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**NBC Universal Media LLC and National Association of Broadcast Employees & Technicians-Communication Workers of America, AFL-CIO, Petitioner.** Case 02-UC-000625

July 29, 2020

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

The principal issue presented in this case, on remand from the United States Court of Appeals for the District of Columbia Circuit, is whether separately certified or recognized bargaining units have merged to form a single unit such that the Petitioner (herein also referred to as the national Union or NABET) represents a single nationwide unit. On remand from the Board, the Regional Director issued a Supplemental Decision on December 13, 2018 (pertinent portions of which are attached), answering that question in the affirmative and clarifying that single unit to include the newly created content producer job classification. Thereafter, in accordance with Section 102.69(c)(2) of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review. The Petitioner filed an opposition.

In concluding that the Petitioner represents a single, merged unit, the Regional Director—consistent with the Board's instructions—applied a “wholistic” analysis. Upon further consideration, and as discussed more fully below, we have concluded that this approach affords insufficient weight to Section 7 rights and has proved overly cumbersome in its application and inconsistent in its results. The Employer's request for review is therefore granted as it raises a substantial issue warranting review. Upon review, we reaffirm and reinstate the standard set forth in Board decisions such as *American Can Co.*, 109 NLRB 1284 (1954), and *Hygrade Food Products Corp.*, 85 NLRB 841 (1949), and hold that, in order to demonstrate that a merger of units has occurred, the alleging party must show an “unequivocal manifestation of an intent” to merge the units. *American Can*, supra at 1288. Applying that standard here, we find that the evidence fails to establish that the parties unequivocally intended to

<sup>1</sup> Immediately preceding implementation of the new model in New York, the Employer and NABET's New York local (Local 11) signed a contract (herein the Local 11 Agreement) providing, in relevant part, that the New York content producers would *not* (absent an election) be represented by the Union, but that unit members hired into the content producer position *could choose* to keep their existing representation.

merge the separately certified and recognized units into a single nationwide unit. Accordingly, we reverse the Regional Director's finding on this matter.

I. BACKGROUND

The Employer produces television-news programming for both network and local stations. For about seven decades, NABET and its locals have represented various classifications of the Employer's employees (including, as most relevant here, news writers, editors, and photographers employed at local stations) under a series of Master Agreements. The most recent Master Agreement expired on March 31, 2009. The Master Agreement consists of 26 General Articles, 15 Individual Articles, and multiple Sideletters. The Individual Articles apply to different groups of employees according to their job classifications and, in some instances, their work locations. For example, all technical employees, including editors and photographers, are covered by a subagreement referred to as the “A” agreement, which is national in scope, while news writers are covered by the “H,” “M,” or “N” agreements according to their location (Chicago, Los Angeles, and New York, respectively).

In response to a substantial decline in its broadcast-news viewership due to increased use of other news platforms, the Employer created a new business model in 2008 and 2009 whereby the news would be produced as “content” that could be readily adapted to the entire range of platforms. The Employer created the content producer position as a critical part of this model, with content producers filming, editing, news writing, and exercising editorial control over their content. This was in contrast to the traditional model, where different classifications were responsible for each of these news-production aspects. The Employer first implemented its new model at its local station in New York, and then extended it to local stations in Chicago, Los Angeles, and Washington, D.C. In doing so, the Employer shifted work that previously had been assigned to employees working in positions covered by the Master Agreement to the content producer position. The Employer did not conceive of the content producer position as a bargaining-unit position.<sup>1</sup>

NABET filed the instant UC petition (Case 02-UC-000625) on December 20, 2010, seeking to clarify that the employees at these four local news stations were part of a single, nationwide unit and that the content producers were part of that purported unit.<sup>2</sup> On October 26, 2011,

<sup>2</sup> The local unions representing NABET employees in New York (Local 11), Chicago (Local 41), Los Angeles (Local 53), and Washington, D.C. (Local 31) had previously filed unit-clarification petitions (in Cases 02-UC-000619, 13-UC-000417, 31-UC-000323, and 05-UC-000403, respectively) seeking to add content producers to their local units. The American Federation of Television and Radio Artists (AFTRA)

the Acting Regional Director issued a Decision on Unit Clarification Petitions (Clarification Decision) finding that the Petitioner represents a single nationwide unit<sup>3</sup> and—applying *Premcor*, 333 NLRB 1365 (2001)—clarifying that unit to include all content producers in the Employer’s New York, Los Angeles, and Chicago stations.<sup>4</sup> The Employer filed a request for review, which the Board denied on September 25, 2013.

The Employer subsequently refused to bargain and NABET filed unfair labor practice charges. On April 7, 2014, the Board granted the General Counsel’s Motion for Summary Judgment, finding that the Employer failed to recognize and bargain with the NABET as the exclusive representative of the content producers in the bargaining unit. *NBC Universal, Inc.*, 360 NLRB 633 (2014). The Employer filed a petition for review with the United States Court of Appeals for the D.C. Circuit, and the Board filed a cross-petition for enforcement.

On February 23, 2016, the court denied the Employer’s petition for review and the Board’s cross-application for enforcement and remanded this proceeding to the Board, instructing it to explain the principles embodied in its relevant precedent and how those principles apply to the parties’ dispute over whether the Master Agreement covered a single nationwide unit or multiple units.<sup>5</sup> *NBCUniversal Media, LLC v. NLRB*, 815 F.3d 821, 834 (D.C. Cir. 2016).

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subsequently filed a petition (Case 05–UC–000407) covering the Washington, D.C. content producers.

<sup>3</sup> Accordingly, the Acting Regional Director dismissed the unit-clarification petitions filed by the relevant local unions. With respect to the Washington, D.C. content producers, the Acting Regional Director found that the unit-clarification petitions raised a question concerning representation and therefore dismissed the petitions filed by NABET Local 31 and AFTRA.

<sup>4</sup> The Acting Regional Director also found that (1) the content producers are not historically excluded from the nationwide unit, and (2) the Local 11 Agreement is not binding on the national NABET and therefore did not preclude the instant UC petition.

<sup>5</sup> More specifically, the court asked the Board to address: (1) whether the “wholistic” approach followed in cases involving “master agreements” such as *Columbia Broadcasting Systems*, 208 NLRB 825 (1974) (*CBS*), *National Broadcasting Co.*, 114 NLRB 1 (1955), and *American Broadcasting Co.*, 114 NLRB 7 (1955), is appropriate to address the issue, instead of the Acting Regional Director’s “two-step bifurcated” approach (815 F.3d at 830–832); (2) the Board’s view of the effect of an earlier certification decision reported at *National Broadcasting Co.*, 59 NLRB 478 (1944), the apparently indeterminate state of the record with respect to the parties’ history of bargaining agreements, and the applicability of *CBS* (in view of the fact that *CBS* involved a relationship based on voluntary recognition rather than certification) (815 F.3d at 829–830); and (3) whether *NBC*, 114 NLRB 1, may be distinguished from the instant case (815 F.3d at 833). The court specifically asked the Board to address the factors set forth in *CBS*, supra at 826, noted below, and their relevance to the instant case. 815 F.3d 832–833. Finally, as noted further below, the court instructed the Board to address the parties’ dispute over the whether the Local 11 Agreement is binding on the national Union but

On May 24, 2016, the Board advised the parties that it had accepted the court’s remand and invited them to file statements of position with respect to the issues raised by the remand. The Employer, the General Counsel, and the Union filed statements of position, the Employer filed a reply brief and limited response to the General Counsel’s statement of position,<sup>6</sup> and the General Counsel and the Union each filed a supplemental statement in response.

