

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEATTLE TIMES COMPANY

Case 19-RC-261015

Employer,

and

PACIFIC NORTHWEST NEWSPAPER  
GUILD, COMMUNICATION WORKERS  
OF AMERICA, LOCAL 37082.

Petitioner.

**PETITIONER'S RESPONSE TO SEATTLE TIMES COMPANY'S REQUEST FOR  
REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

**INTRODUCTION**

The Seattle Times (Times) seeks review of the Regional Director's (RD) straight-forward decision to allow the Pacific Northwest Newspaper Guild, Communication Workers of America, Local 37082 (Local 37082 or the Guild) to represent the digital newsroom employees at the Times through a self-determination or *Armour-Globe* election. The Times argument is based on its contention that the RD did not correctly apply the *Briggs Indiana* line of cases to the New Media Agreement (NMA), currently included as Addendum 12 of the Collective Bargaining Agreement (CBA). The Times argues that the NMA bars Local 37082 from attempting to represent the digital newsroom employees. Similarly, the Times argues that the contract precludes Local 37082 from relying on cross-jurisdictional work in its organizing effort. Finally, the Times asserts that the Board committed prejudicial error by excluding evidence that Local 37082 relied on cross-jurisdictional work in its organizing effort.

The Times' arguments must once again fail. As the RD correctly held, under the clear and unambiguous language of the NMA, Local 37082 is only barred from seeking to represent the digital newsroom employees "through accretion, unit clarification procedures or contract

grievance procedures.” The Times’ analysis ignores the impact of this limiting prepositional phrase and cannot be squared with board precedent. Similarly, this same language does not bar Local 37082 from using cross jurisdictional work in its organizing effort and the RD properly determined that evidence of using cross jurisdictional work has no bearing on the interpretation of the contract and was not at issue in the pre-election hearing.

### STATEMENT OF FACTS

Local 37082 has long-represented employees in the newsroom of the Seattle Times. Decision and Direction of Election (DD&E) at 2. The operative collective bargaining agreement (CBA) between the parties became effective on April 1, 2019 and ends on March 31, 2023 (CBA). *Id.*

On May 29, 2020, Local 37082 filed a representation petition seeking to represent “[a]ll full-time and regular part-time digital newsroom employees (digital newsroom or new media employees) in a self-determination or *Armour-Globe* election. On March 31, 2020, the Times filed an unfair labor practice charge (ULP) with Region 19 arguing that Local 37082 was violating the New Media Agreement (NMA) contained in Addendum 12 of the CBA by petitioning for a self-determination election and asked that the election be blocked as a result. On July 1, 2020, the Region denied the Times’ request to block the election, and ordered a pre-election hearing.

The NMA, Section D states:

The Parties further agree the Guild will not use this Agreement, work assignments, or products resulting from this Agreement as a means to attempt to represent or claim jurisdiction over any unaffiliated employee(s) from a non-Guild home department or sub-department *through accretion, unit clarification procedures or contract grievance procedures*. Work assigned or performed pursuant to this cross- jurisdictional Agreement is not intended to enhance or detract from any future *accretion, unit clarification or contract grievance argument* made by the Guild. Once this Agreement ends, nothing in it shall

prevent the Guild from seeking *accretion, unit clarification or redress through the contract grievance procedure*. Furthermore, nothing in this Agreement is intended to alter the historical practice of the parties with regard to unit work performed by unaffiliated employees in supervisory or executive positions. The Seattle Times recognizes the National Labor Relations Act, Section 7, rights of employees, including those in unaffiliated departments involved with new products and projects within the scope of the Agreement.

Er. Ex. 1 at 74 (emphasis added).

