

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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OPTOMEN PRODUCTIONS, INC., :
 :
 : Employer, :
 : :
 : and : Case No. 2-RC-23545
 : :
 WRITERS GUILD OF AMERICA EAST, INC., :
 AFL-CIO, :
 : :
 : Petitioner. :
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**PETITIONER'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS TO
HEARING OFFICER'S REPORT AND RECOMMENDATION ON CHALLENGES**

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I. INTRODUCTION

Petitioner Writers Guild of America East, Inc. (“WGAE” or “the Union”), by and through its attorneys, Spivak Lipton LLP, submits this brief in opposition to the exceptions filed by Employer Optomen Productions, Inc. (the “Employer” or “Optomen”) concerning Hearing Officer Rhonda E. Gottlieb’s (“Hearing Officer”) Report and Recommendation on Challenges (“Report”) in Case No. 2-RC-23545.

The entire evidentiary record, in combination with the applicable law and Board policies, overwhelmingly supports the Hearing Officer’s determinations on three (3) determinative challenged ballots. As discussed herein, the Hearing Officer emphatically concluded that the evidence in support of the Employer’s position on all legally material issues was unequivocally lacking and the testimony of its witnesses unreliable. A review of the record makes plain that the Hearing Officer’s determinations were amply supported. As such, the Board should reject the Employer’s exceptions and adopt the Report and Recommendation in its entirety.

II. PROCEDURAL BACKGROUND

The Union filed a representation petition in this case on October 8, 2010. The parties executed a Stipulated Election Agreement (the “Stipulation”) on November 15, 2010 wherein a mixed mail-manual election was agreed to. (Jt. Ex. 1, ¶ 12.)¹ The Stipulated Election

¹ All references to the transcript of the January 27, 2011 – January 28, 2011 hearing (“Hearing”) appear as “Tr. ___.” Exhibits introduced by the Petitioner during the Hearing are referred to as “U. Ex. ___.” Joint exhibits are referred to as “Jt. Ex. ___.” Employer exhibits are referred to as “Er. Ex. ___.” The Hearing Officer’s Report and Recommendation on Challenges is referred to as “Report p. ___.” References to the Employer’s Exceptions appear as “Er. Excep. ¶ ___.”

Agreement made the following inclusions and exclusions:

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

EXCLUDED: All other employees, including Writers, Editors, Productions Coordinators, and guards and supervisors as defined in the Act.

Id. at ¶ 13.

The parties agreed to the following specific language in the Stipulation with respect to the Employer's Development Associate Producer: "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." Id.

The parties further stipulated to an eligibility formula. Consistent with the "look back" formula utilized by the Board in Davison-Paxson Company, 185 NLRB 21 (1970), eligible to vote were "individuals included within the [Stipulation's agreed upon] Collective-Bargaining Unit. . . .who worked 52 hours or more in the 13-weeks prior to October 8, 2010...." Id. at ¶ 11.

Pursuant to the terms of the Stipulation, the mail balloting period began on December 1, 2010. Id. at ¶12. Mail ballots were to be returned to the Region by the close of business on Friday, December 17, 2010. Id. Manual voting took place on December 14, 2010. Id. A tally of ballots issued on December 20, 2010 shows four (4) votes in favor, and four (4) votes against representation, as well as three (3) determinative challenged ballots. The three determinative ballots were cast by Laura Donaghey ("Donaghey"), Amy Van Vesseem ("Van Vesseem") and

References to the Employer's Brief in Support Exceptions appear as "Er. Br. at ____."

Josh Vinitz (“Vinitz”).

Donaghey’s ballot was challenged by the Union on the basis that Donaghey’s title—“Assistant Producer”—is expressly excluded from the stipulated unit. (Report p. 2.) Van Vessem’s ballot was challenged by the Board Agent because her name did not appear on the Excelsior list. (Id.) The Employer sought to exclude her from voting on the basis that she is a supervisor within the meaning of the Act. (Id.) Vinitz’s ballot was also challenged by the Board Agent on the basis that, by dint of his title—“Development Associate Producer”—he was only permitted to vote subject to challenge. (Id.)

Pursuant to the Board’s Rules and Regulations, the Regional Director issued a Notice of Hearing on challenges on January 19, 2011. (Report p. 2.) A hearing was then held on January 27 and 28, 2011. The Employer called Donaghey and Vinitz as witnesses at the hearing. Van Vessem did not testify at the hearing.

The instant Report was issued on March 10, 2010. The Employer filed 33 exceptions and a brief in support on March 24, 2010.

III. FACTUAL BACKGROUND

The Employer’s Operations and the Stipulated Unit

The Employer in this case is a television production company generally engaged in the production of non-fiction television shows. (Report p. 3.) Optomen’s management staff includes Executive in Charge of Production Maria Silver (“Silver”), who testified regarding the

Employer's position in support of the challenge to Van Vessem and in opposition to the challenge of Donaghey. Id. Silver generally described the work of individuals included in the stipulated unit employed by Optomen. Associate Producers assist producers with all aspects of the filming of a show, including requisite preparation for video shoots, and the shooting of footage. (Tr. 147-48.) Post-producers are responsible for creating and finalizing the finished product that goes to television networks and is eventually aired. (Report p. 3.) Generally, Associate Producers and Post Producers work on a "freelance basis" for Optomen. (Tr. 82, 94.) For example, an Associate Producer would be employed for Optomen on a particular Stipulation on of a television show that it produces. Both Associate Producers and Post-Producers work long hours (sometimes upwards of 16 hours per day). Id. at 4. The freelance employees within the stipulated unit are not offered fringe benefits. (Tr. 83-84, 97.)

