The Employer’s request for review of the Regional Director’s Second Supplemental Decision is denied as it raises no substantial issues warranting review.

In denying review, we find, in accord with the Regional Director, that, consistent with the 2011 Decision on Unit Clarification Petitions and the 2018 Supplemental Decision in Case 02–UC–000625 (collectively, the 2011 and 2018 Decisions), Local 11 did not have the authority, under the bylaws for the National Association of Broadcast Employees & Technicians—Communication Workers of America, AFL–CIO (NABET), or the master agreement (Master Agreement) between NABET and the Employer, to waive NABET’s right to represent certain classifications of employees in the absence of a Board election.1

We also agree with the Regional Director that the Locals’ petitions are not facially deficient as they meet the minimum requirements set forth in Section 102.61(d) of the Board’s Rules and Regulations, and find that the Employer has not otherwise shown a deficiency in the Locals’ requests based on its contention that the Locals’ petitions sought to have the Board consider two possible units into which the content producers might be placed. In this regard, we note that the Board processes unit clarification petitions that analogously seek for the Board itself, and not the party filing the petition, to determine the appropriate unit placement of disputed employees. See, e.g., Wisconsin Electric Power Co., 193 NLRB 316, 317 (1971) (Without taking a position as to which of the units the employees belonged, the employer asked the Board to determine whether employees should be clarified into the unit represented by one of two local unions.).

We further agree with the Regional Director that the 2011 and 2018 Decisions warrant the conclusion that, under Premcor, Inc., 333 NLRB 1365 (2001), the Employer’s content producers are properly viewed as “remaining” in the unit covered by Individual Article A of the Master Agreement. See id. at 1366 (reaffirming that when a new classification of employees “perform[s] the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion”). The 2011 and 2018 Decisions engaged in a comprehensive analysis of the functions performed by the content producers and various NABET-represented classifications at each locality, concluding that the content producers perform a variety of functions—including shooting, editing, and newswriting—that were historically performed by bargaining unit classifications. In this regard, the 2011 and 2018 Decisions explicitly identified several classifications covered by Individual Article A that performed these functions, such as photographers, editors, and videojournalists.2

1 The Employer argues in its request for review that Local 11 waived its right to represent the Employer’s employees in the Content Producer classification. However, Local 11 is not the exclusive bargaining representative of the Employer’s employees and is not seeking to represent any of the Employer’s employees in this case. The recognition clause in the Master Agreement states that the Employer recognizes NABET, not any of its Locals, as the exclusive bargaining agent for all of its employees covered by the Master Agreement. The record shows that Local 11 merely administers the Master Agreement for NABET-represented employees at the location that NABET has designated it to cover (i.e., the Employer’s local TV station in New York). Further, Local 11’s petition states that NABET is the recognized bargaining agent for the unit(s) into which it asks the Board to clarify the content producers, and a unit clarification petition is not an appropriate vehicle for designating a new collective-bargaining representative for an existing unit of employees. See Union Electric Co., 217 NLRB 666, 667 (1975) (“Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it. . . .”). Finally, the agreement into which Local 11 and the Employer entered states that “NABET-CWA agrees that it will make no claims to represent any non-NABET-represented Content Producers employed by [the Employer at its local TV station in New York] except in the event such employees elect NABET-CWA as their bargaining agent in an election supervised by the NLRB.” Thus, the agreement purports to waive NABET’s right to represent the content producers in the absence of a Board election. Accordingly, the issue before the Board is whether Local 11 had the authority to waive NABET’s right to represent the content producers in the absence of a Board election, and we agree with the Regional Director that it did not.

