

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO**

**FOX TELEVISION STATIONS, LLC**

**and**

**Case 02-CA-246371**

**TELEVISION BROADCASTING STUDIO  
EMPLOYEES UNION LOCAL 794, I.A.T.S.E.**

**COUNSEL FOR THE GENERAL COUNSEL'S POST-TRIAL BRIEF TO  
ADMINISTRATIVE LAW JUDGE HONORABLE LAUREN ESPOSITO**

Dated at New York, New York  
This 5<sup>th</sup> Day of May 2020

Jacob Frisch, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Rm. 3614  
New York, NY 10278

**TABLE OF CONTENTS**

STATEMENT OF THE CASE ..... 1

I. Proceedings Before the Hearing ..... 1

STATEMENT OF FACTS..... 2

I. Overview of Respondent’s Operations and Union Representation ..... 2

II. Assignment of Unit Editing Work to Non-Unit Personnel ..... 3

III. The Public Affairs Department and Joseph Silvestri ..... 7

IV. Silvestri Continues to Produce Public Affairs Programs ..... 13

ARGUMENT ..... 17

I. Respondent Unlawfully Transferred Unit Editing Work to a Non-Unit Employee ..... 17

II. The Parties Were Never at Overall Impasse During Negotiations ..... 22

III. Respondent’s Defenses Have No Merit ..... 23

    A. The Union Did Not Consent to the Removal of Unit Work and Assignment to  
        Non-Unit Manager ..... 23

    B. Silvestri Is the Public Affairs Manager Even Though He Produces  
        Public Affairs Programming ..... 23

    C. The 2008 Agreement Does Not Privilege the Respondent’s Unilateral  
        Action..... 28

    D. Respondent’s Waiver Defense Is Not Applicable..... 29

    E. The Charge Is Not Untimely Pursuant to Section 10(b)..... 29

    F. MV Transportation Does Not Apply ..... 30

CONCLUSION ..... 31

**TABLE OF AUTHORITIES**

*Alamo Cement Co.*, 281 NLRB 737 (1986) ..... 17

*Bierl Supply Company*, 179 NLRB 741 (1969) ..... 22

*Bottom Line Enterprises*, 302 NLRB 373 (1991)..... 17, 22

*Comau, Inc.*, 364 NLRB No. 48 (2016) ..... 20

*Fresno Bee*, 339 NLRB 1214 (2003) ..... 22

*Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 (1994), enforced in relevant part, 87 F.3d 1363 (D.C. Cir. 1996)..... 18

*Hankins Lumber Co.*, 316 NLRB 837 (1995) ..... 23

*Fire Fighters*, 304 NLRB 401 (1991) ..... 23

*Land O'Lakes, Inc.*, 299 NLRB 982 (1990) ..... 18

*Larsdale, Inc.*, 310 NLRB 1317 (1993) ..... 18

*Leach Corp.*, 312 NLRB 990 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995)..... 29

*Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991)..... 17

*Matson Terminals, Inc.*, 367 NLRB No. 20 (2018) ..... 18, 19, 20

*Mi Pueblo Foods*, 360 NLRB 1097 (2014)..... 20

*MV Transportation, Inc.*, 368 NLRB No. 66 (2019)..... 30

*New York Paving, Inc.*, JD(NY)-01-20 (Jan. 27, 2020) ..... 18, 19

*Nexstar Broadcasting, Inc/ d/b/a KOIN-TV*, 369 NLRB No. 61 (April 21, 2020) ..... 30

*NLRB v. Katz*, 369 U.S. 736 (1962) ..... 17

*NLRB. v. J. H. Rutter-Rex Manufacturing Company, Inc.*, 396 U.S. 258 (1969) ..... 29

*Overnite Transp. Corp.*, 330 NLRB 1276 (2000), affirmed in part, reversed in part 248 F.3d 1131 (3d Cir. 2000) (unpublished)..... 19

<i>Provena St. Joseph Medical Center</i> , 350 NLRB 808 (2007).....	30
<i>RBE Electronics of S.D., Inc.</i> , 320 NLRB 80 (1995).....	17, 23, 29
<i>Regal Cinemas, Inc.</i> , 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003).....	18
<i>Richfield Hospitality, Inc.</i> , 368 NLRB No. 44 (2019) .....	17
<i>Silverman v. Major League Baseball Players Relations Committee, Inc.</i> , 880 F. Supp. 246 (S.D.N.Y. 1995).....	21
<i>Triple A Fire Protection, Inc.</i> , 315 NLRB 409 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999) .....	17
<i>Vanguard Fire &amp; Security Systems</i> , 345 NLRB 1016 (2005).....	29
<i>W. C. Nabors Co.</i> , 134 NLRB 1078 (1961), modified 323 F.2d 686 (5th Cir. 1963), cert. denied 376 U.S. 911 (1964).....	29

## STATEMENT OF THE CASE

### I. Proceedings Before the Hearing

On November 22, 2019, the Regional Director of Region 2 of the National Labor Relations Board (“the Board”), on behalf of the General Counsel, issued a Complaint and Notice of Hearing (“Complaint”) alleging Fox Television Stations, LLC (“Respondent”) violated Section 8(a)(5) of the National Labor Relations Act (“the Act”) by failing and refusing to bargain collectively and in good faith with the Television Broadcasting Studio Employees Union Local 794, I.A.T.S.E. (“Union”) by unilaterally changing employees’ terms and conditions of employment when it assigned a non-unit employee to perform bargaining unit work in violation of the parties collective bargaining agreement. (GC-1(g)).<sup>1</sup> Respondent filed an Answer denying all substantive allegations (GC-1(i)).

A hearing in this case opened before Administrative Law Judge Lauren Esposito (“ALJ”) on March 9, 2020 and continued March 10, 2020. On March 9, 2020, the Complaint was amended pursuant to the motion of the Counsel for the General Counsel (“the General Counsel”) made on the record the same day. (GC-25, Tr. 8-9). ALJ Esposito closed the record on March 10, 2020 but allowed Respondent to resubmit certain admitted exhibits with Bates numbers and redactions, which it subsequently did on March 18, 2020.

---

<sup>1</sup> Reference to the Exhibits of the General Counsel and Respondent will be designated as “GC-#” and “R-#.” Respectively, with the appropriate number or numbers for those exhibits. Reference to Joint Exhibits will be likewise designated as “J-#.” References to the transcript in this matter are designated as “Tr. #.” An Arabic numeral(s) after “Tr. #” is a reference to a specific page of the transcript, and an Arabic numeral following a page citation references specific lines of the page cited, e.g. Tr. 15 at 13-16 is transcript page 15 at lines 13 through 16.

## STATEMENT OF FACTS

### I. Overview of Respondent's Operations and Union Representation

Respondent owns and operates two local broadcast televisions, WNYW and WWOR, in the New York/New Jersey metropolitan area. (Tr. 31 at 7-8). Respondent produces and broadcasts forty to fifty hours of live news programming and one hour of public affairs programming. (Tr. 76 at 9-15, 214 at 12-24).<sup>2</sup> In addition, it also broadcasts programs it does not produce such as syndicated televisions programs like Wendy Williams or FOX network shows. (Tr. 121 at 22-25).

For the past 75 years, and at all material times, the Union has represented Respondent's technical staff at WNYW and WWOR who are "engaged to operate, maintain, repair, modify, and re-install equipment." ("Unit") (J-1; J-2, p.1; Tr. 35 at 9-10).<sup>3</sup> The technical staff consists of camera persons, technical directors, floor managers, maintenance personnel, technical operations technicians, editors, audio operators and graphic artists. (Tr. 35 at 3-8). At all material times, Respondent jointly recognized the Union and its sister local, Television Broadcasting Studio Employees Union Local 819, I.A.T.S.E. ("Local 819") as the joint bargaining representatives of the Unit, which comprises technical staffs at WNYW, WWOR, and two television stations in the Washington DC area, WTTG and WDCA. (J-1; J-2). That recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from October 16, 2008 through October 15, 2011, and was subsequently extended through May 11, 2012. (J-1; J-2 ("2008 Agreement")).

