

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of

**PEACOCK PRODUCTIONS OF NBC
UNIVERSAL MEDIA, LLC,**

Employer,

-and-

WRITER'S GUILD OF AMERICA EAST, INC.,

Petitioner,

Case No. 2-RC-092111

**EMPLOYER'S REQUEST FOR REVIEW OF
DECISION AND DIRECTION OF ELECTION**

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I. PRELIMINARY STATEMENT

On October 27, 2012, Writer’s Guild of America East, Inc. (“Petitioner”) filed a petition pursuant to Section 9(a) of the National Labor Relations Act (“the Act”) with National Labor Relations Board Region 2 seeking a representation election among a unit of all part-time and full-time freelance and “run of show” producers, associate producers and casting producers of Peacock Productions of NBC Universal Media, LLC (“Peacock” or “Employer”). In a Decision and Direction of Election dated April 30, 2013 (“DDE”), the Regional Director found that the freelance and run-of-show producers did not exercise supervisory authority as defined by Section 2(11) of the Act and therefore were to be included in the voting unit.

As an initial procedural matter, the Employer asserts that the Regional Director should have held this matter in abeyance rather than issuing the DDE. Under Section 9(c) of the Act, the authority of the Regional Director to investigate and make determinations pursuant to a representation petition flows from that of the Board. 29 U.S.C. § 159(c). However, as was recently held by the Federal Court of Appeals for the D.C. Circuit, the Board is without authority to act because it lacks a quorum. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Accordingly, until the Board is comprised of a duly constituted quorum, the Regional Director lacks authority to act on the instant petition. In the event that the Board is unwilling to direct the Regional Director to hold this matter in abeyance, this Request for Review is offered to set out the Employer’s substantive objections to the Regional Director’s findings.

Peacock seeks review of the DDE pursuant to the Board’s Rules and Regulations, Sections 102.67(c)(1) and (2) on the grounds that: (1) a substantial question of law or policy is raised because of a departure from officially reported Board precedent; and (2) the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error

prejudicially affects the rights of Peacock. Specifically, the Board should grant review of the DDE for the following reasons:

(1) The Regional Director's finding that the freelance and run-of-show producers do not have authority to effectively recommend hiring of associate producers, directors of photography, technical crew members, actors and post-production employees is clearly erroneous on the record and deviates from well-settled Board precedent. The uncontroverted evidence established that Peacock relies exclusively on the producers to recommend candidates for such positions and that these recommendations are routinely accepted by Peacock management. The existence of such authority mandates a finding of 2(11) supervisory status under the Act and existing Board doctrine.

(2) The Regional Director's decision that producers do not assign such employees to times, locations and significant overall duties also is clear error in light of record and fails to properly apply Board precedent. The producers in question are responsible for *all* assignments to associate producers, crew members and actors on their productions. Contrary to the Regional Director's determination, these are complex projects requiring the exercise of tremendous discretion in making assignments. Moreover, the fact that the exercise of this authority is accomplished in furtherance of the producer's professional expertise and artistic vision actually supports its nature as an exercise of independent judgment.

(3) Similarly, the Regional Director's determination that these producers do not responsibly direct the work of others on their projects constitutes clear error and a misapplication of Board principles. While finding it "unavoidable" that producers exercise such authority, as with the authority to assign, the Regional Director improperly applied precedent in deciding that such direction was not exercised "responsibly" because it did not require producers to exercise

independent judgment. Contrary to the Regional Director's conclusion that Peacock programs are the result of collaboration of a team of professionals, the uncontroverted evidence demonstrated that the producer is the pinnacle of the production unit and holds ultimate responsibility for the quality of the program.

II. FACTUAL BACKGROUND¹

Peacock produces long-form, documentary-style, non-fiction programming, primarily for distribution over cable television by Peacock's clients, such as Investigation Discovery, TLC, the History Channel, and MSNBC. Tr. 22-23. This programming primarily consists of one-hour long episodes of television series or stand-alone, one-hour programs involving many elements, interviews, locations, and event recreations to present the material in a unique and compelling perspective. *Id.* Once a project begins, a senior producer, who is responsible for up to twelve projects at a time, assigns a producer to conceive, execute and manage the production on a day-to-day basis while retaining executive oversight to ensure that the program is produced pursuant to client expectations and to manage client relations. Tr. 25, 28 and 120-121. Typically, a one-hour program is produced over a period of at least twelve weeks unless the program requires an accelerated production schedule known as a "crash." Tr. 23 and 213.

Producers at Peacock are categorized as freelance, run-of-show, or staff. Notwithstanding these separate categories, their responsibilities and degree of supervision are identical.² Tr. 65-66, 73-74, 122, 214 and 385. Producers are responsible for the program from its inception to its final form as the production moves from pre-production, to field production and finally, post-production. Tr. 29-30, 74, 131, 134-135 and 212. Around the time that they

¹ The facts established at hearing and described in more detail in the Employer's Post-Hearing Brief to the Regional Director are incorporated below as relevant to support the separate grounds upon which review from the DDE is sought.

