NATIONAL LABOR RELATIONS BOARD

NBCUNIVERSAL MEDIA, LLC,	:	Case No. 02-UC-000625
Employer,	:	
vs.	:	
NABET-CWA (NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS – COMMUNICATION WORKERS OF AMERICA, AFL-CIO), et al.,	:	
Petitioners.	:	

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION BY NBCUNIVERSAL MEDIA, LLC

Dated: January 31, 2019

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NBCUniversal Media, LLC ("NBC" or the "Company") submits this Request For Review of the Regional Director's Supplemental Decision in this matter, pursuant to Rule 102.67 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"). For the reasons set forth below, the standard for Board Review is met and review should be granted with respect to the unit clarification petitions of the National Association of Broadcast Employees and Technicians – Communications Workers of America, AFL-CIO ("NABET," the "Union," or the "Sector") in this matter.

PRELIMINARY STATEMENT

Throughout their long and well-established seventy-plus year bargaining relationship, NBC and NABET have consistently recognized that the work of "producers" is not covered by the parties' Master Agreement. NABET has attempted to disrupt this long-established understanding by seeking to add Content Producers to its jurisdiction through this unit clarification proceeding. After the D.C. Court of Appeals deemed the Acting Regional Director's Initial UC Decision in this matter "incomprehensible" and a remand necessary, the Regional Director has now issued a Supplemental Decision which, although purporting to abide by the direction of both the Court of Appeals and the Board in their remand, in fact, entirely ignores the facts that were established at both hearings in this matter, misapplies precedent, and drastically interferes with the parties' carefully constructed and firmly established split between exclusively NABET covered work and work that is non-exclusive to NABET as negotiated through their multi-unit bargaining relationship.

In his Supplemental Decision, the Regional Director relied on the undisputed fact that the Content Producers perform some work traditionally covered by NABET's Master Agreement (such as certain newswriting, editing and video camera work) in addition to their core producer responsibilities (which have always been outside the scope of the Master Agreement). He,

however, completely ignores, discounts, or misinterprets a series of heavily negotiated agreements explicitly allowing the Company to assign non-union employees to perform this work that would otherwise be performed by union-represented employees. The record contains irrefutable evidence that NABET voluntarily agreed to these work assignment provisions and, whether looked at under a strict "waiver" theory or the more appropriate "contract coverage" approach, clearly gave up its right to claim jurisdiction over non-represented employees assigned this work (including Content Producers). By filing this action, NABET sought to circumvent these negotiated agreements, and the Regional Director's decision improperly allowed them to do just that, undermining the Board's long-standing policy of promoting mutual agreements and labor stability.

In his analysis of the multi-unit issue, the Regional Director not only ignored prior Board rulings that NABET represents multiple units at NBC, but he also failed to address the fact that there is no clear manifestation of the parties' intent to merge bargaining units, as required by Board law. The Regional Director committed clear error by completely disregarding overwhelming and unrefuted evidence of multiple units. He acknowledged the existence of but refused to give any persuasive weight to (i) dozens of references to multiple units in the parties' Master Agreement, including eleven separate scope of unit descriptions for each individual bargaining unit; (ii) a history of bargaining that clearly and unmistakably evidences the parties' intent to maintain multiple bargaining units, the pattern of which has not changed since 1951; (iii) prior Board and arbitrator rulings that the Master Agreement covers multiple units <u>and</u> where NABET argued that the Master Agreement covers multiple units; and (iv) unrefuted evidence detailing six separate bargaining unit certifications, one decertification and two raiding petitions.

This clear error was compounded by the Regional Director completely misinterpreting the relevance of the negotiated work assignment clauses allowing employees in one bargaining unit to perform work in another unit, which contrary to the Regional Director's illogical analysis, supports a finding of multiple bargaining units (not a single unit). He also inexplicably concluded that the parties grievance handling process within one specific unit somehow was evidence that other unrelated bargaining unit had merged into one.

The Regional Director also committed clear error on other key factual findings underlying his Supplemental Decision. For example, unrefuted evidence in the record proves that the Regional Director was completely incorrect when he posited that (i) there are almost no employees currently working under any individual article other than the A unit; (ii) the parties did not have a general agreement or practice regarding how they implemented contracts in instances where some but not all of the units ratified their contracts; and (iii) NABET's reference to multiple units in its own documents is "shorthand" and not intended to evidence multiple units, for which there is absolutely no record evidence in support.

The Supplemental Decision also, once again, improperly applies the Board's decision in *Premcor* to the facts of this case. Applying *Premcor* here is inappropriate both because it is based on the erroneous single-unit determination, and because neither *Premcor* nor any of its progeny involve facts where the parties' collective bargaining agreement specifically authorized the work in question to be performed by non-unit employees.

Finally, the Regional Director committed clear error in his analysis of the Content Producer Agreement with Local 11. The Regional Director ignored the fact that Local 11 had actual and apparent authority to bind the Sector, and his conclusion that the Content Producer Agreement was unenforceable was based on inapposite case law.

The Supplemental Decision, in sum, is riddled with clear factual errors and misapplication of Board precedent, presents significant and compelling issues for the Board to review its existing precedent, and, therefore, the Request for Review should be granted.

BACKGROUND

I. Procedural History

This long-running matter began in 2009. That year, various NABET local organizations, including Local 11 in New York, Local 41 in Chicago, Local 53 in Los Angeles, and Local 31 in Washington, D.C. (the "Locals") each filed unit clarification petitions, followed later by a separate unit clarification petition filed by the NABET Sector in December 2010; all looking to add Content Producers to the scope of NABET's representation at NBC.[1] (Exs. B-1(A), B-1(B), B-1(C), B-1(D), B-1(E).) The Locals' petitions sought to include the Content Producers in various existing NABET-represented bargaining units at four NBC-owned local television stations; NABET's petition did not specifically identify an individual bargaining unit. (*Id.*)

After the Board's consolidation of the cases and an extensive factual hearing, Acting Regional Director ("ARD") Elbert Tellem of NLRB Region 2 issued a decision on October 26, 2011, granting NABET's unit clarification petitions, and ordered NBC to bargain with NABET regarding the Content Producer position. *NBC Universal, Inc.*, Case No. 02-UC-000619 (Oct. 26, 2011) ("Initial UC Decision"). On September 25, 2013 the Board denied NBC's request for review.

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[1] Case Nos. 02-UC-000619, 02-UC-000625, 05-UC-000403, 13-UC-000417, and 31-UC-000323.

On October 28, 2013, NABET filed an unfair labor practice charge alleging a violation of Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "Act") based on NBC's refusal to bargain. *NBC Universal, Inc.*, Case No. 02-CA-115732 (Oct. 28, 2013). The Board issued a Decision and Order on April 7, 2014, as amended on May 2, 2014, enforcing the bargaining order.

On April 15, 2014, NBC petitioned the United States Court of Appeals for the District of Columbia Circuit for review pursuant to Section 10(f) of the NLRA. 29 U.S.C. § 160(f). The Board filed a Cross-Application for Enforcement. On February 23, 2016, the Court of Appeals denied both NBC's Petition for Review and the Board's Cross-Application for Enforcement, and remanded this proceeding to the Board. *NBCUniversal Media, LLC v. NLRB*, 815 F.3d 821 (D.C. Cir. 2016). The court instructed the Board to clarify its rationale underlying the Initial UC Decision, calling the Board's decision "incomprehensible," and explaining that the court could not "decipher . . . how the Board determined that all NBC employees represented by NABET are part of a single, nationwide bargaining unit." *Id.* at 823. The court also instructed the Board to "address the parties' dispute over the Local 11 agreement." *Id.* at 834.

After the Board remanded the proceeding to the Region 2 Regional Director,[2] NLRB Hearing Officer Rachel Feinberg conducted a supplemental factual hearing at Region 2 in New York from May 22–26, 2017.

On December 13, 2018, more than 14 months after the parties submitted their post-hearing briefs, Regional Director John J. Walsh, Jr. issued a Supplemental Decision, once again granting NABET's request for unit clarification. *NBC Universal Inc.*, Case No. 02-UC-00625, (December 13, 2018) ("Supplemental Decision").

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[2] *NBC Universal, Inc.*, Case No. 02-CA-115732, 2017 WL 971647, at *2 (Mar. 7, 2017).

II. Factual Background

NBC is a business with television, film, and cable operations throughout the country and world. (Initial UC Decision at 3, 16, 23.) The Company's local news operations at the Company's owned and operated stations are the subject of this proceeding. (*Id* at 3.)

The NBC/NABET collective bargaining relationship spans more than seventy years. (2011 Tr. at 80.) NABET was originally certified to represent NBC's technical employees in 1944. *Nat'l Broad. Co.*, 2-R-4732; 2-R-4733 (NLRB 1944). Over time, NABET increased the scope of its representation through a series of certified elections and voluntary recognitions of separate and distinct bargaining units. (Supplemental Decision at 19-20.)

Since 1951, NBC and NABET have negotiated a series of master collective bargaining agreements ("Master Agreement"). (Exs. J-1–18; *Nat'l Broad. Co.*, 114 NLRB No. 1, 3 (1955) ("*NBC*").) The Master Agreement is an umbrella agreement covering union-represented employees in multiple bargaining units at NBC's network news and sports units, live and videotape entertainment programming, and parts of the Local Media Division. (Exs. J-1–18.) The Master Agreement is divided into two parts: twenty-six General Articles applicable to all bargaining units, and fifteen Individual Articles that include separate contracts for each of the eleven bargaining units.[3] (Ex. J-18.) Of particular relevance here, the A Unit is the nationwide Engineering/technical unit whose responsibilities include, among other things, certain shooting

[3] The eleven bargaining units are: Engineering Department (Nationwide); Staging Services (Washington, D.C.); Building Maintenance (Chicago); News and News Special Events Writers (Chicago); Couriers (Chicago); Mail-Messenger and Duplicating (Chicago); Air Conditioning and Plant Maintenance (Los Angeles); Newswriters (Los Angeles); Newswriters (New York); Air Conditioning (New York); and Couriers (New York). (Ex. J-18.) Three of the fifteen Individual Articles are agreements to merge formerly separate units, and the remaining Individual Article addresses the assignment of new work. (Ex. J-18.)

and editing. The H, M, and N Units are the Newswriter Units in Chicago, Los Angeles, and New York, respectively. The Master Agreement also contains a number of Sideletters modifying the terms of the General and Individual Articles.

