

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD, REGION 2

OPTOMEN PRODUCTIONS, INC.,

Employer,

and

WRITERS GUILD OF AMERICA EAST, AFL-  
CIO,

Petitioner.

Case 2-RC-23545

OPTOMEN'S BRIEF IN SUPPORT  
OF ITS EXCEPTIONS TO  
HEARING OFFICER REPORT  
AND RECOMMENDATIONS ON  
CHALLENGES

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## I. INTRODUCTION

Employer Optomen Productions, Inc. (“Optomen”), hereby submits its brief in support of exceptions to the Hearing Officer’s Report and Recommendations on Challenges issued on March 10, 2011 (“Report”). As shown below, the Report is riddled with substantial and material factual errors, internal inconsistencies, and erroneous legal conclusions. Accordingly, the Report’s recommendations to sustain two challenges and overrule a third challenge are factually and legally wrong and must be set aside.

## II. PROCEDURAL BACKGROUND

Pursuant to a Stipulated Election Agreement (“Stipulation”), the Board conducted an election on December 14, 2010. At the election, three ballots were challenged and proved determinative. Those ballots belong to the following individuals:

- (1) Josh Vinitz, Associate Producer
- (2) Laura Donaghey, Associate Producer
- (3) Amy Van Vessem, Senior Post Producer (former employee)

Hearing Officer Rhonda Gottlieb took testimony regarding the three challenged ballots on January 27 and 28, 2011.

The Stipulation defined the bargaining unit as follows:

**INCLUDED:** All full-time and regular part-time Associate Producers and Post-Producers employed by the Employer at its facility at 100 Avenue of the Americas, 12th Floor, New York, NY.

**EXCLUDED:** All other employees, including Writers, Editors, Production Coordinators, Guards, and Supervisors as defined in the Act.

Inasmuch as the parties cannot agree on whether or not the Development Associate Producer should be included in or excluded from the unit, he may vote subject to challenge.

Jt. Ex. 1 at ¶ 13.

Optomen employees in the included classifications were eligible to vote if they worked “52 hours or more in the 13-weeks prior to October 8, 2010.” *Id.* at ¶ 11. Eligibility did not hinge upon whether the employee was employed by Optomen on the day of the election. Employees who met the Stipulation’s formula became ineligible to vote only if they quit or were discharged. *Id.*

### III. FACTUAL BACKGROUND

Optomen is a television production company that makes non-fiction television shows. Optomen develops ideas for the shows, and attempts to sell those ideas to television networks. Once a network has purchased a show, Optomen produces the video content for the program. Some of its shows are episodic, and others consist of only one show. Report at 3; Tr. 144:22-147:10.

At the election, the Union challenged the ballot of Laura Donaghey, an Associate Producer. The NLRB Agent challenged the ballot of Josh Vinitz, pursuant to the Stipulation. At the time of the Stipulation, Josh Vinitz was an Associate Producer in Development, and the parties could not agree whether Development Associate Producers should be included in the unit. The NLRB Agent also challenged the ballot of Amy Van Vesseem because she was not on the *Excelsior* list. Optomen did not place Van Vesseem on the *Excelsior* list because she was not employed within the bargaining unit and because she was a statutory supervisor.

#### A. Laura Donaghey.

At the time of the hearing, Donaghey was an Associate Producer at Optomen for a series with the working title of *Vegan Treats*. She began working at Optomen as an intern in March 2010. She came with an extensive background in British productions and, on September 27, 2010, she was hired to perform casting work in Optomen’s Development group.

Tr. 153:22-25. She worked sufficient hours in the thirteen weeks prior to October 8 to be eligible to vote. Employer Ex. 6 (Donaghey payroll records). By December 2010, *Vegan Treats* went into production and Donaghey began working on that series. Tr. 162:13-17.

**B. Amy Van Vessem.**

In 2009, Van Vessem was a Post Producer at Optomen for the first season of a series called *Worst Cooks in America* (“*Worst Cooks*”). For Season Two of *Worst Cooks*, Optomen hired Van Vessem as the Senior Post Producer. She received a salary raise, had editorial oversight over the Post Producers, and was charged with hiring and managing post production crew members such as the loggers and assistant editors. Tr. 166:6-167:3; 167:11-18. In assigning and directing the work of the loggers, for example, she organized and determined the work they were to accomplish each day based on the needs of the production and the available footage. Tr. 169:14-170:2. Van Vessem “knew where the good sound bites were, and the best action was, and what tapes the interviews were on,” and used this specialized knowledge to prioritize and assign work to loggers and assistant editors. *Id.* Van Vessem was not employed by Optomen on the date of the election. *See* Employer Ex. 7 (last payroll period ending November 11, 2010).

**C. Josh Vinitz.**

Vinitz is an Associate Producer at Optomen and currently works in the Development group. Before moving to Development, he worked as an Associate Producer for an Optomen series entitled *Mysteries of the Museum*. He worked on *Mysteries of the Museum* for more than 52 hours during the eligibility period set forth in the Stipulation. Employer Ex. 5 (payroll records for Josh Vinitz). Vinitz moved to the Development role in September, and performed essentially the same functions as an Associate Producer for a series. *See* Tr. 60:3-12, 61:22-

63:10 (testifying that he produced nearly identical written work product for *Mysteries of the Museum* and in Development); *See e.g.*, Employer Ex. 3 and 4 (series and story pitches written by Vinitz); Tr. 126:4-5; 126:18-127:1 (testifying that Vinitz coordinated shoots in Development like he did for *Mysteries of the Museum*). Overall, Vinitz described the work in Development as “quite similar” to his duties working on a series. Tr. 127:2-13.

#### IV. ANALYSIS

In ruling on exceptions, the Board reviews the entire record of the case. *Magic Beans LLC*, 352 NLRB 872 (2008); *Home Care Network Inc.*, 347 NLRB 859 (2006). To affirm the Report, the Board must find that the conclusions and recommendations are supported by the record and applicable law. *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006). In the instant proceeding, the Report is not supported by the record or applicable law and resulted in erroneous conclusions regarding the challenged ballots. For the reasons that follow, Optomen asks the Board to reverse the Hearing Officer’s recommendations for each challenged ballot.

##### **A. The Ballot of Josh Vinitz Must Be Counted.**

##### **1. Vinitz' Work As An Associate Producer On A Series Qualifies Him To Vote.**

##### **a. The Unambiguous Terms Of The Stipulation Allow Vinitz To Vote.**

Optomen employs some of its staff on an intermittent basis, and employees join and leave as varying projects commence and conclude. As a result, the parties chose not to use the Board’s traditional eligibility formula and stipulated, instead, to the formula described in *Davison-Paxon Co.*, 185 NLRB 21 (1970). Consequently, those individuals who had worked in the bargaining unit more than 52 hours in the 13 weeks preceding October 8, 2010 were eligible to vote. Jt. Ex. 1, ¶ 11. Notably, the parties chose the October 8 date even though they entered into the Stipulation on November 15, 2010 and the election would be a month away.

Accordingly, the parties anticipated that eligible voters might no longer be in those positions—or even employed by Optomen—by the time ballots were cast in December. With this knowledge, the only exclusions to which the parties agreed were those who voluntarily resigned or were discharged for other than unlawful reasons. *Id.*

There is no dispute that Josh Vinitz worked more than 52 hours as an Associate Producer on the series *Mysteries of the Museum* during the 13 weeks preceding October 8, 2010. There is also no dispute that Vinitz neither resigned nor was discharged. Under the express terms of the Stipulation, Vinitz was eligible to vote.