Laura Donaghey

Donaghey first began working for Optomen in March 2010 as an unpaid intern. On about September 27, 2010, Donaghey began paid employment with Optomen as an "Assistant Producer" within Optomen's development department. (Report p. 5; U. Ex. 2.) Beginning in early December 2010, Donaghey worked principally on a television program called "Vegan Treats." (Report p. 6.) Donaghey testified about her responsibilities on that show. (Tr. 20-21.) She was generally responsible for identifying people and events to be featured in the program. (Tr. 20-21, 24.)

Donaghey testified at length about her prior work in the United Kingdom. (Tr. 25-27.) That testimony included her subjective understandings of the term "Assistant Producer." Id.

Donaghey testified that upon commencing paid employment with Optomen in September 2010, she was an “Assistant Producer” (Tr. 27, 37). Donaghey did not testify that her job title subsequently changed at any point up to, or after the election. Donaghey thus became, and remained an Assistant Producer throughout the relevant eligibility period.

Josh Vinitz

Between January and August of 2010, Vinitz worked as a freelance Associate Producer on the television program “Mysteries at the Museum.” (Tr. 51.) His work on that show, ended in mid-August 2010. Id. In September 2010, Vinitz was offered and accepted the regular full-time position of “Development Associate Producer.” (Report p. 7.) On the date of the Stipulation, and at all times thereafter, Vinitz was the only Development Associate Producer employed by Optomen. (Tr. 57.)

The “development” team at Optomen is a unit which performs a different function than employees who make up the staff of Optomen’s various productions. The role of the development department is creating ideas and writing proposals for new shows and producing pilots or “taster tapes,” which are short mock-ups of possible shows that the company uses to solicit the interest of television networks. (Id. at 4, 7; Tr. 52-54, 146-50.)

The development department is made up of three employees during the relevant period Vinitz; Vice President of Development Kurt Tondorf; and Producer Stephanie Angeletes. Vinitz is supervised by Tondorf and Angeletes (Tr. 52-53, 101). As a Development Associate Producer, Vinitz receives fringe benefits while the freelancers in the stipulated unit do not.

(Report p. 7-8.) Vinitz generally has little contact with employees in the stipulated unit. Id. Vinitz also considers his current job permanent, unlike the freelance positions of ordinary Associate Producers. (Tr. 83.)

Amy Van Vesse

As noted, Van Vesse did not testify at the hearing. The only testimony regarding Optomen's challenge to her ballot was provided by Silver. (Report p. 4.) Van Vesse worked for Optomen on a television program called "Worst Cooks in America." Id. Van Vesse's title on the first Stipulation on of that show was "Post Producer." She continued work on "Worst Cooks in America" for its second season. Id. The documentary evidence shows that Van Vesse's job title did not change when she returned in about May 2010 to continue working on the second season. (U. Ex. 7.)

In connection with her work on the second season, she organized the work of "Loggers" and "Assistant Editors," other entry level post-production employees who generally performed rote editing tasks such as "digitizing" (loading video footage into a computer system) and transcribing the material captured on a video tape. (Report p. 3-4.)

IV. STANDARD OF REVIEW

The Employer has registered 33 exceptions on the bases that the Hearing Officer executed erroneous legal conclusions, made erroneous factual conclusions and made findings unsupported by evidence. In ruling on exceptions the Board reviews the entire record in light of

the exceptions and briefs. Regional Emergency Medical Services, 354 NLRB No. 20 slip op. at 1 (2009).

In accordance with its long-standing practice, the Board should not disturb the Hearing Officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces the Board that a resolution is incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enforced, 188 F.2d 362 (3d Cir. 1951). See also Millard Refrigerated Services, Inc., 345 NLRB 1143, 1143 fn. 3 (2005) citing Stretch-Tex Co., 118 NLRB 1359, 1361 (1957).

V. ARGUMENT

A. Laura Donaghey

1. Donaghey is ineligible to vote based on the parties' exclusion of her from the stipulated unit.

The Hearing Officer properly concluded that Donaghey is excluded from the stipulated unit on the basis that she is an "Assistant Producer," a classification excluded from the unit. In this case, the parties' SEA expressly includes only "Associate Producers and Post-Producers" and excludes "[a]ll other employees." (Jt. Ex. 1, ¶ 13.) "Assistant Producers" fall within the exclusion of "all other employees." The parties have thus chosen not to include Donaghey in the unit and that choice should be enforced.

When the parties have executed a stipulated election agreement, the Board uses a three part test to determine whether a challenged voter is properly excluded from voting:

[T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the

stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Caesar's Tahoe, 337 NLRB 1096, 1097 (2002).

Where, as here, the stipulated unit excludes "all other employees," and the disputed voter's classification does not fit the language of the stipulation, the parties' agreement is deemed unambiguous and the voter is excluded. Halsted Communications, 347 NLRB 225, 225 (2006) (If the disputed job title is not included in the parties stipulation, but the parties have excluded "all other employees," the stipulation will be read to clearly exclude that classification.); See also Bell Convalescent Hosp., 337 NLRB 191 (2001) (same).

The Hearing Officer's finding is properly based on documentary evidence which establishes conclusively that Donaghey was titled "Assistant Producer" when her paid employment with Optomen began in September 2010, and at all relevant times during the eligibility period. (Report at p. 10; U. Ex. 2; Tr. 35-57.)