---

<sup>2</sup> In the Respondent's lexicon, Public Affairs is synonymous with Community Affairs. (J-1).

<sup>3</sup> Television Broadcasting Studio Employees Union Local 819, I.A.T.S.E. (herein "Local 819") represent the technical staff at WTTG and WDCA in the Washington DC area.

Rank-and-file unit employees compose the Union's executive staff (Tr. 135 at 20-25, 136 at 1-10). Nick Kroudis, a Technical Operations Technician, has been the Union President since 2006 (Tr. 32 at 3-5). Donna Biglin, a Post-Production Editor, is the Union Treasurer. (Tr. 121 at 17, 122 at 5-6). Other Union officials include Business Agent Dennis Beattie, Secretary Ryan Priest and Executive Board Members Tom Blair, Regina McGinnis, and Alan Horowitz. (Tr. 135 at 24-25, 136 at 1-3).

## **II. Assignment of Unit Editing Work to Non-Unit Personnel**

It is undisputed that "editing is under the jurisdiction of the bargaining unit." (J-2, p. 9). Over the past 15 or so years, computers equipped with editing software have allowed material to be recorded on a hard drive and edited on a laptop. (Tr. 66 at 11-19, 68 at 19-22). That process is known as non-linear editing. (Tr. 66 at 16). Prior to non-linear editing, editing was more complicated and required two tape decks that would copy and record video, like a cassette player. (Tr. 66 at 2-11). At all times, however, a single person has been to able edit. (Tr. 67 at 21-24).

As the technology improved, the parties agreed, that in certain limited circumstances, non-bargaining unit personnel would be allowed to edit, despite such work being within "the jurisdiction of the bargaining unit." (J-2, p. 9; GC-20 p. 73). For example, the parties' prior collective-bargaining agreement, effective from October 16, 2005 through October 15, 2008 ("2005 Agreement") included a side letter titled, "Sideletter #8 Non-Linear Editing," which read:

The Company recognizes that editing is under the jurisdiction of the bargaining unit and that non-bargaining unit personnel will supplement bargaining unit editors only as set forth in this Sideletter. Bargaining unit editors will continue to edit promos and news pieces.

The Union agrees that the number restrictions will be lifted for the life of this agreement and will be revisited to see whether its concerns are being met.

Only the following job categories of employees may perform non-linear editing functions, on non-engineering equipment:

- (i) Writers
- (ii) Producers
- (iii) Reporters
- (iv) Promotion Producers
- (v) Sales department employees, but not for air.

. . . In all other circumstances, operation of non-linear editing will be performed by Technicians. (GC-20, p. 73).

Under this 2005 Agreement, the non-unit Public Affairs Producer position was not permitted to perform non-linear editing. (R-11, p. 7).

During negotiations for the most recent collective-bargaining agreement (the 2008 Agreement), Respondent sought to expand this section. (Tr. 38 at 23-25, 39 at 1-2, 71 at 7-10). Particularly, Respondent wanted to allow additional personnel—who were precluded from doing so under the agreement then in effect—to engage in non-linear editing. (Tr. 71 at 13-14). Accordingly, the parties bargained regarding that issue and the Union agreed to expand the list of non-unit titles permitted to do such editing. (Tr. 72 at 3-7). Nick Kroudis, the only witness who was present during these bargaining sessions testified that there was a “willingness to try to reach a deal” and that the parties bargained over what specific titles, including what managers to add to the list.<sup>4</sup> (Tr. 78 at 1-4, 102 at 3-16). The Union carefully considered which titles, if any, would be included in the exception

---

<sup>4</sup> Kroudis was on the Union’s bargaining committee and attended all the negotiation sessions. (Tr. 69 at 3-6). Additionally, to the extent that negotiations occurred away from the bargaining table, the bargaining committee needed to agree to those changes. (Tr. 11 at 1-5).

list. (Tr. 109 at 24-25, 110 at 1-6). The Union did not agree to all Respondent's proposals. (Tr. 78 at 5-7). For example, the Union agreed to add the Public Affairs Producer but not the Public Affairs Manager to the exception list (Tr 36 at 5-6, 77 at 24-25, 78 at 1-4). Kroudis testified that the decision to include the Public Affairs Producer title but not Public Affairs Manager title was "discussed at length." (Tr. 78 at 2). While the parties did not agree to add the Public Affairs Manager position, they did agree to add other specific manager titles, such as News Department Executive Producer and Creative Services Manager. (Tr. 56 at 8-11). The decision to allow certain managers was "very significant" to the Union because it was "opening up [its] jurisdiction to managers for the first time." (Tr. 109 at 4-10).

The parties' agreement on editing work was memorialized as "Section 1.09(b) Non-Linear Work Assignments" in the 2008 Agreement. (J-2, p. 9).<sup>5</sup> As noted, that agreement marked the first time any managers were permitted to perform non-linear editing work. (Tr. 108 at 20-24). The relevant text of Section 1.09(b) states:

(b) Non-Linear Editing Work Assignments.

The Company recognizes that editing is under the jurisdiction of the bargaining unit and that non-bargaining unit personnel will supplement bargaining unit editors only as set forth in this Section. Bargaining unit editors will continue to edit promos and news pieces.

Only the following job categories of employees may perform non-linear editing functions:

1. News Department Executive Producers, Senior Producers, Producers, Segment Producers, Writers and Reporters.
2. Creative Services Managers, Promotion Producers, and Marketing Producers
3. Sales Department employees, but not for air.
4. Public Affairs Producers.

---

<sup>5</sup> Although the 2008 Agreement was effective as of October 2008, negotiations concluded in 2010. (J-2, p. 62).

The above four listed job categories include individuals who are "upgraded" into such positions as allowed under an applicable collective bargaining agreement. Under no circumstances will anyone be reclassified to circumvent the express language contained in this Section 1.09.

....

Any individuals described herein must have a direct editorial connection to the non-linear editing assignment and the piece must be one to which they are assigned. The individual's job, not editing, continues to be the primary job function of these individuals. (J-2, p. 9)

Under Section 1.09(b), if a Public Affairs Producer was not editing a public affairs program, a unit employee needed to edit the program. (Tr. 103 at 24-25, 103 at 1-4).<sup>6</sup>

Section 1.09(b) also allows an employee in a position which is not permitted to perform editing to be "upgraded" into a position in which he or she may do that work. (J-2). For example, a Production Assistant may be assigned to fill in as a Writer. (Tr. 36 at 15-20). When that happens, the Production Assistant is "upgraded" to Writer, and receives a pay increase because of the change in job function. (Tr. 36 at 17-20). While a Production Assistant is not normally allowed to edit, Section 1.09(b) may permit that if he or she is serving as a Writer. (J-2; Tr. 36 at 21-23, 83 at 4-16).

But while holding one of the titles listed in Section 1.09(b) is necessary to permit a non-unit person to edit, it is not sufficient. The contract section also requires that any non-unit individual performing editing work have a direct editorial connection to the actual program or story he or she is editing. (Tr. 89 at 17-23). This clause is only triggered if the non-unit individual is in one of the exempted classifications. (Tr. 103 at 3-13.) To phrase it differently, if an individual does not fit into one of the above-exempted classifications, they cannot perform editing work even if they have a direct editorial connection to the program. (Tr. 103 at 19-23).