² Freelance and run-of-show producers are temporary employees, hired on a project basis whereas staff producers are regular employees.

are given the concept for the program, producers are also given broad budgetary parameters within which they are supposed to operate, while retaining discretion to make adjustments in all stages of production. Tr. 240.

Within this framework, the producer devises the creative and technical plan to produce the program at each stage of production. Because the producer is accountable for the final product, he or she is bestowed with and exercises the authority to select and hire the key members of the production team, including associate producers, directors of photography, technical crew (such as cameramen, audio and lighting engineers), actors and editors. Once the team is assembled, the producer assigns and responsibly directs their work, making countless decisions over the course of the project – what research to conduct, whom to interview and what to ask them, what video images and sound effects to use, whether to include a reenactment of a particular scene, how to assemble the story elements into a final product and many more. *See, e.g.*, Tr. 35, 129-30, 179, 181, 272, 330-31, 381-82, and E-5, E-6.

As freelancers and run-of-show producers, they acutely feel the responsibility to generate an excellent work product that is on time and on budget. Their future employment opportunities are dependent upon successfully satisfying these responsibilities. Tr. 277-78, 679-698.

III. ARGUMENT

A. General Principles of Supervisory Status under the Act

Section 2(11) defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Under this definition, “individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g. “assign” and “responsibly direct”) listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); see also *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), *cert. denied*, 338 U.S. 899 (1949). As the definition makes clear, “[s]upervisory status may be shown if the putative supervisor has the authority to perform a supervisory function or to effectively recommend the same.” *Id.*; see also *Entergy Systems & Service*, 328 NLRB 902 (1999); *Detroit College of Business*, 296 NLRB 318 (1989); and *Westwood Health Care Center*, 330 NLRB 935 (2000). “If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment.” *Oakwood*, 348 NLRB at 688.

The circumstances under which the exercise of authority to assign and responsibly to direct is not routine or clerical but requires use of independent judgment is of particular significance given the Regional Director’s decision. Prior to the Supreme Court’s decision in *NLRB v. Kentucky River*, 532 U.S. 706 (2001), the Board held that employees do not use independent judgment when they exercise ordinary professional or technical judgment in directing less skilled employees. The Board’s view was that such judgment, even if exercised in a degree sufficient to meet the statutory standard, by its nature was not “independent judgment.” *Id.* at 714. The Court rejected this notion as having no basis in the statutory language, adding: “[w]hat supervisory judgment worth exercising, one must wonder, does not rest on ‘professional

or technical skill or experience’?” *Id.* at 715. Following the *Kentucky River* decision, the Board adopted and extended this reasoning to the authority to assign in addition to authority responsibly to direct. *See Oakwood*, 348 NLRB at 688.

B. The Regional Director Made Erroneous Findings of Fact and Misapplied Board Precedent in Finding Producers Do Not Hire or Effectively Recommend Hiring of Peacock Employees

1. Hiring of Associate Producers

Contrary to the record evidence, the Regional Director erroneously found that producers do not effectively recommend the hiring of associate producers. The Regional Director incorrectly attributed this authority to Supervising Producer Ann Kolbell, stating that she is in charge of recruiting freelance APs in consultation with the senior producers. *See DDE* at 14-15 (“The most common situation described by the freelance producers is that Kolbell simply informs them of the assigned associate producer without their input.”). On the contrary, Ms. Kolbell plays only an administrative role and as such simply is responsible for the mechanics of coordinating assignment of APs to the many projects Peacock handles. She relies on the advanced input and post-project feedback of the producers to determine who will (and who will not) be engaged and assigned as an associate producer.

In the first instance, Ms. Kolbell relies upon the input or preference of the producer on the project when selecting an associate producer for that project. All requests by a producer for an associate producer employed by Peacock are granted unless that associate producer is already assigned to another project. *Tr.* 92, 130; *see Tr.* 187, *Tr.* 195 and 236. Indeed, many times the producer will bring to the attention of Peacock an associate producer with whom he or she has worked before and who, as a result, is hired. *See Tr.* 31 (“We have found many of our AP’s through producers. Either they’ve worked with them in the past somewhere else, and they know they have particular strengths – and they are very vocal because . . . the producer’s . . . ass [is] on

the line.”); *see also* Tr. 31, 74, 92, 130, 187 and 195. Based on this uncontroverted evidence, the producers exercise authority to effectively recommend employment of associate producers.

