

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC

And

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
& TECHNICIANS, COMMUNICATIONS WORKERS OF
AMERICAN, LOCAL 31, AFL-CIO,

RECEIVED
Case No. 5-CA-31828
OCT 26 2010
BY:

And

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC

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NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
& TECHNICIANS, COMMUNICATIONS WORKERS OF
AMERICAN, LOCAL 11, AFL-CIO.

Case No. 5-CA-33125
(formerly 2-CA-36129)

**CNN AMERICA, INC.'S OPPOSITION TO THE
CHARGING PARTY'S MOTION TO EXPEDITE**

Respondent, CNN America, Inc. ("CNN"), respectfully submits this memorandum in opposition to the Charging Party's Motion to Expedite pursuant to Section 102.95 of the Board's Rules and Regulations. CNN likewise seeks efficient resolution of this litigation; however, this case presents serious and complex issues, developed through the course of an 82 day hearing, and requires careful and deliberate consideration. The decision below is substantively and procedurally wrong on multiple grounds. Resolution of this case is further complicated by two interlocutory decisions of the two-member Board that are intertwined with the final decision and must be reconsidered before the main issues can even be addressed. Unless the Board carefully considers the issues in this case, its decision will only sentence the parties to continuing litigation and further delay of the final resolution of this matter. CNN

cc. JJ, L-31 + L-11 Prcs.

respectfully suggests that the Board undertake the deliberate consideration of this case that it deserves.

1. Initially, it should be noted that Section 102.95 of the Board's Rules and Regulations do not support the expedited consideration of this case the Charging Party requests. That rule concerns the expedited processes applicable to cases brought under Sections 10(l) and 10(m) of the Act, as well as several subsections of Section 8(b). As the Charging Party observes, the Complaint in this case involved charges under Sections 8(a)(1), (3), and (5) of the Act. No charges were filed under Sections 10(l), 10(m) or 8(b). In fact, Section 102.95(b) contains only one provision that even arguably concerns the allegations in the Amended Complaint, and it is inapplicable. Section 8(a)(3) charges will be given priority by the "the *Regional Office* in which such charge is filed." N.L.R.B. R & R 102.95(b) (emphasis added). Section 102.95(b) does not provide for the expedited consideration of this—or any other—case by the *Board*.

2. Even were there any legal basis for the Charging Party's request, it would be improper to grant it. CNN agrees that many years have passed since the reorganization that led to this case. The extensive delays that have plagued this case are entirely attributable to the conduct of the General Counsel, including but not limited to years of delay before the General Counsel initiated the hearing in this case.¹ Additionally, the trial of this case was delayed for many months due to lengthy recesses which were requested by the General Counsel, for reasons including the replacement of many of the General Counsel attorneys handling the case.

¹ As detailed in CNN's briefs to the Board, the lengthy delay cited by the Charging Party is attributable to years of indecision on the part of the General Counsel prior to issuing the Complaint. In addition, the General Counsel lengthened the hearing, which lasted over a period of eight months, by requesting numerous recesses, repeatedly recalling witnesses on non-successive days, and improperly deferring cross examination of witnesses.

3. After years of delay largely attributable to the General Counsel, there is no valid reason the Board should now act without giving due consideration to the serious issues presented in this case. Judge Amchan's decision suffers from a multitude of legal flaws, many of which raise complicated legal and factual issues. For example, Judge Amchan held that CNN was a joint employer with Team Video despite overwhelming record evidence to the contrary, relying upon plainly inapplicable legal principles; he concluded that the prior "historic" bargaining unit remained appropriate, as opposed to a production-wide unit as required by long-standing Board law in the broadcast industry, despite undisputed evidence that the prior unit ceased to exist as a distinct entity years ago; and he found that CNN discriminated against unit members in initial hiring even though it hired a majority of the prior union workforce, and in the face of compelling statistical evidence to the contrary which he dismissed in one disingenuous footnote. The issues raised by these extraordinary rulings are complex and significant, and cannot be properly dealt with in summary fashion.