October 8, 2010 was the final date of the eligibility period. (See Jt. Ex. 1, ¶ 12. "Eligible to vote are those individuals...who worked 52 hours or more in the 13-weeks prior to October 8, 2010...") Thus, any work that Donaghey performed *after* that day cannot form the basis for her inclusion in the unit. See Sweetener Supply Corp., 349 NLRB 1122, 1122 (2007) ("To be eligible to vote, an individual must be employed and working in the bargaining unit on the eligibility date...") (internal quotation marks and citation omitted) Time cards showing Donaghey's hours of work between September 27, 2010 and October 8, 2010 unequivocally list

Donaghey's title as "Assistant Producer." (Er. Ex. 2.) The same is true of the Employer's payroll records – for each date worked during the eligibility period, Donaghey's "Job" is listed as "Assistant Producer." (Er. Ex. 6.) The timecards, and Donaghey's start-up paperwork (U. Ex. 2) were endorsed by Optomen managers, and therefore accepted as official company documents. In determining Donaghey's eligibility, the Board must simply compare the job titles at issue with the language of the Stipulation. See, e.g. Butler Asphalt, 352 NLRB at 190 ("The stipulated election agreement excludes 'all laborers,' and these [challenged] employees are classified as laborers..."). The documentary evidence establishes that Donaghey held the title of "Assistant Producer" during the eligibility period. (U. Ex. 2.)

The Employer's attempt to minimize the documentary evidence by noting that Donaghey herself filled out certain documents in the record is of no consequence. The Employer cannot seriously contend that its own documents provide unreliable evidence. Documents regularly maintained by the Employer recognize Donaghey as an "Assistant Producer." (U. Ex. 2; Er. Ex. 2; Er. Ex. 6.) Furthermore, as discussed above, those documents bear the signature of Optomen management. Had Donaghey completed any of those documents, the Employer ratified their contents by signing them and failing to correct them.

2. The Board should not "look behind" Donaghey's title to examine the work she performed.

The Employer argues that "the Report fails to explain how an employee who performs exactly the same duties, but calls herself a different title ... can be excluded." (Er. Br. at 24.) That is an irrelevant contention, as an examination of the work performed by Donaghey would be improper. Where the parties have agreed to a stipulated unit, asking the Board

to look behind classifications to the work employees perform is inconsistent with the expectation, upon which the Caesar's Tahoe analysis is based, that the parties know the employees' job titles and intend their descriptions in the stipulation to apply to those job titles. Doing so, moreover, would compromise the predictability and finality afforded by the Caesar's Tahoe framework, under which employers and labor organizations can expect that their unambiguous stipulated election agreements will be enforced as written.

Butler Asphalt, 352 NLRB 189, 191 (2008).

The Hearing Officer properly found that the "employer knew the role Assistant Producer existed and used that term at the time Doneghey was hired." (Report p. 10.) The documentary evidence also establishes that the "Assistant Producer" title existed at the time the parties entered into the Stipulation. (Report p. 10; Er. Ex. 2; Jt. Ex. 1.)

The Employer's attempts to create ambiguity in the Stipulation as it applies to Donaghey should be disregarded. Testimony that both Silver and Donaghey have backgrounds doing entertainment work in the United Kingdom is unavailing and probative of nothing. Where the parties have clearly expressed their intent to include certain titles, and expressly exclude all others, the Board must give effect to that agreement. Bell Convalescent Hosp., 337 NLRB at 191. The Board cannot disregard the Stipulation simply because an individual employee holds a subjective belief that a title is the "UK version" of the American title describing the same role. Giving effect to the Stipulation, the Hearing Officer found that based on the applicable law, Donaghey must be excluded from voting based on her title, Assistant Producer.

Had Optomen intended to include "Assistant Producers" (which it purports is the same job as an Associate Producer in the United States (tr. 154-155)), it had an opportunity to do so

prior to executing the Stipulation. It cannot now seek to subvert the express terms of the Stipulation by imposing an unnecessary ambiguity based on international discrepancies in the entertainment industry. Adopting the Employer's assertion would only undermine the intent of Caesar's Tahoe by examining extrinsic evidence (of one party's subjective intent) while ignoring the otherwise clear and unambiguous language of the Stipulation.

3. The Hearing Officer's resolutions of the testimony regarding Donaghey should be given deference; or in the alternative, the testimony should be disregarded as unnecessary in determining Donaghey's title.

As indicated above, Optomen offered witness testimony from Silver and Donaghey in support of its position concerning Donaghey's ballot. The Hearing Officer, having ample occasions to observe the demeanor of the witnesses during the course of the hearing, found that in view of the vague and contradictory responses of these witnesses, their testimony was entirely unavailing. Optomen excepts to the Hearing Officer's determinations in that regard. (See Er. Excep. 11.)

As a threshold matter, Optomen's criticisms of the Hearing Officer's credibility determinations of Silver and Donaghey are wholly irrelevant to the determination of Donaghey's eligibility. The Employer's documents, as previously noted, speak for themselves. In any event, the Hearing Officer's determination to discredit the testimony of Silver and Donaghey on the topic of Donaghey's title and that finding is due deference from the Board. Stretch-Text Co., 118 NLRB at 1361. In light of the various inconsistencies between the documentary evidence and the testimony of Silver and Donaghey, the Hearing Officer chose to base her decision upon the evidence she found most reliable—the Employer's documents.

Optomen argues that the Board should not accept that resolution because it was not based on the demeanor of the witnesses. That contention is frivolous since the Hearing Officer obviously based her resolutions on impressions of the witnesses' demeanor. The Report states that as a witness, Donaghey had a "desire to produce testimony in a light most favorable to Optomen rather than provide honest and accurate answers." (Report p. 10.) Similarly, the Hearing Officer found that Silver "shaded her testimony" about Donaghey's precise job title. (Id. p. 11.) Such language is clearly consistent with credibility determinations that the Board has upheld as based on demeanor. See e.g., ABB Inc., 355 NLRB No. 2 slip op. at 7 (2010) (upholding ALJ's credibility determination where he found that employer witness "wanted to mold and shape his testimony in a manner he perceived would help the Company without regard for being candid and telling the full and complete truth"); ManorCare, 356 NLRB No. 39 slip op. at 9 (2010) (Board upheld judge's credibility findings where judge discredited testimony where witness showed "litigation-inspired efforts to avoid providing evidence" contradictory to the employer's case); Standard Sheet Metal, 326 NLRB 411, 422 (1998) (affirming decision in which judge rejected testimony of witness who "failed to exhibit the candor of an honest witness").