---

<sup>6</sup> As explained below, because the ten titles listed above the Public Affairs Producer in Section 1.09(b) do not have a direct editorial connection to public affairs programming, they are not permitted to edit that programming.

Finally, and critically for the purposes of this case, Section 1.09(b) prohibits any individual whose classification changes, say from Writer to Producer, from being reclassified back to his or her original classification in order to circumvent the express language of the section. (J-2; Tr. 37 at 1-2).

### **III. The Public Affairs Department and Joseph Silvestri**

Respondent's Public Affairs Department is responsible for, inter alia, producing two weekly half-hour shows, Good Day Street Talk and New Jersey Now. (Tr. 214 at 12-24). Good Day Street Talk airs on WNYW on Saturdays from 6 to 6:30 a.m. while New Jersey Now airs on WWOR on Sundays from noon to 12:30 p.m. (Tr. 214 at 12-24). Additionally, the Department is also responsible for interfacing with the public, participating in community events, and filing FCC compliance reports. (GC-24; R-20; Tr. 44 at 10-12).

Until about April 2015, Senior Director of Public Affairs and Public Relations Audrey Pass headed the Public Affairs Department. (Tr. 192 at 6-7, 295, at 10-11). Although Pass was the Senior Director, she was referred to as the Public Affairs Manager. (Tr. 43 at 23-25, 44 at 1, 112 at 2-5, 117 at 5-11). As the Senior Director, Pass oversaw the Public Affairs Department and interfaced with the community. (Tr. 44 at 10-12, 295 at 18-19). There are no unit employees in the department (Tr. 43 at 5-7). Two non-unit employees, Public Affairs Associate Producer Isaura Nunez and Public Affairs Producer Ronica Harris, were both laid off in 2009. (Tr. 167 at 15, 20-21, 169 at 5-6, 14).

Since 2009, Joseph Silvestri has been the only employee in the Public Affairs Department other than Pass. (Tr. 212 at 19-21). Silvestri began in 2005 as the Public Affairs Coordinator. (R-4; Tr. 142 at 7-9, 213 at 6-8). In that position, he began producing the public affairs shows. (Tr. 212 at 3-5, 9-

11). In 2007, Silvestri's title changed to Public Affairs Producer. (Tr. 144 at 16-19, 213 at 15-17).<sup>7</sup> That change is reflected in both yearly written performance evaluations and Personnel Action Forms used to document promotions, salary changes, and status changes of employees. (GC-8; GC-2; R-5 at p. 5-8, 10; J-1).<sup>8</sup>

As the Public Affairs Producer, Silvestri continued to produce Respondent's public affairs programming, Good Day Street Talk and New Jersey Now (Tr. 45 at 2-4, 214 at 12, 19). As the producer for those programs, Silvestri would identify a topic he wanted discussed on the show; research the topic; identify guests that he wanted on the show to discuss the topic; contact and book the guests; write out speaking parts for the host; identify the date to tape the show; contact the Director of Production to secure studio time; pre-interview guests; attend the studio taping; take notes during taping; and finally, identify and schedule the date that the particular show would air. (Tr. 219 at 22-25, 220 at 1-17). After Nunez and Harris were laid off, Silvestri was the only employee who produced the public affairs programming. (Tr. 214 at 5-7).

In March 2009, Silvestri emailed Vice President of Engineering Al Shjarback and asked if he could perform unit editing work. (R-11, p. 7). Up to then, Silvestri had not performed any editing work. (Tr. 224 at 19-21). Instead, a union editor would do that work. As Silvestri stated, if he had been able to edit, "it would alleviate news editors of this function." (R-11, p.7; Tr. 224 at 22-23, 318 at 1-3). Shjarback emailed back and wrote, "Under the current agreement[,] your area is not covered as an exemption for editing." (R-11, p. 7). Shjarback thereby confirmed the limitations on non-unit

---

<sup>7</sup> While Respondent maintains job descriptions of various Producer positions, it does not maintain a job description for the Public Affairs Producer position. Tr. 145 at 2, 7, 18-23).

<sup>8</sup> Respondent's Human Resources Director Roselyn Barranda signs off on all performance evaluations and completes and fills in Personnel Action Forms. (Tr. 148 at 15, 165 at 10-17).

personnel performing editing still applicable under the 2005 Agreement but noted that in negotiations for the new collective bargaining agreement Respondent had “proposed to have all Producer’s no matter what area they work in edit, ingest, and dub. That is on the table but not yet agreed to.” (R-11, p. 7).

About a year later, on March 25, 2010, Audrey Pass emailed Shjarback and asked if Silvestri could edit under the new 2008 Agreement, which had been signed around that same time. (R-11, p. 6; Tr. 72, 9-12, 73 at 1). Shjarback replied the same day, “Yes[,] this has now been resolved and a ‘Public Affairs’ Producer is allowed to edit.” (R-11, p. 4). Shjarback attached Section 1.09(b) from the 2008 Agreement. (R-11, p. 4-6; Tr. 319 at 9-13).

At that point, Silvestri could edit because he was the Public Affairs Producer, a listed exception under Section 1.09(b) of the 2008 Agreement. (J-2 at p. 9). In addition to his duties described above, Silvestri would now visit the Ingest room once a week to drop off recorded material on a storage card. (Tr. 237 at 22-25). The recorded material would be “ingested” and transferred to computer files, allowing it to be edited. (Tr. 238 at 1-2). Once Silvestri received the ingested files, he would edit the video and audio into final form using a computer. (Tr. 220 at 12-14, 237 at 11-16). Despite his responsibility for editing those files, Silvestri did not have his own editing room. Instead, he used different rooms, depending on availability, for that purpose, and could be kicked out if another department needed the room he was using. (Tr. 308 at 22-25, 309 at 1-2).

Pass left her job with Respondent in about April 2015. (Tr. 295 at 13). As a result, Dan Carlin, the Vice President of Programming became Silvestri’s supervisor in around May 2015. (GC-3). A few months later, on August 12, 2015, Human Resources Director Roselyn Barranda, sent an email to her superiors asking for “approvals for the following promotions and salary increases,” including a request

*“to promote Joseph Silvestri, Public Affairs Producer[,] to a new title of Public Affairs Manager.”* (GC-5, p.1-2 (emphasis added); Tr. 140 at 16). Barranda also asked to increase Silvestri’s salary, writing that the “increase is well-deserved with the new position; in addition to his newer responsibilities in managing the department.” (GC-5, p. 2; Tr. 196 at 1-4). The Respondent’s Senior Vice President of Human Resources and Senior Vice President/Chief Financial Officer both wrote back to Barranda approving the promotion. (GC-5; Tr. 164 at 20-21). Barranda testified that in addition to needing approval for his promotion, she also needed to seek special permission for Silvestri’s salary increase because it was over three percent. (Tr. 194 at 11-6, 195 at 17-19).

Thereafter, Barranda completed the necessary Personnel Action Form to process Silvestri’s promotion and 22.60% salary increase. (GC-4; J-1; Tr. 196 at 18-24).<sup>9</sup> Barranda listed “Community Affairs Manager” as Silvestri’s job title and “truthful[ly] and accurate[ly]” selected the appropriate manager-specific boxes including Job Type/Job Step/Description (“C-30 – MGR / Community Affairs Manager”), EEO Job Category (“010 – 1st/Mid-Level Managers”), and Affirmative Action Job Code (“02-Management”). (GC-4; Tr. 199 at 9-13, 200 at 5-8). She also selected “002-Promotion” for the reason of his salary change (GC-4). Lastly, she wrote in the remarks section, “Promoted to Community Affairs Manager.” (GC-4; Tr. 196 at 18-24). The Personnel Action Form was approved on September 16, 2015 but allowed Silvestri’s salary increase to apply retroactively, starting from July 1, 2015. (GC-4).