On March 7, 2017, the Board issued an order finding that the “wholistic” approach identified by the court was the appropriate standard to use in determining whether the separately recognized and certified units have merged to form a single nationwide unit in this case. The Board remanded the proceeding to the Regional Director for further analysis in light of the court’s opinion, and the Regional Director issued an order reopening the hearing to afford the parties the opportunity to supplement the record on the unit-scope issue.

## II. THE REGIONAL DIRECTOR’S SUPPLEMENTAL DECISION ON REMAND

In his Supplemental Decision, the Regional Director affirmed all of the findings of fact in the underlying Clarification Decision, and concluded that, based on a “wholistic” analysis, the Union represents one nationwide unit. In reaching this conclusion, the Regional Director found that the structure of the Master Agreement,<sup>7</sup> the parties’ bargaining history,<sup>8</sup> and the process for handling grievances<sup>9</sup>

acknowledged that the resolution of that issue may depend in part on how we resolve the unit-clarification issue. 815 F.3d at 834.

<sup>6</sup> Per the Employer’s request, its answering brief was limited to responding to the General Counsel’s argument that the Board should accrete content producers into the “A” unit of the Master Agreement.

<sup>7</sup> More specifically, the Regional Director found that (1) although the Individual Articles partially set the terms and conditions of employment for certain classifications of employees, they do not and cannot stand alone as descriptors of working conditions for classifications listed within them, and must be interpreted in conjunction with the General Articles and multiple Sideletters; (2) while there is significant language in the Master Agreement indicating the existence of multiple units, that agreement also references all represented employees as part of a single unit, and “a deeper reading shows a significant blurring of the lines” between the employees working under different Individual Articles; and (3) there are almost no employees currently working under any Individual Article other than nationwide bargaining unit “A” (covering technical and engineering employees).

<sup>8</sup> The Regional Director particularly found significant that (1) for decades, the parties have bargained the Master Agreements at the national level; (2) neither side has designated different teams to bargain the Individual Articles; and (3) the supplemental local agreements arise on an *ad hoc* basis and do not necessarily align with the classifications in the Individual Articles. He concluded that where local bargaining has occurred along the lines of the distinct Individual Articles, this has happened as a matter of convenience and did not evidence that bargaining was separate for each Individual Article.

<sup>9</sup> The Regional Director noted that although the parties process grievances in the locations where the grievances arise, this is based on

all favor finding a single nationwide unit. At the same time, the Regional Director acknowledged that the Master Agreement contains statements suggesting the existence of multiple units (though, as noted above, he concluded that a “deeper reading” of the Agreement ultimately favors a single unit), that the Master Agreement’s ratification process somewhat favors finding multiple units<sup>10</sup> (but did not accord this process much weight, commenting that the practical effect of the process is “unclear and untested”),<sup>11</sup> and that union letters and documents that reference multiple units tend to indicate the existence of multiple units (but that these communications also appear to be short-hand references to certain terms and conditions and not necessarily indicative of a limitation on unit scope). The Regional Director also considered the unit certifications and the arbitration awards in evidence but concluded that they were neutral considerations of little value to his analysis.<sup>12</sup>

As directed by the court and the Board, the Regional Director also applied the four factors set forth in *CBS*, 208 NLRB at 826, which the Board has applied in determining whether the nature of local bargaining was sufficient to defeat a claim that the parties intended to merge separate units into a single unit,<sup>13</sup> and determined that on balance, these factors similarly favor finding a single, merged unit. Here too, he acknowledged that under the first factor, the Master Agreement includes numerous references to

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geographic convenience, not on the jurisdiction set forth in each Individual Article.

<sup>10</sup> The Union conducts contract-ratification votes among groups of employees working under Individual Articles, and the Master Agreement is not considered ratified until each such group has accepted it by majority vote. In instances where Individual Articles have not been ratified, the parties have negotiated further about the terms pertaining to the relevant group(s) of employees.

<sup>11</sup> The Employer neither asserted nor provided evidence that it could not implement the Master Agreement until each article was ratified.

<sup>12</sup> Regarding the certifications, he determined that, while the certifications show that some job classifications were separately certified (thus suggesting multiple units)—see, e.g., 59 NLRB 478 (technical employees) and 114 NLRB 1 (film editors)—the original mode of recognition is less significant than bargaining history in determining unit scope and he could not generalize from this evidence; he also found that there are a wide range of classifications covered under the Master Agreement for which there are no individual certifications in the record and no other evidence about how the Union came to represent employees in those classifications. As for the arbitration awards, the Regional Director found that they were difficult to analyze as they are “limited to the granular issue[s]” presented in the individual grievances at issue in each case, and do not consider factors that the Board applies in determining unit scope.

<sup>13</sup> These factors are: (1) references in a master agreement to “units,” with a description of each unit, (2) an absence of a significant history of joint bargaining, (3) bargaining through the years for various numbers of locations where the union demonstrated majority status, and (4) the existence of separate agreements with no master agreement or recognition

“units” (and that unit descriptions appear in most Individual Articles, which the contract provides hold primacy over the General Articles), but concluded that the other factors all favor finding a merged unit.<sup>14</sup>

Having concluded that NABET represents a single, merged unit, the Regional Director went on to affirm the Clarification Decision’s finding that the content producers perform the same basic functions historically performed by unit employees and they “remain” in the unit under *Premcor*. Finally, the Regional Director determined that the Local 11 Agreement does not waive the national Union’s right to claim jurisdiction over the content producers.

### III. DISCUSSION

The Employer argues that a party claiming that separate and distinct units of employees have been consolidated into a single unit must present evidence of “unequivocal manifestation of an intent” to merge the units, citing *American Can*, 109 NLRB at 1288. It urges that “[t]he Board does not find a merger in the absence of unmistakable evidence that the parties *mutually* agreed to extinguish the separateness of the previously recognized or certified units.” *Duval Corp.*, 234 NLRB 160, 161 (1978) (emphasis in original). For the following reasons, we agree with the Employer that these are the appropriate standards to apply.<sup>15</sup>

clause expressing intent to merge separately certified units into a single unit. *Ibid.*

<sup>14</sup> With respect to the second factor, he found that the parties have a consistent practice of nationwide bargaining for new contracts, bargaining teams share a desire to reach one contract covering the Employer’s operations from coast to coast, and severing a segment of this group at this point would destroy stability. Regarding the third factor, he emphasized that although some groups were separately certified, they were later “folded in” with other classifications of employees (as a result of which nearly all employees are now covered by Art. A) and that any remaining geographic demarcations appear to be for administrative convenience. And for the fourth factor, the Regional Director found that while there is no language explicitly announcing an “intent to merge,” the record contains numerous examples of arrangements that have “blended some of the distinctions between separate ‘units,’” and the Sideletters and other arrangements between the parties over the years show “a course of conduct in which the parties intended that the NABET-represented employees” in the various units were to merge into and “function as a single unit.”