The Hearing Officer’s inquiry should have ended there. “If the objective intent of the parties is expressed in clear and unambiguous terms in the Stipulation, the Board simply enforces the agreement.” *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002) (citing *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999)). This Stipulation described the hours to be worked, the time period in which they should work, and the exceptions to eligibility. Vinitz satisfied all those criteria.

Despite the clear and unambiguous language of the Stipulation, the Hearing Officer created an exception to which the parties had not agreed. She determined that Vinitz’ acceptance of a position as an Associate Producer in Development disqualified him to vote. As will be shown below, Vinitz should also be eligible to vote because of his work in Development. However, even assuming *arguendo* that Development should be excluded, Vinitz should not be disenfranchised because of his subsequent work in Development.

The Hearing Officer denied Vinitz an opportunity to vote because she concluded he did not have a reasonable expectation of returning to his position as an Associate Producer. Report, at 21. This conclusion demonstrates a stark misunderstanding of the *Davison-Paxon*

formula. The purpose of such a formula is to stand as a proxy for other tests of regularity of employment and whether the employee is reasonably expected to return to his position. The formula does not permit other inquiries into whether the employee is expected to return:

The Employer provides a few isolated examples of employees who worked on several productions throughout the course of a year but will be disenfranchised as a result of the application of the *Davison-Paxon* formula. However, '[a]n election necessarily occurs at a single moment in an employer's otherwise fluid work force history.' *Steiny & Co.*, 308 NLRB 1323, 1325 (1992). We recognize, as the Board did in one of its earliest decisions establishing an eligibility formula, that 'absolute accuracy [in determining eligibility] is probably unattainable here.' *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938).

*Steppenwolf Theater Co.*, 342 NLRB 69, 69 n.12 (2004). *See also Columbus Symphony Orchestra*, 350 NLRB 523, 525 (2007) (Use of 2007 rather than 2006 for eligibility formula to measure reasonable expectation of return). By creating this exception, the Hearing Officer improperly modified the parties' Stipulation.

Not only did the Hearing Officer's error in creating a new exception to the formula contravene the parties' intent, it also leads to injustice and a lack of due process. First, the parties were not aware that they could challenge votes based on a subsequent determination of "reasonable expectation of return."<sup>1</sup> Other voters may have been challenged on the same basis. Second, the Hearing Officer's newly created exception allows the decision concerning representation to be made by those who are even more "remotely and insubstantially affected by the activities of that representative." *Columbus Symphony Orchestra*, 350 NLRB at 524. For instance, an employee who worked at Optomen during the eligibility period and then took a

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<sup>1</sup> Indeed, one of the challenged voters no longer works at Optomen at all. Optomen might have demonstrated that Van Vessem has no reasonable expectation of return based on her subsequent employment away from Optomen.

permanent job far from New York would be eligible to vote. Likewise, a former employee who left the entertainment industry and—heaven forbid—went to law school would be eligible to vote despite no interest in returning to a position as Associate Producer. The mixed manual/mail balloting would have made it easy for such former employees to vote. Yet, Vinitz, still employed as an Associate Producer at Optomen, would be ineligible. From the very terms of the Stipulation, and from a basic understanding of the purpose of the formula, it makes no sense that an employee who no longer works at Optomen is eligible to vote when Vinitz is not.

Further, the facts relied on by the Hearing Officer to disqualify Vinitz might apply to any employee who had left Optomen: that they received benefits, that they were no longer a free lance employee, and that they believed their new position was superior. Report at 21. Yet there was no examination permitted of the other employees' expectation of return. The parties did not stipulate to a double standard.

The sole case relied on by the Hearing Officer, *Mrs. Baird Bakeries*, 323 NLRB 607 (1997) has no application here. Although the case is brief, there is nothing in the opinion that suggests the parties used something other than the traditional approach that the employee must be employed in the unit at the time of the election. “[T]he general rule is that an employee must be employed both on the eligibility date and the date of the election.” *An Outline of Law and Procedure in Representation Cases*, NLRB, at 279, §23-200. Where that is the standard, it is appropriate to consider whether an employee who is temporarily outside the unit for layoff or transfer is reasonably expected to return to the bargaining unit. Here, however, the parties expressly agreed that employees who were no longer employed in the bargaining unit were

eligible. Under the terms of the Stipulation, there is no basis to distinguish between employees who left Optomen completely and those who were performing other responsibilities.<sup>2</sup>

**b. Even Under The Hearing Officer's Formulation, Vinitz Is Eligible To Vote As The Record Shows He Had A Reasonable Expectation Of Employment In The Unit.**

Even if the Board were to modify the unambiguous eligibility formula in the Stipulation, the evidence does not support the Hearing Officer's conclusion that Vinitz did not have a reasonable expectation of future employment in the bargaining unit. Employees often transition back and forth between Development and series work as the job functions require the same skill set and Optomen's staffing needs fluctuate. At least five Optomen employees have moved between Development and series work.

- (1) Ben Parry: Produced more than one series episode, moved to Development for three weeks in January 2010, and then moved back to series work to do Post-Production. Tr. 151:6-11.
- (2) Joseph Urdley: Produced two series episodes in 2010, moved to Development after his series contract ended, and moved back to series producing. Tr. 151:16-25.
- (3) Steve Dost: Regularly vacillated between Development and series work depending upon the needs of Development and availability of work on a series. Tr. 152:5-12.
- (4) Laura Donaghey: Began working in Development and transitioned to a series. Tr. 152:19-24.
- (5) Joshua Vinitz: Began with Optomen as a series Associate Producer and then moved to Development. Tr. 51:2-10.

The Hearing Officer focused on Vinitz' testimony about his desire to continue working in Development to undermine his reasonable expectation of employment in the unit. Vinitz'

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<sup>2</sup> We recognize that the result may be different if the employee assumed a supervisory role under Section 2(11) of the Act. That is not the case with Vinitz.

career goals, however, are irrelevant to whether he has a reasonable expectation of continued employment in Development or in the bargaining unit. He does not control the work available for series or in Development, nor Optomen's chosen use of resources. It is undisputed that Development has expanded and contracted in response to Optomen's business needs, not any employee's personal preferences. Tr. 150:4-15. Donaghey, for example, worked in Development only until a position became available on a series. Tr. 153:22-154:8. Given the track record of employees dipping in and out of Development, Vinitz' hope to remain in Development should not undermine the objective facts presented at hearing regarding the permeability between series work and Development.

**2. Even If The Board Considers Vinitz' Role In Development, The Community Of Interest Tests Require His Inclusion.**

The Hearing Officer also erroneously concluded that Vinitz' work in Development did not have sufficient community of interest with the bargaining unit.<sup>3</sup> In reaching this conclusion, the Hearing Officer misstated important facts and ignored others. As shown below, the facts clearly demonstrate an overwhelming community of interest between the Associate Producers who perform series work and Vinitz.