VP of Programming Carlin notified Silvestri of the promotion. (Tr. 289 at 24-25). As a result of the promotion, Silvestri testified, his title changed from Public Affairs Producer to Public Affairs

---

<sup>9</sup> Barranda testified that in all other years where Silvestri received a salary raise, he only received two to three percent and she did not have to seek approval to grant those raises. (Tr. 198 at 5-13).

Manager. (Tr. 289 at 5-13). Additionally, Silvestri's performance evaluation that year, completed in September 2015, stated, "Joe is being promoted to Manager of Public Affairs."<sup>10</sup> (GC-15).

There was no announcement, email, or press release from Respondent publicizing Silvestri's promotion to Public Affairs Manager. (Tr. 53 at 17-24, 126 at 18-20, 127 at 12-14, 173 at 4-5). Nor was Silvestri given business cards or letterhead reflecting his new title. (Tr. 293 at 9-13).

In each of Silvestri's annual performance evaluations subsequent to his promotion, his title was listed as Community Affairs Manager. (GC-16; GC-17; GC-18; GC-19). Those evaluations were completed by Silvestri's supervisor, Dan Carlin, and discussed Silvestri's job duties. (Tr. 152 at 4-6, 18-22). In the 2016 evaluation, Carlin wrote, "Since assuming his new role as Community Affairs Manager, Joe has been able to manage the department very effectively with very little or no supervision." (GC-16). Later in the same document, Carlin stated, "[I]n his first year as Community Affairs Manager, Joe excelled in his position," and he "is an extremely effective manager." (GC-16). Carlin also wrote "Joe should continue the exceptional job he is doing in his *position*." (GC-16 (emphasis added)). Carlin reaffirmed his understanding of Silvestri's position in Silvestri's 2017 performance evaluation, noting "Joe was promoted to Community Affairs Manager two years ago." (GC-17). Silvestri too illustrated his understanding of his position by virtue of reading his performance evaluations, confirming that the information therein was accurate, and signing them. (Tr. 313 at 7-17).

Respondent updated its organizational chart after Silvestri became Public Affairs Manager. (GC-6). On that chart, Silvestri is represented on the same management level as Programming Manager Mary Claire Walsh, Research Manager Jason Wren, Creative Services Director Kenneth

---

<sup>10</sup> The Union does not receive copies of non-unit employee evaluations. (Tr. 55 at 21-23, 128 at 1-2). Additionally, Union officials have never heard of Personnel Action Forms. (Tr. 55 at 24-25, 128 at 3-4).

Ashley, and Design Director Matthew Ohnemus. (GC-6). Dan Carlin supervises all those individuals. (GC-6; Tr. 193 at 12-14). None of those individuals have the title of Producer. (GC-6; Tr. 194 at 5-7). Additionally, if one of those managers, including Silvestri, wanted unit employees to be assigned to a particular project, he or she needed to request such crew from the Director of Production or News Operations Manager. (Tr. 293 at 22-25, 294 at 1-4, 313 at 2-4). Moreover, Silvestri, Walsh, and Wren are identified as managers even though no subordinates are listed under them on the chart. (GC-6).

Respondent's internal email system address book currently lists Silvestri as "Manager Community Affairs," and its internal employee management software, Workday, currently gives his title as "Manager[,] Community Affairs." (GC-7; GC-21). Neither of those databases lists Silvestri as a Public Affairs Producer. (GC-7; GC-21). Although Silvestri's expired ID card, lists his title as Public Affairs Producer, Barranda admitted that if an employee receives a new title, he or she is not required to get a new ID badge reflecting that change. (R-8; Tr. 177 at 7-9). The security database where information about ID cards is maintained is similarly not required to be updated after employees receive changes in titles and promotions. (R-9; Tr. 179 at 16-18). For example, Barranda testified that she last updated Silvestri's title in the security database when he became Public Affairs Producer in 2009. (Tr. 179 at 7-15).

Silvestri updated his LinkedIn profile after he was promoted. (Tr. 311 at 24-25, 312 at 1). In it, he listed his position as "Manager, Public Affairs," and wrote he was "Responsible for managing all aspects of public affairs. . . including public service announcements, community events and media partnerships with non-profit and charitable organizations, and all FCC required reports." (GC-24). Silvestri testified that language accurately describes his job duties. (Tr. 325 at 13-15).

At the time Silvestri was promoted to Public Affairs Manager, no other employee held the Public Affairs Producer title. (Tr. 313 at 25, 314 at 1-2). In fact, at all times from September 2015 to the present, Respondent did not employ anyone whose title was Public Affairs Producer. (Tr. 314 at 3-5).

#### **IV. Silvestri Continues to Produce Public Affairs Programs**

Despite his promotion and new managerial duties, Silvestri continued to produce and edit Respondent's public affairs programming. (R-36; Tr. 84 at 10-13, 290 at 20-22). Union officials, including Kroudis and Biglin, saw him editing and producing after his promotion. (Tr. 46 at 13-15, 125 at 14-20, 135 at 4-13, 138 at 15-17). Kroudis, for example, occasionally observed Silvestri in the Ingest room, directly adjacent to the Technical Operations Center where Kroudis works. (Tr. 45 at 16-20, 46 at 6-7, 86 at 4-7). However, because Respondent failed to announce or otherwise publicize Silvestri's promotion, Kroudis and Biglin continued to believe Silvestri was working as Public Affairs Producer when they saw him producing and editing.<sup>11</sup> Kroudis and Biglin engaged in "small talk" with Silvestri and spoke to him about work and non-work topics. (Tr. 87 at 10-20, 125 at 4-13, 247 at 6-7) At no point did Silvestri reveal he had been promoted to a manager position. (Tr. 54 at 7-10, 126 at 12-14, 139 at 2-5).

In his emails to outside parties dating from after his promotion, Silvestri did not use his official title, identify himself as the Public Affairs Manager, or describe himself as the Public Affairs

---

<sup>11</sup> Silvestri gave Kroudis a coffee mug once but other non-managerial employees also gave out Respondent-branded merchandise such as hats. (Tr. 88 at 7-10, 113 at 18-21, 114 at 14-17).

Producer.<sup>12</sup> (R-32; Tr. 273 at 13-17, 315 at 25, 316 at 1-2). Instead, Silvestri referred to himself as “the producer of the New Jersey Now,” or a “producer for FOX 5/WNYW.”<sup>13</sup> (R-32, p. 2, 9, 33).

Respondent’s websites for New Jersey Now and Good Day Street Talk in 2016 and 2019, respectively, informed the public that they could “suggest a topic” for the programs by contacting Producer Joe Silvestri. (R-19 and R-20).<sup>14</sup> The websites do not list Silvestri’s official title within Respondent’s organization, Public Affairs Manager. (R-19 and R-20).

Similarly, in the credits that are run for special presentations and special public affairs programs, Silvestri has always been listed as “Producer” rather than any official title, including Public Affairs Coordinator, Public Affairs Producer, and Public Affairs Manager.<sup>15</sup> (R-21; R-22; R-23; R-24; R-25; and R-26; Tr. 261 at 10-12, 264 23-25, 265 at 1, 310 at 19-22). This is not surprising, since a program’s credits identify an individual’s role in the production of that show, rather than a person’s title at Respondent. (Tr. 310 at 6-10, 19-22, 311 at 11-17). For example, Senior Director of Public Affairs Audrey Pass was identified as “Executive Producer” in numerous credits for programs (GC-23; Tr. 309 at 8-10). Additionally, Director of Production Donna Pisciotta has been credited as “Executive Producer” on programs despite her Director of Production title. (Tr. 128 at 14-18, 311 at 8-17). Likewise, because Silvestri produced the public affairs programs from 2010 to the present, he

---

<sup>12</sup> Silvestri did, however, refer to himself as the “Public Affairs Producer,” prior to his promotion. (R-32 at p. 6).