The Regional Director also failed to apply the well-settled principle that the authority to effectively recommend *against* hiring also establishes supervisory status. *See Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (finding supervisory authority where recommendation that a candidate not be hired “would be fatal”); *HS Lordships*, 274 NLRB 1167, 1173 (1985) (supervisory status established where bar manager’s recommendations not to hire were followed). Where a producer does not make a specific request for an associate producer, or the requested individual is not available, Ms. Kolbell will provide an associate producer; however, such an assignment remains subject to the ultimate approval of the producer. For example, Producer Kimberly Ferdinando testified that “[i]f Ann Kolbell wanted me to work with someone I did not want to work with, I absolutely would not have to work with them.”³ Tr. 234. Similarly, Producer Dan Bowen testified that he has the authority to reject the assignment of an associate producer if he decided he didn’t want to work with him or her. Tr. 286. This authority to reject an associate producer, even in the absence of a specific example that it was exercised, is sufficient to establish supervisory status. *See Sheraton Universal Hotel*, 350 NLRB at 1118 (citing cases).

The Regional Director improperly disregarded yet another facet of the producers’ authority to effectively recommend hiring, as well as against hiring, associate producers – recommendations they make for employment of associate producers on future projects. The

³ The Regional Director appeared improperly to discount the testimony of Producer Ferdinando because she is a staff employee of Peacock. *See* DDE at 6. As stated above, the testimony at hearing demonstrated without contradiction that staff producers perform the same functions and have the same responsibilities as the freelance and run-of-show producers who are the subject of the Petitioner’s election petition. Tr. 65-66, 73-74, 122, 214 and 385. Moreover, she began her career at Peacock as a freelance associate producer, so she has direct experience as a freelance employee. Thus, the testimony of Producer Ferdinando should carry the same weight as that of any other witness.

qualified pool from which Ms. Kolbell draws associate producers when a producer does not make a specific request or the requested individual is unavailable has been established based on extensive input from the producers themselves. At the end of each project, producers are expected to provide an evaluation of the performance of the associate producer who worked for them to senior management. Tr. 97. The producer's evaluation is the sole basis on which associate producers are given opportunities for future work or promotions. Tr. 98. As Ms. Kolbell explained, "the feedback I get from the producer is what determines whether a person gets another assignment and what kind of assignment they would get." *Id.*; *see also* Tr. 98-105, E-2-E-5, Tr. 166-167 and 347 ("their feedback means I'm going to get put on another project."). As explained by Producer Ferdinando, who was promoted to producer from her role as an associate producer, producers provide feedback:

on a continuous basis. They are the reason I was hired initially. They are the reason why I was eventually promoted. The producers are intrinsic in giving feedback to Ann Kolbell or anyone else who is doing assigning, because they're the only people who work directly with the APs.⁴

Tr. 183; *see also* Tr. 194, 197 and 198.

Similarly, a negative assessment from a producer means that the associate producer will not be hired again. For instance, Producer Steve Rivo (a witness called by Petitioner) testified that he had given negative feedback to Teresa Palaia, a freelance associate producer who was working with him on an episode of *Fatal Encounters*. Tr. 824-825 and E-31. Shortly after returning from the field, Mr. Rivo gave additional feedback on Ms. Palaia to Ms. Kolbell. Ms. Kolbell confirmed that Mr. Rivo's evaluation of Ms. Palaia resulted in her no longer working at Peacock:

HEARING OFFICER LEAF: Okay. And is Teresa still employed with Peacock?

⁴ "AP" refers to "associate producer."

THE WITNESS: No.

HEARING OFFICER LEAF: And do you know why?

* * *

THE WITNESS: Well, when Steve came back from the field, he had a lot of problems with her performance. And I – which he had shared. And I asked him about them. And he, he liked her as a person. He did not feel she was experienced enough. He said that when she, she needed a lot of direction. Her time management was not good. She was not ready to be in such a big production where there were 20 actors or something like 20 actors and 4 cities. And she just didn't have the skillset. And he had to spend too much time giving her tasks and then she wouldn't do them in a timely manner.

HEARING OFFICER LEAF: Okay. And what did you do with this information from Steve Rivo?

THE WITNESS: I didn't assign Teresa to another show.

* * *

THE WITNESS: It was all Steve's feedback, because she – this was her first project with Peacock and he was the person who had the experience with her, so it was all based on his feedback.

Tr. 959-960.

At times, Peacock management has removed an associate producer in the middle of a project and disqualified them from future employment based entirely on a producer's complaints. Ms. Kolbell testified that she terminated an associate producer and assigned a substitute after receiving an e-mail from a producer which said, "Anastasia is really not pulling her weight on this show and . . . lacks in basic skills I think . . . is there any way we can ditch her and get a different AP?" Tr. 94-95 and E-1. Shortly after being removed from the project, and based entirely on producer evaluations, Ms. Kolbell declined to invite the associate producer to return for additional employment on a program with Peacock. Tr. 95-96.