Moreover, the Board may infer that the Hearing Officer's resolutions rest directly on observations of these witnesses' character and demeanor. See e.g., Triple A Machine Shop, Inc., 235 NLRB at 209 ("[W]e believe it is appropriate to infer that the Hearing Officer found the testimonial demeanor of [witnesses] to be persuasive of their veracity."). Even if the record were not so replete with ample grounds for the Hearing Officer's determinations, the Board may find that "there are substantial evidentiary factors in support of the Hearing Officer's credibility

finding which [she] failed to note specifically in [her] report.” Triple A Machine Shop, Inc., 235 NLRB at 209. (The Hearing Officer is not required to annotate her decision with complete details of each and every credibility finding when testimony is found unreliable. E.g. Walker’s, 159 NLRB 1159 (1966).)

In sum, the Hearing Officer’s determinations regarding Donaghey’s ballot should be given proper deference and upheld.

B. Josh Vinitz

1. Vinitz is not eligible to vote based on his prior work as an Associate Producer.

It is undisputed that when the parties executed the Stipulation, and through the date of hearing, Vinitz was employed as the exclusive “Development Associate Producer.” (See Jt. Ex. 1 ¶ 13; Tr. 7, 150.) As discussed above, the parties agreed to specific language in the Stipulation that would be applied to Vinitz alone: “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 ¶ 13) (emphasis added). The parties thus agreed to disagree about Vinitz’s eligibility. Where, as here, the parties have objectively manifested such clear intent regarding the eligibility of a particular voter, the Board must give effect to that agreement. See G&K Services, 340 NLRB 921 (2003).

In disregard of the Stipulation’s explicit terms regarding Vinitz, Optomen now argues that he should be found eligible in light of work he performed for Optomen *before* he was transferred to the position of Development Associate Producer. Allowing the Employer to

ignore and subvert the parties' intent would seriously undermine the Board's settled policies. Optomen seeks to do so here by first allowing an employee to vote subject to challenge, and then later resisting that challenge by offering an alternative basis for the employee's eligibility.

While the Stipulation thus makes clear that an analysis of Vinitz's work as a Development Associate Producer is the only relevant inquiry here, well settled Board precedent also establishes that Vinitz's work prior to his transfer to that position is immaterial. The record conclusively demonstrates that Vinitz transferred to a non-unit position prior to the time of the election. In such circumstances, a transferred employee is ineligible to vote. See Peirce-Phelps, Inc., 341 NLRB 585, 585 (2004). Indeed, the Board has established eligibility formulas in order to enfranchise "employees who have a reasonable expectancy of further employment" within the bargaining unit. DIC Entertainment, 328 NLRB 660, 662 (1999) citing, Medion, Inc., 200 NLRB 1013 (1972). When an employee transfers permanently to an out-of-unit position, he can hardly expect further employment within the unit. See e.g., Peirce-Phelps, Inc., 341 NLRB at 585.

In support of its contention that Vinitz should be found eligible by virtue of his pre-transfer work as an Associate Producer, Optomen cites to a "general rule" that "an employee must be employed both on the eligibility date and the date of election." NLRB Outline of Law and Procedure in Representation Cases, 279, §23-200. The Employer errs in stating that rule. In order to vote, an employee must not only be employed generally, but must be employed "within the proposed bargaining unit." Peirce-Phelps, Inc., 341 NLRB at 585. Indeed to address such circumstances, the Board applies well settled authority (which Optomen inexplicably and vaguely attacks) holding that even if he or she remains employed by the employer, "[a]n

employee who is transferred out of the bargaining unit before the election will not be eligible to vote unless he or she has a reasonable expectancy of returning to the unit.” Peirce-Phelps, Inc., 341 NLRB at 585.

In Peirce-Phelps, the parties agreed to a stipulated election agreement, and an employee was transferred to a position outside the stipulated unit after the eligibility date, but before the election date. Id. at 586. That employee was properly excluded from voting. Id. The Board noted that, “on the date of the election,” the challenged voter was in an excluded position, and therefore ineligible. Id.

In the face of such settled Board authority, Optomen cannot seriously contend that Vinitz’s pre-transfer work as an Associate Producer qualified him to vote. The Board has held that when an employee has transferred out of the unit, “[t]hat transfer represented a change of status” and an employee’s “qualification [to vote] must be based on his regular and substantial performance of unit work *after* the transfer.” Martin Enterprises, 325 NLRB 714, 711 (1998) (citations omitted) (emphasis added)².

² Both Peirce-Phelps and Martin Enterprises further demonstrate that transferred employees may still be eligible to vote, if after transfer they still perform bargaining unit work. In such circumstances, the Board considers the disputed employee a “dual-function” employee with sufficient ties to the bargaining unit.” First, the Employer has not asserted Vinitz is a “dual function” employee. Second, even if its assertions could be construed as characterizing Vinitz as a “dual function” employee, such an argument would be misplaced here where a stipulated election agreement defines a unit based on job titles as opposed to work performed. See Halsted Communications, 347 NLRB 225, 225 fn. 5 (2006), citing Harold J. Becker Co., 343 NLRB No. 11, slip op. at 1 (2004) (Dual-function test inapplicable where “the stipulated bargaining unit is defined only by job classification and not by the type of work performed.”).

The Employer argues, relying on testimony solicited from Optomen management, that several employees have “moved between” the development department and series productions. (Er. Br. at 8.) That evidence is irrelevant to the question of whether Vinitz had a reasonable expectation of returning to the unit. The Board applies a subjective inquiry to determine whether an employee expects further unit employment. See e.g., Mrs. Baird’s Bakeries, 323 NLRB 607 (1997) (employee had a reasonable expectation of return when he was explicitly told that transfer to non-unit position was only temporary). Here, the record shows Vinitz understanding that his new position is permanent and he does not intend to retreat to a unit position. (Tr. 79, 83.)