<sup>13</sup> Several people from inside and outside the Respondent’s organization also referred to him as a “producer” or “the show’s producer” in emails but never as the “Public Affairs Producer.” (R-33; Tr. 305 at 16-20).

<sup>14</sup> Silvestri inaccurately claimed that the websites identify him as “public-affairs producer.” (Tr. 254, at 22-24). The websites plainly identify him as “Producer.” (R-19; R-20).

<sup>15</sup> Credits only run after special presentations or special public affairs programs and do not run at the end of the weekly public affairs programs. (Tr. 260 at 24-25; Tr. 261 at 1-7).

was listed as Producer in show if credits, despite his title. (R-21; R-22; R-23; R-24; R-25; R-26; Tr. 261 at 10-12, 264 at 23-25, 265 at 1, 310 at 19-22). These Executive Producer and Producer roles for specific programs are also identified in New York Emmy Awards nominations and Emmy winner press releases. (GC-23; R-30; R-31; Tr. 310 at 23-25, 311 at 1).

#### **V. Respondent Consolidates Departments to Fourth Floor in Early 2019**

The Public Affairs Department along with several other departments moved onto the fourth floor in February 2019. (Tr. 45 at 10-11, 48 at 13-15). That department had previously been housed on the first floor and was temporarily relocated to the seventh floor in about April 2018 before moving to its ultimate fourth floor destination. (Tr. 122 at 16-20, 138 at 10-12).

Shortly after that move, on February 21, 2019, Post-Production Editor and Union Treasurer Biglin was working late when she ran into Silvestri on the fourth floor. (Tr. 125 at 23-25, 126 at 2-8.) Silvestri told Biglin he was the only manager in their department that was not given an office after the move. (Tr. 126 at 6-11). Prior to that conversation, no one, including Silvestri, had told Biglin that Silvestri was a manager. (Tr. 126 at 12-17).

Biglin spoke to Nick Kroudis and told him Silvestri said he was the Manager of Public Affairs. (Tr. 47 at 17-20, 48 at 13-28, 127 at 15-19). This was the first time that Kroudis learned Silvestri had been promoted to a manager position. (Tr. 47 at 10-14). Kroudis consulted the parties' collective bargaining agreement and saw that Public Affairs Manager was not one of the listed exceptions under Section 1.09(b). (Tr. 49 at 3-7). He contacted Union Business Agent Dennis Beattie and described what he learned. (Tr. 49 at 10-11).

Kroudis proceeded to investigate whether Silvestri was indeed the Public Affairs Manager. (Tr. 49 at 14-16). He looked on Respondent's internal email system and saw that Silvestri was listed

there as Manager of Public Affairs. (GC-7; Tr. 49 at 16-18). Kroudis then spoke to Beattie to ensure that before the Union filed a grievance, it confirmed that Silvestri was performing editing work, which it did. (Tr. 50 at 11-15.) Kroudis was and is unaware of any other individual who held the Public Affairs Producer title who would be allowed to perform the editing work under Section 1.09(b). (Tr. 119 at 11-14).

The Union filed a grievance on March 26, 2019, asserting that Respondent was in “violation of Section 1.09(b) – Non-Linear Editing Work Assignments.” (GC-22; Tr. 50 at 14-25). That grievance continued, “It has been brought to the Union’s attention that the Manager of the Public Affairs department has been editing the program ‘NJ Now.’ This is a clear violation of the Collective Bargaining Agreement between the parties.” (GC-22). The grievance demanded that Respondent cease and desist from violating the Agreement and that the Union and unit employees be compensated for lost wages. (GC-22).

The Union and Respondent met to discuss the grievance in May 2019. (Tr. 51 at 11-12.) Present for the Union were Kroudis and Business Agent Beattie while Respondent was represented by Vice President of Engineering Rick Wheeler and Barranda. (Tr. 51 at 14-17). After discussing the facts, Respondent told the Union it needed to look into the issue and get back to the Union. (Tr. 51 at 17-23.) The parties met several more times without a resolution. (Tr. 52 at 3-9). Eventually, in July 2019, Wheeler told Kroudis that while the grievance was pending, he would have Silvestri cease and desist from editing. (Tr. 52 at 11-13, 90 at 24-25, 91 at 1). However, Silvestri continued to edit over the next few days. (Tr. 52 at 19-25). The parties met a day or two later and Respondent notified the Union that it was denying its grievance. (Tr. 53 at 8-10).

While the current collective-bargaining agreement expired in May 2012, the parties have continually met since to bargain for a successor agreement. (Tr. 33 at 17-19). During these negotiation sessions, Respondent never informed the Union that the Public Affairs Manager was performing unit editing work or provided an organizational chart listing Silvestri as Public Affairs Manager. (Tr. 54 at 16-19, 55 at 12-15). The parties last met in February 2020 and are scheduled to meet again. (Tr. 33 at 22-25). The parties have not reached agreement on all terms and no party has stated that they are at an impasse. (J-1; Tr. 34 at 1-2, 21-23).

## **ARGUMENT**

### **I. Respondent Unlawfully Transferred Unit Editing Work to a Non-Unit Employee**

Section 8(a)(5) prohibits an employer from making a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union with prior notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). Following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 2 (2019) (citing *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), *enfd.* 136 F.3d 727 (11th Cir. 1998), *cert. denied* 525 U.S. 1067 (1999)). Stated another way, absent exigent circumstances, when parties are engaged in contract negotiations, an employer must refrain from making unilateral changes in unit employees' terms and conditions of employment absent an overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Any unilateral change to employees'

terms and conditions of employment without a valid impasse violates Section 8(a)(5). *Larsdale, Inc.*, 310 NLRB 1317, 1318-1319 (1993).

It is well-established that transferring bargaining unit work to managers or other individuals outside the unit is a mandatory subject of bargaining. *Regal Cinemas, Inc.*, 334 NLRB 304 (2001), *enfd.* 317 F.3d 300 (D.C. Cir. 2003); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 & n.17 (1994), *enforced in relevant part*, 87 F.3d 1363, 1370-71 (D.C. Cir. 1996); *Harris-Teeter Super Markets, Inc.*, 307 NLRB 1075 at fn.1 (1992); *Land O'Lakes, Inc.*, 299 NLRB 982, 986-987 (1990). See also *New York Paving, Inc.*, JD(NY)-01-20 (Jan. 27, 2020), slip op. at 33 (“The transfer of bargaining unit work to non-bargaining unit employees constitutes a mandatory subject of bargaining”), citing *Matson Terminals, Inc.*, 367 NLRB No. 20, slip op. at 4 (2018).

Here, Respondent unlawfully unilaterally transferred bargaining unit work to a non-unit employee, which also contradicted the parties’ collective-bargaining agreement. That transfer of work to a non-unit employee, the Public Affairs Manager, was a change to a mandatory subject of bargaining. See *Regal Cinema, supra*. The evidence demonstrates that the parties agreed that “editing is under the jurisdiction of the bargaining unit.” (J-2, p. 9). There is a narrow exception under Section 1.09(b) of the parties’ 2008 Agreement that allows limited and specific non-unit titles to perform unit editing work (J-2, p. 9, “non-bargaining unit personnel will supplement bargaining unit editors only as set forth in this Section”). Under that limited exception, the non-unit Public Affairs Producer, along with ten other job titles, by virtue of being specifically recognized in Section 1.09(b), were able to perform unit work. The Public Affairs Manager is *not* one of the eleven specific exemptions in Section 1.09(b). Further, the only witness who testified about the parties’ negotiations stated that while the parties agreed to add some manager titles to the exemption list, they did not agree to add the Public Affairs Manager position. Accordingly, the 2008 Agreement’s own unambiguous language not listing

the Public Affairs Manager, as well as testimony that the parties did not intend the exemption to cover the Public Affairs Manager, demonstrates the Public Affairs Manager cannot perform unit editing work.