Ignoring the contents of the record, the Regional Director expressed concern regarding the absence of documentary evidence of these recommendations, holding that the lack of paper

evidence should be construed against Peacock. DDE at 10, 16. Apparently, the Regional Director overlooked the documents admitted into evidence that clearly show freelance and run-of-show producers giving explicit performance feedback on associate producers. *See* E-1, E-31 the overwhelming weight of testimonial evidence supports the existence and exercise of the producers' authority to recommend hiring. As was demonstrated at hearing, freelance employment is typically for the period of a project and, as a result, carries fewer of the formalities associated with staff employment. The absence of large numbers of supporting documents cannot be permitted to somehow erase those that are in the record as well as the clear and unequivocal testimony presented at hearing, including by Petitioner witnesses, that producers give post-project evaluations and that such evaluations are the exclusive basis on which future hiring decisions are made. Thus, in direct contravention of the Regional Director's findings, producers possess and regularly exercise the authority to effectively recommend in favor of or against hiring associate producers for Peacock projects.

2. Producers Effectively Hire Directors of Photography and Other Technical Crew Members

The Regional Director also committed clear error in finding that freelance and run-of-show producers do not hire or effectively recommend the hiring of directors of photography, cameramen, sound technicians and other crew members. DDE at 7-8. The existence of this authority was supported not only by Peacock Production management representatives, *see* Tr. 75-76 and 163, but also by the testimonial evidence of producers and associate producers. *See* Tr. 202-03 and 279; 384 and 388.⁵

⁵ The Regional Director erroneously relied upon a document entitled "On-boarding Procedure" as a justification for ignoring the weight of evidence supporting the fact that Peacock producers have authority to hire. DDE at 7 & n. 5, P-4. As the uncontested evidence showed, these guidelines are not official Peacock policy but merely provide guidance to those who have questions. Tr. 942 ("[T]he Wiki . . . is an information source. Some people use it, some

Strikingly, the Regional Director found that freelance and run-of-show producers called to testify by Petitioner referred directors of photography who were in fact hired to work with them on a particular project. DDE at 8 (referring to testimony of Producers Van Taylor, Mettler, Zumwalt and Wong). For example, run-of-show producer Mettler testified that he recommended a director of photography, Mark McKnight, who was ultimately hired on one of his shoots in Seattle. Tr. 589-90. Similarly, producer Van Taylor, another Petitioner witness, testified:

Sometimes, there's more than one DP⁶ available, who they will work with. And, they'll ask you – ask me my preference. Sometimes, they . . . can't find a DP is available and they'll, you know ask me if I know anybody. . . . Once or twice, I have recommended DPs in that situation but they haven't worked out I did recommend a DP before I was hired, who has become a regular DP at Peacock.

Tr. 459-460. Mr. Van Taylor later testified to working with the director of photography he effectively recommended hiring. *See* Tr. 477.

In further support of the producer's authority to hire crew, Guild witness, freelance producer Annie Wong testified that, despite only working on one project for Peacock, she effectively recommended a cameraman who was later hired to shoot an episode of *Disappeared*. Tr. 718-719. Ms. Wong explained that she informed the cameraman of the number of days he would work and then a line producer negotiated payment and other terms and conditions of employment. *Id.* Accordingly, based on the independent judgment and authority to hire or

people don't.") (testimony of Danielle Bibbo). Peacock producers are not required to follow the guidelines set forth in the document and often disregard them when addressing production needs. *Id.*

Despite the clear testimony demonstrating that the document is far from an absolute rule, the Regional Director improperly gave it more weight than the testimony from numerous witnesses. *See, e.g.*, Tr. 75-76 ("Q. Who decides how many crew members to hire? A. The Producers.") (Walker testimony), Tr. 75-76 ("[Y]ou want the best people working for you when you're responsible for the show.") (Ferdinando testimony), Tr. 202-03 ("Q. [W]ho makes the decisions as to who to hire and how many of each category you need? I mean we can just start for an example of how many cameramen do you need, who makes that decision? A. The producer would make that decision.") (Halpin testimony), Tr. 163 ("usually the producer has a strong sense of who they want to work with."), Tr. 384 (Producer Matson testimony). Indeed, producers Matson, Van Taylor and Wong all testified that they had hired or effectively hired crew in the past. *See* Tr. 153, 254-58 279, 384, 388, 401, 459-60, 477, 589-90, and 718-19. Clearly, the so-called "On-boarding Procedure" in no way interfered with or constrained the producers' exercise of hiring authority.

⁶ "DP" stands for director of photography.

effectively recommend hiring of crew for field production, Peacock producers are Section 2(11) supervisors.

This record evidence, confirmed and accepted by the Regional Director, should have been more than adequate to conclusively find the producers to be supervisors under Section 2(11). However, the Regional Director dismissed the significance of this clear authority to effectively recommend hiring by saying “the producers did not participate in the interview or any other aspect of the hiring process, including setting the terms and conditions of employment.”

Id. This finding was factually incorrect. The testimony revealed that, although the producer may enlist the services of a line producer to assist with these matters, he or she frequently will call crew members and negotiate their rate of pay without consultation with senior management. Tr. 254-58. In any event, the Regional Director’s finding also comprised an incorrect application of the law. The Act does not require a putative supervisor to participate in the details of the hiring process in order to effectively recommend hiring. All he or she must do is recommend an individual who ultimately is hired without independent investigation by superiors. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), *overruled on other grounds by Cal-Western Transp. & Bldg. Material Dump Truck Drivers*, 283 NLRB 453 (1987). This is precisely what has occurred with the crew members in question.