2 The videojournalist classification was created as a result of the Employer and NABET entering into Sideletter 50 in 1990. Sideletter 50 provides that employees covered by Individual Art. A may perform,
The Employer does not identify any errors in the 2011 or 2018 Decisions, either as a matter of fact or law; however, it contends that these decisions are no longer applicable because the petition at issue in Case 02–UC–000625 sought to clarify the content producers into a single, merged unit covering all the Individual Articles, and that in NBC Universal Media LLC, 369 NLRB No. 134 (2020), the Board concluded that no such merged unit exists. The Board’s 2020 decision did not, however, disturb the findings from the 2011 and 2018 Decisions that the content producers perform functions historically performed by NABET-represented employees covered under Individual Article A, specifically.

The Employer also argues that the content producers’ bargaining unit duties span both the duties of the Individual Article A technical unit and those of the Individual Articles H, M, and N newswriter units, and that the question of unit placement where there is some potential overlap with multiple possible units cannot be answered by Premcor. Our dissenting colleague too asserts that the existence of multiple possible overlapping units cast doubt on the application of Premcor. He further suggests that the scope of the units here into which the content producers might be placed is itself uncertain.

The dissent’s contention that unit scope is unclear cannot be squared with the record here. The current record and findings in this case, developed in the 2011 and 2018 proceedings, as well as the positions of the parties, definitively establish the scope of the relevant units. From the outset of litigation, the question raised in the Locals’ petitions has been framed as whether the Content Producers belong in a nationwide unit broadly including technical employees, as described in Individual Article A, and/or Newswriter units based in Chicago, Los Angeles, and New York, as described in Individual Articles H, M and N, respectively. See 2011 Decision at 53 fn. 80. The Employer explicitly asserts in its request for review that the relevant units are the Individual Article A technical unit, including editors and videojournalists, and the Individual Articles H, M, and N newswriter units. Further, the Regional Director’s Second Supplemental Decision refers to a discrete unit covered by Individual Article A, and the Petitioners have argued in their opposition to the Employer’s request for review that the Regional Director correctly clarified the content producers into the nationwide Individual Article A unit. While our 2020 decision dismissed the NABET petition calling for a nationwide unit consisting of all classifications, it acknowledged that there remained a broad nationwide unit of technical positions defined by Individual Article A. See NBC Universal Media, supra, slip op. at 1, 8.

Having homed in on the scope of the units at issue, it becomes clear that the content producers belong in the Individual Article A unit. The Employer and Petitioner agree that Individual Article A is a nationwide technical unit, the members of which perform, as stated in the Employer’s request for review, “certain video shooting and editing” tasks. Additionally, as discussed above, employees covered by Individual Article A perform newswriting functions under the videojournalist classification. In other words, employees in the Individual Article A unit historically performed functions substantially similar to those now performed by content producers. In fact, our dissenting colleague acknowledges that the content producers perform shooting, editing, and newswriting functions, which, as discussed above, were historically performed by NABET-represented classifications covered by Individual Article A. While Individual Articles H, M, and N also encompass employees with newswriting duties, the Board found in its 2020 decision that the parties consider these units, along with all other units apart from the Individual Article A technical unit, to be “peripheral” (which is unsurprising, considering that, as found in the 2011 and 2018 Decisions, the Employer has to a significant extent phased out the Individual Articles H, M, and N units). See NBC Universal Media, supra,

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1 The 2011 Decision states that following the creation and implementation of the content producer classification, no employees worked under the newswriter classification at the Employer’s local TV stations in Chicago, Los Angeles, and New York. 2011 Decision at 28, 44, 50. The 2018 Decision states that due to “an accelerating consolidation of classifications under Individual Art. ‘A’…vanishingly few NABET-represented employees are covered by the terms of any other Individual Article”. 2018 Decision at 2. See also 2018 Decision at 9 (“There is no evidence of employees currently working under any other Articles [than Individual Article A], except for Article C (two employees) and Article P (ten employees”). 2018 Decision at 12 (“in practice there are also almost no employees currently working under any Individual Article other than A”). As stated above, in its instant request for review, the Employer has not identified any factual errors in the 2011 and 2018 Decisions, including the findings concerning the “vanishingly few” number of employees under Individual Articles, H, M, and N—even though these findings are in tension with its current theory of the case that the content producers cannot be clarified into the Individual Article A unit because their duties overlap with those of Individual Articles H, M, and N.