The evidence demonstrates that from 2011 to 2015, Respondent utilized the narrow exception under Section 1.09(b) to properly assign Public Affairs Producer Silvestri to perform unit editing work (instead of assigning it to a unit employee). However, Silvestri was promoted to Public Affairs Manager in late 2015. At that point, Silvestri no longer held a non-unit title that would allow him to perform unit work under Section 1.09(b). Respondent nonetheless continued to assign him unit editing work.<sup>16</sup> In other words, Respondent transferred bargaining unit work to a non-bargaining unit employee, the Public Affairs Manager. And as stated above, that transfer of bargaining unit work to the non-bargaining unit Public Affairs Manager constituted a mandatory subject of bargaining.

Further, the transfer of unit work here constituted a material, substantial, and significant change. See *New York Paving, Inc.*, JD(NY)-01-20, (Jan. 27, 2020), slip op. at 41, citing *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2. A transfer of bargaining unit work is material, substantial and significant even where there is no evidence of impact on bargaining unit employees, including whether the transfer of work resulted in any loss of work or pay for any existing unit employee or whether any employees were laid off. See *Overnite Transp. Corp.*, 330 NLRB 1276 (2000) (“We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit”), affirmed in part, reversed in part 248 F.3d 1131 (3d Cir. 2000) (unpublished). See also, *e.g.*,

---

<sup>16</sup> Although Respondent began assigning bargaining unit work to a non-unit employee in 2015, the Union first became aware of that assignment in February 2019.

*Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (no evidence of impact on employee compensation necessary to establish substantial and material change due to transfer of bargaining unit work); *Comau, Inc.*, 364 NLRB No. 48 at p. 21 (2016) (same); *Mi Pueblo Foods*, 360 NLRB 1097, 1097-1099 (2014) (transfer of bargaining unit work material and substantial even absent layoffs or significant impact on wages and hours for bargaining unit employees). In *Matson Terminals*, the Board stated that General Counsel “met his burden” to establish a substantial and material change “by showing that the Respondent transferred barge menu work – which had been exclusively performed by unit employees – to nonunit employees.” 367 NLRB No. 20 at p. 1, fn. 2.

Accordingly, the transfer of unit editing work to the non-unit Public Affairs Manager constituted a material, substantial, and significant change because it is work that would otherwise be performed by unit employees. Further, although an impact on unit employee terms and conditions is not necessary to establish a substantial and material change due to transfer of bargaining unit work, the evidence here demonstrates that there necessarily was an impact on bargaining unit employees. Under the Section 1.09(b) of the 2008 Agreement, editing of public affairs programs can either be done by bargaining unit employees or by the non-unit Public Affairs Producer. The evidence is undisputed that Respondent did not have a Public Affairs Producer after 2015 when Silvestri was promoted from Public Affairs Producer to Public Affairs Manager. (Tr. 314). Thus, it necessarily follows that Respondent could only have assigned the editing work to bargaining unit employees because Respondent did not employ a Public Affairs Producer. But, contrary to the explicit language of the parties’ agreement, Respondent attempted to broaden the circumstances under which it could avoid assigning this work to unit employees. Respondent’s actions resulted in a diminution of unit work, thereby impacting bargaining unit employees in a manner that cannot be characterized as *de minimis*.

As the transfer of unit work here constituted a material, substantial, and significant change, the exhibit that Respondent introduced that purported to show the number of hours worked by unit editors from 2011 to 2019 is irrelevant. (R-11). Additionally, as shown above, there was necessarily an impact on the unit because the editing work that was performed by Silvestri after 2015 needed to be performed by a unit editor. Even if unit editor hours before and after Silvestri's promotion are relevant, the evidence demonstrates that the exhibit is wholly inaccurate and should not be relied upon. The exhibit listed employee names and their total hours worked per year. (R-11). However, it appears that a large portion of the list contains employees other than unit editors. (Tr. 330-336). For example, there are four or five individuals on the yearly lists who were not unit editors, but rather primarily photographers or ingest operators. (Tr. 330-336). Additionally, the lists include daily hires, ranging from four to eight daily hires a year, that are not unit editors. (Tr. 330-336). Lastly, for each of the nine years, the lists do not include the hours of two unit editors who do not appear on the lists. (Tr. 330-336). Thus, the chart does not reflect the actual hours worked by unit editors and cannot support any conclusion regarding the extent of bargaining unit editing work over time.

Lastly, a change to a term concerning working conditions following expiration of the parties' collective-bargaining agreement constitutes a violation of Section 8(a)(5). See *Silverman v. Major League Baseball Players Relations Committee, Inc.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995) (J. Sotomayor) (“A unilateral change of an expired provision on a mandatory topic, such as one involving wages, is an unfair labor practice, as it violates the duty to bargain collectively in good faith”). Because Respondent assigned unit work to a non-unit position that was not listed in Section 1.09(b), Respondent unilaterally changed that expired provision, violating its duty to bargain in good faith.

## II. The Parties Were Never at Overall Impasse During Negotiations

As noted above, the Board held in *Bottom Line* that an employer is obligated, during negotiations for a renewal collective-bargaining agreement, to maintain the status quo absent overall impasse, exigent circumstances, or overall agreement. 302 NLRB at 374. It is undisputed that Respondent and the Union have not reached overall agreement or overall impasse during their negotiations. Kroudis testified that neither party has thus far raised any claims of impasse, Respondent did not present any evidence of overall impasse, and the parties are continuing to meet and bargain. (Tr. 33-34). See *Bierl Supply Company*, 179 NLRB 741, 741 (1969) (Board found no impasse in bargaining where the parties were continuing to meet).

Because the evidence fails to establish any impasse in bargaining, Respondent cannot defend its unilateral change on that basis. Thus, if Respondent is to justify the change, it bears the burden of establishing that its unilateral change was privileged by the existence of exigent circumstances. *Fresno Bee*, 339 NLRB 1214, 1214 (2003). Respondent cannot meet that burden.

The Board recognized two exceptions to the rule in *Bottom Line*: (1) when the union is “continually avoiding or delaying bargaining,” and (2) when “economic exigencies compel prompt action.” 302 NLRB at 374. Neither is present in this case.

First, there is no evidence that establishes that the Union delayed or avoiding bargaining in any way. Kroudis, the only witness to testify about the parties’ bargaining, stated that the parties have met and are continuing to meet. Thus, Respondent cannot establish, nor does it assert that the Union delayed bargaining.

Second, there was no economic exigency requiring Respondent to transfer the unit work. The economic exigencies exception would require Respondent to meet a heavy burden. *RBE Electronics*,

320 NLRB at 81. Such exigency exists when unforeseen circumstances require the Employer to implement the change at the time the action is taken, or an economic business emergency that requires immediate action. *See e.g., Fire Fighters*, 304 NLRB 401 (1991) (holding that the upcoming holiday season did not justify immediate implementation of unilateral changes); *Hankins Lumber Co.*, 316 NLRB 837 (1995) (lumber shortage was not a compelling economic circumstance to justify the layoff because the employer knew about the shortage for months prior to acting). Here, Respondent did not present any evidence of economic exigency or business emergency requiring the transfer of unit work to a manager. Applying *Bottom Line* here, the evidence shows that Respondent made a unilateral change by transferring unit work to a non-unit position while the parties were negotiating for a contract and none of the exceptions are applicable. Thus, the decision to transfer unit work to a non-unit employee during negotiations for a collective-bargaining agreement, without reaching good-faith impasse in those negotiations, violates Section 8(a)(1) and (5) of the Act.