3. Hiring of Actors

Furthermore, the Regional Director made clearly erroneous factual conclusions and misapplied the law regarding the producers’ authority to hire actors. As an initial matter, the Regional Director’s finding entirely ignores the fact that the producers decide in the first instance *whether* actors are to be employed at all. Tr. 546 and 645-46. Once a producer makes this decision, the producers (including those called by the Petitioner) testified that they exercise the

discretion to choose *whom* to engage. Tr. 645-46 (testimony of Producer Mettler), 706 (testimony of Producer Zumwalt), 730 (testimony of Producer Wong). Similarly, Guild witness, run-of-show producer Steve Rivo conceded on cross-examination that although line producers may be involved, he approves the hiring of actors:

Q There are actors on this shoot, do you know how many?

A At least a dozen if not, plus 20.

Q In addition to the actors that you mentioned before . . . did you hire any other actors?

A The casting director hires all the actors. We, we as a team are, as a company we're employing the actors, yeah.

Q Right. Did you, did you approve which actors would be hired or did they do this without consulting you?

A No, no, no, I approve them.

Tr. 841; *see also* 830-831.

The testimony further demonstrated that the producers negotiate the rate of pay that the actors will receive. Tr. 706 (testimony of Producer Zumwalt); 730 (testimony of Producer Wong). In short, the record unequivocally showed that the producers both actually hire and effectively recommend the hiring of actors to perform in reenactments and therefore are Section 2(11) supervisors.

The Regional Director, however, dismissed this evidence, finding that the authority to hire actors was not exercised with adequate independent judgment to pass the statutory test of supervisory status. *See* DDE at 15 (citing *Robert Greenspan, DDS*, 318 NLRB 70 (1995)). In so finding, the Regional Director opined that, because they are selected for their resemblance to people involved in the story being told, the selection is not more than a “the experience of a journeyman . . . determining which employee had the requisite skills or other characteristics to

perform the job.” *Id.* It is precisely this critique that the Supreme Court rejected in *Kentucky River* and that the Board corrected in *Oakwood*. The cases clearly prohibit the Regional Director from finding that independent judgment does not exist merely based on the type of authority exercised. With regard to hiring, judgment that comes from experience in an industry or a particular expertise unquestionably is independent for purposes of Section 2(11). It is the producer who knows that “look” is best for the role that is being cast and the producer exercises that independent judgment in selecting the actors that he or she believes are the best “fit” for the role. The Regional Director committed clear error in contravention of the teachings of *Kentucky River* and *Oakwood* in dismissing the judgment as lacking independence simply because of its foundations in the producer’s artistic vision for the project.

C. The Regional Director Made Erroneous Findings of Fact and Misapplied Board Precedent in Holding That Producers Do Not Exercise the Authority to Assign Work

The Regional Director misapplied Board precedent and made clearly erroneous findings of fact regarding producers authority to assign with the meaning of the Act. The authority to “assign” under Section 2(11) is the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties to an employee.” *Oakwood*, 348 NLRB at 689. To qualify as supervisory authority, assignments must be made in the exercise of independent judgment, meaning that they must not be of a routine nature. *Id.* at 684.

1. Producers Exercise Assignment Authority by Appointing Crew Members to Work at Particular Locations and Times

The Regional Director committed clear error in ignoring evidence that producers both appoint employees to a particular place (such as a location, department, or wing) and to a particular time (such as a shift or overtime period). In particular, the Regional Director credited

the vague testimony of certain producers who “disputed that they had such authority” over the extensive and specific record testimony demonstrating that producers not only possess but exercise this authority. DDE at 8. Moreover, as with the exercise of authority to hire actors, the Regional Director attacked the assignment authority as lacking independent judgment, stating without record citation that, “the producers in question are merely scheduling slots within the confines of shoot days set by his superiors and the availability of the participants under the close review of his superiors.” DDE at 17-18. The record evidence, however, stands to the contrary.

The producer possesses and exercises complete discretion over the times and locations of work to be performed. With regard to schedules themselves, as Producer Ferdinando explained:

[W]e have a typical like 10:00 to 6:00 schedule. If the associate producer is not - - can't be there for some reason, they'll tell me that information. If they need to work late into the evening to get something done for the next day, I'll be the one assigning that to them. If they need to be on a shoot out of town, that'll be me that's directing them that they need to be there. That really is all at the producer's discretion.

Tr. 190. Additionally, the overwhelming evidence showed that associate producers seek the approval of their producers to take a day off or alter their hours.⁷ Tr. 93, 128, 214-215, 216-217, 259, E-11 and E-12.