News producer positions are outside the scope of the Master Agreement.[4] (2011 Tr. at 294, 553–54, 562–63, 775, 1031–32, 1282, 2841, 3172, 3249–50, Local 11 Submission to Office of Appeals, dated August 12, 2010, p. 3.) A producer will conceive a story, research and develop it, determine who to interview, when and how to interview and film those interviewed, and supervise the writing, filming, and editing of a story. (2011 Tr. at 118–19, 173, 187, 350, 408, 449, 659–60, 780, 839–40, 944-45, 952–53, 1000, 1176, 1179, 1329, 1356, 1402, 1610–11, 1633–34, 1866–68, 1928–29, 2783–85, 2851, 52, 2898, 2936, 2967–68, 3172–80, 3184–85, 3315, 3445, 3476-77, 3663.) In short, a producer has both responsibility and accountability for all aspects of a local news story from beginning to end.

NBC negotiated the right under the Master Agreement to assign newswriting and certain shooting and editing to non-bargaining unit persons such as producers, reporters, and other on-air talent to streamline the workflow by taking advantage of numerous technological advances that made these tools accessible to non-technicians. (2011 Tr. at 511–12, 514, 520–24, 526, 529, 532–36, 563–64, 1277–78, 2581–82, 2691–93, 3259–60; Ex. J-18, Art. H at 2017 CPH_001409, Art. M at 2017CPH_001436, Art. N at 2017CPH_001449, Sideletters 11 at 2017CPH_001527, 70 at 2017CPH_001579.) Conversely, the Master Agreement also allows NBC to assign non-union producer functions to NABET-represented editors, photographers, and newswriters from the five different units under certain circumstances. (2011 Tr. at 431-32, 483-84, 1297-98, 1757,

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[4] The Master Agreement does however contain provisions addressing the parties' understanding if and when NBC assigns producer duties to NABET-represented employees.

2788-89, 2814-16; Ex. J-18, Sideletter 54 at 2017 CPH_001564, Sideletter 50 at 2017CPH_001562.)

NBC created the Content Producer position in an initiative to change the production of local news. (2011 Tr. at 355.) The Content Producer position is a producer position at its core. (2011 Tr. at 350.) Accordingly, as a producer, each Content Producer has full ownership and editorial responsibility for the creation of a story from inception to completion, across all content platforms. (2011 Tr. at 118–19, 168, 173, 187, 350–52, 364, 447–49, 455–59, 772–75, 846–47, 850–51, 952, 955, 1001, 1182–83, 1216, 1355, 1359–60, 1622–23, 1636, 1786–87, 2861, 3179–80.) Content Producers perform the non-NABET-represented work of conceiving, researching, developing and producing a story from start to finish. *Id*. Pursuant to the various provisions in the Master Agreement and along with other non-NABET represented employees, they also may do the additional tasks of non-linear editing, newswriting, and shooting with handheld digital cameras ancillary to the primary functions of the position. (2011 Tr. at 152, 350–51, 352, 952–53, 1001, 1182–83, 1216, 1335–36, 1355, 1359–60.) The performance of these additional tasks by producers on a non-represented basis are the result of negotiated agreements between NABET and NBC.

Given that the work functions of the Content Producer that go beyond the traditional producer work (certain newswriting, shooting and editing) are non-exclusive to NABET under the Master Agreement, NBC had the contractual right to assign this work to non-NABET represented employees and thus it classified the Content Producer position as non-union.

ARGUMENT

THE BOARD MUST GRANT REVIEW AS THE REGIONAL DIRECTOR'S DECISION PLACING CONTENT PRODUCERS IN A NON-EXISTING SINGLE BARGAINING UNIT RAISES SUBSTANTIAL QUESTIONS OF LAW AND POLICY, IS A DEPARTURE FROM BOARD PRECEDENT, AND IS BASED ON CLEARLY ERRONOUS FACTUAL FINDINGS

This matter clearly meets the standards under Rule 102.67 of the Board's Rules and Regulations for granting review of a Regional Director's representational decision.[5] As discussed in detail below, (i) the Regional Director has misapplied and departed from officially reported Board precedent; (ii) the Regional Director's findings on substantial factual issues are clearly erroneous on the record and the errors prejudicially affect NBC's rights; and (iii) the Regional Director's analysis and conclusions presents compelling reasons for the Board to reconsider important Board rules or policies.

As set forth below, the Supplemental Decision's conclusion – primarily resulting from the Regional Director's continued misplaced reliance on the *Premcor* clarification standard, failing to understand and give proper weight to the parties' firmly established contractual provisions, and a continued misunderstanding of the parties' bargaining structure – allows NABET to use the Board's process improperly to renege on its negotiated agreements that

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[5] Rule 102.67 provides that granting review is appropriate where:
(1) That a substantial question of law or policy is raised because of:
(i) The absence of; or
(ii) A departure from, officially reported Board precedent.
(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

clearly outline the scope of its jurisdiction. The Board should, thus, grant review to address the proper standards for the unit clarification petitions in light of these heavily negotiated contractual provisions, the Regional Director's clear legal and factual error in evaluating the structure of the parties' bargaining relationship, and the Regional Director's departure from the Board's traditional unit clarification standard.

I. The Supplemental Decision Is Antithetical To The Act's Long-Standing Policy Of Promoting Collective Bargaining And Labor Stability By Ignoring NBC And NABET's Well-Established Agreements That The Work Of Content Producers Is Contractually Excluded From Any NABET Bargaining Unit

With respect to the newswriting and technical elements of a Content Producer's job, NABET and NBC have agreed that this work is not within the exclusive jurisdiction of NABET. This has occurred through two different types of agreements. In some cases, NABET has explicitly ceded any claim over the work. In others, there has been an explicit agreement that non-union personnel may perform functions that would otherwise be within NABET's exclusive jurisdiction. Taken together, they establish that NABET has clearly waived any right to represent non-union individuals assigned to do that work.

A. NABET And NBC Have Agreed That The Newswriting, Editing, And Shooting Work Done By Content Producers Is Not Within NABET's Exclusive Jurisdiction

Content Producers can do non-linear editing based on Sideletter 14 of the Master Agreement, which the parties commonly call the "Computer Sideletter." The Computer Sideletter was first added to the Master Agreement in 1983 and made clear that, "Persons, whether or not covered by the Master Agreement, may operate computer systems in the performance of their work functions." (Exs. J-2, Sideletter 14; J-18, Sideletter 14 at 2017CPH_001535; 2011 Tr. at 520-21, 523.) Sideletter 70 was later added to the contract to further clarify and explicitly provide that computer-based non-linear editing (like the work done

by Content Producers) is not within NABET's exclusive jurisdiction. (Exs. J-5, Sideletter 70; J-18, Sideletter 70 at 2017CPH_001579; 2011 Tr. at 511–12, 521–23, 2690.) In fact, Sideletter 70 makes clear that NABET has jurisdiction of non-linear editing work *only* when the employee has no "editorial responsibility."[6] (Exs. J-5, Sideletter 70 § 2; J-18, Sideletter 70 § 2 at 2017CPH_001579.)

It then goes even further to provide that when NABET-represented employees are assigned non-linear editing work, "it shall not create a precedent or practice …any such assignment of NABET-CWA represented engineers alone shall not make that area in which such assignment is performed a technical area, or an area in which NABET-CWA represented engineers are deemed to be regularly or normally assigned." (Exs. J-5, Sideletter 70 § 5; J-18, Sideletter 70 § 5 at 2017CPH_001580.) The parties, thus, agreed that non-linear editing was not exclusively covered work, and even if it was assigned to unit members, that fact could not be used to support a claim for jurisdiction.

NABET retained jurisdiction over traditional linear editing. (2011 Tr. at 522-23.) As video tape technological advances made computer-based non-linear editing more common, NABET was concerned that (because of the Computer Sideletter) it would have no further jurisdiction over any editing. (2011 Tr. at 521-22.) In fact, during the parties' 1994 negotiations, which eventually resulted in Sideletter 70, the Union sought to reach an agreement allowing some of the non-linear editing performed by producers under the Computer Sideletter,

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[6] Sideletter 70 provides in relevant part, "Persons employed by NBCUniversal who are assigned by the Company to operate such non-linear computer editing systems to 'edit' material for broadcast as part of a program covered by the Master Agreement, *but who at no time are responsible for the editorial content of the program material which they are 'editing'* (hereinafter 'editorial responsibility'), shall be covered by the 'A' Contract when they perform such functions." (Exs. J-5, Sideletter 70; J-18, Sideletter 70 at 2017CPH_001579-80) (emphasis added).

to be assigned to bargaining unit employees. (2011 Tr. at 523–24.) The Company refused to extend the Union's jurisdiction to non-linear editing, but (as set forth in Sideletter 70) ultimately agreed to permit bargaining unit editors to be assigned non-linear editing work, at the Company's discretion. (2011 Tr at. 526.) So that there could be no doubt on the issue of the Union's lack of exclusive jurisdiction over this work, Day Krolik, the Company's then head of Labor Relations and chief spokesperson in those negotiations, made it clear (as does Sideletter 70 itself) that the only way the Company would agree to allow assignment of non-linear editing to bargaining unit members was with the Union's express and unequivocal agreement that doing so would not extend the Union's jurisdiction over that work or in any way limit the Company's right to assign such work to non-Union persons. (2011 Tr. at 524, 529; Exs. J-5, Sideletter 70, J-18, Sideletter 70 at 2017CPH_001579–80.) The Union gave that commitment, and it further conceded that non-linear editing systems were computers within the intended meaning of the term "computers" in the Computer Sideletter. (2011 Tr. at 521; Exs. J-5, Sideletter 70, J-18, Sideletter 70 at 2017CPH_001579–80.)