In sum, the evidence demonstrates, and the Hearing Officer properly found that Vinitz, beginning in September of 2010 and at all other times preceding the election, held the title of “Development Associate Producer.” (Tr. 7, 78, 150.) Contrary to the Employer’s position, his voting eligibility may not be based on any previous titles he held. The Employer cites no authority in support of that contention, and such a proposition is without foundation in the law.

2. Vinitz is properly excluded from the unit because he lacks a community of interest with the stipulated unit.

As noted above, the parties stipulated that Vinitz, as the sole “Development Associate Producer” employed by Optomen, was only permitted to vote subject to challenge. (Tr. 149-50.) Where a pre-election agreement allows a particular employee to vote “subject to challenge,” the parties have not expressed any clear intent to exclude that employee from the unit. Air Liquide America Corp., 324 NLRB 661, 662 (1997). Instead, “the parties intended that [the challenged

employee's] . . . eligibility would be determined at a later date.” Id. The disputed employee's eligibility is then determined “in accordance with traditional Board principles.” Id.³

Thus, the only relevant inquiry with respect to Vinitz is whether he shares a community of interest with the stipulated unit. In making community of interest determinations, “the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision.” Publix Super Markets, Inc., 343 NLRB 1023 (2004) citing Ore-Ida Foods, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995).

The record demonstrates, and the Hearing Officer found that in comparison with the stipulated unit, Vinitz has: no common supervision (Tr. 52-53, 59); starkly different regularity and length of works hours (Tr. 52, 211, 222-23); no communication with certain employees in the stipulated unit (Tr. 93, 96); and a vastly different compensation package (the Employer provided Vinitz with numerous benefits not available to unit employees) (Tr. 71-73, 75, 77, 120-22.). The Hearing Officer's findings are supported by ample evidence, and Vinitz's own testimony. The Hearing Officer's thorough review of the law and evidence should be upheld.

Further, “production” and “development” are regarded as separate units within Optomen's organizational structure and produce different products. (Tr. 81, 146-50). Thus,

³ The “traditional Board principles” referenced in Air Liquide are the Board's community of interest principles; even though in that case, the Board instead applied a dual-function analysis. The dual-function analysis is but “a variant of the community-of-interest test.” Halsted Communications, 347 NLRB at 226.

there is only a slight degree of functional integration here. In comparison, the Board has recognized, for example, a high degree of functional integration in the newspaper industry where, “the end product is always the result of the close cooperation and joint efforts of all departments.” Evening News, 308 NLRB 563, 567 (1992). Here, the “development” team is not functionally integrated with the overall production staff. The development department provides no input or effort in producing the final products made by the production staff—namely series of television shows prepared for public viewing. Instead, the development staff produces only pilot-type videos designed to elicit new projects or new ideas for television series. (Tr. 146-50.)

Lastly, the stipulated unit in this case consists of employees who work on a “freelance” or project-by-project basis, whereas Vinitz will remain in the Development Associate Producer position permanently and “indefinitely.” (Tr. 83.) All of these factors militate against a finding that Vinitz shares a community of interest with the unit. Based thereon, the Hearing Officer correctly determined that Vinitz has no community of interest with the stipulated unit.

The evidence offered by the Employer in seeking to establish that Vinitz has a community of interest with the stipulated unit is starkly inadequate. For example, the Employer attempted to elicit testimony from Vinitz to show that he shares common working conditions with the included Associate Producers because he goes on “shoots” (capturing video footage at out-of-office locations). (See Tr. 53-54.) The record demonstrates that attendance at shoots is a major part of an Associate Producer’s duties. (Report p. 3.) However, when asked whether he goes on shoots, Vinitz initially responded, “Occasionally I will go on shoots, which hasn’t happened very much yet, but I think it will in the future.” (Tr. 53.) Not only does Vinitz concede

that his attendance of shoots is nominal, his testimony only provides rank speculation about what could happen in the future.

In a disturbing demonstration of a lack of candor, Vinitz, after improperly conferring with Optomen's counsel during a break in the hearing, "remembered" an example of a shoot that he attended during the eligibility period. (Report p. 20.)⁴ Ultimately the Hearing Officer properly discredited Vinitz testimony regarding his attendance of video shoots based on his "over eager conduct" and the record as a whole. (Report p. 20.) That resolution is due deference from the Board. Stretch-Tex Co., 118 NLRB at 1361.

In further support of its contention that Vinitz lacks a community of interest, Optomen relies on several cases and Board "rules" that have no application in this case. Vincent Ippolito, 313 NLRB 715 (1994), relied on by Optomen, is inapposite. (Er. Br. at 9-10.) In that unfair labor practice case, the Board found that the employer had unlawfully withdrawn recognition from an appropriate bargaining unit. The Board's order to recognize and bargain with that unit, including all individuals found by the ALJ to be properly included within that unit, was based on that withdrawal of recognition. No unfair labor practice charge is at issue here. Optomen is of course under the ordinary duty to abide by the Board's determination as to the appropriate unit inclusions or exclusions in this case.

⁴ It goes without saying that Vinitz contact with Optomen's counsel wherein he discussed his testimony was wholly unacceptable. Had Vinitz thought that he needed to correct his testimony (his alleged justification for conferring with counsel) he should have raised that issue with the Hearing Officer, not with the Employer's attorney.