The producer's authority to assign times and locations is particularly extensive during periods of work in the field. In such circumstances, producers routinely designate associate producers and crew employees to locations in a variety of cities, states and countries. Tr. 818. Producers use “their judgment and authority . . . to gather the necessary elements of the show” and in doing so, determine the location of the shoots, the hours worked and authorize any overtime. Tr. 74-75; *see also* Tr. 128, 133, 280, 486, 840 and E-32. As explained by freelance producer Bowen, the crew has “call times that I determine and I schedule all of the moving

⁷ The associate producer is also required to inform Ann Kolbell for record keeping purposes. Tr. 93.

parts.” Tr. 280. Although a shot schedule is planned in advance, the schedule often changes once the field production begins based on the producers determination on when he or she has obtained adequate footage. In this sense, the producer has the “complete discretion” to decide in the field when to finish or “wrap” for the day and whether to incur overtime. Tr. 164, 208-209 and 898. Producer Ferdinando explained that with respect to crew members,

I tell them to work past their 10 hours and know that we’re incurring an X dollar fee for every hour that I’m hour that I’m working past the time we started in the morning. And then when the bill comes in I sign it I have to review the bills, yeah. If I’m tracking overtime in the field, I want to make sure the schedule lines up with what he hours were.

Tr. 209. Similarly, a witness for the Guild, run-of-show producer Rivo, testified that it was his decision to set the schedule in the field and determine if certain crew members would incur overtime, including an example of the director of photography that he hired for a particular shoot, Ian Saladyga:

Q And it was ultimately your decision when people could be released is that correct?

A Yes.

Q Okay. Do you know if that resulted in, in overtime?

A Ian Saladyga his deal with Peacock including his overtime after 10 hours.

Q Okay. If I’m looking at this schedule though it looks like you’ve got something longer than a 10-hour day, and it may depend obviously on when Ian was arriving, but do you recall if he went beyond the 10 hours?

A I’m sure he did.

Tr. 843-844; *see also* E-32 and Tr. 519-520 (testimony of Van Taylor admitting that he would authorize overtime in the field without seeking approval of a senior producer).

This extensive control over the times and locations where work will be performed and the authority to respond independently to changed circumstances in order to complete the necessary

work in light of production schedules and budgets is exactly the type of independent judgment and direction exercised in *Westinghouse Broadcasting Co., Inc.*, 188 NLRB 157, 157-58 (1971) (finding news producers to be statutory supervisors where they, inter alia, “decides the time for each news segment, sets the places for commercials, assigns new reporters”).

2. Producers Assign Significant Overall Duties to Associate Producers and Crew Members

The Regional Director accepted the weight of the record evidence demonstrating another means by which authority to assign may be established – namely, that producers give significant overall duties to associate producers, crew members and actors. *See* DDE at 17. In the Regional Director’s view, however, the producers’ authority in this area falls short of the statutory standard because the instructions given are “either routine in nature or are motivated by the artistic effect the procedures seek to achieve.” *Id.*

Taking these concepts one at a time, the idea that the assignments made to associate producers and crew members are routine is belied by the nature and extent of the producers’ responsibility on these programs. Each episode to which the producer is assigned entails a tremendous amount of work to be performed by a production team over a 12 week period, resulting in a one-hour television program. As explained by the Vice President of Programming and a multitude of witnesses, “[t]he associate producer does whatever the producer asks them to do It’s a very broad discretion that the producer has in assigning the associate producer.” Tr. 35; *see also* Tr. 129-130, 179, E-5, E-6, Tr. 181, 272, 330-331 and 381-382. These tasks are not only significant, but comprise the vast majority of the core duties performed by an associate producer. They include, among others:

- Finding critical people that the producer wants to interview. Tr. 277
- Securing “rights and clearances” to use certain material in a program. Tr. 29.

- Researching archival footage. Tr. 188.
- Researching locations to shoot interviews and re-creations. Tr. 188-19; 276-77.
- Preparing a draft production schedules. Tr. 504.
- Arranging logistics for a shoot such as the delivery of equipment. Tr. 337.
- Assisting in the field with coordination of tasks determined in pre-production. Tr. 278-279.
- Fact checking. Tr. 700, 705-706.
- Gathering and logging archival footage from pre-production or obtained in the field. Tr. 29-30 and 338.
- Purchasing particular props for field production. Tr. 29 and 504.

See also Tr. 188-193, 500; E-7, E-8, E-13 and E-14.

To accept the Regional Director's holding that the producer's assignment authority is not accomplished in the exercise of independent judgment assumes that all members of the production team know precisely without being told what their role will be and what tasks to perform. This conclusion strains credulity past the breaking point. In fact, each show has different needs and each project requires different skills, such that the decisions are in no way automatic or routine. Tight production schedules and budgetary parameters that the producer is responsible for meeting increase the degree of independent judgment that they must exercise in making assignments to associate producers, editors, crew and others. *See* Tr. 283-284. Because of the complexity of these assignments and their criticality to the success of the production, producers regularly check in with associate producers to monitor their progress work "multiple times a day." *See* Tr. 189-193, 207. E-7, E-8, E-13, E-14. For example, in an e-mail to freelance associate producer Danny Mehrer, freelance producer Bowen noted:

The shoot schedule you've generated for our next four shoots looks fine, but as we discussed in our "kitchen meeting" today, I need you to keep in mind the following as we move forward: Manage your time wisely – I sensed today that the pressure is growing on you because there is a great deal on your plate. That said, and as I've said from the start, I'm here to manage this process and manage your time and ideas wisely . . . so find solace and lessons in the way I best feel I should manage your days from both a logistic and creative point-of-view."