The fundamental issue in determining the appropriate unit is the community of interest among the employees. *Vincent Ippolito, Inc.*, 313 NLRB 715, 716 (1994). Employees sharing a strong community of interest with the proposed bargaining unit *may not be excluded* from

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<sup>3</sup> The Report incorrectly referred to the standard principles that "the Act requires only that the petitioned-for unit be appropriate" and that the "petitioner's unit desire is a relevant consideration." Report, at 18. These principles have no application here where the parties have stipulated both (a) to the appropriate unit and (b) that they cannot agree to the placement of the Development Associate Producer. The only question, in this context, is whether the Development Associate Producer shares a sufficient community of interest to be included in the unit.

that unit. *Id.*; *TDK Ferrites Corp.*, 342 NLRB 1006, 1008 (2004) (production and maintenance employees share community of interest and are so highly integrated that carving out the unit requested by the union would be inappropriate) .

Where the Petitioner seeks a fragment of an integrated workforce, the question is “whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 at 1 n. 2 (2010), *quoting Newton-Wellesley Hospital*, 250 NLRB 409, 411-412 (1980) (emphasis in original). Thus, the test is whether the interests of the employees in the unit are common internally *and* different from other groups.

Factors used to determine the common interests include: “the method of wages; hours of work; employment benefits; nature of supervision; difference in training and skills; interchange of employees, functional integration; and history of bargaining and extent of organization.” *Ippolito*, 313 NLRB at 716 (citing *Kalamazoo Paper Box. Corp.*, 136 NLRB 134, 137 (1962)) (transfer station employees at a garbage disposal plant must be included in the same union with the plant’s maintenance shop employees due to the similarity in pay, workdays, hours and benefits as well as functional integration and close interaction). Not all factors must be present for a community of interest to exist. *TDK Ferrites Corp.*, 342 NLRB at 1008, 1009 (community of interest among all production and maintenance employees outweighed nominal community of interest shared by group based on wage and skill level distinctions).

In *Harrah’s Illinois Corporation*, the Board determined that the maintenance employees were not a distinct and homogeneous group of employees with interests separate from the cleaning employees. 319 NLRB 749 (1995). The Board dismissed the petition even though the

maintenance employees and cleaners had separate immediate supervisors finding that they were grouped together for budgetary and payroll purposes, and there were four transfers within the department in a two-year period. *Id.*

Similarly in *Monsanto Company*, the Board dismissed the union's petition to represent the maintenance employees and exclude the production employees at the same location. 183 NLRB 415 (1970). The Board found that work functions were frequently reassigned between the two groups, production employees were often assigned to maintenance to avoid layoff, production employees were often recruited from the ranks of the maintenance employees, employees were subject to common safety standards and provisions, attended trainings together and shared substantially the same working conditions and fringe benefits. *Id.* The Board stated that "we are persuaded that any separate community of interest which the maintenance employees might enjoy has been largely submerged into the broader community of interest which they share with the production employees." *Id.* at 416.

Here, uniform treatment (i.e., wages, schedules) by Optomen and interchange among its series Associate Producers and Vinitz as the lone Associate Producer in Development establish an indivisible community of interest.

**a. Similar compensation, work schedules, and contact.**

Optomen applies the same compensation range among the Associate Producers irrespective of whether they work on a series or in Development. Vinitz' wage of \$1,300 per week, did not change when he transitioned from *Mysteries at the Museum* to Development. *See* Employer Ex. 5; Tr. 71:14-16, 72:21-73:7, 160:17-18. Moreover, this is within the range of \$1,200 to \$1,400 for all Associate Producers. Report, at 4.

Associate Producers who work on a series or in Development maintain similar work schedules. The Hearing Officer stated:

Vinitz works standard business hours from 10:00 am to 6:00 pm, in contrast to post producers and Associate Producers who work very long hours including up to sixteen hours per day.

Report, at 19. This finding has no basis in the evidence. Instead, Vinitz testified, without dispute, that he worked the same hours in each position. He worked 10:00 am to 6:00 pm on *Mysteries at the Museum*, except when they were shooting. He worked 10:00 am to 6:00 pm in Development, except when they were shooting. Tr. 51:14-1, 52:2-11, 65:2-9, 73:1-3. In other words, in both settings, he worked normal business hours unless they were in the field shooting. Likewise, Donaghey also testified that she experienced no change with regard to her work schedule (or office location or use of the Optomen facilities) when she moved from Development to a series. Tr. 25:6-9, 29:17-25.

The Hearing Officer also incorrectly found that “Vinitz has no contact, including phone or email contact, with the stipulated unit employees who work on a separate floor from him and are generally engaged in the field.” Report, at 19. This conclusion has two significant errors. First, it appears that the Hearing Officer confused one series with all of Optomen’s productions. The Associate Producers and Post Producers on *Worst Cooks* worked on a different floor than Vinitz, but the vast majority of all other Associate Producers for other series worked on the same floor as Vinitz. Tr. 65:10-67:4; 82:19-83:4; 96:10-16; 144:10-16. In fact, when Vinitz changed from working on *Mysteries at the Museum* to Development, he did not change desks or his location within Optomen’s office. Tr. 65:2-9. While in his Development role, he continued working in the midst of those working on a series. Tr. 65:18-66:25.

Second, Associate Producers on a series are not “generally engaged in the field.” Both Vinitz and Donaghey testified about a substantial amount of work performed in the office while doing series work. Tr. 51:14-21; 25:6-9. The field work was only for shoots, and not the immense amount of preparation required for a shoot. Thus, both Vinitz, while in Development, and other Associate Producers spent a considerable time in the office on the same floor, intermingled.

**b. Analogous Supervisory Structures.**

The Hearing Officer also relied on the fact that, while in Development, Vinitz reports to supervisors who do not supervise other members of the bargaining unit. Report, at 19. Yet this is true of all supervisors at Optomen. At Optomen, supervision is organized by production so that Associate Producers working on one show have separate supervision from those working on other shows. Tr. 103:12-104:12; 104:19-105:9. A supervisor on *Mysteries of the Museum* has no supervisory authority or contact with employees on other shows like *Monsters Inside Me*. Tr. 104:25-105:2. Vinitz reported to Lloyd Fales, when he worked on *Mysteries at the Museum*. Tr. 103:25-104:11. Fales did not have any supervisory authority over other Associate Producers assigned to other series outside of *Mysteries at the Museum*. Tr. 104:19-5. In this aspect, supervision within Development is analogous to supervision on a production. While there might be separate supervision, the organization of the supervision is the same.

Thus, the separate supervision of Development should be a neutral factor in analyzing the community of interest. See *Carson Cable TV*, 795 F.2d 879, 884-85 (9th Cir. 1986) (the unit consisted of “all field employees, including installers, technicians, warehousemen, and construction employees employed by Carson Cable TV” despite separate supervision of these classifications); see also *Casino Aztar*, 349 NLRB 603, 607 (2007) (finding that “separate

supervision is insufficient to demonstrate that [an employee group has] a separate community of interest from unit employees where the employees in both classifications worked “similar hours and are paid in a similar manner, and employees regularly transfer among three subdepartments.”).

**c. Nearly Identical Skills and Duties.**

The Report completely ignored the nearly identical skills and duties among Associate Producers on a series and Vinitz in Development. In both roles, Vinitz was required to research stories, identify good characters for the story, pre-interview the subject, gain access to key contributors, write proposals or pitches, and present proposals to his team. Tr. 51:21-24, 147:20-128:8, 56:19-21, 57:14-21, 58:1-3, 58:11-20, 53:5-18. The written work product created by Vinitz for Development and *Mysteries at the Museum* are also identical in layout, length, and style. See Employer Ex. 3 and 4. He also testified that organizing and attending video shoots was a part of his work on both *Mysteries at the Museum* and in Development. Tr. 18:6-7, 53:11, 54:3-4, 55:9-15, 56:2-9.