Moreover, Optomen's reliance on cases where a union seeks to represent a "fragment" of a larger unit is specious. (See Er. Br. at 9-11; 17-18.) In those cases—Wheeling Island Gaming, 355 NLRB No. 127 (2010); Harrah's Illinois, 319 NLRB 749 (1995); TDK Ferrites, 342 NLRB 1006 (2004) and Monsanto Company, 183 NLRB 415 (1970)—the Board considered the appropriateness of a unit requested by a petitioner. Here, the parties have stipulated to a unit. Therefore, Optomen's "rule" that the Board must consider "whether the interests of the group are sufficiently distinct from those of the other employees to warrant a separate unit" should be disregarded. See, e.g., Hampton Inn & Suites, 331 NLRB 238, 239 (2000) ("The Board has long held that a stipulated unit will not be cast aside solely because it designates a unit we might find inappropriate had resolution of the issue not been agreed upon by the parties."). Hewing to this principle, the Hearing Officer properly focused on whether Vinitz shares a community of interest with the stipulated unit, and not whether the stipulated unit could have taken a different shape.

The Employer's remaining argument with regard to Vinitz merits little discussion. Optomen alleges that Vinitz exclusion from the unit would be improper on the grounds that it would leave an inappropriate residual unit of one employee. The Board will easily find, as did the Hearing Officer that there is simply no evidence that Vinitz would be left in an inappropriate unit of one. Notably, the record demonstrates, to the contrary, that the Employer has several development staff members, who may have a community of interest with Vinitz. (Tr. 149-50.)

C. Amy Van Vessem

1. The Hearing Officer's determination that Van Vessem is properly included in the stipulated unit based on her title should be upheld⁵.

The Hearing Officer found that the documentary evidence—maintained by Optomen—conclusively establishes that Van Vessem was employed within the included title of “Post Producer” during the eligibility period. (See U. Ex. 7; Er. Ex. 7.) The Employer nonetheless maintains that Van Vessem was titled “Senior Post Producer” upon beginning work on the second Stipulation on of “Worst Cooks in America.” (Er. Br. at p.29.) The Employer excepts to the Hearing Officer's conclusions on this topic, and alleges that the Hearing Officer “avoided” evidence that Van Vessem was titled “Senior Post Producer.” Id.

Optomen obviously misunderstands the Hearing Officer's Report. The Hearing Officer did not “avoid” evidence; she expressly discredited Silver's transparent efforts through testimony to explain away Optomen's own documents. Accordingly, the vast majority of the “evidence” that was allegedly avoided was properly discredited within the discretion of the Hearing Officer. Since the Hearing Officer's resolution of Silver's testimony on this topic was based on her thorough observation and remarks detailing the witness's demeanor, that resolution must be

⁵ The Union again notes that the Employer's argument in this regard was not raised until Optomen's counsel, during closing comments, suggested that, “we also argued at the beginning that her title is not included within the unit description.” (Tr. 230.) However, a thorough review of the Employer's opening statement of position does not reveal that express argument. (Tr. 7.) A party is not foreclosed from raising alternative grounds for a challenge during the course of a hearing. See Anchor-Harvey Components, 352 NLRB 1219, 1220 (2008) citing Coca-Cola Bottling of Miami, 237 NLRB 936 (1994) (“[A] party may raise and litigate an alternative ground for a properly challenged ballot during a hearing even if that alternative ground had not been raised prior to the hearing.”). However, in this case, Optomen did not expressly raise the issue of Van Vessem's title until the close of the hearing. Counsel opened the hearing only by taking the position that Van Vessem was excluded as a supervisor. (Tr. 7.) No complete record was developed on the issue of Van Vessem's title. Therefore, at this time, the Employer should be barred from raising any further argument as to Van Vessem's exclusion from the unit.

upheld. Standard Dry Wall Products, 91 NLRB at 545. (The Board grants “great weight to a trial examiner’s credibility findings insofar as they are based on demeanor.”)

As was the case with Silver’s testimony concerning Donaghey, the record is clear that the Hearing Officer discredited Silver’s testimony about Van Vessem based on her demeanor and conflicting explanations of documentary evidence. (See Report p. 15.) (“Silver’s...testimony is totally incredible;” “Silver has shaped her testimony ... rather than testifying in an honest and straightforward manner.”) Silver’s testimony regarding Van Vessem was also “extremely vague” and Silver, as noted previously had a “penchant for shading testimony.” (Report p. 17.) Again, such determinations are squarely founded on the Hearing Officer’s observations of demeanor. The language of the Hearing Officer’s Report is plainly consistent with cases where the Board routinely upholds a character-based credibility determination. See e.g., Enterprise Masonry Corp., 341 NLRB 442, 442 fn. 2 (2004) (Adopting administrative law judge’s rejection of “vague, self-serving testimony.”); Park N Go of Minnesota, 344 NLRB 1260, 1264 (2005) (affirming judge’s discrediting of testimony that “tended to be vague”); Standard Sheet Metal, 326 NLRB at 418 (affirming decision wherein a determination was made based on whether witness was “straightforward”); Stalwart Ass’n, 310 NLRB 1046, 1051 (1993) (affirming judge’s credibility findings, including that testimony “often appeared to be inconsistent, vague, or self-serving”).

Even if demeanor were not a determinative factor in the Hearing Officer’s credibility finding, she is still able to “properly base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable

inferences which may be drawn from the record as a whole.” In re Daikichi Corp., 335 NLRB 622, 623 (2001). In this case, in addition to Silver’s determinative demeanor, the Hearing Officer also found that her testimony was plainly contradicted by the Employer’s own business records. (See Report p. 15-16; U. Ex. 7; Er. Ex. 7.) In this regard, the Hearing Officer discounted Silver’s testimony as compared with the stronger, contradictory documentary evidence. That determination was plainly within her discretion. The Hearing Officer thus properly found that “payroll records reflect Van Vessem’s official title was post producer.” (Report p. 16.)