E-14. Associate producer Matson explained:

it is really the producer who is telling me what to do. I mean I know where to research, but I wouldn't know what to do unless they told me you need to research this specific thing.

Tr. 383. This authority and exercise of independent judgment meets the supervisory definition under 2(11) of the Act. *See Superior Bakery, Inc. v. NLRB*, 893 F.2d 493, 496 (2d Cir. 1990) (finding that individual had assignment authority "because he would select the people necessary to do the work at the times he chose," thereby demonstrating that he exercised independent judgment (internal quotation marks omitted)).

The idea, repeated on several occasions that the senior producers actually exercise this sort of authority rather than the producers strains credulity. Each senior producer is responsible for production of up to 12 episodes at a time. Tr. 25, 28 and 120-121. As noted, much of this work is performed in the field, away from Peacock's headquarter offices where the senior producers are based, and under tight deadlines. Given the volume of work performed over a large number of projects in a short time, the senior producers could not possibly assign or responsibly direct the work of those under the producers. The Board has refused to find that the employees in question are not Section 2(11) supervisors where so doing would effectively leave them unsupervised. *See, e.g., Salvation Army*, 293 NLRB 944 (1989). The finding that producers make assignments for creative or artistic reasons and thus are not exercising independent judgment equally lacks merit. In *Kentucky River*, the Supreme Court held that the

Board could not find a lack of independent judgment merely because the judgment exercised was based on professional or technical skill or expertise. The Court made clear that while the degree of judgment must be sufficient to surpass the threshold for supervisory status, the Board could not introduce exclusions based on the type of judgment exercised. 532 U.S. at 714-15. As the Court noted, “[w]hat supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience?’” *Id.* at 715.

The Regional Director’s reliance on *King Broadcasting Co. d/b/a KGW-TV*, 329 NLRB 378, 382-38 (1999) on this point was misplaced. *King Broadcasting* involves a news department of a television station that is in charge of four daily news broadcasts. *Id.* at 378. The production and editing of short segments is hardly comparable to the hour long programs that the producers are tasked with completing at Peacock. As SVP of Programming Walker testified, producing an hour long story that has a beginning, middle and end, compared to the “temporal” reporting that occurs in a segment of a news program are “completely different universes.” Tr. 38.

Perhaps more importantly, the Regional Director’s reliance on *King Broadcasting* is misplaced, as that decision and others finding that television news producers do not exercise independent judgment in assigning tasks to others have been overturned. *See Kentucky River*, 532 U.S. 706. As in *Kentucky River*, the producers assign tasks in the pursuit of excellence in their profession – here, the attempt to bring to life the producer’s artistic vision. Contrary to the Regional Director’s statements, nothing about this effort is “routine in nature.” DDE at 17; *see Kentucky River*, 532 U.S. at 714-15 (Board cannot hold authority is not exercised with independent judgment based on the *type* of judgment exercised). The Court’s view of independent judgment has since been applied in at least one case involving the supervisory status of local news producers having less authority and discretion to make assignments than those

employed by Peacock. There, citing *Kentucky River*, the court held that producers exercised independent judgment in making assignments. *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896, 900 (8th Cir. 2002) (rejecting the Board’s finding that an employee’s professional skill and training we excluded from the independent judgment required in Section 2(11)).

D. The Regional Director Misapplied Board Precedent Regarding Producers’ Authority Responsibly to Direct the Work of Others

The Regional Director made clear factual errors and departed from officially reported Board precedent in deciding that producers’ authority to direct others on the production crew was not exercised responsibly as required to be a Section 2(11) supervisor. While the Regional Director conceded that the presumption a producer directs others is “unavoidable,” DDE at 18, she incorrectly found that this authority was not exercised “responsibly” because it did not involve the exercise of independent judgment. More particularly, the Regional Director erroneously held that, rather than responsibly directing others, producers are “part of an integrated production team in which their skills and responsibilities are joined in a collaborative effort to coordinate and develop a single project.” DDE at 18 (citing *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123 (1974)). As with the authority to assign, the Regional Director also found that, because the directions given “are motivated by the artistic effect that the producers seek to achieve,” they are less supervisory in nature. DDE at 18. These findings ignore the record evidence of the clear hierarchical distinction that exists between the producer and the rest of the production team and misapply the law on independent judgment.

The Board has stated that for direction to be responsibly exercised with independent judgment, “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly.”