At hearing, the Times sought to introduce evidence of the bargaining history of this section, in particular, the testimony of Martin Hammond, Senior Director of Human Resources and Labor Relations. However, when asked about across the table discussions, he responded merely that “[i]t’s explicit in the language. I mean, it’s raised in the language. So yes, I mean, I had to propose it. So it -- it was raised by my proposal.” Tr. 52:24-25; 53:1-3. Similarly, the Times introduced the affidavit of Christopher J. Biencourt, Vice-President, Labor and Employment, in which he stated, “[t]he intent of this provision was, in return for allowing the print journalists to work on the digital platforms, that the Guild would be ‘hands-off’ the digital journalists until the New Media Agreement expired... . We believed that, because of these limitations, the Guild would not be able to represent the digital journalists.” Er. Ex. 18. However, his declaration does not contain any testimony that his understanding of the NMA was communicated across the table.

Examining the language of the NMA, the Regional Director (RD) determined that under the *Briggs Indiana* doctrine, *Briggs Indiana Corp.*, 63 NLRB 1270 (1945), and its progeny the unambiguous language of the NMA did not bar Local 37082 from holding a self-determination election. DD&E at 5-7; 24-25. The RD explained that “[t]he NMA, on its face, limits the scope of the agreement not to ‘attempt to represent or claim jurisdiction’ solely to accretion, unit clarification, and grievance procedures. Each of these has clear meaning under the Act, and each is distinct from the self-determination election...” *Id.* at 6. Similarly, the RD upheld the hearing

officer's ruling to allow evidence of cross-jurisdictional work stating, "[c]onsistent with my finding that the *Briggs Indiana* doctrine does not apply due to the limited scope of Petitioner's promise in the NMA, I also reject the Employer's contention that Petitioner is precluded from presenting evidence in the instant proceeding based on work assigned or performed pursuant to the NMA." *Id.* at 6. The RD also upheld the hearing officer's exclusion of Employer Exhibit 11, which consisted of a series of tweets, noting:

the question of whether the Petitioner breached the NMA is not currently before me. The sole question at issue regarding the NMA is whether it contains an express promise to refrain from representing the petitioned-for digital news employees, and Employer Exhibit 11 has no bearing on this question. This is especially true given that Petitioner stipulated, and the record establishes, that Petitioner relied on cross-jurisdictional work arising out of the NMA in support of the instant petition.

*Id.* at 7. The Times now seeks review of the RD's decision.

## ARGUMENT

### I. Standard of review.

"The Board will grant a request for review only where compelling reasons exist therefor." 29 C.F.R. § 102.67(d). In particular: (1) a substantial question of law or policy is raised because of an absence of or departure from, officially reported Board precedent; (2) the RD's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) the conduct of any hearing or ruling made in connection with the proceeding has resulted in prejudicial error. *Id.*<sup>1</sup>

### II. The RD's decision does not raise a substantial question of law or raise a substantial factual issue that is clearly erroneous because the NMA unambiguously does not bar Local 37082's petition.

#### A. The RD identified the correct legal standard.

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<sup>1</sup> This response does not address whether there are compelling reasons for reconsideration of an important Board rule or policy because the Times does not argue that there are such reasons in its Request for Review. C.F.R. § 102.67(d)(4).

Under *Briggs Indiana Corp.*, a union may be barred from representing a certain group of employees if the union agrees to refrain from accepting them as members or representing them. 63 NLRB at 1271-72 (1945).

However, this rule will be applied only where the contract itself contains an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership; such a promise will not be implied from a mere unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations.

*Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959); *Lexington Health Care Grp., LLC*, 328 NLRB 894, 896 (1999) (clarifying *Cessna* to hold that the agreement need not be embodied in the CBA if it is contained in a written agreement). “Because a promise by a union not to seek representation of a particular group of employees during the term of an existing collective-bargaining agreement ‘is, in a sense, a limitation upon the rights of employees to select representatives of their own choosing,’” the National Labor Relations Board (NLRB or Board) will not imply this promise absent an express promise not to represent a group of employees. *Springfield Terrace Ltd*, 355 NLRB 937, 937 (2010) (quoting *Cessna Aircraft Co.*, 123 NLRB at 856-57). This rule is applied equally to a stand-alone unit and an *Armour-Globe* election. *Umass Mem’l Med. Ctr.*, 349 NLRB 369, 370 (2007) (holding that a petition for an *Armour-Globe* election was not precluded by contract where the union never made an express promise not to include the petitioned for employees in the union).