The Hearing Officer’s credibility resolutions should not be disturbed unless a clear preponderance of *all* the relevant evidence convinces the Board that the resolution was incorrect. Millard Refrigerated Services, Inc., 345 NLRB at 1143 fn. 3 (emphasis added). It surely cannot be said in this instance that *all* the relevant evidence tends to show that the Hearing Officer’s resolution was incorrect. To the contrary, the documentary evidence supports, rather than invalidates the Hearing Officer’s credibility conclusion. The company payroll records unequivocally note Van Vessem’s title as “Post Producer.” (Er. Ex. 7.) Thus, all the relevant evidence could not possibly overcome the Hearing Officer’s conclusion.

Aside from Silver’s properly discredited testimony, the Employer offered nothing to establish indicates that Van Vessem held any other position than “Post Producer.” The Employer nonetheless alleges that a few emails generated by Van Vessem and bearing Van Vessem’s electronic signature (describing her title as “Senior”) should rebut its own official company documents. (Er. Br. at 30.) The Hearing Officer soundly and properly concluded that the payroll documents were due greater evidentiary weight than the several emails. Silver was the only

witness to corroborate those emails, and as discussed, her testimony has been properly discredited. Moreover, the record raises serious concerns about the precise degree of personal knowledge that Silver had of Van Vessem. (See Tr. 178, 181.) Silver was unaware of or uncertain about several of Van Vessem's possible job duties. (Tr. 217-19.) The Hearing Officer correctly called into doubt, Silver's ability to testify about the content of Van Vessem's emails. (Tr. 178, 181.)

The Employer's argument that payroll records are not created by Optomen and instead by an "outside company" should be disregarded. (See Er. Br. at 31.) As similarly discussed above, the payroll documents are created in the interest of Optomen and Optomen ratifies their contents by failing to correct them. By maintaining those documents, the Employer has effectively conceded that Van Vessem's title is accurately noted on the payroll records as "Post Producer."

The Employer also intimates that the Petitioner erred by failing to call Van Vessem as a witness to rebut Silver's flimsy testimony. The Union had no need to call Van Vessem as a witness on this topic, or on the issue (discussed below) of her alleged supervisor status. The Union was certainly not required to call her for any purpose since, "[t]here was good reason for the union to believe that [the Employer] had failed to meet its burden of proof." Overnite Transportation Co. v. NLRB, 140 F.3d 259, 267 (D.C. Cir. 1998) (citation omitted). It was Optomen that sought to exclude Van Vessem from voting, thus it therefore bears the "burden of establishing that the individual is, in fact, ineligible to vote." Regency Service Carts, Inc., 325 NLRB 617, 627 (1998). The Employer could have easily called Van Vessem to corroborate Silver's otherwise unsound testimony, though (as noted by the Hearing Officer) it did not.

In sum, the record evidence as a whole, examined by the Hearing Officer was insufficient to satisfy the Employer's burden of proof on this matter. The exceptions related to that determination should be rejected.

2. Van Vessem's lack of supervisory duties

The brunt of Optomen's challenge rests on its contention that Van Vessem was a supervisor within the meaning of Section 2(11) of the Act. That contention lacks merit as found by the Hearing Officer, and as shown below. The evidence shows, and the Hearing Officer found, that the record is insufficient in establishing that Van Vessem exercised any supervisory functions.

Section 2(11) of the Act 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. § 162(11).

The Employer takes the position that Van Vessem possessed the supervisory authority to "hire," "assign" or "responsibly to direct." These are the only three supervisory indicia that the Employer raises and the Hearing Officer correctly found the record completely devoid of any contention (let alone evidence) that Van Vessem held any of the remaining supervisory functions (e.g. transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances). (Report p. 18.)

3. The Employer did not meet its burden of establishing Van Vessem's supervisory status, and any lack of evidence was properly construed against the Employer.

The Employer suggests that "an adverse inference" based on the absence of Van Vessem's testimony would be improper. However, at no point in the Hearing Officer's Report is an adverse inference expressly drawn based on the Employer's failure to call Van Vessem as a witness. The Employer cites several cases for the proposition that it was improper for the Hearing Officer to draw an adverse inference from a potential witness' absence. (See Er. Br. at 32 fn. 8.) Those cases have no application here.

The Employer had the burden of establishing Van Vessem's supervisory status. Sheraton Universal Hotel, 350 NLRB 1114, 1115 (2007), citing N.L.R.B. v. Kentucky River Community Care, 532 U.S. 706, 711 (2001). ("The burden of proving supervisory status falls on the party asserting it.") The Hearing Officer determined that the record evidence offered by Optomen was insufficient in meeting that burden. The testimony of Van Vessem could have been one of many possible evidentiary offerings necessary to satisfy the Employer's burden. Though, as correctly cited by the Hearing Officer, the Board holds that "[a]ny lack of evidence in the record is construed against the party asserting supervisory status." Williamette Industries, Inc., 336 NLRB 743, 743 (2001), citing, Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (1999). Thus, the record's lack of sufficient testimony (whether by Van Vessem, or any other potential witness) may be properly construed against Optomen. Furthermore, while Van Vessem could have been called to testify by either party; the Union was certainly not required to call her for any purpose since as mentioned above, "[t]here was good reason for the union to

believe that [the Employer] had failed to meet its burden of proof.” Overnite Transportation Co. v. NLRB, 140 F.3d at 267 (citation omitted).

The Hearing Officer found that Silver’s testimony regarding Van Vesseem was unreliable. The Board will find that the Hearing Officer described Silver’s testimony as “vague” and noted her “penchant for shading testimony.” (Report p. 17.) On the basis of that finding and in light of the evidence as a whole, the Hearing Officer chose not to credit Van Vesseem’s testimony. Again, that resolution is due deference from the Board. Stretch-Tex Co., 118 NLRB at 1361.