<sup>15</sup> We acknowledge that this standard differs from the “wholistic” standard found appropriate in the Board’s 2017 order remanding and which the Regional Director was instructed to apply here. This change in course is deliberate and, as explained further below, is based on the need to clarify this area of precedent and our finding that requiring an unequivocal manifestation of intent to merge will better accommodate employees’ Sec. 7 rights, and it will better serve the Agency and our stakeholders by providing clear guidance. This change in course is accordingly within the Board’s discretion. See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125–2126 (2016) (stating that “[a]gencies are free to change their existing policies as long as they provide a

The Board's approach to determining whether separately certified or recognized bargaining units have merged to form a single unit has shifted over the years, resulting in an inconsistent body of precedent. In one line of cases, as the Employer indicates, the Board has required "unmistakable" or "unequivocal" evidence of mutual intent between the parties to find that such a merger has occurred, considering both contractual language and bargaining history in making this determination.

For example, in *Hygrade Food Products*, 85 NLRB 841, the Board found that a single-plant unit had not effectively merged with units at other plants to form a single, multiplant unit. Although the master agreements contained features present in cases where the Board had found multiplant units, the Board concluded that there was "no unmistakable indication that these parties mutually intended to extinguish the right of the employees in each of the original plant units to select and change their bargaining representatives, at appropriate intervals, by the vote of their separate majority," and that the practice of negotiating master agreements apparently had occurred because of convenience. *Id.* at 844–845. Similarly, in *American Can*, 109 NLRB 1284, the Board found that a single-plant unit had not effectively merged with other units to form a multiplant unit. Citing *Hygrade Food Products*, the Board reviewed the features of the master agreement and the bargaining history and found "no clear indication as to whether or not the parties . . . actually intended to effect a consolidation of the local plant units," and "no unequivocal manifestation of an intent" to merge those units. 109 NLRB at 1288. And, in other cases, the Board has required "clear," "unmistakable" or "unequivocal" evidence of an intent to merge separately certified or recognized units.<sup>16</sup>

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reasoned explanation for the change," and that an agency must "'display awareness that it is changing its position' and 'show that there are good reasons for the new policy'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *National Federation of Federal Employees, FD-1 v. FLRA*, 412 F.3d 119, 121 (D.C. Cir. 2005) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.") (quoting *BB & L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995) (per curiam)). This change of course is also consistent with the court's remand, which directed the Board to "explain both the principles embodied in the relevant precedent and how application of those principles to the facts here supports the resolution of the parties' dispute," 815 F.3d 834, but did not require the Board to apply the "wholistic" standard.

<sup>16</sup> See, e.g., *Metropolitan Life Insurance Co.*, 172 NLRB 1257, 1258 (1968) (finding "no clear mutual intent to effect the consolidation of the certified units into a single overall unit"); *Remington Office Machines*, 158 NLRB 994, 996–997 (1966) (finding no "clear" or "unmistakable indication" that the parties "mutually intended to extinguish the right of the employees in each branch office to select, change, or decertify their bargaining representatives by the vote of their separate majorities[]");

In another line of cases, however, the Board seemingly deviated from this approach in favor of a "wholistic" analysis of parties' contract language, bargaining history, and course of conduct. In *General Motors Corp.*, 120 NLRB 1215 (1958), for example, the Board found that numerous separately certified plant units had been merged into a nationwide multiplant unit without citing or applying the "unequivocal intent" standard discussed above. Instead, after considering the "total picture of bargaining," the Board found that there was "no doubt that General Motors and UAW intended to, and in fact did, carry on their collective-bargaining on the basis of a single companywide multiplant unit" notwithstanding "some minor facts that might point to a contrary intent." *Id.* at 1220.

Later, in *General Electric Co.*, 180 NLRB 1094 (1970), the Board went even further, finding a merger of units based on the parties' conduct. The Board found that several factors supported a finding that the units had not been merged, such as reference in the national agreements to "units," in the plural, negotiation of supplemental agreements on the local level, the absence of any explicit admission on the record that the parties intended to merge the separate units into a single multiplant unit, and the grouping of various employees of different occupations into a single unit. The Board nevertheless found a multiplant unit on the basis that these factors were "outweighed by the long continuous bargaining history, and the manner of negotiation, execution, coverage, and application of the agreements between the parties," and that a single multiplant unit was "more in step with the realities of the relationship between the parties than would be a contrary finding." *Id.*

Likewise, in *White-Westinghouse*, 229 NLRB 667, 672 (1977), *enfd. sub nom. Electrical Workers v. NLRB*, 604 F.2d 689 (D.C. Cir. 1979),<sup>17</sup> the Board adopted an

*Radio Corp. of America*, 121 NLRB 633, 634–635 (1958) (finding "no clear intent by the parties to establish a definable multiplant unit"); *U.S. Rubber Co.*, 115 NLRB 240, 244–245 (1956) (finding no "clear intent" to consolidate separate units); *Continental Can*, 110 NLRB 1042, 1045 (1954) (reviewing master agreements and local supplements and finding "no clear indication" that the parties "intended to effect such a consolidation of preexisting separate plant units as to destroy the separate identity of separate units[]"); *Armour & Co.*, 101 NLRB 1072, 1078 (1952) (finding "no clear indication that the contracting parties intended to destroy the separate identity of the original plant units and to establish a single, broader unit").

<sup>17</sup> While the court's decision concerned the successorship issue in that case, the court also noted that the Board's ruling that the parties' pattern of conduct had merged the individually certified units into a single multiplant unit was "consistent with substantial Board precedent holding that parties to collective-bargaining relationships may by contract, bargaining history, and course of conduct, merge existing certified units into multiplant appropriate units." 604 F.2d. 689, 693 fn. 11 (citations omitted). The court did not otherwise comment on the Board's standard or in any way suggest that the Board could not apply a different standard.

administrative law judge’s finding that the parties “by their own conduct effected a merger of local plant units into a multiplant unit.” Unlike *General Motors* and *General Electric*, the judge in *White-Westinghouse* acknowledged the competing line of precedent embodied in *American Can* and *Continental Can*, but concluded that *General Electric* had “clearly eschewed” any requirement of “an explicitly stated contractual intent to effect a merger of local plant units . . . in favor of a course of conduct approach.” *Id.* at 672 & fn. 10.

As the court and the Regional Director in the instant case discussed at length, the Board also applied a “wholistic” or “course of conduct” approach in *CBS*, 208 NLRB 825. In that case, the Board appears to have construed this approach in terms of the four-factor test, noted above, for assessing whether parties have demonstrated an intent to merge separate units into one bargaining unit. Based on these considerations, the Board determined that a merger of separate units had occurred in light of the contract language and bargaining history, finding that “the scope and nature of the local bargaining and the resulting local supplements to the national agreement [were] not so substantial as to defeat” the finding of a national bargaining unit. *Id.* at 826.