### **III. Respondent's Defenses Have No Merit**

#### **A. The Union Did Not Consent to the Removal of Unit Work and Assignment to Non-Unit Manager**

Respondent made a unilateral change when it assigned bargaining unit work to the Public Affairs Manager. The Union never consented to Respondent's assignment. In fact, the evidence shows that the Union specifically rejected Respondent's proposal to allow the Public Affairs Manager to edit under Section 1.09(b). (Tr. 77-78).

#### **B. Silvestri Is the Public Affairs Manager Even Though He Produces Public Affairs Programming**

Despite Respondent's contention that Silvestri produces the public affairs programming and that he is credited as a producer, his official title at Respondent is Public Affairs Manager, not Public Affairs Producer. Any assertion that he somehow continued to hold the Public Affairs Producer title

because he produced public affairs programs is not supported by the evidence. Likewise, any claim that he was given an “additional title” of Public Affairs Manager while still maintaining his old Public Affairs Producer title is contrary to both the record and the terms of the expired agreement, which prohibits Respondent from “reclassif[ying employees] to circumvent the express language contain in” the agreement.

Initially, the eleven identified categories of non-unit personnel permitted to edit under Section 1.09(b) are plainly job titles rather than functions. Importantly, the only witness to testify about the parties’ bargaining stated that Section 1.09(b) only specified job titles. Additionally, the Section’s own language is plainly couched in terms of job titles given the use of capital letters and using actual job titles such as, “Creative Services Manager,” “Promotion Producer,” and “Public Affairs Producer.” “Upgrading” employees into positions allowed to perform editing is also defined by titles rather than function. While a person temporarily assigned to the position of Writer (and paid accordingly) is allowed to edit under Section 1.09(b), that Section does not provide similar allowance for anyone who does some writing. Thus, a non-unit individual’s job title is a threshold condition for coming within the scope of Section 1.09(b). The work individuals may have been performing, how they held themselves out, and what others may have thought their role was, are all irrelevant absent holding one of the eleven job titles listed in Section 1.09(b).

The evidence shows that Silvestri was promoted from Public Affairs Producer to Public Affairs Manager in 2015. Respondent’s own internal paperwork demonstrates he was promoted and that his title changed. Initially, Barranda, Respondent’s Human Resources Director, sought approval to “promote Joseph Silvestri, Public Affairs Producer to a new title of Public Affairs Manager.” (GC-5, p. 2). After she received that approval from two high-level Respondent executives, she completed a Personnel Action Form and changed his job title from Public Affairs Producer to Public Affairs

Manager and wrote in the remarks section, “Promoted to Community Affairs Manager.” (GC-4; Tr. 196 at 18-24). On the Personnel Action Form, Barranda also selected three separate manager designations and listed “Promotion” as the reason for his substantial salary increase. (GC-4; Tr. 199 at 9-13, 200 at 5-8). After his promotion, every single one of Silvestri’s annual performance evaluations listed his title as Community Affairs Manager. (GC-16; GC-17; GC-18; GC-19). No Personnel Action Form or performance evaluation from 2016 to the present listed his title as “Public Affairs Producer.” Respondent’s own organizational chart identifies Silvestri as “Manager, Community Affairs” and does not identify him as “Public Affairs Producer.” (GC-6). Moreover, Respondent’s internal email system and internal employee management software list his title as “Manager Community Affairs”—not a Public Affairs Producer. (GC-7; GC-21). Although his ID card and Respondent’s security database list his title as Public Affairs Producer, the evidence demonstrates that they are not required to be updated after an employee receives a new title or promotion, and Barranda testified she last updated Silvestri’s title in the security database back in 2009. (Tr. 177, 179). Thus, his ID badge and Respondent’s security database cannot be relied on to adduce his current and accurate title, nor can they overcome his official title conferred by Respondent’s Human Resources Department. At all times from the end of 2015 to the present, therefore, Silvestri held the title of Public Affairs Manager for Respondent and did not hold the title of Public Affairs Producer.

Any suggestion that the “manager” title was purely symbolic and that Silvestri remained the Public Affairs Producer because his job did not change is unfounded and contradicted by Respondent’s own witnesses and evidence.<sup>17</sup> First, Barranda’s email seeking approval of the promotion stated

---

<sup>17</sup> Silvestri’s testimony that Carlin told him to “keep on doing exactly what you’ve been doing” when he was notified on his promotion is inadmissible hearsay and General Counsel objected to the testimony on the record. (Tr. 290 at 7-12). ALJ Esposito overruled General Counsel’s hearsay objection. (Tr. 290 at 11). Even if that statement is credited, the underlying evidence concerning his job duties is completely and wholly inapposite.

Silvestri will have “newer responsibilities in managing the department.” (GC-5). Second, because of those new managerial responsibilities, he was given a 22 percent salary increase as opposed to the 2 to 3 percent increase he normally received, which equates to more than a 633 percent increase over his normal amount. (GC-5; Tr. 198). Third, Silvestri’s performance reviews repeatedly highlight that Silvestri is doing an “exceptional job” in his managerial role and that he “has been able to manage the department very effectively. (GC-16). Fourth, Respondent’s organizational chart lists Silvestri at the level as other admitted managers and the evidence demonstrates those managers have the same managerial responsibility or authority as Silvestri does. (GC-6).<sup>18</sup> Lastly, Silvestri himself testified that he accurately updated his LinkedIn profile to list himself as the Public Affairs Manager and that he was “[r]esponsible for managing all aspects” of the department including community events and interfacing with the public. (GC-20). Silvestri’s own description of his job aligns with his description of Audrey Pass’s job as Public Affairs Manager when he testified that she “oversaw the public affairs department.” (Tr. 295). Accordingly, Silvestri, as the Public Affairs Manager, was a manager and performed the duties of a manager.

Lastly, although Silvestri continued to produce the public affairs programming, this work is not tantamount to holding the Public Affairs Producer title. The fact that Silvestri or others may refer to him as a “producer” does not mean that he can edit pursuant to the extremely limited exception of Section 1.09(b). Rather, as demonstrated above, the “Public Affairs Producer” term in the provision

---

<sup>18</sup> For example, if any of those managers, including Silvestri, needed unit employees to be assigned to them, they all were required to request a crew from the Director of Production or News Operations Manager and could not assign the employees by themselves. (Tr. 293 at 22-25, 294 at 1-4, 313 at 2-4).

refers to the actual job title “Public Affairs Producer” and not to employees who happens to produce public affairs programming.

Further, to the extent that Silvestri was identified as “Producer” in program credits and Emmy nominations, the evidence demonstrates that the credits identify the role of an individual for the purpose of the production of that show only, not that person’s job title, as Respondent’s own witness testified. Indeed, both Senior Director of Public Affairs Audrey Pass and Director of Production Donna Pisciotta, have been credited as “Executive Producer” on programs despite their actual titles. Similarly, Emmy nominations do not list the individuals’ official job title.

For the same reasons, it is not probative that Respondent’s websites refer to him as a producer. The websites do not list his official title within Respondent’s organization, but rather instruct the public to contact “Producer Joe Silvestri.” (R-19; R-20). Similarly, as to emails that Silvestri sent, he never referred to himself by his official title at any time after he was promoted to Public Affairs Manager, but he did call himself the “producer of New Jersey Now,” or a “producer for FOX 5/WNYW.” (R-32). Lastly, although emails written by individuals inside and outside the Respondent’s organization referred to him as a “producer” or “the show’s producer,” those representations do not magically confer the “Public Affairs Producer” title on him. (R-33; Tr. 305 at 16-20). His official title is only granted by Respondent and its Human Resources Department, not by outside guests.

