NABET-represented employees of NBC, consistently reference multiple "units" which will vote separately, "unit-by-unit" on provisions which apply to them.

¹³ The Regional Director stated in his direction of election that the film editor unit had originally been certified in 1951 pursuant to a consent agreement, after which the unit was included in the parties' master agreement under its own "separate and distinct 'contract.'"

¹⁴ The Court asked whether the mode of recognition was relevant. While certifications and voluntary recognition are relevant to processing decertification petitions, the mode of recognition is not determinative in unit clarifications. *CBS*, 208 NLRB 825 (1974)(collective-bargaining relationship established by voluntary recognition; Board considers precedent involving many permutations of modes of recognition and found that multiple individually certified units can merge into a single unit as a result of years of central negotiations).

The Employer also notes that Union officials on many occasions during bargaining sessions through the 1980s insisted forcefully that it represented separate units of employees. As related in the Employer's brief, one Union negotiator in the 1970s and 80s seemed to taunt the Employer with the possibility of the Employer going to the NLRB to seek a single unit. The same negotiator insisted in 1984 that he was trying to, "preserve the integrity of each unit. I won't talk about this [Sideletter concerning computers] if it applies to more than one unit."

This evidence tends to indicate the existence of multiple separate units.

V. The Content Producers

A. Application of the Wholistic Analysis and the "CBS Factors" to Determine Unit Scope

Based on the record evidence and the wholistic analysis above, in summary, although the Individual Articles partially set the terms for certain classifications of employees, the Articles must be interpreted in conjunction with the General Articles and Sideletters. In addition, by 2010, almost all of the represented employees were working under Article A. Thus, the structure of the Master Contract weighs in favor of finding a single unit.

For decades, the parties have bargained the Master Agreements at the national level and neither side designates different teams to bargain the Individual Articles. The supplemental local agreements arise on an *ad hoc* basis and do not necessarily align with the classifications in the Individual Articles. Thus, the bargaining history also weighs in favor of finding a single unit.

With respect to the other record evidence adduced on this issue, the ratification process conducted on a multi-unit basis weighs somewhat in favor of finding a multi-unit structure, however, I do not accord it much weight because the practical effect of the ratification process is unclear and untested. Regarding the administration of the contract, the grievance process is generally conducted in the location in which the grievance arose, or in New York. A geographic grouping does not comport with the Employer's contention that Article A, which is national in scope, is itself a separate unit. Therefore, grievance processing weighs somewhat in favor of finding a single unit. The arbitration awards do not consider factors used by the Board in determining unit scope and therefore, I accord them little weight. Similarly, the Union's communications referencing "units" appears to be a shorthand reference to certain terms and conditions, and not necessarily a limitation on scope. The certifications in evidence show that some classifications were separately certified; however, the original mode of recognition is less significant than the bargaining history in determining scope. Thus, I find that these factors are of little value in my analysis.

Finally, as noted above, the Board in *CBS*, 208 NLRB 825 (1974), identified four factors distinguishing cases in which unions were found to represent multiple units at a single employer: (1) references in a master agreement to "units," with a description of each unit, (2) an absence of a significant history of joint bargaining, (3) bargaining through years

for various numbers of locations where the union demonstrated majority status, and (4) the existence of separate agreements with no master agreement or recognition clause expressing intent to merge separately certified units into a single unit.

Of the four distinguishing factors listed in *CBS*, the first is present in the instant case – as we have seen above, the Master Agreement includes numerous references to “units” and unit descriptions appear in most Individual Articles. And, the contract provides for the primacy of Individual Articles over the General. However, the Master Agreement has been treated by the parties as a tripartite agreement, wherein the Sideletters modify the General and the Individual Articles.

With respect to factor two, the parties have a consistent practice of nationwide bargaining for new contracts, albeit with the use of break-out groups and occasional local negotiations over particular groups of employees. Although the ratification vote is conducted “article-by-article,” again, the practical effect of this process is unclear. The reams of documentary evidence showing the same bargaining teams, along with the parties’ proposals, show a desire to reach one contract covering the Employer’s operations from coast to coast. Severing a segment of this group - at this point in the parties’ relationship - would destroy the stability this industry has enjoyed for decades.