The Times agrees that the RD identified the standard correctly for determining whether Local 37082 may represent the digital newsroom. *Seattle Times Request for Review (Req. for Rev.)* at 7 (citing DD&E at 3-4, 5-6).

**B. The RD properly found that the language in the NMA did not constitute an express promise to not seek to represent the digital newsroom employees through a representation election proceeding.**

The Times asserts the contract contains such an express promise and that it is not asking the Board to infer an express promise because it is not relying on conduct for this inference. Req. for Rev. at 7-10. In doing so, the Times fails to contend with the basic grammar of the NMA and seeks to excise the limiting prepositional phrase of the NMA. The CBA states:

The Parties further agree the Guild will not use this Agreement, work assignments, or products resulting from this Agreement as a means to attempt to represent or claim jurisdiction over any unaffiliated employee(s) from a non-Guild home department or sub-department *through accretion, unit clarification procedures or contract grievance procedures.*

Er. Exh. 1, p. 74; (NMA) (emphasis added). As the RD correctly held, “[t]he NMA, on its face, limits the scope of the agreement not to ‘attempt to represent or claim jurisdiction’ solely to accretion, unit clarification, and grievance procedures. Each of these has clear meaning under the Act, and each is distinct from a self-determination election, or any alternative election for a stand-alone unit, sought herein.” DD&E at 6. As a result, the RD “conclud[ed] that the Petitioner did not expressly promise not to represent the digital newsroom employees, and thus that the NMA does not bar the present petition.” *Id.*

The Times also argues that the DD&E “overlooks” the possibility that the “attempt to represent or claim jurisdiction over any unaffiliated employee(s)” and “accretion, unit clarification procedures or contract grievance procedures” constitute “two different promises” in the same sentence. Req. for Rev. at 12. This proposition is grammatically unsupportable. The use of “through” connects the two phrases and serves to limit “attempt to represent...” to the three procedures specified in the contract. See Er. Exh. 1, p. 74. The Times’ attempt to divorce these two clauses and ignore the limiting effect of the preposition “through” must fail in the face of basic principles of grammar.

The Times also makes much of the use of “or” separating “attempt to represent” or “claim jurisdiction over.” Req. for Rev. at 13-14. But, the Times provides no evidence that “attempt to represent” and “claim jurisdiction over” have different meanings in this context. The idea that these phrases have different meanings is particularly strange given the NLRB’s holding in *Briggs Indiana* that no specific phrasing is required for a union to give up the ability to represent a group of employees only that the union expressly promise from doing so. *See Briggs Indiana Corp.*, 63 NLRB 1270, 1273 (1945). The Times states that “attempt to represent” connotes a Board election while “claim jurisdiction over” does not, Req. for Rev. at 13-14, but following an accretion, clarification, or contract proceeding Local 37082 would still represent the digital newsroom.<sup>2</sup>

The Times argues that it is not asking the Board to infer an express promise because “[b]y requiring an *express promise*, the Board simply meant that the promise must be in words and not inferred from conduct.” Req. for Rev. at 8. However, this interpretation defies logic and ignores that the clear precedent of the Board. CBAs are replete with express promises, but the express promise must be related to the issue at bar—whether the union agreed to expressly promise not to represent a particular group of employees. The Board has held that an express promise cannot be implied based on the language of the CBA. *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959) (“such a promise will not be implied from a mere unit exclusion”). Moreover, the Board has also refused to imply a promise not to resort to the NLRB election when the contract specifies other procedures for organizing. *Springfield Terrace Ltd*, 355 NLRB 937, 938

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<sup>2</sup> Furthermore, the Times argues that Addendum 11, a provision governing a different group of employees supports its arguments, but a close examination of the language of Addendum 11 actually cuts against the Times argument that “attempt to represent” cannot be limited by “through accretion, unit clarification or contract grievance procedures.” Req. for Rev. at 14. Addendum 12 states that the Petitioner “will not attempt to represent such employees through accretion or unit clarification procedures as provided by the NLRB or the grievance procedures....” Er. Ex. 1, p. 72. Clearly, “accretion or unit clarification” can refer to an “attempt to represent.”