The Hearing Officer wrongly focused on the final product, rather than the work being done by Associate Producers in both roles. To be sure, the work in Development is designed to interest networks in purchasing shows from Optomen. Tr. 17:20-24. Based on that, perhaps an argument could be made that the executives in Development have a different role than the executives in production. However, for Associate Producers, the work is the same: finding interesting stories and people, suggesting those stories and people to their supervisors, and organizing shoots to create the product of their suggestions.

Incredibly, the Hearing Officer attempted to distinguish Development work from production work by stating:

While Associate Producers and post producers are engaged in the production of actual television programming and have responsibility for actual shows and series, the Development department merely produces ten minute video tapes (taster tapes), in order to pitch a show to a network.

Report, at 19. The Hearing Officer should have focused on the *work* of the Associate Producers to make this product, not the end result. Further, it is specious to find that no community of interest exists because one employee worked on a ten minute video and another worked on a thirty or sixty minute video.

The Hearing Officer has additional factual errors in her report about Vinitz' duties. She stated that "Vinitz, in fact, initially had no examples of any video shoots he attended." Report, at 20. This is patently false. Vinitz testified unequivocally that he attends shoots in the regular course of his Development duties. Tr. 52:2-8, 53:5-13, 54:2-4. Moreover, at the outset of his testimony on this topic, Vinitz was able to discuss a video shoot that he had attended within the month prior to his testimony:

Q Okay. And have you been on a shoot with Development --

A Yes, sir.

Q -- since you've joined that area?

A Yes, I have.

Q How many times?

A There was one in Brooklyn a couple weeks ago. And then I don't know how we call this a shoot but we did a very quick screen test in our office of one guy, and that -- it took longer to set it up and break it down but that was about all.

Tr. 54:12-20. This testimony was given before Vinitz' alleged inappropriate communication with Optomen's counsel regarding another shoot Vinitz attended.<sup>4</sup> The Hearing Officer also found it to be truthful that Vinitz participated in another shoot in October 2010. Report, at 20. Although Vinitz may have appeared "over-eager" to the Hearing Officer, his desire to provide accurate information does not discredit his testimony, and there is no evidence to the contrary. Given the short period of time Vinitz was in Development prior to the hearing, the small number of shoots on which he worked is significant.

In another instance of material error, the Hearing Officer added to the list of Associate Producer duties that they are charged with assessing the footage that should be edited and recommending what portion of the video footage will be cut. Report, at 3. Silver, who is credited with this testimony, never listed this responsibility as the responsibility of an Associate Producer. Instead, she testified that Producers, not Associate Producers, "prepare the script of how they have envisaged the hour of programming" which is then presented to the editor. Tr. 141:1-8. The Associate Producer's role is to "make sure that everything is set up and ready to go for the *producer*." Tr. 148:6-8 (emphasis added).

**d. Extensive Interchange Between Associate Producers Performing Development Work and Series Work.**

The Hearing Officer also managed to find that "there is no record evidence that Vinitz himself transfers between the departments or has any interchange with the production operations." Report, at 20. Of course, there is ample evidence in the record that Vinitz did

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<sup>4</sup> Vinitz comment to Optomen's counsel was not inappropriate. After he had testified the first day of the hearing, he told Optomen's counsel that he wanted to correct something he said. There was no substance to the conversation. Tr. 125:20-126:5, 133:1-4. Indeed, even the Hearing Officer determined that his testimony about the subject was truthful. Notably, the Hearing Officer never gave Vinitz any instructions about sequestration.

transfer between production and Development—during the eligibility period. Moreover, he was not the only one. Silver identified five recent examples of Optomen employees who have transferred between the series and Development work. Tr. 150:4-152:18 (identifying Kurt Tondorf, Ben Parry, Joseph Urdley, and Steve Dost); Tr. 152:21-24 (identifying Laura Donaghey). Significantly, both of the Associate Producers whose ballots are being challenged have moved between Development and production. The testimony also shows that this interchange is possible given the strong similarity in duties and skills required for both roles. Thus, the “community of interest which the [Development] employees might enjoy has been largely submerged into the broader community of interest which they share with the [series] employees.” *Monsanto*. at 416.

**e. The Interests of Vinitz are not Sufficiently Distinct from Other Associate Producers Working On Shows.**

Part of the Board’s analysis must be whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” *Wheeling Island Gaming, Inc.*, 355 NLRB 127 (2010) (citing *Newton-Wellesley Hospital*, 250 NLRB 409, 411-412 (1980) (emphasis added)).

The Board has a long history of applying this standard in unit determinations. *See, e.g.*, *Standolind Oil and Gas Research Section*, 81 NLRB 1089 (1949) (dismissing a petition because the employees in the requested unit formed an integral part of a larger group of employees having a common basis of training and comparable skills, functional coherence and interdependence); *Glosser Bros., Inc.*, 93 NLRB 1343, 1345-1346 (1951) (“The Board does not grant a separate unit to a group of employees that does not include all the same or similar classifications”); *Monsanto Co.*, 183 NLRB 415 (1970) (maintenance unit sought is not

composed of a distinct and homogeneous group of employees with interests separate from those of other employees); *Harrah's Illinois Corp.*, 319 NLRB 749, 750 (1995) (same).

As described above, an accurate reading of the record demonstrates that, in Development, Vinitz does the same kind of work as series Associate Producers, works in the same area, receives the same compensation, uses the same skills, and has had interchange with them. The only real distinctions between them are that Vinitz was offered benefits after he finished a trial period in Development and that his employment is not tied to a specific show. Report, at 19-20. These distinctions do not suffice to negate the overwhelming community of interest between Vinitz and the rest of Optomen's Associate Producers. The most important elements of a community of interest are the same: his compensation, his skills, his work responsibilities, his location, and his hours. The fact that he was offered benefits—of which he has not availed himself (Tr. 73:8-12, 78:7-14)—is only a minor factor. This one difference would not impair collective bargaining in a broader unit nor make a labor dispute more likely.<sup>5</sup> Given that benefits would likely be a subject of collective bargaining if the union is certified, it would be ironic to exclude Vinitz because he already had a benefit that the Union would seek.

Moreover, not all Associate Producers in Development have benefits. Donaghey worked in Development from September 27 through the first week of December performing all the same functions as Vinitz. If that situation occurs again, it would not be appropriate to distinguish between employees in Development based on whether they have benefits.

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<sup>5</sup> The WGA also sought to cast accusations about the timing of the benefits. However, it is undisputed that Vinitz was told in June, long before the petition was filed, that if he completed his trial period in Development he would be offered benefits. Tr. 108:18-109:2, 109:10:-24, 110:3:15, 156:21-157:21.