Since *CBS* and *White-Westinghouse*, the Board has continued to apply a “wholistic” or “course of conduct” approach in analyzing merger cases. See, e.g., *Anheuser-Busch, Inc.*, 246 NLRB 29, 31–32 (1979); *Gibbs & Cox, Inc.*, 280 NLRB 953, 954, fn. 5 (1986).<sup>18</sup> Even so, the Board has never overruled the “unequivocal” approach, and at times, language regarding unmistakable or unequivocal evidence of intent to merge multiple units into a single unit has resurfaced in Board decisions. See, e.g., *Scott Paper Co.*, 257 NLRB 699, 670 (1981) (finding “unmistakable evidence that the parties mutually agreed to merge the instrument technicians into the broader bargaining unit”); *Duval Corp.*, 234 NLRB at 161 (requiring “unmistakable evidence that the parties mutually agreed to extinguish the separateness of the previously recognized or certified units” (emphasis in original)); see also *Delta Mills, Inc.*, 287 NLRB 367, 368–369, fn. 10 (1987) (finding no merger where “the parties have not agreed to extinguish the separate units”).<sup>19</sup>

Having fully considered the relevant precedent, it is evident that the Board has at best been unclear in its approach to the merger issue presented in this case. Despite myriad decisions stating that a clear, explicit,

unmistakable, or unequivocal manifestation of an intent to merge is a requirement, later cases have overlooked or ignored this requirement. Although, as noted, the judge in *White-Westinghouse* suggested that *General Electric* and other cases had “clearly eschewed” the requirement, it has never been expressly overruled, and cases more recent than *White-Westinghouse* have seemingly rearticulated it. Indeed, the D.C. Circuit’s comprehensive decision mentioned the various standards the Board has applied in the past, including *American Can*, supra, faulted the Board’s prior decision in this case for “misreading” and failing to take into account Board precedent, and directed the Board on remand to “explain both the principles embodied in the relevant precedent and how application of those principles to the facts here supports its resolution of the parties’ dispute.” 815 F.3d at 832, 834. Our conclusion that the Board’s previous endorsement of the “wholistic” approach in this case did not fully reckon with the full sweep of precedent in this area is consistent with the court’s observations.

Given the need to clarify the Board’s inconsistent approach, we deem it appropriate to revisit whether the “wholistic” approach should be applied in merger cases. We conclude that it should not and instead reaffirm (or, to the extent it was ever overruled, reinstitute) the requirement of an unequivocal manifestation of intent to merge separate units. In so doing, we do not intend to narrow the types of evidence that we will consider: the parties’ intent need not be evidenced in a master agreement or written contract. Nevertheless, where, as here, there is equivocal language in such documents and no other evidence (such as bargaining history or the parties’ course of conduct) supplies the requisite unequivocal manifestation of intent, no merger will be found.

To begin, this standard balances better the Section 7 rights of employees with labor stability. It is well established that, when those two statutory goals conflict, the Board’s job is to strike a sensible balance between them. See, e.g., *Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1983), cert. denied 466 U.S. 936 (1984). As the D.C. Circuit has stated, in a merger situation, “[o]nce the Board deems a multiplant unit appropriate, it becomes a [s]ingle bargaining entity. The component parts merge indistinguishably and lose their individual identity.” *Electrical Workers v. NLRB*, 604 F.2d at 695, fn. 14. As a result, a merger of multiple units operates to “extinguish the right of employees in each of the individual plant units to select

<sup>18</sup> Outside of *CBS* itself, however, the Board does not appear to have construed this approach as a four-factor test. Thus, *Anheuser-Busch*, supra at 31, states that units can be merged “by contract, bargaining history, and course of conduct.”

<sup>19</sup> As discussed in the court’s decision and noted in the Board’s 2017 order remanding, precedent in this area has been further confused by the Board’s decision in *Louisiana Dock Co.*, 293 NLRB 233 (1989), enf. denied 909 F.3d 281 (1990), which appeared to articulate a “bifurcated” approach.

and change their bargaining representatives, at appropriate intervals, in plantwide elections.” *American Can*, 109 NLRB at 1288; see also *Hygrade Food Products*, 85 NLRB at 845. Finding a merger without an unequivocal manifestation of such intent too readily permits the rights of employees to be affected, even extinguished, by the conduct of the parties; requiring unequivocal intent to merge better protects employee freedom of choice in such situations. At the same time, in those situations where unequivocal evidence of an intent to merge has been shown, labor stability will be preserved by honoring the parties’ clear intent, rather than allowing ambiguous evidence to disrupt established, often (as here) longstanding, relationships.<sup>20</sup>

The wholistic standard, in contrast, fails to give the proper weight to these considerations. That standard is analytically flawed as well. It is well settled that, when the same union is certified or recognized as the representative of a series of separate units of employees of the same employer, the parties need not merge the units into a national unit in order to negotiate on a nationwide basis or to negotiate a master agreement covering all of the employees in the separate units. See, e.g., *Sperry Rand Corp.*, 158 NLRB 997 (1966) (multiplant negotiations did not establish unit merger); *Remington Office Machines*, 158 NLRB 994 (1966) (multiplant negotiations did not establish unit merger); *Dow Jones & Co.*, 142 NLRB 421 (1963) (multiplant contracts did not establish merger of units). The wholistic standard nevertheless relies on those same factors to find unit merger. As exemplified in *CBS*, supra, 208 NLRB at 826, the wholistic standard also weighs the evidence based on a sliding scale under which the result turns on fine distinctions that defy easy classification. There, the Board analyzed the scope of the unit as follows (emphasis added):

Moreover, the scope and nature of the local bargaining and the resulting local supplements to the national agreement are not *so substantial* as to defeat the claim of a "national" or multistation unit. In those cases in which the Board found such circumstances to exist there were certain factors present -reference in the master agreements to "units" with inclusion of a description of each "plant unit," absence of *significant* history of joint

bargaining, bargaining through the years for various numbers of locations where the union was able from time to time to demonstrate majority status, and/or existence of separate agreements with no master agreement or recognition clause expressing the intention to merge separately certified units into a single bargaining unit—which are absent in the instant case. Hence, in those situations the Board relied on the absence of any intention to merge into one bargaining unit in determining that the *nature* of the local bargaining defeated a claim that there was an existing multiplant unit.

Taken at face value, this analysis indicates that local bargaining and supplements will “defeat” a merger claim if they are “substantial” enough; a history of joint bargaining will support a unit merger finding if that history is “significant” enough, unless the “nature” of the local bargaining nevertheless defeats a claim of a multiplant unit; and the existence of a “master agreement” may or may not support a merger finding depending on whether it refers to a unit or to “units” or otherwise expresses an intent to merge the units. But see *General Motors*, supra (contract referred to “units” but merger found); *General Electric*, supra (same). In these circumstances, it is easy to see why the D.C. Circuit found that the *CBS* factors “seem to point toward inconsistent outcomes.” 815 F.3d at 833.