(2010) (“Although it is clear that the Union may not invoke section 3 in seeking to represent the LPNs, that is not the equivalent of an express promise not to invoke the Board’s procedures through the petition in this case, where none of the special provisions of section 3 (e.g., employer neutrality and application of the existing agreement’s terms) will apply.”). Thus, the fact that the CBA explicitly forecloses some procedural paths to representation cannot imply a ban on a self-determination election. To hold otherwise would overturn *Briggs Indiana* and its progeny.

Similarly, the Times contends that a failure to bar Local 37082 from holding a self-determination election would not hold Local 37082 to its promises. But, as demonstrated above, the CBA does not contain a promise not to represent the digital newsroom employees through a self-determination election. Instead, it simply states that Local 37082 will not seek to represent the digital newsroom *through accretion, unit clarification procedures or contract grievance procedures*. The Times seeks to enforce the CBA it wishes it had bargained for, not the agreement it has. To find otherwise, renders the CBA’s unambiguous language meaningless and infringes on the Section 7 rights of the digital newsroom, which the Seattle Times agreed to honor in the NMA. See *Springfield Terrace Ltd*, 355 NLRB 937, 937 (2010) (quoting *Cessna Aircraft Co.*, 123 NLRB at 856-57) (“Because a promise by a union not to seek representation of a particular group of employees during the term of an existing collective-bargaining agreement ‘is, in a sense, a limitation upon the rights of employees to select representatives of their own choosing,’”). As a result, the Seattle Times has failed to identify any substantial question of law or fact that warrants review.<sup>3</sup>

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<sup>3</sup> The Times’ argument that its reading of the NMA better respects the right of the currently represented newsroom employees must fail because it assumes that its clearly erroneous reading of the contract is correct.

**C. The RD did not need to resort to the parties’ past-bargaining history and correctly determined that even if it had taken it into account, it does not support the Times’ argument that the NMA bars Local 37082 from representing the digital newsroom employees.**

The Times argues that the RD erred because in determining whether there was written, express promise not to represent the digital newsroom, Req. for Rev. at 11-17, the RD did not find it necessary to analyze the parties’ bargaining history or unrelated parts of the contract, and when it turned its attention to this extrinsic evidence assuming *arguendo* that it was relevant the RD found this evidence unpersuasive. DD&E at 6.

**1. The clear language of the NMA and the written, express promise standard leaves no room for extrinsic evidence.**

As found by the RD, the contract unambiguously does not include an express promise that the Union agreed not to represent these employees through an election proceeding conducted by the Board, rendering any bargaining history evidence meaningless to this analysis. DD&E at 6. The NLRB in *Cessna* bars the use of such extrinsic evidence stating, “such a promise will not be implied from a mere unit exclusion, *nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations.*” *Cessna Aircraft Co.*, 123 NLRB at 857 (emphasis added).

**2. Assuming *arguendo* that bargaining history is relevant here, the RD properly found that at hearing, the Times adduced no persuasive bargaining history regarding the meaning of the NMA.**

Furthermore, as noted by the RD, “[e]ven assuming *arguendo* that the bargaining history of the NMA were relevant to the instant inquiry, I find nothing in the bargaining history that undercuts my finding that Petitioner’s express promise is limited to accretion, unit clarification and contract grievance proceedings, none of which is at issue here.” DD&E at 6. This finding is obviously correct because at hearing the Times adduced no evidence that there were across-the-table conversations that suggested that Local 37082 agreed not to seek to represent the digital

newsroom through a representation election. Instead, when asked about across-the-table discussions, Martin Hammond, Senior Director of Human Resources and Labor Relations, responded merely that “[i]t’s explicit in the language. I mean, it’s raised in the language. So yes, I mean, I had to propose it. So it -- it was raised by my proposal.” Tr. 52:24-25; 53:1-3. However, such a commitment by the Guild is very clearly *not* explicit in the language of the NMA, because by its own terms the commitment not to seek to represent digital newsroom employees is limited to the forswearing of accretion, unit clarification procedures, or contract grievance procedures—none of which are at issue here.<sup>4</sup> In fact, the specific reference to these three procedures, and these three procedures alone, is repeated in the new language added in 2013 which states,

Work assigned or performed pursuant to this cross-jurisdictional Agreement is not intended to enhance or detract from any future *accretion, unit clarification or contract grievance* argument made by the Guild. Once this Agreement ends, nothing in it shall prevent the Guild from seeking *accretion, unit clarification or redress through the contract grievance procedure*.