**3. A Residual Unit of One Associate Producer in Development is Inappropriate.**

For the reasons above, Vinitz has a substantial community of interest with the other Associate Producers and it would be inappropriate to exclude him. Yet there is an additional reason to include Vinitz: excluding him would leave an inappropriate residual unit. The Board is reluctant to leave a residual unit where the employees could be included in the larger group. *Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998) (declining a unit that excluded five peer health educators, despite their separate functions, hours, wages, and benefits, because “[t]heir exclusion, as we have found them to be employees, would create a residual unit, which the board seeks to avoid.”); *Airco Inc.*, 273 NLRB 348 (1984) (finding that a plant-wide unit was appropriate to avoid a residual unit).

In *Airco, Inc.*, the Board considered a plant-wide unit consisting of drivers, mechanics and operators at the same facility. 273 NLRB at 349. Although the functions of these employees were somewhat integrated, the three groups had little in common, had minimal contact, and had different supervision both at the immediate and facility level. *Id.* Finding that a plant-wide unit consisting of all three jobs classifications was appropriate, the Board stated:

Indeed, the alternatives to a plantwide unit here are not favorable. The Board does not favor organization by department or classification, and it is doubtful that either the mechanics or operators are a craft. A combined unit of the two would be even less appropriate on community-of-interest grounds than either alone. Any of these units could thus be called residual, as the Regional Director noted, and the Board has normally preferred to avoid creating such units where possible.

*Airco, Inc.*, 273 NLRB at 349.

Similarly to *Airco*, Vinitz must be included in the bargaining unit with the other Associate Producers because his exclusion would create an inappropriate residual unit. A

residual unit is appropriate only if it includes all unrepresented employees of the type covered by the petition. *Huckleberry Youth Programs*, 326 NLRB at 1272. Vinitz does not share any similarities with job classifications that are excluded from the petition, such as Writers, Editors, Production Coordinators, guards and supervisors. The same factors on which the Hearing Officer relied more greatly distinguish him from the remaining classifications at Optomen.

The fact that there is currently only one Associate Producer in Development is also an important consideration in this case. *Lifeline Mobile Medics, Inc.*, 308 NLRB 1068 (1992) (“Units of two or more employees, or similarly small numbers of employees, would in many cases be impractically small”). Vinitz, as the single Associate Producer performing Development duties, is unlikely to find representation to assert his bargaining rights.

In rejecting this argument, the Hearing Officer claimed that the record was devoid of any evidence of Optomen’s “varied classifications.” Report, at 20-21. This is wrong. The record contains ample evidence of Optomen’s organizational structure, (Tr. 137:21-138:5), of the employees who work in production (Tr. 138:6-140:24), and of the employees who work in post-production (Tr. 140:25-143:14). The evidence clearly establishes that the only employees in Development are Vinitz and supervisory/managerial employees. Where else would one look for classifications to include with Vinitz? The only non-supervisory employees in production are Associate Producers, researchers, and Production Assistants. Vinitz’ interests are far more similar to the Associate Producers than to researchers and Production Assistants. The non-supervisory employees in post-production, in addition to the post-producers, are editors, assistant editors, and loggers. Yet the Hearing Officer has already noted the differences between production and post-production; they have different skills and work on different ends

of the process. Certainly the Hearing Officer did not intend to place Vinitz with accounting or business groups of employees. Excluding Vinitz from the union would leave him without any employees with whom he would share a significant community of interest.

**B. The Ballot of Laura Donaghey Must Be Counted.**

While the Stipulation is unambiguous about the formula for determining Vinitz' eligibility, it is ambiguous with respect to Donaghey. It is ambiguous because it is unclear (1) whether the parties intended to exclude those with exactly the same responsibilities but with a different title; and (2) whether the parties intended to exclude those who had believed themselves to have one title but actually had another one. Because of the ambiguity and the absence of extrinsic evidence about the meaning of the Stipulation, the Board must consider its usual community of interest factors. *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). Here, those factors compel eligibility for Donaghey.

**1. The Hearing Officer Ignores The Fact That Donaghey Performs Associate Producer Duties As An "Assistant Producer."**

Regarding the first point, the Stipulation is silent as to whether the parties intended to exclude employees who were *de facto* Associate Producers, meaning that they performed all the functions of an Associate Producer and by extension share a community of interest with Associate Producers. There is no dispute Donaghey performs the exact same functions of an Associate Producer in the bargaining unit. Whether she was in Development or on a series called *Vegan Treats*. Donaghey researched stories and people for potential stories and characters. For *Vegan Treats*, those stories and characters were focused on a particular vegan bakery, but the duties and purpose were the same. Tr. 20:2-11, 14, 17-21. Unlike a "Production Assistant" who performs secretarial duties, Donaghey works in the "editorial chain

of command” on the creative side of the production. 29:15.<sup>6</sup> She “casts” for the series by researching and identifying potential stories and characters that might be featured on the show about a vegan baker. As noted by the Hearing Officer, “Associate Producers . . . are engaged in the production of actual television programming and have responsibility for actual shows and series.” Report, at 25.

**2. There Is No Evidence Showing Optomen Titled Donaghey As “Assistant Producer” And Therefore Intended To Exclude Her From The Unit.**

The Hearing Officer concluded Donaghey should be excluded because she was titled “assistant producer,” and that title was not included in the Stipulation. This conclusion falls on two grounds. First, it is undisputed that both Silver and Donaghey believed that “assistant producer” was the same as “Associate Producer. Both Silver and Donaghey are British, and have ties to the British entertainment industry. Silver’s immediate supervisor and business affairs manager are based in London. Tr. 137:6-9, 146:25-147:1. Silver also leveraged her industry network in the United Kingdom to confirm Donaghey’s qualifications. Tr. 153:5-6. Donaghey worked extensively in the United Kingdom before coming to Optomen and Silver was aware of her background. Tr. 25:20-24; 26:19-23; 154:25-155:2. The British system uses “assistant producer” to denote the same functions as an Associate Producer in the United States. Tr. 26:16-27:4, 154:23-155:2. Thus, regardless of what she was “titled,” she performed all the same functions as an Associate Producer. Under any reasonable reading, could the exclusion of “all other employees” really mean those who perform exactly the same work?

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<sup>6</sup> Notably, the Union challenged Donaghey’s ballot because it thought she was an intern or Production Assistant. Tr. 9:20-10:3. A Production Assistant is a business employee, different from an assistant or Associate Producer. Tr. 29:9-11.

Second, Optomen did not give Donaghey the “assistant producer” title. The only evidence that the Hearing Officer relies on to exclude Donaghey from the unit are documents Donaghey completed, without consulting with Optomen. Donaghey filled out the “job title” section of Union Exhibit 2 without any consultation with Optomen management. Tr. 45:25-46:21. Moreover, Optomen uses an outside company to process its payroll. Tr. 205:7-8. The fact Donaghey used the “Assistant Producer” title on Union Exhibit 2 and her time cards, which were then used by an outside payroll company, does not establish Optomen’s knowledge of this alleged job classification. Alternatively, even if Optomen had knowledge of Donaghey’s reference to her job as “assistant producer,” it would have been considered immaterial because the two terms describe the same function within a production company.

Further, the Hearing Officer’s reliance on time cards bears no weight. Report, at 10. As noted by the Hearing Officer, the time cards, which Donaghey filled out, list Donaghey as “assistant producer” on some weeks and on other weeks she labels herself “Associate Producer.” *See* Employer Ex. 6. Donaghey testified that she used both terms because she “believed it was the same thing.” Tr. 43:21-23. Thus, if anything, the time cards show only that there is interchangeability between the Associate Producer classification and alleged “assistant producer” classification.