Oakwood, 348 NLRB at 692. Television producers have been found to exercise such authority even prior to *Kentucky River and Oakwood*, where they have “full responsibility from the planning stage through the presentation on the air.” *Great Western Broadcasting Corp.*, 192 NLRB 1203, 1204 (1971); *see also Hearst Broadcasting Corp. d/b/a WDTN-TV*, 267 NLRB 326 (1983) (local news producers are supervisors where had authority to change work assignments, give direction to reporters, authorize overtime, and submit reports which can result in discipline, among other duties). Contrary to the Regional Director’s erroneous findings, this description fits precisely the responsibilities of the producer vis-à-vis the programs Peacock creates. As SVP of Programming, Knute Walker, stated: “[t]he producer . . . [has] ultimate responsibility for the contents, the form, the shape, whatever you see on television, that’s the producer’s responsibility for that particular show.” Tr. 74.

The scope of the producers’ authority responsibly to direct is present at every stage of the project but is particularly apparent in field production work. Witnesses produced by the Employer and the Guild testified that in the field, the producer is the “Napoleon” (Tr. 29), the “quarterback” (Tr. 653), or the “highest in command” (Tr. 840). As such, the producer is ultimately accountable for directing crew and actors in the field to bring back the footage needed to create the program. Tr. 201, 280, 628 and 702. If the work of an associate producer, camera person, lighting person, or any other work of a crew member in the field negatively impacts the production, it is the producer who is responsible. Tr. 36.

This responsibility in connection with the direction of the work is felt acutely by the producers with regard to every task their team performs. As freelance producer Bowen testified in the context of a task he assigned to an associate producer, Michelle Dubert to contact an interview subject who was central to the program:

I would ask to approve the emails or any correspondence that she would have with him, because . . . **it falls on me**. And if she sends an email out that could rub him the wrong way and cause him not to agree to do the interview, then I've got a problem. I've lost a big get and that reflects on me, because **it is my responsibility to make the show great**.

Tr. 277-278 (emphasis added). The Petitioner's witnesses were in agreement on this point.

Freelance producer Zumwalt testified that in relation to the cameraperson and sound engineer, she is "the director of the shoot. . . . which means that theoretically all, all flows from me" and "I am ultimately responsible." Tr. 679-698. She elaborated on her role and accountability by explaining that whereas the sound engineer "is charge of getting the sound. **It is my job to check the sound and make sure it is gotten.**" Tr. 698 (emphasis added). Run-of-show producer Steven Rivo described his directing duties as follows:

A My responsibilities in the field are . . . conducting interviews, to determine what materials [are] discussed in the interviews, to determine when the interview ends, to direct the re-creations [scenes], to capture footage need[ed] for the production, guide the actors to, guide the crew, I have a lot of responsibilities as the – you're responsible for the story of the hour and to come back with all the footage that you need.

* * *

Q . . . who is the highest in command on the shoot?

A **I am the highest in command on the shoot.**

Tr. 839-840 (emphasis added).

The producers' duty responsibly to direct the work of others continues when they return from the field and enter post-production. At that stage, "[t]he producer is the overall director of the editor in the edit room, providing instruction on how they want the show to come together."

Tr. 133. The editor works from the script that the producer has written, the video that the producer has obtained and selected from the field, and the music that that the producer has chosen. *Id.* The producer is ultimately responsible for the editor's manipulation of sound and video. Tr. 134-135.

As stated above with regard to the assignment of work to associate producers and other production team members, the artistic nature of the work direction provided by the producer in no way diminishes the fact that it is the product of the producers' independent judgment. Again, as stated clearly in *Kentucky River* and *Oakwood*, independent judgment must be sufficient in **degree** to qualify as supervisory, but the Regional Director may not discriminate against independent judgment based upon its **type**. Here, the producer's decision, borne of his or her artistic vision, how to direct the work of the production team is no less legitimate an exercise of independent judgment than the professional or technical judgment ratified by the Court in *Kentucky River*.

IV. **CONCLUSION**

Based on the above, The Regional Director's decision on substantial factual issues was clearly erroneous. The Regional Director also departed from officially reported Board precedent in answering questions of law and policy. Indeed, the scope of a freelance or run of show producer's duties in hiring, directing, assigning work and overseeing employees falls squarely within the definition and meaning of Section 2(11) and warrants the Board's review pursuant to subsections 102.67(c)(1), and (2) of the Board's Rules and Regulations.

Dated: May 28, 2013
New York, New York.

Respectfully submitted,
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CERTIFICATION OF SERVICE BY EMAIL UPON ELECTRONIC FILING

Charles O. Rooker II certifies that, on May 28, 2013, he caused true copies of the Employer's Request for Review of Decision and Direction of Election in Case 2-RC-092111 to be filed with the National Labor Relations Board and the Regional Director of Region 2 of the Board by electronic filing, and to be served by electronic mail (e-mail) upon:

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Dated: May 28, 2013

By: /s/Charles O. Rooker II