Er. Exs. 1 & 8 (emphasis added).<sup>5</sup> If the Seattle Times had meant to broaden the limits on Local 37082’s right to organize digital employees and conversely limit employees’ rights to be represented by the union of their choice, they needed to specify that in the contract.

Instead, all that the bargaining history (should it even be considered) shows is that the NMA allows the Times to assign non-bargaining unit work to members of the Guild’s bargaining unit (see Paragraph A), while simultaneously allowing the Seattle Times to assign non-

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<sup>4</sup> Christopher Biencourt’s affidavit was also entered into evidence where he made representations about what he believed “[t]he intent of the provision was,” but his affidavit provided no evidence of across the table conversations. *See generally*, Employer Ex. 18; *See also* Req. for Rev. at 15-16. Instead, like Mr. Hammond’s testimony, evidence about what one party believes a contract says cannot form the basis of an understanding between parties and is irrelevant to the analysis.

<sup>5</sup> The Times argues the fact that these sentences do not include “attempt to represent” means that Times views “attempt to represent” as a distinct concept from these other means to represent the digital newsroom. Req. for rev. at 14. To the contrary, the fact that these three concepts are repeated without reference to either “attempt to represent” or “claim jurisdiction over” suggests that that accretion, unit clarification or contract grievance proceeding are the only three means of gaining representation barred by the NMA.

bargaining unit members “work on products or projects” that might take place in a “Guild Represented Department” (see Paragraph B). Employer Ex. 2. In exchange, Local 37082 agreed that it would not represent these employees through three delineated procedures with specific and well-established legal meanings: accretion, unit clarification or redress through the contract grievance procedure (see paragraph D). *Id.*

In 2013, the agreement was amended. Tr. 39:6-7. As digital media became more integrated in the workings, the Seattle Times demanded, and the Guild agreed, that the Guild would not “use this Agreement, work assignments, or products resulting from this Agreement” to try to obtain recognition for the non-unit members through accretion, unit clarification, or contract grievance procedures, and the parties also agreed that “[w]ork assigned or performed pursuant to this cross-jurisdictional Agreement” was not intended to “enhance or detract from” any future effort to accretion, unit clarification, or contract grievance efforts the Guild might make. Er. Ex. 8. In exchange, the Guild received a limitation on the amount of bargaining unit work that non-bargaining unit employees could perform. Er. Ex. 8. When viewed together, there is no indication beyond the bare assertions of the Times’ management that the NMA does more.

**3. The RD did not err by refusing to find based on the language in Addendum 11 that the NMA contained an express promise not to represent the digital newsroom through an *Armour-Globe* election.**

The Times argues that the RD failed to adequately take into account the language of Addendum 11, which relates to unit sales employees because the RD was “unpersuaded by the Employer’s argument regarding Addendum 11, as different language in another addendum to the CBA does not render unclear the otherwise clear language of the NMA.” DD&E at 6. In making this finding, the RD determined that this unrelated language did not call into question the unambiguous language of the NMA. Nor, does a different phrasing in a different part of the contract suggest that the phrasing in Addendum 12 is clearly incorrect.