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slip op. at 8. Further, as discussed above, in the past the parties themselves have negotiated to allow employees under Individual Article A to perform functions normally performed by employees under Individual Articles H, M, and N (and vice versa). While we do not suggest the parties have formally modified the units thereby, this practice indicates that the parties themselves are able to bargain over the specific contract provisions relating to the content producers. The parties may simply keep the content producer classification under Individual Article A or may bargain to place it under a different existing Individual Article of the Master Agreement or a completely new Individual Article. Thus, regardless of unit assignment, practically speaking, the employment terms and conditions of the content producers here, as they conduct their various duties, are subject to bargaining between the parties.

Under these circumstances, we believe that Premcor is properly applied here. Indeed, where a newly created position is “basically” similar to those in an existing unit—even where there is some other less-similar unit which it overlaps—it would be contrary to a fundamental premise of that decision, to ensure that existing bargaining obligations are not circumvented by the creation of new job titles, were we to hold otherwise. The principle behind Premcor does not allow for an employer to avoid its bargaining obligation by creating a new hybrid classification that performs functions historically performed by unit employees simply because some of those functions were performed by employees in multiple classifications across more than one unit.4 Further, we see little practical impact to including content producers in the Individual Article A unit in spite of their newswriting job functions, where employees covered under Individual Article A may perform newswriting functions and where the parties can and have negotiated for different contractual coverage for newswriting duties as necessary.

Thus, the analysis contained in the 2011 and 2018 Decisions and the record in this case establish that content producers perform the same basic functions as employees covered under Individual Article A and are properly clarified into the unit described by Individual Article A.

Finally, there is no merit to the Employer’s contention that the Board should reopen the record to accept evidence with respect to how the content producer position has changed since the 2011 and 2018 Decisions issued. In representation cases, a party seeking to reopen the record must establish “(1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence.” Manhattan Center Studios, 357 NLRB 1677, 1679 (2011). Here, the Employer is seeking to introduce evidence not in existence at the time of the original hearing. See Puna Geothermal Venture, 362 NLRB 1087, 1087–1088 & fn. 4, 5 (2015) (“The new evidence identified by the Respondent pertains to changes in the composition of the certified unit after the representation hearing closed. Even assuming this information is correct, it is not ‘newly discovered and previously unavailable’ evidence warranting a hearing.”). Moreover, the Employer has failed to identify any specific functions performed by content producers that would change the result of this proceeding—rather, it broadly asserts that the role of the content producer has changed over time due to turnover and new managerial structures, and that it varies from station to station, without providing any relevant details. Vague claims of this sort, in addition to not representing newly discovered and previously unavailable evidence, do not demonstrate the existence of evidence that would change the result of this proceeding. See Premier Living Center, 331 NLRB 123, 124–125 (2000).5

In sum, the existing record as developed in Case 02–UC–000625 warrants a conclusion that the Content Producers at each of the relevant locations addressed by the respective petitions should be clarified into the Individual Article A unit. Absent a concrete showing from the Employer that relitigation might reasonably result in a different outcome, we see no need to further delay resolution of these petitions, or to depart from the Board’s general rules with respect to reopening the record.

Dated, Washington, D.C. March 8, 2022

Lauren McFerran, Chairman

4 We agree with our dissenting colleague that the 2011 and 2018 Decisions found that many content producers continue to perform the same functions that they had previously performed as NABET-represented employees. Those findings further demonstrate that it would be contrary to the principle behind Premcor to allow the Employer to avoid its bargaining obligation simply by creating a new classification to perform those functions.