4. The resolution of these issues is further complicated because the trial of this case was affected by two interlocutory appeals, decided by the two-member Board, which are no longer valid under *New Process Steel LP v. NLRB*, 560 U.S. ___, 130 S.Ct. 2635 (2010). In one of the appeals, the two-member Board reversed a decision by Judge Amchan on the proper application of Fed. R. Evid. 612, *see CNN America, Inc.*, 352 NLRB 265, 266, with the result that part of the trial was conducted under an inappropriate construction of the proper evidentiary rules. The severe prejudice to CNN resulting from the portion of the trial conducted under an erroneous standard has never been resolved. The other interlocutory appeal concerned the validity of a grossly overbroad subpoena issued by the General Counsel and unprecedented discovery orders concerning attorney-client privileged material stemming from that subpoena,

which form the basis of portions of the Judge Amchan's decision that are effectively adverse inferences.² The validity of Judge Amchan's decision on the merits is bound up in these interlocutory appeals, as well as other issues that are raised in the appeal of the final decision. Before the Board can resolve the parties' exceptions and cross-exceptions to the decision of the Administrative Law Judge, it must resolve the issues surrounding the interlocutory appeals. CNN has requested leave to brief the impact of the Supreme Court's recent decision in *New Process Steel*, and the Board has not yet ruled on that motion. That motion must be resolved, and the *New Process Steel* issues briefed and decided by the Board or in the courts, and then the impact of the resolution of those issues on the final decision briefed and considered, before the Board can even consider the merits of the parties' exceptions and cross-exceptions with respect to the final decision.

5. The proper resolution of these complex questions thus requires careful consideration — not a rush to decide the case simply for the sake of a decision. Far from solving the problems listed by the Charging Party, a hurried adjudication will only trigger more litigation that will further postpone the ultimate end of this case and exacerbate the repercussions to CNN and the Charging Party of the General Counsel's delay in initiating and litigating the case.

6. The Charging Party's Motion claims that former employees "have abandoned hope of ever returning to their former workplaces and sought employment elsewhere." Putting aside the undisputed fact that many of the former Team Video employees were hired by CNN, surely any employees who sought work elsewhere did so years ago, during the extended delay by the General Counsel in deciding to litigate this case; it was nearly four years from the time of the

² These issues, concerning enforcement of an NLRB subpoena, initially were placed before the federal district court in *NLRB v CNN America, Inc.*, Misc. No. M-36 (SDNY), which was dismissed without prejudice in light of *New Process Steel* on July 1, 2010.

underlying events in this case until the trial of this matter began, and unless former employees were independently wealthy they would have sought work elsewhere long ago. As to the claimed loss of bargaining rights, the Charging Party has always had the opportunity to alter its status by seeking to organize CNN's workforce, which was and remains comprised of many former union-represented personnel. Its failure to do so makes its protestations of loss of recognition chimerical.

Accordingly, for the foregoing reasons, CNN respectfully requests the Charging Party's Motion to Expedite be denied, and that the Board render its decision based upon the careful consideration of this complex case as the record and issues demand.

Respectfully Submitted,

Zachary D. Fasman, by Kenneth M. Willner, with permission

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JOINT EMPLOYERS

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WORKERS OF AMERICA, LOCAL 11, AFL-CIO

AFFIDAVIT OF SERVICE

Eric Engberg, being duly sworn, deposes and says as follows:

1. I am over 18 years of age, am not a party to this proceeding, and am employed by the law firm of Paul, Hastings, Janofsky & Walker LLP, 875 15th Street, N.W., Washington, D.C. 20005.
2. On the 20th day of October, 2010, I filed, via E-file, CNN America, Inc.'s Opposition to the Charging Party's Motion to Expedite, with Henry S. Breiteneicher, Associate Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570.
3. On the 20th day of October, 2010, I served one true and correct copy of the forgoing, via regular mail, on the following counsel of record:

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Eric Engberg

Sworn to before me this
20th day of October, 2010


Notary Public

Carole L. Stephens
Notary Public, District of Columbia
My Commission Expires 2/14/2015