Thus, the evidence demonstrates that from 2015 to the present, Silvestri’s sole title at Respondent was Public Affairs Manager. And as conclusively shown above, the Public Affairs Manager was not permitted to perform unit editing work.

### **C. The 2008 Agreement Does Not Privilege Respondent's Unilateral Action**

Contrary to Respondent's assertion, the 2008 Agreement did not privilege it to assign bargaining unit work to the Public Affairs Manager because he stepped into the Public Affairs job category listed in Section 1.09(b). Section 1.09(b) identifies a specific and limited circumstance when an individual who is not one of the eleven listed job titles can nevertheless perform unit work. For example, Section 1.09(b) allows individuals who get upgraded into a higher position to edit because their upgraded position is one of the eleven job titles. It is plain that a manager cannot be "upgraded" to a lower position. While there is evidence that Production Assistants have been upgraded to Writer positions and thus, eligible to edit when they are upgraded, those upgrades are entirely consistent with Section 1.09(b).

Further, Section 1.09(b) prohibits Respondent from reclassifying an individual to one of the 11 listed exempted titles in order to circumvent the express language of the section. Accordingly, Respondent is precluded from simply reclassifying the Public Affairs Manager as the Public Affairs Producer, thereby circumventing the explicit prohibition in the parties' 2008 Agreement.

Moreover, it is immaterial whether Silvestri, as Public Affairs Manager, continued to have a direct editorial connection to the editing work. Although Section 1.09(b) requires a non-unit individual performing unit editing work to have a direct editorial connection to it, that individual still must be in one of the eleven job titles permitted to edit. Kroudis' uncontested testimony (and the plain language of Section 1.09(b)) establish that a direct editorial connection is only relevant if the non-unit individual is in one of the exempted classifications. (Tr. 103 at 3-13). After his promotion, Silvestri did not hold one of the exempted titles and thus, was not privileged by Section 1.09(b) to perform editing work.

#### **D. Respondent's Waiver Defense Is Not Applicable**

There is also no merit to Respondent's claim that the Union waived its right to bargain over the assignment of unit editing work to a non-unit Public Affairs Manager. When analyzing unilateral changes during contract negotiations, *Bottom Line* is the appropriate standard; the Board does not ask whether the Union was given notice of or failed to diligently request bargaining about the change. *RBE Electronics of S.D., Inc.*, 320 NLRB at 81. In any event, it is undisputed that Respondent failed to give notice when it assigned unit editing work to the Public Affairs Manager.

Similarly, Respondent's claim that the allegations in the Complaint are barred by the doctrine of laches is inapplicable because laches does not apply against United States agencies. *NLRB. v. J. H. Rutter-Rex Manufacturing Company, Inc.*, 396 U.S. 258 (1969); *W. C. Nabors Co.*, 134 NLRB 1078 (1961), modified 323 F.2d 686 (5th Cir. 1963), cert. denied 376 U.S. 911 (1964).

#### **E. The Charge Is Not Untimely Pursuant to Section 10(b)**

The Section 10(b) period commences only when a party has "clear and unequivocal notice of a violation." *Leach Corp.*, 312 NLRB 990, 991-92 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). The burden on showing notice is on the party raising the 10(b) affirmative defense. *Ibid.* The requisite notice may be actual or constructive. See *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005) (the 10(b) period will begin to run once a union is on notice of facts that would reasonably engender suspicion of an unfair labor practice).

Here, Respondent failed to satisfy its burden to establish that it provided the Union with clear and unequivocal notice it had permanently transferred work covered by its collective-bargaining agreement with the Union to non-bargaining unit employees outside the scope of Section 1.09(b). Respondent further failed to establish that the Union could have discovered the unilateral transfer of

work outside the Section 10(b) period had it exercised due diligence. It is undisputed that Respondent never informed the Union of Silvestri's promotion to Public Affairs Manager. Additionally, there is no evidence that Silvestri or any other person told the Union that he was the Public Affairs Manager. The Union was never provided copies of any documents that listed his title after he was promoted in 2015. Further, because the Union was never notified, it had no reason to investigate and verify Silvestri's title through Respondent's internal email address book, internal employee management software, or Silvestri's LinkedIn page. Thus, Respondent is unable to show that the Union had knowledge of the violation or, with reasonable diligence, should have had knowledge of the violation.

Nothing in the record contradicts Biglin's and Kroudis's testimony that the Union first learned that a Public Affairs Manager, a position that was not a listed exception in Section 1.09(b), was performing unit editing work, on February 21, 2019. Accordingly, the charge, which was filed on August 9, 2019, and served on August 12, 2019 is timely. (GC-1(g); J-1).

#### **F. MV Transportation Does Not Apply**

Lastly, *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), is inapplicable to this case because the unilateral change occurred after expiration of the parties' last collective-bargaining agreement. In *MV Transportation*, the Board overturned the "clear and unmistakable waiver" standard set forth in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) and adopted the "contract coverage" standard to determine whether an employer's unilateral action is permitted by a collective-bargaining agreement. However, the Board clarified that this new standard applies only when a contract is in effect and would not affect "the status of contract provisions authorizing unilateral employer action after the contract containing the provisions has expired." 368 NLRB slip op. at 15, n.36. See also *Nexstar Broadcasting, Inc/ d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 1 (April 21, 2020) (holding that "provisions in an expired collective bargaining agreement do not cover post-expiration unilateral

changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration”). Here, the “contract coverage” analysis set forth in *MV Transportation* does not apply because the Employer’s unilateral work assignment was made years after expiration of the 2008 Agreement and there was no explicit language extending any relevant provision post-expiration.

### CONCLUSION

For the foregoing reasons, the evidence supports a finding that Respondent violated Section 8(a)(5) of the Act when it unilaterally transferred unit editing work to a non-unit employee during negotiations for a collective-bargaining agreement, without reaching good-faith overall impasse in those negotiations. As such, the General Counsel seeks a cease and desist order requiring Respondent to rescind the unlawful unilateral transfer and restore the status quo ante by transferring the editing work back to the unit or assigning the work to a non-unit Public Affairs Producer as allowed under the 2008 Agreement. General Counsel also seeks a make whole remedy to make bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral transfer. Lastly, the General Counsel requests any other remedial relief your Honor deems just and proper.

Dated: New York, New York  
May 5, 2020

Respectfully Submitted,

/s/ Jacob Frisch

Jacob Frisch, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Rm. 3614  
New York, NY 10278  
Telephone (212) 264-0300  
Facsimile (212) 264-2450  
jacob.frisch@nlrb.gov

**COUNSEL FOR THE GENERAL COUNSEL'S POST-TRIAL BRIEF TO  
ADMINISTRATIVE LAW JUDGE HONORABLE LAUREN ESPOSITO**

I, the undersigned employee of the National Labor Relations Board, hereby certifies that I electronically filed a true and correct copy of the above-entitled document with the National Labor Relations Board and served the above-entitled document upon counsel for the parties by electronic mail at the following addresses:

Hope A. Pordy, Esq.  
Spivak Lipton, LLP  
1700 Broadway, 21st Floor  
New York, NY 10019 2905  
hpordy@spivaklipton.com

Kevin Casey, Esq.  
Thomas E. Casey, Esq.  
Fox Television Stations, LLC  
1211 Avenue of the Americas, 21st Floor  
New York, NY 10036  
kevin.casey@foxtv.com  
thomas.casey@foxtv.com

Dated: New York, New York  
May 5, 2020

/s/ Jacob Frisch

Jacob Frisch, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Rm. 3614  
New York, NY 10278  
Telephone (212) 264-0300  
Facsimile (212) 264-2450  
jacob.frisch@nlrb.gov