The Report contains a fundamental inconsistency on this point. With respect to the time cards, the Hearing Officer found that “Donaghey’s subjective understanding of her job title is immaterial in resolving the challenge. . . .” Report, at 10. Yet by relying on Donaghey’s use of the term “assistant producer” on the same records, the Hearing Officer is also relying on that same subjective understanding.

The Hearing Officer strangely accused Silver and Donaghey of using the initials “AP” as a way to mask Donaghey’s title. Report, at 11. This conclusion ignores the fact, however, that “AP” is the common shorthand term used to refer to an Associate Producer. It was used throughout the hearing by both parties in a variety of contexts. *See e.g.*, Tr. 131:12-18 (Vinitz discussing series with “AP’s working” in October 2010); 80:2 (Vinitz referring to himself as a “story/casting AP” on a series); 81:23-25, 100:24-101:1 (union counsel referring to Vinitz as an “AP”); Union Ex. 4 (job description for “Development AP”); 139:1-3 (Silver testifying that “AP’s” report to series producers).

In total, the Report fails to explain how an employee who performs exactly the same duties, but calls herself a different title (but one that means the same in her mind), can be excluded from the unit.

**3. The Hearing Officer Improperly Discredited Testimony Regarding The Ambiguity Surrounding Donaghey’s Job Title.**

The Hearing Officer discredited Donaghey’s testimony because she claimed that Donaghey attempted to mischaracterize the position she was offered at Optomen. The record does not bear this out, however. Donaghey was completely transparent during direct examination that she worked in the United Kingdom previously under the job title “assistant producer” which was equivalent to an “Associate Producer” title in the United States.<sup>7</sup>

According to Donaghey, the role of an Assistant Producer in the United Kingdom means the following:

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<sup>7</sup> It is akin to other vernacular differences between the United Kingdom and United States where different words are used to describe the same thing. For example, what is commonly referred to as “Football” in the United Kingdom is usually called “Soccer” in the United States. These speakers would be referring to the same sport although the speakers are using different names to identify the sport.

To me that means the person who is one tier below the producer. The responsibilities that they have, that I suppose may vary across various companies and productions, I understand it to mean the support that you -- that the person one tier below the producer provide to the producer and the exec producer above that --

Tr. 25:14-19. Her description of the Assistant Producer role is identical to that of the Associate Producer role as summarized in the Report,:

[Maria] Silver testified that Optomen employ[s] executive producers who generally oversee a range of shows. Beneath the Executive Producers, producers oversee the production of individual shows or series. Associate Producers working on a show report to the series producer who assigns and supervises their work.

Report at 3.

Moreover, Donaghey's testimony was clear that she used the terms "assistant producer" and "Associate Producer" interchangeably because she "believed it was the same thing." Tr. 43:11-16, 21-23 (testifying that she wrote "Associate Producer" and "assistant producer" interchangeably on her time cards because she "believed it was the same thing").

Q Okay, have you used the term assistant producer in the United Kingdom?

A Yes.

Q And have you worked in the United States, other than this position for Optomen?

A I have for a British company and I was filming here and -- a few years ago and filming on location at a hospital in the Bronx.

Q Okay. And are you familiar with the term Associate Producer here?

A Yes.

Q In your experience in working with these companies do those 2 have different meanings?

A No.

Q When you were offered the position in September were you offered an AP position?

A Yes.

Q Did you assume that to mean assistant producer?

A Yes.

Tr. 26:16-27:9.

Donaghey's testimony is consistent with Silver's testimony that the terms "assistant producer" and "Associate Producer" refer to the exact same position within a production company. Silver testified that when she offered Donaghey the position with Optomen, she was, in her mind, offering her an Associate Producer position:

Q How did [Donaghey] come to have the title of assistant producer?

A I think that she -- I hired her as an AP, which I understand to mean associate producer. She has worked primarily in the UK, where that role is more often described as an assistant producer. As I only refer to the position as an AP, we were just talking at cross-purposes, but we were talking about the same role.

Tr. 154:23-155:4.

The Hearing Officer, however, construed the apparent confusion between the Assistant Producer and Associate Producer terms as an attempt to "shade" testimony about Donaghey's job title. The Board may disregard the Hearing Officer's credibility resolutions where they were not based on the witness' demeanor. *Beverly Enterprises*, 279 NLRB 327, 329 n.10 (1986), citing *Red's Express*, 268 NLRB 1154 (1984):

In disagreeing with the hearing officer's findings and conclusions, we note at the outset that the hearing officer's credibility resolutions were not based primarily on the demeanor of the witnesses. Rather, his resolutions were grounded on his assessment that the testimony of the Employer's witnesses was evasive and self-serving and on his belief that the Employer's financial decisions were unreasonable or irrational. Our policy normally is to attach great weight to a hearing officer's credibility findings insofar as they are based on demeanor. However, to the extent they are based on other factors, we may proceed with an independent evaluation.

Devoid from the Hearing Officer's credibility assessments are any references to the demeanor of Donaghey or Silver. Accordingly, the Board is not bound to give her credibility determinations significant deference and may make its own findings. Both witnesses provided accurate and consistent testimony regarding the confusion surrounding the language to describe Donaghey's job title. Donaghey should not be deprived the right to vote simply because an "Associate Producer" in the United States would be called an "assistant producer" in the United Kingdom.

Moreover, Donaghey's testimony corroborates the point because her duties, use of Optomen's facilities, and work schedule did not change when she started working under an employment agreement that identified her job title as "Associate Producer." *See* Employer's Post-Hearing Brief at 7-9 (citing Tr. 29:17-23, Tr. 16:4-10, 16:25, Tr. 16:18-25, Tr. 17:7-12, 19:3-20:2, Tr. 21:9-23, 22:2-3, 22:17-22, Tr. 19:3-20:2, 23:11-16, 24:3-7, 24:14-16, 24:23-25). Where an employee lacks a bona fide job title (as evidenced by written job descriptions, performance evaluations, or any other records from the challenged voters' personnel files), the employee's job functions shall be examined to determine classification. *Kalustyans*, 332 NLRB 843 (2000). Here, evidence regarding Donaghey's job duties reflects the fact that she

has always performed the duties of an Associate Producer even though the title of assistant producer and Associate Producer are used interchangeably in her Optomen paperwork.

#### **4. Disenfranchising Donaghey Leads To Absurd Results**

Sustaining the challenge to Donaghey's ballot leads to at least two absurd results. First, excluding Donaghey disenfranchises an employee with a clear expectation of employment in the bargaining unit. It is without dispute that Donaghey is performing work in the editorial chain of command on an Optomen series. She works pursuant to an employment agreement that identifies Donaghey the title of Associate Producer. Union Ex. 1. In short, she has been doing and continues to perform the exact same work as other Associate Producers whose votes were counted in the election. The Report, however, excludes Donaghey from the unit despite her reasonable expectation of continued employment in the unit.

Secondly, if the Board allows the challenge to stand, and the union is certified, there will be no clear delineation of the bargaining unit or of jurisdiction. If there are no differences in functions but only in titles, the Employer would wield ultimate discretion over the scope of the bargaining unit by virtue of the titles it assigns to its employees regardless of the actual work performed. Such a position contravenes Section 9(b) to "assure employees have the fullest freedom in exercising the rights guaranteed by' the Act." *See St. Francis Hospital*, 223 NLRB 1451 [92 LRRM 1772] (1976) (finding employees should be included in the bargaining unit because they performed bargaining unit work) It would also lead to an inappropriate unit, repugnant to Board policies.