The parties have a similar history of negotiating over the Company's right to assign newswriting to non-union employees. Before 1994, the Union had (with some limited exceptions) jurisdiction over all writing of news copy at the Company in New York, Los Angeles, and Chicago, meaning that only Union-represented employees could perform that newswriting function. (2011 Tr. at 562.) In 1994, the Company bargained for and obtained the right to assign newswriting to non-Union persons so that producers no longer had to join the Union or work under the terms of the Master Agreement to do newswriting work for news

shows. (2011 Tr. at 563–64; Exs. J-5 § H2.1, § M2.1, § N2.1; J-18 § H2.1 at 2017CPH_001409, § M2.1 at 2017CPH_001436-37, § N2.1 at 2017CPH_001449.)[7]

A similar agreement was reached over shooting with certain digital cameras. During the parties' negotiations in 2002, NABET asserted that work with these digital cameras should be treated as being within the Union's exclusive jurisdiction. (2011 Tr. at 532-36.) The parties resolved the issue by agreeing to Sideletter 11, so that (just like non-linear editing and newswriting) the Company had the right to assign work on these digital cameras to either NABET-represented employees or non-union employees depending on the Company's operational needs.[8] As with the Computer Sideletter, in Sideletter 11 NABET clearly and unequivocally agreed that the Company has the right to assign this work to non-NABET persons if doing so makes sense in terms of the Company's operational needs:

> Non-unit persons (except production assistants, runners and interns) may use such cameras when such use is combined with (but which may or may not be performed simultaneously with) other work or functions which (i) such person normally performs, (ii) are outside the scope of the exclusive duties of a NABET-CWA-represented Engineering employee, and (iii) are in connection with the same program or same material.

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[7] Individual Articles H, M and N provide in relevant part, "(ii) Senior Producers in Network and Local News; the Assistant News Director, Producers (of shows) and Managing Editor in Local News, and Executive Producers in Network and Local News may write any such material for any use or purpose, and (iii) other Producers, including by not limited to, Field Producers, may also write any such material, but only for elements, portions, segments, inserts, stories or pieces arising out of or in connection with their producing work. It is understood that the exceptions in (ii) and (iii) apply to successor titles and persons performing similar functions." (Exs. J-5 § H2.1, § M2.1, § N2.1; J-18 § H2.1 at 2017CPH_001409, § M2.1 at 2017CPH_001436-37, § N2.1 at 2017CPH_001449.)

[8] Sideletter 11 provides in relevant part, "[T]he parties recognize that the Company may assign other than NABET-CWA-represented engineers to gather material for broadcast utilizing digital cameras…." (Exs. J-7, Sideletter 11; J-18, Sideletter 11 at 2017CPH_001527.)

(2011 Tr. at 534; Exs. J-7, Sideletter 11, J-18, Sideletter 11 at 2017CPH_001527.)

B. By Filing Its Unit Clarification Petitions, NABET Sought To Circumvent The Clear Agreements It Has Made With NBC Regarding The Scope Of Its Own Jurisdiction

The Regional Director's Supplemental Decision accreting Content Producers into a NABET bargaining unit failed to include any analysis of whether the parties' mutually negotiated work assignment provisions bar NABET from representing Content Producers. Moreover, the Supplemental Decision places the Board in the position of negating the clear agreements NABET has made with NBC regarding its own jurisdiction, thus disrupting the "benefit of the bargain" reached by the parties at the negotiating table. Since the 1980's and over the course of numerous Master Agreement bargaining cycles, NBC has made specific bargaining trades and reached agreement with NABET for the right to assign the very work at the center of this dispute to non-represented producers. (*See* Exs. J-2, J-5, J-7.) As is the case with any voluntarily negotiated agreement, NABET received and/or maintained a benefit for its represented employees in exchange for extending these jurisdictional easements to NBC. NABET's subsequent unit clarification petitions and the Regional Director's Supplemental Decision completely upend those deals and are in direct contrast to the Board's overwhelming policy for labor stability and to allow parties to reach their own agreements. *See Young Women's Christian Ass'n. of W. Mass.*, 349 NLRB 762, 763 (2007) ("It would be profoundly destabilizing to the collective-bargaining process to allow one party unilaterally to back out of its agreement, based on events that took place after the fact."); *see also Int'l Bhd. of Elec. Workers*, 342 NLRB 101, 107 (2004) ("Industrial peace under a collective bargaining agreement is best maintained where parties may confidently assume that its rules will be enforced as written, not trumped by vague generalities."); *Collyer Insulated Wire, A Gulf & W. Sys. Co.*, 192 NLRB 837, 843 (1971) ("We believe it to be consistent with the fundamental objectives of Federal law to

require the parties… to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures.”).

Indeed, the Board has consistently held that, as part of collective bargaining, a union may waive its right to represent a group of employees. *Briggs Ind. Corp.*, 63 NLRB 1270 (1945); *Lexington Health Care Grp., LLC*, 328 NLRB 894 (1999). Here, NABET’s petitions and the Regional Director’s decision deviate from this established policy. In fact, the Regional Director ignored the parties’ negotiated jurisdictional agreements when he failed to engage in any analysis of whether NABET had already waived its right to represent Content Producers.

Under current Board law, a union’s waiver of a statutorily protected right must be “clear and unmistakable.” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Such a waiver, however, can be established through both the explicit language of the agreements or the parties’ bargaining history. *Id.*; *Olean Gen. Hosp. & N.Y. Nurses Ass’n.*, 363 NLRB No. 62, *3 (2015). Whether a waiver is clear and unmistakable is “necessarily a question of fact that can be decided only upon the specific facts of the case.” *Hearst Corp.*, 113 NLRB 1067, 1072 (1955); *Chesapeake & Potomac Tel. Co. v. N.L.R.B.*, 687 F.2d 633, 636 (2d Cir. 1982), enforcing 259 NLRB 225 (1981) (“Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.”).[9]

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[9] Notably, the Board has repeatedly found that an employer’s proposal may serve as a representation waiver even if such proposal does not contain explicit language excluding the possibility of representation, when the proposal states that work would be assigned to non-bargaining unit employees. *See Taylor Warehouse Corp.*, 314 NLRB 516 (1994); *Bremerton Sun Publ’g Co.*, 311 NLRB 467 (1993); *ABC, Inc., Case Nos*. 2-CA-37923, 2-CA-37948, NLRB General Counsel Advice Memo (Oct. 23, 2007).

Here, the parties clearly contemplated whether or not the employees assigned under the work assignment provisions would be represented by NABET. First, the entire thrust of these negotiations was NABET's insistence that such work be assigned to union-represented employees and NBC's insistence otherwise. The resulting work assignment provisions were the agreed upon resolution to the underlying representation and jurisdictional dispute. (*See* Ex. J-18, H2.1 at 2017CPH_001409, M2.1 at 2017CPH_001436-37, N2.1 at 2017CPH_001449, Sideletter 11 at at 2017CPH_001527, Sideletter 14 at 2017CPH_001535, Sideletter 70 at 2017CPH_001579.)

Additionally, the discussions at these negotiations shows that the parties fully explored the issues and the union consciously waived its right to future representation. For example, during the parties' 1994 negotiations over NBC's proposal to amend Section 2.1 of the H unit contract to allow producers to perform newswriting functions, NABET bargaining representative Ray Taylor said, "The implication of your proposals for the future is no NABET [H] contract." (Exs. E-53 at 2017CPH_012848-61; 1994 Bargaining Notes, E-39 at 2017CP_007319.) He clearly contemplated and concluded that non-union producers would remain outside of the Union's jurisdiction.

Therefore, the parties' discussions at negotiations, the voluntariness of the agreements, and the plain language of the work assignment provisions serve as NABET's clear and unmistakable waiver to represent non-union employees assigned such work under the Master Agreement.

C. The Parties' Negotiated Agreements Require The Board To Apply A Contract Coverage Analysis To Conclude That NABET'S Own Conduct Bars Their UC Petitions

If the Board fails to find a clear and unmistakable waiver based on the parties' course of conduct, then this case calls for reevaluation of the standard to be used in determining whether a

union has, in fact, waived a statutory right to represent employees in this context. The "clear and unmistakable" standard has frequently been criticized by both Board members and various Courts of Appeals, particularly in evaluating agreements made as part of collective bargaining agreements, and it should be replaced with the more appropriate and workable "contract coverage" standard.

In contrast to a clear waiver requirement, contract coverage correctly places an emphasis on the existing, agreed-upon contract language and intent of the parties, rather than looking for any magic language that purports to create an express waiver. *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (Member Miscimarra, dissenting); *Baptist Hosp. of E. Tenn*., 351 NLRB 71, 72 (2007). We recognize that using contract coverage for the waiver of the right to file a representation petition may be an issue of first impression, but given the long history of the parties bargaining over the clear outlines of NABET's jurisdiction, it is highly appropriate to apply it to this matter.[10]

Indeed, Board members and Courts of Appeals have long advocated for a contract coverage rather than a waiver analysis in other contexts. In *Provena Hospitals*, 350 NLRB 808 (2007), although Board concluded that the union had clearly and unmistakably waived its right to bargain over the employer's performance improvement plan, then-Chairman Battista advocated for a contract coverage approach. He explained that, "[T]he issue is not whether the union has waived its right…. The issue is whether the union and the employer have bargained concerning

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[10] The Board, however, has long followed the *Wallace-Murray* doctrine, recognizing that the purpose of the Act is not served "to use... the unit clarification procedure to modify a unit which is clearly defined in the current bargaining agreement" during the term of a CBA. *Wallace-Murray*, 192 NLRB 1090, 1090 (1971) (based upon "the rationale that, where the parties have reached a contract, it would be disruptive for the Board to change that contract midterm." *Edison Sault Elec. Co.*, 313 NLRB 753, 754, 1994 WL 68425 (1994)).

the relevant subject matter." *Id*. at 817. The clear and unmistakable waiver standard has been repeatedly challenged by dissenting Board members who argue for the application of a contract-coverage approach instead. *See Cal. Offset Printers*, 349 NLRB 732, 737 (2007) (Member Schaumber, dissenting) ("Under a contract coverage analysis, if the subject at issue is 'covered by' or 'contained in' the collective-bargaining agreement… then a party has exercised its statutory right to bargain over the subject, and the question to be answered is simply one of contract interpretation. Here, I would find that the Current Agreement clearly covers the subject… and that several provisions, taken together, privilege the directive."); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836-37 (1999) (Member Hurtgen, dissenting) ("…the 'contract coverage' analysis, set forth by the D.C. Circuit… is the appropriate test to be applied… Under that analysis Respondent had the right, inter alia, to make fair and reasonable rules… Accordingly, Respondent was privileged to implement them."); *Exxon Research & Eng'g Co*., 317 NLRB 675, 676-77 (1995) (Member Cohen, dissenting) ("The parties bargained about the Thrift Plan, and the subject is covered by the applicable collective-bargaining agreements… the issue is *not* whether the statutory right to bargain has been waived. Rather the parties *have bargained* concerning the subject matter, and they have embodied their agreement in the contracts. The only issue is one of interpreting the terms of these contracts.").