The unequivocal manifestation of intent standard addresses these analytical flaws by focusing the inquiry and the litigation of these cases to address whether the parties unequivocally intended to merge the units. As this case forcefully illustrates, the “wholistic” approach has required sprawling hearings involving voluminous testimony and exhibits and multiple lengthy decisions addressing the full panoply of possible considerations.<sup>21</sup> Requiring an unequivocal manifestation of intent to merge much more clearly delineates the relevant standard and will provide greater clarity and predictability in this important area of Board law by avoiding the need for the Board and the parties to balance and weigh the many factors informing the “wholistic” approach.<sup>22</sup>

In sum, requiring an unequivocal manifestation of intent to merge brings clarity to this area of law, better balances employee rights and labor stability, and will afford far greater clarity and predictability with respect to the

<sup>20</sup> Requiring unequivocal intent also promotes labor stability by making it less likely that a party to an agreement will, without realizing it has done so, effectuate a merger through less-than-unequivocal conduct. In addition, the unequivocal intent standard comports with the principle that the scope of a unit established by certification or voluntary recognition may be changed thereafter only with the consent of the parties or the Board. See, e.g., *Hampton House*, 317 NLRB 1005 (1995) (once a specific job has been included within the scope of the bargaining unit by either Board action or the consent of the parties, the employer cannot

remove or modify the position without first securing the consent of the union or the Board.). It is difficult to see why equivocal evidence should suffice in a unit clarification case when actual consent is required in an unfair labor practice case.

<sup>21</sup> As indicated above, even a brief summary of the Regional Director’s analysis requires substantial explication.

<sup>22</sup> We note that, even as the court described the “wholistic” approach, the court also appears to have approved of *American Can*, supra. See 815 F.3d at 832.

litigation of this issue. We overrule any prior cases to the extent that they are in conflict with this standard.<sup>23</sup>

We will apply this standard retroactively. “The Board’s usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage.” *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2 (2019) (citations and internal quotation marks omitted). Indeed, in representation cases such as this one, the Board’s established presumption is to apply a new rule retroactively unless doing so would work a manifest injustice. *Ibid.* In determining whether retroactive application will work a manifest injustice, the Board considers the parties’ reliance on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application. *Ibid.*

Here, as discussed above, the Board’s precedent in this area has been inconsistent, with some cases still requiring unequivocal evidence, others not. Further, the parties have litigated this case based on the “wholistic” approach, and, in the course of doing so, had ample opportunity and incentive to present any relevant evidence pertaining to unequivocal intent, which is a narrower standard.<sup>24</sup> Finally, retroactive application will also serve the purposes of the Act by bringing immediate clarity and uniformity to this area of the law.<sup>25</sup>

Applying the unequivocal-intent standard to the uncontested facts set forth in the Regional Director’s Supplemental Decision, we emphasize his undisputed finding that “there is no language explicitly announcing an ‘intent to merge.’” There is no explicit language to this effect in the Master Agreement, nor in any other documentary

evidence. While the Master Agreement contains *some* language that refers to all represented employees as part of a single unit,<sup>26</sup> the Regional Director also found “significant language” that indicates “the existence of multiple units.”<sup>27</sup> Further, the numerous Sideletters that are also integral to the Master Agreement do not contain explicit language indicating that the parties have agreed to merge the separate units into a single unit.<sup>28</sup>

The bargaining history similarly offers no unequivocal evidence that the parties intended to merge the separate units into a single unit. There is simply no evidence that, at any point during bargaining for the Master Agreement, the parties agreed that the separate individual units would be merged into one single nationwide unit. There also is no bargaining history concerning the miscellaneous agreements (national supplements and local agreements) cited by the Regional Director that would establish any unequivocal intent—and, in fact, some of the evidence supports a finding of multiple units.<sup>29</sup>

Moreover, other factors that the Regional Director cited weigh against a finding that the parties unequivocally intended to merge the units. The Regional Director found that the ratification process conducted on a multiunit basis weighs somewhat in favor of finding a multiunit structure, to the extent that the evidence establishes that employees working under each Article hold veto power over the parties reaching an overall Master Agreement. Moreover, the Regional Director found that the Employer had introduced a number of letters and other documents in which the Union referenced “multiple units” that it represents at NBC.<sup>30</sup>

<sup>23</sup> Specifically, we overrule prior cases to the extent they have found a merger of separately certified or recognized units without applying the unequivocal manifestation of intent standard to which we have returned. However, nothing in our decision today should be read to call into question the current scope of any unit addressed in those cases. Any dispute in that regard would, of course, be resolved on the basis of current circumstances, not those prevailing decades ago at the time those cases were decided.

<sup>24</sup> For this same reason, the parties could not be prejudiced by their reliance on “wholistic” cases, because any evidence of unequivocal intent clearly would be relevant to (and, indeed, dispositive of) the “wholistic” analysis.

<sup>25</sup> See *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 180–181 (3d Cir. 2002) (Court concluded that new standard in unsettled area, which Board articulated in response to earlier court remand, was properly applied retroactively, noting that it “must defer to agency retroactivity rulings unless the ruling creates ‘manifest injustice.’” (citations omitted)).

<sup>26</sup> For instance, the Regional Director found that General Article VI refers to all represented employees as part of a single unit for purposes of transferring or “subcontracting out” work, stating that “[i]n respect to work or functions which in the past have been performed for the Company both by persons within and without the *unit* the Company may continue to have such work performed outside the bargaining *unit* to a degree no greater than heretofore” (emphasis added).

<sup>27</sup> The Master Agreement includes numerous references to “units” and defines the “Individual Articles” as “contain[ing] the description of each bargaining unit . . . .” The Preamble refers to “the basic collective bargaining agreements between the parties,” and the Recognition Clause states that “[t]he Union represents . . . for collective bargaining purposes all of the employees of the Company as defined in the applicable SCOPE OF UNIT clause.” Most of the Individual Articles contain separate “SCOPE OF UNIT” provisions indicating the grouping of employees to which the terms stated in each article apply, and the contract provides for the primacy of Individual Articles over the General Articles.

<sup>28</sup> Some Sideletters set terms of employment that are broadly applicable to all covered employees, while others address issues relevant only to employees in a particular classification. Further, some set terms for employees when they are temporarily performing work covered by a different Individual Article, and several address the performance of “non-exclusive” work by unit employees.

<sup>29</sup> For example, some of the local agreements were clearly signed only by the Local Union involved.

<sup>30</sup> These include: (1) Sec. 8(d) notices from the 1980s and 1990s, where the Union provided notice to the Employer of its intent to terminate “contracts” covering employees of NBC and expressing the wish for the parties to meet and confer “for the purpose of negotiating new Agreements to cover your employees in Bargaining Units” represented by NABET; (2) a 2009 notice referencing a single new “Agreement” to be negotiated, but repeating the prior references to “Bargaining Units”; and

In finding that the multiple units have merged into a single nationwide unit, the Regional Director placed great emphasis on the fact that the vast majority of employees, including editors and photographers, are now covered under Article A (the nationwide technical and engineering unit), which the parties refer to as the primary “unit” while considering the other Individual Articles to be “peripheral.” Even so, it is undisputed that not all of the separately certified or recognized units now work under the terms of Article A.<sup>31</sup>

For the foregoing reasons, we find, based on the undisputed facts cited by the Regional Director, that the evidence fails to establish an unequivocal manifestation of an intent to merge the separately recognized and certified units.<sup>32</sup> Accordingly, we find that the Regional Director erred by finding that the Master Agreement covers a single nationwide unit.