#### **C. The Ballot of Amy Van Vessem Must Be Excluded.**

##### **1. Van Vessem's Job Title Is Excluded From The Bargaining Unit.**

While excluding Donaghey's ballot because Donaghey believed she had a different title

but performed the same work, the Hearing Officer managed to include Van Vesseem's ballot despite that fact that Van Vesseem believed, accurately, that she had a different title and performed different work. The challenge to Van Vesseem's ballot should be sustained because she was not included in the stipulated unit and because she is a statutory supervisor.

There is no dispute that if Van Vesseem was a Senior Post Producer she should be excluded from the unit because of the exclusion from the bargaining unit of "all other employees." Putting aside the issue of whether the Senior Post Producer is a supervisory position, it plainly was different from other post-producers. Tr. 165:15-166:24, 167:8-168:8.

The Hearing Officer avoided piles of evidence that Van Vesseem was a Senior Post Producer. Silver testified, without contradiction, that Van Vesseem was offered and did accept the position of Senior Post Producer for Season Two of *Worst Cooks* because of the experience she amassed while working as a Post Producer on Season One. Tr. 163:5-11, 165:6-11. Compared to Season One, the Senior Post Producer position had different duties, a different schedule, and a higher rate of pay. She was expected to oversee the editorial staff and manage their workflow for the entire season. Tr. 166:13-19; *see also* discussion of supervisory status below, at 31-36. She was asked to attend the shooting in the production phase in order to have greater insight as to how to manage the post-production workload. Tr. 166:20-24. The Executive Producer told the network that Van Vesseem would be "overseeing the producers and editors who will create the web content." Employer Ex. 8. Finally, Optomen increased her weekly salary by \$300. Tr. 164:16-17, 166:6-9.

Corroborating Van Vesseem's title as Senior Post Producer are her own emails in which she refers to herself as "Senior Post Producer" in her signature block. From June through November 2010, Van Vesseem held herself out to Optomen staff and third parties as the Senior

Post Producer for the series. *See* Employer Ex. 9, 10, 11, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, 31, 32, 33. The Hearing Officer discounts the value of these email messages claiming that they simply evidence how Van Vessem referred to herself. However, the Hearing Officer overlooks the fact that the email messages also establish notice on the part of Optomen management regarding Van Vessem's job title. Exhibit 18, for example, is a message from Van Vessem to Silver in July 2010 regarding the hire of an additional employee to support Van Vessem. In her signature block, Van Vessem lists her title as "Senior Post Producer." There is no evidence that Silver disagreed with Van Vessem's use of the title Senior Post Producer in her email messages. To the contrary, Silver testified that this was the exact job title given to Van Vessem. Unlike Donaghey's assumed title of "assistant producer," Optomen knew Van Vessem's title and did not include her classification in the bargaining unit.

The Hearing Officer dismisses Van Vessem's emails by saying that they "simply reflect her view that she is a senior employee." Report, at 15-16. This is complete speculation by the Hearing Officer; there was no testimony about Van Vessem's views. In any event, the position and font of the "Senior Post Producer" on the emails obviously reflect that Van Vessem considered it her title and held herself out to Optomen employees and third parties as a Senior Post Producer.

Thus, Optomen's business records show that Van Vessem held the title of Senior Post Producer. Her elevated pay and expanded job duties evidence the fact that she was hired to perform more duties than that of a Post Producer. Contrary to the Hearing Officer's assertion that "Optomen offered no evidence that Van Vessem was actually promoted," (Report, at 15) the record shows that Optomen provided ample evidence that Van Vessem was promoted from a Post Producer in Season One to Senior Post Producer in Season Two as described above.

Silver testified that Van Vesseem received a higher weekly salary because of her promotion. Tr. 164:16-15, 166:6-12. There is no evidence that her elevated rate of pay was awarded for any other reason than her new position. And the Union did not call Van Vesseem to rebut Silver's testimony.

The Hearing Officer inexplicably found, out of a jumbled inconsistency, that Van Vesseem's time cards "conclusively establish[]" that she was employed as a Post Producer. Report, at 15. The time cards do no such thing. Van Vesseem's time cards show that she used at least two job titles including "Post Sup Producer" (recognizing her supervisory status) and "Post Producer." See Union Ex. 7. Moreover, the payroll records on which the Hearing Officer relies are a mixed bag of titles including "Edit Producer" and "Post Producer." Employer Ex. 7. "Edit Producer" is not within the stipulated unit.

And, as previously established, Optomen is not involved with creating the payroll records which are handled by an outside company. Thus any designation given to an employee in their payroll records should not be credited determinative weight with regard to an employee's job title or actual responsibilities.

Contrary to the Report, the weight of the evidence shows that Van Vesseem occupied the position of Senior Post Producer. Because Post Producers are included in the bargaining unit and "all other employees" are excluded, the job classification of Senior Post Producer has been excluded from the unit by the unambiguous intent of the parties. The challenge to Van Vesseem's vote must be sustained.

## **2. Amy Van Vesseem Possessed And Exercised Supervisory Authority.**

Van Vesseem should also be excluded from the bargaining unit because she was a Section 2(11) supervisor. She possessed the authority, in Optomen's interest, to engage in

enumerated supervisory functions, namely “to . . . assign, . . . or responsibly to direct” Optomen employees. *Oakwood Healthcare Inc.*, 348 NLRB 686 (2006) (interpreting 29 U.S.C. § 152(11) (2006)). “Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.” *Id.*

Concerning responsible direction, the Board has stated that if a person has other employees under them, and “if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ [. . .] and carried out with independent judgment.” *Id.* The Hearing Officer, however, failed to heed the unopposed testimony regarding Van Vessem’s supervisory status.

The uncontroverted testimony<sup>8</sup> established that Van Vessem possessed the authority to effectively recommend the hire of employees, assign work to employees, and responsibly direct their work.

- Van Vessem recommended that a certain Post Producer be hired and the person was hired, even though Silver preferred another candidate. Tr. 137:4-5, 187:1-11, 188:11-17. Plainly, this was an effective recommendation.

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<sup>8</sup> The Hearing Officer makes note that Optomen did not call Van Vessem as a witness. Report, at 15 (“It must first be noted that although Optomen carries the burden to exclude Van Vessem from the unit, Optomen failed to call her as a witness.”). The fact that Optomen did not call Van Vessem as a witness, however, should be irrelevant to the Hearing Officer’s determination as to the credibility of Optomen’s evidence or her ultimate determination of Van Vessem’s supervisory status. Where, as here, the evidence is undisputed, an adverse inference is inappropriate. Furthermore, where, as here, the witness in question is no longer working for the employer and is equally available to the parties, it is improper for the Hearing Officer to draw an adverse inference from the potential witness’ absence. *See Norbar, Inc.*, 267 NLRB 916 (1983), *enfd.*, 752 F.2d 235, 240 (6<sup>th</sup> Cir. 1985) (finding ALJ improperly drew adverse inference against employer from failure of former employee to testify; adverse inference is not warranted where absent witness no longer works for employer, and the former employee was equally available to both parties), *See also Hitchiner Mfg. Co.*, 243 NLRB 927 (1979), *enfd.* 634 F.2d 1110 (8<sup>th</sup> Cir. 1980); *O’Dovero Constr.*, 264 NLRB 751 (1982).