The District of Columbia Circuit (which has reviewed this case once already) rejected the clear and unmistakable waiver standard in favor of the contract-coverage analysis in *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). The Court explained, in words that are particularly applicable to this matter, that one party should not be able to circumvent a negotiated agreement simply because they are unhappy with its terms:

> [N]either the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract

> and would prefer to negotiate a better arrangement. Quite the contrary, the courts are bound to enforce lawful labor agreements as written.

Id at 836. Indeed, the Court considered the waiver analysis "analytically distinct" from an inquiry about whether the parties have already bargained over a subject:

> A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.... Accordingly, questions of "waiver" normally do not come into play with respect to subjects already covered by a collective bargaining agreement.

Id. at 836-37 (quoting *Dep't of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)).

In *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992), the Seventh Circuit concluded that the union had waived its right to negotiate over an employer's policy regarding on- and off-duty drug and alcohol use because such employee conduct was "comprehended by" the CBA and therefore the concept of waiver was inapplicable. *Id*. at 935-37. The Court noted that: "Unions employ experienced contract negotiators, who do not need special rules of construction to protect them from being outwitted by company negotiators…the contract will control and the 'clear and unmistakable' intent standard is irrelevant." *Id.*

Though the issue of waiver versus contract coverage has typically been addressed in a failure to bargain context rather than unit clarification, it is directly applicable – and the contract coverage analysis is preferable – in the current circumstance. The Board has not yet had to address this issue. This is likely because once the parties have voluntarily agreed to work assignment provisions, they are recognizing that the work in question is no longer within the Union's exclusive jurisdiction, and it would be contrary to this voluntary agreement to turn around and seek to add these positions back in to the Union's jurisdiction. Indeed, failure to give

such agreements their full effect renders the Act's mandate to bargain collectively meaningless.

Importantly, adopting the contract coverage approach here will also prevent NABET and others from "forum shopping." The issue in dispute is whether NBC can assign functions covered by the Master Agreement to Content Producers. As this question is, as discussed above, highly dependent on the interpretation of the parties' Master Agreement, any such dispute over who the work is assigned to or the status of employees performing said work should be addressed under the grievance and arbitration provisions of the Master Agreement. (Ex. J-18, Art. XX, Grievances and Arbitration at 2017CPH_001333; *Collyer Insulated Wire, Gulf & Western Systems Co.,*192 NLRB 837, 839-40 (1971).)

The Board has clearly expressed its interest in deferring to the parties' agreed upon dispute resolution mechanisms whenever possible. *Sheet Metal Workers, Local 18 (Everbrite LLC)*, 359 NLRB 1095, 1096 (2013); *Collyer Insulated Wire, Gulf, & Western Systems Co.*, 192 NLRB at 839 (1971). Allowing these unit clarification petitions to be granted would be tantamount to the Board inviting unions to litigate contractual issues before the Board rather than through arbitration. Chairman Battista addressed this very issue in his *Provena* dissent, noting that the waiver doctrine, "poses [a] conflict between the Board and the grievance-arbitration process," and allowing unions to engage in forum shopping by forgoing arbitration and choosing the Board and its stringent clear and unmistakable waiver standard. *Provena Hosps*., 350 NLRB at 817–18.

The D.C. Circuit had a similar view in *McDonnel Douglas Corp. v. NLRB*, 59 F.3d 230 (D.C. Cir. 1995). There, in an unfair labor practice context, the union charged the employer with unilaterally altering the scope of the bargaining unit when the employer transferred certain

employees from one corporate division to another and reclassified them out of the bargaining unit. *Id.* at 231. The employer contended that the parties' collective bargaining agreement allowed them to transfer and reclassify the employees. *Id.* The D.C. Circuit held that the case should have been submitted to arbitration because the contract would likely settle the issue. *Id.* at 236.

Whether viewed as through a waiver analysis or adopting a contract coverage approach, the Board should find that where a union has voluntarily agreed that the work in question may be performed by non-unit employees, it cannot then seek to include those non-unit employees in the bargaining unit. In this case, where NABET voluntarily agreed to work assignment provisions, they should not be allowed to receive the benefit of negotiated agreements and then attempt to nullify those agreements by filing unit clarification petitions. Thus, review should be granted and the petitions should be denied.

II. The Regional Director Improperly Relies On *Premcor's* "Same Basic Functions" Standard, And In Doing So Irreparably Harms The Parties' Bargaining Relationship

The Regional Director departed from Board precedent by applying to the supposed single unit the clarification standard established in *Premcor*, 333 NLRB 1365 (2001) – whether Content Producers perform the "same basic functions" historically performed by employees of that supposed unit. (*See infra* Point III, at 23-38 for a detailed explanation as to why the Region Director's analysis of his single unit determination is clearly wrong.)

The facts and circumstances of *Premcor* and its progeny are materially distinguishable from the instant matter. Neither *Premcor* nor any cases applying the standard from *Premcor* discuss a circumstance where the work was assigned to the new position pursuant to a contractually agreed upon work assignment clause in their collective bargaining agreements. *See*

Premcor, 333 NLRB 1365 (2001); *Developmental Disabilities*, 334 NLRB No. 143 (2001); *Tarmac Am., Inc.*, 342 NLRB No. 107 (2004).

As discussed in detail above, NBC has the full contractual authority under the work assignment clauses of the Master Agreement to assign the work at issue to non-NABET represented employees, including Content Producers. (*See supra* Point I(A), at 10-13.) The entire premise of *Premcor* and its progeny is that the employers in those cases assigned work to non-bargaining unit employees for whom they had no authority – contractual or otherwise – under which to assign said work. The Regional Director committed clear error and acted contrary to the fundamental policy of prioritizing negotiated resolutions by erroneously applying *Premcor*. In doing so, he has allowed NABET to use the assignment of work to non-union employees under explicit agreements it made with NBC in an end run to automatically add those same employees to its bargaining units. Allowing a union to renege on its negotiated agreements like this would do irreparable harm to the parties' relationship and the collective bargaining process in general. If the Board allows the Regional Director's findings to stand, it will impede the parties from making future agreements on similar issues, NBC will, rightly, fear that NABET can simply undo such agreements through future Board proceedings. This is directly contrary to the purposes of the Act and the mission of the Board.

Further, the Regional Director failed to consider or determine whether Content Producers performed the "same basic functions" of any of the actual, specific bargaining units (*e.g.*, editor and camera operation work in the A Unit, newswriting in Chicago in the H Unit, newswriting in Los Angeles in the M Unit, or newswriting in New York in the N Unit).[11] As the Regional

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[11] The Regional Director mischaracterized NBC's position on the application of the *Premcor* doctrine. NBC has repeatedly stated that no evaluation of unit placement can be applied until the single verses multiple unit issue is resolved (*see* 2017 NBC Post-

Director treated functions belonging to multiple units as if they belonged to one, his analysis of whether Content Producers were performing the "same basic functions" as unit employees could not be correct even if *Premcor* were the appropriate analytical framework, which it is not.

Therefore, the Board should not apply *Premcor*'s "same basic functions" standard to NABET's unit clarification petitions.

III. The Regional Director's Supplemental Decision Was Once Again Based On The Clearly Erroneous Finding That NABET Represents A Single Bargaining Unit At NBC

The Regional Director's finding that NABET represented a single bargaining unit is the linchpin in finding that Content Producers perform bargaining unit work. Without that finding, it is impossible to show that Content Producers belong in any one specific bargaining unit represented by NABET at NBC. Yet, that critical finding is patently erroneous both on the law and the facts.

A. The Regional Director Committed Clear Error By Departing From Board Precedent And Failing To Require A Clear Manifestation Of Mutual Intent To Merge The Bargaining Units

The burden of proof in this case was firmly on NABET – the party seeking unit clarification – to show that the parties have merged historically separate units. This is a critical point that the Regional Director completely failed to acknowledge. Indeed, a party claiming that groups of employees initially organized as separate and distinct units were thereafter consolidated into a single unit must present evidence of "unequivocal manifestation of an intent" to merge the units. *Am. Can Co.*, 109 NLRB 1284, 1288 (1954). That is, "[t]he Board does not find a merger in the absence of unmistakable evidence that the parties *mutually* agreed to

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Hearing Brief at 2)), not that the *Premcor* analysis only applies in the event there is a single overall unit. (Supplemental Decision at fn. 6.)

extinguish the separateness of the previously recognized or certified units." *Duval Corp.*, 234 NLRB 160, 161 (1978) (emphasis in original) (internal quotation marks and citation omitted). *See also Sambo's Restaurants*, 212 NLRB 788 (1974); *Remington Office Machs., Div. of Sperry Rand Corp.*, 158 NLRB 994, 997 (1966); *Dow Jones & Co., Inc.*, 142 NLRB 421, 424 (1963). The Regional Director failed to even mention, let alone try to distinguish or otherwise address, any of this firmly established precedent.

In its February 23, 2016, decision remanding these proceedings to the Board, the Court of Appeals described the "wholistic approach" under which the single versus multiple unit issue should be decided. *NBCUniversal Media*, 815 F.3d at 830. Citing Board precedent, the court found that, under this approach, "when a unit clarification proceeding involves a 'master agreement' covering a number of divisions of a company, the parties' bargaining history and the structure of their agreement are always relevant." *Id.* at 834. The court focused in particular on three Board decisions addressing the issue: (i) *Columbia Broadcasting System*, 208 NLRB 825 (1974) ("*CBS*"); (ii) *National Broadcasting Co.*, 114 NLRB No. 1 (1955) ("*NBC*"); and (iii) *American Broadcasting Co.*, 114 NLRB 7 (1955) ("*ABC*").[12]

The discussion of contract language and bargaining history in these cases was identified by the Court of Appeals as a model for the Board's analysis in this case.[13] The Board in *CBS*, for example, found that a single unit existed, based on factors such as: (i) centralized bargaining; (ii)

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[12] Though the Court of Appeals did not specifically instruct the Board to address the *ABC* case, the court identified it, along with *NBC* and *CBS*, as instructive to the analysis in the current matter.