#### IV. CONCLUSION

In sum, the evidence fails to establish that the parties unequivocally intended to merge the separately certified and recognized units into a single, nationwide bargaining unit. Therefore, the Regional Director improperly granted NABET’s request to clarify the unit to include content producers, and we reverse the Regional Director’s Supplemental Decision.<sup>33</sup>

#### ORDER

The Regional Director’s Supplemental Decision is reversed and the petition in Case 02–UC–000625 is dismissed. The petitions in Cases 13–UC–000417, 31–UC–000323, and 02–UC–000619, dismissed by the Acting Regional Director, are reinstated and the cases are remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. July 29, 2020

\_\_\_\_\_  
John F. Ring, Chairman

(3) documents regarding ratification that the Union sent to NABET-represented employees of NBC, consistently referencing multiple “units” that will vote “unit-by-unit” on provisions that apply to them.

<sup>31</sup> The Regional Director found, and no party disputes, that the air-conditioning employees covered by art. P (certified as a separate unit in 1956 to be represented by Local 11 in New York) and the staging employees covered by art. C are not covered by art. A.

<sup>32</sup> We note that, in remanding this case, the court directed the Board to “address the parties’ dispute over the Local 11 [A]greement,” but also noted that the resolution of that issue “may depend in part on how the Board resolves the unit clarification issue.” 815 F.3d at 834. Our finding that there is not a single unit here renders irrelevant the question of whether the Local 11 Agreement is binding on the national Union. Accordingly, we need not resolve that issue here.

\_\_\_\_\_  
Marvin E. Kaplan, Member

\_\_\_\_\_  
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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#### SUPPLEMENTAL DECISION

##### I. SUMMARY OF CASE

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

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

After subsequent appeals and review, on February 23, 2016, the United States Court of Appeals for the District of Columbia Circuit, remanded the case to the Board for further explanation and analysis regarding whether NABET represented a single unit

<sup>33</sup> As the Master Agreement consists of multiple units and not a single nationwide unit, we need not address whether the Regional Director properly found that the purported single nationwide unit should be clarified to include the content producers. But in the absence of a single nationwide unit, the unit-clarification petitions filed by the New York, Chicago, and Los Angeles locals seeking to include content producers in their individual units should not have been dismissed. We shall therefore reinstate those petitions and remand them for further appropriate action.

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

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

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

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

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

Briefly, the record demonstrates that the parties have circumstantially bargained accommodations for work that may be covered under the terms of more than one of the Master Agreement's "Individual Articles." Through the years, the parties have also

bargained over mutations in the work performed by NABET-represented employees, which have come about as a result of technological advances and/or organizational changes. The cumulative effect of this bargaining has been a blurring of distinctions between classifications covered by the different Individual Articles, as well as, an accelerating consolidation of classifications under Individual Article "A," such that vanishingly few NABET-represented employees are covered by the terms of any other Individual Article.

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

## II. PROCEDURAL HISTORY

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

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

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

On March 7, 2017, the Board remanded the matter to the Regional Director for further analysis in light of the court's decision. By Order dated March 28, 2017, at the Employer's request, the Regional Director reopened the hearing for receipt of supplemental evidence. The hearing was conducted on May 22 through 26, 2017, and briefs were subsequently filed on September 8, 2017.<sup>3</sup>

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

<sup>3</sup> Based on the entire record in this proceeding, I find:

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

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

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

## III. RELEVANT CASE LAW

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

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

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

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

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

agreement was supplemented by local agreements covering several cities, including Los Angeles. The Board noted that the master agreement provided for a "unit" which was not modified by the local agreements. While local negotiations were extensive and covered significant provisions, such as wages and hours, the parties had signed a single agreement, extending the national and supplemental agreements which provided for across-the-board wage increases. Further, the parties conducted local bargaining centrally and the employer's negotiating team was the same for all locations. *Id.* at 826, fn. 10. The Board noted its reluctance to disturb a multi-station bargaining unit which had existed for about 20 years.

....

The instant case is factually closer to *GM, Cadillac Motor Car Division*, 120 NLRB 1215 (1958). Unlike *NBC* and *ABC*, the UAW had represented all of GM's workers for 20 years. Based on this long course of bargaining, the Board found that the UAW represented a single, multi-plant unit which was national in scope. Starting in 1938, the UAW won successive single plant elections and was certified by the Board as the exclusive representative in each plant as a separate bargaining unit. However, UAW and GM engaged in common centralized bargaining "for all the plants, from which there emerged a single contract—nationwide and companywide in scope. The UAW-represented employees were divided into 11 groups. The groupings followed in some cases job classifications, in some cases type of plant involved, and in some cases kind of car assembled. Some groups included a few entire plants, plus certain parts of other plants. In the case of the "tool and die maintenance" group, some employees worked in the vast majority of the 120 plants. Thus, the old unit lines based on Board certifications were totally disregarded. Although the national contract provided for separate supplemental negotiations and signed supplemental agreements that dealt with special problems affecting that location, the Board held that the total picture left no doubt that the parties carried on their collective-bargaining on the basis of a single, companywide, multiplant unit.

....

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

## IV. FACTORS RELATED TO UNIT SCOPE

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

A. *The Structure of the Master Agreement*

The Master Agreement in effect at the time of the creation of

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

the content producer position was effective from 2006 to 2009. The Preamble, which has been a part of the parties contract over decades of successor agreements, explains that the parties intend, “to set forth herein the basic collective bargaining agreements between the parties . . .” The Recognition Clause states that “[t]he Union represents . . . for collective bargaining purposes all of the employees of the Company as defined in the applicable SCOPE OF UNIT clause, and the Company recognizes the Union as the exclusive bargaining agent for all such employees of the Company.” The Master Agreement is signed only by national representatives of the parties.

### 1. The General Articles

The first 26 “General Articles” apply to all employees covered by the Master Agreement, including, for example, the same grievance and arbitration provision, the same dues-checkoff provision, the same benefits provisions, and the same severance pay provisions.

As detailed in the underlying Clarification Decision, general article VI refers to all represented employees as part of a single unit for purposes of transferring or subcontracting out work: “In respect to work or functions which in the past have been performed for the Company both by persons within and without the *unit* the Company may continue to have such work performed outside the bargaining *unit* to a degree no greater than heretofore.” (Emphasis added.)

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

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

### 2. The Individual Articles

The Master Agreement defines the “Individual Articles” as “contain[ing] the description of each bargaining unit . . . the rates of pay and any unusual working conditions which have no general application.” (Emphasis added.) Most of the Individual Articles, including articles A, H, M, and N, contain separate “SCOPE OF UNIT” provisions indicating the grouping of employees to which the terms stated in each article apply. Each of

the 15 Individual Articles have their own seniority lists, wage rates,<sup>8</sup> meal periods, work hours, and other distinct terms and conditions of employment that are markedly different.