**III. The RD upheld the Hearing Examiner’s ruling to allow evidence of cross-jurisdictional work and correctly determined that the NMA does not contain an express promise that Local 37082 not rely on cross-jurisdictional work to organize the digital newsroom.**

The Times argues that the RD erred by finding that the NMA did not bar Local 37082 from presenting evidence of cross-jurisdictional work to attempt to represent employees. Req. for Rev at 17. The RD found that consistent with its finding that the *Briggs Indiana* doctrine did not bar Local 37802 from representing the digital newsroom employees, Local 37802 was also not barred from using cross-jurisdictional work assignments to support its organizing drive. The RD found:

Similar to the other language in the NMA, the NMA’s section discussing work assignments states that the use of cross-jurisdictional work assignments “is not intended to enhance or detract from any future accretion, unit clarification or contract grievance argument” brought by the Petitioner. As this proceeding is not an accretion, unit clarification, or a grievance, the NMA on its fact does not bar Petitioner from presenting evidence regarding work assignments in the instant representation case.

DD&E at 6-7 (quoting Er. Ex. 74).

Despite the Times’s protestations, the agreement not to use cross-jurisdictional work is limited to supporting the Guild’s potential accretion, unit clarification, or contract grievance arguments. These terms have specific legal meaning that does not encompass an *Armour-Globe* election. There is no mention of an *Armour-Globe* or self-determination election in this agreement. Thus, there is unambiguously no promise not to use cross-jurisdictional work to support a finding that there is a community of interest between the digital newsroom employees and the rest of the newsroom under the contract. The Times has also introduced no evidence that the Times’s understanding of the agreement was communicated across the table.<sup>6</sup> As a result, by

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<sup>6</sup> Even if a different meaning had been communicated across the table, it would be irrelevant as the language of the contract is unambiguous. Moreover, to the extent that the Seattle Times argues that Local 37082’s prior failure to try

its plain terms, the New Media Agreement does not prohibit the Guild from supporting its self-determination petition with evidence of cross-jurisdictional work assignments.

**IV. The RD’s decision to exclude Employer Exhibit 11 was not unduly prejudicial because the question of whether there was a breach of the agreement or the petition was tainted was not before the RD, and the tweets contained in Exhibit 11 have no bearing on whether the NMA contains an express promise by Local 37082 not to petition for a self-determination election.**

The Times argues that the tweets in Employer Exhibit 11 are relevant because “these tweets directly demonstrate that the petition is founded upon a contractual violation.” Req. for Rev. at 19. However, as the RD found:

[T]he instant proceeding is not a consolidated investigation into the allegations raised in Case 19-CB-261080. Accordingly, the question of whether the Petitioner breached the terms of NMA is not currently before me. The sole question at issue regarding the NMA is whether it contains an express promise to refrain from representing the petitioned-for digital news employees, and Employer Exhibit 11 has no bearing on this question.

DD&E at 19. Furthermore, as recognized by the DD&E, Local 37082 stipulated and the record demonstrates that Local 37082 relied on cross-jurisdictional work. DD&E at 7. Thus, whether these tweets were admitted could have no prejudicial effect on the meaning of the collectively-bargained language of the NMA, especially in light of the fact that Local 37802 stipulated that it relied on cross-jurisdictional work. Thus, these tweets could not have any impact, let alone a prejudicial impact, on the RD’s decision.

### CONCLUSION

The Board should deny the Times’ request for review because the RD’s decision raises no substantial question of law in its application of the *Briggs Indiana* doctrine, did not make any

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to organize this group is evidence as to what the NMA means, inaction is not an indicator of intent and this contention is contradicted by pre-petition evidence that the Guild did think that the NMA permitted it to attempt to organize the workers in this fashion. Er. Ex. 10.

clearly erroneous factual interpretations in interpreting the NMA, and to exclude Exhibit 11 did not constitute prejudicial error.

Respectfully submitted this 9th day of September, 2020.

A handwritten signature in black ink that reads "Melissa Greenberg". The signature is written in a cursive style with a horizontal line underneath the name.

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**DECLARATION OF SERVICE**

I, Jennifer Woodward, hereby declare under penalty of perjury that on the date noted below, I filed the foregoing document with the National Labor Relations Board at [www.nlr.gov](http://www.nlr.gov) and emailed at true and correct copy to:

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Signed in Shoreline, WA, this 9th day of September, 2020.

  
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Jennifer Woodward, Paralegal