[13] On March 7, 2017, the Board remanded the case to the Regional Director for further analysis in light of the Court of Appeals' decision. *NBC Universal, Inc.*, 2017 WL 971647, at *2. In its Order, the Board also endorsed the "wholistic approach" followed in *CBS*, *NBC*, and *ABC* as "appropriate to address the single versus multiple unit issue." *Id.*

the contract's inclusion of a clause indicating that the parties intended the unit to include all employees covered by the master agreement, and allowing for the expansion of that unit; and (iii) that the "local supplements" to the master agreement "do not even purport to modify the 'unit' as provided in the [master] agreement." *CBS*, 208 NLRB at 826. The Board also distinguished previous cases in which multiple units were found by listing several factors present in those cases that were absent in *CBS*: (i) use of the term "units" in the contract; (ii) descriptions of each "unit"; (iii) absence of a significant history of joint bargaining; (iv) bargaining through the years over a varying number of employee groups, for whom "the union was able from time to time to demonstrate majority status"; and (v) the "existence of separate agreements with no master agreement or recognition clause expressing the intention to merge separately certified units into a single bargaining unit." *Id.* at 826.

In *NBC* and *ABC*, however, the Board found that multiple separate bargaining units existed despite the occurrence of centralized bargaining over a single master agreement. In *NBC*, the Board considered many of the same factors discussed in *CBS*, as well as: (i) the inclusion in the master agreement of both "general sections" and "individual sections," with the latter describing "each bargaining unit"; (ii) separate "scope of unit" clauses; and (iii) seniority provisions referring to "unit seniority," measured as length of service in "the unit in which the employee is employed." *NBC*, 114 NLRB at 2–4. The Board in *ABC* noted similar elements of the parties' contract, as well as the fact that the contract had been negotiated and administered "on the basis of separate units." *ABC*, 114 NLRB at 9; *see also, e.g.*, *Remington Office Machs.*, 158 NLRB at 995–96 (giving weight to, *inter alia*, "the Employer's resistance to bargaining with respect to any unit in which the Union did not continue to enjoy majority status").

Instead of applying this Board precedent, as specifically instructed by the Court of Appeals and the Board, the Regional Director disregarded the Board's precedent in *American Can*, *NBC* (which involved the Master Agreement), and *ABC* (which also involved a similar agreement). He admitted that he found "no language explicitly announcing an 'intent to merge,'" but otherwise did not address Board precedent requiring a clear manifestation of mutual intent to merge separate units. (Supplemental Decision at p. 22.) The Regional Director explicitly and summarily rejected the Board's previous ruling that the NBC-NABET Master Agreement was comprised of multiple units in *NBC*, by concluding that it was "not controlling" because of the "subsequent decades of bargaining and changes in the parties' treatment of employees under the Master Agreement since that time."[14] (Supplemental Decision at fn. 4.) However, as discussed below, the Regional Director's analysis of the parties' long bargaining history under the Master Agreement that led to that conclusion is deeply flawed.

B. The Regional Director's Legal And Factual Analysis Of The Single Vs. Multiple Unit Issue Is Clearly Erroneous

As part of his "wholistic analysis," the Regional Director appears to have developed a balancing test, looking at seven separate factors and categorizing those factors in to supporting, not supporting or neutral on the question of whether the bargaining units have been merged. Each of his conclusions, however, is rife with error. He erroneously concluded that three of the factors – the parties' Master Agreement, their bargaining history, and the grievance procedure – support a single-unit determination. He also, somehow, determined that numerous prior Board decisions and arbitration awards provided no weight on the question, and the long history of

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[14] Additionally, two separate NLRB Regional Directors stated that NABET represented multiple units at NBC. (Ex. E-79 at 2017CPH_013873; Ex. E-86 at 2017CPH_013897).

Board-certifications of separate units provided "neutral" evidence. (Supplemental Decision at 17-20.) He also, inexplicably, concluded that, while the parties' ratification process and the Union's own documentation repeatedly stating that it represented multiple separate bargaining units did support a finding of multiple units, these facts were not significant. (Supplemental Decision at 16, 20–21.)

(i) The Master Agreement

The Regional Director's analysis of the parties' Master Agreement is completely illogical.

The Regional Director spends pages in his decision describing the undisputed structure of the Master Agreement, which contain General Articles, Individual Articles and Sideletters. Throughout that description, he repeatedly recognizes, as he must, that the parties have identified that NABET represents multiple bargaining units. In fact, there are over thirty-one separate references to individual "units" in the Master Agreement and separate unit descriptions in each of the Individual Articles. (Ex. J-18; Supplemental Decision at 8.)

Indeed, the Regional Director concluded that there was "significant language in the Master Agreement indicating the existence of multiple units." (Supplemental Decision at 12.) He, however, considered that this "significant language" was only "superficial." (*Id.*)

He reached this conclusion for two main reasons – first that there were a number of provisions that allowed employees in one bargaining unit to perform work in another bargaining unit and second that there "are almost no employees currently working under any Individual Article other than [the] A [unit]." (*Id.*) The first completely misunderstands the structure and purpose of the Master Agreement and its various Sideletters. The second is just outright wrong.

Throughout their relationship, while agreeing to merge certain specific bargaining units and allowing for cross-unit work assignments, NABET and NBC have meticulously maintained the Master Agreement's multiple unit structure. (Ex. J-18.)

First, NBC's success in achieving operational flexibility with its workforce does not magically merge separate bargaining units into a single unit. Contractual agreements allowing employees to work across units do not evidence merged units any more than a contractual agreement to subcontract bargaining unit work would mean that the bargaining unit ceases to exist. In fact, that the parties agreed to various work assignment provisions without merging the units—despite the parties having demonstrated that they knew the process by which to merge units—actually serves to highlight the multiple unit structure. (*See* Ex. J-18, Sideletter B-1 at 2017CPH_001395 (merging Bargaining Unit B into Bargaining Unit A).)

Next, the Regional Director is simply wrong that the A unit is currently the only unit under which NABET-represented employees work. While *some* of the bargaining units covered by the Master Agreement have no current employees, there are employees in five units other than the A unit, two of which are newswriter units (particularly relevant to the Content Producers). (*See* 2017 Tr. at 84–87.) The Los Angeles newswriters M unit has nine employees, and the New York newswriters N unit has approximately eleven. (2017 Tr. at 86, 390-91.) Additionally, the C unit has two employees, the K unit has one employee, and the P unit has approximately twenty employees. (2017 Tr. at 86, 386, 390.)[15] It is critical that the Regional Director repeats and

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[15] The fact that these units contain fewer employees than the A unit is entirely irrelevant. The Board certifies units with as few as two employees and allows employers to voluntarily recognize units containing a single employee. *P. & C Lighting Ctr.*, 301 NLRB 828, 833 (1991). Board law does not distinguish between a two person unit and a 100 person unit for the purpose of applying Board law.

relies on this incorrect conclusion on a number of occasions to support his single unit finding. (Supplemental Decision at 2, 9, 12, 23.)

It was thus clear error for the Regional Director to ignore the clear manifestation of the parties' intent by failing to account for the explicit language in the Master Agreement.

(ii) The Parties' Bargaining History

The Regional Director concluded that bargaining history evidenced a single unit because "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." (Supplemental Decision at 22.) He inexplicably credited "reams" of documents showing the bargaining teams' structure, but fails to acknowledge the voluminous records NBC submitted into the record showing the explicit history of the parties' maintaining the separateness of the units while engaging in collective negotiations.

1. Contrary To The Regional Director's Decision, Board Precedent Provides That Centralized Bargaining Does Not Create A Merged Bargaining Unit

The fact that the parties engaged in centralized bargaining is simply not dispositive. First, to the extent the parties engaged in centralized bargaining, they have always engaged in such bargaining. (*See* 2017 Tr. at 330.) The continuation of this well-established practice that began with the onset of the Master Agreement cannot be evidence of a single, integrated unit now. Second, the Board has clearly held, and the Regional Director fails to recognize, that centralized bargaining for the convenience of the parties does not necessarily indicate intent to merge multiple units into one. *See Remington Office Machs.*, 158 NLRB at 996 (where the Board concluded that centralized bargaining for convenience did not evidence an intent to merge multiple units into one); *Univac Div., Sperry Rand Corp.*, 158 NLRB 997, 1002 (1966) (same); *Dow Jones*, 142 NLRB at 424 (same).

2. *The Regional Director Failed To Give Any Weight To NABET's Own Efforts In Bargaining To Maintain Separate Units*

NABET officials have been entirely consistent and direct about their view that the Union represents multiple bargaining units at NBC. For example, in 1967, Ed Lynch, then-President of NABET, opened the negotiations by stating, "NABET is the collective bargaining agent for the *several separate* and appropriate *units* . . . Each unit is and remains a *separate unit* for purposes of collective bargaining." (Ex. E-31 at 2017CPH_013699) (emphasis added). In the 1973 negotiations, Lynch stated that the Union had a "number of *separate Units* as to *which we'll bargain separately*," and that "[e]ach Unit is and remains [a] *separate Unit* for bargaining purposes." (Ex. E-33 at 2017CPH_013742, 46) (emphasis added). A few years later, in 1976, after NBC's Richard Goldstein stated, "An individual agreement is a whole separate bargaining unit," Lynch responded, "No question." (Ex. E-35 at 2017CPH_002183.) During the 1983 negotiations, Lynch asked the NBC negotiators directly if they wanted to merge the separate, multiple bargaining units into a single unit: "Do you have any interest in our representing one overall bargaining unit?" (Ex. E-36 at 2017CPH_003194.) NBC's Bob Hurford responded, "Not much." (*Id.*)

3. *The Regional Director Failed To Acknowledge That The Parties' Bargaining Proposals To Each Other Have Been Consistent With Multiple Units*

The Regional Director also ignored that the parties' have explicitly structured their proposals to address the separateness of the units. The proposals were clearly separated into proposals for the General Articles and proposals for each individual contract. (*See* Exs. E-52 at 2017CPH_011925, 2017CPH_0112453; E-53 at 2017CPH_012508, 2017CPH_012840; E-45 at 2017CPH_009456–57; E-132 at 2017NABET_000635.)

Often, the parties would make the exact same proposal for more than one unit. For example, in the 2001 negotiations, NBC made two separate proposals for the same change to the E and the K Units. (Ex. E-55 at 2017CPH_013256–57.) Similarly, in the 2009 negotiations, NBC made three separate newswriter proposals—one for each of the three newswriter bargaining units—that included the same changes to each of the three newswriter contracts. (Ex. E-57 at 2017CPH_013410–12.) Clearly, if there was only a single unit, there would be no need for this type of redundancy.