- Van Vessem had the authority to modify other employees' schedules and determine their termination date. *See* Employer Ex. 21.
- Van Vessem directed the work of the loggers and assigned tasks to them based on the priorities of the post-production. Tr. 169:13-15, 169:24-170:2, 218:3-4; *See e.g.*, Employer Ex. 25 (directing the work of Associate Producers); 10, 14-15, 26 (directing the work of the loggers); 11, 16, 22-23, 27-29 (directing the work of assistant editors); 8 (executive producer introducing Van Vessem as “overseeing the producers and editors who will create the web content.”).

In finding that Van Vessem’s decisions did not require independent judgment, the Hearing Officer incorrectly conflated the routine tasks performed by the post-production staff with the independent judgment and decision-making of Van Vessem.<sup>9</sup> Specifically, the Hearing Officer repeated the Union’s arguments that the work of logging and digitizing were routine tasks:

“Here, the evidence establishes that the post production employees allegedly supervised by Van Vessem had duties which were basic and repetitive. To the extent that Van Vessem instructed employees on prioritization of their tasks, the tasks were routine . . . .”

Report, at 16. The Hearing Officer’s focus on the routine work of the loggers and assistant editors is poorly aimed. The question is not whether the work of loggers and editors was routine, but whether Van Vessem’s *decisions* about their work were routine or required independent judgment.

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<sup>9</sup> The Hearing Officer also credited Van Vessem with testimony regarding the Van Vessem’s supervisory duties even though Van Vessem was not offered as a witness and did not attend the hearing. *See* Report, at 21 (“Van Vessem testified there is no written template regarding the tasks loggers perform because it is a basic function which can be easily explained.”).

An example proves the faulty analysis by the Hearing Officer. If the job of employees is to push buttons, that is a simple routine task. But if the supervisor determines which buttons should be pushed and when the buttons should be pushed based on her knowledge of the product being created and the importance of sequencing the work, the supervisor is still using independent judgment when instructing employees to push the buttons.

Here, the work of the loggers and the assistant editors may be routine, even boring. Van Vessem played a much more important role. Van Vessem had to be aware of the major storylines of the show, know where the key sound bites were located amongst extensive show footage, and make determinations as to how to best manage the assistant editors and loggers in order to keep the show on schedule. Tr. 166:20-24, 169:14-170:2. Thus, Van Vessem used her independent judgment in determining priority, determining importance of certain content, and in determining how to keep the project on schedule with the resources she had available.

Moreover, there is no evidence that Van Vessem performed *her* duties at the detailed direction of a superior or other authority. As noted by the Hearing Officer, the Supreme Court and the Board have recognized that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Report, at 14-15 (citations omitted). There is no evidence that Van Vessem performed her duties according to detailed instructions handed down from a supervisor or any other authority. It was error, therefore, for the Hearing Officer to conclude Van Vessem did not exercise independent judgment where no such evidence exists to support the conclusion.

The Hearing Officer also erred in characterizing Van Vessem’s supervisory duties as “ad hoc.” Report, at 16. To the contrary, the record shows that Van Vessem’s exercise of her

supervisory status occurred on a daily basis. Numerous email messages submitted as exhibits demonstrate that Van Vessem would send out daily emails to the post production staff to ensure timely completion of editing the show footage and equitable distribution of workload. *See e.g.*, Employer Ex. 10 (email string sent to loggers directing their transcription of show footage); Ex. 12 (email to assistant editors regarding distribution of tapes to loggers); Ex. 14 (email to loggers regarding their work assignments). She executed these job duties to manage the workflow of all the post-production staff from the post-producers to the loggers.

The Hearing Officer also erroneously relied on the fact that Van Vessem spent “most” of her work time in a non-supervisory capacity post-producing her own shows. Report, at 18. First, the testimony was only that Van Vessem spent a majority of her time doing actual post production work. Tr. 168:3-5. Even at a majority, however, this fact does not deprive Van Vessem of supervisory status. Where, as here, the evidence shows that individuals regularly spend a substantial portion of their time performing supervisory duties, they are considered 2(11) supervisors. *See Oakwood Healthcare, Inc.*, 348 NLRB 686 [180 LRRM 1257] (2006). “Where an individual is engaged a part of the time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions.” *Id.* “Regular” means “according to a pattern or schedule” and “substantial” may be as little as 10-15 percent of the employee’s work time. *Id.* It is undisputed that Van Vessem performed supervisory duties every day.

Further evidence of Van Vessem’s supervisory status is the fact that she held herself out as such in her correspondence. As described above, it is undisputed that Van Vessem asserted her Senior Post Producer title in the signature block of her email messages to Optomen

employees and third parties. Van Vessem's self-identification as a supervisor militates toward a finding that she is a 2(11) supervisor. *See Progressive Transportation Services Inc.*, 340 NLRB 1044 (2003); *SKC Electric Inc.*, 350 NLRB 857 (2007).

The Hearing Officer also ignored the undisputed testimony that Van Vessem possessed the authority to assign overtime to the loggers. Despite the Union's attempt to lead Silver to testify to the contrary, Silver testified without qualification that Van Vessem had the authority to assign overtime without the oversight of Optomen's upper management:

- Q She didn't assign overtime, did she?  
A She could have assigned overtime to the loggers.  
Q They get paid overtime?  
A They get paid overtime, yes.

Tr. 217:23-218:1. Further, the record establishes that Van Vessem agreed with the post production supervisor that post production employees could work ten hours per week of overtime, thereby determining working conditions for those she supervised. Tr. 218:7-10.

The Hearing Officer, however, rejected this testimony because of Silver's "penchant for shading testimony" and because Silver was not aware of any instances in which Van Vessem assigned overtime. Report, at 17. However, whether or not a supervisor actually exercises such authority is not dispositive of whether they possess supervisory status under Section 2(11). Moreover, the record is devoid of contradictory testimony to undermine Silver's testimony that Van Vessem had the authority to assign overtime to her subordinates. Again, the Hearing Officer's credibility determination is not rooted in fact, an assessment regarding Silver's demeanor, or supported by the record. As such, the Board should disregard this credibility determination and make its own findings.

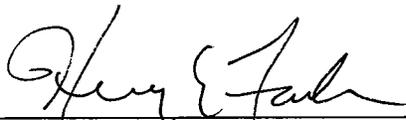
As in *Oakwood*, Van Vessem dictated “what job shall be undertaken next or who shall do it,” among the post-production staff of *Worst Cooks*. Van Vessem is a section 2(11) supervisor and therefore her ballot should be excluded.

**V. CONCLUSION**

Optomen respectfully requests that the Board reject the Hearing Officer’s Report and Recommendations which are unsupported by the record and contrary to Board precedent. Optomen requests that the Board determine that the ballots of Vinitz and Donaghey be opened and counted, and that the challenge to the ballot of Van Vessem be sustained.

DATED this 24th day of March, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I caused to be served via electronic mail a copy of the foregoing Post-Hearing Brief upon the following:

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DATED this 24th day of March, 2011.

  
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Claire D. Tollfeldt