

**Questions & Answers**  
***NLRB v. CNN America, Inc.*, Case No. 15-1112**

**Q: What did the court decide?**

**A:** There are six principal aspects to the decision of the United States Court of Appeals for the District of Columbia Circuit. These aspects are as follows:

- (1) The Court set aside the findings and conclusions of the National Labor Relations Board (“Board”) that CNN America, Inc. (“CNN”) was a joint employer with Team Video Services (“TVS”) of the technical employees in the bargaining units at CNN’s D.C. and N.Y. Bureau.
- (2) The Court upheld the Board’s findings and conclusions that CNN discriminated against the TVS employees during the Bureau Staffing Project (“BSP”), which is the process used by CNN to hire its own workforce to perform the technical work at the D.C. and N.Y. bureaus, and, thus, is a discriminatory successor who forfeited the right of a successor to set the initial terms and conditions of employment.
- (3) The Court upheld the Board’s findings that certain CNN managers and supervisors violated the Act by making statements that TVS employees would not be hired because CNN’s newly hired workforce would be non-union.
- (4) The Court held that the employees are entitled to a backpay remedy; however, the Court remanded the backpay remedy to the Board for further proceedings to conform its remedy to the Court’s decision in *Capital Cleaning Contractors v. NLRB*, in which the court held that a successor can be held to the terms and conditions of a predecessor’s collective bargaining agreement for a “reasonable period of time”; and, thereafter, the General Counsel or Unions will have to show that CNN would have agreed to better terms or backpay beyond that reasonable period of time will be calculated based upon what CNN actually paid.
- (5) The Court rejected CNN’s challenges to the reinstatement remedy on the basis that any such challenge was premature and had to be litigated as part of the compliance proceeding (which, as explained below, is the proceeding where the specifics of the remedy are determined).

- (6) The Court set aside the affirmative bargaining order, remanding the issue back to the Board because the Board failed to follow the Court's precedent requiring certain explanations to be provided in support of such an order.

**Q: How is this a significant victory for the employees?**

**A:** The Court vindicated the former TVS employees by upholding the Board's findings that CNN intentionally discriminated against those employees during the Bureau Staffing Project, which was the process used by CNN to hire its own workforce to perform the technical work at the D.C. and N.Y. bureaus. Thus, the Court upheld the Board's finding that CNN is a discriminatory successor, which means that CNN forfeited its right as a successor to set the initial terms and conditions of employment for its newly-hired workforce. CNN was obligated to follow the terms and conditions of employment of the predecessor employer, TVS, for a reasonable period of time.

In addition, the Court upheld the Board's findings that CNN unlawfully failed and refused to recognize NABET-CWA Local 31 as the exclusive bargaining representative of the bargaining unit of technical employees at CNN's D.C. Bureau and Local 11 as the exclusive bargaining representative of CNN's technical employees at the N.Y. Bureau. The Court further enforced the Board's order requiring CNN to refrain from refusing and/or failing to recognize Locals 31 and Local 11.

**Q: I've seen press reports that indicate CNN won on some issues, too. What were they?**

**A:** As noted above, CNN prevailed on the issue of whether it is a joint employer with TVS. Given the Court's finding, CNN is not a joint employer with TVS. While this means that CNN will not be required to rehire employees or pay backpay because of a joint employer relationship, *CNN will still be required to hire those employees who were not offered jobs as part of the BSP and will still be required to pay backpay to TVS employees and CNN employees. This reinstatement and backpay remedy is based upon the findings that CNN is a discriminatory successor.*

**Q: What are the next steps?**

**A:** There is a forty-five (45) day period during which any party can seek rehearing from the Court. There are two types of rehearing. First, there is a panel rehearing, whereby a party asks the same panel of three (3) judges to reconsider

its findings. Second, there is *en banc* hearing, whereby a party asks the entire D.C. Circuit to reconsider a finding of the panel.

Assuming no rehearing is sought, the D.C. Circuit will issue its mandate within seven (7) days. At that point, the proceedings before the appellate court will be closed. Any party could file a petition for certiorari with the U.S. Supreme Court. If no petition is filed, the case will be remanded back to the Board to address the issues raised by the D.C. Circuit (joint employer, backpay, and affirmative bargaining order).

**Q: What does this decision mean for those TVS employees who lost their jobs when CNN refused to hire them?**

**A:** TVS employees who lost their jobs when CNN refused to rehire them still have the remedy of reinstatement and backpay. The specifics of this remedy have to be litigated at the compliance hearing. Generally, the General Counsel will issue a compliance specification alleging that CNN would have hired the discriminatees on a certain date. The compliance specification will further allege that the employees would have continued in CNN's employ throughout the backpay period unless there is evidence that the discriminatee was removed from the labor market (such as the death of the discriminatee). CNN would bear the burden of proving that the discriminatees would have left its employ before the end of the backpay period. Once the employment period is determined, backpay will be calculated for that period of time, with interest compounded daily.

For those discriminatees who were not hired but are willing to work for CNN, CNN will be required to hire them in a substantially equivalent position and provide them with the requisite training. This may also have to be addressed in a compliance proceeding, but we are looking into how the return of these employees can be expedited.

**Q: What does it mean for current CNN employees?**

**A:** Current employees will be entitled to the difference between the predecessor's terms and conditions of employment and CNN's unilaterally implemented terms and conditions of employment, plus interest. The Court limited this remedy to a reasonable period of time, unless the General Counsel and/or the Union could show that CNN would have agreed to better terms. We believe that the issues of what constitutes a "reasonable period of time" or what quantum of evidence is required to show that an employer would have agreed

to better terms and conditions of evidence have never been litigated before the Board or the Court. We are continuing to look into this matter.

**Q: What does it mean for whether or not CNN employees will have union representation and a union contract?**

**A:** After the issuance of the mandate, CNN will be required to recognize and bargain with Locals 31 and 11. This requirement will no longer be subject to debate. Whether CNN will agree to meet with the Unions and whether the parties will be able to reach an agreement depends upon how much longer CNN wishes to flout the National Labor Relations Act.

**Q: Since the Court ruled that it is not barring the claim of joint employer, can the NLRB and NABET file a new claim?**

**A:** No. It is remanded for the Board to consider using the “direct and immediate control” standard based on the record in this case.

**Q: If NABET really did win some things for us, why are some press accounts spinning that CNN won?**

**A:** Please note that CNN’s attorney has not made any comment. The press is basically the frenzy around the joint employer issue (which has broader implications than the question of whether union members in this particular case suffered harm) and is fueled by certain special interest groups like franchisor restaurants.