4. The Regional Director Failed To Address That The Bargaining History Was Clear That Bargaining Units Are Added, Removed, Or Merged Only With Specific Agreement By The Parties

Since the 1950s, units have been added, removed, or merged only when the parties did so consciously and intentionally. As Mr. Ortiz testified, "[W]hen the parties want to merge something, we merge it explicitly." (2017 Tr. at 389.) The same can be said for adding and removing units. (*See*, *e.g.*, Exs. E-116 at 2017CPH_014007 (discussing the removal of the D and N Units in 1964); E-47 at 2017CPH_009756–58 (NBC's 1970 proposals to remove the I and J Units); E-110 at 2017CPH_013952–53, 79–82 (the parties agreed in 1967 to add the San Francisco Newswriters Unit to the Master Agreement).) For example, NABET has perennially proposed to merge the C Unit (Staging Services – Washington, D.C.) into the A Unit (Engineering) (most recently in 2009), but NBC has continually rejected the proposal, and as such, those two units remain separate. (Exs. E-68 at 2017CPH_013827; E-162; 2017 Tr. at 368.)

The Regional Director's Decision makes absolutely no mention of this. Yet, the parties' extensive history of proposing and, when appropriate, agreeing to merge units proves that they knew they were dealing with separate bargaining units and that it would be unlawful for either side to make jurisdictional changes without a negotiated agreement. *See Metro. Life Ins. Co.*, 172 NLRB 1257, 1258 (1968) (adjustments to the jurisdiction of units that shifted employees

from one unit to another proved that the units "maintain[ed] their separate identities" and that there was "no clear mutual intent to effect the consolidation of the certified units into a single overall unit").

5. The Regional Director Made No Reference To The Fact That The Parties Have Conducted Separate Bargaining For Separate Units Under The Master Agreement

Although the Regional Director ignored the fact, the hearing testimony and bargaining notes showed that the parties often held separate meetings in different locations with different personnel to deal with separate units. (2017 Tr. at 213–18.) NBC presented undisputed evidence of this occurring in 1967, 1987, 1990, 1994, and 1998. As both Mr. Krolik and Mr. Ortiz testified, nothing about this general bargaining structure has changed in any significant way during their many years with NBC. (2017 Tr. at 213, 279–80, 330.)

6. The Regional Director Improperly Relied On The Local Nature Of The Parties' Supplemental Agreements

The Regional Director acknowledged that there were numerous supplemental agreements reached between NBC and NABET and its Locals over the years, but misunderstood the purpose and role of these various supplemental agreements. Many of these agreements were limited in geographic scope and covered only part of the nation-wide A unit, because the matters only involved employees in a specific geographic area. The Regional Director somehow turned this fact into support for the idea that where local bargaining occurred *for other bargaining units* it was only for the convenience of the parties, and had nothing to do with the separateness of the units. This is bootstrapping at its best. The fact that the parties have had local discussions in one nationwide unit, cannot in any way lead to the conclusion that other individual negotiations and agreements involving geographically localized bargaining units are somehow irrelevant as evidence.

(iii) The Ratification Process

The Regional Director properly found that the Union's ratification process, which is undisputedly done on a unit-by-unit basis (not by an overall vote of all the employees NABET represents), weighs in favor of a multi-employer structure. (Supplemental Decision at 21.) He, however, failed to give the evidence sufficient weight, because he erroneously concluded that there was no evidence showing, "any general agreement or practice" regarding the "implementation in the instances where some Articles have been ratified later than others." (Supplemental Decision at 17.) This is simply untrue. The Regional Director failed to acknowledge that NABET itself filed charges against NBC in 1967 when the NBC took an "all or nothing" approach to bargaining ratification. (Ex. E-81 at 2017CPH_013876-92.) This, combined with the evidence cited by the Regional Director of the 1994 implementation of agreements that were ratified while others were not, shows a clear understanding by both parties of the multi-unit nature of the relationship.

(iv) Grievance Processing

The Regional Director applies the same nonsensical approach to grievance processing as the local agreements discussed above. He somehow concludes that because A unit grievances are often handled on a local basis, this means there is no such thing as separate bargaining units for other work covered by the Master Agreement. (Supplemental Decision at 17, 21.) Again, how grievances are handled in the nationwide A unit has absolutely no bearing on the whether the parties have agreed to merge other separate and distinct units *with that A unit*. Giving this any weight in favor of a single unit was, thus, clear error.

(v) Arbitration Awards

The Regional Director concluded that the evidence of references to multiple units in arbitration awards and arbitration awards deciding that the Master Agreement cover multiple

units were "neutral" to his analysis, and then he concluded that such awards should be "accorded…little weight" because those decisions did not rely on the same factors the Board uses in determining that the Master agreement covers multiple units. (Supplemental Decision at 19, 21.) Again, the Regional Director's conclusion is based on clear error.

The Regional Director's reasoning fails to address the fact that in 1978, NABET argued before Arbitrator Thomas Roberts that the A Unit and the M Unit were separate and distinct bargaining units. (Ex. E-165 at 2017CPH_014210.) Similarly, in 1980, Arbitrator Richard Bloch issued an arbitration award over NABET's contention that because the A Unit and N Unit had separate scopes of jurisdiction, NBC had no right to assign unilaterally employees in one unit to do work covered by the jurisdiction of a different unit. (Ex. E-164 at 2017 CPH)_014191.) The arbitrator agreed with NABET. (*Id* at 2017CPH_014196-98.)

It is well-established that arbitrators are in the best position to understand the intent of the parties and meaning of collective bargaining agreements. The complete dismissal of these decisions further compounds the Regional Director's error.

(vi) Recognition and Board Certifications

Both the Court of Appeals and the Board specifically directed the Regional Director to examine the effect of voluntary recognitions and Board certifications on the question of multiple unit status. The Regional Director, in turn, incomprehensibly concluded that even though NBC presented significant evidence that "separate certifications suggest multiple units," the parties' history of recognition and Board certifications is "neutral" to the question. (Supplemental UC at 20.)

He somehow characterized as "neutral" the unrefuted evidence detailing six separate bargaining unit certifications for units covered by the Master Agreement, one decertification of a unit that had been covered, and the handling of two "raiding" petitions involving NABET

bargaining units covered under the Master Agreement. (Exs. E-69-71, 73-75, 78, 82, 84, 87-88; J-18 at 2017CPH_00146; J-2 at 129; *NBC*, 114 NLRB 1 (1955).)

The Regional Director claims that "although separate certifications suggest multiple units," he could not "generalize this evidence regarding the overall relationship." That, however, is exactly what can be done. NABET sought certification of separate units, and the Board certified them. It is beyond comprehension on how the Regional Director can simply dismiss the Board's own actions as evidence in this case.

The Regional Director's haphazard analysis in the face of the Court of Appeals' clear instruction to review and consider the parties' certification process evidences nothing short of clear error and cannot stand.

(vii) Union Documents

NBC submitted into evidence several documents in which NABET itself referenced multiple units, including communications to its members and to NBC. For example, before bargaining began in 1987, 1990, 1994, and 2009, NABET sent letters to NBC in accordance with Section 8(d) of the NLRA, terminating the prior Master Agreement. (Exs. E-103–105, E-108.) In every such notice, the Union stated that it was providing notice of termination of "all other contracts covering any employees of NBC." (*Id.*) Similarly, the NABET negotiating committee's rules and guidelines for 2001 stated that, "[t]he contract ratification vote shall be conducted by secret ballot on a unit-by-unit basis." (Ex. E-155 at 2017NABET_000028.)

Given the evidence, the Regional Director had no choice but to conclude that the union documents referencing multiple units "tends to indicate the existence of multiple units." (Supplemental Decision at 21.)

However, he immediately and inexplicably discounted the weight of the evidence by determining that, "[T]he Union's communications referencing 'units' appears to be a shorthand

reference to certain terms and conditions, and not necessarily a limitation on scope." (Supplemental Decision at 21.) The Regional Director provided no explanation as to the basis of his conclusion that the references were "shorthand," and the Union submitted absolutely no evidence, testimony or otherwise, that provided such explanation for its references to "units." In fact, the Union did not even attempt to demonstrate that its references to units indicated anything other than the existence of multiple units. Therefore, the Board must conclude that the Regional Director committed clear error.

C. The Regional Director's Application Of The Facts To The Board's Decisions In *CBS*, *NBC*, And *ABC* Was Erroneous

On Remand, the Court of Appeals instructed the Board (and the Board instructed the Region) to explain the relevance of the factors in *CBS* and to address the Board's previous holding in the 1955 *NBC* case. In response, the Regional Director misapplied the *CBS* factors, dismissed Board precedent in *NBC* finding the Master Agreement covered multiple bargaining units, and ignored *ABC* completely.[16]

The Regional Director's analysis of the four factors identified in *CBS* as evidence of multiple units defies logic. He acknowledged that the first factor – references in the master agreement to units, and a description of each separate unit -- is present in the parties' Master Agreement. (Supplemental Decision at 22.) But then, without explanation, he completely discounts this overwhelming evidence because the Master Agreement also has a number of

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[16] Further, the Regional Director's reliance on *GM, Cadillac Motors Car Division*, 120 NLRB 1215 (1958) for his single-unit finding was misplaced. In *GM*, the Board found that from the very outset of their relationship, the parties completely disregarded separate certifications in their 120 single-plant units in both their bargaining and ratification processes. *Id.* at 1218-20. Here, the separately-certified bargaining units in the Master Agreement retain their significance both in bargaining and in the ratification process. As described above, separate proposals were made for each unit. Indeed, the Regional Director admitted that the unit-by-unit ratification process supported a finding of multiple bargaining units. (Supplemental Decision at p. 17.)

Sideletters that modify both the General and Individual Articles. (*Id.*) Neither *CBS*, *NBC*, *ABC* nor any other controlling Board law address the presence of similar Sideletters, and there is nothing whatsoever about these letters that contradicts the multi-unit structure of the Master Agreement.

In evaluating the second factor – joint bargaining – the Regional Director ignores the overwhelming evidence that bargaining had been on a coordinated basis and at the convenience of the parties from the beginning of the relationship and through the next seventy-plus years the parties intentionally and meticulously maintained the multi-unit bargaining structure. (*See supra* Point III(B)(ii), at 29-32.)