Regarding the origins of inclusion of various classifications under the Individual Articles (analogous to distinguishing factor three), the record demonstrates that in at least some instances, groups of employees were separately certified prior to being covered in the Master Agreement. Some of those separately certified groups have later been folded in with other classifications of employees under Article A. I note that in 1944, the Board certified NABET as representative of a nationwide unit of engineers. *NBC*, 59 NLRB 478 (1944). In 1955, the Board found that editors and associated employees in Los Angeles were a separate appropriate unit. *NBC*, 114 NLRB 1 (1955). For some time now, the Employer’s editors and photographers have been covered by the terms of Article A, the successor to the original engineering unit, regardless of their work location. While the parties have retained some geographic demarcations, these groupings appear to be more a matter of administrative convenience. In the over half a century of intervening bargaining history and a corresponding evolution in the Employer’s work flow, the originally certified separate units are all but meaningless since they have been absorbed under the Master Agreement. As the parties agreed at the hearing, the employees covered under Article A have been the heart of the unit for years, with the other Articles viewed as “peripheral.” The fact that the vast majority of employees are now covered under Article A weighs in favor of finding that the NABET-represented employees are a single unit.

Finally, as for factor four, while there is no language explicitly announcing an “intent to merge,” the record contains numerous examples of arrangements that have blended some of the distinctions between separate “units.” Again, Article A has absorbed classifications previously working under other Articles, such that some are now empty. Other Individual Articles are now defunct as a result of technological or administrative changes in the industry and at NBC. Above all, the parties have reached numerous side-agreements allowing for employees covered under one Individual Article to perform work covered under another, both via transfer of the employee from one location to another and by mutual consent that certain types of work may be performed by employees working

under different individual Articles. Thus, I find that the Sideletters and other arrangements between the parties over the years show a course of conduct in which the parties intended that the NABET-represented employees merged and function as a single unit.

In conclusion, neither in *CBS* nor in other decisions concerning this issue has the Board adopted a formulaic approach to its analysis – there is no suggestion that an evaluation of factors weighing toward one conclusion or the other could be performed by a mathematical calculation of “one unit” versus “multiple unit” indicia. Rather, the Board has looked at the unique circumstances of the bargaining relationship before it in each case. Accordingly, I find that the parties have generally treated the represented employees as a single unit. I recognize the countervailing indicia; however, in the over half a century of intervening bargaining history and a corresponding evolution in Employer’s work flow, I find that the originally certified or recognized separate units have been merged.

It is undisputed that the vast majority of NABET-represented employees work under Article A. The parties refer to Article A as the primary “unit” while other Individual Articles are considered “peripheral.” Article A wage scales are a frequent point of reference in side agreements concerning work that is not clearly covered in the Master Agreement. Today, many of the Individual Articles function less as a means of defining distinct units and more as placeholders for classifications which were grouped separately for historical rather than current, practical reasons. The Employer’s editors were ultimately consolidated into the nationwide group of technical and engineering employees covered under Article A. Photographers are likewise covered under Article A. In 1990, years before the creation of the Content Producer position, the parties agreed on the terms of Sideletter 50, permitting employees covered by Newswriter articles H, M, and N to use equipment used by employees covered under Individual Article A, and permitting Article A employees to perform Newswriter work. Apparently, until the instant conflict over the treatment of the Content Producers, the parties have operated according to convenience with respect to the issue of separate units. Where classifications could be logically grouped for the purposes of working conditions, they have been grouped under the Individual Articles. When because of technological advances or other circumstances, the Employer wished to assign work to represented employees beyond the description in a particular Article, the parties bargained and resolved unique situations. In my view, as amplified below, the same should occur here.

B. The “Placement” of the Content Producers

I find that the Content Producer classification performs work that has historically been unit work and therefore, the position should remain in the unit. The record demonstrates that Content Producers who had prior positions at NBC continued to perform work that aligned to a significant extent with that of their unit work. Although the Employer introduced evidence indicating that its intent had been for Content Producers to perform a wide variety of tasks and have significant responsibility for production, the weight of the evidence demonstrated that those who had previously worked as photographers continued to do camera work (as they did when covered under Article A), newswriters continued to write (as they did under the newswriter Article covering their geographic location), and video journalists under “group 8” continued to perform their work, much as they did when they held their prior NABET-represented title. The

Employer's re-naming these employees "Content Producers," does not transform the unit work that they performed into non-unit work.¹⁵

In accord with the underlying Clarification Decision, I find that the Employer has re-titled the work of the former NABET-represented employees who were hired into the Content Producer position. They perform the "same basic function" in their roles as Content Producers that they previously performed in unit classifications and thus must be seen as remaining in the unit. *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001).