5 Nor is this a situation where failing to consider the “changed circumstances” would result in the Board certifying an inappropriate bargaining unit in derogation of its duty to determine the appropriate unit under Sec. 9(b) of the Act. See, e.g., Michigan Bell Telephone Co., 216 NLRB 806, 807 (1975); Metropolitan Life Insurance Co., 156 NLRB 1408, 1409–1410 (1966).
David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting.

The petitions in this case seek to clarify longstanding bargaining units to include a content producer classification created by NBC in 2008 at its local stations in New York, Chicago, and Los Angeles. Unfortunately, the litigation of these petitions has consumed the past 13 years, through three regional director decisions, three prior Board decisions, and one decision by the United States Court of Appeals for the District of Columbia Circuit. A principal problem in this case is that the parties do not agree on the scope of the existing unit or units into which the content producers allegedly should be clarified. The Regional Director’s Second Supplemental Decision clarified the content producer position into “[t]he bargaining unit covered by Individual Article A” of the parties’ Master Agreement at each local station but does not make any clear findings regarding the scope of that unit. I would grant review because the Employer’s request for review raises substantial issues regarding that determination.

A unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly established classification. Union Electric Co., 217 NLRB 666, 667 (1975). As the Regional Director found, the content producers perform “hybrid work brought into existence in part because of technological changes.” Specifically, they perform work traditionally performed by, among others, separate classifications of technical employees and newswriters. The parties dispute whether the technical employees and newswriters are represented in separate units at each station or whether there is instead a single, nationwide unit of technical employees with separate units of newswriters at each station.1 It appears that the technical employees and newswriters were at least initially represented in separate units, and the Regional Director made no finding of “an unequivocal manifestation of intent to merge” those units. NBC Universal, above, slip op. at 5.2 In these circumstances, the Regional Director’s finding that the employees should nevertheless be clarified, at each local station, into “[t]he bargaining unit covered by Individual Article A” of the parties’ Master Agreement, which covers solely technical employees, raises substantial issues warranting review.

There are also substantial issues warranting review to the extent that the Regional Director clarified any single unit to include work historically performed by classifications in separate units. In Premcor, Inc., 333 NLRB 1365 (2001), the Board clarified a refinery production and maintenance unit to include a newly created process control coordinator classification after finding that an existing unit Operator 1 classification had historically performed the same basic functions as the new classification. In those circumstances, the Board explained, “the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion.” Id. at 1366. Here, however, the Content Producers perform the same basic functions as both technical employees and newswriters. No precedent supports the application of Premcor to clarify into one unit a newly-created classification that performs work historically performed by employees in multiple units.3 Accordingly, the Regional Director’s application of Premcor raises substantial issues warranting review to the extent that the technical employees and newswriters are represented in separate units – an issue as to which the Regional Director made no clear findings, as noted above.

1 In this regard, it is undisputed that (1) NABET represents, among others, technical employees and newswriters at each local station; and (2) terms and conditions of employment for these employees are governed by a master agreement that includes an Art. A covering the technical employees, an Art. H covering newswriters in Chicago, an Art. M covering newswriters in Los Angeles, and an Art. N covering newswriters in New York. In NBC Universal Media, Inc., 369 NLRB No. 134 (2020), the Board dismissed a petition seeking to clarify the content producers into a purported single, nationwide unit because the evidence did not establish that the parties had created such a unit. The Board therefore reinstated separate petitions filed by NABET Locals 11, 41, and 53 seeking to clarify the content producers into their local units in New York, Chicago, and Los Angeles, respectively.

2 Instead, the Regional Director noted that “for decades, the parties engaged in bargaining over such hybridized work as technological changes blurred the lines between classifications. The cumulative effect of this bargaining has been a blurring of distinctions between classifications covered by the different Individual Articles. Finally, the record also demonstrates that most of the employees covered by the master collective bargaining agreement fall within Individual Article A.” These factors fail to establish a merger of units for the reasons stated in NBC Universal, above.