The Regional Director also ignores the language of the third factor – bargaining through the years over a varying number of employee groups, for whom "the union was able from time to time to demonstrate majority status." Instead, he unilaterally decides, again without explanation and based on an assumption clearly refuted by record evidence, that the number of employees in each respective unit is a more appropriate measure (than the factors endorsed by the Court of Appeals), and evidence of a single unit. He also discounted the significance of the Board's repeated certifications of separate units and the fact that the Board has found on multiple occasions that the NBC-NABET relationship consisted of multiple separate bargaining units.

Finally, consistent with the rest of his analysis, the Regional Director applied the wrong (and unrelated) facts to the fourth factor – the "existence of separate agreements with no master agreement or recognition clause expressing the intention to merge separately certified units into a single bargaining unit." (Supplemental Decision at 22.) After acknowledging that, "there is no language explicitly announcing an "intent to merge," the Regional Director again cites the Sideletters as evidence of a single unit. (*Id.*) In particular, he cites as support for his single unit

theory the parties' written agreements allowing employees to work across jurisdictions from one unit to the next. (*Id.*) As discussed above, however, these Sideletters are some of the best proof that multiple units exist. In short, if the Master Agreement only covered one unit, there would simply be no need for such Sideletters—a point the Regional Director fails to acknowledge in any way.

The Regional Director's analysis of the single verses multiple unit issue is clearly erroneous: it fails to follow Board precedent, ignores the clear instruction of the Court of Appeals, and makes a mockery of the facts of this case, and thereby the meticulously documented and negotiated relationship between NABET and NBC.

IV. Under The Traditional Accretion Analysis, Which The Regional Director Should Have Used, Unit Clarification Is Inappropriate

The Board's policy on accretion is restrictive and grants accretion only in those very rare instances where the targeted employees in a unit clarification proceeding have "little or no separate group identity and thus cannot be considered to be a separate unit" and where the community of interest between the target employees and the existing bargaining unit is "overwhelming." *See Safeway Stores*, 256 N.L.R.B. 918 (1981). Under the Board's two-part overwhelming community of interest standard, the Union's petitions therefore must be denied if either the employees in question have that separate group identity or if they do not have that overwhelming community of interest with the existing bargaining unit employees. *Safeway Stores*, 256 N.L.R.B. at 918. This accretion standard takes into account the union's rights under the Act, the employer's rights under the Act, and the Section 7 rights of the employees in the new position. *Id.*; *see also Archer Daniels Midland Co.*, 333 N.L.R.B. 673 (2001).

With respect to separate group identity and the overwhelming community of interest, the factors to be considered in any unit clarification case involve the following: (1) the functional

integration of the groups involved, involving more than just interaction; (2) the management and supervision of the target group versus the existing bargaining unit group or groups (*i.e.*, do the groups have the same supervision or different supervision); (3) the places where the groups work physically; (4) the nature and level of interchange between the target employees and the employees in the existing bargaining unit; and (5) the collective bargaining history between the parties, including any historical exclusion of the target group from the existing bargaining unit or units. *See Milwaukee City Ctr.*, LLC, 354 NLRB. No. 77, 2009 WL 2998229, at *3 (2009); *Safeway Stores*, 256 NLRB. at 924. While all of these factors are important, the Board has held that common day-to-day supervision and significant employee interchange are especially critical to any finding of accretion. *Frontier Tel. of Rochester, Inc.*, 344 NLRB. 1270, 1271 (2005) (*citing E. I. DuPont de Nemours, Inc.*, 341 N.L.R.B. 607, 608 (2004)); *Gitano Grp., Inc.*, 308 N.L.R.B. 1172, 1174 (1992); *Super Valu Stores*, 283 NLRB. 134, 136 (1987).

The Content Producers in each city have their own separate group identity and the Union has failed to provide evidence that the Content Producers in any city have the requisite overwhelming community of interest with any of the separate bargaining units under the Master Agreement. Accordingly, under the required accretion analysis, the Union's petitions fail under both prongs of the Board's test.

A. The Content Producers In Each City Have Their Own Separate Group Identity

Content Producers in each city have their own separate group identity that allows them to function as a separate unit. (2011 Tr. at 958-59, 971-72, 1872-73, 1929-34, 2040-41, 2044-45, 2058-59, 3149-50, 3445.) At the 2011 hearings, Union and Company witnesses alike testified as to the strong separate group identity of the Content Producers in each city. (2011 Tr. at 352, 449, 749, 772–73, 811, 850–51, 955, 958-59, 971-72, 1872–73, 1929–34, 2040–41, 2044–45, 2558–

59, 2631, 2806–09, 2858–59, 2940, 3090–91, 3149–50, 3264, 3290–91, 3481, 3492, 3445.) Those separate group identities came about because of changes under the Content Center Model and the fact that they rely on each other and work together as a team under the same working conditions and with the same assignments. (2011 Tr. at 1872–73, 1929-34, 2040-41, 2044-45, 3090–91, 3149–50, 3179, 3381–82, 3445.) As a matter of law, once it is established that the targeted employees have a separate group identity and could therefore function as a separate bargaining unit – a point that is established beyond any question here and that the Union did not and could not counter or challenge – the Board's unit clarification standard calls for denial of the petitions. *Archer Daniels Midland*, 333 NLRB at 675.

B. The Union Did Not Show That The Content Producers Have An Overwhelming Community Of Interest With Any Of The Bargaining Units

In both 2011 and 2017, the Union failed to provide evidence that the Content Producers in any city have the requisite overwhelming community of interest with any of the bargaining units under the Master Agreement. The evidence showed that Content Producers have very little in common with any of the bargaining units, which is unsurprising given that it is a producer role. (2011 Tr. at 352, 364, 447, 850-51, 777-78, 955, 1622-23, 1636, 1786-87, 2861, 3179-78.)

With respect to the critical factors of common day-to-day supervision and significant employee interchange, the Union has presented no relevant evidence with respect to either of these critical factors. To the contrary, in 2011, multiple Company and Union witnesses testified that the Content Producers in each city and union-represented personnel in the A, H, M, and N units have separate supervision. (2011 Tr. at 344, 658, 845–46, 955, 2038, 2533, 2806, 2858, 3021, 3101, 3118.) There is also substantial evidence in the record that the union-represented photographers, editors, and newswriters do not carry the same editorial responsibilities and control as the content producers and therefore are not by any means similar to them or

interchangeable with them. (2011 Tr. at 293, 330, 352, 364, 772–75, 850–51, 955, 1622, 1636, 1765–66, 1786–87, 1805–09, 2861, 3179–80.) Again, simply because some union-represented employees may share a single function with Content Producers, does not make the groups interchangeable (as reflected by the record), in fact, there is very little interchange between the groups. (2011 Tr. at 772-75.) Finally and critically, as discussed in detail above, the bargaining history is patently clear that producers have been historically excluded by mutual agreement from NABET-representation, and the Master Agreement explicitly allows producers to do all the work in question on a non-represented basis.

Simply put, Content Producers do not share an overwhelming community of interest with any NABET-represented bargaining units, and the unit clarification petitions should have been denied for this reason.

V. The Regional Director's Decision That The Agreement Between NBC And Local 11 Is Not Binding Is A Departure From Board Precedent

The Regional Director again departed from Board precedent when he found that the Sector was not bound by the September 19, 2018 agreement between NBC and NABET Local 11 over Content Producers at NBC's New York newsroom ("Content Producer Agreement"). The Content Producer Agreement, signed by NABET Local 11 President Ed McEwan, provides that: (i) Content Producers at WNBC in New York, excluding those formerly represented by NABET who chose to remain NABET-represented, would not be covered by the parties' Master Agreement; and (ii) "NABET-CWA agrees that it will make no claims to represent any non-NABET-represented Content Producers employed by WNBC except in the event such employees elect NABET-CWA as their bargaining agent in an election supervised by the NLRB." (Ex. E-10.) Local 11 acted well within its authority in committing to the Content Producer Agreement with NBC because the Sector and Local 11 are joint bargaining

representatives, Local 11 had actual authority to enter into the agreement, Local 11 had apparent authority to enter into the agreement and even if Local 11 lacked such authority initially, the Sector's conduct after the agreement was executed constituted a ratification of the agreement.

A. The Content Producer Agreement Is Lawful And Enforceable Under Board Law

The Board has long held that a union may waive its right to represent a group of employees even if the waiver is not incorporated into the applicable collective bargaining agreement. *Briggs Ind. Corp.*, 63 NLRB 1270 (1945); *Lexington Health Care Grp., LLC*, 328 NLRB 894 (1999). An agreement not to represent certain employees, moreover, may bind a union even if the union is not a party to the agreement. *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969).

Here, the Content Producer Agreement does not require Local 11 to relinquish its right to represent Content Producers fully. The Agreement merely states: "NABET-CWA agrees that it will make no claims to represent any non-NABET-represented Content Producers employed by WNBC except in the event such employees elect NABET-CWA as their bargaining agent in an election supervised by the NLRB." (Ex. E-10.) Given that the Board will enforce agreements under which a union completely waives its right to represent a group of employees, and because the Content Producer Agreement requires even less of Local 11, the Content Producer Agreement is undoubtedly lawful.

B. The Regional Director Failed To Address That Local 11 Had Authority To Bind The Sector As A Joint Bargaining Representative

It is well settled that two or more unions may serve as joint collective bargaining representatives for a single unit of employees. *NLRB v. Nat'l Truck Rental Co.*, 239 F.2d 422, 425 (D.C. Cir. 1956); *see also* 29 U.S.C. § 159(a). Where a unit is jointly represented, one joint representative may negotiate and execute agreements that bind all joint representatives. *Tree-*

Free Fiber Co., 328 NLRB 389, 389 (1999); *Pharmaseal Labs.*, 199 NLRB 324, 325 (1972). The Board considers four factors to determine whether joint representation exists: (i) the parties' contracts; (ii) bargaining history; (iii) past interactions; and (iv) general industry practice. *Musical Arts Ass'n*, 356 NLRB 1470, 1479–85 (2011). The Board has acknowledged in particular the prevalence of joint representation in the context of national and local unions, calling a combination of national and local bargaining "commonplace." *Radio Corp. of Am.*, 135 NLRB 980, 983 (1962). Where a national union and its locals share representational duties, the Board does not require the joint representatives to expressly divide their responsibilities, instead allowing the parties to establish a "workable pattern of bargaining" that "accommodate[s] the interests of local and national bargaining." *Id.* Based on the record in this case, it is clear that before the Content Producer Agreement was executed, the conduct of the parties had established that the Sector and Local 11 were joint bargaining representatives of NABET-represented employees in New York.