4. Van Vesseem did not effectively recommend the hire of any Optomen employees.

Optomen contends that Van Vesseem effectively recommended the hire of one individual during the relevant period leading up to the election. (Er. Br. at 32; Tr. 187-88.) However, the record shows that Van Vesseem simply emailed the resume of a job candidate to Silver. (See Er. Ex. 18.) Simply forwarding the resume of an individual who might fill an open position for the employer hardly constitutes the effective recommendation of a hire. See Springfield Terrace, 355 NLRB No. 168, slip op. at 10 (2010), citing Training School at Vineland, 332 NLRB 1412, 1471 (2000) (“[M]ere participation in the hiring process, particularly where higher management officials . . . participate in the process, absent specific evidence of authority to effectively recommend hire, is insufficient to establish supervisory authority.”). Even assuming Van Vesseem effectively recommended an individual for hire; such an occurrence would not establish supervisory status. One isolated instance of a supervisory function is not sufficient to establish that an employee is a supervisor within the meaning of Section 2(11). Shaw, Inc., 350 NLRB

354, 357 (2007). (The hearing transcripts show Optomen’s counsel conceding that there was only one “example” of an alleged recommendation of hire. (Tr. 230.))

5. Van Vessem did not “assign” work within the meaning of Section 2(11).

The Employer contends that Van Vessem supervised the work of low level production employees (i.e. “loggers” or “Assistant Editors”). (Tr. 168-69.) The Hearing Officer’s Report, provides that Van Vessem’s alleged subordinates performed only “basic and repetitive tasks” that obviated the need for “assignment” within the meaning of the Act. (Report p. 16.) The Hearing Officer properly noted that alleged subordinates who perform “simple,” “routine” or “repetitious” tasks belie the possibility of supervision. See e.g. Pro/Tech Security, 308 NLRB 655, 660 (1992). At most, Van Vessem performed “routine direction of simple tasks or the issuance of low level orders that the Board has found does not constitute supervisory authority.” Willamette Industries, 335 NLRB at 744.

The Employer argues that Van Vessem exercises independent judgment in her assignments based on her determination of the sequence in which those routine tasks should be performed. It further argues that the Hearing Officer’s “focus on the routine work of the loggers and assistant editors is poorly aimed.” (Er. Br. at 33.) However, Optomen first ignores the Board’s rule that “choosing the order in which the employee will perform discrete tasks . . . would not be indicative of exercising the authority to assign.” Oakwood Healthcare, Inc., 348 NLRB 686, 727 (2006). Second, there is insufficient evidence in the record to support a finding that Van Vessem has engaged in actual supervisory functions—namely—“designating an employee to a place (such as a location, department, or with), appointing an individual to a time

(such as a shift or overtime period) or giving significant overall duties to an employee.” Id. Even if Van Vessem executed the assignment of work within the meaning of the Act, the record contains no evidence of specific examples, and it is therefore insufficient to establish supervisory status. Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006) (“[P]urely conclusory evidence is not sufficient to establish supervisory status.”).

6. Van Vessem was not accountable for the underlying tasks that Optomen alleges she “responsibly directed.”

The Employer consistently contends that Van Vessem “directed” the low-level post-production staff. However, Optomen drastically overlooks a major component of the term “responsibly to direct” as used in the Act. The Board provides that

for direction to be ‘responsible,’ 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 performed by the employee are not performed properly.

Oakwood, 348 NLRB at 691-92. In accordance with the Hearing Officer, the Board should find that the record contains not even a mere suggestion, let alone any evidence, that Van Vessem’s functions meet the Board’s accountability standard. There is no evidence that Van Vessem must take some corrective measure if the “Loggers” and “Assistant Editors” fail to properly complete the tasks that Van Vessem allegedly directs. There is no mention of any consequences that may affect Van Vessem; if for example, a logger errs in transcribing an audio track or noting the camera angles within in a particular video shoot. (See Tr. 142-43, 216.)

Finally, there is no evidence in the record that Van Vessem was specifically delegated the authority to direct Optomen post-production staff. See Oakwood, 348 NLRB at 692. A true

supervisor as defined by Section 2(11) must be notified of their assigned supervisory duties (“[t]he Board has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed...”). Golden Crest Healthcare, 348 NLRB at 730, fn. 10, citing Volair Contractors, Inc., 341 NLRB 673 (2000). The evidence shows that no such notification occurred. In the Employer’s estimation, Van Vessem, “took on more of the boss . . . role than I expected....” (U. Ex. 6; Tr. 203-4.)

Finally, The Employer’s argument that Van Vessem was a 2(11) supervisor based on inconclusive evidence that she assigned overtime can hardly be considered by the Board. See Golden Crest Healthcare Center, 348 NLRB at 730 fn. 10 (“It is well established that where, as here, putative supervisors are not shown to possess any of the primary indicia of supervisory status enumerated in Sec. 2(11), secondary indicia are insufficient to establish supervisory status.”) Moreover, any argument that Van Vessem was a 2(11) supervisor because she held herself out as such should be rejected out of hand. It is well-settled that titles are not determinative of supervisory status. Alois Box Co., 326 NLRB 1177, 1178 (1998).

For these reasons, the Hearing Officer’s determination that Van Vessem is not a supervisor within the meaning of Section 2(11) is correct. She is therefore eligible to vote and the Board should adopt the Hearing Officer’s recommendation that the challenge to her ballot be overruled.

VI. CONCLUSION

For the foregoing reasons, and in light of the record as a whole, the Employer's exceptions are meritless. The Petitioner respectfully requests that the Board adopt the Hearing Officer's findings and recommendations on challenges in this case.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that on March 31, 2011, a true copy of Petitioner's Answering Brief to Employer's Exceptions to Hearing Officer's Report and Recommendation on Challenges was served electronically with the National Labor Relations Board pursuant to the Rules and Regulations of Section 102.114(i) upon the following parties:

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