3 Walt Disney World Co., 367 NLRB No. 80 (2019), and Boeing Co., 349 NLRB 957 (2007), cited by the Regional Director, are not to the contrary. In Walt Disney, the union’s petition, which the Board dismissed, sought to clarify separate full-time and part-time driver units to include new full-time and part-time driver classifications, respectively. In Boeing, the employer’s petition, which the Board remanded for further processing, sought to clarify existing professional and technical units to exclude new classifications of professional and technical employees. While the petitions in both cases sought to clarify multiple units in the same proceeding, they did not seek either to clarify into a single unit a new classification that performed the same basic work functions historically performed by employees in two units, or to clarify a single new classification into multiple units.
Going beyond the Regional Director’s findings, my colleagues conclude that Article A is a nationwide technical unit and that the Content Producers belong in it. They dismiss the significance of Articles H, M, and N on the basis that the parties consider them peripheral and have blurred the lines between those units and the nationwide technical unit through various side agreements allowing for employees in one unit to perform work historically performed by employees in other units. My colleagues implicitly acknowledge that the content producer classification is a new hybrid classification that performs functions historically performed by employees from multiple classifications covered by different articles but claim—without any support—that “the principle behind Premcor” applies all the same. Finally, the majority posits that, notwithstanding today’s decision, the employment terms and conditions of the content producers remain “subject to bargaining between the parties,” noting that they can bargain to place the content producer classification under a different existing Individual Article of the Master Agreement or a completely new Individual Article. I respectfully disagree.

First, as noted above, the purpose of a unit clarification proceeding is to “resolve[ed] ambiguities concerning the unit placement of individuals who . . . come within a newly-established classification. . . .” Union Electric Co., 217 NLRB at 667 (emphasis added). There is clearly an ambiguity here, and the majority fails to resolve it. Second, nothing in the Board’s decision in Premcor, or any subsequent case applying it, supports its extension to a hybrid classification like the content producers for the reasons stated above. The majority’s extension of Premcor, with no supporting analysis and without first granting review to permit a full consideration of the issue, falls short of the reasoned decision-making that courts require of the Board. See, e.g., Fred Meyer Stores v. NLRB, 865 F.3d 630, 638 (D.C. Cir. 2017). Finally, I agree that the parties have blurred the lines between Articles A, H, M, and N through negotiated agreements permitting employees covered under one article to perform work covered by another article. But these blurred lines detract from the majority’s unit determination rather than support it because Content Producers perform functions that were historically performed by employees in all the relevant articles, not just Article A. Indeed, the Petitioners requested inclusion of the Content Producer position into both Article A and the newswriter articles, showing they agree the newswriter articles also appropriately cover the position.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. March 8, 2022

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

hearing conceded that there were nine newswriters working under Art. M and 11 newswriters working under Art. N. Moreover, Senior Vice President of Labor Relations Operations Ortiz testified that there were a “chunk” of newswriters working under Art. N and that Art. H was still a “live” if empty unit. It is unclear why the Regional Director disregarded this testimony and NABET’s representations in finding that no employees worked under the newswriter articles, but it is not surprising the Employer did not challenge the finding. The issue in the 2011 and 2018 decisions was NABET’s petition to represent a single nationwide unit that included the content producers among other employees covered by Art. A and the local newswriter articles, so it did not require determining which article applied to the unit. Here, on the other hand, after the Board dismissed the nationwide unit petition and reinstated the local petitions, and the majority finds Art. A itself to constitute the appropriate unit in reliance in part on the purported defunctness of the newswriter articles, the fact of their defunctness is relevant in a manner it never was in any previous decision or hearing. The parties should therefore have an opportunity to address the issue on review.

My colleagues attempt to discount Arts. H, M, and N by claiming that the Employer “has to a significant extent phased out the Individual Arts. H, M, and N units,” but I believe the record is insufficient to support that conclusion. Indeed, the Union’s opening statement at the