There are numerous examples in the record of Local 11 negotiating agreements with NBC without any Sector involvement. For example, in 1989, Local 11's Vice President Calvin Siemer executed an agreement with NBC regarding vacation relief arrangements without any Sector involvement. (Ex. E-114 at 2017CPH_014002; 2017 Tr. at 238.) In 1991, Local 11 entered into an agreement resolving various grievances and, among other things, amending certain provisions of the Master Agreement's N Contract. (Ex. E-167 at 2017CPH_014214.) More recently, in the 2000s, Local 11 and NBC reached numerous agreements allowing NABET-represented employees to perform work under the terms and conditions established in the Master Agreement, on a non-precedent basis, which would otherwise fall outside NABET's jurisdiction. (Exs. E-168–171 at 2017CPH_014216-21.)

Testimony from the hearings further underscores the prevalence with which Local 11 would enter into agreements with NBC without Sector involvement. Angel Ortiz, Senior Vice President of Labor Relations Operations at NBC, testified that "these agreements were very par for the course," representing a consistent practice developed over the years whereby NBC would execute agreements with locals without Sector involvement. (2017 Tr. at 349–50, 363.) Day Krolik, NBC's former head of labor relations, similarly testified that "[w]e make many agreements with Local 11 officials and officials in the various other locals," adding that Mr. McEwan entered into agreements covering NABET-represented employees in New York "[f]requently, as did his predecessors, the previous presidents of Local 11." (2011 Tr. at 541, 547.) Andrew Herzig, then Executive Vice President for Labor Relations and Employment Contracts, echoed such testimony, characterizing the negotiations that lead to the Content Producer Agreement as the "type of discussion that we've had with the Union in general and with Local 11 in particular many times before." (2011 Tr. at 1037.) This unrebutted testimony, coupled with documentary evidence showing many agreements between Local 11 and NBC to which the Sector was not a signatory, clearly demonstrates the long-standing practice of the Sector and Local 11 jointly representing NABET workers in New York—something the Regional Director completely ignored in his decision.

C. The Regional Director Ignored The Fact That Local 11 Had Actual Authority To Bind the Sector

Even if Local 11 was not a joint bargaining representative, the Sector clearly bestowed actual authority on Local 11 to enter into agreements with NBC, including the Content Producer Agreement. Board law is clear that a union who is the exclusive bargaining representative for a unit of employees may delegate bargaining authority to another union. *Am. Tel. Co.*, 309 NLRB 925, 927 (1992) (citing *Kodiak Island Hosp.*, 244 NLRB 929 (1979)). The Board relies on

traditional common-law agency standards to determine whether one union has bound another. *Int'l Bhd. of Elec. Workers*, 121 NLRB 143, 146–48 (1958). "Actual authority" refers to an agent's power to act on behalf of a principal that is created by the principal's manifestation to the agent. *Local 9431, Commc'ns Workers of Am.*, 304 NLRB 446, 448 n.4 (1991) (citing Restatement 2d, *Agency*, § 7). That manifestation need not be express; it can also be implied, based on the circumstances. *Id.* For example, where a national union acquiesces to locals' bargaining, the locals act as authorized agents, even if the collective bargaining agreement specifies a national union as exclusive bargaining representative. *Braeburn Alloy Steel Div.*, 202 NLRB 1127 (1973); *Musical Arts Ass'n*, 356 NLRB at 1479. The record in this case shows that Local 11 clearly had actual authority to execute the Content Producer Agreement on behalf of itself and the Sector.

Local 11 entered into at least seven agreements with NBC similar to the Content Producer Agreement. These agreements include: (i) the "Telemundo Agreement" (2011 Tr. at 1054–56); (ii) the "Wake Up With Al Agreement" (2011 Tr. at 1057–59); (iii) the "Dr. Oz Show Agreement" (2011 Tr. at 1059–61); (iv) the "Michael Eisner Show Agreement" (Ex. E-169 at 2017CPH_014217; 2017 Tr. at 338–39, 373); (v) the "Maintenance Work Agreement" (Ex. E-170 at 2017CPH_014218; 2017 Tr. at 340–41); (vi) the "Patriots-Giants Preseason Game Agreement" (Ex. E-171 at 2017CPH_014219-21; 2017 Tr. at 342–44); (vii) the "August 14, 2008 Grievance Settlement Agreement" (Ex. E-175 at 2017CPH_014227-8; 2017 Tr. at 352).

In holding that Local 11 did not have authority to enter into the Content Producer Agreement, the Regional Director attempted to distinguish these seven agreements. He wrote:

> [N]either 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 . . . 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.

(Supplemental Decision at p. 24.) The Regional Director thus admitted that Local 11 *did* enter into agreements with NBC that extended beyond general matters of contact administration. However, he distinguished these agreements from the Content Producer Agreement by stating that these did not pertain to national issues. Yet again, the Regional Director's conclusion is clearly erroneous. The Content Producer Agreement *did not* pertain to national issues – it only barred the Union from seeking to represent the Content Producers *in New York* (except through a secret ballot election). Accordingly, there is no basis for the Regional Director's clearly erroneous finding that Local 11 did not have authority to bind the Sector when it entered into the Content Producer Agreement.

D. The Regional Director Failed To Address The Fact That Local 11 Had Apparent Authority To Bind the Sector

Even if Local 11 was neither a joint representative of NABET-represented employees in New York nor an agent with implied actual authority, it had apparent authority to execute the Content Producer Agreement.

Unlike actual authority, which depends on a manifestation by the principal to the agent, apparent authority is created through some manifestation by the principal to a third party that supplies a reasonable basis for the third party to believe the principal has authorized the agent to do the acts in question. *NLRB v. Donkin's Inn*, *Inc.,* 532 F.2d 138, 141 (9th Cir. 1976). "Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief." *Serv. Emps. Local 87 (West Bay Maint.)*, 291 NLRB 82, 83 (1988) (citing Restatement 2d, *Agency* §

27 (1958, Comment)). In determining whether apparent authority exists, the Board looks for two elements: (i) some manifestation by the principal to a third party, and (ii) a belief in the third party that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.*

The Sector manifested Local 11's authority to NBC by: (i) agreeing to language in the CBA delegating various responsibilities to the locals, and (ii) failing to repudiate agreements similar to the Content Producer Agreement between Local 11 and NBC over many years. Additionally, the record includes unrebutted testimony that NBC consequently believed Local 11 had authority to execute the Content Producer Agreement. Mr. Herzig, who personally negotiated the Content Producer Agreement for NBC, stated that he thought Local 11 was acting within its authority because "this agreement that we reached was part of our course of conduct since . . . shortly after I joined the company" and because Mr. McEwan, while negotiating the agreement, never suggested he did not have full authority. (2011 Tr. at 1040–41) ("it was never a question"). Mr. Krolik testified that the Content Producer Agreement was "[a]bsolutely" consistent with his understanding of Local 11's authority, and that he was "shocked and appalled" to discover NABET had taken the position that Local 11 lacked such authority. (2011 Tr. at 541, 548–49.) Mr. Ortiz echoed this testimony, stating that the locals' ability to bind the Sector in similar agreements with NBC was "why we had an agreement with Local 11, which was of the same ilk and type, having to do with the Content Producers of New York." (2017 Tr. at 363.)

Thus, it is clear that Local 11 had apparent authority to enter into the Content Producer Agreement and bind the Sector, and the Regional Director erred by ignoring this argument.

E. The Sector's Conduct After The Content Producer Agreement Was Executed Constituted Ratification Of The Content Producer Agreement

The Regional Director also ignored NBC's argument that the Union, by its conduct after the Content Producer Agreement was executed, ratified the agreement and is thus bound by it. The Sector did not repudiate the Content Producer Agreement until March 17, 2009, when the Sector launched its litigation strategy by filing an unfair labor practice charge asserting that Local 11 could not authorize the Agreement. (*NBC Universal, Inc.*, Case No. 02-CA-039208 (Mar. 17, 2009); 2011 Tr. at 1043.) This was despite ample opportunity to express any disavowal, including when the Sector met with NBC to negotiate a new master agreement. (2011 Tr. at 1085–87, 1137.) The Regional Director's failure to address this argument constituted clear error.

F. The Regional Director's Conclusion That The Content Producer Agreement Was Unenforceable Was Based On Inapposite Case law

The Regional Director concluded that the Content Producer Agreement "appears to be a 'members-only' agreement, [and therefore] it cannot operate as a bar to the instant petition." (Supplemental Decision at p. 25 (citing *Appalachian Shale Prods. Co.*, 121 NLRB 1160 (1958); *G.C. Murphy Co.*, 80 NLRB 1072 (1948); *N. Sumergrade & Sons*, 121 NLRB 667 (1958); *Bob's Big Boy Family Rests.*, 235 NLRB 1227 (1978))). The Regional Director's conclusion misses the mark and the cases he cites are inapposite.

The cases that the Regional Director cites stand for the proposition that a members-only contract cannot bar a petition. While that is undoubtedly true, that is not the issue here. The issue here is whether or not the Union has waived its right to file a petition in the first place. None of the cases cited by the Regional Director bear on that question. Again, they all relate to whether a particular contract is limited in its scope to only apply to union members (rather than the entire appropriate bargaining units). The undisputed terms of the Content Producer

Agreement concern the Union's express waiver to file a petition with the Board. As described above, the Board has consistently held that a union may indeed waive its right to represent a group of employees. *Briggs Ind. Corp.*, 63 NLRB 1270, 1273 (1945); *Lexington Health Care Grp., LLC*, 328 NLRB 894, 896 (1999). As such, it was clear error for the Regional Director to conclude that the Content Producer Agreement could not act as a bar to the Union's petition because it was a "members-only" agreement.

CONCLUSION

For the foregoing reasons, NBC respectfully submits that the Board should grant review of the Regional Director's decision in this matter pursuant to Rule 102.67.

Dated: January 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Corinne Osborn, an attorney, hereby certify that on January 31, 2019, I caused a true and complete copy of NBCUniversal Media, LLC's Request For Review to be served via electronic filing and/or electronic mail, as indicated below, upon the following persons:

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