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

Transfers between jobs covered by different Individual Articles are addressed in other sections of the Master Agreement, including, for instance, Sideletters 50, 51 and 53, as discussed below. Articles H, M, and N, describe units of newswriters in Chicago, Los Angeles, and New York, respectively. As is true of article A, the newswriter articles include provisions elaborating “exclusive duties of the covered employees, the circumstances in which such duties may also be performed by noncovered employees, and additional duties that the covered employees may perform.

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

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

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

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

<sup>8</sup> The wage rates in arts. H and N for comparable job classifications appear to be identical, while the wage rates in article M are somewhat lower. Notably, arts. H, M and N include wage rates for some “producer”

positions. For example, all of these sub-agreements provide wage rates for “Producers” of 1/2 hour’ and 1-hour long shows or segments, while the “M” Agreement also includes wage rates for “Sky News Producers” and the “N” Agreement includes wage rates for “Field Producers” and “Associate Producers” of 1/2 hour and 1-hour long shows or segments.

article or another.<sup>9</sup>

Notwithstanding the continued existence of the Individual Articles, the vast majority of employees represented by NABET have been, for some time, working under the terms of article A. There is no evidence of employees currently working under any other articles, except for article C (two employees) and article P (10 employees). In some cases, the parties have agreed that job classifications previously covered under the terms of now “empty” Individual Articles, are now covered under the terms of article A (this is apparently true of former article B traffic coordinators and former article O building maintenance employees).

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

### 3. The Sideletters

The Master Agreement also contains numerous Sideletters, which are an integral part of the Agreement. Some Sideletters set terms of employment that are broadly applicable to all covered employees (like the General Articles). Other Sideletters address issues only relevant to employees in a particular classification, while still others set terms for employees when they are temporarily performing work covered by a different individual article. Several Sideletters address the performance of “nonexclusive” work by unit employees. Thus, over time, the Sideletters bend the demarcations of work between the Individual Articles, in some cases, to address how technological change can create a need for adjustments in work jurisdiction.

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

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

Sideletter 14, the “Computer Sideletter,” provides for use of computers in the course of work functions by employees, regardless of whether or not they are represented by NABET. Computers are not included in the “technical equipment” covered by

individual article A. The issues covered in this sideletter are elaborated in sideletter 70, the “Nonlinear Editing Sideletter,” which specifically concerns the use of computer editing technology by both unit and non-unit employees.

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

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

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

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

It appears that the “video journalist” classification was included in the unit via this sideletter because video journalists performed both newswriter functions under article M and technical functions under article A.

Sideletter 51, the “Hyphenate Sideletter,” addresses circumstances in which covered employees may be assigned “non-exclusive” work in addition to their regularly assigned work. The Employer or a Union-represented employee may initiate discussions which could lead to assignment of functions other than those usually performed, which functions may or may not be covered by another collective-bargaining agreement. “[S]uch assignments shall not constitute precedent nor an expansion or diminution of the jurisdiction in the Master Agreement.”

As noted in the underlying Clarification Decision, the record demonstrates that unit employees had been assigned producing work under the hyphenate sideletter and received a “producer’s upgrade” in pay whenever this occurred. Unlike the crossover Sideletter (50), this hyphenate Sideletter, in allowing unit employees to perform non-exclusive work, does not appear to require that assignments of nonexclusive work be limited to

<sup>9</sup> At least one content producer had formerly worked as a NABET-represented video journalist.

situations in which the work is being performed in conjunction with the employees habitual functions.

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

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

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

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

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

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

## B. The Bargaining History

### 1. The Master Agreement

Contract negotiations occur between national representatives with input from local representatives and subject-matter experts. Party representatives during contract bargaining were largely consistent over multiple negotiation sessions for a given contract. The Union’s brief exhaustively relates the party representatives present for bargaining sessions during 47 sessions of 1987 contract negotiations. Testimonial and documentary evidence demonstrate that the parties were consistent with this approach throughout the 1970s, 80s, and 90s and into the 2000s.

The Union’s contract bargaining team includes representatives from each network local Union, as well as, national representatives. Not only have essentially the same bargaining teams negotiated the Master Agreement, the same teams also negotiated specific proposals that covered all aspects of the Master Agreement — the General Articles, the Individual Articles, and the Sideletters. To be sure, there are multiple examples in evidence of peripheral negotiations which are related exhaustively in the Employer’s brief. These include:

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

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

### 2. Miscellaneous agreements

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

#### a. National supplemental agreements

The national-level agreements were signed by the Union’s

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

- An August 31, 2007, “MSNBC Agreement” provides that the Union will make no claims to work performed in connection with material produced by or for MSNBC, unless employees of that entity elect the Union as their bargaining agent in an NLRB election or MSNBC produces full, regularly-schedule programs that originally air on the NBC Television Network. The agreement further provides that certain Union—represented engineers will cover certain stories for MSNBC. The agreement provides additionally that any Union—represented employees hired under Sideletter 32 for MSNBC work will not count toward the Employer’s allotment under Sideletter 32. A May 9, 2008, “Telemundo Agreement” provides that work for Telemundo includes payments to be made to Union-represented employees of amounts no less than the applicable “A” Agreement Group 5 scale.
- An August 8, 2011, “Olympics Agreement” covering the 2012 and 2014 Olympics provides that assigned Union-represented employees will be paid their usual base rate; non-staff employees will be paid at a rate no less than the minimum rate per function as included in Sideletter 32; work days specified; per diem payments provided; eligible employees will continue to be covered by insurance programs in Master Agreement; and arbitration in accordance with Master Agreement.
- A March 7, 2012, “NBC Sports Agreement” provides that the Union will not make claims to work performed in connection with NBC Sports, except that NBC Sports shall assign Union-represented engineers to cover events “consistent with the jurisdictional provisions of the NABET-NBCU Master Agreement (“Master Agreement”) as if such work was under that Agreement.” The parties will meet “promptly in New York” to review implementation at request of either party.
- A May 2012 “Steve Harvey Show Agreement” provides that Union-represented employees will be assigned to work on that show per the terms of the Master Agreement with a few modifications specified.
- A July 21, 2014, “NBC Sports Cable Network Agreement” provides that Daily Hires will work under the terms of Article A or Article D, as determined by NBC Sports Group; specified employees will work, “without ever having to become a member of NABET-CWA or being covered by the Master Agreement.”
- A November 2015 “Olympics Agreement” covering the 2016 and 2018 Olympics provides for assignments

to be offered to a specified minimum number of Union-represented employees and for arbitration of conflicts according to the terms of the Master Agreement.