VI. The Agreement Between Local 11 and the Employer Does Not Bind the National Union.

The Employer asserts that the Local 11 Agreement is a bar to processing the instant petition by contending that the Employer already has an agreement covering the Content Producers. As discussed in the underlying Clarification Decision, neither the Union's by-laws nor the Master Agreement confer upon Local 11 the authority to bar future representation claims by NABET. The Master Agreement permits limited negotiations between Local unions and the Employer's local management to resolve general matters of contract administration such as transfers, travel arrangements, and grievance settlements. As detailed above, Local 11 has on at least seven occasions over the years reached agreements with the Employer on issues involving unit employees in New York, seemingly without the participation of the Sector. None of these agreements pertain to national issues of the sort raised by the instant petition.

Moreover, neither the Union's by-laws nor the Master Agreement permit Local 11 to unilaterally waive the Sector's right to claim representation of Content Producers, whether located in New York or elsewhere. Thus, the Local 11 Agreement is not binding on the Sector.

Finally, the Local 11 Agreement provides that "NABET-represented staff and daily hire employees who successfully apply for [Content Producer] positions should have the opportunity to decide whether to remain NABET-represented [staff]..." Further, "Any employment of NABET-CWA-represented employees to work for WNBC as Content Producers shall be on a no-precedent basis and shall not create any obligation to treat any other Content Producers or other employees as represented by the union or covered by any agreement between the parties." New employees hired into the Content Producer position do not become members of the Union covered by the contract, unless and until the Union is certified as their bargaining agent. Importantly, "This Agreement is made on a non-precedent basis, is without prejudice to the contractual positions of the parties and may not be cited in an arbitration or other legal proceeding, except one alleging a violation of this specific Agreement." And finally, "The parties agree to meet to discuss any issues arising out of the application of this Agreement."

Leaving aside for a moment that discussion of the Local 11 agreement is prohibited by its terms in this forum, when an employer has not applied the contract to the employees covered, and the union has not sought to administer it to them, the contract does not

¹⁵ "Calling a dog's tail a leg, doesn't make it a leg." Reminiscence of Abraham Lincoln. Allen Thorndike Rice, New York: Harper and Brothers Publishers, 1909, p. 242.

establish the existence of a stabilizing labor agreement. *Tri-State Transportation Co.*, 179 NLRB 310 (1969). Section 9(a) of the Act provides that “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.” Accordingly, as the Local 11 contract appears to be a “members-only” agreement, it cannot operate as a bar to the instant petition. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *G.C. Murphy Co.*, 80 NLRB 1072 (1949); *N. Sumergrade & Sons*, 121 NLRB 667 (1958); *Bob’s Big Boy Family Restaurants*, 235 NLRB 1227 (1978). Thus, even assuming Local 11 had the authority to enter into an agreement with national implications, this contract provides for coverage of some employees working as Content Producers, while denying others who were not former members, contract benefits. In my view, this constitutes a members-only application of this contract, and therefore, can have no effect on the processing of the instant petition.

VII. Conclusion

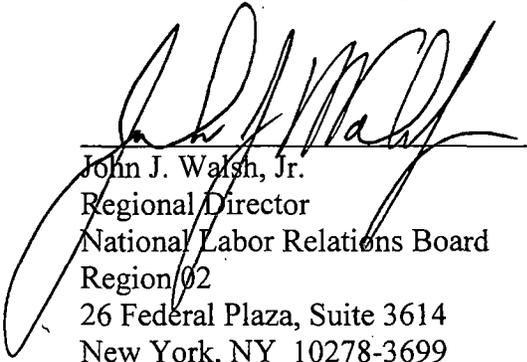
The NABET Sector’s request for unit clarification in Case 02-UC-000625 is granted. The NABET unit should be clarified to include Content Producers who are performing work historically within the NABET unit at the Employer’s New York, Los Angeles, and Chicago owned and operated local news stations. Specific placement of Content Producers within the Master Agreement should be in accord with the historical placement of the work performed or in accordance with a negotiated sideletter.

Right to Request Review

Pursuant to Section 102.67(c) Board’s Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board’s Rules and Regulations and must be filed by **December 27, 2018**.

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: December 13, 2018



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