*b. Local 11 agreements*

- A May 15, 1989, letter confirms an agreement allowing Newswriters working under Article M (Los Angeles) to substitute for a New York Newswriter during his vacation weeks. The agreement is signed for the Union solely by the Local 11 President.
- A 1991 “pot settlement” resolved about forty grievances which included amendments to Article N covering New York Newswriters. The agreement is signed by representatives of the Employer and Local 11 only.
- A January 2000 settlement agreement concerning the assignment of Article A employees to work for the Discovery Channel is signed only by local representatives of the parties.
- A January 2006 agreement stated that work assignments to Article A engineers for a CNBC show featuring Michael Eisner would be on a non-precedent, non-citable basis and not create jurisdictional claims. Such assignments would be made under the terms of the Master Agreement, with further such assignments in the Employer’s sole discretion. Representatives signed on behalf of the Employer and Local 11.<sup>10</sup>
- A March 30, 2006 Agreement provided that any maintenance work done by union-represented employees on equipment utilized by non-broadcast entities would be non-precedential and create no jurisdictional claims. This applied only to New York Article A engineers and did not create any new job classifications.
- An August 2, 2006, “NY Giants Agreement” concerned payment of Article A rates for employees assigned to work on coverage of a NY Giants pre-season game.
- An August 14, 2008, agreement which settled two Article A grievances involving employees in New York. In part, the agreement provides that a particular employee who had been working without union representation would be given the option of becoming a NABET-represented employee covered under the “A” contract when another “A” contract employee severs employment in the applicable department. No new job classifications were created as a result of this agreement

*c. Other Local agreements*

- In 2007, 2008, and 2009, the Employer entered

<sup>10</sup> While the record indicates that this agreement could have allowed an engineer in any part of the country to work for the show, the only assignments being made were in New York.

Further, this agreement did not alter the compensation paid to employees assigned to work on this show, nor did it remove any employees from coverage of article A.

into three agreements concerning Article A employees' work on a computer system known as "ROS." These agreements were signed only by representatives of the Union locals in Chicago (Local 41), Los Angeles (Local 53) and Washington D.C. (Local 31). The agreements provided that employees would make no less than the group 8 wage scale in Article A. No national NABET representatives signed these agreements. Importantly, no unit employees were removed from coverage of Article A as a result of the installation of the ROS system equipment.

- In December, 2012, NBC and Local 53 entered into a settlement concerning severance, reassignment, and various other issues which arose from the scheduled layoff of Article L employees (air conditioning workers at KNBC) when the Employer shut down its Burbank facility.
- In 2014, the Employer entered into an agreement regarding accretion of a large number of listed employees working on "E! Programs" into positions under Article A. The agreement was negotiated in New York and Los Angeles, with some discussions conducted by phone. It was signed by representatives of both Local 53 and the Sector.

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

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

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

unit.

### *C. Contract Ratification*

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

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

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

### *D. Administration of the Contract Through Grievance Processing*

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

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

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

Articles.

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

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

#### *E. Arbitration Awards Construing Contract*

The arbitration awards in evidence show that neutrals have struggled with jurisdictional issues. As discussed in the underlying Clarification Decision, a 1971 arbitration concerned a former KNBC newswriter in Burbank, who was promoted to the 17 nonbargaining unit position of Senior Producer, but continued to perform "line producer" work that he had performed as a NABET-represented newswriter. The arbitrator determined that "producer work" was regularly performed by both unit and non-unit employees at KNBC and that the "transfer of work" provision expressly permitted this. The arbitrator observed that,

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

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

consistent with the Employer's past practice.

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

Regarding the issue of single v. multiple units, the record contains a smattering of arbitral decisions. The earliest example is a 1958 Award, wherein the arbitrator considered issues arising out of joint bargaining that NBC and ABC had conducted with NABET. The companies took the position that the negotiations encompassed one agreement covering all units represented by the Union, while the Union argued that the negotiations encompassed separate and distinct contracts between each of the companies and each of the groups of employees represented by the Union. The issue in the decision was not precisely the existence of multiple units under the NBC contract, but the Arbitrator concluded that: "[t]he 1958 negotiations were consummated by one contract referable to all of the separate units covered by the Master Agreement at each Company. The signing encompassed one contract for all groups without disturbing the separateness of the several units and agreements."

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

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

#### *F. History of Recognition and NLRB Certifications*

The Board first certified NABET as the representative of the Employer's employees in 1944, with a Decision and

Certification for a unit of technical employees and engineers.<sup>12</sup> These employees are now covered by individual article A in the Master Agreement.

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

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

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

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

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

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

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

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

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

### G. Union Documents Referencing Multiple Units

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

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

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

## V. THE CONTENT PRODUCERS

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

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

For decades, the parties have bargained the Master Agreements at the national level and neither side designates different teams to bargain the Individual Articles. The supplemental local agreements arise on an *ad hoc* basis and do not necessarily align

bargaining history and the nature of the work at issue in determining the appropriate unit.

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

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

with the classifications in the Individual Articles. Thus, the bargaining history also weighs in favor of finding a single unit.

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

Finally, as noted above, the Board in *CBS*, 208 NLRB 825 (1974), identified four factors distinguishing cases in which unions were found to represent multiple units at a single employer: (1) references in a master agreement to "units," with a description of each unit, (2) an absence of a significant history of joint bargaining, (3) bargaining through years for various numbers of locations where the union demonstrated majority status, and (4) the existence of separate agreements with no master agreement or recognition clause expressing intent to merge separately certified units into a single unit.

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

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

Regarding the origins of inclusion of various classifications under the Individual Articles (analogous to distinguishing factor three), the record demonstrates that in at least some instances, groups of employees were separately certified prior to being covered in the Master Agreement. Some of those separately certified groups have later been folded in with other classifications of employees under article A. I note that in 1944, the Board certified

NABET as representative of a nationwide unit of engineers. *NBC*, 59 NLRB 478 (1944). In 1955, the Board found that editors and associated employees in Los Angeles were a separate appropriate unit. *NBC*, 114 NLRB 1 (1955). For some time now, the Employer's editors and photographers have been covered by the terms of article A, the successor to the original engineering unit, regardless of their work location. While the parties have retained some geographic demarcations, these groupings appear to be more a matter of administrative convenience. In the over half a century of intervening bargaining history and a corresponding evolution in the Employer's workflow, the originally certified separate units are all but meaningless since they have been absorbed under the Master Agreement. As the parties agreed at the hearing, the employees covered under article A have been the heart of the unit for years, with the other articles viewed as "peripheral." The fact that the vast majority of employees are now covered under article A weighs in favor of finding that the NABET-represented employees are a single unit.

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

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

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

It is undisputed that the vast majority of NABET-represented employees work under Article A. The parties refer to Article A as the primary "unit" while other Individual Articles are considered "peripheral." Article A wage scales are a frequent point of reference inside agreements concerning work that is not clearly covered in the Master Agreement. Today, many of the Individual Articles function less as a means of defining distinct units and more as placeholders for classifications which were grouped separately for historical rather than current, practical reasons. The Employer's editors were ultimately consolidated into the

nationwide group of technical and engineering employees covered under article A. Photographers are likewise covered under article A. In -1990, years before the creation of the Content Producer position, the parties agreed on the terms of Sideletter 50, permitting employees covered by newswriter Articles H, M, and N to use equipment used by employees covered under Individual Article A, and permitting Article A employees to perform newswriter work. Apparently, until the instant conflict over the treatment of the content producers, the parties have operated according to convenience with respect to the issue of separate units.

Where classifications could be logically grouped for the purposes of working conditions, they have been grouped under the Individual Articles. When because of technological advances or other circumstances, the Employer wished to assign work to represented employees beyond the description in a particular article, the parties bargained and resolved unique situations. In my view, as amplified below, the same should occur here.

....